UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

SOCIAL SECURITY ADMINISTRATION RESPONDENT and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923, AFL-CIO CHARGING PARTY	Case No. WA-CA-80113

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 pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JULY 27, 1998**, and addressed to:

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

_____
JESSE ETELSON
Administrative Law Judge

DATED: June 23, 1998
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: June 23, 1998

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
RESPONDENT

and Case No. WA-CA-80113

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923, AFL-CIO

CHARGING PARTY

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(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

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION RESPONDENT and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923, AFL-CIO CHARGING PARTY	Case No. WA-CA-80113

Cathy Six
Richard Matthews
For the Respondent

Thomas F. Bianco, Esquire
Patricia A. Armstrong, Esquire
For the General Counsel

Before: JESSE ETELSON
Administrative Law Judge

DECISION

An unfair labor practice complaint alleges that Respondent (SSA) violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) when it implemented a change in location without providing the Charging Party (the Union) with an opportunity

to negotiate to the extent required by the Statute.[1] The complaint also alleges that the Union requested to bargain over transportation (or transit) subsidies for certain employees that it represents, that the request was made "in connection with the [relocation]," and that SSA failed to negotiate in good faith with the Union over such subsidies. SSA's answer admits all of the material factual allegations except that it denies failing to negotiate in good faith. The answer also denies that SSA failed to provide the Union with an opportunity to negotiate to the extent required by the Statute and that it committed unfair labor practices.

A hearing on the complaint was held in Washington, D.C., on April 30, 1998. Counsel for the General Counsel and for SSA filed post-hearing briefs. In its brief, SSA defends solely on the ground that the matter of transit subsidies was "covered by" its 1996 National Agreement with the Union's parent organization, the American Federation of Government Employees, AFL-CIO (AFGE), and that SSA therefore had no duty to bargain over such subsidies during the term of that agreement.

Findings of Fact

A. Events Precipitating the Unfair Labor Practice Charge

SSA announced in December 1996 that its Office of Research, Evaluation[,] and Statistics (ORES) would be moving from Van Ness Center, 4301 Connecticut Avenue, N.W., Washington, D.C., to 500 E Street, S.W., Washington, D.C. Shortly after that announcement, the Union requested that SSA bargain over transportation subsidies before ORES employees were moved. SSA acknowledged receipt of the bargaining request but refused to bargain over such subsidies. It implemented the move in September 1997.

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[1] Paragraph 17 of the complaint alleges that SSA committed its unfair labor practices by the conduct described in paragraph 15 of the complaint. The conduct described in paragraph 15 (and admitted in SSA's answer) is that SSA implemented the relocation in or about September 1997. Paragraph 16 alleges that SSA implemented the change without providing the Union with an opportunity to negotiate to the extent required by the Statute. I infer that the complaint was intended to include the conduct described in paragraph 16 in the ultimate unfair labor practices allegation (paragraph 17) and that SSA was not misled by the omission. SSA denied paragraph 16 and its substance was fully litigated.

The move resulted in the relocation of approximately 60 ORES employees, among whom were employees in a nationwide consolidated bargaining unit. The Union, as an agent of the national exclusive representative, represents these ORES employees. Bargaining unit employees had been able to find free parking, or garage parking for $65.00 a month, at or near the Van Ness Center. After the move, street parking was not available and garage parking was available at $145.00 a month. The parties stipulated that the move changed the ORES employees' conditions of employment and had more than a *de minimis* impact on them.

B. Negotiation History Relevant to SSA's Duty to Bargain

1. Results of "Term" and Other National Bargaining

In 1992 and 1993, AFGE, while bargaining for a new national collective bargaining agreement, made certain proposals to alter certain articles of the then current agreement, including Article 13, entitled "Parking and Transportation." AFGE proposed that, "To the extent permitted by law, the Agency will provide maximum subsidy to those employees who use public transportation." SSA rejected that proposal, citing budgetary priorities and the absence of a showing that providing subsidies would increase the employees' use of public transportation for their daily commute. AFGE resubmitted its original proposal, but later, in January 1993, revised the proposal. The revised proposal added some detail with respect to the underlying policies and the administration of the subsidy program. It also specified that each employee would be issued "up to $60.00 each month" in transit checks as a tax-free benefit.

