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| UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C.<br><br>Respondent | |
| and<br><br>NATIONAL BORDER PATROL COUNCIL AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO<br><br>Charging Party | Case No. SF-CA-30165 |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **MAY 30, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: April 28, 1995
Washington, DC

MEMORANDUM DATE: April 28, 1995

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE,
WASHINGTON, D.C.

Respondent

and Case No. SF-CA-30165

NATIONAL BORDER PATROL COUNCIL
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

**UNITED STATES OF AMERICA**
**FEDERAL LABOR RELATIONS AUTHORITY**
**OFFICE OF ADMINISTRATIVE LAW JUDGES**
**WASHINGTON, D.C. 20424-0001**

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| UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, WASHINGTON, D.C.<br><br>Respondent | |
| and<br><br>NATIONAL BORDER PATROL COUNCIL AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO<br><br>Charging Party | Case No. SF-CA-30165 |

Amy V. Dunning, Esq.
Counsel for the Respondent

R. Timothy Sheils, Esq.
Counsel for the General Counsel, FLRA

Mr. T.J. Bonner
Representative of the Charging Party

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1), (5) and (6) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1), (5), and (6), by implementing its new Air Operations Manual, thereby changing conditions of employment, while the matter was pending before the Federal Service Impasses Panel (herein the Panel or FSIP).

A hearing was held in San Diego, California, at which the General Counsel and the Respondent were afforded full opportunity to adduce evidence, to call, examine and cross-examine witnesses, and to argue orally. Briefs were filed by

Respondent and the General Counsel and have been carefully considered.[1]

Upon the entire record in this case, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

## Findings of Fact

The National Border Patrol Council, American Federation of Government Employees, AFL-CIO, is the exclusive representative of a nationwide consolidated unit of the Respondent's Border Patrol agents appropriate for collective bargaining. Between 50 and 60 of the unit employees are pilots who patrol the northern, southern and western borders of the United States in fixed-wing and helicopter aircraft, searching for and interdicting illegal immigration in coordination with Border Patrol agents on the ground.

According to Respondent, the pilots--who operate in 13 different sectors located in three of its four regions--had not been following completely standardized procedures. In order to achieve the desired standardization, which it thought would promote air safety, the Respondent in May 1992 proposed to issue an Air Operations Manual.[2] Toward that end, the Respondent's Director of Personnel in Washington, D.C., Marylou Whelan, sent a letter dated May 20, 1992, to Union President T.J. Bonner's office in Campo, California, enclosing a copy of the proposed Air Operations Manual for the

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[1] The Respondent and the General Counsel have filed motions to strike portions of each other's brief. Both motions are denied. The record evidence itself, rather than the parties' characterizations of it, is controlling. Similarly, the relevance of other cases involving the same parties and what weight, if any, to accord them, are for me to determine in the first instance.

[2] The record indicates that the Respondent had considered issuing such a manual as early as 1980, but had finally done so in 1991. On that occasion, however, the Respondent had implemented the new Air Operations Manual without first notifying the Union and affording it an opportunity to bargain over the impact and implementation of the changes in bargaining unit employees' working conditions. Accordingly, as part of a settlement agreement with the General Counsel in Case No. SA-CA-20066, dated May 5, 1992, the Respondent agreed to rescind the Manual and, if it later chose to reissue the Manual, to notify the Union and fulfill its bargaining obligation before implementation.

Union's comments and/or proposals.[3] By inadvertence, the enclosure sent to and received by Bonner omitted every other page of the two-sided Manual. When the error was called to management's attention, Bonner received a complete copy of the Manual on June 8 and the parties agreed that he would have the contractual 30-day period--that is, until July 8--to respond.[4]

On July 8, Bonner sent a 13-page letter to the Respondent in which he expressed concerns with respect to certain provi-sions of the Manual; asked questions about some provisions; offered some preliminary proposals; and requested specific information deemed necessary for the Union to formulate addi-tional proposals.[5] At the conclusion of his letter, Bonner made it clear that "[t]he foregoing questions, concerns, and proposals are by no means all-inclusive. Following the receipt of the information requested herein, and a reasonable period of time in which to review said material, the Union will submit additional bargaining proposals, and will suggest dates for the commencement of formal negotiations." Bonner further requested that implementation of the Manual be held in abeyance pending the completion of negotiations. Consistent with his established practice, Bonner also sent a copy of his 13-page letter to the Respondent by telefacsimile ("fax") that same day.

