

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

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

Case No. 4-CA-70766

Elaine F. Cohen, Esq.
For the Respondent

Steven P. Flig, Esq.
For the Charging Party

Richard S. Jones, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose 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. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for Region IV, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by

declaring nonnegotiable a Union proposal dealing with rotating Customs Inspectors into various functional areas and implementing a new rotation system without providing the Union an opportunity to bargain over the matter.

A hearing on the Complaint was conducted in Miami, Florida at which all parties were represented by counsel and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by all parties and have been carefully considered.

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

At all times material the Union has been the exclusive collective bargaining representative of various of Respondent's employees including Customs Inspectors located at the Port of Miami. Unit Inspectors examine cargo and inspect passengers to assure compliance with numerous regulatory requirements governing the entry into the United States of persons and commodities including food and agricultural products, drugs and money. All Inspectors have the same Position Description and are capable of performing any aspect of the job. Some employees "swap" assignments upon appropriate request and approval.^{1/} Inspectors work at two sites; the Miami Airport and the Seaport. Inspectors at the Miami Airport inspect passengers and baggage (herein referred to as Passenger) and inspect air cargo (herein Cargo). Inspectors assigned to work the Seaport, inspect passengers, baggage and cargo (herein Seaport).

Since at least 1983 Inspectors have rotated between Passenger, Cargo and Seaport duties. Inspectors generally rotated duties every one month from 1983 to 1985, every three months from 1985 to February 1986, and essentially every six months beginning in 1986. Due to the "staffing situation" and number of supervisors available, Respondent determined the rotation system required modification and accordingly in May 1987 Respondent notified the Union's

^{1/} See Article 20, Section 17 of the parties negotiated agreement.

Chapter 137^{2/} that it intended to change certain aspects of the rotation system commencing August 2, 1987. Inspectors would thereafter spend a minimum of six months at Cargo and Seaport and a maximum of six months at Passenger. Respondent and the Union exchanged correspondence and met at various times to discuss and negotiate on the change. The Union indicated it was flexible with regard to the number of Inspectors assigned at each location but was primarily concerned with the duration of rotation at Airport and sought to limit rotation at that location to no more than three months. The Union submitted proposals on the matter which Respondent rejected. The parties met on July 23, 1987 at which time the Union submitted the following proposal:

"All qualified employees will rotate initially utilizing the bid process or in the alternative Merit Promotion principles contained in Article 17 of the National Agreement as follows:

"(a) All qualified employees who rotate into Cargo will remain there for six (6) continuous months.

"(b) All qualified employees who rotate to the Seaport will remain there for six (6) months.

"(c) All qualified employees who rotate to Airport Baggage will remain there for three (3) continuous months.

"The rotation will be staggered initially. It is understood that for the initial rotation, some employees will remain in Cargo or at the Seaport for only three (3) months, in order to create a staggered rotation. The Union agrees that the Employer can choose which employees will be permitted or required to initially move from Cargo or the Seaport after the first three months (3) months of this staggered rotation.

^{2/} Chapter 137 is the agent of the Union with regard to representing unit employees in the Miami District.

"The Employer retains the right to determine the numbers, types, and grades of employees needed at each specific work location."

Respondent rejected the Union's proposal as nonnegotiable. The Union brought to Respondent's attention the Authority's decision in National Treasury Employees Union and U.S. Customs Service, Northeast Region, 25 FLRA 731 (1987) wherein the Authority found negotiable union proposals requiring rotation of employees among various established work locations every six months. Respondent remained unpersuaded and on July 29 advised the Union, through its attorney, that it would implement its rotation plan on August 2.^{3/} Respondent also notified the Union that the length of assignment in the Passenger, Cargo and Seaport areas was not negotiable, contending duration of assignment interferes with management's right to determine the organization, number of employees and internal security practices of the agency and to assign and direct employees as set forth in section 7106(a)(1) and 2(a) of the Statute, and; to determine the number of employees assigned and the methods and means of performing work as outlined in section 7106(b)(1) of the Statute.^{4/} Respondent's letter further stated:

^{3/} The record discloses no further Union requests to bargain on the matter after the July 23 meeting of the parties.