The subsidy proposals were not incorporated into the 1993 national agreement, which included, without change, the pre-existing Article 13 and several other pre-existing articles on which AFGE had submitted proposed alterations. Except as set forth above, the record is silent on the course of these negotiations.

A letter of understanding (LOU) that accompanies Article 13 in the 1993 national agreement provides that AFGE would have 120 days from the signing of "this contract" to identify and, if unresolved at a lower level, bring to the attention of the Deputy Commissioner for Human Resources, any problems with the distribution of parking spaces at local installations. The 1993 national agreement had an effective date of November 17, 1993. The LOU was signed by representatives of AFGE and SSA in July and August 1993,

respectively. The record contains nothing about the negotiations that led to it.

Article 13 of the 1993 national agreement was adopted, unchanged, in the parties' 1996 national agreement. In the booklet in which the 1996 agreement is bound, the 1993 LOU on parking spaces is reproduced and appears on the page facing Article 13. There is no evidence in the record about the negotiations for the 1996 agreement. Article 13, as it appears in both the 1993 and 1996 agreements, contains four sections. Sections 1 and 2 deal with parking arrangements. Section 3 deals with administrative leave for employees who contest citations for traffic violations. Section 4 provides for shuttle service to transport employees between buildings for official business.

2. MOU on Midterm Bargaining

Article 4 of the 1993 national agreement sets forth certain procedures for "Negotiations During the Term of the Agreement on Management Initiated Changes." Union President John Gage, who was also AFGE's chief negotiator for the 1996 national agreement, had some preliminary discussions with Ruth Pierce, SSA's Deputy Commissioner for Human Resources, about changes in Article 4 and another article. In a November 1995 letter to Gage, Pierce mentioned their previous communications and her understanding that Gage desired to "put what we are actually doing [with respect to midterm bargaining] in writing." Pierce proposed the following language as an agreement "to maintain the status quo":

> In consideration of AFGE not reopening Article 4 of the AFGE/SSA National Agreement, which covers midterm bargaining, SSA agrees that it will continue its current practice of giving notice to AFGE concerning changes in conditions of employment. This practice will continue without regard to the Barstow decision. Where it is clear that a matter at issue is set forth explicitly and comprehensively in the National Agreement or existing MOU, unless the Parties mutually agree, the subject is not appropriate for midterm negotiations.

Gage found this proposal acceptable in substance. He understood that the "current practice" to which the letter refers was that midterm bargaining "on changes to Agency policy or conditions of employment [would continue] without regard to the 'covered by' theory" (Tr. 24). Gage believed

that the substance of Pierce's proposal represented an agreement in principle, and asked Barry Nelson, another AFGE official, to work on finalizing the language. Nelson was also to deal with other issues and was, for these purposes, to meet with Pierce's designee, Albert Siemek.

At the time of the hearing, Siemek was SSA's Deputy Director of Management and Employee Relations. It was he who had drafted Pierce's November 1995 letter to Gage. Earlier, Siemek had been present at a meeting with Pierce and Gage at which Gage had voiced his concern that SSA would begin relying on the *Barstow* decision[2] and cease giving notice to AFGE on midterm changes. Siemek testified that he and Pierce had responded to Gage that SSA had been "very judicious in exercising our *Barstow* rights, we had generally continued to give the Union notice of mid-term changes; and, depending upon what the nature of those changes was and any bargaining obligations ensuing there, we may or may not raise the *Barstow*." (Tr. 81-82). Stated otherwise, Siemek testified that they informed Gage that SSA would not waive its rights under *Barstow*, but would invoke it only sparingly, "at appropriate times and we did not expect it to be that often" (Tr. 83). Siemek drafted the letter, for Pierce's signature, to communicate that SSA would continue with its current practice (Tr. 82).

