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

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, WASHINGTON, D.C. AND INTERNAL REVENUE SERVICE, CINCINNATI, OHIO DISTRICT OFFICE Respondent	
and	Case No. 5-CA-70141
NATIONAL TREASURY EMPLOYEES UNION, AND NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 27 Charging Party	

John F. Gallagher, Esquire
For the General Counsel

Michael T. Lamb, Esquire
with Michael J. McAuley, Esquire, on the Brief
For the Charging Party

John A. Freeman, Esquire
For the Respondent

Before: JESSE ETELSON
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. § 7101, et seq., (the Statute).

Upon an unfair labor practice charge filed by the National Treasury Employees Union, (NTEU) and National Treasury Employees Union, Chapter 27, against the Department

of the Treasury, Internal Revenue Service, Washington, D.C., and Internal Revenue Service, Cincinnati, Ohio District Office (IRS), the General Counsel of the Federal Labor Relations Authority (the Authority), by the Regional Director for Region V, issued a Complaint and Notice of Hearing on March 4, 1988. The Complaint alleges that the Respondent violated Section 7116(a)(1) and (5) of the Statute by refusing to negotiate with the Union concerning the impact and implementation of the assignment of revenue agents to other positions.

A hearing was held on May 11, 1988, in Columbus, Ohio. All parties were permitted to present their positions, to call, examine, and cross-examine witnesses, and to introduce evidence bearing on the issues presented. The General Counsel, NTEU, and IRS submitted post-hearing briefs.1/

On the basis of the entire record, the briefs, and my evaluation of the evidence, I make the following findings of fact, conclusions, and recommendations:

Findings of Fact

The facts are not disputed. NTEU is the exclusive bargaining representative of the employees concerning whom the alleged unfair labor practices were committed. It is a party to a nationwide collective-bargaining agreement with the IRS which is effective from May 27, 1985, to January 27, 1989. As the current agreement is the second to which the parties have given the designation, "National Office, Regions and Districts" agreement, it is called by the acronym, "NORD II."

This case concerns the IRS' refusal to bargain over the impact and implementation of certain lateral reassignments of employees. The Authority has specifically held that in the preceding agreement between the parties, NORD I, NTEU waived its right to "bargain over" such lateral reassignments. Internal Revenue Service, Denver District, Colorado,

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1/ Counsel for the General Counsel filed a Motion to Correct Transcript. The motion was unopposed and the corrections appear to be proper. The motion is therefore granted and the transcript is corrected as requested. As none of the corrections affect the facts I have found to be dispositive, I find it unnecessary to set them forth as part of this decision.

17 FLRA 192 (1985).2/ The parties have stipulated in this case that the lateral reassignments which are at issue here are the same type as those in issue in the Denver District case. It is also stipulated that the NORD I provisions which were found by the Authority to constitute the waiver have been carried over to NORD II.

NORD II, as stated above, remains in effect until January 27, 1989, subject to the following reopener provision:

> Either party at the national level may reopen up to four (4) articles of this Agreement. Reopening shall be effected by the service of written proposals by one party upon the other at any time during November, 1986. Negotiations shall commence on all articles so opened by either party at a mutually agreed time, but no sooner than sixty (60) days from the date the last timely proposal was received by either party. In addition to reopening up to four (4) Articles pursuant to this provision, either party may submit proposals respecting groundrules to be followed in the renegotiation of the remainder of this Agreement.

NTEU exercised its right to reopen, among other NORD II articles, those that contained the waiver of the right to bargain over lateral reassignments. The parties subsequently negotiated over those provisions and eventually submitted the subjects they covered to binding interest arbitration. The arbitrator issued an award on March 13, 1987, which included a resolution of the issue of bargaining over employee reassignments. NTEU filed exceptions to the award, but the Authority denied them and held the award to be valid and enforceable. National Treasury Employees Union and Internal Revenue Service, (Ross, Arbitrator), 30 FLRA 1097 (1988).

After the relevant articles were reopened, but before the arbitrator's award, IRS announced certain vacancies for the position of revenue agent coordinator in its Cincinnati,

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2/ See n. 5, infra, for further discussion of the scope of the Authority's holding in that case.

