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

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE LOUISVILLE DISTRICT LOUISVILLE, KENTUCKY Respondent	
and	Case No. 4-CA-90484
NATIONAL TREASURY EMPLOYEES UNION Charging Party	

Richard S. Jones, Esquire
For the General Counsel

Stephen J. Neubeck, Esquire
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Respondent (Louisville District) withdrew from several Internal Revenue Officers represented by the Charging Party (NTEU) the use of Government-owned cars they had been assigned for the purpose of field collection activities. As management did not bargain with NTEU before withdrawing the cars, NTEU filed an unfair labor practice charge alleging that Louisville District had violated the Federal Service Labor-Management Relations Statute (the Statute) by unilaterally changing working conditions. The General Counsel of the Federal Labor Relations Authority issued a complaint alleging that Louisville District's actions

constituted a refusal to bargain collectively in good faith, an unfair labor practice under sections 7116(a)(5) and (1) of the Statute.

I heard this case in Louisville, Kentucky, on March 6, 1990. Based on the record, the briefs, and my evaluation of the evidence, I find and conclude as follows:

Findings of Fact

NTEU is the exclusive representative of Louisville District's revenue officers. For over 20 years, Louisville District has assigned cars it obtained from the General Services Administration (GSA) to some of its revenue officers. These cars are for their use in making tax collections at various places where taxpayers' assets might be found. In January 1989 approximately 17 Louisville District revenue officers had GSA cars. GSA's Federal Property Management Regulations suggest, as a guideline agencies may use in determining whether a fulltime passenger car assignment is necessary, that the assignee should drive it at least 12,000 miles a year. 41 CFR § 101-39.301.

Michael Clark became Collection Field Branch Chief for the Louisville District on January 2, 1989. Almost immediately, it was brought to his attention that a number of the 17 assigned GSA cars were being driven less than 12,000 miles a year. At the time, the field collection branch was under acute budgetary restraints, and Clark moved promptly to verify the vehicle mileage situation with an eye to saving some money by returning the underutilized cars to GSA. When he determined that there were nine underutilized cars then assigned to revenue officers, he notified NTEU that he intended to "pull" them.1/

Revenue Officer Larry Tompkins was the president of NTEU Chapter 25, the local unit of NTEU operating in the Louisville District. Tompkins made a formal request to bargain over the intended change in car assignments, and included some specific proposals. Clark scheduled a meeting for February 17, 1990, to brief NTEU on the situation.

1/ It is unnecessary to determine whether this notification was made to Chapter President Tompkins, as Tompkins testified, or to Chief Steward Thomas, as Clark testified.

Clark testified that in the course of setting up the February 17 meeting he had a conversation with Tompkins during which Tompkins "acknowledged that [the matter] was not negotiable," but that his bargaining request "gave us a point to start talking." Tompkins testified that he did not recall saying that he believed the matter was not negotiable. Whatever weight such an acknowledgment by Tompkins might conceivably have borne with respect to the ultimate issues in this case, I naturally find it hard to imagine that, having recently requested bargaining, he made such a statement. I have the impression that Clark honestly believed so, but I think it more likely that he was mistaken than that he was correct.

At the February 17 meeting, Clark gave Tompkins a copy of a page from the GSA Federal Property Management Regulations, with the 12,000-mile guideline highlighted in yellow. Clark told Tompkins that the guideline "required"[2/] him to rescind car assignments to revenue officers who did not meet this minimum. Therefore, he explained, withdrawing the cars did not change any condition of employment and was not negotiable. However, he "discussed," then rejected, some alternatives such as pooling vehicles within groups of revenue officers.[3/]

Clark gave or showed Tompkins a copy of a memorandum he was about to send to his managers. The memo listed the tag numbers of nine cars they were to "pull" by February 27 because they did not meet the "utilization guidelines." Clark later determined that the continued assignment of two of these nine could be justified. He exempted them from his order but "pulled" the other seven. The revenue officers whose assigned cars were "pulled" were from then on expected to use their own cars for Government business and to be reimbursed according to the mileage reimbursement rate established by GSA.

2/ Both Tompkins and Clark testified that he used the word "required" in connection with the effect of the guideline.

3/ A question by Respondent's counsel to Clark placed NTEU as the source of a suggestion that pooling be considered as an alternative. It is not clear whether Clark adopted counsel's premise (see Tr. 46-47), nor does the record otherwise support it (cf. Tr. 14-15).

