

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: June 27, 2003

TO: The Federal Labor Relations Authority

FROM: ELI NASH
Chief Administrative Law Judge

SUBJECT: DEPARTMENT OF HOMELAND SECURITY
BORDER AND TRANSPORTATION
SECURITY DIRECTORATE, BUREAU OF
CUSTOMS AND BORDER PROTECTION
WASHINGTON, D.C.

Respondent

AND

Case No. WA-CA-02-0189

NATIONAL TREASURY EMPLOYEES UNION

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 transcript, exhibits and any briefs filed by the parties.

Enclosures

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

DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION WASHINGTON, D.C. Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. WA-CA-02-0189

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/her 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 **JULY 28, 2003**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, Suite 201
Washington, DC 20424

ELI NASH
Chief Administrative Law Judge

Dated: June 27, 2003

Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF HOMELAND SECURITY BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION, WASHINGTON, D.C. Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. WA-CA-02-0189

Philip F. Carpio, Esquire
For the Respondent

Gary J. Lieberman, Esquire
Laurie S. Houle, Esquire
For the General Counsel

Before: ELI NASH
Chief Administrative Law Judge

DECISION

Statement of the Case

On July 18, 2002, the Regional Director for the Boston Region of the Federal Labor Relations Authority (herein called the Authority), issued a Complaint and Notice of Hearing in the captioned matter. This proceeding was initiated by an unfair labor practice charge filed on December 27, 2001, by the National Treasury Employees Union (herein called the Union or NTEU). The Complaint alleged that the Department of the Treasury, U.S. Customs Service, Washington, D.C. (herein called Customs Service or

Respondent)1 violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (herein called the Statute) by implementing a change in the policy concerning in-stream/midstream boardings of vessels without providing the Union with prior notice and an opportunity to bargain. More precisely, the complaint alleges that the Respondent amended its National Vessel Entry and Boarding Policy by requiring authorization prior to conducting in-stream/midstream boardings and limiting such boardings to extraordinary circumstances.

A hearing was held in the captioned matter in Washington, D.C. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Respondent and the General Counsel submitted post hearing briefs which have been fully considered.²

Findings of Fact

The Union holds exclusive recognition for a nationwide bargaining unit consisting of some professional and all non-professional employees of the U.S. Customs Service. That bargaining unit includes approximately 7,000 Customs

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Subsequent to the hearing in this case, the General Counsel submitted a motion pursuant to §§ 2423.23 and 2429.5 of the Federal Labor Relations Authority's Rules and Regulations that I take official notice of the organizational and name change of Respondent. The motion, which is unopposed, is, hereby, granted. I take official notice that effective March 1, 2003, the name of the Respondent changed from U.S. Department of the Treasury, U.S. Customs Service to Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection. The case caption has been changed to reflect the current name of the Respondent.

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Prior to the hearing in this case, Respondent filed a motion for summary judgment asserting that there were not material facts in dispute. I denied that motion at the outset of the hearing. In its post-hearing brief, Respondent "reiterates the arguments in its Motion for Summary Judgment" that it is entitled to a judgment as a matter of law. To the extent that Respondent has renewed its motion for summary judgment, I deny the motion. I find that there are facts in dispute. In particular, the parties dispute whether by a directive issued in October 2001 Respondent changed its policy with respect to in-stream/midstream boarding and, if so, the extent of the impact on bargaining unit employees.

inspectors. A collective bargaining agreement covering that unit expired in 1999; however, the parties continue to operate under it as "an expired agreement."

Customs inspectors are responsible for enforcing various laws relating to entry into the United States. Such entry can occur at airports, seaports and land border crossings. Entry procedures at seaports can include Customs inspectors going on board vessels that are entering the United States in order to ensure compliance with the laws and regulations enforced by Customs.³ Among other things, boarding involves reviewing, verifying and completing documents and declarations; interviewing the vessel crew; and scrutinizing the condition of the vessel, crew and any passengers. Boarding is, however, not synonymous with search of the vessel; Customs can conduct a boarding without conducting a search.⁴

Boardings can take place at dockside or in-stream. A dockside boarding, as its name suggests, involves a Customs inspector going on board a vessel that is docked. The terms "in-stream," "midstream," and "anchor" boarding are used synonymously to refer to an operation in which a Customs inspector boards a vessel that is not docked but is reached by and boarded from a launch, water-taxi or other water transport. In an in-stream boarding, the vessel is boarded from the ferrying craft by using either a gangway or Jacob's ladder.

