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

U.S. CUSTOMS SERVICE WASHINGTON, D.C. AND U.S. CUSTOMS SERVICE NORTHEAST REGION, BOSTON, MASSACHUSETTS Respondents	
and	Case No. 1-CA-80126
NATIONAL TREASURY EMPLOYEES UNION AND NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 133 Charging Parties	

Peter F. Dow, Esquire
For the General Counsel

Dennis J. Cronin, Esquire
For the Respondents

Jonathan S. Levine, Esquire
(with Michael B. Filler, Esquire, on the brief)
For the Charging Parties

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

The Respondent Agency and its regional office are charged with refusing to bargain with the Union by failing for an unreasonable period of time to resume negotiations over a subject that was conceded to be one over which the Respondents were duty-bound to negotiate. The facts are

virtually undisputed, and the sole issue on the merits is whether there are circumstances which justify the interruption in bargaining which was brought about by the Respondents' failure to resume negotiations. The complaint alleges that the Respondents violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7101, et seq., by failing and refusing to meet and negotiate with the Union, the acknowledged exclusive representative of employees of the Respondents, since October 13, 1987, and at all times thereafter.

A hearing was held in Boston, Massachusetts, on December 6, 1988. 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, the Respondents, and the Charging Parties submitted post-hearing briefs.

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

Findings of Fact

In June 1987, the Respondents advised Edward Pacewicz, president of the Union's Chapter 133, that its Boston regional office (Northeast Region) would be relocated on July 19. The Respondents invited the Union to submit proposals concerning the impact of the move on bargaining unit employees. The Union did so on July 8. The Union also requested further contact to establish mutually agreeable times to meet and negotiate and, in addition, requested that the move be held in abeyance until negotiations could be completed.

It was stipulated that the Respondents proceeded with the move on July 19, without awaiting negotiations, because of an "overriding exigency" which required that negotiations follow rather than precede the move. Chapter 133 President Pacewicz, meeting with management officials on July 22 concerning other matters, requested that negotiations concerning the July 19 move proceed. Patricia Ann Royer, a labor relations specialist for the Respondents who then had responsibility for negotiating with the Union over the move, advised Pacewicz that management was not yet prepared to negotiate.

The parties held a bargaining session on September 24, 1987. Ms. Royer and another management official represented the Respondents. Mr. Pacewicz and one or two associates represented the Union. The parties negotiated for approximately 4 1/2 hours and adjourned, setting October 14 as the date of the next session. On October 13, Pacewicz received a call from a representative of management informing him that the October 14 session had to be cancelled and that Ms. Royer would get back to him to reschedule the negotiations.

But Royer never did. The only contact she had with the Union concerning this matter was on dates unknown when she had occasion to tell Pacewicz that she would get back to him. This contact appears to have occurred when Pacewicz phoned her requesting resumption of negotiations (compare pp. 21 and 33 of the transcript of hearing). She also had a conversation with Union representative Larry Adkins in which she explained that the reason for the cancellation of the October 14 session was a death in her family. The Respondent changed Royer's duties around the first week of November 1987 resulting in her leaving responsibility for the negotiation in question with team leader Leo Harrold. Royer, continuing to operate out of Washington, D.C., was switched from the Northeast team to the Southwest team.

Pacewicz continued to contact management labor relations officials, including Harrold, attempting to get negotiations moving, until December 31. Union representative Adkins did likewise.1/ Each time Pacewicz spoke with a management representative on this subject, the representative told him he or she was working on it and would get back to him. On December 31, Union gave up on attempting to obtain the Respondents' voluntary resumption of negotiations and began to prepare a file for the unfair labor practice charge it filed to initiate this case on February 1, 1988. The charge was not served on the Respondents until February 17. Still, no one from the Respondents "got back" to the Union to resume negotiations, nor did anyone thereafter, up to and including May 25, when the complaint was issued.

1/ Pacewicz's testimony regarding Adkins' efforts was hearsay, admitted without objection. Reliance on this testimony is neither crucial nor prejudicial to the Respondents, who had the opportunity to dispute its accuracy by having their labor relations officials deny that Adkins contacted them for this purpose.