By letter dated July 17, the Respondent provided some of the information requested by the Union on July 8 but refused

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[3] The record indicates that while Ms. Whelan signed the letter, it (and all subsequent correspondence between the parties in this case) was actually written by Al Hilliard, a labor relations specialist also located in Washington, D.C., whom the letter designated as the appropriate management representative for the Union to contact.

[4] All dates herein refer to 1992 unless otherwise indicated.

[5] While the Manual sought to standardize certain practices which varied from sector to sector at the time, such as where pilots were authorized to land their aircraft and how unauthorized landings should be reported, a number of the Manual's provisions announced new policies. For example, the Manual required for the first time that pilots involved in an accident be tested physically and psychologically; that pilots must fly with a supervisory observer at least once every 90 days; that pilots must attend safety meetings every month; that it is the pilot's responsibility to check the aircraft for airworthiness before using it, rather than relying on the maintenance mechanics' inspection as previously; and that pilots may be removed from flight status by management for a variety of reasons which previously did not constitute grounds for such action.

to furnish other information; answered the questions raised by the Union on July 8; and concluded by notifying the Union that "[b]argaining is scheduled during the week of July 27-31 at the USBP Sector Headquarters, San Diego, California." Because the Respondent did not follow Bonner's practice of faxing as well as mailing correspondence to the Union, the July 17 letter actually arrived at Bonner's office in California on Friday afternoon, July 24, too late (given the 3-hour time difference) for Bonner to call the Respondent's representative, Al Hilliard, in Washington to postpone the negotiations which management had scheduled to start the following Monday morning (July 27) without consulting the Union.[6] Therefore, Bonner mailed and faxed a letter to the Respondent the following day (Saturday, July 25) declaring July 27 unacceptable, but expressing the Union's willingness to negotiate "at the earliest practicable time" and suggesting that the Respondent "contact this office to schedule a mutually satisfactory time and place to conduct said negotiations."

On August 10, over two weeks later, the Respondent acknowledged receipt of the Union's July 25 letter which found July 27 unacceptable for negotiations and requested to negotiate ground rules. Seeking "to proceed expeditiously and avoid all unnecessary delays," the Respondent proposed either the week of September 8-12 or 14-18 as dates to begin formal negotiations in San Diego, and suggested that ground rules could be bargained on the first day of negotiations. The Union responded with two separate letters dated August 28. One answered the Respondent's request for additional explanation concerning the Union's need for certain information that management previously had denied; the other enclosed the Union's proposed ground rules, including one which suggested

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[6] According to Bonner's undisputed testimony, the Respondent's unilateral announcement of bargaining dates was a departure from the parties' practice of establishing mutually acceptable dates by discussing the availability of all participants in telephone conversations. As Bonner indicated, in nationwide negotiations such as these, the Union's bargaining representatives came from diverse locations and could not be assembled without advance planning and coordination. The problems of scheduling were exacerbated during the summer months due to previously scheduled vacations. Hilliard confirmed that, in the past, it has required some coordination to establish mutually acceptable dates for bargaining.

that "[t]he site for the initial bargaining sessions shall be Marfa, Texas."[7]

By letter dated September 3, the Respondent rejected the Union's justification for additional information and accused the Union of "attempt[ing] to delay and frustrate the bargaining process." The following day, September 4, the Respondent addressed the Union's ground rules proposals by again accusing the Union of bad faith bargaining in proposing Marfa, Texas in lieu of San Diego as the site of the negotiations, and by stating that "formal negotiations will be held in the metropolitan Washington, D.C. area." In addition, the Respondent addressed the other ground rules proposed by the Union. Specifically, the Respondent counter-proposed in part that each party would be responsible for the cost of travel, lodging and per diem incurred by the members of its negotiating team; that the parties would share the costs of the negotiating room in a mutually acceptable hotel in the Washington, D.C. area; and that rather than hold the implementation of the Manual in abeyance pending completion of negotiations, as proposed by the Union, "[i]f the parties have not reached a mutual agreement on negotiations prior to September 14, the Manual will be unilaterally implemented on that date."[8]

The Respondent's September 4 letter reached the Union on the afternoon of September 10. As Bonner read management's final counter-proposal, the Manual was about to be implemented in about three days because there was no chance of reaching a

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[7] The record indicates that the Union proposed Marfa, Texas, because two members of its bargaining team who were experts on aircraft accident investigations and related safety issues lived in Marfa--one of the Respondent's sector headquarters.

