

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

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UNITED STATES CUSTOMS SERVICE .  
REGION IV, MIAMI DISTRICT, .  
MIAMI, FLORIDA .  
Respondent .  
and .  
NATIONAL TREASURY EMPLOYEES .  
UNION .  
Charging Party .  
. . . . .

Case No. 4-CA-70849

Richard S. Jones, Esquire  
For the General Counsel

S. Andrew Ostapski, Esquire  
For the Respondent

Steven Flig, Esquire  
For the Charging Party

Before: BURTON S. STERNBURG  
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on September 11, 1987, by the National Treasury Employees Union, (hereinafter called the Union), a Complaint and Notice of Hearing was issued on March 9, 1989, by the Regional Director for Region IV, Federal Labor Relations Authority, Atlanta, Georgia. The Complaint alleges that the United States Customs Service, Region IV, Miami District, Miami Florida, (hereinafter called

the Respondent), violated Sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by transferring Pedro Rodriguez, President of the Union, from Operation Sea Eagle to another less desirable employment position because of his participation in activities protected by the Statute.

A hearing was held in the captioned matter on July 20, 1989, in Miami, Florida. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Respondent, Charging Party and the General Counsel submitted post-hearing briefs on September 7, 8 and 11, 1989, respectively, which have been duly considered.<sup>1/</sup>

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

#### Findings of Fact

The Union is the exclusive representative of the Customs Inspectors located in Respondent's Miami District. Mr. Pedro Rodriguez, the alleged discriminatee herein has worked for Respondent for approximately 11 years. He is currently a Grade 9 Customs Inspector. For the past eight years Mr. Rodriguez has held various positions in the Union.

Sometime around June 1986 Respondent became concerned with the manner in which private aircraft was being inspected for drugs, etc. Thus, while the Customs Inspectors had no problem inspecting private aircraft landing at the Miami International Airport for drugs, etc., it realized that it needed to improve on the inspection of private aircraft arriving at "Non-Customs Designated Airports." To this end it established Operation Sea Eagle which was designed to, among other things, monitor aircraft observed in the Bahamas and Puerto Rico areas for purposes of determining whether they had participated in any air drops of prohibited drugs prior to landing at the various airports in the Miami area.

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<sup>1/</sup> In the absence of any objection, the General Counsel's "Motion to Correct Transcript," should be, and hereby is, granted.

According to Mr. Paul Voight, a former supervisory employee of Respondent, who was responsible for setting up Operation Sea Eagle, he selected the personnel for the operation on the basis of their background. Mr. Pedro Rodriguez who had previous military intelligence experience as well as experience with private aircraft processing was selected by Mr. Voight around August of 1986 to participate in Operation Sea Eagle. Eventually, when Operation Sea Eagle went from the planning stage to the operational stage Mr. Rodriguez was the only Customs Inspector assigned to Operation Sea Eagle in the Miami area, where he worked along with three intelligence agents from the Office of Enforcement. Mr. Rodriguez stayed with Operation Sea Eagle until July 30, 1987, when he was "rotated" to the sea port.<sup>2/</sup> It is this reassignment which is alleged to have been discriminatorily motivated.

According to Mr. Voight he had always recommended that the personnel assigned to Operation Sea Eagle should be retained in their respective position for the duration of the operation. He had no advance notice that Respondent was contemplating a reassignment of Mr. Rodriguez.

In December 1986, approximately six months prior to his reassignment, Mr. Rodriguez became president of Chapter 137 of the Union. In such capacity he became deeply involved in negotiations with the Respondent concerning the rotation system utilized in the Miami District. The negotiations on the issue appear to have been initiated by a letter from Respondent wherein it proposed to revise the existing rotation plan which called for the employees to rotate positions in three areas, namely the seaport, airport cargo and passenger baggage at the International Airport. During the negotiations the Respondent proposed that the rotation occur every six months and the Union countered with a request that the rotation be every three months. According to Mr. Rodriguez and Mr. Voight, who participated in the negotiations as a management representative, at no time during the negotiations did Respondent inform the Union that it intended to include the newly established Operation Sea Eagle in the rotation schedule.

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<sup>2/</sup> It appears from the record that the Customs Inspectors in the Miami District work one of three places, i.e. Miami Seaport, and Miami International Airport at either the baggage area or the cargo area. The toughest assignment is the baggage area processing incoming passengers.

When the parties could not reach agreement even with the help of a Federal Mediator, Mr. Rodriguez and the other members of the Union's Executive Board decided to conduct informational picketing at the airport. By letter dated July 28, 1987, the Miami International Airport gave the Union permission to conduct the informational picketing. A copy of the letter was sent to Respondent.

Two days later, on July 30, 1987, one day before the scheduled informational picketing, Mr. Robert Gomez, Seaport Director, and Ms. Esther Mandelay, Assistant District Director for the Miami area, notified Mr. Rodriguez that he was reassigned from Sea Eagle to the Seaport effective August 2, 1987, the date that Respondent had selected to rotate the other Customs Inspectors in the Miami District. Mr. Voight learned of Mr. Rodriguez's transfer the same way that Mr. Rodriguez did, orally from Ms. Mandelay. Mr. Voight further testified that he was not surprised by Respondent's action in this respect since "there was at the time existing in Miami an extremely adversarial relationship between Union and management."<sup>3/</sup>

The record indicates that Mr. Rodriguez's position on Operation Sea Eagle was not filled until approximately one month later.

The parties stipulated that during the time that Mr. Rodriguez was on Operation Sea Eagle he was a good worker and that management did not remove him from such position for performance based reasons. The parties further stipulated that "Sea Eagle is considered to be a career-enhancing assignment."

