UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE:
July 31, 2007

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS

Respondent

AND Case No. WA-CO-06-0356

FEDERAL AVIATION ADMINISTRATION

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. ∋ 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcripts, exhibits and any briefs filed by the parties.

Enclosures

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NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. ∋ 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. ∋∋ 2423.40 – 2423.41, 2429.12, 2429.21 – 2429.22, 2429.24 – 2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 4 2007**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

RICHARD A. PEARSON
Administrative Law Judge

Dated: July 31, 2007
Washington, DC

OALJ 07-20

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C.

PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS

Respondent

AND

Case No. WA-CO-06-0356

FEDERAL AVIATION ADMINISTRATION

Charging Party

Thomas F. Bianco
Sarah Whittle-Spooner
For the General Counsel

Joseph E. Kolick, Jr.
For the Respondent

Michael Herlihy
Donna L. Lewis
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423. It poses a question that has never been squarely addressed by the Authority: does a union commit an unfair labor practice by actively recommending that its membership reject a contract proposal that its negotiators have just accepted?

On March 31, 2006, the Federal Aviation Administration (the Charging Party, Agency or FAA) filed an unfair labor

practice charge against the Professional Airways Systems Specialists (the Respondent, Union or PASS), alleging that the Union had violated its duty to bargain in good faith by

stopping negotiations to conduct a ratification vote on a tentative agreement that the Union was recommending its members disapprove. G.C. Ex. 1(a). On June 9, 2006, the FAA filed an amended charge, alleging that PASS leaders had engaged in bad faith bargaining by stating they do not support contract proposals that they had previously agreed to, and that the Union had tainted the ratification process by seeking to ensure that the proposed contract would be voted down. G.C. Ex. 1(b). After conducting an investigation, the Regional Director of the Washington Region of the Authority issued a complaint against the Respondent on January 10, 2007, alleging that the Union violated its duty to bargain in good faith under section 7114(a)(4) of the Statute, thereby committing an unfair labor practice under section 7116(b)(1) and (5), by sending communications to Union members and to the Agency stating that the Union opposed the tentative contract and recommending that its members reject ratification. G.C. Ex. 1(c). On February 7, 2007, the Regional Director filed a First Amended Complaint, alleging the same essential unfair labor practice but adding additional examples of unlawful communications. G.C. Ex. 1(i).

The Respondent filed timely answers to the Complaint and the First Amended Complaint, both times admitting that Union officials had communicated with its members to encourage them to vote against the tentative agreement, but denying that this conduct violated the duty to bargain in good faith or otherwise violated the Statute. The Respondent further asserted affirmative defenses that the statements and actions of its officers constituted free speech and truthful statements of fact or opinion, protected under the United States Constitution and the Statute. A hearing was held in the matter on March 27, 2007, in Washington, D.C., at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel, the Respondent, and the Charging Party subsequently filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

PASS is the exclusive collective bargaining representative for five bargaining units of approximately 11,000 employees of the FAA (G.C. Ex. 2 at 1).[1/] The instant case involves one of those bargaining units, consisting of about 7,000 employees, referred to in previous years as the Airway Facilities unit, and more recently as the Technical Operations unit (Tr. 39, 177). These employees maintain all of the equipment utilized by the FAA for air traffic control. Tr. 157-58. PASS and the FAA are parties to a collective bargaining agreement (CBA) (G.C. Ex. 26(a) and (b)) for this unit, which by its terms was effective from July 2, 2000, to July 2, 2005, and which has remained in effect in the absence of a new agreement. G.C. Ex. 26(a) at 97.

The events in this case occurred primarily between January and August of 2006, as the parties attempted to negotiate a new CBA. But in order to properly understand the events of 2006, they must be viewed in the broader context of the unique collective bargaining environment that exists at the FAA. Beginning in 1996, Congress passed a series of laws that authorize the FAA to establish its own personnel management system, one which is not subject to most provisions of title 5 of the United States Code. 49 U.S.C. § 40122(g)(1). However, Congress expressly made chapter 71 of title 5 (the Statute) applicable to the Agency. 49 U.S.C. § 40122(g)(2)(C). The new laws also established a unique process for negotiating changes to this personnel management system, a process that requires the Agency to bargain with the unions representing its employees, but when such negotiations are unsuccessful, the FAA is not required to submit its proposals to the Federal Service Impasses Panel (the Panel); instead, the Agency is free to implement its proposed changes 60 days after it has transmitted the proposals to Congress. 49 U.S.C. § 40122(a)(2). Moreover, in carrying out her duty to fix compensation for its employees, the FAA Administrator is instructed not to "engage in any type of bargaining, except to the extent provided for in section 40122(a)". 49 U.S.C. § 109(l)(1).

The exact meaning of these changes has been hotly contested between the FAA and its various unions, and both the

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[1/] Other unions, principally the National Air Traffic Controllers Association (NATCA), represent other units of employees and bargain separately with the FAA.

Authority and the Federal courts have begun to interpret the disputed provisions. Thus the Authority has held that the FAA, unlike most Federal agencies, "is required to negotiate pursuant to the Statute with exclusive bargaining representatives concerning the compensation of its employees." *United States Department of Transportation, Federal Aviation Administration and Professional Airways Systems Specialists, AFL-CIO*, 61 FLRA 750, 752 (2006), *citing United States Department of Transportation, Federal Aviation Administration, Mike Monroney Aeronautical Center and American Federation of Government Employees, Local 2282, AFL-CIO*, 58 FLRA 462, 463 (2003).

The FAA collective bargaining system was further tested when, in 2003, the FAA failed to reach contractual agreements with PASS for four bargaining units and with NATCA for 11 other bargaining units. The unions sought impasse assistance from the Panel, but the FAA argued that the legislative changes had eliminated FSIP jurisdiction over bargaining impasses. The unions, for their part, argued that the provisions in title 49 allowing the FAA to implement changes after submitting them to Congress are applicable only to "changes to the personnel management system" and not to negotiations on collective bargaining agreements. 49 U.S.C. § 40122(a)(1); *unions' position summarized* in *National Air Traffic Controllers Association, AFL-CIO v. FSIP*, 437 F.3d 1256, 1261, 1264 (D.C. Cir. 2006) (*NATCA v. FSIP*). The Panel declined to assert jurisdiction over the disputes, "because it is unclear whether the Panel has the authority to resolve the parties' impasse." *Department of Transportation, Federal Aviation Administration, Washington, DC and NATCA, AFL-CIO*, Case No. 03-FSIP 144 at 1 (January 9, 2004); *Department of Transportation, Federal Aviation Administration, Washington, DC and PASS, AFL-CIO*, Case Nos. 03-FSIP 149, 150, 151, and 157 at 1 (January 9, 2004). While the Panel did not decide whether it actually had jurisdiction of such cases, it ruled that it should not attempt to resolve the impasses until the jurisdictional issue had been resolved "in an appropriate forum". *Id.* at 4. The unions then went to Federal court seeking an order directing the Panel to assist them in resolving the impasses, but both the District Court and the District of Columbia Circuit refused to do so. Noting that "[b]oth the FAA and the Unions have raised compelling arguments regarding the proper interpretation of the disputed statutory provisions", the Circuit Court held that the Panel could not be found to have violated a clear and mandatory statutory directive; therefore, an injunction was improper. *NATCA v. FSIP*, 437 F.3d at 1264. While this litigation was

pending in court, the FAA submitted its final bargaining proposals for the 11 NATCA bargaining units to Congress, and after Congress failed to act within 60 days, the Agency implemented the terms and conditions of the collective bargaining agreements on June 10, 2005. *Id.* at 1262; *see also* Tr. 144, 178.

It was in this environment that PASS and the FAA began the process of negotiating a new CBA for the 7,000 Technical Operations employees.[2/] Thomas Valenti served as the Chief Negotiator for the Agency and Michael Derby served in a similar capacity for the Union. In April of 2005 the parties began ground rules negotiations, and those ground rules were finalized with the assistance of the FSIP, which directed the parties to participate in mediation-arbitration.[3/] The Agency sought, among other things, to impose a specific termination date on the CBA negotiations, while the Union favored an open-ended bargaining period.[4/] The Agency also resisted a Union proposal that the agreement would be subject to ratification by the Union membership. Tr. 54. During mediation in December 2005, the parties agreed on a schedule of six bargaining sessions, each of which would last two weeks, beginning on February 6, and ending on July 21, 2006,[5/] and they agreed on compromise language stating that "The parties recognize there will be a ratification process by the PASS members." G.C. Ex. 3, Section 5 at 2, and Section 17 at 4; Tr. 54-55.

