United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of DEPARTMENT OF HOMELAND SECURITY U.S. CUSTOMS AND BORDER PROTECTION WASHINGTON, D.C. and NATIONAL TREASURY EMPLOYEES UNION	Case No. 07 FSIP 108

DECISION AND ORDER

The Department of Homeland Security (DHS), U.S. Customs and Border Protection, Washington, D.C. (Employer, CBP or Agency), 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 National Treasury Employees Union (Union or NTEU).

Following an investigation of the request for assistance, arising from bargaining over ground rules for the negotiation of the parties' first master collective-bargaining agreement (CBA), the Panel determined that the dispute should be resolved through an informal conference with Panel Member Grace Flores-Hughes, who would chair the proceeding, and Panel Member Barbara Bruin. The parties were advised that, should any issues remain at impasse after the conference, the Panel would consider the parties' final offers and take whatever action it deems appropriate to resolve the matter. Pursuant to the Panel's procedural determination, the parties met with the Panel Members on November 28, 2007, in the Panel's offices in Washington, D.C. Although the parties were able to resolve several items, at the close of the informal conference a number of key issues remained. Thereafter, the parties submitted their final offers and summary statements of position to the Panel which now has considered the entire record.

BACKGROUND

CBP's mission is to prevent terrorists and terrorist weapons from entering the United States. It also is charged with the interdiction of drugs and other contraband, and the prevention of individuals from illegally entering the country. The Union represents a newly-consolidated nationwide unit consisting of approximately 21,000 Customs and Border Patrol Officers and other employees in various support staff positions, at grades GS-5 through -12.[1/] Until a master CBA between the Union and CBP is effectuated, the parties generally are following the provisions of the agreements that existed between the unions and the legacy agencies that pre-dated the creation of DHS.

ISSUES AT IMPASSE

Essentially, the parties disagree over the following ground rules issues: (1) official time for Union chapter representatives to attend a session with the Union's bargaining team; (2) matters that may delay negotiations; (3) assistance from a third-party neutral throughout contract bargaining; (4) payment of travel and *per diem* expenses for the Union's bargaining team; (5) Union ratification of the contract and Union challenges to the legality of Panel-imposed contract provisions; (6) implementation of articles from the prior Customs Service and NTEU contract while the parties are bargaining over their first CBA; and (7) the duration of the ground rules agreement.[2/]

1/ The Federal Labor Relations Authority (FLRA) certified the Union as the exclusive representative of the consolidated unit on May 18, 2007. The unit consists of employees from other bargaining units within the former U.S. Customs Service, the Immigration and Naturalization Service, and the Department of Agriculture, Agriculture Quarantine and Inspection Service.

2/ The complete text of the parties' proposals are attached as Appendix A (Union) and Appendix B (Employer).

POSITIONS OF THE PARTIES

1. Official Time

a. The Union's Position

The Union proposes that the Employer authorize 20 hours of official time, plus reasonable travel time, for each of four Union representatives from its chapters to attend a nationwide session with Union bargaining team members.[3/] In support of its proposal, the Union contends that, in the past, the Customs Service authorized official time for 250 chapter leaders to attend a training conference in the spring to review work-related issues. There is no demonstrated need to change the practice and, in fact, there is a greater need for it since the Union now represents a much larger and more diverse group of employees. Thus, Union chapter representatives should be permitted to "dialogue with one another" to understand the decisions to be made at the bargaining table. Furthermore, official time for such a meeting would help the Union obtain consensus among those it represents, thereby making more likely the ratification of any tentative agreement negotiated by the Union's bargaining team. Since the Employer refuses to provide the Union with its proposals for contract bargaining until only a few days prior to the commencement of negotiations, the Employer effectively has denied the Union any alternative opportunity to use other gatherings of CBP Union representatives to accomplish this task. The official time would be used to prepare the Union's bargaining positions and not for internal Union business. The Union would be willing to provide the Employer with an agenda of the meeting, as it has in the past, to allay any Employer concerns that internal Union business is being discussed. In addition, the Union would pay the travel expenses for the attendees; it seeks only official time from the Employer so employees would not have to use annual leave. Most importantly, the Employer never has objected to the proposal on the basis of cost.