Ms. Mandelay does not recall personally informing either Mr. Rodriguez or Mr. Voight that Mr. Rodriguez was being included in the rotation scheduled for early August 1987. According to her testimony, it was her understanding throughout the negotiations concerning the scheduled August 1987 rotation that all the employees in the Miami area were to be included. She does not contend, however, that Operation Sea Eagle was specifically mentioned by name as being included in the rotation. Further, according to Ms. Mandelay, who was transferred to Washington sometime around November 1987, the decision to rotate Mr. Rodriguez from

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<sup>3/</sup> The foregoing is based upon the respective testimony of Mr. Rodriguez and Mr. Voight.

Operation Sea Eagle to the Sea Port was made sometime prior to July 6, 1987, which was several weeks before Respondent became aware of the fact that the Union intended to place informational pickets at the airport. In support of her testimony Ms. Mandelay identified a list bearing the date July 6, 1987, which allegedly was the final determination of management with respect to where the employees in the Miami region would be rotated in August 1987. Ms. Mandelay further testified that a copy of the list, albeit not in the exact form, was subsequently posted pursuant to the requirements of the collective bargaining agreement in effect.

Ms. Mandelay denied that she bore any animosity towards Mr. Rodriguez because of the manner in which he represented the union membership in the negotiations concerning the rotation of the employees.

Finally, Ms. Mandelay acknowledged that Mr. Rodriguez's position on Operation Sea Eagle was not filled for over a month after he was transferred. In this connection she pointed out that Operation Sea Eagle was not left unmanned since three Enforcement Agents were still on the job. In this latter connection the record indicates that Operation Sea Eagle was a joint operation to be manned by both Customs Inspectors and Enforcement Agents.

#### Discussion and Conclusions

Counsel for the General Counsel and Counsel for the Charging Party in separate post-hearing briefs take the position that the record establishes that Mr. Rodriguez's inclusion in the rotation was based solely on his participation in activities protected by the Statute, namely the informational picketing. In support of their positions, they point to the timing of the notice to both Mr. Rodriguez and his supervisor, Mr. Voight, i.e. two days after Respondent became aware of the picketing and one day before the scheduled picketing, the absence of any mention during the negotiations concerning the impending rotation that Operation Sea Eagle was included in such rotation, Mr. Voight's testimony that he had at all times recommended that the staffing of Operation Sea Eagle remain the same for the duration of the operation, and the fact that Mr. Rodriguez's position on Sea Eagle remained unfilled for approximately 30 days.

Respondent on the other hand takes the position that the Complaint should be dismissed in its entirety. In support

of its position Respondent relies on the testimony of Ms. Mandelay to the effect that the decision to include Mr. Rodriguez in the picketing was made several weeks prior to Respondent being informed of the scheduled information picketing and the absence of any independent evidence of union animus.

Having analyzed the testimony of the three principal witnesses, Mr. Voight, Mr. Rodriguez and Ms. Mandelay, and observed their demeanor while on the witness stand, I find all three to be credible. I further find that their respective testimony does not present any substantial contradictions. Thus, Ms. Mandelay does not contend, contrary to Mr. Rodriguez and Mr. Voight, that the inclusion of Operation Sea Eagle in the scheduled August rotation was specifically mentioned during the negotiations, but rather merely states that she always was under the impression that the employees on such operation would be involved in the rotation. While Mr. Voight did testify that he had always recommended that the staffing of Operation Sea Eagle remain the same for the duration of the operation, he offered no probative proof that his recommendation in this respect was adopted, besides merely stating his belief that it had been. Ms. Mandelay was never questioned about the fate of Mr. Voight's recommendation that the staffing of the operation remain the same for the duration of the operation.

The only significant conflict in the three employees testimony concerns the timing of the notice to Mr. Rodriguez and Mr. Voight about the fact that Mr. Rodriguez was to be included in the upcoming rotation. Thus, Mr. Voight and Mr. Rodriguez testified that they were orally notified of such fact a few days prior to the rotation, while Ms. Mandelay does not recall ever personally giving them any oral notification.

Neither Mr. Voight nor Mr. Rodriguez offered any probative testimony to contradict Ms. Mandelay's testimony that the decision to include Mr. Rodriguez in the scheduled August rotation was reached several weeks prior to the date Respondent actually received notice that the Union was about to conduct informational picketing at the airport. Although Mr. Rodriguez denied seeing the final list of employees to be included in the rotation which, according to Ms. Mandelay, was posted shortly after July 6, 1987, he did acknowledge that he had not visited the airport premises where any such list would have been posted.

Based upon the foregoing analysis of the respective testimony of the principal witnesses, I find no reason to

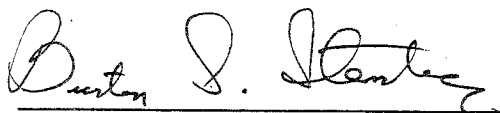
discredit Ms. Mandelay's denial that the inclusion of Mr. Rodriguez in the August rotation was in anyway related to his participation in activities protected by the Statute. In such circumstances, I find that the General Counsel has failed to meet the burden imposed upon him by Section 2423.18 of the Authority's Rules and Regulations, namely to prove the allegations of the Complaint by a preponderance of the evidence.

Accordingly, it is recommended that the Authority adopt the following Order dismissing the Complaint in its entirety.

ORDER

It is hereby Order that the Complaint should be, and hereby is, dismissed in its entirety.

Issued, Washington, D.C., October 25, 1989

  
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BURTON S. STERNBURG  
Administrative Law Judge