Ms. Royer testified that between September 1987 and March 1988 the workload of Respondents' labor relations specialists who were assigned the negotiating duties for the Northeast Region (the "Northeast team") was extremely heavy. Judith Bond, a new team leader for the Northeast Region who assumed her position on April 7, 1988, testified that she became aware on about April 13 that the Boston relocation negotiations were in a state of limbo. This came to her attention when Counsel for the General Counsel Dow called her to request an interview as part of his investigation of the February unfair labor practice charge. From that point on, considering Mr. Dow's indication on April 26 that a complaint would be issued, and Bond's heavy workload, she decided to let the negotiations "[remain] in status quo."

Discussion and Conclusions

Section 7114(b)(3) of the Statute makes part of an agency's duty to negotiate in good faith the obligation: "to meet at reasonable times . . . as frequently as may be necessary, and to avoid unnecessary delays[.]" By any measure, the Respondents have fallen short of fulfilling that obligation.

The Respondents cannot be faulted for cancelling the October 14, 1987, negotiating session because of Ms. Royer's sudden and tragic unavailability. However, there is no evidence as to any effort they made, from that date until at least May 1988, toward the resumption of these negotiations. They did not even attempt to work out an accommodation with the Union for any delays that may have been necessary. Instead, they virtually ignored the Union. In fact, the only evidence the Respondents presented consists of reasons why, it is asserted, the Respondents should be excused from making an affirmative effort to resume negotiations. Primarily, this consists of the testimony that the Northeast Region team was extremely busy, giving rise to the Respondents' argument that, in the circumstances, it was reasonable for them to establish priorities that did not permit these negotiations to be scheduled. For the months of April and May, 1988, the additional reason given was that the expected issuance of the complaint justified holding fast.

If these reasons could justify the Respondents' inaction, there would be no such thing as a duty to bargain. To avoid bargaining, a party could simply fail to allocate sufficient

resources to enable it to conduct the negotiations being requested, and thus just never get around to it. It must be remembered that the Respondents transferred to another assignment the person responsible for these negotiations. Apparently, they did not replace her. While the Authority apparently has not had occasion to rule on the issue, decisions both in private sector national labor law and in pre-Authority federal sector administrative jurisprudence reject attempts to defend dilatoriness in scheduling negotiations on the ground that the party's representatives are too busy. Storall Mfg. Co., 275 NLRB 220, 238 (1985); Defense Civil Preparedness Agency, Region I, Maynard, Massachusetts, 7 A/SLMR 169, 172-73 (1977). As for the idea that either the pendency of the unfair labor practice charge or the imminence of the issuance of a complaint warranted further delay, it would seem that just the opposite should be true. The unfair labor practice proceeding should have impressed upon the Respondents the seriousness of the situation created by permitting the negotiation to languish.

I must also reject a related contention made by the Respondents. The Respondents would have me speculate that the Union, by abandoning its efforts to pursuade the Respondents directly to resume negotiations in favor of pursuing the unfair labor practice litigation, evidenced an intention not to resume negotiations after December 31, 1987, absent resolution of the charge it filed. The Union's motivation at that point is of dubious relevance. But it can hardly be said that the Union evidenced such an intention by pursuing a course the natural consequence of which would be to compel the Respondents to resume negotiations.

Still further off the mark is the Respondents' contention that the Union indicated a lack of concern over the need for prompt completion of negotiations by agreeing to delay opening of negotiations until September 24, 1987. This contention, if accepted, would do as much damage to the goal of promoting collective bargaining as acceptance of the "too busy" defense. For it would exact a legal price from the Union for taking a cooperative attitude toward the bargaining process instead of insisting on beginning negotiations before the Respondents, as they represented at the time, were ready.

Finally, the Respondents contend that they never refused to bargain because they kept indicating that they were willing to resume negotiations. Their position, however, was that they were willing but not able. Their inability

having arisen from a cause which does not provide a legal excuse, mere willingness does not fulfill the duty to bargain. The obligation described in section 7114(b)(3) is an independent, affirmative duty. It is not absolved by a subjective intention to negotiate in good faith. The Respondents have not complied with that affirmative duty and have thereby violated section 7116(a)(1) and (5) as alleged in the complaint.2/

The Remedy

Counsel for the General Counsel requests that the affirmative part of any remedial order require prospective bargaining -- a simple resumption of the impact and implementation negotiations over the relocation of the Northeast Region office. The Charging Parties urge a limited retroactive bargaining order -- a direction that any agreement reached be given retroactive effect.