Gage, recalled by the General Counsel as a rebuttal witness, denied that Siemek or Pierce told him that SSA intended to invoke the "covered by" doctrine, even infrequently, as Siemek had testified. As explained further below, I find that this factual dispute represents different perceptions by Siemek and Gage about what they were talking about when they discussed the "covered by" doctrine. I find it unnecessary to resolve exactly what was said at the disputed meeting, but my resolution will establish what I find to be the substance of the discussion.

When Siemek met with Nelson to discuss this and other matters, Siemek understood that AFGE did not "totally accept" the language of the Pierce letter relating to midterm negotiations. They "tinkered" with it and agreed on a revision that did not change the language substantially but represented "almost the mirror image" of the manner in which the proposition was formulated. Thus, instead of stating that midterm bargaining would be *inappropriate* if it were clear that the matter at issue had been set forth explicitly and comprehensively, the revised version made a subject *appropriate* for midterm bargaining "[u]nless it is

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[2] *Department of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992).

clear that [it] is set forth explicitly and comprehensively . . . .” (Tr. 72-73, 84-85; GC Exh. 3, p. 2.)

Siemek believed that the agreement was an attempt “to incorporate the rationale or principles from the *Barstow* decision, obviously not the exact words, but what I had in mind, certainly, was that we were trying to put something in there to the effect that where the parties had dealt with the matter during term negotiations[,] that just because we did not deal with every aspect or application or iteration of that issue [did not mean] that we had to continually revisit that issue during the life of the contract” (Tr. 85-86). However, neither Siemek nor Nelson specifically explained to the other his understanding of the language agreed upon (Tr. 61-62, 86).

The final memorandum of understanding (MOU) on this issue, as worked out by Siemek and Nelson, was signed on March 5, 1996, by Ruth Pierce and, for AFGE, by Arthur B. Johnson. It was inserted as an addendum to the parties’ March 5, 1996, national agreement:

> The Parties agree that in the administration of Article 4 of the National Agreement, SSA will continue its current practice of giving notice to AFGE concerning changes in conditions of employment without regard to the Barstow decision.
>
> Unless it is clear that a matter at issue is set forth explicitly and comprehensively in the National Agreement or existing MOU, the subject is appropriate for mid-term bargaining.

Discussion and Conclusions

Applicable Principles in General

An agency must negotiate with its employees’ exclusive representative over changes in bargaining unit employees’ conditions of employment, except as provided otherwise by Federal law, Government-wide rule or regulation, or agency regulations for which a compelling need exists. Even if the decision to effect the change in conditions of employment is outside the duty to bargain, an agency must bargain about the impact and implementation of a change that has more than a *de minimis* impact on unit employees’ conditions of employment. *U.S. Department of the Treasury, Customs Service, Washington, D.C.*, 38 FLRA 875, 880 (1990). The exclusive representative may waive its right to bargain, but such waiver must be clear and unmistakable. *Department of the Air Force, Scott Air Force Base, Illinois*, 5 FLRA 9

(1981). Even in the absence of a waiver, however, the duty to bargain over a particular matter is satisfied during the term of any collective bargaining agreement between the parties if the agreement "covers" that matter. *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993)(*SSA Baltimore*).

The General Counsel's Prima Facie Case

Although SSA does not dispute the General Counsel's establishment of a *prima facie* case, I shall set forth the necessary analysis to confirm the nature of what has been established. As the parties stipulated, SSA's relocation of an office to which bargaining unit employees were assigned effected a change in the conditions of employment of those employees and had more than a *de minimis* impact on those conditions. SSA has admitted that the Union's request to bargain over transit subsidies before the employees were moved was made in connection with the move. Therefore, this case is unlike *Department of Veterans Affairs, Washington, D.C.*, 53 FLRA 236, 240-42 (1997)(*DVA 1997*), where the Authority dismissed a complaint that alleged that the agency violated the Statute by refusing to negotiate over transit subsidies.

