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

SOCIAL SECURITY ADMINISTRATION Respondent	
and	Case No. 3-CA-00816
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 220, AFL-CIO Charging Party	

Mr. Laurence Evans, Esq.
For the General Counsel

Ms. Carol Fehner
For the Charging Party

Mr. Wilson G. Schuerholz
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Service Labor-Management Relations Statute, as amended, 5 U.S.C. § 7101 et seq., (herein called the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (herein called Authority), 5 C.F.R., Chapter XIV, Part 2423.

Pursuant to an unfair labor practice charge filed on September 7, 1990, by the American Federation of Government Employees, Council 220 AFL-CIO (herein called AFGE or the Union) the Regional Director of Washington, D.C. Region of the Authority, issued a Complaint and Notice of Hearing on

September 18, 1991 alleging that on August 16, 1990, (the Social Security Administration (herein called SSA or the Respondent refused to reopen negotiations on a Memorandum of Understanding (herein called MOU) executed on May 3, 1990.

A hearing was held before the undersigned in Washington, D.C. All parties were represented and afforded the full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs which were timely filed by all the parties have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor and my evaluation of the evidence, I make the following:

Findings of Fact

1. AFGE has been the certified exclusive representative of a nationwide consolidated unit of Respondent's employees which includes, among others, employees in the field operations part of the Agency since August 30, 1979.

2. Since August 30, 1979, the level of recognition has been between AFGE and SSA nationally. Apparently it is visualized that the President of AFGE deals with the Commissioner of SSA. However, the President of AFGE designated an SSA General Committee to deal with SSA. Under the General Committee, there are six (6) AFGE Councils corresponding to the six (6) major components or parts of SSA. One of these six (6) components is Field Operations, which interfaces with the AFGE's National Council of SSA Field Operations Locals, which has been designated Council 220. The Council deals on matters at the national field operations component level. Matters at higher or lower levels are supposedly dealt with by other designated parts of the AFGE.

3. In 1980, the Council adopted, for the first time, a constitution which included a provision for ratification of certain agreements, including mid-term bargaining agreements, entered into with SSA.

4. The parties entered into their first collective bargaining agreement on June 11, 1982, covering the nationwide unit. This agreement was followed until January 25, 1990, their second collective bargaining agreement covering the nationwide unit became effective.

5. Sometime around June 18, 1985, Council President Witold Skwierzynski sent a letter to Thomas Whitlock, then Chief of Respondent's Field Operations Branch, stating in pertinent part, as follows:

> This is notice to the Agency that in all Council level bargaining, the Memorandum of Understanding (MOUs) will be subject to ratification as set forth in the Council Constitution, Article X, Section 5. (Copy enclosed.)

6. At sometime during 1990, Council President Skwierczynski received advance notification of Respondent's intent to make changes in SSI Transfer of Duties Project. Skwierczynski then made a request for negotiations and designated Rose Seaman as AFGE negotiator. There is no dispute that the Union's ratification procedures were not mentioned by Seaman during negotiations.

7. On September 27, 1989, notice was given to Skwierczynski, concerning an initiative to transfer certain SSI duties to employees in the SR position in field offices.

8. Skwierczynski, as noted designated Seaman to act as the Union's chief negotiator on this matter. Sometime around October 24, 1989, Seaman requested negotiations and also submitted written substantive proposals and ground rules.

9. Negotiations were delayed until the spring of 1990. At that time Seaman, met with John Barrett, who represented SSA in the bargaining. The two agreed to follow the uniform ground rules contained in the collective bargaining agreement effective January 25, 1990.

10. Actual bargaining commenced on April 23, 1990, and on May 3, 1990 the parties reached agreement on all issues. The MOU at issue in this case was signed on May 3, 1990.

11. After the May 3, 1990, the Union submitted the MOU to its ratification procedures. The May 3, 1990, MOU was not ratified pursuant to Union ratification procedures and Respondent was informed of the failure to gain ratification on June 29, 1990.

12. On July 28, 1990, Whitlock received a letter from Seaman demanding to reopen negotiations on the SSI Transfer of Duties matter.