Prior to 1993, Customs inspectors boarded almost every vessel entering the United States. Testimony revealed that although Customs maintains records of the number of boardings conducted each year, those records do not differentiate between in-stream boardings and dockside boardings. From anecdotal evidence provided by witnesses at the hearing, it emerged that the number of in-stream boardings and, for that matter, all boardings have decreased during the last 10 to 15 years. Statistics for each Fiscal Year (FY) during the period 1999 through 2002 submitted

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A vessel's entry at a Customs port can also be accomplished by a vessel agent bringing necessary documents to the Customs house for processing rather than a Customs inspector going on board the vessel.

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Where a search is not initially planned but a Customs inspector sees something suspicious while conducting a boarding, he or she can recommend or request that additional inspectors be sent in and a ship search be conducted. Such searches may result in seizures of contraband.

during the hearing confirmed that the number of all boardings steadily dropped.⁵

Several factors were cited as responsible for the decrease in boardings. One factor cited was Customs Directive Number 5290-006, which was issued September 24, 1991. That directive, which was for the self-described purpose of ensuring that inspection activities were performed in a safe manner, provided that "in-stream boarding of vessels will NOT be done as a matter of course." [Emphasis in original.] (Jt. Exh. 2.) This instruction was reiterated in a memorandum to all Port Directors dated October 2, 1998. What emerged, however, as the major factor in reducing the number of boardings was the passage of the "Customs Modernization Act" in 1993,⁶ which changed previous requirements regarding boarding. The Customs Modernization Act required that Customs board only a "sufficient number of vessels to ensure compliance with the laws it enforces" and, thus, afforded Customs more discretion with respect to the decision of whether to board a vessel. 19 U.S.C. § 1934(b).

In February 2000, Customs issued Customs Directive No. 3120-016, "National Vessel Entry and Boarding Policy." (G.C. Exh. 1; Jt. Exh. 5.) That directive was issued as a result of a joint analysis performed by Customs Service and NTEU in response to the changes in boarding requirements contained in the Customs Modernization Act. That directive noted that vessel boardings were no longer required for all arriving commercial vessels and identified

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The figures for total boardings were: FY 1999--45,358; FY 2000--37,629; FY 2001--23,115; and FY 2002--18,979. In FY 2000 compared to FY 1999, total boardings dropped 17%; in FY 2001 compared to FY 2000, total boardings dropped 39%; and in FY 2002 compared to 2001, total boardings dropped 18%. One witness estimated that in the port of New Orleans, Customs boarded over 90% of arriving vessels prior to the "Customs Modernization Act," which was enacted and signed into law in 1993. The witness testified that, by comparison, this figure was approximately 70-72% in FY 1995; 37% in FY 2000; 28% in FY 2001; and 16% in FY 2002.

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At the trial in this case, the witnesses and documents submitted used the terms "Customs Modernization Act" or the "Mod Act." It appears that the statutory provision to which they were referring is actually Title VI of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, which is entitled "Customs Modernization." In this decision, I will use the term Customs Modernization Act.

four separate categories in which inspectors would continue to board vessels. The first, enforcement boardings, would occur when a vessel was selected by Anti-Smuggling Units/ Contraband Enforcement Teams and others for narcotics or other enforcement operations. The second, compliance measurement boardings, would occur when a vessel was randomly selected for the purpose of measuring compliance with vessel documentation and procedural requirements enforced by the Customs Service. The third, marine targeted boardings, would occur when a vessel was selected based on an analysis of arriving vessels against criteria used to identify which ones were most likely to have discrepancies relating to or violations of Customs regulations and policies. The fourth, service to industry boardings, would occur when a vessel representative requested that a Customs inspector go on board to perform entry procedures in lieu of the vessel agent reporting to the Customs house. A request for a service to industry boarding would be granted only if Customs' resources permitted.

All four categories of boardings can take place either in a dockside or in-stream location and at times that fall within or outside of the regular working hours of Customs inspectors.

