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

NAVAL AVIATION DEPOT NORFOLK, VIRGINIA Respondent and LOCAL LODGE 39, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO Charging Party	Case No. 34-CA-80771

Robert J. Gilson, Esq.
For the Respondent

Ana de la Torre, Esq.
For the General Counsel

Russell E. Hurdle
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on August 31, 1988 by the Regional Director, Federal Labor Relations Authority, Region III, a hearing was held before the undersigned on November 15, 1988 at Norfolk, Virginia.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (herein called the Statute). It is based on a charge filed on May 19, 1988 by Local Lodge 39, International Association of Machinists and Aerospace Workers, AFL-CIO (herein called the Union) against Naval Aviation Depot, Norfolk, Virginia (herein called the Respondent).

The Complaint alleged, in substance, that on or about April 24, 1988 Respondent terminated the C shift for bargaining unit employees in Shop 94226, Avionics Division; that it did so without notifying the Union and providing it an opportunity to negotiate over the impact and implementation of this change in working conditions--all in violation of Sections 7116(a)(1) and (5) of the Statute.

Respondent's Answer, dated September 25, 1988 denied the aforesaid allegations as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Briefs were filed with the undersigned which have been duly considered.1/

Upon the entire record hereto, from my observation of the witnesses and their demeanor, from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has been the exclusive representative of all non supervisory employees of Respondent and employees assigned to the Production Department Shops whose duties are related to production and maintenance employees.

2. At all times material herein Respondent and the Union have been parties to a collective bargaining agreement covering the aforesaid unit employees. The said agreement was executed by the parties on May 27, 1986 and, by its terms, became effective on November 21, 1986 for a period of three years.

3. The aforesaid agreement contains, inter alia, the following pertinent provisions:

1/ A Motion to Correct Transcript was filed with the undersigned by the General Counsel. No objection having been interposed, and it appearing that the proposed correction is proper, the Motion is granted.

Article IV

Section 2. It is also recognized that the Employer has an obligation to notify the Union of proposed changes to conditions of employment and to bargain over such in accordance with Public Law 95-454 . . .

Article VIII[2/]

Section 6. . . . In the event it becomes necessary to change or establish a shift not defined, the Employer will advise the Union in writing furnishing the reason thereof.

Section 9. . . . The selection and rotation of Employees for assignment to night shift shall be made in accordance with the following procedures.

a. Night shift assignment will be made for each tour by rate in inverse order from the shift roster, with the "C" shift being staffed first.

2/ In addition to the provisions in this Article set forth by the undersigned, the agreement contains other clauses which govern night shift work as well as assignment of newly hired employees to shifts. Thus Section 10 deals with employees who leave "B" or "C" shift voluntarily and are replaced, and the crediting or options granted the employee or his replacement. Section 11 covers possible changes in shift hours and the Employer's obligation to consult thereon with the Union. Section 12 deals with requiring employees to take annual leave for any part of a scheduled shift and the notice to be given him. Section 13 is concerned with allowable clean up time to employees at the end of each shift.

> b. Volunteers for night shift will be utilized for the shift of their choice first, in order of their appearance on the shop roster, provided they are of the same rate as the vacancy required and are qualified to do the work on that shift. Once employees are assigned night shift work, including those working nights on the effective date of this Agreement, they will not have their shift disturbed except by request or in the event there is no longer a need for their services on the shift. Also, a volunteer's assignment to the "B" or "C" shift shall not preclude assignment to the other night shift if it is that employee's rotational turn for that shift assignment . . . (Emphasis supplied)

4. About 4000 wage grade employees are employed at the Naval Aviation Depot in Norfolk, Virginia, who are represented by the International Association of Machinists and Local 39. The function of the Depot is to overhaul military aircraft. There are about 1900 employees in the Production Department. Within the Department are 5 major divisions, 11 branches, 25 sections and 100 shops. Between 17-25 individuals work in each shop.

5. There are three shifts worked by Respondent's employees. Shift "A" from 6:40 a.m. - 8:15 p.m., shift "B" from 3:10 p.m. - 11:40 p.m., shift "C" from 11:00 p.m. - 7:00 a.m.