^{4/} Section 7106 provides, in relevant part:

"(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

"(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

"(2) in accordance with applicable laws--

(Footnote continued)

"The Union's proposal on duration of assignment would seriously reduce the agency's flexibility to assign work and determine organization of work as organizational and environmental demands and needs change. Additionally, the Union's proposal would push employees through the Cargo area faster. Thus, Cargo would lose 10-12 Inspectors under a 6 month rotation. Under a 3 month rotation, Cargo would lose 19 Inspectors. This is a 30 percent increase. Therefore, numbers of employees in Cargo would be adversely affected thus interfering with management's right to determine the

4/ Footnote continued:

"(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

"(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted. . . . "

. . . .

"(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

"(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work."

numbers of employees in a specified work location as outlined in Section 7106(b)(1).

. . .

"Finally, the Agency has a statutory obligation to negotiate appropriate arrangements for employees adversely affected by the exercise of a management right as outlined in Section 7106(b)(3). Duration of assignment is not an appropriate arrangement but a management right in and of itself, especially where the duration of assignment is linked to the specific duties to be performed and its relationship to the efficient and effective accomplishment of the mission and operations of the Service.

"Management stands ready to impact bargain any changes it makes to the duration of a rotation assignment but finds the duration of the assignment issue, in and of itself, non-negotiable."

The record reveals that an Inspector's approach to performing his duties can change from month to month or sooner regarding the strategy and the technology used in the performance of duties and the location of assignment. For example, emphasis can change from examining particular merchandise to drug search. Cargo search techniques can be changed and such information would be transmitted to the Inspector through a computerized program known as Automated Commercial System which documents and tracks products and importers and issues various instructions and recommendations to the Inspector concerning procedures to be used in inspecting particular cargo. Inspectors have a substantial discretion on performing inspection duties. The importing public desires not only stability of rules which govern what is required to import products but a consistency in interpretation and application of the rules by Inspectors. The Customs Service is sensitive to such reactions and therefore generally find longer rotation periods are more desirable than shorter periods in this area.

As to passenger and baggage inspections, the record reveals Inspectors are provided with "profiles" of passengers suspected of being narcotics smugglers. Also provided Inspectors is information relating to the origin of the contraband being targeted and current manner of smuggling operations. The number and types of profiles can change on a daily basis. The type of merchandise which will be emphasized in inspections can also change from day to day. Management is of the opinion that the longer an Inspector works in this area, the more knowledgeable and hence more proficient the employee becomes thus increasing the Inspector's efficiency as reflected by the Inspector's seizure rate of contraband.

Testimony also disclosed Respondent prefers a longer than three month duration of duty in the Passenger area in order to increase the opportunity for continuing supervisory training and development of Inspectors. More time on the particular function, according to Respondent, also allows more time for the employee to provide creative input to management regarding the job and a longer opportunity for the employer to reap top performance from the Inspector. Respondent is also convinced that a greater time on the job would give more of an opportunity for managers to properly appraise employees, recognize their abilities and expertise and take corrective action where warranted.

With regard to Respondent's system of rotation which is currently in use, testimony reveals management is provided with substantial flexibility in rotating employees. Thus, a letter from management to the Union dated July 6, 1987 describing the system Respondent desired to implement states, inter alia:

4. "A current breakdown of actual inspectors is available on the existing bi-weekly schedule. The actual number of line inspectors varies as staffing fluctuates throughout the year.
5. "In our previous meetings it was held by both parties that a maximum time period be established in Air Passenger Processing. It is our intent to keep that rotation period for six months. The employee will then rotate out to the other assignments:

Projection - baggage - 6 month maximum

Projection - cargo/other - 6 month minimum

Cargo/other may be longer than 6 months as determined by Air Passenger Processing staffing levels.