13. On August 16, 1990, Whitlock responded to the demand saying, in part:

> As indicated in my July 26 letter to Witold Skwierczynski, the bargaining which resulted in the May 3 agreement was conducted under the uniform ground-rules described in Appendix A of Article 4 of the National Agreement.
>
> We have discharged any bargaining obligation owed to the Field Council regarding the SSI duties initiative of October 2, 1989. All matters were resolved at the bargaining table. Your demand to reopen bargaining on this subject is inappropriate. We have implemented this initiative, consistent with the terms of the midterm bargaining agreement of May 3 and intend to continue with implementation.

14. The Union filed the instant unfair labor practice charge on September 7, 1990.

Conclusions

The central issue in this case is whether the Union has an inherent statutory right to ratify negotiated agreements.

Respondent argues, in essence that section 7114(c) of the Statute requires that a relevant collective bargaining agreement becomes effective and binding on both the agency and exclusive representative upon approval of the agency head, or in the absence of either approval or disapproval within the 30-day period of agency head review, in the 31st day. National Federation of Federal Employees, Local 1263 and Defense Language Institute, 14 FLRA 761 (1984). Respondent points out that in Federal Employees Metal Trades Council of and U.S. Department of the Navy, Charleston Shipyard, Charleston, South Carolina, 35 FLRA 1091 (1990) (Charleston) the Authority found a negotiability proposal which allowed ratification after the agency head review was found inconsistent with section 7114(c) as the agreement was already binding of the parties.

Respondent also contrasts Federal sector ratification with that of the private sector. In this regard, Respondent asserts that recurring impact and implementation bargaining does not occur in the private sector causing "unending possibilities for disagreement and conflict" which do not

apply in the private sector because there the only formal bargaining is for the term agreement. This of course depends on what one considers "formal" bargaining for there is no doubt that same type bargaining occurs on a daily basis in the private sector as well. Respondent however, would differentiate between term bargaining and impact and implementation bargaining in asserting that formal impact and implementation bargaining does not comply with Congress' directive to conduct labor relations in a manner consistent with the requirements of effective and efficient government. Furthermore, Respondent urges that section 7114(b)(2) of the Statute requires that parties provide representatives who are empowered to negotiate and enter into agreements and that membership ratification may not be used to reject an agreement reached by duly authorized union negotiators. Finally, Respondent urges that the Authority should not permit an agent to conduct negotiations with the express, as well as implied, understanding that they have authority to negotiate an agreement without it having to be accepted by the union.

Contrary to Respondent's position that absent bilateral agreement, there can be no union ratification of labor agreements, the General Counsel contends that, even in the absence of a bilateral agreement, a union may seek ratification of a labor agreement pursuant to its constitution so long as (1) the employer has notice of the ratification requirement and (2) there is no waiver of the right by the union. In Hiney Printing Co., 262 NLRB 157, 164 (1982), the administrative law judge stated with regard to "notice":

> A union is entitled to condition the execution of an agreement arrived at during collective bargaining upon ratification by its membership, Houchens Market v. N.L.R.B., 375 F.2d 208 (6th Cir. 1967), but such a condition precedent must be known to employer's representatives during the bargaining sessions. Indeed, ratification votes as a prerequisite to final and binding agreements are a commonplace feature of labor relations and have been a regular feature of the relations between Hiney and Respondent Union as long as they have maintained a collective-bargaining relationship.

Also, in Houchens Market, supra at 212, the Court stated:

> The Company, by insisting after all the other terms of the contract were agreed upon, that the contract

> be approved or ratified by a majority of the employees, was attempting to bargain, not with respect to "wages, hours and other terms and conditions of employment", but with respect to a matter which was exclusively within the internal domain of the Union. Members of a Union have the right to determine the extent of authority delegated to their bargaining unit. It is within their province to determine whether or not their bargaining unit may enter into a binding contract with or without membership ratification. It is not an issue which the company can insist upon without mutual agreement by the Union, any more than the Union can insist that the contract be submitted to the Board of Directors or stockholders of the Company. The Union, by virtue of its certification as exclusive bargaining agent, was empowered by its members to make agreements on behalf of the employees it represented without securing the approval of those employees.

In North Country Motors, Ltd., 146 NLRB 671 (1964), the NLRB, found that the Employer had to accept the ratification procedure despite no preconditioned agreement to that effect. See also International Union of Elevator Constructors, Local No. 8, AFL-CIO and National Elevator Industry, 185 NLRB 769, 773 (1970); enf'd, NLRB v. International Union of Elevator Constructors, Local No. 8, AFL-CIO, 465 F.2d 974 (1982), citing Houchens Market, supra.