In *DVA 1997*, the complaint had not alleged that there was a unilateral change in conditions of employment. Here, in contrast, the complaint plainly implies that there was a unilateral change in a condition of employment and that the request to bargain over subsidies was made in connection with the impending change. The request could reasonably be characterized either as one to negotiate over the substance of transit subsidies or over such subsidies as an appropriate arrangement for employees adversely affected ("impacted") by the change.

The Authority dismissed the complaint in *DVA 1997* because of the absence of a unilateral change and of the failure to establish that the proposal submitted to the agency was substantially identical to one which the Authority had *previously* determined to be negotiable. As discussed below, the instant case is also distinguishable from *DVA 1997* on this point.

In *National Federation of Federal Employees, Council of VA Locals and U.S. Department of Veterans Affairs, Washington, D.C.*, 49 FLRA 923 (1994)(Proposal 4), decided after the agency refused to bargain in *DVA 1997* but before SSA refused to bargain in the instant case, the Authority found a proposal to provide monthly subsidies to employees

who use public transportation (among others) to be negotiable, rejecting a number of agency challenges to its negotiability. *Id.* at 930-43. The Authority's decision implicitly found the subject matter of the proposal to be negotiable. *Cf. National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service, Ohio District, Cincinnati, Ohio*, 44 FLRA 405 (1992)(proposal that employer take all necessary actions within its authority to subsidize the use of public transportation, to the extent permissible by law, was negotiable).

In the instant case, the stipulation concerning the request to bargain over transportation contains no indication that the Union was insisting at that point on any particular proposal or on any dollar amount for the subsidies to be negotiated. Therefore, SSA's refusal to negotiate constituted a refusal to enter into any negotiations over the subject of transit subsidies, and it is unnecessary to consider whether any subsequent specific proposal might have contained elements that were nonnegotiable. The subject of transit subsidies was negotiable (unless SSA's affirmative defense is established) and the refusal to negotiate constituted, *prima facie*, in these circumstances, an unfair labor practice.

The "Covered By" Defense

Although what the parties have referred to in their dealings here as the *Barstow* decision represented the court's rejection of the Authority's application, at that time, of what became known as the "contained in"/"covered by," or simply the "covered by" inquiry, the court expressly declined "to establish a definitive test for determining when an otherwise bargainable matter is 'covered by' a public sector collective bargaining agreement, such that there is no further duty on the part of the agency to engage in 'impact and implementation' bargaining with respect to that matter." *Barstow*, 962 F.2d at 62. Given this judicial restraint, the Authority undertook, in *SSA Baltimore*, to establish such a test consistent with the court's decision.

The test that the Authority so established was whether the subject matter of the proposal is: (1) expressly contained in the collective bargaining agreement, by virtue of language sufficiently similar that a reasonable reader would conclude that the provision settles the matter in dispute; *or* (2) is inseparably bound up with a subject expressly covered by a contractual provision, in that it is "inseparably bound up with" *and* "so commonly considered to be an aspect of the matter set forth in the provision that

the negotiations are presumed to have foreclosed further bargaining over the matter[.]" *SSA Baltimore*, 47 FLRA at 1018. Application of this test involves "an interpretation of the contract at issue." *Department of Veterans Affairs Medical Center, Denver, Colorado*, 52 FLRA 16, 25 (1996)(*Veterans Affairs*), *quoting NLRB v. U.S. Postal Service*, 8 F.3d 832, 837 (D.C. Cir. 1993).3

However else one might characterize this defense to an allegation of refusal to bargain, it must be treated in a manner consistent with the Authority's recognition that it is a *defense. See, for example, Equal Employment Opportunity Commission, Washington, D.C.*, 52 FLRA 459 (1996). Cf. *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091, 1106 (1993)(decision on remand)(Authority determines the meaning of any contract provision raised as an affirmative defense to an alleged violation of the Statute). Accordingly, the respondent must bear the burden of persuasion, and, if applicable, the burden of proof, to establish its right to have refused to bargain.