3/ In its final offer, the Union has stated that in the event the Employer agrees to authorize official time for chapter representatives to attend a spring meeting, the Union would not pursue this proposal. There is no indication in the record whether the Employer intends to authorize official time for a spring meeting of Union officials and, if it does, when the authorization would be given.

b. The Employer's Position

The Employer proposes that each of the six Union bargaining team members entitled to official time be granted up to 6 additional hours of official time "during the week immediately preceding each scheduled negotiation session in order to prepare for the pending negotiations." This is an increase from the 4 hours of preparation time it previously offered. As to the Union's proposal, the time it is requesting "does not constitute bargaining preparation" and, as far as can be determined, "has never [] been provided to a federal union through ground rules, much less ordered by FSIP." The Employer also has no guarantee that the official time sought by the Union would be used for bargaining preparation; rather, it may be used for convening a meeting of Union representatives where internal Union business would be discussed. Furthermore, it is inappropriate to look to past practices concerning official time authorized by the Customs Service for Union representatives since that relationship no longer exists; rather, the Union and the CBP are parties to a new bargaining relationship that began on May 18, 2007, and, as such, they have no "history" of authorizing and utilizing official time to convene *en masse* meetings of Union officials. Finally, authorizing official time for more than 200 CBP officers to be away from duty at the same time may adversely affect the Employer's ability to cover work.

CONCLUSIONS

Having carefully considered the parties' positions on this issue, we shall order the adoption of the Union's proposal to resolve the dispute. Official time for Union representatives to convene a meeting to develop positions on contract issues would further the bargaining process, particularly in light of the new diverse bargaining unit that the Union now represents as a result of the Employer-initiated petition to clarify the appropriate unit and exclusive bargaining representative. It is unlikely that allowing approximately 200 CBP officers to utilize official time during the same few days would have any significant effect on the Employer's ability to accomplish its mission given that it has a total complement of over 22,000 employees nationwide. Finally, the agenda of the meeting that the Union will provide the Agency should quell concern that internal Union business may be discussed.

2. **Bargaining Dispute Assistance**

a. The Union's Position

The Union proposes that the parties adopt a "one-stop" dispute resolution process while bargaining the contract. Under this approach, the parties would mutually agree to the selection of a neutral or strike arbitrators from their current national arbitration panel that may include arbitrators from the parties' regional panels. The selected neutral would have the authority to render a binding decision on grievances filed during bargaining, subject to the statutory rights of the parties to appeal such grievance decisions. Furthermore, the neutral would meet with the parties at the end of 5 weeks of unassisted bargaining or, by mutual agreement, at some other time. During this meeting, which would last for 1 week or longer if the parties mutually agree, the neutral would provide mediation assistance in resolving contract provisions and issue a factfinder's report with recommendations on any issues that remain open. If the recommendations are not accepted, either party may submit them to the Panel for its consideration as part of an impasse. The parties would share costs and expenses of the neutral who also would have the authority to settle any disputes about process or procedure that may arise.

According to the Union, the parties have a record of success using this process; it is the same one used by NTEU and the Customs Service since the early 1980s during bargaining over term agreements; each time, use of the process led to a voluntary resolution after only a few months without the need for Panel involvement. The only time when the parties asked the Panel to review the neutral's recommendations, the Panel ordered them adopted.[4/] In contrast, when the Panel imposed ground rules on the parties that did not permit them to use a neutral to mediate and issue a report with recommendations, the bargaining failed to produce a contract.[5/] Because the neutral would be selected from the parties' existing arbitration panels, the designated individual already would have demonstrated familiarity in dealing with matters concerning CBP operations

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4/ Department of the Treasury, U.S. Customs Service, Washington, D.C. and NTEU, Case No. 01 FSIP 153 (June 7, 2002), Panel Release No. 449.

5/ Department of the Treasury, U.S. Customs Service, Washington, D.C. and NTEU, Case No. 02 FSIP 182 (March 11, 2003), Panel Release No. 456.

and detailed knowledge of how ports are run. The Employer has not demonstrated a need to change the parties' long-standing and successful practice of dispute resolution for term contracts and, therefore, it should be used by the parties for this contract. Allowing a neutral to issue a report and recommendations may narrow the issues for the parties and, should the matter come before the Panel, allow it to focus on a smaller number of issues. The proposed process is one that is most likely to lead to a quick resolution of the parties' first term agreement and bring an end to the current situation where the Employer has four different sets of work rules in place for bargaining-unit employees. It also would be faster than a Panel-imposed impasse procedure because the private neutral could do two things the Panel cannot — resolve ULP allegations and pre-schedule when the parties are to conclude bargaining and present the dispute for the neutral's assistance. The Panel also must wait for a dispute to be referred by FMCS before it intervenes. Finally, the proposed one-step dispute resolution process is similar to the one proposed by the Bush Administration in its attempt to design a new labor relations dispute resolution system for DHS.

b. The Employer's Position

The Employer proposes that the Panel order the Union to withdraw its proposal. The parties would rely on the statutory processes in 5 U.S.C. Chapter 71 for dispute resolution during the course of their contract negotiations. In essence, there is no need for a privately-employed neutral to resolve allegations of grievances or ULPs because there already are effective statutory mechanisms to deal with such claims; these processes could be utilized by the parties without additional delay in the bargaining process. Furthermore, NTEU and CBP have never negotiated a term agreement or agreed to use a private neutral to assist in bargaining, so there is no past practice for the Union to invoke in the current circumstances.