Discussion and Conclusions

The primary issue is whether the withdrawal of the cars from seven revenue officers (concededly effected without bargaining with NTEU) was a change in "conditions of employment" as that term is used in subsection 7103(14) of the Statute.[4/] In addition, Louisville District contends that, even if the withdrawal was a change in a condition of employment, NTEU is estopped from asserting that an obligation to bargain arose, and contends further that NTEU's proposals are not negotiable.

A. Was there a change in a condition of employment?

The subject of providing employees with a government vehicle, to the extent that it involves the transportation of employees who are required to travel from one work site to another, but is otherwise unrelated to the performance of the agency's work, is a mandatorily negotiable subject. National Treasury Employees Union, Chapter 153 and Department of the Treasury, U.S. Customs Service, 21 FLRA 1116, 1122 (1986). Based on this controlling precedent, the General Counsel is correct in arguing that the pre-January 1989 system of assigning cars was a condition of employment and that any decision to change that system required collective bargaining with NTEU.

Louisville District's position on the primary issue focuses mainly on the contention that any change that occurred was not a change in a condition of employment. In this case, it argues, the pre-existing system for assigning cars did not make the continued assignment of cars a condition of employment of the employees whose cars were withdrawn. Implicit in the General Counsel's position, on the other hand, is the contention that Louisville District's providing of these cars was an established practice that had ripened into a condition of employment (since it involved a matter which, as found above, falls within the statutory definition of a condition of employment. See Letterkenny Army Depot, 34 FLRA 606, 611 (1990)).

4/ Subsection 7103(14) defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions," with exceptions not pertinent here. Subsection 7103(12) defines "collective bargaining" essentially (in pertinent part) as "the performance of the . . . obligation" to seek agreement "with respect to the conditions of employment affecting . . . employees."

The Authority's general guidelines for the establishment of conditions of employment by past practice were brought together and set forth in Norfolk Naval Shipyard, 25 FLRA 277, 286 (1987):

> It is well established that parties may establish terms and conditions of employment by practice, or other forms of tacit or informal agreement, and that this, like other established terms and conditions of employment, may not be altered by either party in the absence of agreement or impasse following good faith bargaining. . . . Past practices generally include all conditions of employment not specifically covered in the parties' collective bargaining agreement which are followed by both parties, or followed by one party and not challenged by the other party over a period of time. Past practices may also include the actual practices being followed, regardless of the contractual agreement. In order to constitute the establishment by practice of a term and condition of employment the practice must be consistently exercised for an extended period of time with the agency's knowledge and express or implied consent. . . . [Ellipses represent internal citations.]

Louisville District argues at the outset that, lacking the authority to do so, it could not have vested the assignment of cars to these employees with the status of a condition of employment. In United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA 253, 257, 290-92 (1982), the Authority concluded that the agency had established a condition of employment by its past practice of exercising its discretion to permit employees to use their private vehicles when traveling to locations to which they were assigned for extended operational details away from their normal work sites. The United States Court of Appeals for the Fifth Circuit overruled the Authority on this point. It held that pertinent Federal Travel Regulations restricted the agency's discretion sufficiently to have prevented it from establishing a uniform past practice. Hence, there was no change in a condition of employment. U.S. Department of Justice v. FLRA, 727 F.2d 481, 489-90 (1984). Louisville District argues that the court's decision is controlling here.

In a Supplemental Decision following the Fifth Circuit's decision in Department of Justice, the Authority accepted

the court's opinion as the law of the case and made appropriate revisions to its findings in the underlying case. 14 FLRA 851 (1984). Since then, the Authority has referred to the Department of Justice case on several occasions but has never indicated that it has adopted the court's resolution of this issue rather than its own. In these circumstances, to the extent that that case is controlling, I am bound by the Authority's, rather than the court's, decision. See Michigan Army National Guard, Lansing, Michigan, 11 FLRA 365, 373-74 (1983).

Nor does the court's approach to the issue presented in Department of Justice lead to the conclusion that in the instant case Louisville District lacked the authority to create a condition of employment in the assignment of cars. The Federal Travel Regulations on which the court relied were written in mandatory terms that led the court to conclude that they obligated the agency "to make a case-by-case determination regarding the form of transportation." U.S. Department of Justice v. FLRA, 727 F.2d at 490. The GSA regulation on which Louisville District relies here, on the other hand, is a discretionary guideline. It does not even come close to restricting Louisville District's authority as did the regulations in Department of Justice. There was, in short, no external legal obstacle to Louisville District's having made these assignments conditions of employment.5/

Equally unavailing is Louisville District's related contention that the GSA guideline somehow became a binding minimum mileage requirement by virtue of its incorporation into the parties' collective bargaining agreement and the Internal Revenue Service's own internal regulations. The national agreement between IRS and NTEU contains the following provision, which in almost identical words is echoed in the IRS regulations:

> Employees who can be expected to drive 12,000 or more miles per year on official IRS business will be offered a GSA automobile for their use, subject to availability.