SSA has not persuaded me that its defense satisfies either of the alternative prongs of the Authority's test. In applying the first, or "contained in" part, the Authority determines only whether a contractual provision "expressly encompass[es] the matter[.]" *SSA Baltimore,* 47 FLRA at 1018. There is nothing in any of the agreements placed in the record that refers, one way or another, to transit subsidies. The fact that Article 13 of the national agreement bears the title, "Parking and Transportation," might suggest that any provision the parties negotiated regarding transit subsidies would belong there. There is, however, no such provision. Nor does the fact that Article 13 contains provisions about parking, traffic violations, and shuttle service suggest to the "reasonable reader" that any or all of these provisions settle the matter of transit subsidies.

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3 In *Veterans Affairs*, 52 FLRA at 23, the Authority described as a "third prong" to the *SSA Baltimore* approach an inquiry into extrinsic evidence, such as bargaining history, to determine the parties' intent. As the Authority makes clear in *Veterans Affairs*, however, this "third prong" is brought into play only where it is otherwise "difficult to determine whether the subject matter sought to be bargained is an aspect of matters already negotiated." As explained in n.4, below, I conclude that the "third prong" inquiry is inapplicable here.

Nor does SSA's defense hold up under the second prong of the test, in which the Authority determines whether a matter, although not expressly "contained in," is otherwise "covered by" the contract. Notwithstanding its broad title, none of Article 13's provisions, including the related LOU concerning parking spaces at local installations, covers a matter with which subsidies are "inseparably bound up" *and* of which they are "so commonly considered to be an aspect . . . that the negotiations are presumed to have foreclosed further bargaining over the matter."

While transit subsidies might share some kinship with parking or intra-agency shuttle services, these subjects are hardly siblings, much less twins, Siamese or otherwise. Rather than "inseparably bound," I find these subjects to be more or less "tangentially related," and therefore conclude that one is not "covered by" the others. *SSA Baltimore*, 47 FLRA at 1019.

All of the parking provisions of Article 13, including the attached 1993 LOU, address conditions from the perspective of then-existing parking availability. These provisions are designed either to maintain the *status quo*, or, in the case of the LOU, to address conditions existing within 120 days of the signing of "this contract." Whichever contract is referred to there, the 120 days had expired before SSA announced the relocation of its ORES office and engendered the Union's bargaining request. It would be unreasonable to presume that those parking provisions contemplated and thus "covered" all transportation issues arising from the changed conditions that would be effected by an office relocation -- that is -- to presume that they were intended to preclude negotiations over all transportation issues that are connected to such relocation but are not specifically addressed in the agreement or the LOU.

Further, the Union's bargaining request was plainly not a broad attempt to reopen the subject matter of Article 13 but a response to an agency exercise of a managerial right at a particular location. As stated earlier, the Union's request can reasonably be read as a request to bargain about the impact of the announced relocation. *Cf. Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 53 FLRA 1092, 1104-05 (1998) ("covered by" defense inapplicable where it was the change of employees' conditions of employment that gave rise to the obligation to bargain on the impact and implementation of that change).

SSA places much of its emphasis on the fact that, prior to the 1993 national agreement, the Union had submitted proposals on the subject of transit subsidies and that no such proposals were adopted. However, at least in the circumstances of this case, the evidence of bargaining history is inapplicable to the "covered by" issue but is to be determined according to whether the evidence establishes that the Union waived its right to bargain over this subject.[4]

The Issue of Waiver During Previous Negotiations

Co-existing with, and related to but distinct from the "covered by" analysis, the Authority continues to consider whether a party has waived its right to bargain over a particular matter. In certain circumstances a waiver may be evidenced by the parties' bargaining history. To establish such a waiver, the party resisting the bargaining obligation must show that the matter was "fully discussed and consciously explored during negotiations and [that the other party] consciously yielded or otherwise clearly and unmistakably waived its interest in the matter." *Headquarters, 127th Tactical Fighter Wing, Michigan Air National Guard, Selfridge Air National Guard Base, Michigan*, 46 FLRA 582, 585 (1992) (*Selfridge*). Although the Authority abandoned, in *SSA Baltimore*, its previous approach which, as characterized by the court in *Barstow*, had "collaps[ed]" the 'contained in'/'covered by' inquiry into the 'waiver' inquiry" (*SSA Baltimore*, 47 FLRA at 1016), it continued to assert the viability of the *Selfridge* "waiver" analysis as it applied to determinations of whether the