6. "Management will utilize automated and manual scheduling for tracking purposes. Management will work within the provisions of Article 20 of the National Agreement to ensure that assignment of work is issued in a fair and objective manner."^{5/}

Article 20 of the National Agreement provides in relevant part:

"Section 16. A. Where necessary or appropriate the Employer shall rotate employees through different work locations, assigned work, shifts, and/or tours of duty within the confines of the employee's post of duty and/or other locations for which the employees are regularly assigned.

B. Should the Employer decide to make substantial changes in an established rotation system, timely notices and the opportunity to bargain will be given in accordance with Article 37."

Discussion and Conclusions

The General Counsel alleges Respondent violated section 7116(a)(1) and (5) of the Statute: when it declared nonnegotiable the Union's proposals on rotation of

^{5/} Testimony indicates that present rotation schedules permits "a certain percentage" of Inspectors to remain in Cargo for up to nine months and sufficient flexibility to where ". . . if the number (of employees) is changed or staff needs changed, somebody in cargo could potentially be there for as long as a year . . ." The majority of Inspectors however currently rotate every six months.

Inspector's assignments when the Authority had previously found negotiable similar proposals in Treasury Union/Customs, Northeast, supra; and implementing a change in rotation of Inspectors after refusing to bargain with the Union on the matter. Respondent contends that notwithstanding the Authority's decision in Treasury Union/Customs, Northeast, the Union's proposal which affects the duration of Inspectors' rotation assignments is nonnegotiable because it interferes with management's authority to determine when tasks are to be performed. Respondent urges such authority is inherent in management's right to assign work. Respondent also contends that, in any event, the record in the case herein is sufficient to distinguish the Authority's decision in Treasury Union/Customs, Northeast.

In Treasury Union/Customs, Northeast the Authority considered the negotiability of the following union proposals the agency contended violated its right to assign employees under section 7106(a)(2)(A) of the Statute and its right to assign work under 7106(a)(2)(B):

Proposal 1

All Qualified Employees (Customs Inspectors, Inspectional Aides and Customs Entry Aides) will be assigned to work locations which have been identified by the employer utilizing the bid process based on occupational seniority in a descending order. If there is a tie, Customs service will be utilized to break the tie. If a tie still exists, service computation data will be used to break the tie. If the tie still exists, a lottery will be used to break the tie. In the alternative, Merit Promotion Principles will be utilized to assign employees.

Proposals 2

All qualified employees (Customs Inspectors, Inspectional Aides and Customs Entry Aides) will rotate utilizing the bid process or in the alternative Merit Promotions Principles, every 6 months.

Proposals 3

In order to maintain proficiency in significant aspects of the employees' assigned duties, employees will change work locations once a year. For purposes of this agreement, only the airport passenger (Volpe) assignment will be considered one work location and only 7/3, 3/11, 4/12 shifts' assignments will be considered as one work location.

Proposal 13

Assignments of Customs Inspectors to Duty Officers Terrorist Team and Cargo Accountability Team (C.A.T.) will be made in accordance with Article 20, Section 5, of the National Agreement. These assignments will have a duration of 6 months.

Proposal 14

The assignment of Customs Entry Aides to the Cargo Accountability team will be in accordance with Article 20, Section 5, of the National Agreement. This assignment will have a duration of 6 months.

The Authority held that none of these proposals would restrict management's right to assign employees to particular positions since the employees had already been assigned to positions and the "proposals merely concern determinations as to the specific work locations where these employees will perform the duties that have already been assigned to their positions." The Authority further distinguished numerous cases the agency relied on to support its argument that the requirement to rotate employees among the various established work locations every six months violated its right to assign. The Authority found the cases cited by the agency prevented management from either taking into account valid individual characteristics in making work assignments or required rotations regardless whether new work was available or an assignment had been completed. The Authority stated:

"The record in this case, however, establishes that the employees in the port of Boston currently rotate among the various work locations on a regular basis pursuant to procedures in the parties' master agreement and as a result, perform all the duties incident to an assignment to a specific work location. . . . There is nothing in the express language of these proposals or otherwise in the record to support a claim that these proposals prevent the Agency from continuing to analyze individual characteristics in requiring employees to rotate in the port of Boston."