5/ Even if the guideline could be read as restricting Louisville District's discretion to some extent, that alone would not preclude the exercise of sufficient discretion to permit the reaction of a condition of employment. See Department of Treasury, U.S. Customs Service v. FLRA, 836 F.2d 1381, 1385-6 (D.C. Cir. 1988).

Nothing here, however, can reasonably be read as compelling Louisville District to remove cars from employees who do not currently drive them at least 12,000 miles a year.6/

Louisville District, then, could have established a practice which made the use of GSA cars a condition of employment of some employees who drove less than 12,000 miles. The question that remains concerns the nature and duration of whatever practice it did establish. Here the record is not as fully fleshed out as one might hope for. Counsel for the General Counsel rested on a bare set of facts that establishes a longstanding practice of assigning GSA cars and that clearly supports the inference that before January 1989 Louisville District permitted employees who had been assigned GSA cars to retain those cars without regard to the 12,000-mile guideline. But how long had the sanctioned noncompliance with the guideline gone on?

It appears to be the General Counsel's position that the assignment of the cars had become, in itself, a condition of employment, and that absent evidence that anything else had changed, the only change that occurred was Clark's invocation of the guideline. Thus the finding that would be compelled is that for an indefinite but extended period the situation had been what it was before Clark's action: car assignments were not affected by the mileage guideline.

Does this approach involve an impermissible shifting of part of the burden of proof to Louisville District? While at first blush the absence of evidence about the earlier application of the guideline might appear to be a failure of proof in the prima facie case, that view has in its favor, at best, only a hollow logic. It requires the presumption that Clark merely resurrected a then recent practice of applying the guideline as a condition on the use of the cars. But that presumption makes no sense unless there is reason to believe either that, recently, the mileage of all seven of the affected employees had dropped to less than 12,000 miles, or, the monitoring of mileage had temporarily become lax. I do not think the General Counsel was required to negate these scenarios as part of the prima facie case. In these circumstances the burden was on Louisville District to show if and when such a condition on the assignments was in effect. It has not made such a showing.

6/ Louisville District's brief also mentions Federal Travel Regulation 1-2.2(b), which concerns "method[s] of transportation," but makes no cogent argument for its applicability.

Another view of the burdens of proof yields the same result. Assuming the necessity of affirmative proof that the assignments had long been unlinked from the mileage guideline, there is circumstantial evidence of that.

Very soon after Branch Chief Clark took over, he was informed that nine or ten of the 17 assigned GSA cars were being driven less than 12,000 miles a year. By the time Clark completed his investigation he was satisfied that all but eight satisfied the guideline and that special circumstances excused the lower mileage one of the eight had been driven. Still, this meant that almost half of the assigned cars did not conform to the guideline.

That someone thought to bring the matter of car mileage quickly to Clark's attention suggests that it was common knowledge at the Louisville District that the guideline was being ignored. The informant decided that the new branch chief should know about it. His or her decision and its timing may have been connected with the branch's budgetary problems, but the informant's motive is not essential to the resolution of this case.

That the breaching of the guideline was as widespread as it was further suggests that management had been ignoring it for some time (assuming that anyone had ever paid any attention to it). Had it been management policy to monitor mileage, it is hard to explain the breadth of the non-compliance Clark discovered. It is possible that the branch's travel requirements had recently diminished, but there is no basis on which to find that it did. It is also possible that the widespread nonconformity was a result of a temporary laxness in enforcement, but that explanation (a rather obvious one if it had any basis) has not been argued. Clark, the only agency witness, did not know whether Louisville District had ever "pulled" cars before.

Assuming, then, that it is necessary for the record to show affirmatively that Louisville District's relevant past practice did not make continued assignment of GSA cars contingent on the mileage guideline, I infer so from the whole record. I do this without any great degree of certainty. Nor am I necessarily convinced that the reasons behind this inference (stated above) would support any burden of persuasion more demanding than that of preponderance. I simply conclude that the existence of this set of facts is more probable than its nonexistence.7/

7/ See McCormick, Evidence § 339 (3d ed. 1984).