[4] As stated in n.3, above, the Authority considers extrinsic evidence such as bargaining history as part of the "third prong" of its *SSA Baltimore* approach. However, as the Authority explained in *Veterans Affairs*, 52 FLRA at 23, the "third prong" applies in cases where it is difficult to make the necessary determination under the "second prong" (the "covered by" inquiry into whether the matter is an aspect of something already negotiated). By implication, the "third-prong" inquiry is not reached unless the "second-prong" determination is "difficult." My analysis of the "covered by" issue, set forth above, leads me to conclude that its determination is not sufficiently difficult to warrant engaging in a "third-prong" inquiry. *Cf. U.S. Department of Justice, Immigration and Naturalization Service, Washington, D.C.*, 51 FLRA 1274, 1279 (1996)(Authority did not examine the parties' bargaining history because it found, under the second prong, that the disputed subject was an aspect of a subject already negotiated).

bargaining history itself, as distinguished from bargaining history as evidence of whether the matter sought to be bargained is an aspect of the matters already negotiated, demonstrated an abandonment of proposals on a particular subject. *Id.* at 1015 n.6, 1018-19.[5] *See also Department of Health and Human Services, Social Security Administration*, 47 FLRA 1206, 1209 (1993).

Under *Selfridge*, "more than mere discussion during prior negotiations is required to establish a waiver by bargaining history." As the Authority went on to explain:

> [A] matter must be fully discussed and consciously explored during negotiations and the union must have consciously yielded or otherwise clearly and unmistakably waived its interest in the matter. To find a waiver based on a lesser standard would place constraints on a union's ability to raise questions and issues freely at the bargaining table. If mere discussion of a matter were sufficient to establish a waiver, unions could be deterred from tentatively exploring issues in negotiations. Finding a waiver based on mere discussion also would encourage agencies to raise all conceivable issues in contract negotiations simply for the purpose of foreclosing future bargaining on those issues. Such an approach does not encourage fruitful and constructive negotiations and the meaningful resolution of mutual problems through negotiations, but, rather, increases the potential for conflict in negotiations. 46 FLRA at 585.

The relevant bargaining history in the instant case shows that, during the negotiations leading to the 1993 national agreement, the Union had submitted two sets of proposals for transit subsidies, that SSA rejected those

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[5] Although the Authority, *id.* at 1019, cited *Triangle PWC, Inc.*, 231 NLRB 492 (1977) as a case where the Board determined, based on evidence of prior agreements *and* bargaining history, that a subject was "covered by" the prior agreement, the Board in fact went further and found in that case that the union had *waived* its right to bargain over that subject. *Id.* at 493.

proposals, and that the resulting agreement contained no provisions for transit subsidies. This bargaining history provides insufficient basis for the kind of waiver that *Selfridge* demands.

Moreover, there is no evidence that the Union renewed its request for transit subsidies during negotiations for the 1996 national agreement. A waiver by bargaining history normally indicates that the party has abandoned its proposals during the term of the agreement the parties reached through the negotiations in the course of which the waiver occurred. That is, even a conscious yielding or other evidence of a waiver of interest in the matter for the duration of the agreement being negotiated would not, in itself, justify a finding that the "waiving" party had abandoned that subject forever. Therefore, even assuming that there had been a waiver by the Union over the subject of transit subsidies for purposes of the 1993 national agreement, the absence of affirmative evidence that the Union abandoned or yielded on this subject matter during the negotiations for the 1996 national agreement, or did so contemporaneously or later, leaves me with no basis for finding that the Union waived its bargaining rights over transit subsidies during the term of the 1996 agreement.

