

71 FLRA No. 177

NATIONAL WEATHER SERVICE
EMPLOYEES ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF COMMERCE
NATIONAL WEATHER SERVICE, NOAA
(Agency)

0-MC-0030

ORDER DENYING MOTION FOR STAY

August 13, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

During bargaining over a successor collective-bargaining agreement, the parties failed to reach agreement on several articles, and the Agency requested the assistance of the Federal Service Impasses Panel (the Panel). The Union has filed a motion requesting that the Authority stay the Panel proceedings. We deny the Union's request because it has not exhibited that a stay is appropriate under the circumstances of this case.

II. Background and Panel Proceedings

The parties have been attempting to negotiate a successor agreement since 2015. After utilizing the services of the Panel to resolve their ground-rules-negotiation impasse in 2016, the parties began substantive negotiations on a successor agreement in early 2017. The parties bargained for over two years and engaged in 146 bargaining sessions – including fifty-five sessions with three mediators – but reached agreement on only four articles.

On December 19, 2019, the Agency requested the Panel's assistance, and, on March 12, 2020, the Panel asserted jurisdiction over an impasse related to forty-two articles. Before asserting jurisdiction, the Panel considered, but rejected, the Union's contention that the Panel's composition violated the Appointments Clause of the United States Constitution.

The Panel directed the parties to provide written submissions regarding the forty-two articles. While the Panel was considering those submissions, the parties agreed to thirteen articles, reducing the number of articles in dispute to twenty-nine.

On June 15, 2020, the Union filed a motion to stay (the motion) the Panel proceedings.¹ Just ten days later, the Panel issued a decision and order resolving the parties' impasse.²

III. Analysis and Conclusion: The Union has not shown that a stay of the Panel's order is warranted.

Section 7119(c)(1) of the Federal Service Labor-Management Relations Statute (the Statute) establishes the Panel as "an entity within the Authority"³ and "authorizes [the Panel] to investigate 'promptly' any negotiation impasse and to 'take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.'"⁴ Panel orders are not directly reviewable by the Authority or the courts.⁵ Instead, the Statute provides an avenue for parties to challenge a Panel order. Specifically, it is an unfair labor practice (ULP) for an agency or a labor organization "to fail or refuse to cooperate in impasse procedures and impasse decisions."⁶ A party that fails or refuses to comply with a Panel order, and is consequently charged with a ULP, may then challenge the Panel's order.⁷

In only two cases has the Authority found unusual circumstances warranting a stay of a Panel order: *NTEU*⁸ and *SSA (SSA II)*.⁹ In *NTEU*, an agency requested that the Authority stay a Panel order directing the parties to submit their impasse issues to interest arbitration.¹⁰ At the time of the agency's request, two of the Authority's negotiability decisions – involving the same parties and "substantively identical proposals" to those at impasse –

¹ After receiving the Union's motion, the Authority granted the Agency leave to file a response. The Agency filed an opposition to the Union's motion on July 6, 2020.

² *U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin, Nat'l Weather Serv.*, 20 FSIP 021 (2020) (*Dep't of Comm.*).

³ 5 U.S.C. § 7119(c)(1).

⁴ *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984) (*Brewer*) (quoting 5 U.S.C. § 7119(c)(5)(A), (B)(iii)).

⁵ *Id.*

⁶ 5 U.S.C. § 7116(a)(6).

⁷ *Brewer*, 735 F.2d at 1500.

⁸ 32 FLRA 1131 (1988).

⁹ 71 FLRA 763 (2020) (Member DuBester dissenting).