6. On November 13, 1987 Ronald Perry, Respondent's Production Department Head, spoke to the Union's Chairman, George Yaeckel, and his assistant Donald Thompson. At their meeting Perry informed the Union representative that significant reductions in the "B" and "C" shift staffing would be made due to the general decline in workload. The former head of this department, William Whitby, testified that in July or August of the same year he told both Yaeckel and Thompson that management would have to reduce the number

of people in the extra shifts ("B and C") to get the overhead rates down.3/

7. On April 24, 1988 Respondent eliminated the "C" shift in Shop 94226 which had been in existence, along with "A" and "B" shifts, for 32 years. No notice was given the Union, nor was it afforded an opportunity to bargain as to the impact and implementation of the termination.

8. Three employees were on the "C" shift at the time of its termination: Paul Koss, Frank W. Godak, and Donald Plante. Both Koss and Godak were assigned to the "A" shift while Plante went on the "B" shift.

9. Management will normally put people on a shift, or staff it, when there is an increase in work load. Under such a condition, Respondent's representative Ronald Perry testified notification would be given to the Union only as a courtesy--not by virtue if any obligation. The record reflects that, in the past, Respondent's practice in regard to notifying the Union when it planned to terminate a shift has not been consistent. On some occasions such notification has been given by managers whereas others have not notified the Union of proposed termination of a shift.

10. Russell E. Hurdle, a Union representative who was chief negotiator for the Union at its contract negotiations, testified there were discussions thereat re shift terminations. However, he stated the Union never gave up its right to receive notice and bargain as to any impact and implementation.

Glen Rotella, who participated in the 1986 contract negotiation on behalf of the Union, testified that management did mention during the discussion that shifts may need to be changed or terminated; that it was a right of management, but the Union could bargain as to any impact and implementation. Rotella also stated the Union did not agree

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3/ The reduction started in December, 1987, although management started winding down in April, 1987. A general reduction in shift work occurred between 1986-1988.

to give up its right to notification or bargain regarding impact and implementation.4/

Ronald Perry, Production Head at the Depot, testified he has never bargained impact and implementation of assignment to "B" or "C" shift while accompanying his position.

David Chadwick, chief negotiator for Respondent at the 1986 contract negotiations, testified there was considerable discussions thereat re shift rotation and assignment; that section 9 in Article VIII was the mechanism for putting people on and off a shift; that managers were not advised to notify the Union each time he put a new employee on a shift or takes one off a shift.

Lawrence Chapman, former branch head in 94226, testified he has notified the Union of shift changes as he was obliged to discuss same with the bargaining representative. However, he stated this did not include elimination of an entire shift.

11. Record facts show the change in shifts for each of the three employees (Koss, Godak and Plante) resulted in about a $200 per month reduction in pay. Further, that two of the individuals were required to change their situation. Godak, who was attending college, was required to take two weeks of annual leave and rearrange his schedule. Plante's wife had recently given birth and he was compelled to also use annual leave to accomplish things he usually did during the daytime.

Conclusions

The issue to be resolved herein is whether the transfer of the three employees from the "C" shift in shop 94226, without notifying the Union and bargaining with it concerning procedures to be followed and arrangements in the adverse effects upon these individuals, was violative of the Statute.

4/ Both parties stipulated that Union representative Frances Harold, who participated in the current contract negotiations, would testify the same as Hurdle and Rotella if asked the same questions re any waiver by the Union re its right to notification and bargain on impact and implementation.

General Counsel's position is that Respondent terminated the "C" shift on April 14, 1988; that it failed to notify and bargain with the Union prior thereto as to the impact and implementation of such action. In this respect, General Counsel refers to the established case law which imposes such obligations upon an agency despite the exercise of a reserved management right. It is further contended that Article 8, Section 9 of the collective bargaining agreement does not waive the Union's statutory right to receive notice and to bargain on shift terminations.

Respondent argues that, under the agreement between the parties, management is accorded the right to move employees from one shift to another provided it follows the procedure outlined in the agreement. Moreover, management pursued that procedure when it moved the three employees from the "C" shift in shop 94226. Since the parties negotiated the manner in which the transfer of employees could be effected, Respondent should not be compelled to renegotiate the matter.

The focal point of the dispute herein apparently centers on the term "termination" as it applies to the "C" shift in shop 94226. Thus, General Counsel insists that since the bargaining agreement makes no mention of terminating a shift, any procedures set forth therein concerning shift changes have no significance. It is conceded, however, that Article 8, Section 9 thereof establishes a rotation system for transferring employees from one shift to another but since the Complaint alleges "termination" of a shift, Respondent has an obligation to bargain concerning its procedures.