The March 1996 "*Barstow*" MOU

Based on the previous analysis, and my conclusion that SSA has failed to establish any defense to the General Counsel's *prima facie* case, this case can be resolved without deciding whether the General Counsel has rebutted SSA's "covered by" defense by virtue of the March 1996 MOU. However, for the purpose of reducing the likelihood that the Authority would find a remand necessary in the event that my analysis or conclusions are overturned, I find it appropriate to consider the MOU.

On its face, the MOU sustains the midterm negotiability of any "matter at issue" that is not "set forth explicitly and comprehensively in the National Agreement or existing MOU." When read with the preceding sentence/paragraph, however, and based on the record as a whole, it appears that the phrase, "matter at issue," means a matter arising from SSA's change in conditions of employment, rather than any matter that AFGE (or its agents) wishes to raise midterm.

Some confusion enters the picture because of the reference to "*Barstow*." Although the "*Barstow*" reference, read in isolation from the second sentence/paragraph, appears to refer only to *notice* to AFGE, the record as a whole, including the Pierce letter that places the second

part of the proposal immediately after the "*Barstow*" reference without a paragraph break, convinces me that, just as "matter at issue" in the second paragraph derives some of its meaning from the first paragraph, the "*Barstow*" reference was intended to relate to the second paragraph as well, and thus applies not only to providing notice but also to the obligation to bargain.

The confusion arises in part from the fact that the parties evidently had no more than a vague mutual understanding, if mutual at all, of what "*Barstow,*" as they labeled it, stood for. As noted above, the *Barstow* decision itself (the decision of the United States Court of Appeals for the District of Columbia Circuit), did not formulate any test for the "covered by" defense. The court was satisfied, nonetheless, that such a defense had been established on the facts of the cases before it. At the time SSA and the Union held the discussions that led to the March 1996 MOU, over two years had elapsed since the Authority had announced its *SSA Baltimore* test for the "'contained in'/'covered by' inquiry" (a phrase the Authority quoted from the court's *Barstow* decision).

It is impossible to determine, from their testimony alone, to what aspects of either of these decisions the parties thought they were referring when they referred to "*Barstow.*" However, the texts of the actual MOU and of the letter that preceded it provide the most reliable clue.

The phrase, "set forth explicitly and comprehensively," found in both the letter and the MOU, manifestly relates to the "contained in," and not to the "covered by" part of the inquiry. With this understanding, Siemek's and Gage's testimony can be reconciled. Thus, Siemek testified that he or Pierce told Gage that SSA's continuing practice was not to waive its rights under *Barstow* but to invoke it only sparingly, and that he (Siemek) then drafted the letter for Pierce's signature, incorporating what had been discussed. Gage would have been justified in interpreting the oral statement to which Siemek testified, as explicated in the letter, as an undertaking to limit SSA's reliance on "*Barstow*" at least in certain respects.

The respect that is most immediately relevant here is that the defense to a bargaining obligation based on previous agreements would be asserted only if the matter had been treated expressly in such previous agreements, if the bargaining were to concern changes in conditions of employment instituted by SSA. As noted above, the MOU's standard ("set forth explicitly and comprehensively") is related to, although it may not conform precisely to, the

"contained in" part of the *Barstow-SSA Baltimore* description of the inquiry. Pointedly omitted from both the Pierce letter and the MOU, however, is any suggestion of applying the second prong of the Authority's test, whereby an agency may show that a matter was "covered by" a previous agreement even though it does not expressly "contain" the matter.

I have previously concluded that SSA has failed to demonstrate that the "matter at issue" is inseparably bound to or is "so commonly considered to be an aspect of" a matter expressly set forth in a previous agreement that the foreclosure of further bargaining is to be presumed. I further conclude, based on the March 1996 MOU, that SSA is precluded from relying on that defense in any event. If the language of the MOU were to be considered at all ambiguous in this regard, which I do not believe it to be, I find that the bargaining history supports this preclusive reading. Thus, the extent of AFGE's dissatisfaction with the language of the Pierce letter, according to Siemek, was that it spoke in terms of subjects that were *inappropriate* for midterm bargaining. At Nelson's suggestion, that formulation was inverted so as to provide affirmatively that a subject not clearly set forth explicitly and comprehensively in a prior agreement is *appropriate* for midterm bargaining. That change assured AFGE that, "without regard to the *Barstow* decision," such matters would continue to be negotiable.