Ohio, district, for its Columbus, Ohio, post of duty. On January 27, 1987, James Kyser, president of NTEU Chapter 27, which bargains locally for the Columbus employees, submitted a written bargaining request on behalf of NTEU and its Joint Council for the Cincinnati district. He requested bargaining over the "substance and impact and implementation" of the assignment of revenue agents to revenue agent coordinator positions in the Cincinnati district.3/ IRS refused to bargain, and proceeded unilaterally to reassign revenue agents to the vacant coordinator positions.4/

Discussion and Conclusions

I assume for the purposes of the following discussion that the General Counsel has established a prima facie case, and I have little doubt that he has. The one insurmountable hurdle to his prevailing is IRS' defense that NTEU's waiver of the right to bargain over the subject involved here was still in effect. The General Counsel concedes that the applicable provisions carried over from NORD I continue as a complete waiver of NTEU's bargaining rights if they were still in effect at the time of the Cincinnati district's refusal to bargain.5/

3/ This case involves only the "impact and implementation" aspect of Kyser's request.

4/ If my view of the case, discussed below, is correct, neither the further facts developed in the record nor the issues to which they relate are dispositive.

5/ NTEU, as the Charging Party here, expressly conceded only that the provisions in questions constitute a waiver of its right to bargain over implementation of the lateral reassignments at issue here. One possible explanation for this limited concession is that a distinction might be drawn between the effect of the waiver provisions on IRS' duty to bargain over implementation (as defined in section 7106(b)(2) of the Statute), on the one hand, and impact (as defined in section 7106(b)(3)), on the other. In fact, Judge Devaney drew such a distinction in the Denver District case, supra (17 FLRA at 206-07), finding that implementation bargaining rights were waived but that impact bargaining rights were not. In adopting Judge Devaney's finding that NTEU waived

(footnote continued)

In order to pass this hurdle, the General Counsel would equate NTEU's reopening of the waiver provisions with their termination, thereby reviving the Respondent's statutory bargaining obligation as explained in Federal Aviation Administration, 23 FLRA 209, 211 (1986). NTEU clearly took the position, in correspondence with IRS, that the reopening was tantamount to termination. The issue, however, is whether that is a defensible position.

Counsel for the General Counsel does not make a persuasive argument as to how the reopener provision can be read as permitting either NTEU or IRS to avoid the operation of those provisions concerning which the right to negotiate, mid-term, is exercised, before those provisions are changed by mutual agreement. Indeed, Counsel for the General Counsel puts the best possible face on it when he states, in his brief, that neither the contract language nor any record testimony explains the effect of a reopening on the waiver.

Notwithstanding that the continuance of the waiver must, to be enforceable against NTEU, be clear and unmistakable, I perceive no basis for reading in to the reopener provision any more than its ordinary meaning -- that one or both parties shall have the right, and the other party the corresponding duty, to bargain over certain mid-term proposals. See, e.g., National Association of Government Employees, SIEU, AFL-CIO and Veterans Administration Medical Center, Grand Junction, Colorado, 24 FLRA 147, 148 (1986). Thus, there is no evidence that the parties intended for a reopening, by itself, to effect a premature termination of the reopened articles. While subsequent negotiation or interest arbitration might result in mid-term changes (which might or might not be retroactive), no immediate relief from the existing contractual provisions can be presumed to have been contemplated. Cf. Daily Newspaper Publishers of Baltimore City, 33 BNA LA 898 (1960)(Stockman, Arb.)

5/ (footnote continued)

its right to "bargain over the lateral reassignment of employees" (Id. at 192 n. 2), the Authority found it unnecessary, "in the circumstances of this case," to make that distinction. I am not certain that the Authority's disposition precluded any party from renewing the argument that impact bargaining was never waived. However, no party has.

NTEU argues, however, that NLRB v. Lion Oil Co., 352 U.S. 282 (1957) suggests a policy of construing the "expiration date" of the waiver provisions so flexibly as to make the reopening date its equivalent. That is a great leap. In Lion Oil, the Supreme Court recognized the right of private sector employees to strike in support of mid-term proposals that were advanced pursuant to a reopener provision. For the purpose of deciding whether the union was precluded from calling a strike until the entire existing collective-bargaining agreement was about to expire, the Court held that the term, "expiration date," as it appears in section 8(d)(4) of the National Labor Relations Act, as amended (29 U.S.C. § 158(d)(4)), should be construed to encompass any date on which the contract by its own terms was subject to modification. 352 U.S. at 290. The Court was there interpreting an ambiguous statutory provision so as to best capture Congress' intention when it enacted a limited restriction on the right to strike. Neither the Court's conclusion nor its analysis of the problem has much to do with the contract-interpretation question of whether the reopening of a particular provision suspends the operation of that provision.

I have concluded that in the instant case the reopening did not have that effect, and nothing in Lion Oil suggests the contrary. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

The Complaint in this proceeding is dismissed.

Issued, Washington, D.C., September 29, 1988

JESSE ETELSON
Administrative Law Judge