I find, therefore, that the practice in effect when Clark took over, of permitting those revenue officers who had been assigned GSA cars to retain them without respect to their meeting the 12,000-mile guideline, had been exercised consistently for an extended period of time with management's knowledge and consent. As the practice concerns a subject falling within the statutory definition of "conditions of employment" (see ante at 4), it was a condition of employment at the time Clark changed it. Norfolk Naval Shipyard, supra; U.S. Department of the Navy, Naval Avionics Center, Indianapolis, Indiana, 36 FLRA 567, 570 (1990).8/

B. Louisville District's defenses

As noted, Louisville District contends that NTEU is estopped from asserting that an obligation to bargain arose. It relies on Tompkins' alleged acknowledgment that the subject was not negotiable and on NTEU's failure to complain about the agency's failure to provide written notification of the change or to proceed in accordance with the parties' collective bargaining agreement with respect to declarations of non-negotiability. I have previously found that Tompkins did not acknowledge that the matter was not negotiable. Nor, even if he had expressed the opinion that it was not, could I see that as constituting a clear and unmistakable waiver relieving the agency of its statutory duty to bargain. Less persuasive yet is the argument that NTEU's failure to invoke certain provisions of the collective bargaining agreement (having to do with midterm negotiations) constituted a waiver. NTEU made no contract claim here, nor is the General Counsel's case based on a contractual obligation to bargain.9/

8/ Certain evidence concerning the potential cost-saving effect of withdrawing underutilized cars found its way into the record. In the course of its argument that it had changed no condition of employment, Louisville District, anticipating an argument by the General Counsel that the agency's budgetary problem was either unfounded or pretextual, defended its cost-saving projections. The General Counsel did not make such an argument, and I am not sure how Louisville District's anticipatory response speaks to the "condition of employment" issue. In fact, I tend to agree with the very next statement in its brief, which notes the "total lack of relevance of [the General Counsel's] anticipated claim to the issue of whether the Agency [changed] a condition of employment."

9/ Louisville District does not contend that anything in the agreement itself constitutes a waiver or estoppel.

Louisville also argues that the substance of its decision to withdraw the cars was not negotiable, but that contention is, for the most part, dealt with above. The only statement in its brief that appears to relate to that argument is that no obligation to bargain about a change in a condition of employment arises until the union submits a negotiable proposal regarding such a change. That statement, however (as Louisville District appears to recognize), is contrary to Authority precedent. Rather, an actionable refusal to bargain occurs when a party rejects a valid request for bargaining over a negotiable subject, apart from any question as to the negotiability of the requesting party's specific proposals. Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Chicago, Illinois District Office, 33 FLRA 147, 152, 167 (1988) (IRS Chicago).

The action constituting the unfair labor practices alleged here was Louisville District's refusal to negotiate concerning the withdrawal of cars, which I have found to have constituted a change in a condition of employment. Louisville District contends that none of NTEU's proposals were negotiable, but this contention is irrelevant. While the complaint also alleges that NTEU submitted proposals, that allegation is not part of the chain of events on which the alleged unfair labor practices lie. I find, therefore, irrespective of the negotiability of any of NTEU's proposals, that Louisville District refused to negotiate in good faith. This conduct violated section 7116(a)(5) of the Statute and interfered with employee rights in violation of section 7116(a)(1).

C. Justiciability of the negotiability of the proposals

In the recent case of U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Fitchburg, Massachusetts District Office, Fitchburg, Massachusetts, 36 FLRA 655 (1990)(Fitchburg), the Authority found that it was not necessary to determine the negotiability of a proposal because the unfair labor practice (refusal to notify the union or to provide it with an opportunity to bargain over the impact and implementation of a change) had occurred before the proposal was submitted. However, the Authority proceeded to review the administrative law judge's determination of the negotiability of the proposal. The Authority explained that resolution of its negotiability was "appropriate, consistent with efficient enforcement of the Statute," in view of the prospect that the parties "may, pursuant to our Order, engage in future negotiations" over the subject of the proposal.

I requested of the parties (including NTEU, which had not appeared formally at the hearing or submitted a brief) their views as to whether, in light of Fitchburg, I should make an independent determination as to the negotiability of each of NTEU's proposals. Both the General Counsel and NTEU responded that it was not necessary for me to do so in order to resolve the unfair labor practice case, but that it would be "helpful" or "arguably more efficient" to have these issues resolved at this point rather than waiting until the parties return to the bargaining table. Counsel for Louisville District stated that the agency did not understand the basis for my request, but opposed the idea of giving either the General Counsel or NTEU any opportunity to file additional arguments on negotiability.