The Union's claim that its proposed process would quicken the time it takes for the parties to effectuate a contract also is unfounded. In this regard, when the Customs Service and NTEU used essentially the same process now proposed by the Union, the bargaining process was lengthened substantially, not decreased, taking from 2001 until 2004 to resolve less than a half-dozen issues. Futhermore, contrary to the Union's contention, adding a grievance/advisory arbitration step would serve to delay bargaining because any decision of the neutral still would be subject to *de novo* review by the FLRA. In light of the Union

chief negotiator's vehement position that he will not return to "this Panel" to resolve substantive contract issues, any process that ultimately would place issues before the Panel is unlikely to result in a contract being resolved quickly. Thus, if the Panel orders the adoption of the Union's proposal, it would be directing the Employer to accept provisions which the Union admits it has no intention of complying with and, thereby, effectively establish the neutral as the *de facto* final authority on the parties' labor agreement. In light of the Employer's critical national security mission, it is essential that the contract be resolved by those persons appointed and charged by the President with primary and ultimate responsibility for the resolution of bargaining disputes between Federal agencies and the unions representing their employees.

CONCLUSIONS

After evaluating the parties' positions on this issue, we are not persuaded that the Union has justified the use of a different dispute resolution method than what is provided in the Statute. While parties are free to mutually agree to alternative processes, the imposition of such a process by the Panel when one of them objects to its use is inappropriate. To do so would effectively deny the Employer rights it has under the Statute to pursue mediation through FMCS and utilize the Panel's processes once the parties reach a bargaining impasse. Accordingly, we shall order the Union to withdraw its proposal.

3. Effect Of Unfair Labor Practice (ULP) Charges And Grievances Filed During Bargaining

a. The Union's Position

Under its proposal, Union-filed ULP charges and grievances alleging that its ability to continue bargaining has been harmed by the Employer's conduct would postpone negotiations until a final and binding decision is issued on the matter or the parties mutually agree to continue negotiations. In the alternative, if the parties select a neutral third party to assist them in negotiations, and the allegations are presented to the neutral for resolution, bargaining may not be delayed. The Union asserts that illegal conduct by the Employer during bargaining, e.g., denying the Union requested information, refusing to grant official time to members of the Union's bargaining team, or failing to comply with a key ground rule provision, could unreasonably restrict the Union's ability to bargain and, as such, negotiations would need to be postponed

until a final and binding decision on the ULP charge or grievance is issued. If, however, the parties were to use the services of a neutral during the course of negotiations, that individual would have the ability to issue decisions without interrupting the bargaining process. This alternative approach would avoid delays in concluding negotiations and has been used successfully by the Union in its negotiations with the Internal Revenue Service, the Customs Service, the Federal Deposit Insurance Corporation, and the Department of Health and Human Services, among others. Essentially, the alternative proposal would allow the parties to reach an agreement on a contract faster and avoid the "untenable" situation that currently exists at CBP where management is constrained to apply four sets of work rules to bargaining-unit members. If the parties utilize the services of a neutral, the Union would agree voluntarily to waive its "right" to postpone bargaining while related ULP charges and grievances are resolved so that negotiations could move expeditiously towards resolution and implementation of a contract.

b. The Employer's Position

The Employer opposes the Union's proposal and asks the Panel to order its withdrawal. Its adoption would permit the Union to effectively halt bargaining, for any specious reason, while its ULP charges and grievances are resolved in other forums. The Union could control the pace of negotiations by filing frivolous allegations as a bargaining tactic without any risk of adverse consequences. Under FLRA case law, a party is not entitled to suspend or disregard its bargaining obligations merely because it has not yet received all the information it might wish to have; the ULP forum already provides a mechanism for suspension of bargaining if a union can persuade the FLRA to seek a temporary injunction against an employer because its failure to comply with statutory requirements would cause the union irreparable harm. As to the Union's alternative approach of submitting ULP allegations and grievances to a neutral chosen by the parties, this would not expedite the bargaining process because negotiations would be delayed further if either party appeals the neutral's decision.

CONCLUSIONS

Upon thorough review of the parties' positions on this issue, we shall order the Union to withdraw its proposal. The Union's need for the proposal is speculative and would permit it to unilaterally control the bargaining process by filing

frivolous ULP charges and grievances. While union claims of illegal employer conduct eventually may prove meritorious, they should be addressed through existing statutory mechanisms rather than in a manner that unreasonably alters the balance of power between the parties during negotiations. As to the Union's alternative proposal to allow a designated neutral to resolve ULP charges and grievances while bargaining continues, we have addressed our rationale for rejecting this approach in the preceding issue.