More recently, as a result of the events of September 11, 2001, the emphasis in Customs' border operations shifted from interdicting and seizing contraband, such as narcotics, to efforts focused on security and preventing terrorist actions. According to witnesses, this has produced an increased emphasis in seaport operations on inspecting containers and further contributed to reducing the number of boardings. This reduction is in large measure because container inspection requires use of processes different from those historically associated with boarding a vessel. Containers were described as resembling the trailer on the back of a semi. While on board a vessel, containers are stacked four to six high with stacks grouped together and tethered down. Their size and placement prevents effective search while they are on a vessel. Rather, they must be unloaded from the vessel and examined either by using an x-ray process or taking them to a warehouse where contents can be removed for inspection. Both of these inspection processes are conducted by Customs inspectors who operate the equipment associated with the x-ray process or conduct the inspections that occur in warehouses. In container examinations, as contrasted with boardings, the Customs inspectors interact with stevedores and warehouse personnel rather than vessel crews.

The event that is the focus of the complaint in this case occurred on or about October 22, 2001, when Customs Service issued Customs Directive 3120-16A, "National Vessel Entry and Boarding Policy." (Jt. Exh. 6) The only difference between this directive and the directive of the same title that was issued in February 2000, was the addition of a provision that Customs officers would not board any vessel in-stream/midstream unless the Directors, Field Operations, Customs Management Centers, authorized an in-stream/midstream boarding for extraordinary reasons.⁷

Customs Service did not provide advance notice to the Union before issuing the October 2001 Directive. Rather, it provided informational notification by letter dated October 30, 2001. By letter dated November 5, 2001, the Union requested bargaining and that implementation be stayed pending completion of bargaining. Customs Service responded and rejected the Union's request that implementation be held in abeyance but expressed willingness to re-open the National Vessel Boarding Policy. In its response, Customs Service asserted that the directive reflected long-standing policy and had no impact on the conditions of employment of bargaining unit employees other than to increase workplace safety.

Kimberly Nott, who is the Chief of the Manifest and Conveyance Branch of Customs Service and was involved in drafting the 2001 Directive, testified that the concern driving issuance of that directive was employee safety. Nott stated that the earlier instructions that in-stream boardings not be done as a matter of course were not being enforced in a sufficiently strict manner and Customs headquarters issued the 2001 Directive to bring more uniformity to the practice. In her testimony, Nott acknowledged that the "extraordinary reasons" language is

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In relevant part, the directive stated:

7 INSTREAM/MID-STREAM BOARDINGS.

7.1 Customs officers will not board any vessel instream/mid-stream, including those at anchorage. Only for extraordinary reasons may the Directors, Field Operations, Customs Management Centers, authorize an instream/mid-stream boarding. It is then the Boarding Officer's responsibility to determine if conditions on site allow for a safe boarding. Safety of the Customs Inspector is paramount to all other concerns while performing an instream/mid-stream boarding.

different from the "not as a matter of course" language and would probably induce fewer in-stream boardings.

Anecdotal evidence submitted at the hearing in this case confirms that there have been very few in-stream boardings subsequent to the 2001 Directive.

Witnesses testifying for the General Counsel at the hearing identified two principle concerns about the reduction of in-stream boardings. The first involved potential reduction in overtime. The second involved reduction in job satisfaction and skills associated with in-stream boarding.

Evidence submitted demonstrates that one of the principle objectives in assigning inspection overtime is to equalize opportunity for overtime earnings. To accomplish this, an overtime roster is maintained in which employees in each overtime pool are listed in order of the amount of overtime dollars that they have earned so far during the earnings year. As an overtime opportunity arises, absent other relevant considerations, it is offered to the lowest earners first. Individual overtime earnings are capped at \$30,000 per year; however, a waiver may be obtained to exceed the cap.⁸ Also, up to \$15,000 in annual overtime earnings may be counted toward an inspector's income for the purpose of computing his/her annuity. Witnesses testified that some inspectors tend to be consistently among the high earners while others are consistently among the low earners. Witnesses attributed this largely to the personal preferences of the inspectors with respect to their willingness to work overtime. Testimony from supervisory personnel indicated that the need to "draft" inspectors to work overtime in the absence of volunteers was not uncommon.

Many ports of entry that have a seaport also include an airport that handles international flights and, thus, conduct inspection operations at both the seaport and airport. While all inspectors who are normally assigned to the seaport are qualified to perform inspection duties at the airport, the reverse is not as common. What is important to the dispute in this case is that Customs inspectors normally assigned to seaport operations may earn overtime performing inspection activities at the airport.

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Historically, such waivers were rarely granted. An exception occurred during FY 2002 when approximately 392 waivers were granted. This large number was unprecedented and was attributed to activities generated by the events of September 11, 2001.