The one ground rule the parties could not resolve was whether a definite termination date for bargaining should be established; this question was thus decided by Panel Member

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[2/] Throughout the period leading up to and including the CBA negotiations, PASS was also lobbying heavily in Congress to amend the statutes governing the FAA collective bargaining process in ways that would restrict the Agency's ability to implement a CBA unilaterally. See G.C. Ex. 9 at 1, 4-6; C.P. Ex. 16 at 1-3.

[3/] There is nothing in the record to indicate why the FAA filed an impasse resolution request in this case, when it had argued in the 2003-04 cases that the Panel lacked jurisdiction over FAA bargaining impasses.

[4/] It took the parties roughly three or four years to reach agreement on the 2000-2005 CBA (Tr. 201), and it is clear from the NATCA v. FSIP decision that contract negotiations in those units dragged on for at least a few years. 437 F.3d at 1261-62.

[5/] Hereafter, all dates are 2006 unless otherwise noted.

Mark A. Carter, serving as arbitrator, on behalf of the Panel. G.C. Ex. 3, Section 5; G.C. Ex. 2. The arbitrator decided in favor of the Agency, finding that the establishment of a terminal date for negotiations was warranted, and that the date should be July 21, 2006, unless the parties mutually agreed to extend negotiations beyond that date. G.C. Ex. 2 at 4.

Substantive bargaining for a new CBA began as scheduled on February 6. Approximately a week in advance, the parties exchanged written contract proposals, and the bargaining continued, Monday through Friday, from February 6 to 17. A second session began on March 20 and concluded on the ninth of ten scheduled days, March 30. When the parties reached agreement on a proposal, the chief negotiators would initial and date the draft and mark it "TAU" (tentatively agreed upon). *See* G.C. Ex. 24.

From the outset of the negotiations, FAA management was on the offensive and PASS was on the defensive. Tr. 173. Many of the Agency's contract proposals involved either reductions in employee pay (*compare, e.g.*, Articles 23 and 24 of G.C. Ex. 24 *with* Pay Plan Appendix and Article 33 of G.C. Ex. 26(a)), restrictions on employee rights or choices (*compare, e.g.*, Articles 13, 21 and 35 of G.C. Ex. 24 *with* Articles 16, 29 and 50-51 of G.C. Ex. 26(a)), or expansions of management's discretion (*compare, e.g.*, Articles 35, 36, 37 and 49 of G.C. Ex. 24 *with* Articles 50-51, 52-54, 55 and 69-70 of G.C. Ex. 26(a)). Under the Agency's pay proposal, employees being paid above the maximum for their pay band would receive no annual pay increases for the seven-year duration of the contract. Tr. 154-55, 176-77. According to the Union's estimate, 40% of its employees at the start of the new contract would thus be ineligible for pay raises, and this would increase to 80% by the end of the contract. Tr. 154-55. Additionally, the Agency declared approximately 350 Union proposals (by the Union's count) to be either nonnegotiable or permissive subjects over which it chose not to bargain, despite the fact that many of these were provisions that had either been included in the 2000-2005 CBA or had been approved by the Agency in its negotiations with NATCA. Tr. 174-76, 193-94.

Union negotiator Derby testified that by the end of the fourth week of negotiations, his team had come to the following conclusion: "When we looked at all the circumstances, particularly the Agency's positions on the issues of major concern to our membership, we didn't think

there was going to be any movement whatsoever." Tr. 173. Derby referred to statements by Agency negotiators that the "pendulum has swung . . . to our side. You have to just accept that. . . We're going to be taking back things from the contract." *Id.* It was Derby's view, as well as that of Union President Thomas Brantley, that "further talks playing out the spring through July was not going to result in a more meaningful agreement with the Agency." Tr. 178. Rather, the Union came to believe that the Agency was "intent on just getting everything on the table, but not actually bringing to closure" (Tr. 141), and that once the July 21 deadline arrived, the Agency would impose its proposals on PASS, just as it had done to NATCA in 2005. Tr. 141-42, 144, 148-49, 159, 178, 181.

The prospect of the Agency unilaterally imposing its contract proposals was particularly alarming to the Union because it would prevent the Union from submitting a CBA to its membership for a ratification vote. Union President Brantley stated: "[I]t was also important to us that members had a say. If they weren't part of the process, you know, ultimately to me that would mean the bargaining failed." Tr. 141; *see also* 144, 178-80, 194. In its internal communications with its membership, PASS noted that under the Agency's "misinterpretation" of the 1996 FAA reauthorization legislation, "the FAA is claiming that it has the authority to impose contract terms unilaterally on employees without union agreement or employee ratification." C.P. Ex. 16 at 2 (Brantley's column in the January-February 2006 "PASS Times" newsletter). Both the January-February and the March-April editions of this Union newsletter contained legislative reports to the members emphasizing the importance of lobbying Congress to amend the FAA bargaining process, and the primary reason asserted for the new legislation was that the FAA "is intent on using the [existing] law to unilaterally impose working conditions on employees . . . without union input or employee ratification." G.C. Ex. 9 at 1; similar at C.P. Ex. 16 at 2. Article Nine of the PASS Constitution provides: "All collective bargaining agreements shall be ratified by those members covered by the agreement." C.P. Ex. 17 at 17.

In light of these concerns, PASS devised a bargaining strategy which would ensure its members the opportunity to vote on the Agency's proposals, and which the Union hoped would "send a message" to the FAA. As Brantley testified:

> The message that we were trying to send is that we weren't going to just take whatever they had to

> offer, that we wanted the Agency to come in and negotiate an agreement. Not just try to ram one down our throats.

Tr. 130. After consulting with Brantley during a recess in the March 30 bargaining session, the Union negotiating team and Brantley decided that the Union would withdraw all of its contract proposals and accept the Agency's most recent proposals. Tr. 126-27, 171. In so doing, the parties reached a tentative agreement that would be submitted to the Union membership for ratification or rejection. When Derby returned to the bargaining table on March 30, he handed FAA Negotiator Valenti a letter (G.C. Ex. 4) advising him of the Union's action and asking him to prepare a clean copy of all approved articles for initialing. The letter indicated that "the negotiations are concluded, subject to membership ratification and agency head review." *Id.* The letter concluded:

> Unfortunately, based on the Agency's extremely regressive bargaining positions on virtually all matters of concern to our membership and the continuation of the Agency's disparate treatment of PASS and its members, we will not be in a position to support this agreement during the ratification process.

The Agency negotiators were taken aback by the Union's announcement; one of them asked Derby whether this was some sort of April Fool's joke, and Derby replied that he was "dead serious". Tr. 58, 171-72. A few minutes later, Valenti spoke to Derby privately to ask if he was sure he wanted to go through with this, and Derby again said yes. Tr. 58, 172. According to Derby, Valenti then said he assumed that "you're not going to campaign against this tentative agreement," and Derby replied that that would be a "wrong assumption." Tr. 172.

Later that same day, PASS issued a press release (G.C. Ex. 5) and sent an email letter to interested employees (G.C. Ex. 6) explaining its actions and bargaining strategy. The press release stated that the Union accepted the Agency's proposals "not because it thinks the FAA offer is fair or reasonable, but to give the working members . . . an opportunity to speak their own minds." G.C. Ex. 5. Noting the Union's belief that the FAA was intending to implement its proposals unilaterally after July 21, the press release quoted Brantley as saying: "That course would give the employees no voice." *Id.* It further quoted Brantley as follows:

> I am confident that PASS members will vote down the contract offer, which will send PASS and the FAA back to the bargaining table. Hopefully, the FAA will learn a lesson and approach the next round of negotiations with the intention of actually negotiating in good faith and securing a contract that is beneficial to all parties involved.

Id. Brantley's letter to employees made the same points, at greater length, and cited the Union's constitutional obligation to submit contracts to the membership for ratification. He stated:

> The agency is so sure that in the end it can force a contract on employees represented by PASS that it is completely unconcerned with PASS's ability to ratify an agreement. In fact, the agency recently forced a contract on 11 NATCA bargaining units without ratification by the membership.