4. Travel and *Per Diem*

a. The Union's Position

The Union proposes that the Employer pay the travel and *per diem* expenses of the six Union bargaining team members during the weeks of unassisted bargaining, up to a cap of $75,000. Thereafter, the Union would be responsible for its own expenses for the duration of bargaining, *e.g.*, for time spent before a private neutral, or before FMCS and the Panel. It is seeking less financial assistance from the Employer than what the Customs Service authorized in 2000 in a prior ground rules agreement where the agency paid 100-percent of Union team members' travel costs. The Employer can well afford to provide the Union with some financial assistance during negotiations in that it has a $9 billion dollar budget and "recently spent $950,000 to advertise on [the] NASCAR [circuit]." Moreover, the Union's proposal is far more reasonable than management's demand that it pay nothing. The Employer should contribute to the Union bargaining team's travel expenses because it, not the Union, wants to bargain a new contract; the Union would be willing to apply the terms of the last CBA between it and the Customs Service to the newly-consolidated unit. Additionally, this is the unit the Employer asked the FLRA to certify as appropriate, so it is only fair that the Employer shoulder the majority of the Union's costs of bargaining a first agreement. The proposal also provides a benefit to management because it establishes an incentive for the Union to reach agreement without the need for impasse assistance before it depletes the travel funds provided by the Employer; once those funds are used, the Union would have to pay all travel costs.

Management's assertions of the Union's ability to pay its own costs for bargaining should not be credited. In this regard, during the informal conference, the Employer attempted to influence the Panel representatives by misstating that the Union receives $600,000 each month in dues from the bargaining

unit. Subsequently, the Employer retracted that claim in writing when the Union's chief operating officer submitted a signed statement to the Panel attesting that the Union received only $95,000 in dues every pay period until May 18, 2007, and $135,972 a pay period thereafter when the FLRA formally certified the Union as the exclusive bargaining representative. Management's position that it pay nothing towards travel and *per diem* costs for Union bargaining team members is merely a tactical measure to place pressure on the Union. At no time has the Employer contended that it is unable to pay these costs or that the payment of travel expenses would harm its ability to accomplish its mission.

b. The Employer's Position

The Employer proposes that each side pay its own travel expenses for its negotiating team members throughout the bargaining process. Bargaining over the reimbursement of travel and *per diem* expenses is a negotiable topic, rather than a mandatory entitlement under the Statute because Congress intended it to be a remedy for labor organizations that have insufficient financial resources. There is no need, however, to level the playing field for the Union because its most recent report to the Department of Labor shows significant liquid assets to enable it to afford underwriting travel expenses for its bargaining team. The Union's "threat" not to participate in negotiations if it runs out of travel funds is not worthy of further consideration. In a previous ground rules impasse, the Panel awarded the Union $15,000 in travel funds for negotiations primarily because the Customs Service had a history of paying some of the Union's bargaining expenses. Now that the Union is bargaining with CBP, there cannot be any reliance on "history" because the parties have a brand new relationship.

CONCLUSIONS

Having carefully considered the record regarding this issue, we shall order that the Employer pay up to $50,000 in travel and *per diem* expenses for the Union's bargaining team. While the Union did not submit documentary evidence to enable an accurate assessment of what the actual cost of bargaining may be, in our view an Employer contribution of up to $50,000 is warranted because negotiations are to take place in a high cost city (Washington, D.C.) for an indeterminate period. In addition, the Employer was the party that sought clarification of the bargaining unit after CBP was created. Thus, we are persuaded that it should share some of the cost savings it

realizes from having to negotiate over only one contract instead of three.

5. Ratification and Severability

a. The Union's Position

The Union proposes that if contract provisions are disapproved during the agency head review process, it should retain the right to "react," including the right to resubmit the contract to its members for ratification before the contract is effectuated. Furthermore, "if the Union decides to challenge the legality of any FSIP-imposed provisions, only those provisions mutually agreed upon may be implemented until the FLRA has ruled on the legality of the FSIP order." In its view, the proposal would promote labor-management stability because, if the Employer is required to recognize that the Union has the right to re-ratify the contract, it may be less likely to disapprove contract terms for frivolous reasons. Under the Union's severability provision, the parties would have the right to mutually agree to implement uncontested provisions, but neither party would be required to do so.

b. The Employer's Position

The Panel should reject the Union's proposed wording because the Statute does not entitle it to the multiple ratification opportunities it seeks, nor is this an accepted practice within the Federal Service. The Union's approach also would only serve to confuse and delay the parties' negotiations. As to the Union's proposal that certain provisions be implemented while others are pending legal challenge, this matter concerns a permissive subject of bargaining that the Employer elects not to negotiate.