I am not inclined to accept the invitation to visit these negotiability issues. In Fitchburg, the parties had argued the negotiability of the proposal to the judge, and as he viewed the case it was necessary to address it in order to decide the unfair labor practice issues. Here, only the agency addressed the negotiability of the proposals in an unsuccessful attempt to deny that it had any duty to bargain. The General Counsel and NTEU, who assert correctly that resolution of these issues is unnecessary to the unfair labor practice case, did not previously argue their negotiability but volunteer to do so if requested.10/

The Authority, in Fitchburg, viewed the issue of the negotiability of the proposal from a different perspective than that of the judge. The Authority resolved its negotiability, but not as part of the unfair labor practice case. Rather, it treated the issue somewhat as though it had been raised in a negotiability appeal under section 7117 of the Statute. The Authority may also have been asserting a kind of discretionary jurisdiction pursuant to its duty under section 7105(a)(1) to "provide leadership in establishing policies and guidance relating to matters under this chapter. . . ." or, under section 7105(a)(2)(I), to "take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter."11/

10/ I have not relied on any arguments made by the parties in these responses with respect to matters other than the appropriateness of my addressing the negotiability issues.

11/ See also International Organization of Masters, Mates and Pilots and Panama Canal Commission, 36 FLRA 555, 564 (1990).

An administrative law judge, on the other hand, has no role in a negotiability appeal (FLRA v. Aberdeen Proving Ground, Department of Army, 108 S.Ct 1261, 1263 (1988)) and no discretionary jurisdiction.12/ His or her powers are confined principally to assisting the Authority in determining "whether any person has engaged or is engaging in an unfair labor practice." Section 7105(e)(2) of the Statute.13/ Warrant for my treating the negotiability of specific proposals might (but might not) have existed if the complaint had alleged that Louisville District's refusal to bargain over them constituted additional unfair labor practices. The complaint did not, and I shall not.

Having concluded that Louisville District committed unfair labor practices by refusing to bargain over a change in conditions of employment, I recommend that the Authority issue the following order.14/

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Department of the Treasury, Internal Revenue Service, Louisville District, Louisville, Kentucky, shall:

12/ Granted, questions concerning whether a particular issue is properly treated in a negotiability appeal or in an unfair labor practice proceeding can reach an alarming level of complexity. See, e.g., U.S. Department of the Army, Fort Stewart Schools, Fort Stewart, Georgia, 36 FLRA 409-447 (1990).

13/ Administrative law judges are also assigned roles in connection with unfair labor practice proceedings having to do with settlements, backpay, subpenas, attorneys fees, and, in some cases, election objections. See Authority's Rules and Regulations §§ 2421.9, 2422.21, 2423.31, 2429.7, and Part 2430.

14/ The General Counsel requests that as part of the affirmative remedy for these unfair labor practices, Louisville District be ordered to request replacement of the cars from GSA. This remedy is appropriate. See United States Marshall Service, 12 FLRA 650, 654 (1983). A make-whole remedy for unreimbursed losses is also appropriate. U.S. Department of Labor, Occupational Safety and Health Administration, Chicago, Illinois, 19 FLRA 454 (1985).

1. Cease and desist from:

(a) Failing and refusing to bargain with the National Treasury Employees Union about the termination of individual vehicle assignments to employees represented by the Union.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, bargain with the National Treasury, Employees Union about any decision to terminate individual vehicle assignments to employees represented by the Union.

(b) Consistent with law and regulation, make whole bargaining unit employees for losses incurred as a result of the termination of individual vehicle assignments, to the extent they have not already been reimbursed.

(c) Make every effort to replace the vehicles, including but not limited to requesting, through appropriate channels and in accordance with applicable regulations, that the General Services Administration replace the vehicles which had been used by unit employees in the Louisville District offices and which were relinquished to the General Services Administration in or around February 1989 without bargaining in good faith with the employees' exclusive representative concerning the decision to do so.

(d) Post at its offices in the Louisville District 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, including 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.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IV, Federal Labor Relations Authority, Atlanta, Georgia, 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., October 17, 1990.

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 bargain with the National Treasury Employees Union about the termination of individual vehicle assignments to employees represented by the Union.

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

WE WILL, upon request, bargain with the National Treasury Employees Union about any decision to terminate individual vehicle assignments to employees represented by the Union.

WE WILL, consistent with law and regulation, make whole any bargaining unit employees for losses incurred as a result of the termination of individual vehicle assignments to the extent that they have not already been reimbursed.

WE WILL make every effort to replace the vehicles including but not limited to requesting, through appropriate channels and in accordance with applicable regulations, that the General Services Administration replace the vehicles which had been used by unit employees in the Louisville District and which were relinquished to the General Services Administration on or about February 1989 without bargaining in good faith with the exclusive representative of our employees concerning the decision to do so.

_____

(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 IV, whose address is: 1371 Peachtree Street, N.E., Suite 736, Atlanta, GA 30367, and whose telephone number is: (404) 347-2324.