As already noted, the Authority, on several occasions, has recognized a union's right to ratification of a labor agreement. In Charleston, the Authority made it clear that its ". . . disposition of this proposal does not preclude the Union from subjecting an agreement to ratification by the Union's membership."

Similarly, in Department of the Air Force, Griffiss Air Force Base Rome, New York, 25 FLRA 579 (1987), the Authority adopted the administrative law judge decision concerning ratification, where it stated, at 592 that:

> The Authority has recognized that the ratification of a tentative contract by an exclusive representative's membership may be a precondition to a final and binding agreement between the parties to a bargaining relationship. [Citations omitted] Where the membership rejects a tentative contract, an agency is obligated to resume

> negotiations absent a showing that the exclusive representative clearly and unmistakably waived its right to reopen contract negotiations.

See also U.S. Department of Commerce, Bureau of the Census, 17 FLRA 667 (1985) and Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, 13 FLRA 571, 573 (1984), where Chief Judge Fenton noted:

> While there is much dispute on the question whether the parties intended that ratification would be a requirement of a full and binding agreement, there is no evidence whatever that Union negotiators ever explicitly yielded on this point. Given the past practice and the language of the ground rules, I find that ratification was essential to a binding agreement.

The foregoing findings cast doubt on Respondent's argument that no statutory right exists for a union to ratify a labor agreement, absent the existence of a bilateral agreement. In essence, Respondent argues that it must accept or agree when the union insists on ratification before final agreement. I find no case law support for this position and Respondent cites me to none. Furthering the right of employees to ratify labor agreements implicitly and logically flows from section 7102 of the Statute where employees have the right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter."

Notice to an employer is obviously an essential element in establishing that a union properly exercise its ratification procedures and is thus entitled to reopen negotiations upon rejection of the labor agreement. On the other hand, whether a union must provide representatives empowered to negotiate and enter agreements is not an issue since it is within a union's province to determine whether its delegated representatives need seek ratification. Houchens Market, supra. In this case, AFGE advised Respondent, in writing in 1985, that it retained the right to ratify agreements at the Council level. Indeed, then Branch Chief Whitlock acknowledges receiving and reading a January 15, 1985 letter from President Skwierczynski regarding union ratification. Even SSA Chief Negotiator Paul Arca conceded that he was aware of the letter. Finally, not only did Whitlock acknowledge that he received the letter, but he also testified that he was aware of the

AFGE constitution provision providing for union ratification. Although ratification was not mentioned during negotiations, SSA had sufficient notice that it could be a requirement for a binding agreement here. Accordingly, it is found that Respondent had notice and that it was not necessary that it agree that matters negotiated by delegated representatives of the union were not binding until submitted to union ratification procedures.

The next question is whether the Union waived its statutory right to ratification under Article 4, Appendix A. In that regard, Respondent's chief negotiator Arca testified that waiver was not an issue here. Arca also testified about what appears to be Respondent's chief interest, that ratification in certain circumstances would seriously hamper Respondent's operations.

[By Mr. Evans]

Q. But in your direct testimony, and I made a note about this--you testified it's a horrible event in your Agency, it's just a terrible thing to have this I&I bargaining subject to ratification because it keeps you from accomplishing your statutory mission, right? You testified to that.

[By Mr. Arca]

A. Well, you put some colorful words on it, "horrible" and all that. What I am saying, it is very serious delay in our ability to service people with Social Security needs. That's what I'm saying.

Q. Right.

A. I'm saying people under Social Security have a very, very sensitive reason why they're in touch with us and they need service. There's loss of income for some reason or another and we have to get that and we have to do it as fast as we can. Now, we recognize the Union responsibility. What I'm saying is ratification, if we were to go along with it, or it was imposed on us, on mid-term bargaining, would very seriously hamper the ability of our Agency to deliver to Social Security people.

you know, right down at the gut issue of furnishing services.