CONCLUSIONS

We shall order the Union to withdraw its proposals on ratification and severability. Under FLRA case law, a union may condition the execution of a labor agreement upon ratification by its membership so long as: (1) the employer has notice of the ratification requirement; and (2) there is no waiver of the right by the union.[6/] Therefore, the Union does not need a

6/ *See* Social Security Administration and American Federation of Government Employees, Council 220, AFL-CIO, 46 FLRA 1404 (1993).

ground rules provision to ensure its right to ratification. By extension, if a union has the "right" to multiple ratification opportunities, as the Union posits, a ground rules provision to this effect is also unnecessary. The Union also has failed to demonstrate the need for its proposal on severability.

6. Negotiation Environment

a. The Union's Position

The Union proposes that the parties implement, for a 90-day period beginning on the date the ground rules agreement becomes effective, the following eight articles from the most recent NTEU/Customs Service master CBA: Article 4, Union Rights; Article 5, Employer Rights; Article 31, Grievance Procedure; Article 32, Arbitration; Article 33, Union Representatives and Official Time; Article 34, Access to Facilities and Services; Article 37, Bargaining; and Article 38, Dues Withholding. These provisions would cover the bargaining unit, as certified by the FLRA on May 18, 2007; at the end of the 90-day period, the Employer may elect to unilaterally terminate the "pilot" and return to managing under four sets of working conditions. Furthermore, implementation of the provisions would not serve as a bar to a certification election or petition after the 90 days expires. According to the Union, the proposal, which is similar to one offered by management early on in ground rules bargaining, would allow the parties to operate under an "interim" agreement while they negotiate a comprehensive term agreement. This would benefit both parties, for example, the Employer would be able to manage under only one set of work rules instead of four, and the Union would not have to use four different grievance and arbitration procedures to pursue violations of personnel policies, practices and working conditions. During this 90-day period, the parties also could use what they learn from implementation of the eight articles to guide them in revising the related provisions of the term contract. Finally, because ground rules agreements are "collective bargaining agreements," and the Statute requires that every "collective bargaining agreement" contain a grievance/arbitration procedure, the Panel is required to adopt the Union's proposal or "substitute language." Failure to do so would make its order legally unenforceable, and the parties will have to "resolve this problem" in another forum before bargaining can begin.

b. The Employer's Position

The Union's proposal should not be adopted because the Panel does not have the authority to impose provisions concerning topics that the parties have not bargained to impasse. In this regard, the Employer is entitled to negotiate over the eight articles referenced in the proposal before the Panel can impose them, and this has not occurred. On the merits, the Union's "rather bizarre concept" would create a chaotic situation where the eight articles would apply to the entire bargaining unit for 90 days, at which time the bargaining unit would be moved "to yet another set of newly-negotiated provisions." Thus, managers and employees would have to be trained under one set of work rules and, shortly thereafter, retrained on a different set.

CONCLUSIONS

After carefully examining the parties' positions on this issue, we shall order the Union to withdraw its proposal. The Union has failed to substantiate the need to impose substantive contract terms in a ground rules agreement. Moreover, there is no indication in the record that the parties have negotiated over the provisions the Union wants imposed for a 90-day period, let alone reached an impasse. While the concept the Union proposes may initially have been suggested by the Employer, under the circumstances presented, the adoption of this proposal is unwarranted.

7. Duration

a. The Union's Position

The Union proposes that the ground rules agreement remain in effect for 18 months. If the parties do not reach agreement on an initial CBA by that time, or the Panel has not taken jurisdiction over unresolved articles, either party would be free to propose a new set of ground rules. The Union contends that an 18-month duration clause would provide the parties with a reasonable period of time in which to negotiate and implement a contract and it would keep "pressure" on the parties to reach an agreement. If it should take the parties more than 18 months to reach an agreement, "either party should be permitted to seek a radical change in the ground rules and the newly-elected White House Administration should be permitted to have influence over that decision" through its Panel appointees. Furthermore, even a ground rules agreement is a "collective bargaining agreement"

under the Statute and, therefore, it must have a duration clause. Without one, the agreement could be reopened at any time by either party creating a chaotic bargaining environment. Furthermore, the Panel cannot legally require the parties to accept a ground rules agreement without a duration clause; NTEU would refuse to sign such an agreement and reserves its right not to comply with such a Panel order. Finally, the Employer has not provided any argument or evidence as to why it would be harmed by including a duration clause in the parties' ground rules agreement.

b. The Employer's Position

The Union should be ordered to withdraw its proposal because there is no need for a duration clause. The speed with which negotiations are conducted and completed rarely, if ever, is attributable to parties' ground rules agreements; rather, it is the parties' diligence, good faith and willingness to compromise that moves the bargaining process along. If the parties do not have a contract at the end of 18 months, renegotiating the ground rules is unlikely to "speed things up." To the contrary, halting contract negotiations to revisit ground rules likely would delay progress over reaching a term agreement. More importantly, adding a duration clause to the ground rules is not likely to motivate the Union to bargain because its chief negotiator vehemently stated during the informal conference that the Union will "not return to this Panel under any circumstances." There is also no statutory support for the Union's claim that a ground rules agreement requires a duration clause; rather, a ground rules agreement is not a labor agreement *per se*, but "a mere step in the creation of a labor agreement." Finally, the Employer's research failed to disclose a single Federal sector ground rules agreement that has a duration provision.