[8] Bonner testified without contradiction that the Respondent's counter-proposal for the Union to pay the travel and per diem expenses of its negotiating team and to pay half the cost of the negotiating room were departures from past practice inasmuch as the Respondent previously had paid these costs in the same circumstances.

mutual agreement on negotiations before then.[9] Accordingly, Bonner immediately sent a letter to both the Federal Mediation and Conciliation Service (FMCS) and the FSIP on September 11, requesting their assistance in this matter. He also sent a letter and a fax that day to the Respondent, attaching a copy of the Union's requests for assistance to the FMCS and the Panel, and reiterating that the Respondent should not implement the Manual until all phases of bargaining have been completed. Although the Panel acknowledged the Union's filing of a request for assistance by letter to both parties dated September 15,[10] the Respondent thereafter notified the Union by letter dated September 23 that the Manual would be implemented effective October 1. Implementation occurred on that date, as the Respondent had announced.

## Discussion and Conclusions of Law

As previously indicated, the complaint in this case alleges that the Respondent violated section 7116(a)(1), (5) and (6) of the Statute by implementing its new Air Operations Manual while the Union's request for assistance was pending before the Panel. While the parties expended considerable effort at the hearing and in their post-hearing briefs arguing about who was responsible for the failure to reach agreement on ground rules and therefore for preventing negotiations over the impact and implementation of the Respondent's decision to

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[9] Hilliard testified that sometime after September 4 but before September 11, he telephoned Bonner to explain that the Respondent's final counter-proposal did not mean that management was going to implement the Manual unilaterally on September 14, but was merely intended to get the Union to stop delaying and negotiate in good faith. Bonner denied that Hilliard ever called him during that period to clarify the Respondent's intent. I credit Bonner's testimony in this regard. Thus, the notes that Hilliard prepared and had with him while testifying--a chronology of events in this case--made no mention of any such telephone call. Moreover, Hilliard had not called Bonner for any other purpose connected with these negotiations even though it would have expedited the process if he had done so. Hilliard seemed to prefer written communications, and I conclude that it would have been uncharacteristic of him to call Bonner over this matter, especially since such a clarifying call would have undercut the reason why the Respondent made the statement in the first place: to "scare" the Union into negotiating quickly by threatening unilateral implementation.

[10] The Panel subsequently accepted jurisdiction over the dispute and issued a final decision and order concerning ground rules in Case Nos. 92 FSIP 238 et al. on May 13, 1993.

issue the new Manual, I find such questions irrelevant to the disposition of the issues raised by the complaint in this

case.[11] Thus, there is no allegation that either the Respondent or the Union bargained in bad faith before the dispute was referred to the Panel. The only allegation is that the Respondent violated the Statute by implementing the Manual while the matter was pending before the Panel.

Where such an allegation is made, the pivotal issues are:
(a) whether the Respondent implemented a change in working conditions despite the Union's timely invocation of the Panel's processes, and if so, (b) whether the Respondent has established as an affirmative defense that its actions were consistent with the necessary functioning of the agency. Thus, under well established Authority precedent carried over from the policy under Executive Order 11491, as amended,[12] once parties reach an impasse in their negotiations and one party timely invokes the services of the Panel, the status quo must

