

In the Matter of

DEPARTMENT OF HOMELAND SECURITY  
U.S. CUSTOMS AND BORDER PROTECTION  
PORT OF SAVANNAH  
SAVANNAH, GEORGIA

and

NATIONAL TREASURY EMPLOYEES UNION

Case No. 13 FSIP 135

### ARBITRATOR'S OPINION AND DECISION

The National Treasury Employees Union (Union or NTEU) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119 between it and the Department of Homeland Security, U.S. Customs and Border Protection, Port of Savannah, Savannah, Georgia (Employer or CBP).

After an investigation of the request for assistance, which arises from bargaining over compressed work schedules (CWS) for employees,<sup>1/</sup> the Panel directed the parties to mediation-arbitration with the undersigned, Panel Chairman Mary Jacksteit. Accordingly, on December 12, 2013, a mediation-arbitration proceeding was convened at the Employer's facilities in Savannah, Georgia. During the mediation phase, the parties were unable to resolve the issues. Consequently, the matter has been submitted for arbitration. In rendering my decision, I have considered the entire record, including the parties' final offers, documentary evidence, and witness testimony.

### BACKGROUND

This case concerns a dispute over whether compressed schedules (5-4/9 or 4/10) should be available for employees in eight work units in addition to one unit, the Advanced Terrorism Contraband Enforcement Team (ATCET), where the Employer has agreed to implement a 4/10 schedule. The head of the agency has

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<sup>1/</sup> In this decision, the terms "CWS" and "AWS" (alternative work schedules) are used interchangeably.

not alleged that the Union's proposal is likely to cause an adverse impact on agency operations; therefore, the matter is being considered under the Statute, which allows the Panel to resolve the dispute based upon the merits of the parties' proposals/positions.<sup>2/</sup>

The Employer's mission is to manage, control and protect the Savannah port of entry by keeping terrorists and contraband out of the country while enforcing hundreds of U.S. laws. In terms of volume handled, Savannah is the third largest port in the United States. The Union represents a bargaining unit consisting of approximately 25,000 professional and non-professional employees at the national level. In the Port of Savannah, there are approximately 101 bargaining-unit employees; of those, 90 are uniformed and armed Customs and Border Protection Officers (CBPO) and 11 are uniformed (but unarmed) Agricultural Specialists.

The parties' master collective-bargaining agreement is in effect until May 11, 2014. Article 14 of that agreement addresses Alternative Work Schedules. The parties "recognize and acknowledge that broad use of alternative work schedules enable employees to better balance their work and personal responsibilities, increase employee effectiveness and job satisfaction, and aid CBP's recruitment and retention efforts"; and agree to "take necessary and reasonable steps, consistent with the effective and efficient accomplishment of the Agency's mission, to support and encourage employee use of alternative work schedules." The Article provides for local bargaining over establishing, implementing, modifying or terminating CWS, stating that schedules "must align to staffing and workload requirement, and not adversely impact operations or result in

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2/ In contrast, cases involving the establishment of compressed schedules where the head of the agency, or delegate, alleges that the proposed schedule is likely to result in an adverse agency impact through a reduction of productivity, diminished level of services to the public, or increased costs other than those incurred to establish a CWS, require that the Panel assert jurisdiction under the Federal Employees Flexible and Compressed Work Schedules Act (Act), 5 U.S.C. § 6131. Under the Act, the sole question to be considered by the Panel is whether the agency has supported with evidence its allegation of adverse agency impact. If it fails to do so, the Panel has the discretion only to order the parties to negotiate over the union's proposal; it may not impose the proposed CWS.

increased operating costs."<sup>3/</sup> Sections 7 and 8 describe situations where the Employer may temporarily suspend a CWS, or require an employee to work a 5/8 schedule (e.g. temporary assignments, travel, unexpected work requirements, and changes in staff levels). Section 9 sets out the right of the Employer to terminate a CWS because of adverse agency impact consistent with law and regulation.

Approximately 2 years ago, these local parties began bargaining over a Union proposal to implement CWS for bargaining unit employees at the Port of Savannah. Early on, they tentatively agreed to a 4/10 CWS for six employees assigned to the ATCET but this agreement was not perfected due to disagreement over the Union's proposal to allow compressed schedules for employees assigned to other work units.

#### ISSUES AT IMPASSE

The parties disagree over whether employees in work units in addition to ATCET should be permitted to work either 5-4/9 or 4/10 CWS.<sup>4/</sup>

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3/ Following that language, Section 6 continues:

With this in mind, in order to promote the availability and employee participation in such scheduling options, where traditional compressed work schedules are not feasible, local parties are encouraged to explore the feasibility of more creative compressed work schedule options such as (but not limited to) alternating between compressed and regular schedules based on known fluctuations in workload (e.g. seasonal fluctuations).

4/ Because of disagreement on this threshold issue, it seems the parties have not arrived at agreement on implementation details, something that will be necessary going forward. It appears there is an outstanding disagreement on whether CWS employees will be required to take a paid lunch.