CONCLUSIONS

Having carefully considered the parties arguments and evidence on this issue, we shall order the Union to withdraw its proposal. Ground rules agreements in the Federal sector typically do not have duration provisions and generally remain in effect until the parties effectuate a CBA or memorandum of understanding, or mutually agree to reopen them. The Union has failed to demonstrate the need to deviate from this common practice.

ORDER

Pursuant to the authority vested in it by the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7119, and because of the failure of the parties to resolve their dispute during the course of proceedings instituted under the Panel's regulations, 5 C.F.R. 2471.6(a)(2), the Federal Service Impasses Panel under § 2471.11(a) of its regulations hereby orders the following:

1. Official Time

The parties shall adopt the Union's proposal.

2. Bargaining Dispute Assistance

The Union shall withdraw its proposal.

3. Effect of Unfair Labor Practice Charges and Grievances Filed During Bargaining

The Union shall withdraw its proposal.

4. Travel and *Per Diem*

The parties shall adopt the Union's proposal modified to require the Employer to pay travel and *per diem* expenses of six Union bargaining team members during the weeks of unassisted bargaining, up to a cap of $50,000.

5. Ratification and Severability

The Union shall withdraw its proposals.

6. Negotiation Environment

The Union shall withdraw its proposal.

7. Duration

The Union shall withdraw its proposal.

By direction of the Panel.

H. Joseph Schimansky
Executive Director

March 4, 2008
Washington, D.C.

APPENDIX A

NTEU 11/29/07: Last Best Offer

Ground Rules Proposal for 2007 Term Contract Negotiations

(Only those provisions **in bold print** are unagreed as far as the union knows.)

1. Authority. This agreement is entered into pursuant to the provisions of the Federal Service Labor-Management Relations Statute, 5 USC 7101, et. seq. (FSLMR or Statute), and shall serve as the procedural ground rules governing the conduct of term labor agreement negotiations for the creation of a national labor agreement (NLA) between U.S. Customs and Border Protection (CBP or Agency) and the National Treasury Employees Union (NTEU or Union) for the bargaining unit certified on or about May 18, 2007. **Agreed**

2. Bargaining Teams. The union shall be entitled to have six (6) bargaining unit employees present on official time during the conduct of negotiations, including caucuses, on designated bargaining days, unless the parties voluntarily agree pursuant to 5 USC 7131 that more may be present on official time. **Agreed**

   A. Each of those union representatives entitled to the official time described above may also use up to six (6) hours of official time during the week immediately preceding each scheduled negotiation session in order to prepare for the pending negotiations. **Agreed**

   B. **Furthermore, management agrees that the union is entitled under the current NTEU-CBP/Customs contract practices to use 20 hours of official time, plus reasonable travel time, for four officials[1] from each chapter to attend a nationwide session with the NTEU bargaining team. (However, if time is approved for the union's Spring conference on the dates requested and for the number requested, the union will not get the time granted in this subsection.)**

3. Official Time. Bargaining unit members serving on the NTEU team as designated negotiators shall be on official time during the conduct of negotiations, and shall also be permitted to use a reasonable amount of official time for travel to and from bargaining sessions, to the extent such employees would otherwise be in a paid duty status. The agency agrees to adjust the work schedules of designated negotiators to place them in a

[1] They could be from any of the three legacy units or from among the new hires..

duty status during regular negotiation hours and for time spent in travel to and from scheduled bargaining sessions. **Agreed**

4. Scope of Bargaining. NTEU shall provide a complete list of proposals that it wishes to address during negotiations of the NLA to CBP in electronic format (Microsoft Word) within five (5) days of execution of this ground rules agreement or an FSIP Order establishing these ground rules. Within five (5) days of receipt of the NTEU bargaining proposals or the date upon which they are due, CBP shall provide proposals on any additional topics it wishes to raise in negotiations. Within thirty (30) days of the exchange of proposals, the parties shall meet to commence negotiating the national labor agreement. **Agreed**

5. Bargaining Schedule. Within five (5) days of the effective date of this agreement the parties shall a) establish a mutually agreeable schedule for the conduct of negotiations based on meeting a minimum of two (2) weeks for bargaining during every four (4) week period until such time as either agreement or impasse is reached. **Agreed**

   If the parties cannot agree on a schedule, they shall commence bargaining every other week beginning with the first full week that starts after the thirtieth (30^{th}) day following the exchange of proposals or the expiration of the time permitted for the exchange of proposals, or an FSIP Order establishing these ground rules, whichever date occurs soonest. However, if the resulting date or any one of the weeks that would normally be scheduled under this arrangement includes a federal holiday, the parties will skip that week, meet to bargain instead the immediately following week, and adjust subsequent weeks accordingly. **Agreed**