While the theory of General Counsel's case is clearly stated, the essential facts herein and the applicable law do not support a conclusion that such obligation should be imposed upon Respondent. It is true that the "C" shift was discontinued in Shop 94226, that there is no evidence that this shift was in fact terminated throughout the Depot. There were 100 shops in the Productions Department where the "C" shift was apparently still maintained. The actions taken by Respondent, irrespective of the terms applied, involved transferring or assigning the three employees working on that shift to the other two shifts: "A" (day) and "B" (night). Procedures for this action, contrasted with eliminating a shift so as to lay off employees, are provided for in the parties' negotiated agreement.

The Authority has been confronted with a similar time in Naval Amphibious Base, Little Creek, Norfolk, Virginia, 9 FLRA 774. That case concerned a change in status of two employees from regular part-time to intermittent. Although the union requested negotiations, the employer replied it was a reserved management right and not within the duty to bargain. General Counsel contended that there was an obligation to bargain re the procedures to be used in exercising such right, as well as arrangements for employees adversely affected. The Authority held that no such duty to bargain was owed to the union. It concluded that the procedures followed by the employer were as prescribed by the parties negotiated agreement. No new or changed practices or matters affecting working conditions were established.

While the procedures in the involved case for transferring employees are not detailed to the extent described in the cited case, Section 9 of Article VIII does appear to grant the right to Respondent to transfer employees from shift without being required to negotiate thereon. Thus, the procedures thereunder provide under 9(b) that "once employees are assigned night shift work . . . they will not have their shift disturbed except by request or in the event there is no longer a need for their services on the shift" (underscoring supplied). Provision is also made for returning from a night shift to which one has rotated to the former night shift, as well as the effects of rotation on tenure. Further details are set forth in section 9 regarding the movement of employees between shifts to update their skills,5/ or are newly hired, or for training purposes.

While not free from doubt, I am persuaded that the language recited in Article VIII, Section 9 of the agreement was intended to grant Respondent the right to make shift changes, as transfers, without imposing an obligation to bargain thereon. Further, that the procedures for such shift changes were negotiated by the parties so as to

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5/ Section 9(d)(14) calls for a discussion with the chief steward and management as to the length of time an employee assigned to night shift may be required to come on for days to update skills.

absolve the employer from bargaining thereon. The General Counsel agrees that no allegation is made that the three employees were incorrectly rotated into other shifts. Further, that the intent of Article 8, Section 9 is to establish a rotation system for transferring employees from one shift to another. No challenge is made to the procedure followed by such rotation, and the action taken by Respondent was, in fact, a transfer of the three employees from the "C" shift.

Apart from the foregoing, it could be said that Section 9 leaves some doubt as to whether its reference to assignment of employees between shifts encompasses such action when a night shift ("C") is discontinued within a particular shop. Although I do not conclude that such "termination" calls for a different conclusion, the most one could decide is that there exist an arguable interpretation of the negotiated agreement. Assuming arguendo such conclusion is warranted, it would likewise compel a dismissal of the Complaint herein. In such circumstance, the remedy is through the negotiated grievance procedures under the agreement rather than through the unfair labor practice procedures. See United States Marine Corps, Washington, D.C. 33 FLRA 105.6/

Accordingly, on the basis of the foregoing I conclude the Union surrendered its right to bargain re the procedures and attendant arrangements for employees in connection with the reassignment or transfer of the three employees from the "C" shift to the "A" and "B" shifts. Moreover, that having done so via the negotiated agreement with Respondent, the latter had no obligation to negotiate in regard thereto.

It is concluded that Respondent did not violate Section 7116(a)(1) and (5) of the Statute, and I recommend the Authority issue the following order:

6/ Although General Counsel suggests otherwise, the record does not support an established practice of Respondent's bargaining in the past re "terminations" of a shift. Accordingly, I would not find a change in personnel policies, practices or matters affecting working conditions which might require negotiations on procedures and arrangements for adversely affected employees.

ORDER

It is hereby Ordered that the Complaint in Case No. 34-CA-80771 be, it hereby is, dismissed.

WILLIAM NAIMARK
Administrative Law Judge

Dated: October 19, 1989
Washington, D.C.