## POSITIONS OF THE PARTIES

### 1. The Employer

The Employer's proposal is to implement a 4/10 CWS for six out of the 41 employees in ATCET. The other much smaller work units would not be permitted to utilize compressed schedules.

According to the Employer, although the Port of Savannah is the third largest and busiest port in the country, its resources have been shrinking over the past few years as they have been "diverted to border operations." As a result, management has not been able to fill vacancies and staffing levels have diminished even though the volume of work continues to increase and the threat of terrorism and other dangers is undiminished. The Employer does not have "an institutional bias" against CWS as there are two other work units in the Port where all or most employees are on compressed schedules. The difficulty with the Union's proposal to allow CWS in units beyond ATCET is that with these other units being so small (ranging from 3 to 10 employees) there are not enough employees to cover work when staff members take a biweekly or weekly regular day off (RDO). Even with 5/8 schedules some units currently have difficulty keeping up with the increasing volume of work. Allowing AWS in these small units will both increase costs (by requiring overtime) and adversely impact operations. While the Union presented AWS agreements from 8 other Customs locations, these do not present comparable situations (e.g., the facilities differ, there is not the same volume accompanied by shortage of staff, there are no units as small as 3, work units are consolidated). The Employer points out that AWS has not been adopted in the ports of Charleston and Norfolk that have the same number of employees but only half the volume as at Savannah.

The Employer considers the foreseeability of increased overtime costs conclusively established by a "cost calculator" analysis performed by the Atlanta Regional Office. That analysis shows that in all of the small units the proposed CWS will increase costs. Specifically, there would be increased overtime expenditures of \$792 per pay period for seven units and a \$660 increase per pay period for another. The Employer's agreement to a 4/10 CWS for six officers in the ATCET rests on the cost calculator analysis showing a savings of \$5,940 per pay period, a result likely due to the fact that because of the larger number of officers in ATCET (41) schedules can be manipulated to provide coverage for weekly RDOs. Combining the

smaller work units into larger ones might make CWS feasible for more employees but the Union has consistently opposed the creation of larger work units. Adding to the difficulty is that in some small units the work is highly specialized making it difficult to cover by short-term reassignments by officers from other units.

The cost calculator examines each hour in the schedule and compares the number assigned with a number representing "required number of employees." For the "required number" the Employer used the actual number of employees working in each unit, not a larger number including vacant positions, as management has no idea if or when it may be permitted to fill those slots. Where a gap occurs between number assigned and number required, a cost for overtime is charged. The calculator also indicates where CWS schedules will create "idle time."

The Employer opposes the Union's attempt to expand its proposal during the arbitration. The proposal discussed during bargaining and FMCS mediation was a Union proposal for 1 employee to participate in each of the smaller work units. The Employer has not had the opportunity to analyze the expanded numbers in the final proposal offered by the Union in this proceeding.

## 2. The Union

The Union's final proposal offered in arbitration would allow the following number of employees to work either a 5-4/9 or 4/10 CWS<sup>5/</sup>:

Training Unit: 1 employee  
Trade Unit: 1 employee  
Outbound Unit: 3 employees  
Passenger processing Unit: 2 employees  
Advanced targeting Unit (ATU): 3 employees  
Centralized Examination Section (CES): 1 employee  
Agriculture Cargo Unit: 1 employee

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<sup>5/</sup> This proposal differs from the Union proposal presented in the Request for Assistance which sought 1 employee on a CWS schedule in each of these 10 work units: Pax, Trade, Outbound, Training, Nii, ATU, CES, AQI ATU, AQI CES, AQI Pax. The final proposal drops Nii and two of the Agriculture Specialist (AQI) units, retaining "Agriculture Cargo." It adds the new Flex unit created in October 2013.

Anti-Terrorism Contraband Enforcement Team (ATCET): 10 employees  
Flex Unit: 2 employees

The Union challenges the Employer's conclusions that CWS in the smaller units will increase costs and negatively impact operations.

The Union asserts that a 5-4/9 or 4/10 CWS would either be cost neutral or present the Employer with a cost savings in the units where the Union proposes it be allowed. This result is achieved with the Employer's own cost calculator when a more realistic (and lower) number is used for "required number of employees," a number that more closely aligns with management practice on assigning overtime. By using the number of employees in the unit as the "required" staffing level, the Employer's cost calculator analysis exaggerates costs by incorporating an assumption that overtime costs will inevitably be incurred whenever staffing drops below that level. However, according to unrebutted testimony offered by the Union, any assumption that backfilling will always occur is unwarranted since over the last year the only significant use of overtime to cover absences has been in the larger ATCET unit, not in the smaller units.<sup>6/</sup> The Union urges that this historical data is much more reliable as a predictor of overtime cost than the Employer's cost calculator. The Employer's cost calculation makes a similarly erroneous assumption in projecting that "idle time" will be created by the extended daily hours entailed in a CWS. This ignores actual conditions in many units. In some, like Outbound, due to the nature of the work, duties can be completed and employees fully utilized at any time. Elsewhere there may be flexibility in scheduling work (Training) or officers have paperwork they can do in extended hours. Thus, it is inaccurate to make a blanket assumption that CWS employees cannot be fully productive for the full 80 hours they will still work in each pay period.