The General Counsel, of course, takes issue with that position. It argues that such a defense might justify implementation upon reaching a bargaining impasses or before the Federal Service Impasses Panel, but to claim that union ratification following possibly lengthy negotiations inteferes with agency efficiency is an unprecedented proposition. It is noted that the Fourth Circuit in a mid-term bargaining situation found issue-by-issue bargaining "between contacts created uncertainty and continuous bargaining which did not promote effective and efficient government as required in section 7101(a)(1)(B)". Social Security Administration v. Federal Labor Relations Authority, 956 F. 2d 1280 (1982). However, the Authority still follows Internal Revenue Service, 29, FLRA 162 (1987) which carves out no such distinctions in mid-term bargaining situations as asserted by SSA.

While the main thrust SSA' "seriously hamper" argument is appealing, there is no record evidence to support such a position, other than Respondent insisting that bargaining on mid-term initiatives which had to be ratified by the Union's membership would hinder its ability to deliver services to its clients. Respondent offered no evidence in this case as to why it had to implement this particular initiative in the face of the Union's rejection of the MOU. Another problem with its position is, there is nothing in Respondent's September 27, 1989, letter to the Union notifying it of the proposed changes in SSI duties to suggest that a "time is of the essence" situation existed. Nor did any of Respondent's witnesses testify that AFGE's negotiator Seaman, was ever advised that "time was of the essence" in regard to the negotiation of the SSI matter consummated on May 3, 1990. Furthermore, none of Respondent's many exhibits make any reference to an "operational necessity" warranting immediate implementation of any matters covered in the MOU. Finally, although the Union was notified in September 1989 of the transfers herein bargaining did not commence on the matter until late April 1990, thereby indicating a certain lack of urgency in the matter. In these circumstances, it was not shown that the instant situation was one where implementation prior to ratification was necessary to promote effective and efficient government. Therefore, Respondent's argument is rejected.

Additionally, when Whitlock on August 16, 1990, advised Seaman that SSA had no duty to reopen negotiations, he never

raised the defense now raised by Arca. His refusal was based on the following:

> We have discharged any bargaining obligation owed to the Field Council regarding the SSI duties initiative of October 2, 1989. All matters were resolved at the bargaining table. Your demand to reopen bargaining on this subject is inappropriate. We have implemented this initiative, consistent with the terms of the midterm bargaining agreement of May 3 and intend to continue with implementation.

From the letter, it appears that Respondent really believed, in defense of its implementation of the May 3, 1990, MOU that Article 4, Appendix A somehow contained a waiver of the Union's right to seek ratification. However, there is no evidence that AFGE clearly and unmistakably waived its right to submit the MOU for ratification. Department of Veterans Affairs, Veterans Administration Medical Center, Boise, Idaho, 40 FLRA 992 (1991). Without such a showing, the waiver argument is found to lack merit. Furthermore, it appears that Respondent abandoned it contention that a waiver existed and relied heavily on the "efficiency of operations" approach discussed above. Again, not only is this a novel theory vis a vis union ratification, but the record lacks evidentiary support for the "efficiency" approach.

Based on the foregoing, it is concluded that Respondent violated section 7116(a)(1) and (5) of the Statute. Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 7118(a)(7) of the Federal Labor Service Labor-Management Relations Statute, 5 U.S.C. section 7118(a)(7)(A), and section 2423.29(b)(1) of the Rules and Regulations of the Federal Labor Relations Authority, the Authority hereby orders that the Social Security Administration shall:

1. Cease and desist from:

(a) Refusing to reopen negotiations upon request of the American Federation of Government Employees, Council 220, AFL-CIO, after its failure to obtain ratification of a May 3, 1990 Memorandum of Understanding.

(b) In any like or related manner interfering with, restraining or coercing its 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 Federal Service Labor-Management Relations Statute:

(a) Rescind the May 3, 1990 Memorandum of Understanding and make whole any employees adversely affected by its implementation.

(b) Post at its facilities 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 Commissioner or a designee 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 insure 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 of the San Francisco Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 30, 1992

Eli Nash, Jr.

ELI NASH, JR.
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 refuse to reopen negotiations upon request of the American Federation of Government Employees, Council 220, AFL-CIO, after its failure to obtain ratification of a May 3, 1990 Memorandum of Understanding.

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 rescind the May 3, 1990 Memorandum of Understanding and make whole any employees adversely affected by its implementation.

_____
(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, Washington, DC Regional Office, whose address is: 1111 18th Street, NW, 7th Floor, P.O. Box 33758, Washington, DC 20033-0758, and whose telephone number is: (202) 653-8500.