Although exact figures were not available, it is undisputed that, historically, some but not all of the in-stream boardings were conducted on overtime. Some Customs inspectors appearing as witnesses for the General Counsel testified that a significant amount of their overtime earnings came from in-stream boardings. Those witnesses, who normally worked the seaport, generally expressed a preference for earning overtime in seaport operations rather than airport operations. Although the hourly overtime compensation rates were the same, those witnesses testified that they preferred the type of work performed at the seaport to that performed at the airport. One, Jack Russo, testified that his normal duties were incompatible with working overtime at the airport during the week and that his ability to do so would be limited with rare exceptions to weekends.⁹

At the hearing, no evidence was submitted that showed that anyone's overtime earnings actually dropped subsequent to the issuance of the October 2001 Directive. The General Counsel's witnesses attributed this to an increase in overtime generated by post-September 11 activities. Those witnesses maintained that such activities were coming to an end and in the near future would no longer be a source of overtime opportunity. The Respondent's witnesses testified that any loss in overtime opportunities resulting from reductions in the number of in-stream boardings would be compensated for by opportunities flowing from other Customs' operations, such as at the airports or, in the port of New Orleans, increased emphasis on inspecting cruise ships. Significantly, one witness for the Respondent, Robert Dee Jones, testified that the decision to limit in-stream boardings would have no effect on the overtime budget of a port.

With respect to job satisfaction, the inspectors called as witnesses by the General Counsel expressed a clear preference for working in seaport operations, in general, and performing in-stream boardings, in particular. One, Christopher Gerst, stated that he did not find performing x-ray container examinations as satisfying as performing traditional boardings such as in-stream boardings. Also, the witnesses saw in-stream boardings as an opportunity to operate with a higher degree of independence and exercise more independent judgment than other types of boardings or inspections. The witnesses testified that they feared that their potential for making seizures, which they highly

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Russo acknowledged, however, that the airport was not the only additional source of overtime opportunities available to him.

prized as a source of awards and promotion opportunities, would diminish with the reduction of in-stream boardings. Other witnesses testified, however, that seizures are neither unique to nor more common to in-stream boardings, but can occur during inspections done in other types of boardings, airport operations, and container examinations.

Inspectors testifying for the General Counsel also asserted that the drop in in-stream boardings resulted in a corresponding reduction in the frequency of the human interaction involved in that type of boarding. Although evidence shows that container examinations involve human interaction, it also showed that it is of a different nature than that involved in boardings. As acknowledged by Respondent's witness Robert Galloway, Customs inspectors conducting x-ray examination of containers are more likely to be interacting with stevedores and truck drivers about the logistics of handling containers and their contents rather than asking law enforcement questions of vessel crews.

As to the claims that severely curtailing in-stream boardings will result in loss of skills, the evidence shows that the only skills unique to in-stream boardings as contrasted with dockside boardings are the physical skills involved in boarding one craft from another craft rather than from a dock. At the hearing, Customs inspectors Argent Acosta and Christopher Gerst acknowledged that the job and basic skills required are much the same once on board whether the boarding is done in-stream or dockside.

Analysis and Conclusions

The Positions of the Parties

The General Counsel

The complaint alleged that the Respondent violated section 7116(a)(1) and (5) by changing the practice with respect to in-stream/midstream boarding without affording the Union advance notice and an opportunity to bargain prior to implementation. The General Counsel maintains that for a lengthy period prior to October 2001, Customs inspectors had regularly boarded vessels in-stream/midstream and that this continued to occur despite the issuance of the 1991 Directive and 1998 reaffirmation of that directive. The General Counsel contends that Respondent's action in requiring authorization by the Director, Field Operations, and limiting such boardings to extraordinary reasons significantly curtailed in-stream/midstream boardings and effectively removed a duty from the job function of Customs inspectors. The General Counsel asserts that Respondent's action constituted a change in conditions of employment that had more than a *de minimis* effect on bargaining unit employee.

In support of its claim that the change was more than *de minimis*, the General Counsel asserts it is reasonably foreseeable that once the post-September 11 overtime opportunities end, Customs inspectors will have nothing to replace the major source of overtime opportunity that in-stream boardings afforded. The General Counsel maintains that, potentially, this loss will affect not only the annual income of inspectors but their retirement income as well. The General Counsel disputes the Respondent's claims that other sources will generate sufficient overtime opportunities to compensate for those lost through the curtailment of in-stream/midstream boarding. Furthermore, the General Counsel argues that the restriction of in-stream boarding also deprives Customs inspectors of a major source of job satisfaction and will cause the skill level needed for such boarding to diminish.