The Authority has generally not ordered retrospective effect, one recognized exception being where the violation consisted of refusing to bargain over specific proposals previously held to be within the duty to bargain. Environmental Protection Agency, 21 FLRA 786, 790 (1986); U.S. Department of Energy, Western Area Power Administration, Golden, Colorado, 22 FLRA 758, 766 n.9 (1986) (WAPA 3). The Authority's rationale in withholding retroactivity has been, and continues to be, that bargaining is likely to be more fruitful if the parties retain the flexibility to determine for themselves which provisions of their ultimate agreement should be retroactive.

A panel of the District of Columbia Circuit rejected the Authority's position, in National Treasury Employees Union v. FLRA, 856 F.2d 293 (1988). However, the Authority requested rehearing en banc, and the court has granted that request. Id. at 308. Therefore, it would be particularly inappropriate for me to anticipate a change in the applicable precedent to which I am bound.

2/ Although the Respondents initially characterized the prospective negotiations as limited to "impact" bargaining, the Union's response made clear that it also sought, "implementation" bargaining. The Respondents were required to engage in such bargaining as well.

The charging parties also contend, however, that this case falls within the exception for refusals to bargain over proposals previously found to be negotiable, at least with respect to a Union proposal for free parking, a subject the Authority has held to be negotiable in certain circumstance. See American Federation of Government Employees, Local 644, AFL-CIO and U.S. Department of Labor, Occupational Safety and Health Administration, 21 FLRA 658, 662-5 (1986). I find it unnecessary to determine whether that decision governs the negotiability of the Union's parking proposal here. For the category of cases in which retroactivity is warranted because of a previous determination of negotiability would appear to be limited to situations where the respondent simply continues to insist that is not required to negotiate. See WAPA 3, supra, and cases cited there.

More intriguing is the possibility that the Authority would find a retroactive agreement remedy appropriate wherever the respondent's refusal to bargain is so flagrant as to amount to "ignoring the Union's statutory bargaining rights." See U.S. Department of Energy, Western Area Power Administration, Golden, Colorado, 27 FLRA 268, 273 (1987). However, I am not persuaded that this dictum is applicable to this case although, as found above, the Respondents have ignored the Union's bargaining rights. The quoted language on ignoring the Union's statutory bargaining rights presumably must be viewed in the context of the Authority's finding in that case that the violation committed was in effect a continuation of the refusal-to-bargain violation found in WAPA 3, a case which itself was found to warrant a retroactive order. Moreover, any consideration of the appropriateness of such a remedy must be tempered by the Authority's position that mandatory retroactivity is generally detrimental to the bargaining process. Accordingly, I shall recommend only the prospective bargaining order requested by Counsel for the General Counsel. Thus, I recommend that the Authority issue the following Order:

ORDER

The U.S. Customs Service, Washington, D.C., and U.S. Customs Service, Northeast Region, Boston, Massachusetts, shall:

1. Cease and desist from:

(a) Failing and refusing to meet and negotiate with the National Treasury Employees Union, exclusive bargaining representative of their employees, concerning

the procedures which it will observe in exercising its authority to relocate the Northeast Region office and concerning appropriate arrangements for employees adversely affected by the relocation.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of 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 in good faith with the National Treasury Employees Union concerning the procedures which it will observe in exercising its authority to relocate the Northeast Region office and concerning appropriate arrangements for employees adversely affected by the relocation.

(b) Post at their Northeast Region office in Boston, Massachusetts, 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 District Director 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 shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, Room 1017, 10 Causeway Street, Boston, Massachusetts 0222-1076, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., May 4, 1989

JESSE ETELSON
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 fail or refuse to negotiate in good faith with the National Treasury Employees Union, the exclusive bargaining representative of our employees, concerning the procedures to be observed, and appropriate arrangements for employees adversely affected by, the decision to relocate the Northeast Region office.

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

WE WILL, upon request, negotiate in good faith with the National Treasury Employees Union concerning the procedures to be observed, and appropriate arrangements for employees adversely affected by, the decision to relocate the Northeast Region office.

_____

(Agency or Activity)

Dated: _____ 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 of the Federal Labor Relations Authority, Region I, whose address is: 10 Causeway Street, Room 1017, Boston, MA 02222-1046, and whose telephone number is: (617) 565-7280.