¹⁰ 32 FLRA at 1139.

were pending before the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit).¹¹ The Authority noted that the Panel's consideration of duty-to-bargain questions is appropriate only where the duty-to-bargain questions have been "resolved by precedent and the answers to those questions are well settled."¹² With the pending judicial review of substantively identical proposals, the Authority found that the underlying duty-to-bargain issues before the Panel could not be considered well settled, and, thus, the Panel's order directing the parties to interest arbitration was inappropriate.¹³

Then, looking to the equities of the case, the Authority determined that it would be inconsistent with the effective administration of the Statute to require the parties to engage in interest arbitration while simultaneously litigating those same issues before the court.¹⁴ Accordingly, the Authority stayed the Panel's order until the D.C. Circuit ruled on the related negotiability questions.¹⁵

Since *NTEU*, the Authority has applied the power to stay a Panel order very "narrowly,"¹⁶ granting a stay in only one other case. In *SSA II*, the Authority granted a union's motion to stay a Panel order where "parallel proceedings" were pending in federal district court.¹⁷ The Authority concluded that implementation of the Panel's order "would not advance the purposes of the Statute."¹⁸

Here, the Union argues that the Authority must stay the Panel proceedings. The Union cites *SSA II* and relies on a recently filed complaint with the U.S. District Court for the District of Columbia, which questions the constitutionality of the Panel's composition.¹⁹ But, as both *NTEU* and *SSA II* establish, a moving party must exhibit more than the mere existence of a parallel proceeding pending judicial review. Specifically, the moving party must also show how "the equities of the case suggest that the status quo should be maintained"²⁰ and that a stay would be "consistent with the requirements of an effective and efficient Government."²¹ The Union fails to argue either point. Instead, it repeatedly alleges that the Authority should grant the stay because the parties were never at impasse.²² That allegation fails to "respect the statutory framework for review of Panel orders."²³ As noted above, Panel orders – including Panel determinations regarding impasse²⁴ – are "not directly reviewable by the Authority."²⁵ The ULP procedures of § 7118 of the Statute and the judicial review provisions of § 7123 offer the Union the means of having that claim adequately adjudicated.²⁶ Thus, granting a stay based on the Union's allegation that the parties were not at impasse would "interject the Authority prematurely into the carefully developed system of review."²⁷ Moreover, granting a stay would be inconsistent with the requirement of an effective and efficient Government as it would only delay the conclusion of the parties' bargaining, which has been ongoing for the last five years.²⁸

¹¹ *Id.*

¹² *Id.* at 1137 (citing *Commander, Carswell Air Force Base, Tex.*, 31 FLRA 620, 624 (1988)).

¹³ *Id.* at 1139.

¹⁴ *Id.*

¹⁵ *Id.* at 1140.

¹⁶ *IFPTE, Local 4*, 70 FLRA 20, 24 (2016) (*IFPTE*); see also *NTEU*, 63 FLRA 183, 186 (2009) (*NTEU II*) (noting that the Authority's various denials of motions to stay Panel orders "demonstrate how narrowly" it applies the power to stay).

¹⁷ 71 FLRA at 763.

¹⁸ *Id.*

¹⁹ Mot. for Stay (Mot.) at 1-2.

²⁰ *NTEU*, 32 FLRA at 1138-39.

²¹ *SSA II*, 71 FLRA at 763 (citing 5 U.S.C. § 7101(b)).

²² Mot. at 3. (stating that the Panel exerted jurisdiction over an "ostensible 'impasse'"), *id.* (stating that the parties "are clearly not at impasse").

²³ *IFPTE*, 70 FLRA at 24.

²⁴ See *NTEU II*, 63 FLRA at 184-87 (noting that "the unfair[-]labor[-]practice procedures of § 7118 of the Statute and the judicial review provisions of § 7123 offer the [u]nion the means of having its claims adequately adjudicated," including its claim that "the Panel found an overall impasse despite concluding that the parties had not bargained sufficiently on one proposal").

²⁵ *IFPTE*, 70 FLRA at 24.

²⁶ See *POPA v. FLRA*, 26 F.3d 1148, 1153-54 (D.C. Cir. 1994) (finding that Panel erred in directing interest arbitration, and

interest arbitrator had no jurisdiction, because parties had not reached impasse).

²⁷ See *NTEU II*, 63 FLRA at 187.