   Notwithstanding this schedule, NTEU reserves any rights it has to postpone bargaining if it alleges in a grievance that CBP has committed an unfair labor practice or violated the ground rules agreement in any way that harms its ability to continue bargaining, e.g., information has been withheld from it and to which it is legally entitled by 5 USC 7114, management has refused to let the union's chosen representative attend negotiations, etc. Bargaining would begin again when the dispute is resolved with a final and binding decision or by mutual agreement. However, if the dispute can be presented to the neutral mentioned below as part of the impasse process, bargaining may not be delayed and those disputes will be addressed and remedied by that neutral using the powers given an arbitrator by statute and the parties' collective bargaining practices, e.g., to issue a final and binding decision on the grievable issues.

   Generally, negotiations shall be conducted on a Monday through Friday schedule, between the hours of 9:00 a.m. to 4:30 p.m. on Tuesdays

through Thursdays, and from 1:00 p.m. to 4:30 p.m. on Mondays and 9:00 a.m. until 12:00 noon on Fridays, unless otherwise mutually agreed. Travel shall normally be accomplished on Mondays and Fridays. **Agreed**

6. **Bargaining Dispute Assistance. Given the potential impact that ground rule grievances and unfair labor practice allegations can have on pre-scheduled negotiations, and given the historical benefit a private neutral has been to the parties by greatly narrowing the issues that must go before the FSIP for resolution, the parties agree to the following:**

   A. **Any NTEU unresolved grievance related to the conduct of the term bargaining that in any way harms its ability to continue bargaining may presented to the private neutral to address during any med-arb process as part of a "one-stop" dispute resolution mechanism. The neutral's decision on the grievance will be a binding decision pursuant to the authority under the statute and the parties' collective bargaining practices.**

   B. **If the parties cannot mutually select a private individual to serve as a med-arb[2] neutral, they will flip a coin and alternately strike arbitrators from their current national arbitration panel until one name is left. That person will serve as the neutral under this process or, if he or she declines, the previously struck person. However, if either party insists, they will each add to the national panel list the names of three neutrals currently used on their regional arbitration panels and again strike to identify the selectee. This will occur by the end of the first week of bargaining so that the neutral can be pre-scheduled to avoid any bargaining delays.**

   C. **The private neutral will meet with the parties if they have not reached agreement at the end of five weeks of unassisted bargaining, or by mutual agreement some other date. The meeting shall last no more than one week, after which the neutral will issue a fact-finder's report with recommendations on all unagreed issues. The length of the neutral's meeting may be extended by mutual agreement.**

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[2] **We use the term "med-arb" here only to describe a process of mediation, fact-finding, and a report on those facts that includes a written non-binding recommendation to the parties.**

D. **The neutral's recommendations may be taken to the FSIP for further intervention.**

E. **The parties will share costs equally for any of the neutral's activity described above, and the neutral will settle any disputes about process or procedure that the parties may have about how to present disputes to him or her.**[3]

7. Location and Expenses. Bargaining shall be conducted within the Washington, D.C. offices of the CBP. **Agreed**

8. **Travel and Per Diem. Management will pay all reasonable travel and per diem costs of the six union team members for the weeks of unassisted bargaining up to a cap of $75,000. for the bargaining. The union will pay its own costs for the duration of the bargaining after that point, e.g., for time spent at FSIP or in med-arb.**

9. Agreement Status and Severability. Any and all agreements reached at the bargaining table are tentative only to the extent allowed by law. The parties will address the questions of severability for non-negotiable and disapproved provisions as part of their term negotiations. **Agreed**

   A. **If provisions are disapproved, the union retains all its rights to react, including the right to submit the contract to its members once again for ratification before it is implemented.**

   B. **If the union decides to challenge the legality of any FSIP imposed provisions, only those provisions mutually agreed upon may be implemented until the FLRA has ruled on the legality of the FSIP order.**

10. **Negotiation Environment. In order to permit the parties to focus on the negotiation of this new agreement with a minimum number of distractions and to at least partially relieve managers of the burden of managing under four different sets of working conditions, the parties will extend unit-wide on a pilot basis the provisions of the current NTEU-Customs contract found in the following articles: Article 4: Union Rights; Article 5: Employer Rights; Article 31: Grievance Procedure; Article 32: Arbitration; Article 33: Union Representatives and Official Time; Article 34: Access to Facilities and Services; Article 37: Bargaining; Article 38: Dues Withholding. The unit wide-bargaining unit is described in the May 18, 2007 Certification of Representation issued by the Federal Labor Relations Authority in Case No. WA-RP-04-0067.**

This will be done on the date this agreement is effective. Those provisions will remain in effect for at least 90 calendar days and in not serve as a bar to a certification election or petition after that date. The parties may use what they learn from implementation of these provisions to guide them in revising the related provisions of the term contract. After the 90th day, management may unilaterally decide to terminate this pilot and return to managing under four sets of working conditions.