G.C. Ex. 6 at 2.

On April 4, Valenti and Derby met to review all the articles of the proposed contract, some of which had already been initialed and some of which had not. Any articles that had not been initialed on or before March 30 were agreed upon and initialed by Derby and Valenti on April 4, leaving the parties with a complete package to be submitted to the membership for ratification. G.C. Ex. 24.

The Union then began a concerted campaign to educate its members about the proposed contract and to persuade them to vote against ratification. The ratification process was conducted in essentially the same manner as for the 2000 CBA and took about the same amount of time. Tr. 151-52. PASS officials prepared an analysis of each article of the proposed CBA, comparing it to the current CBA (G.C. Ex. 25). This was mailed to all PASS members, along with the text of the proposed contract and a ratification ballot and instructions. C.P. Ex. 19. Because the PASS membership is scattered across the United States and overseas, the voting was conducted by mail. Tr. 150. Prior to the ballots being mailed, the Union conducted a series of briefings with its local officials and members around the country, the first being held in Baltimore on May 24 and the ninth (and last) being held in Honolulu on June 14. G.C. Ex. 13 at 2 and C.P. Ex. 24. The ballots were first sent to members on June 15 or 16, and the deadline for cast ballots being received by PASS was July 31. *Compare*

Tr. 76-78 *with* C.P. Ex. 19 and 20. In all of its communications to members, and in its many forms, the PASS leadership made it very clear to members that it opposed the tentative contract and strongly encouraged members to reject it. *See, e.g.*, G.C. Ex. 8, 10, 12, 17, 18. In most of these communications, the Union explained that the membership's rejection of the contract would hopefully "send a clear message" to the FAA that they should return to the bargaining table and agree to a more favorable CBA. G.C. Ex. 6 at 2; G.C. Ex. 9 at 2; G.C. Ex. 12 at 1, 4, 5. The results of the vote were announced on August 3: with slightly more than 2000 members voting, 98% voted to reject the contract. Tr. 70-71; G.C. Ex. 15.

DISCUSSION AND ANALYSIS

Positions of the Parties

The General Counsel and the Charging Party

The General Counsel argues that the Union breached its duty to bargain in good faith by implementing a "Vote No" campaign to reject the proposed CBA. In the G.C.'s eyes, by engaging in this campaign the Union avoided a binding collective bargaining agreement, delayed bargaining, and sought to compel the Agency to agree to permissive subjects of bargaining. Citing cases under the National Labor Relations Act (NLRA) such as *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963), the General Counsel submits that PASS's conduct inherently undermines the collective bargaining process.

Both the General Counsel and the Agency emphasize that the Union's conduct was a calculated strategy to flaunt the July 21 termination date for negotiations that had been established by the Panel. The Union had opposed the establishment of any termination date, and it viewed the existing CBA as preferable to anything it was likely to negotiate in a successor contract. Thus the Union's strategy was to delay negotiations, and its campaign to prevent ratification was simply a tactic to evade the July 21 termination date while preventing the Agency from implementing its proposals. Both the G.C. and the FAA argue that unless this tactic is held to be unlawful, PASS and other unions can utilize it repeatedly to prolong the bargaining process endlessly.

Section 7114(b)(5) of the Statute provides that when an agreement has been reached, the duty to bargain in good faith

includes the duty to execute that agreement upon request. *International Organization of Masters, Mates and Pilots and Panama Canal Commission*, 36 FLRA 555, 560 (1990). Thus the G.C. and the FAA argue that once the Union accepted the Agency's CBA proposals, its obligation to execute the CBA also included the obligation to make its best efforts to convince its members to ratify the contract. They concede that the Authority has never held that a union has such an obligation,[6/] but they cite National Labor Relations Board precedent for a comparable premise.

The G.C. urges that the case of *United Paperworkers International Union Eriez Local Union No. 620*, 309 NLRB 44 (1992) offers guidance in this regard. In *Paperworkers*, the Board held that a union violated its duty to bargain in good faith by utilizing a "pooled" system of ratification for 24 separately-negotiated contracts, thereby refusing to execute contracts ratified by the members of some units because other units voted against ratification. The Board stated that this system "impermissibly impose[d] extraneous non-bargaining unit considerations into the collective bargaining process." 309 NLRB at 44. According to the G.C., the Board's reasoning indicates that it considered the contract ratification process to be part of "collective bargaining" and thereby subject to the statutory obligation of parties to bargain in good faith. The FAA makes the same point by citing an unpublished District Court decision, *American Postal Workers Union, Headquarters Local 6885 v. American Postal Workers Union, AFL-CIO*, 96 Lab.Cas.P 14,170 (D.D.C. 1982) (appendix to Charging Party's Post-Hearing Brief).

The FAA argues further that PASS's efforts to defeat ratification of the CBA violated the obligation to execute the agreement pursuant to section 7114(b)(5). It cites General *Teamsters Union Local 662*, 339 NLRB 893 (2003) (*Teamsters Local 662*), and *Long Island Day Care Services, Inc.*, 303 NLRB 112 (1991), as examples of the Board holding both unions (in the *Teamsters* case) and employers (in the *Long Island Day Care* case) to a duty to promptly submit tentative contract agreements to their appropriate bodies for ratification. In the *Teamsters* case, the Union negotiated a contract, obtained ratification from its membership, notified the employer of ratification, but then claimed that the ratification was invalid because members had not been shown all the terms of the agreement. The Board held that the agreement was binding

[6/] Indeed, the General Counsel's express basis for issuing complaint in this case was the lack of Authority precedent on this precise issue. Appendix C to FAA's Post-Hearing Brief.

once the ratification occurred and was communicated to the employer, regardless of the procedures used by the union to obtain ratification; the union was thus required to execute and abide by the ratified agreement. 339 NLRB at 898-99. In *Long Island Day Care*, the contract was subject to approval by the employer's board of directors, and the NLRB held that the company's president could not delay submitting the tentative agreement to the directors simply because she disliked some of its terms. It affirmed the ALJ, who stated that "it was therefore incumbent on [the president] to promptly submit the agreement to the Board of Directors for approval or rejection." 303 NLRB at 129.

The Agency and the G.C. argue that these cases stand for more than merely requiring parties to "submit" a contract for ratification; they argue that a party which agrees to tentative contract terms (subject to ratification) acts in bad faith if it turns around and urges its members or board of directors to reject those terms. While conceding that the Authority has never enunciated such a principle, the FAA cites several decisions in which the Authority has at least suggested this. In *Norfolk Naval Shipyard*, 9 FLRA 36 (1981) (*Norfolk I*), for instance, the parties negotiated a CBA, but three months later (before it had even attempted to ratify the agreement), the Union sought to renegotiate some of the terms. The Authority held that the agency had already satisfied its bargaining obligation and was not required to reopen negotiations on any terms, notwithstanding the lack of ratification by the union's membership. 9 FLRA at 37. The FAA submits that the Authority's dismissal of the complaint was a tacit acknowledgement that the union owed an affirmative obligation to obtain ratification.

In *Department of the Air Force, Griffiss Air Force Base, Rome, New York*, 25 FLRA 579 (1987), the ALJ (whose conclusions were affirmed without comment by the Authority) held that when a CBA is subject to union ratification, and a tentative agreement is rejected by the membership, an agency is obligated to resume bargaining unless the union has clearly and unmistakably waived that right. 25 FLRA at 592-94, *citing U.S. Department of Commerce, Bureau of the Census*, 17 FLRA 667 (1985) (*Census*). The respondent in *Griffiss* defended its refusal to resume bargaining after the union had rejected the proposed contract, on the grounds that the union's conduct after negotiating the tentative agreement was "subject to a good faith standard," which it breached by "torpedo[ing] the ratification process". 25 FLRA at 591. The ALJ did not

determine whether a union's conduct in the ratification process is subject to "a good faith standard," but even assuming such a rule, he found that the union leaders acted in good faith and did not "torpedo" the agreement. *Id.* at 597. The FAA urges the Authority to resolve the issue it bypassed in *Griffiss* and to declare that the actions of the PASS leadership against ratification were antithetical to their actions at the bargaining table and contrary to the concept of good faith. It argues that the Union's strategy could be employed repeatedly to avoid reaching agreement, thus turning the give-and-take of collective bargaining into extortion.