²⁸ *Dep't of Comm.*, 20 FSIP 021 at 34 (noting that parties started bargaining ground rules in 2015 and characterizing the parties' negotiations as "inefficient and ineffective," as they were able to reach voluntary agreement on only four substantive articles before Panel intervention in March 2020); see also Exec. Order No. 13,836, *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining*, 83 Fed. Reg. 25,329 (May 25, 2018) ("For collective[-]bargaining negotiations, a negotiation period of [six] weeks or less to achieve ground rules, and a negotiating period of between [four] and [six] months for a term CBA under those ground rules, should ordinarily be considered reasonable and to satisfy the 'effective and efficient' goal . . . of this order"). This extraordinarily protracted and contentious bargaining history, which the Agency highlights throughout its brief opposing the stay and which the Panel notes repeatedly in its decision, was lacking in *SSA II*, where the parties had been bargaining for less than two years (inclusive of ground rules) at the time the Authority issued its stay. See *U.S. SSA, Office of Hearing Operations*, 20 FSIP 001, at 2 (2020). The parties' "ineffective and inefficient" bargaining history, which required two different rounds of Panel intervention and fifty-five different sessions with three different mediators, *Dep't of Comm.*, 20 FSIP 021 at 1-2, provides ample reason to deny the Union's stay request. See *NTEU*, 32 FLRA at 1136 (noting that the Authority's power to issue stays derives from its duty to take such other "actions which

The timing of the Union's motion further militates against a stay. In this regard, the Union asserts that staying the Panel's order is "imperative."²⁹ However, the Union waited more than three months after the Panel asserted jurisdiction to request a stay.³⁰ The Union does not explain that delay – nor does it contend that circumstances prevented it from requesting a stay back in March 2020.³¹

Moreover, because the Panel issued an order, the Authority is unable to maintain the status quo that the Union seeks in its motion to stay the Panel *proceedings*. Therefore, it is unnecessary to address the Union's assertion that "once [a Panel] decision on the merits is issued, there is no incentive for the parties to reach an agreement voluntarily."³² Nevertheless, we take the opportunity to remind both parties that they had nearly *five years* and 146 bargaining sessions to "reach an agreement voluntarily."³³ Providing them with more time would not advance the purposes of the Statute or represent an effective administration of the Statute.

Finally, in response to the dissent, we note that the Authority's precedent makes clear that no litigant is entitled to a stay. Instead, stays are only granted where "the equities of the case suggest the status quo should be maintained."³⁴ Far from being a statutory entitlement of individual parties, the Authority's ability to grant stays derives from its broad supervisory powers to "take such other actions as are necessary and appropriate to effectively administer the provisions of" the Statute³⁵ and to interpret the Statute "in a manner consistent with the requirement of an effective and efficient Government."³⁶ To reflexively stay the Panel's proceedings whenever a party had filed a lawsuit in federal district court collaterally attacking the Panel's jurisdiction, regardless of the equities or any other conceivable circumstance, "would

are necessary and appropriate to effectively administer the provisions of the Statute, and interpret the Statute's provisions "in a manner consistent with the requirement of an effective and efficient Government." In balancing the equities of this case, the Authority cannot turn a blind eye to the prolonged and contentious manner of the parties' bargaining history, as doing so would undermine the Statute's purposes of promoting constructive labor-management relationships and "the effective conduct of public business." 5 U.S.C. § 7101(a)(1)(B); *see also NTEU*, 32 FLRA at 1139 (noting that actions which "would likely only engender further administrative and judicial litigation" do not "advance the purposes of the Statute.")

²⁹ Mot. at 5.

³⁰ The Union's actions in its District Court lawsuit further undermine its argument that a stay is urgently required. Unlike the union in *SSA II*, which promptly moved for a preliminary injunction in District Court four days after filing its initial Complaint and obtained an expedited briefing schedule, *see Docket Ass'n of Admin. Law Judges v. Fed. Serv. Impasses Panel*, No. 1:20-cv-1026, (D.D.C. filed Apr. 20, 2020), the Union here has not moved for a preliminary injunction or taken any

likely only engender further administrative and judicial litigation"³⁷ and eviscerate the Panel's ability to perform its statutory duty "to make swift decisions in order to end disputes in which the negotiation process between a federal agency and its employees has failed."³⁸ Such a simplistic rule, advocated by the dissent, would in no way "advance the purposes of the Statute" – instead, it would disserve the Statute by charting a clear path for litigious parties to delay Panel processes at will.