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[11] In reality, both the Respondent and the Union contributed to the failure of bilateral problem-solving that occurred in this case. The Respondent contributed by failing to provide the Union with a complete copy of the proposed Manual at the outset; then by declaring the dates and place of negotiations without consulting the Union as it had in the past; by communicating the foregoing information to the Union in a letter which arrived just before the "scheduled" negotiations were supposed to begin; by later unilaterally determining that negotiations would be held in the Washington, D.C. area even though the Union had proposed Marfa, Texas; by proposing that the Union should pay the travel and per diem expenses of its negotiating team and share the cost of the negotiating room in the hotel to be selected by the parties, even though the Respondent had paid all of those expenses in the past; and by notifying the Union only several days in advance that the Manual would be implemented unilaterally "if the parties have not reached a mutual agreement on negotiations prior to September 14[.]" For its part, the Union never proposed dates for negotiations which were acceptable to the Union's negotiating team; did not advise the Respondent that San Diego was unacceptable to the Union as a negotiating venue when the Respondent twice proposed it; and, while the Union sought to expedite communications between the parties by faxing as well as mailing all of its correspondence to the Respondent, Bonner never called Hilliard in an effort to arrive at a mutually acceptable time and place for negotiations, instead stating that the Respondent should contact the Union.

[12] See Internal Revenue Service, 6 FLRC 311, 320 and n.18 (1978); Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 6 FLRC 414, 417-18 (1978).

be maintained to the maximum extent possible, i.e., to the extent consistent with the necessary functioning of the agency, in order to allow the Panel to take whatever action is deemed appropriate. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 18 FLRA 466, 468-69 (1985) (BATF); Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, Region II, 35 FLRA 940, 950 (1990) (DHHS).[13] A failure or refusal to maintain the status quo during such time would, except as indicated above, constitute a violation of section 7116(a)(1),(5) and (6) of the Statute. BATF, 18 FLRA at 469; United States Marine Corps, Washington, D.C., et al., 42 FLRA 3, 13-15 (1991).[14]

A. Respondent Changed Working Conditions While The Matter Was Pending Before The Panel

In this case, the Respondent changed working conditions by implementing its Air Operations Manual on October 1 even though it knew that the Union had invoked the Panel's services on September 11 by requesting assistance in resolving a dispute over ground rules in preparation for negotiating over the impact and implementation of management's decision to

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[13] See also U.S. Department of Housing and Urban Development and U.S. Department of Housing and Urban Development, Kansas City Region, Kansas City, Missouri, 23 FLRA 435, 436-37 (1986) (HUD, Kansas City); Department of Veterans Affairs, Veterans Administration Medical Center, Decatur, Georgia, 46 FLRA 339, 345 (1992); Department of Health and Human Services, Health Care Financing Administration, 39 FLRA 120, 131-32 (1991) (HCFA), enforced, No. 91-1068 (4th Cir. 1991).

[14] The same conduct not only violates section 7116(a)(6) of the Statute because it constitutes a failure or refusal to cooperate in the Panel's impasse resolution procedures, but it also violates section 7116(a)(5) because "the impasse reso-lution procedures of the Panel comprise one aspect of the collective bargaining process." Department of Health and Human Services, Social Security Administration, 44 FLRA 870, 883 (1990); HCFA, 39 FLRA at 131-32.

issue the Manual.[15] Respondent does not and cannot dispute that it knew of the Union's filing with the Panel. Indeed, the Respondent not only received a mailed and faxed copy of the Union's September 11 request to the Panel, but also a letter from the Panel dated September 15 acknowledging receipt

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15 Respondent contends that it was free to implement the Manual rather than maintain the status quo because the Union requested the Panel's assistance prematurely, i.e., before the parties had reached a bargaining impasse and before they had utilized and exhausted the services of the FMCS. However, as the Authority has found in similar circumstances, allowing an agency to speculate as to what action the Panel will take after implementation would undermine the important role played by the Panel in collective bargaining under the Statute. DHHS, 35 FLRA at 950. Accordingly, even if the Panel had declined jurisdiction over the dispute in this case, the Respondent's implementation of the Manual while the matter was pending before the Panel would have been improper. I note, however, that the Panel in fact accepted jurisdiction and resolved the dispute herein after the Respondent's imple-mentation of the Manual. Department of Justice, Immigration and Naturalization Service, Washington, D.C. and National Border Patrol Council, American Federation of Government Employees, AFL-CIO, 92 FSIP 238, et al. (May 13, 1993).