The Authority further found nothing in the record which established "any linkage between the length of rotational assignment and the particular duties performed."

Respondent contends that Authority's decision in Treasury Union/Customs Northeast has been overruled by the Fifth Circuit Court of Appeals in U.S. Immigration and Naturalization Service (I.N.S.) v. Federal Labor Relations Authority, 834 F.2d 515 (5th Cir. 1987), denying enforcement of Department of Justice, United States Immigration and Naturalization Service, El Paso District Office, 25 FLRA 32 (1987). In that case the Authority held that a change of a length of rotation on a specific job from 30 minutes to one hour with no change in duties did not involve the assignment of work under the Statute. The Court in its decision held that under the Statute:

". . . management retains complete authority to decide WHEN a particular task is to be performed by an agency employee. There is neither an obligation nor a duty to negotiate with the Union as to WHEN an employee is assigned to a particular task". (Emphasis in original).

The Court, in reaching its conclusion, further held:

"In the national interest of maintaining efficiency and effectiveness in the administrative agencies, Congress

expressed an intention to allow management to retain broad discretion in assigning and scheduling the work of agency employees."

At this time the Authority has given no indication that it intends to alter its approach to negotiability questions involving rotation of employees and the duration of assignments and I am constrained to follow the Authority's decisions. In my view the Authority's holding in Treasury Union/Customs Northeast, supra, clearly indicates a proposal that employees rotate in an assignment among various established work locations for a particular duration, as herein, does not interfere with management's right to assign employees or work under section 7106(a)(2) of the Statute and would therefore be within the duty to bargain unless a "linkage" exists between the length of a rotational assignment and the particular duties performed.

In the case herein the record, as more fully set forth above, establishes that significant changes can be expected to occur regularly in the strategy, technology and techniques of inspection employed by Inspectors, depending upon what is being inspected and where the activity occurs, i.e., passenger/baggage inspection or cargo inspection. Cargo search techniques which management requires of Inspectors change as do "profiles" of suspected smugglers, their country of origin and current manner of smuggling being used. Regulations and emphasis regarding the entry of cargo are also subject to change.

The agency wishes to assure that employees are properly trained on a continuing basis in the various functions, procedures and developments in their assignments. The agency further wishes to receive the advantages of Inspectors' proficiency by leaving Inspectors in the Passenger assignment for more than the three months proposed by the Union, which was the primary bone contention in this case, thus in its judgement furthering the effectiveness and efficiency of its operations.

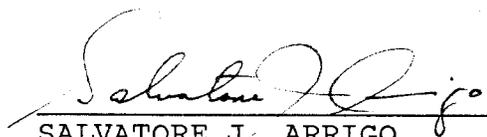
In view of the foregoing and the evaluating the entire record herein I conclude Respondent has established the existence of a significant linkage between the length of a rotational assignment between locations and the particular duties performed by Inspectors at the Port of Miami. Treasury Union/Customs Northeast, supra. Accordingly, I conclude the Union's proposals directly interfere with management's right to assign within the meaning of section

7106(a)(2) of the Statute and Respondent was privileged to refuse to negotiate with the Union on such proposals and, in the circumstances herein, implement the changes in the rotation system absent further indication that the Union desired to continue negotiations on the matter. In these circumstances I conclude the General Counsel has failed to prove the allegations in the Complaint by a preponderance of the evidence and I therefore recommend that the Authority issue the following:

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 4-CA-70766 be, and hereby is, dismissed.

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



SALVATORE J. ARRIGO
Administrative Law Judge