Based on the above, we deny the motion.

IV. Decision

We deny the Union's motion to stay.

other action in District Court to preserve the status quo in the nearly two months since it first filed its lawsuit. *See Docket, Nat'l Weather Serv. Emps. Org. v. Federal Service Impasses Panel et al*, No. 1:20-cv-01563 (D.D.C. filed June 15, 2020).

³¹ We are also troubled by the timing of the Union's constitutional arguments. There is no indication that the Union had similar concerns over the Panel's composition when the parties utilized the Panel's services in 2016 to resolve their ground-rules dispute.

³² Mot. at 5.

³³ *Id.*

³⁴ *NTEU*, 32 FLRA at 1339; *see also id.* at 1336 (noting that the Authority's power to grant stays derives in part from 5 U.S.C. § 705, which states that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review" (emphasis added)).

³⁵ 5 U.S.C. § 7105(a)(2)(I).

³⁶ *Id.* § 7101(b).

³⁷ *NTEU*, 32 FLRA at 1339.

³⁸ *Brewer*, 735 F.2d at 1499.

Member DuBester, dissenting:

I disagree that the Union's motion for stay should be denied for the reasons articulated by the majority. In a recent order addressing a nearly identical request to stay a proceeding of the Federal Service Impasses Panel (Panel), the majority reconsidered its previous decision to deny the request,¹ and granted the request sua sponte, based *solely* on the fact that the union had subsequently filed a court action "that is potentially dispositive of the [parties'] issues before the Panel."² Indeed, the majority justified its subsequent issuance of the stay on grounds that "implementation of the Panel's order . . . 'would not advance the purposes of the Statute' due to the pendency of [the] parallel proceedings in federal district court."³

Specifically, in *SSA (SSA I)*, the union requested that we stay the Panel's exercise of jurisdiction because the "Panel members are not constitutionally appointed," the Panel is not "statutorily constituted," and the parties were "not at impasse."⁴ And the union asserted that a failure to stay the Panel's assumption of jurisdiction would cause the union "irreparable harm" because a decision of the Panel is not directly reviewable by the Authority or a federal court.⁵

In our original decision, we found that these arguments were insufficient to warrant a stay. However, subsequent to that decision, the union filed a challenge to the Panel's composition in federal court.⁶ Acting on its own accord, the majority then issued *SSA II*, deciding on reconsideration that the existence of a parallel court proceeding now warranted a stay of what was, by then, a final decision and order of the Panel.⁷

Remarkably, presented with the same circumstances that were present in *SSA II*, the majority now denies the Union's request because the Union

allegedly failed to sufficiently argue how issuance of a stay "would be 'consistent with the requirements of an effective and efficient Government.'"⁸ And yet, in *SSA II*, the majority reached precisely the opposite conclusion, and stayed the Panel's order, despite the absence of even a *request* by the union to reconsider our previous denial.⁹

The majority's additional efforts to distinguish the Union's request from the request at issue in *SSA II* are equally disingenuous. For instance, noting that the parties have been negotiating their successor agreement for five years, the majority insists that "the Authority cannot turn a blind eye to the prolonged and contentious manner of the parties' bargaining history."¹⁰ And yet, in *NTEU*, the parties had spent *seven* years litigating issues related to their negotiations, and they conducted "no bargaining" during those seven years.¹¹ But contrary to the majority's reasoning, the Authority found that this fact weighed *in favor* of granting the stay request.¹²

The majority also asserts that it is unable to grant the requested stay because the Panel has already issued an order in this case. However, as noted, the Panel had already issued an order in *SSA II* when the majority issued its decision in that case granting the stay.¹³