Respondent further contends that its implementation of the Manual was an exercise of reserved management rights under section 7106(a)(1) of the Statute which could not be restricted by the pendency of a dispute before the Panel, citing U.S. Department of Justice, Immigration and Naturali-zation Service v. FLRA, 995 F.2d 46, 48 (5th Cir. 1993). The Authority has not adopted the Fifth Circuit's view, however. Accordingly, I am constrained to follow existing Authority precedent on the issue. Department of Health and Human Services, Region V, Chicago, Illinois, 26 FLRA 460, 467 n.3 (1987), rev'd as other matters sub nom. FLRA v. Department of Health and Human Services, Region V, Chicago, Illinois, No. 87-1147 (D.C. Cir. Aug. 9, 1990); U.S. Department of the Army, Fort Stewart Schools, Fort Stewart, Georgia, 37 FLRA 409, 416 (1990).

of the Union's request.[16] It is also undisputed that, by implementing the Manual, the Respondent effectuated changes in the pilots' conditions of employment (see n.5, supra).[17] Accordingly, the only remaining question is whether the Respondent has established that its unilateral implementation of the Manual was consistent with the necessary functioning of the agency. See HUD, Kansas City, 23 FLRA at 437.

B. Respondent Failed To Establish That Implementation Of Its Manual Was Consistent With The Necessary Functioning Of The Agency

The record indicates that the Respondent decided to prepare and implement an Air Operations Manual in order to standardize procedures for pilots to follow in performing their mission in every sector of the Border Patrol. According to Douglas Keim, the Respondent's Chief of Air Operations, one of the first tasks he was given upon assuming that position in 1991 was to complete the Manual and thereby change the existing system in which each sector operated somewhat differently from every other sector.[18] In standardizing its air operations, the Respondent sought to improve both safety and the maintenance and preservation of its aircraft.

A standardized air operations program was not a new concept within the Border Patrol, however. The record shows that the Respondent had considered adopting an Air Operations Manual as early as 1980, and that one of its own internal

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16 Moreover, I take official notice that on September 29--three days before the Respondent implemented its Manual--the Panel received an undated letter from the Respondent urging the Panel to decline jurisdiction over the parties' ground rules dispute initiated by the Union's September 11 request (92 FSIP 238). Obviously, the Respondent knew of the Union's request to the Panel in time to file a response before implementing the Manual.

17 Indeed, the Respondent's notice to the Union that a new Manual would be issued and its stated willingness to bargain concerning impact and implementation demonstrates that the pilots' conditions of employment would be changed once the Manual went into effect.

18 As Keim explained, some sectors followed the Federal Aviation Administration (FAA) guidelines, while others followed the applicable military guidelines, depending on their particular needs and the type of aircraft--military or civilian--they were using. All sectors were governed by the FAA's "rules of the road," which dictated how every aircraft (whether private or governmental) was to be operated in a variety of airspace conditions within the United States.

studies in 1988 recommended standardization of operations to increase air safety. Nevertheless, it was not until April 1991 that the Respondent issued and implemented its Air Operations Manual. As previously noted, however, the Respondent failed to meet its bargaining obligations on that occasion, and was charged with an unfair labor practice. On May 5, 1992, therefore, the Respondent voluntarily entered into a settlement whereby it agreed to rescind the Manual; return to its pre-existing policies; and bargain with the Union before re-issuing the Manual. It was the Respondent's notice to the Union dated May 20, 1992, of an intention to reissue the Manual which started the chain of events involved in this case.

Without diminishing in any way the importance of the Respondent's desire to improve air safety and preserve its equipment, I conclude based on this record that implementation of the Manual on October 1--while the matter was pending before the Panel--was not consistent with the necessary functioning of the agency. That is, I find that the Respondent could have maintained the status quo until the Panel acted concerning the parties' dispute without compromising the necessary functioning of the Border Patrol's air operations program. Indeed, to the extent that the Respondent implemented the Air Operations Manual to improve air safety, the record evidence indicates that more aviation accidents occurred after the Manual was implemented than under the previous, more decentralized, system.