The G.C. and the Agency reject the Union's affirmative defense that its "Vote No" campaign was protected speech under the Statute and the U.S. Constitution. The G.C. asserts that because the Union's campaign constituted the action of PASS as an institution, rather than simply the statements of individual officials, neither section 7116(e) of the Statute nor section 411(a)(2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2), protects the statements. Both the G.C. and the FAA note that even under the Constitution, freedom of speech is not absolute. They quote the Supreme Court in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed." While the illegal course of conduct in *Giboney* was an antitrust conspiracy among ice distributors, the FAA argues that the principle is equally applicable to the context of collective bargaining. It submits that PASS's use of speech and written communications here was simply the means by which it violated its duty to bargain in good faith.

To remedy the Union's unfair labor practice, the General Counsel and Charging Party argue that the traditional remedy (ordering PASS to cease its "Vote No" campaign and to hold a new ratification vote) is inadequate in the circumstances of this case, as it would reward the Union for its unlawful conduct by further delaying the CBA. They contend that PASS's motive throughout this case has been to delay bargaining and to frustrate the Panel's decision establishing July 21, 2006 as the end of the bargaining process; a straightforward cease-and-desist order would simply give the Union what it has wanted anyway: more delay. They cite *International Union of Electrical, Radio and Machine Workers v. NLRB*, 426 F.2d 1243, 1249 (D.C. Cir. 1970) as precedent for mandating a broader

remedy here. In order "to restore, as far as possible, the status quo that would have obtained but for the wrongful act and to deter future misconduct," they argue that PASS should be required to execute the CBA its negotiators agreed to, effective March 30, 2006, and that it should not be allowed the opportunity to conduct another ratification vote. *Federal Bureau of Prisons, Washington, DC*, 55 FLRA 1250, 1258 (2000). Such a remedy is, they say, consistent with the remedy normally employed in cases where a party has unlawfully refused to execute an agreement that it has reached. *See, e.g. American Federation of Government Employees, Local 2924*, 25 FLRA 661 (1987). They also cite *Teamsters Local 287*, 347 NLRB No. 32 (2006) (*Teamsters Local 287*), as precedent for applying the contract retroactively. The FAA requests additionally that the Union be ordered to make the FAA whole for the loss of its economic bargain from March 30, 2006 to the date the contract is actually put into effect.

The Respondent

The Union defends its conduct on several grounds, and urges that its "Vote No" campaign was perfectly lawful. First, it says section 7116(e) of the Statute protects non-coercive speech in the context of labor relations and collective bargaining. Just as an agency supervisor in *Oklahoma City Air Logistics Center (AFLC), Tinker Air Force Base, Oklahoma*, 6 FLRA 159 (1981), was free to tell employees that "the union isn't worth the paper it's printed on" and that paying dues to the union was a waste of their money, PASS asserts that it was free to express its opinion concerning the tentative CBA to its members in a non-coercive manner. The Union adds that the FAA also was free to encourage employees to ratify the proposed CBA, citing *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985). Second, it cites *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974), which held that the First Amendment protects speech within the context of labor relations, and that the constitutional protections on speech were extended statutorily under the National Labor Relations Act and Executive Order 11,491, which then covered most federal employees, including postal workers. 418 U.S. at 273-77. While the Union concedes that its right of free speech is not absolute, it submits that as long as its speech is truthful and non-coercive, and no "clear and present danger" is posed, those exceptions are not applicable.

PASS then asserts that the duty to bargain in good faith, as imposed by sections 7114(b) and 7116(b)(5) of the Statute,

does not apply to union ratification votes. It cites numerous decisions of the NLRB that contract ratification is "purely an internal union affair" that cannot be challenged by an employer. *International Longshoremen's Association, Local 1575, AFL-CIO*, 332 NLRB 1336 (2000) (*ILA*); *Martin J. Barry Co.*, 241 NLRB 1011, 1013 (1979). It concedes that actions by a union during the ratification process may violate other labor statutes, such as 29 U.S.C. §§ 185 and 411, but asserts that they are not governed by the statutory duty to bargain. PASS cites the same *Long Island Day Care* decision of the NLRB that was cited by the FAA. While the FAA emphasized the Board's finding that a party must submit a tentative contract for ratification, PASS emphasizes the Board's additional finding that the company's president was not obligated to support the tentative agreement. 303 NLRB at 129. The Union adds that in many NLRB decisions, it is apparent that unions have actively opposed the ratification of tentative contract agreements, but in none of these has it even been alleged (let alone held) that such conduct by the union is unlawful. *See, e.g., EAD Motors*, 346 NLRB No. 93 (2006). PASS urges, therefore, that an inference can properly be drawn that a union does not bargain in bad faith by recommending the rejection of a proposed contract, unless the union has expressly agreed to recommend ratification.

Finally, the Union argues that a finding in favor of the General Counsel in this case "would create the prospect of 'protracted litigation regarding the union's compliance with its own procedures,' thereby encouraging industrial instability." *Beatrice/Hunt-Wesson, Inc.*, 302 NLRB 224, 225 (1991) (Chairman Stephens, concurring), *quoting M&M Oldsmobile*, 156 NLRB 903, 905 (1966). The Respondent cites the General Counsel's opening statement at the hearing to illustrate the impracticality of the G.C.'s position. The G.C. stated:

> [We] are not saying that the Unon is obligated to seek a favorable vote or that the Union officers can't express an opinion that this is a bad contract. But the extent of the campaign here was such that they were insuring a no vote, and we believe that's inappropriate after tentatively agreeing to the terms – presenting to the members to vote on.

Tr. 34. In the Union's view, such a position would force the Authority to police not merely the content of union ratification campaigns, but the "extent" and persuasiveness of

the campaigns. If union officials as individuals can express their negative opinions, how does the Authority draw the line at which the opinion "insures" a "no" vote? PASS insists that the entire area of union speech in a ratification campaign should remain an internal union matter, unless it is coercive.

While PASS contends that it committed no unfair labor practice, it also argues that the remedies sought by the General Counsel are punitive. If the purpose of a remedial order under the Statute is to put the parties in the position they would be in, had no unfair labor practice been committed, the Union submits that the Authority should order the holding of a ratification vote; if the membership ratifies the tentative agreement, it would then (and only then) be appropriate to order the CBA to be put into effect.

The Union emphasizes the importance of allowing the PASS membership a say in the ratification of the CBA, as it was understood by PASS and the FAA from the outset of negotiations that any agreement was subject to membership ratification. The Union analogizes the General Counsel's proposed remedy to so-called "Gissel bargaining orders" issued by the Board, in which a company is ordered to bargain with a union even though the union has never won a certification election. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). PASS notes that because of the high priority placed by the Board on the results of certification elections, the Board orders a company to bargain with a union in the absence of an election majority only when it is shown that the union had at some previous time represented a majority of employees. PASS argues that when a CBA is subject to membership ratification, the Authority should be similarly reluctant to order a union to effectuate a contract without a vote: that is, it should only dispense with a ratification vote when it is clear that the membership at one time supported the proposed contract.

PASS asserts that in this case, it is inconceivable that its membership would have ratified the proposed contract, even if the PASS leadership had said nothing whatever about it. The contract contained many provisions that reduced employee rights and benefits, and it would have denied pay raises for up to seven years to between 40 and 80 percent of the unit. Members had expressed significant reservations about the contract during pre-ratification briefings. It is unreasonable and demeaning to the members to hold that the Union leadership's "Vote No" campaign "brainwashed" them or made it impossible to hold a fair ratification vote. *See, e.g., Conair Corp. v. NLRB*, 721 F.2d 1355, 1378-83 (D.C. Cir.

1983).

Analysis

I.

The nature of the allegations against the Union has evolved from the time that an unfair labor practice charge was initially filed to the date of the hearing. The Agency filed its original ULP charge on March 31, the day after the Union accepted the FAA contract proposal, and in it the FAA argued that PASS had negotiated in bad faith by "stopping negotiations . . . to conduct a ratification vote", an action that the Agency characterized as "clearly designed to delay the collective bargaining process . . . and . . . jeopardize the Parties ability to complete the negotiations by the July 21, 2006, termination date ordered by the FSIP". G.C. Ex. 1(a). Its amended charge alleged that Union leaders had negotiated in bad faith "by stating that they do not support the CBA proposals that they have publicly stated were agreed to in good faith" and by "substantively delay[ing] sending the tentative agreement for a ratification vote . . . ." G.C. Ex. 1(b).