Moreover, the majority's suggestion that the Union's request is based solely on its argument that "the parties were never at impasse" is simply wrong.¹⁴ The Union specifically argues in its motion that the Authority "should issue a stay in this matter for the same reasons that it issued a stay of the Panel's order in [*SSA II*],"¹⁵ which includes the Union's assertion that the Panel "is improperly constituted in violation of the Appointments Clause of the U.S. Constitution."¹⁶ As noted, these

¹ *SSA*, 71 FLRA 652, 653 (2020) (*SSA I*) (finding that the Union failed to demonstrate that a stay of the Panel's exercise of jurisdiction is appropriate where "no case related to the parties' dispute before the Panel was pending between the parties in any judicial forum"), *recons. granted*, 71 FLRA 763 (2020) (*SSA II*) (Member DuBester dissenting).

² *SSA II*, 71 FLRA at 763.

³ *Id.* (citation omitted).

⁴ MC-0028, Mot. for Stay at 1.

⁵ *Id.* at 4.

⁶ *SSA II*, 71 FLRA at 763 (citing *Ass'n of Admin. Law Judges v. Fed. Serv. Impasses Panel*, No. 1:20-cv-1026, Complaint (D.D.C. Apr. 20, 2020)) ("tak[ing] administrative notice that on April 20, 2020, the Union filed a complaint in the U.S. District Court for the District of Columbia arising from the same bargaining dispute with the Agency that was before the Panel").

⁷ 71 FLRA 763 (granting a stay of the "Panel's April 15, 2020 Decision and Order in Case No. 20 FSIP 001"). I dissented in *SSA II* because neither party to our decision in *SSA I* asked us to

reconsider that decision, and the majority granted the stay based upon matters that were not part of the record in *SSA I*.

⁸ Majority at 3 (quoting *SSA II*, 71 FLRA at 763; *NTEU*, 32 FLRA 1131, 1138-39 (1988)).

⁹ *SSA II*, 71 FLRA at 764 (Dissenting Opinion of Member DuBester) ("our decision today grants relief that was not specifically requested by the Union in its motion for stay based on reasons that were never argued by the Union in support of its motion").

¹⁰ Majority at 4 n.28.

¹¹ *NTEU*, 32 FLRA at 1138.

¹² *Id.* at 1139.

¹³ The majority also suggests that the Union's stay request should be denied because it has not sought similar relief in its federal court action. Majority at 4 n.30. However, the Union can hardly be blamed for seeking this relief, in the first instance, from the Authority.

¹⁴ Majority at 3.

¹⁵ 0-MC-0030, Mot. for Stay (Mot.) at 3.

¹⁶ *Id.* at 1.

arguments were deemed sufficient by the majority in *SSA II* to warrant granting the requested stay.¹⁷

In sum, the majority's reasoning fails to adequately explain why the Union here should be treated differently than the union in *SSA II*. The circumstances presented by the Union's request are materially indistinguishable from those upon which the majority relied to grant the stay in *SSA II*. Indeed, it is ironic that the majority now condemns the notion of "reflexively stay[ing] the Panel's proceedings whenever a party ha[s] filed a lawsuit in federal district court collaterally attacking the Panel's jurisdiction"¹⁸ when that is exactly what the majority did in *SSA II*. The lingering question is why the majority did not follow its own precedent and grant the Union's motion.

Accordingly, I dissent.

¹⁷ Despite claiming that the Union's only argument is that the parties are not at impasse, the majority references the Union's constitutional arguments. Majority at 5 n.31 ("stating that it is "troubled by the timing of the Union's constitutional arguments"). The majority also curiously ignores the Union's

argument that "[f]urther proceedings in 20 FSIP No. 21 'would not advance the purposes of the Statute due to the pendency of parallel proceedings in federal district court.'" Mot. at 4 (quoting *SSA II*, 71 FLRA at 763).

¹⁸ Majority at 5.