The Union rejects the idea that the small size of the additional work units, by itself, justifies a conclusion that

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6/ This evidence came from a Union witness who is the Port employee with the responsibility of entering overtime into the payroll system on a daily basis and conducting the twice-yearly overtime audit. The Employer conceded that overtime has not been used to cover absences, attributing this to budgetary limits on overtime pay. Instead, either officers from other units are temporarily assigned, or work is deferred.

CWS will adversely impact operations by preventing needed coverage. The Union has negotiated AWS and CWS in many other locations and offered 8 agreements into evidence. Two work units in Savannah have CWS agreements and some covered employees work in the same areas as officers do (e.g., Trade). The small units vary, and the Union believes that coverage can be achieved in those covered by its proposal. The Employer has not factored in the potential impact of the new work unit it just created - Flex - that exists to provide coverage across units where it is needed. The Union argues that in its experience this Employer always begins very apprehensive about the practicality of AWS but elsewhere has found that its fears are not realized.

#### OPINION AND DECISION

There is no dispute that cost and operational impact are important issues to be considered with respect to implementing alternative work schedules.<sup>7/</sup> When contested in cases before the Panel, these become factual issues to be proved. It is fair to say that in this instance the Employer is standing on the cost calculator results as providing an open and shut case concerning impact, with the small size of the units providing an additional, and in its view, conclusive basis for rejecting CWS in any units other than ATCET.

As the Arbitrator sees it, this means the Employer rests its case on a series of presumptions - that if CWS is permitted, costs will rise because overtime will always be assigned if less than the full complement of employees is not present, and that operations will be undermined because idle time will be created and adequate coverage of RDOs will be impossible. These presumptions are not unreasonable on their face but they are subject to rebuttal, and here there is sufficient factual evidence to call them into question. Given the testimony about overtime use it cannot be considered a foregone conclusion that overtime costs will rise as a result of CWS being used in the small units. That small unit absences are not currently covered by overtime casts doubt on whether they will necessarily be covered in that manner in the future. Given the differences among the small units it is especially shaky to claim that every unit will incur overtime.<sup>8/</sup> It is worth considering that ATCET is

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7/ Article 14 of the National Agreement reflects an intention to address both these interests of management and the interests of employees.

8/ For instance, the work in some units is tied to the normal

where most of the overtime has occurred and according to the Employer, it is set to enjoy significant savings on overtime costs by placing 6 officers there on CWS. The assumption that operations will inevitably be undercut by CWS similarly cannot be sustained. There are significant differences among the smaller units in terms of coverage needs, flexibility, and nature of work but these seem not to have been seriously considered by the Employer before rejecting CWS because of reliance on the cost calculator results. Evidently no consideration was given to the potential impact of the new Flex unit, either.

No assertion was made that the Union at either the local or national level ever agreed to using the Employer's cost calculator analysis as conclusive on the question of CWS impact. Unfortunately, the Employer's stance seems to have operated as a barrier to its examining operational flexibilities and potential resources, and exploring possible ways to meet the Employer's interests while allowing some use of CWS beyond ATCET.<sup>9/</sup>

The Arbitrator is persuaded that implementation of a modest-scale CWS, close to the proposal initially provided by the Union to the Panel,<sup>10/</sup> will provide the parties the opportunity to examine each unit separately, explore alternatives, seek ways around problems (as seems to be envisioned by Article 14) and eventually, gather data from experience. Article 14 incorporates various means for the

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business hours of shippers, but in other units it is not.

9/ In this regard I would note that Article 14 calls on the parties to identify barriers to instituting AWS and seek ways of getting around them.

10/ Normally the Panel does not look kindly on a party bringing a new proposal to mediation-arbitration that has not been fully negotiated. We encourage proposal revisions during the proceeding when they move towards the goal of finding agreement. Here the Union's last proposal instead increases the number of employees to be covered. The Arbitrator sees no basis for allowing this expansion and prefers the more modest levels of the original proposal as a place for the parties to start. On the other hand, the narrowed list of covered units reflects consideration of management operational concerns. Adding the Flex unit makes sense since this unit was created after this case was filed with the Panel.



Employer to protect its legitimate interests in maintaining sufficient capacity to carry out its very important mission, a mission to which its employees, of course, are also fully committed.

ORDER

In conclusion, having carefully considered the arguments and evidence presented, the parties are ordered to implement CWS (either 4/10 or 5-4/9) in the following units with the number of employees participating as indicated:

- ATCET - 6 employees
- Training - 1 employee
- Trade - 1 employee
- Outbound - 1 employee
- Passenger Processing - 1 employee
- Advanced Targeting Unit (ATU) - 1 employee
- Centralized Examination Station - 1 employee
- Agriculture Cargo - 1 employee
- Flex - 1 employee

The parties will negotiate any necessary unresolved implementation issues (including whether, or how it will be determined whether, a 4/10 or 5-4/9 is the schedule adopted per unit).



Mary E. Jacksteit  
Arbitrator

January 7, 2014  
Takoma Park, Maryland