The General Counsel, in its initial complaint, simply listed a series of statements made by PASS officials and alleged that by making these statements the Union had failed to comply with sections 7114(a)(4) and 7116(b)(1) and (5) of the Statute. G.C. Ex. 1(c), paras. 24 and 25. In the amended complaint, the G.C. specified that by these statements the Union had "employed a campaign to convince the members to vote against ratification of the tentative agreement", thereby violating sections 7114(a)(4) and 7116(b)(1) and (5). G.C. Ex. 1(i), para. 20. While in all of these documents the Union has been accused of failing to negotiate in good faith, the focus at the hearing was on the Union's conduct since March 30 rather than on and before that date: the focus has shifted from the Union's intent and bad faith in accepting the proposed contract to the Union's campaign to reject the contract. This shift in focus was also reflected in the parties' stipulation at the outset of the hearing that "[t]here are no allegations in this case of bad faith bargaining against either party in connection with the bargaining that concluded with a tentative agreement." Tr. 14.[7/] The General Counsel has not charged the Union with failing to cooperate in impasse procedures or decisions under 7116(b)(6); it has not

[7/] The parties also stipulated that the FAA and PASS were not at impasse at the close of negotiations on March 30. Tr. 13.

alleged that the Union committed an independent violation of section 7116(a)(1); and it does not contend that the Union violated 7116(b)(5) by conducting an unduly lengthy ratification process. See Appendix C to Charging Party's Post-Hearing Brief. Accordingly, I will limit my analysis to the specific allegation made by the General Counsel: namely, that the Union's campaign to defeat ratification of a contract that it had just accepted violated its duty to bargain in good faith.[8/]

II.

Section 7114 of the Statute provides, in pertinent part:

> (a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. . . .
>
> * * * * *
>
> (4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. . . .
>
> * * * * *
>
> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation –
>
> (1) to approach the negotiations with a sincere resolve to reach a collective

[8/] For this reason, I have not considered an argument made fleetingly in the General Counsel's post-hearing brief at 13, that the Union's campaign was intended to compel the FAA to agree to a permissive subject (a so-called "job security" provision in the current CBA). This allegation was not made in either complaint or in the pre-hearing disclosure; there was little or no testimony elicited regarding permissive issues in the negotiations; and it would be neither fair nor appropriate to draw any conclusions about the impact of such issues on the overall negotiations.

> bargaining agreement;
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> * * * * *
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> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
>
> * * * * *
>
> (5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

The nature of a union's duty to its members, to employees in the bargaining unit, and to the Federal agency employing those employees, with regard to negotiating collective bargaining agreements, has evolved in similar ways as in the private sector, and at times the Authority has drawn on NLRB and court decisions applying the similar provisions of the NLRA in this area. *See National Federation of Federal Employees, Local 1827*, 49 FLRA 738, 745 (1994) ("Congress adopted for government employee unions the private sector duty of fair representation."); *Social Security Administration*, 46 FLRA 1404, 1413-14 (1993). The Board has long held that a union is not obligated to ratify a CBA it negotiates; rather, as the statutory representative of the employees, a union is free to authorize its negotiators to make a binding agreement on their own, or alternatively to limit the negotiators' authority by subjecting negotiated agreements to ratification. *ILA*, 332 NLRB at 1336; *North Country Motors, Ltd.*, 146 NLRB 671, 674 (1964). This view was reflected in an early FLRA case, when the Authority affirmed that it is up to the union to determine whether an agreement must be ratified, as well as whether to allow nonmembers of the union to vote on ratification. *American Federation of Government Employees, Local 2000, AFL-CIO*, 14 FLRA 617, 631 (1984).

Because the decision of how much authority its negotiators should have is primarily within the discretion of the union, the Authority has held that an agency must accept a union's declaration that any agreement it negotiates is subject to membership ratification. *Social Security*, 46 FLRA at 1412-15. While the parties may bargain on this topic and mutually agree to different provisions, it is a permissive subject of bargaining; therefore, an employer or agency may

not insist to impasse on such a provision. *Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967), cited by the ALJ in *Social Security* at 1413-14. Additionally, when an agreement is subject to ratification and the membership rejects it, an agency must resume negotiations with the union, absent a showing that the union clearly and unmistakably waived its right to reopen negotiations. *Griffiss*, 25 FLRA at 592; *Census*, 17 FLRA at 670. However, if membership rejection of an agreement occurs after the Panel has taken jurisdiction of an impasse and has ordered the parties to go to binding arbitration after a specific date, then the Panel's order takes precedence and the agency has no obligation to reopen negotiations. *Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia*, 13 FLRA 571, 576-77 (1984) (*Norfolk II*).

When a union subjects its agreement to ratification, disputes sometimes arise concerning the parties' obligations during the period between tentative agreement and ratification. The Board (unlike the Authority) has dealt with such situations fairly often and has developed a body of law addressing it. In *Beatrice/Hunt-Wesson, supra*, 302 NLRB at 225, Chairman Stephens explained the distinction between cases in which a union imposes on itself a ratification requirement (which he described as the prevailing practice) and those in which the parties negotiate and expressly agree either on ratification or on specific ratification procedures as an "express" term of their overall agreement. *See also Williamhouse-Regency of Delaware, Inc.*, 297 NLRB 199 at n.5 (1989) (majority opinion) and at 200 (concurring opinion), and *Sierra Publishing Company*, 296 NLRB 477 (1989) (concurring opinion). In most cases, although the employer may acquiesce to ratification, the union's purpose in notifying the employer is not to secure an express agreement in the sense of a bargained-for consideration. *Beatrice/Hunt-Wesson* at 225. In such cases, execution of the agreement is conditioned on ratification, but ratification is not a "condition precedent" for the agreement itself to be binding. *Id.; see also Teamsters Local 662, supra*, 339 NLRB at 898; *Williamhouse-Regency*, 297 NLRB at 199 n.5. On the other hand, there are unusual situations in which the employer has a particular need or interest in having a ratification vote taken, or that all employees participate in the vote, or in having the union "sell" the agreement to the members. When a union and employer agree to a specific ratification procedure in such circumstances, ratification is a true condition precedent. *Beatrice/Hunt-Wesson; Sierra Publishing*. Although the distinction between a CBA "subject to ratification" and a CBA

in which ratification is a "condition precedent" is primarily relevant only in determining whether a party may rescind its acceptance during the interim or whether the employer can insist that the specific agreed-upon ratification procedures have been fulfilled, the term "condition precedent" is often used carelessly and inaccurately. *Beatrice/Hunt-Wesson*, 302 NLRB at 225-26; *Sierra Publishing*, 296 NLRB at 478-79 n.3.[9/]

If a union's membership votes to ratify a contract, it is clear that the union is obligated to execute it, and the refusal to do so is an unfair labor practice. *American Federation of Government Employees, Local 2924, AFL-CIO*, 25 FLRA 661, 671 (1987); *Local 554, Graphic Communications International Union*, 306 NLRB 844 (1992). Once the agency or employer has been notified of ratification, neither the union nor the employer may cite irregularities in the ratification procedure to delay or withhold execution. *See, e.g., Teamsters Local 662, supra*, 339 NLRB at 899; *North Country Motors*, 146 NLRB at 673-74. If the membership rejects the agreement, there is no binding contract, and the parties must return to the bargaining table, absent a waiver of that right by the union or a binding order from the FSIP. *Griffiss, 25 FLRA at 592; Census, 17 FLRA at 671*.

III.

Using these principles as a starting point, we can now begin to address the parties' arguments in this case. First, PASS has taken the position that because ratification is "purely an internal union affair," the duty to bargain does not apply at all to its actions during the ratification process. The General Counsel and FAA have argued that because execution of the CBA was subject to ratification, the ratification process was inextricably intertwined with the collective bargaining process, and therefore the union's campaign against ratification is subject to the duty to bargain in good faith. While both of these positions contain a kernel of truth, they also overstate their positions.