In reaching the foregoing conclusion, I note that the Respondent's actions have been inconsistent with its declaration that time was of the essence in implementing the new Manual. Thus, as stated above, the Respondent had been considering the adoption of a manual to standardize its air operations since 1980 but took no action--even after its own internal study in 1988 suggested that air safety could be enhanced thereby--until 1991. Even then, the Respondent's conduct belied any sense of urgency in implementing the Manual. When charged with an unlawful refusal to bargain in 1991 over the impact and implementation of its decision to issue the Manual which changed the pilots' working conditions, the Respondent chose to rescind the Manual voluntarily and return to the pre-existing practices rather than contest the appropriateness of a status quo ante remedy which would require rescission of the unilaterally implemented Manual. If the Manual were truly necessary to the functioning of its air operations program, the Respondent would have been acting irresponsibly by agreeing to discontinue the Manual.

Finally, I note that the Respondent's compliance with the well settled requirement to maintain the status quo to the maximum extent possible while a matter is pending before the

Panel would not have created chaos in its air operations program. Such operations had been conducted effectively for years under a decentralized system in which each sector adopted policies that promoted its particular needs. Moreover, some standardization already existed by virtue of the applicability of the FAA's "rules of the road" to all domestic aviation--civilian and governmental alike. Accordingly, while the Respondent clearly had the right to adopt a standardized Manual to govern its air operations, it had no license to do so without complying with all of the requirements of the Statute. Respondent therefore violated section 7116(a)(1),(5) and (6) of the Statute in the circumstances of this case.

C. The Appropriate Remedy

The General Counsel requests that the Authority issue a status quo ante remedy, requiring the Respondent to rescind the Manual until the parties have completed bargaining, consistent with remedies ordered in similar cases of implemented changes in working conditions while the matter is pending before the Panel. Conversely, the Respondent contends that a status quo ante remedy would be inappropriate under the criteria set forth in Federal Correctional Institution, 8 FLRA 604 (1982) (FCI),[19] because the Union received timely notice that the Manual would be issued; the Respondent made extensive efforts to bargain with the Union; there was no evidence that employees have been adversely affected by implementation of the Manual; and rescission of the Manual would impair the safety of Respondent's operations.

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19 In FCI, the Authority enumerated certain factors it would consider in determining whether to issue a status quo ante order to remedy an agency's failure or refusal to bargain over the impact and implementation of its decision to exercise a management right which changed employees' working condi-tions. The factors identified by the Authority in FCI are: (1) whether, and when, notice was given to the union by the agency concerning the action or change decided upon; (2) whether, and when, the union requested bargaining on the procedures to be observed by the agency in implementing such action or change and/or concerning appropriate arrangements for employees adversely affected by such action or change; (3) the willfulness of the agency's conduct in failing to discharge its bargaining obligations under the Statute; (4) the nature and extent of the impact experienced by adversely affected employees; and (5) whether, and to what degree, a status quo ante remedy would disrupt or impair the efficiency and effectiveness of the agency's operations. 8 FLRA at 606.

I conclude that a status quo ante remedy is appropriate in the circumstances of this case. See, e.g., DHHS, 35 FLRA at 951-53. Thus, in applying the FCI factors, I note first that while the Respondent gave the Union notice of its intention to issue the Manual, such notice was compelled by the terms of an earlier settlement agreement to remedy the Respondent's issuance of the same Manual without providing any notice to the Union. Second, I find that the Respondent's conduct after the Union timely requested to bargain contributed substantially to the parties' failure to negotiate concerning the impact and implementation of the Respondent's decision to issue the Manual (n.11, supra), and that the violation found herein was willful in the sense that the Respondent implemented the Manual on October 1 intentionally with full knowledge that the Union had invoked the Panel's processes on September 11. Third, while there is no record evidence that any adverse actions have been taken against pilots for failing to comply with provisions of the Manual, some of the Manual's provisions (n.5, supra) adversely affect the pilots by placing greater responsibilities and less discretion upon them and by making them more vulnerable to removal from flight status. Finally, I conclude that the Respondent's operations would not be substantially disrupted or impaired by an order requiring a return to the status quo until bargaining has been completed. As previously noted, there is no record evidence that the Manual's standardizing provisions have resulted in a safer or less costly air operations program; rather, the record suggests that the rate of accidents has stayed the same or increased since the Manual was implemented.