The Remedy

SSA committed the unfair labor practice of refusing to negotiate with the labor organization representing its employees, in violation of section 7116(a)(1) and (5) of the Statute. The General Counsel has requested a traditional cease-and-desist order, a bargaining order, and a posting. I shall recommend such remedies but shall limit their breadth.

The General Counsel requests that both the cease-and-desist order and the bargaining order refer generally to bargaining over the impact and implementation of the change in conditions of employment, *including* transit subsidies. As the Union requested bargaining only over transit subsidies, and as it has not been alleged that SSA failed to provide the Union with an opportunity to negotiate over any other matters relating to impact and implementation, I do not find that SSA refused to bargain over such matters generally or that it should be now be required to enter into negotiations over a broad range of such matters.

With respect to the posting, the General Counsel, without explaining why, has submitted a model order that in

effect calls for a nationwide posting. As only the ORES employees, constituting a small part of the nationwide bargaining unit, were affected by the unfair labor practice, and as no showing of the necessity of a broader posting has been made, I shall so limit my posting recommendation. *See National Weather Service, Silver Spring, Maryland*, 21 FLRA 455 (1986). Accordingly, I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Social Security Administration, Baltimore, Maryland, shall:

1. Cease and desist from:

(a) Unilaterally changing conditions of employment by relocating its Office of Research, Evaluation and Statistics, Washington, D.C., without first bargaining with the American Federation of Government Employees, Local 1923, AFL-CIO, over transit subsidies for bargaining unit employees.

(b) In any like or related manner interfering with, restraining, or coercing 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 Statute:

(a) Upon request, negotiate with the American Federation of Government Employees, Local 1923, AFL-CIO, over transit subsidies for bargaining unit employees.

(b) Post at its Office of Research, Evaluation and Statistics, where bargaining unit employees represented by the American Federation of Government Employees, Local 1923, AFL-CIO, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commissioner of Social Security and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps should be taken to ensure that such Notices are not altered, defaced, or covered by other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Washington Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, June 23, 1998.

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JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Social Security Administration, Baltimore Maryland, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

We hereby notify bargaining unit employees that:

WE WILL NOT unilaterally change conditions of employment by relocating our Office of Evaluation, Research and Statistics without first bargaining with the American Federation of Government Employees, Local 1923, AFL-CIO, over transit subsidies for bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, negotiate with the American Federation of Government Employees, Local 1923, AFL-CIO, over transit subsidies for bargaining unit employees.

_____

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(Agency)

Dated:_____

By:_____

(Signature)

(Title)

This Notice must be 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 its provisions, they may communicate directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1255 22nd Street, NW., Suite 400, Washington, D.C. 20037, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by JESSE ETELSON, Administrative Law Judge, in Case No. WA-CA-80113, were sent to the following parties:

CERTIFIED MAIL, RETURN RECEIPT NOS:	**CERTIFIED**
Thomas Bianco, Esquire Federal Labor Relations Authority 1255 22nd Street, NW, Suite 400 Washington, DC 20037	P168-059-581
Patricia Armstrong, Esquire Federal Labor Relations Authority 1255 22nd Street, NW, Suite 400 Washington, DC 20037	P168-059-582
Cathy Six, LRS Social Security Administration LM&ER Office, G10 W. Highrise Bldg. 6401 Security Blvd. Baltimore, MD 21235	P168-059-583
Richard Matthews Social Security Administration LM&ER Office, G10 W. Highrise Bldg. 6401 Security Blvd. Baltimore, MD 21235	P168-059-584

REGULAR MAIL:

William Milton, LRC
AFGE, Local 1923
c/o SSA, Operations Bldg. 1-J-21
6401 Security Blvd.
Baltimore, MD 21235

Bobby Harnage, President
AFGE, AFL-CIO
80 F Street, NW.
Washington, DC 20001

_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: JUNE 23, 1998
WASHINGTON, DC