As the Respondent notes, the procedures used in a ratification vote are generally considered to be strictly an

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[9/] Compare the Board's use of the term "condition precedent" there to the overly broad manner in which the FAA uses the term in its Post-Hearing Brief at 11-15. Even the case cited by the FAA therein, Teamsters Local 662, is one in which the Board and the Circuit Court held that the union's self-imposed ratification requirement did not create a condition precedent. 339 NLRB at 898, enf'd sub nom. NLRB v. General Teamsters Union Local 662, 368 F.3d 741, 745 (7th Cir. 2004).

internal union matter. The Board has refused to second-guess or scrutinize a union's declaration that a contract was ratified, even when the ratification vote was attended by only one employee,[10/] or when the union president ignored the objections to the contract of 80% of the members attending the

[10/] North Country Motors, 146 NLRB at 672.

ratification meeting.[11/] But the G.C. and Agency are also correct that PASS had some duty to make sure that a ratification vote was held; the holding of a vote was not something that was totally outside the Agency's legitimate concern.

The NLRB has, on several occasions, articulated a union's (and in one case, an employer's) obligation regarding ratification. The first such case, as far as I can tell, was *Long Island Day Care, supra*, 303 NLRB 112 (1991), and it was closely followed by *Graphic Communications, supra*, 306 NLRB 844 (1992), *enf'd sub nom. NLRB v. Local 554, Graphic Communications International Union*, 991 F.2d 1302 (7th Cir. 1993). The *Long Island Day Care* case was the rare instance in which ratification was required not only by the union membership but also by the employer's board of directors. The union promptly ratified the tentative agreement, but the company president delayed several months in presenting it to her board. The NLRB held that once the tentative agreement was reached, it was "incumbent on [the company president] to promptly submit the agreement to the Board of Directors for approval or rejection." 303 NLRB at 129. Just as the parties cannot unreasonably delay negotiations, they cannot unreasonably delay the holding of a required ratification vote. *Id.* Nonetheless, the Board rejected an allegation that the company president violated the duty to bargain by refusing to recommend that the board of directors approve the contract. *Id.* In *Graphic Communications*, the union required ratification by both its local membership and by its parent international union; the local membership voted to ratify, but officials of the local never submitted it to the international for approval. After a year and a half of refusing to execute the contract, the union argued to the NLRB that it could not be required to do so in the absence of international approval. In rejecting this defense, the Board held:

> [t]he existence of a requirement for international approval suggests a correlative duty of due diligence on the part of a local to seek such

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[11/] ILA, supra, 332 NLRB at 1336. It should be noted, however, that this case alleged union violation of its duty of fair representation, not its duty to bargain. In duty of fair representation cases, the Authority has distinguished between union activities "undertaken in the union's role as exclusive representative" and activities which are "internal union matters, including participation in negotiations and a contract ratification vote." NFFE Local 1827, supra, 49 FLRA at 746, 747.

> approval or at least to bring the contract to the attention of the international for its consideration.

306 NLRB at 844 n.2, 853. More recently, in *Teamsters Local 287*, 347 NLRB No. 32 (2006), the Board held that a union violated its bargaining obligations by unduly delaying a ratification vote on a tentative agreement. During negotiations, the union had agreed to hold a ratification vote on a specific date, an issue of particular importance to the company because employees were on strike. The ALJ, affirmed by the Board, noted that under common law principles, "there is an implied covenant of good faith and fair dealing between the parties to a contract[,]" and found that "it does not appear unreasonable to expect a contracting party . . . to hold the ratification vote as promised." 347 NLRB slip op. at 7.[12/]

From these decisions, I think it is fair to conclude that when a union agrees to a contract subject to ratification, the Board and the courts impose an obligation on the union to conduct a ratification vote within a reasonable period of time. While this may be more scrutiny than PASS desires, it is also less onerous a requirement than the FAA and the General Counsel seek. It is worth pausing on the exact words used by the Board in these cases: in *Long Island Day Care*, the Board said the company was required "to promptly submit the agreement to the Board of Directors for approval or rejection." 303 NLRB at 129. In *Graphic Communications*, the local was required "to seek such approval or at least to bring the contract to the attention of the international for its consideration." 306 NLRB at 844. And in *Teamsters Local 287*, the union was required "to hold the ratification vote as promised." 347 NLRB No. 32 at 7. In each instance,

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[12/] Interestingly, the Board and the ALJ disagreed as to the extent of a remedy that could be imposed against the recalcitrant union. The Board held not only that the tentative agreement could be imposed on the union, but also that it could be made retroactive to the date on which it had originally agreed to conduct a ratification vote. In distinguishing the Long Island Day Care case, in which the contract was not made retroactive, the Board explained that in the earlier case "[t]he contract had not been ratified, and the Board therefore had no basis to order its implementation as a remedy." 347 NLRB at 2 n.6. By contrast, in Teamsters Local 287, the contract had been ratified, albeit 50 days later than promised; thus the Board considered it appropriate to impute the ratification to the earlier date. Id.

the Board narrowly limited the union's obligation to simply conducting a vote.

In the instant case, however, the FAA and the General Counsel urge that a union negotiating in good faith must not o nly conduct a ratification vote, but also affirmatively support ratification (or at least that it must not discourage ratification). It is clear to me that the NLRB would definitively reject such a contention. Moreover, I see nothing in the Statute or Authority precedent to recommend a different rule for the Federal sector.

In the private sector, it is quite common for unions to negotiate with an employer and then submit the employer's final proposal to the membership with a recommendation to reject it. While I could not find an NLRB decision in which this practice was squarely held to be lawful or unlawful, there are numerous decisions in which the practice is cited without objection. In none of these cases did the Board even consider the possibility that the union was guilty of bad faith bargaining, nor did the employers argue such a point. *See, e.g., White Cap, Inc.*, 325 NLRB 1166 (1998); *Teamsters Local 703*, 320 NLRB 1184, 1190 (1996); *Auto Workers Local 365*, 307 NLRB 189, 190-91 (1992); *Ackley v. Western Conference of Teamsters*, 958 F.2d 1463, 1467-68 (9th Cir. 1992). In the *Ackley* case, the union held three separate ratification votes at different stages of its negotiations: at the first two, the union urged members to reject the contract, and they did; at the third meeting, the union recommended ratification, and the contract was approved. 958 F.2d at 1467-68. In other cases, such as *Teamsters Local 703* and *Auto Workers Local 365, supra*, the membership approved the contracts despite the union leaders' opposition. As I noted earlier, in the *Long Island Day Care* decision, the ALJ and Board rejected the General Counsel's allegation that the company president violated the duty to bargain in good faith by opposing the negotiated agreement to her board of directors. The ALJ found that the company had not made any agreement binding the president to supporting the contract, and the judge went on to state: "I cannot imagine how such an alleged commitment could be enforced." 303 NLRB at 129. In *Sierra Publishing*, the union did make specific commitments to "recommend unreservedly" the proposed contract and to conduct the vote by a specific date. 296 NLRB at 477 (concurring opinion). In emphasizing the extraordinary nature of the union's agreement, the Chairman noted that "this required the bargaining agents to 'sell' an unpopular proposal, thereby putting them in a posture that they would normally not be

expected to assume." *Id.* at 481.

NLRB precedent can thus be summarized as follows: when a collective bargaining agreement is negotiated subject to ratification, a union is obligated to promptly present the agreement to its membership for ratification, but it is not required to recommend approval of the agreement. Furthermore, in the numerous instances when unions have actively opposed agreements which they have presented to their memberships for a vote, the Board has never even suggested that the unions acted in bad faith.

The parties in this case all agree that the Authority has never decided a case like this, but the FAA asserts that the Authority "tacitly acknowledged the issue" in *Norfolk I*, and that it "got closer" in *Griffiss*. FAA's Post-Hearing Brief at 15. In *Norfolk I*, the union and agency negotiated a CBA, but the union apparently never attempted to have it ratified; three months later, the union sought a different grievance procedure and demanded that negotiations be reopened on this point. In holding that the agency had no duty to negotiate further, the Authority said that the union's failure to even attempt to obtain membership ratification did not revive the agency's duty to bargain. 9 FLRA at 37. Contrary to the FAA's assertion, the facts of *Norfolk I* do not indicate whether the agency knew during negotiations that any agreement was subject to ratification, and there certainly was no finding that ratification was a condition precedent. While the Authority's decision suggests that it considered the union remiss in failing to even attempt ratification, this demonstrates nothing more than what I have already summarized from private sector law: if ratification is required for an agreement to take effect, then part of the duty under section 7114(b)(5) to "take such steps as are necessary to implement" the agreement is the duty to submit it for ratification.