Moreover, a status quo ante remedy is appropriate for a reason beyond the application of the FCI factors. Thus, this case involves more than the Respondent's refusal to bargain over the impact and implementation of its decision to issue a new Air Operations Manual. It involves the Respondent's issuance and implementation of the Manual while the matter was pending before the Panel. As the Authority has stated previously, "permitting an agency to implement a change in conditions of employment while a union's request for assistance is pending before the Panel would undermine the Panel's role in resolving impasses and is inconsistent with the purposes of the Statute." Department of Veterans Affairs, Veterans Administration Medical Center, Decatur, Georgia, 46 FLRA at 346. In my judgment, the failure to order a return to the status quo under these circumstances would encourage parties to disregard the Panel's statutory role in the bargaining process and thereby undercut the purposes and policies of the Statute.

Finally, the General Counsel requests that the Respondent be ordered to rescind any adverse or disciplinary

actions taken against unit employees which rely on the provisions of the Manual. While the record contains no evidence that any such actions have been taken, those matters can be addressed in the compliance phase of this proceeding. To the extent that any unit employees have been adversely affected by their failure to comply with the Manual's provisions, such actions should be rescinded.

Accordingly, having found that the Respondent violated section 7116(a)(1), (5) and (6) of the Statute as alleged in the complaint, I shall recommend that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the United States Immigration and Naturalization Service, Washington, D.C., shall:

1. Cease and desist from:

(a) Unilaterally implementing the Air Operations Manual applicable throughout the U.S. Border Patrol at a time that the impact and implementation of its decision to issue the Manual is pending before the Federal Service Impasses Panel.

(b) Failing or refusing to cooperate in impasse procedures as required by the Federal Service Labor-Management Relations Statute.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Cease using the Air Operations Manual unilaterally implemented on October 1, 1992, and reinstate the policies and procedures which existed in the various sectors of the U.S. Border Patrol prior to that date.

(b) Rescind any adverse or disciplinary actions taken against bargaining unit employees because of their failure to comply with provisions of the Air Operations Manual unilaterally implemented on October 1, 1992, and make them

whole for any loss of pay or benefits they may have suffered thereby.

(c) Maintain the status quo, to the maximum extent possible, while impasse proceedings are pending before the Federal Service Impasses Panel.

(d) Notify the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, the exclusive representative of a nationwide bargaining unit of its employees, concerning any intent to issue an Air Operations Manual and, upon request, bargain with the Union concerning the impact and implementation of any such issuance.

(e) Post at the U.S. Border Patrol, copies of the attached Notice to All Employees on forms furnished by the Federal Labor Relations Authority. Upon receipt of the forms, they shall be signed by the Chief of Air Operations, U.S. Border Patrol, and they shall be posted and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the Notices are not altered, defaced, or covered by any other material.

(f) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Federal Labor Relations Authority, San Francisco Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, April 28, 1995

GARVIN LEE OLIVER
Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY**

**AND TO EFFECTUATE THE POLICIES OF THE**

**FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE**

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

WE WILL NOT unilaterally implement the Air Operations Manual applicable throughout the U.S. Border Patrol at a time that the impact and implementation of our decision to issue the Manual is pending before the Federal Service Impasses Panel.

WE WILL NOT fail or refuse to cooperate in impasse procedures as required by the Federal Service Labor-Management Relations Statute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL cease using the Air Operations Manual unilaterally implemented on October 1, 1992, and reinstate the policies and procedures which existed in the various sectors of the U.S. Border Patrol prior to that date.

WE WILL rescind any adverse or disciplinary actions taken against bargaining unit employees because of their failure to comply with provisions of the Air Operations Manual unilaterally implemented on October 1, 1992, and make them whole for any loss of pay or benefits they may have suffered thereby.

WE WILL maintain the status quo, to the maximum extent possible, while impasse proceedings are pending before the Federal Service Impasses Panel.

WE WILL notify the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, the exclusive bargaining representative of a nationwide bargaining unit of our employees, concerning any intent to issue an Air Operations Manual and, upon request, bargain with the Union concerning the impact and implementation of any such issuance.

(Activity)

Date: By:
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is: (415) 744-4000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. SF-CA-30165, were sent to the following parties in the manner indicated:

**CERTIFIED MAIL:**

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Ariel Rios Building, Room 5206
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**REGULAR MAIL:**

Mr. Dennis Ekberg
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Dated: April 28, 1995
Washington, DC