11. Nothing in this agreement is intended to lessen the employer's obligation to comply with all applicable laws, rules and its own regulations. Similarly, nothing herein changes its statutory obligation to continue the practices established by the three previous collective bargaining agreements until it has served notice on NTEU and negotiated. **Agreed**

12. **Duration. This agreement shall stay in effect for an 18 month term. If agreement is not reached by that time or FSIP has not taken jurisdiction, either party is free to propose a new set of ground rules.**

_____ _____

For CBP **Date**

_____ _____

For NTEU **Date**

APPENDIX B

U.S. Customs and Border Protection
Last, Best Offer
For Ground Rules
11/29/07

Key: Provisions that have been agreed upon are reflected below in Times New Roman black, while CBP's last, best offer on disputed issues are presented in **bold, 14 Times New Roman text.**

1. **Authority.** This agreement is entered into pursuant to the provisions of the Federal Service Labor-Management Relations Statute, 5 USC 7101, et seq. (FSLMR or Statute), and shall serve as the procedural ground rules governing the conduct of term labor agreement negotiations for the creation of a national labor agreement (NLA) between U.S. Customs and Border Protection (CBP or Agency) and the National Treasury Employees Union (NTEU or Union) for the bargaining unit certified on or about May 18, 2007.

2. **Bargaining Teams**. The Union shall be entitled to have six (6) bargaining unit employees present on official time during the conduct of negotiations, including caucuses, on designated bargaining days, unless the parties voluntarily agree pursuant to 5 USC 7131 that more may be present on official time.

   Each of those union representatives entitled to the official time described above may also use up to six (6) hours of official time during the week immediately preceding each scheduled negotiation session in order to prepare for the pending negotiations.

3. **Official Time.** Bargaining unit members serving on the NTEU team as designated negotiators shall be on official time during the conduct of negotiations, and shall also be permitted to use a reasonable amount of official time for travel to and from bargaining sessions, to the extent such employees would otherwise be in a paid duty status. The Agency agrees to adjust the work schedules of designated negotiators to place them in a duty status during regular negotiation hours and for time spent in travel to and from scheduled bargaining sessions.

4. **Scope of Bargaining.** NTEU shall provide a complete list of proposals that it wishes to address during negotiation of the NLA to CBP in electronic format (Microsoft Word) within five (5) days of execution of this ground rules agreement **or an FSIP Order establishing these ground rules.** Within five (5) days of receipt of the NTEU bargaining proposals **or the date upon which they are due**, CBP shall provide proposals on any additional topics it wishes to

raise in negotiations. Within thirty (30) days of the exchange of proposals, the parties shall meet to commence negotiating the national labor agreement.

5. **Bargaining Schedule. Within five (5) days of the effective date of this agreement the parties shall a) establish a mutually agreeable schedule for the conduct of negotiations based on meeting a minimum of two (2) weeks for bargaining during every four (4) week period until such time as either an agreement or impasse is reached.**

   If the parties cannot agree on a schedule, they shall commence bargaining every other week beginning with the first full week that starts after the thirtieth (30^{th}) day following the exchange of proposals or the expiration of the time permitted for the exchange of proposals, or an FSIP Order establishing these ground rules, whichever date occurs soonest. However, if the resulting date or any one of the weeks that would normally be scheduled under this arrangement includes a federal holiday, the parties will skip that week, meet to bargain instead the immediately following week, and adjust subsequent weeks accordingly.

   Generally, negotiations shall be conducted on a Monday through Friday schedule, between the hours of 9:00 a.m. to 4:30 p.m. on Tuesdays through Thursdays, and from 1:00 p.m. to 4:30 p.m. on Mondays and 9:00 a.m. until 12:00 noon on Fridays, unless otherwise mutually agreed. Travel shall normally be accomplished on Mondays and Fridays.

6. **Location and Expenses.** Bargaining shall be conducted within the Washington, D.C. offices of the agency.

7. **Travel and Per Diem. Each party shall be responsible for payment of travel and per diem expenses for its own representatives.**

9. **Agreement Status.** Any and all agreements reached at the bargaining table are tentative only to the extent allowed by law. The parties will address the questions of severability for non-negotiable and disapproved provisions as part of their term negotiations.

10. Statutory Obligations. Nothing in this agreement is intended to lessen the Employer's obligation to comply with all applicable laws, rules, and its own

regulations. Similarly, nothing herein changes its statutory obligation to continue the practices established by the three previous collective bargaining agreements until it has served notice on NTEU and negotiated.

For CBP

For NTEU