The facts of the *Griffiss* case have some similarities to our own, and the agency there tried to raise the same issue that the FAA asserts. The union's membership in *Griffiss* rejected a proposed CBA, and the agency defended its refusal to reopen negotiations by claiming that the union had "torpedoed" the ratification by opposing it. The ALJ allowed the agency to offer evidence on this point, and he subsequently found that the union leaders told members the contract was "good." As a result, the judge did not need to resolve the legal issue of whether the "ratification process is subject to a good faith standard". 25 FLRA at 596-97. The Authority affirmed the judge's decision without explanation.

Thus it is quite clear that the judge was expressing no opinion on the extent of a union's obligations during ratification; if anything, his citation to *NLRB v. M&M Oldsmobile, Inc.*, 377 F.2d 712 (2nd Cir. 1967), suggests approval of the NLRB rule that ratification is a purely internal union affair. The FAA is correct in saying that *Griffiss* is the closest the Authority has come to addressing the issue that is squarely raised in our case. Unfortunately, however, it does not offer us any guidance on how the Authority would resolve the issue.

I have already noted that it is common in the private sector for unions to actively oppose a tentative contract which it submits to its membership for ratification. The lack of FLRA precedent should make it clear that the practice is quite rare in the Federal sector. Although the reasons for this cannot be determined from our record, I would suggest that at least one significant reason for the contrast is the presence, in the Statute, of provisions for binding third-party resolution of impasses by the Panel. In the private sector, when parties reach an impasse, they must resort to economic force to exert leverage; but the availability in the Federal sector of the Panel, and the statutory prohibition against strikes, offer unions little incentive or opportunity to resort to such a strategy as PASS pursued here. However, o ne conspicuous difference between this case and most Federal labor disputes is the unique system of impasse resolution that exists at the FAA: specifically, as the labor relations provisions of title 49 have been interpreted and applied by the FAA,[13/] those provisions "divest the Panel of jurisdiction over collective bargaining disputes between the FAA and its unionized employees" and permit the Agency to implement its final contract proposals unless Congress affirmatively acts to stop it from doing so. PASS, of course, is still prohibited from striking, but if the Agency's reading of the law is correct, the Union cannot even hope for assistance from the Panel. While I am not called upon to resolve the parties' competing interpretations of title 49, it is apparent that PASS's bargaining strategy was a response to the FAA's insistence that it could unilaterally implement its proposals without oversight by the Panel, and an attempt to find some way of convincing the Agency to soften its bargaining demands.

The record in this case leaves no doubt as to the Union's motives and intent, and these were also quite clear to the FAA on and after March 30. This is not a case in which the PASS

[13/] The Agency's position was summarized by the Circuit Court in NATCA v. FSIP, 437 F.3d at 1264.

negotiators promised the Agency negotiators, or even led them to believe, that the Union was in agreement with the proposals they accepted on March 30. Up until the caucus in the middle of the March 30 bargaining session, the Union team had strongly opposed most of the Agency proposals, and agreement had been reached on only a small number of relatively minor issues. When the Union returned from the caucus and accepted the Agency's package *in toto*, Derby told Valenti that the Union would not be supporting the package, and he handed Valenti a letter (G.C. Ex. 4) which said that "we will not be in a position to support this agreement during the ratification process."

The Union was seeking to make a show of political force to the FAA by demonstrating to the Agency that its work force was resoundingly against the Agency's contract proposals. This is precisely what private sector unions have done in cases like the ones I cited earlier: they hope to marshall the support of the largest possible number of employees to show management that the union negotiators are not out of touch with their members and that management's demands risk angering the entire work force. If the membership votes down the contract (as they did in *White Cap and Ackley*, for instance), then a "message" has been sent to management that the union and employees are united against it. But the strategy poses significant risk to the union as well: if the membership approves the contract over the union's objections (as they did in *Teamsters Local 703* and *Auto Workers Local 365*), then the union has been severely weakened politically and the members are "stuck" with a contract that the union negotiators considered unacceptable. When the membership ratifies an agreement, the Union cannot return to the bargaining table or refuse to execute the contract. This risk was particularly severe in the instant case, because the Union implemented its strategy at a relatively early stage of the bargaining, when the FAA had not significantly modified most of its economic, benefit and management rights proposals.

The risk of the Union's strategy was even more extreme in this case than in the private sector cases, first because the Union did not have the option of striking, as private sector employees can. Furthermore, even if the Union was successful in convincing its membership to reject the contract, the Union was risking the FAA responding by implementing its contract proposals after July 21, and after submitting the proposals to Congress, as it had done for the 11 NATCA bargaining units in 2005. PASS knew from the 2005 experience that this was no idle threat. And unlike the situation with NATCA, the PASS

and FAA negotiators in the instant case were operating under ground rules that established a termination date of July 21. Although Union President Brantley apparently harbored the view (more accurately, the hope) that the FAA could not implement the contract after the membership rejected it, because the parties were not actually at impasse at that point (Tr. 161-62), he also recognized that the FAA had been steadfastly insisting during bargaining that it would be free to pursue "whatever course of action is legal" at the end of bargaining (Tr. 161).

More compelling to me than Mr. Brantley's personal assessment of the Agency's legal options is the Authority's decision in *Norfolk II, supra*. In that case, the Panel had ordered the parties to negotiate for 30 days, after which any unresolved issues would be submitted to binding arbitration. Although a tentative agreement was reached, the union membership rejected ratification and the union sought to reopen negotiations. Under the normal rules articulated in the *Griffiss* and *Census* decisions, the agency would have been required to resume negotiations, but the Authority held in *Norfolk II* that the Panel's order of binding arbitration after 30 days took precedence, and the agency was not obliged to negotiate further. 13 FLRA at 576-77. The instant case is quite similar: the Panel established a termination date of July 21 for bargaining, although "[t]he parties remain free to mutually agree to an extension of the collective bargaining timetable if they believe that is useful." Arbitrator's Opinion and Decision at 4 (G.C. Ex. 2). Thus, while the Union may have hoped that a resounding vote against ratification would motivate the FAA to return to the bargaining table in a more conciliatory mood, by allowing the ratification process to continue until August 3, PASS was running the distinct risk of losing its window for further bargaining and of having the contract imposed on it.

Both the General Counsel and the FAA accuse the Union of seeking to evade the Panel's imposition of a July 21 bargaining deadline and of unreasonably delaying the bargaining.[14/] I do not find that such a conclusion is warranted by the facts of this case. Although the Union clearly had opposed having an imposed termination date for the negotiations, and it felt that more time would be necessary than what the Panel had allotted, I believe the Union's decision to accept the FAA's proposal on March 30, rather than some date closer to July 21, was motivated at least in part by

[14/] It should be noted, however, that the General Counsel did not allege a violation of section 7116(b)(6) in the complaint.

its hope to obtain a membership vote and to return to the bargaining table in advance of July 21. That timetable was delayed slightly by the difficulties of disseminating information to a membership spread out across the country and by the Agency's refusal to allow PASS to conduct briefings with employees on official time, contrary to the Agency's past practice. However, even with the protracted ratification process, the Union announced the results of the vote on August 3, roughly two weeks after bargaining was supposed to end. And while the Union certainly hoped that the Agency might respond to the ratification vote by returning the bargaining table, PASS had no assurance that this would occur, or that even a temporary extension of the bargaining period by the Agency would not be followed by a unilateral submission of the Agency's proposals to Congress. There is no basis for finding that the Union's ratification campaign could force the Agency to continue bargaining after July 21 any longer than it wanted, or that it was a tactic "designed to hinder, rather than foster, negotiations". *U.S. Department of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 FLRA 524, 533 (1990).

As the Authority held in *Wright-Patterson, supra* at 531, the totality of the circumstances in a case must be considered in evaluating whether a party has fulfilled its statutory bargaining obligations. In the case at bar, I conclude that the Union demonstrated at all times a "sincere resolve to reach a collective bargaining agreement" with the FAA, as it is required under section 7114(b)(1). The Union's statements to members and to the public during the ratification campaign consistently emphasized its hope that a "no" vote would "send PASS and the FAA back to the bargaining table" and that "FAA will learn a lesson and approach the next round of negotiations with the intention of . . . securing a contract that is beneficial to all parties involved." G.C. Ex. 5; *see also* G.C. Ex. 11 at 3, G.C. Ex. 12 at 5. While the Union leaders also urged members to lobby Congress to amend the collective bargaining provisions of title 49, the literature never suggested that rejecting ratification was a way of delaying negotiations indefinitely, or until a better law was enacted. G.C. Exs. 9, 12. Thus the strategy of accepting the Agency's proposals and urging the membership to reject them was designed not to avoid reaching an agreement, but rather to enable the Union to return to the bargaining table in a better strategic position. It was the functional equivalent of a private sector union rejecting a company's offer but agreeing to submit the offer to its membership for approval or rejection. While the PASS negotiators may have said that they

"accepted" the FAA's proposals, rather than saying that they would simply submit them to the membership, this is a distinction without a difference. PASS made it perfectly clear to the FAA on and after March 30 that the proposals were unacceptable, but they wanted the FAA to hear this message from the employees as well as from the negotiators.

In *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960), the Supreme Court held that a union did not negotiate in bad faith by resorting to work slowdowns in the midst of contract negotiations. The Board had found that the slowdowns were "harassing tactics . . . for the avowed purpose of compelling the company to capitulate to its terms" and were "the antithesis of reasoned discussion it was duty-bound to follow." 361 U.S. at 482. Disagreeing, the Court noted that collective bargaining under the NLRA was not structured to be "an academic collective search for truth . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system" created by the NLRA. *Id.* at 489. Then in *NLRB v. Katz*, 369 U.S. 736 (1962), the Court held that in some circumstances the use of economic force can violate the party's duty to bargain. Seeking to strike a balance between these competing forces of bargaining and economic pressure, the NRLB summarized the law by stating that economic pressure is permitted only when it is used "as a device to further, rather than destroy, the bargaining process." *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1389 (1996), *quoting Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1981). This philosophy is reflected in the Authority's own language in *Wright-Patterson*, 36 FLRA at 533.

Having invoked these decisions regarding the use of economic force, I hasten to note that many of the forms of economic force that are lawfully used in the private sector are not permitted in the Federal sector. And when the Court in *Insurance Agents* endorsed the limited use of economic pressure, it framed it in terms of a collective bargaining system "where the Government does not attempt to control the results of negotiations". 361 U.S. at 488. For the most part, the Federal system of collective bargaining, as embodied by the Statute, is one in which the results of negotiations <u>are</u> controlled, namely through the Panel. I do not consider it a coincidence that in the bargaining environment of this case, where the FAA has interpreted and applied its unique bargaining statute to deprive the Panel of jurisdiction to resolve bargaining disputes, one of its unions has sought to resort to a form of force: not economic, but political force,

through the vehicle of a vote of its members on the Agency's proposals. This may not have been the academic exercise of reasoned discussion that the FAA hoped for, but then neither was its threat to submit its final proposals to Congress and implement them without permitting resolution by the Panel. The FAA may be correct in its interpretation of title 49, but such an interpretation invited a response by the Union, and the Union's response in this case appears to me to be entirely lawful.

I cannot agree with the G.C. or the Agency that the Union's actions were, in the terms of *Erie Resistor*, "inherently destructive" or undermined the bargaining process. 373 U.S. at 228. Clearly, the use of membership ratification is not an action that the Authority condemns in any way; our case law clearly endorses it. The G.C. and FAA seem to argue that because the ratification process extended beyond the July 21 termination for bargaining set by the Panel, the Union was seeking to defy or evade the Panel's ruling, thus "undermining" the bargaining process. But as I have already noted, the Union's actions did not deprive the Agency of its ability to take whatever steps it considered necessary in the absence of an agreement. The Agency certainly was free to resume bargaining with the Union after July 21, but it was not obligated to, and it had already noted its willingness to submit its proposals to Congress and then implement them. It could also have chosen to modify its earlier position in the *NATCA v. FSIP* case and to submit itself to the Panel's impasse resolution procedures, as it had done earlier in this case with regard to the ground rules. Indeed, the rationale of *Norfolk II*, 13 FLRA at 576-77, would suggest that when the Panel has imposed a ground rule, parties should return to the Panel when they have a problem, unless a violation of section 7116(a)(6) or (b)(6) is alleged. If the FAA believed that it was not subject to the Panel's jurisdiction, then it was free to resort to the procedures available to it under title 49.

By submitting the FAA proposals to a protracted ratification vote and then hoping to return to the bargaining table, PASS did indeed delay the bargaining process. The Board has noted that lawful bargaining tactics may, by their nature, result in delaying the process; by itself, however, this does not make the tactic unlawful. *Paperworkers*, 309 NLRB at 44-45. What was unlawful in *Paperworkers* was a ratification procedure that enabled employees in separate bargaining units to veto a ratification vote by unit employees, not the fact that the process delayed bargaining. *Id.* at 45. No similar, or comparable, unlawful purpose on the

Union's part has been shown in this case.

IV.

Up until now, I have avoided discussing the issue of free speech that the Union has raised as an affirmative defense of its actions. Based strictly on the duty of a union and an agency to bargain in good faith, as that duty has been interpreted by the Authority and the NLRB, I conclude that PASS met its statutory obligations under sections 7114(b) and 7116(b)(5). It is therefore not necessary for me to resolve the constitutional issues that the Union raises and the other parties seek to rebut.

If the Union's conduct were found to violate the duty bargain in good faith, however, it would be necessary to address those questions, and I do not believe that the Union's constitutional concerns can be easily dismissed. As an initial matter, section 7116(e) of the Statute provides that the expression of personal views and opinions in a manner that contains no threat of reprisal or force or promise of benefit shall not constitute an unfair labor practice. The Authority has interpreted the legislative history of section 7116(e) to apply to noncoercive statements made by union as well as agency officials. *Tinker AFB,* 6 FLRA at 160-61. The Board has held that employees are protected under the NLRA when they oppose the ratification of a contract, and that such employees do not lose their protection simply because they hold a union position. *London Chop House, Inc.*, 264 NLRB 638, 639 (1982). An examination of the allegations in the original and amended complaints in this case, as well as the testimony at the hearing, confirms that the essence of the General Counsel's case is that the Union violated the Statute because it "employed a campaign to convince the members to vote against ratification of the tentative agreement." G.C. Ex. 1(i), para. 20. In its opening statement, citing the adage about shouting "fire" in a crowded theater, counsel for the G.C. asserted: "Speech can be unlawful because it is effective." Tr. 17. It is therefore evident that it was the campaign speech itself that constitutes the unlawful act being alleged, and this inevitably treads on the territory of section 7116 (e).

In *Letter Carriers v. Austin, supra*, 418 U.S. at 278-82, the Supreme Court held that speech in a labor dispute (even speech considered libelous under state law) is protected by Section 7 of the NLRA and Section 1 of the Executive Order which preceded our Statute, and it applied the same test of

malice as it had used in constitutional free speech cases such as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The FAA is correct in asserting that the statutory and constitutional protections of free speech do not immunize a person or an organization when speech and literature are simply the means by which an unlawful act or purpose is carried out; *Giboney, supra*, 336 U.S. 490 (1949). But in the case at bar, the Union's speech and literature were the essence of the unlawful act being alleged, and the only unlawful purposes attributed to PASS's conduct are delay and avoidance of reaching an agreement, both of which I have found to be unproven. Thus, it seems to me that the General Counsel's underlying allegations would confront serious statutory and constitutional obstacles, requiring considerably more justification than a passing analogy to shouting "fire".

For all of the reasons stated above, I conclude that the Respondent did not violate its duty to bargain in good faith, or otherwise commit an unfair labor practice, by engaging in its campaign to defeat ratification of the proposed contract. I therefore recommend that the Authority issue the following order:

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, DC, July 31, 2007.

RICHARD A. PEARSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. WA-CO-06-0356, were sent to the following parties:

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Dated: July 31, 2007
Washington, DC