The General Counsel claims that Customs Service was obligated to maintain conditions of employment with respect to in-stream boarding notwithstanding the expiration of the parties' collective bargaining agreement. Additionally, the General Counsel asserts that the subject of in-stream boarding is not covered by the parties' expired collective bargaining agreement.

As remedy, the General Counsel proposes that the an order be issued requiring post-implementation bargaining, full make-whole relief, and the posting of a notice to employees.

The Respondent

Respondent maintains that it has the "right to implement safety rules and policies dealing with internal security, and it is not required to negotiate such rules substantively with the Charging Party." Respondent's Brief at 37. With respect to the question of whether it had any obligation to negotiate over procedures and appropriate arrangements, Respondent argues that the Union has effectively waived any right that it may have had to bargain concerning the "basic restrictions on in-stream/midstream boardings." *Id.* at 37-38. In support of this claim, the Respondent contends that it initially imposed the restrictions on in-stream boarding in 1991 and that the 2001 Directive constitutes nothing more than a restatement of the earlier directive. The Respondent asserts that the Union failed to request bargaining in 1991 or during negotiations that occurred over boarding issues during the mid-1990's and, at this point, a bargaining request on the matter is no longer timely.

The Respondent insists that because the 2001 Directive restates a preexisting restriction on in-stream/midstream boarding, this case is distinguishable from *United States Department of Agriculture, Plant Protection and Quarantine, Animal and Plant Health Inspection Service*, 17 FLRA 281 (1985) (*APHIS*). The Respondent characterizes *APHIS* as involving the promulgation of a "brand-new in-stream/midstream boarding policy" rather than a "preexisting" one as is involved here. Respondent's Brief at 39, n.5. Thus, Respondent asserts that in any event the impact of the "extraordinary circumstances" requirement in the 2001 Directive was *de minimis*.

Respondent also contends that insofar as the 2001 Directive designated the Director, Field Operations, of each Customs Management Center as the individual responsible for authorizing in-stream/midstream boardings, it involved the exercise of several management rights. Specifically, Respondent cites the rights to: determine the methods and means of performing work under section 7106(b)(1) of the Statute; determine its mission, budget, and internal security under section 7106(a)(1); and direct employees and assign work under section 7106(a)(2). The Respondent argues that in the past all boardings required management approval and merely elevating the permission level to a different

manager does not materially change conditions of employment for bargaining unit employees.

Respondent submits that any claimed impact on overtime, morale and job skills should be rejected as purely speculative or attributable to causes other than the 2001 Directive. Respondent contends that evidence shows that overtime opportunities are likely to continue at or above levels in existence before the promulgation of the 2001 Directive. Respondent also asserts that overall boardings were decreasing prior to the 2001 Directive and any effect on morale flowing from the reduced number of boardings cannot fairly be attributed to that particular directive. With respect to claims that the directive will result in a degradation of skills, the Respondent contends there are no skills of any consequence that are unique to in-stream/midstream boardings as contrasted with dockside boardings.

Respondent asserts that because the parties have already negotiated overtime issues in their collective bargaining agreement, the matter is covered by the agreement and, consequently, the Union's overtime concerns are not subject to further bargaining.

Respondent maintains that a back pay remedy is unwarranted because there is no direct causal relationship shown between the absence of impact and implementation bargaining with respect to the 2001 Directive and any loss of pay or benefits bargaining unit employees may have suffered. Respondent argues that any such overtime assignments are dependent on a multitude of factors unrelated to the directive and there is no evidence of any loss in overtime that was directly attributable to that directive.

Analysis

Prior to implementing a change in conditions of employment of bargaining unit employees, an agency generally is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain. See, e.g., *Federal Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 55 FLRA 848, 852 (1999) (*FCI, Bastrop*). With limited exceptions, parties must satisfy their mutual obligation to bargain before changes in conditions of employment are implemented. See, e.g., *id.* The extent to which an agency is required to bargain over changes in conditions of employment depends on the nature of the change. See, e.g., *id.* Where an agency institutes a change in a condition of employment and the actual decision, or

substance of the change, is negotiable, the extent of impact on unit employees is not relevant to whether the agency is obligated to bargain. See, e.g., *92 Bomb Wing, Fairchild Air Force Base, Spokane, Washington*, 50 FLRA 701 (1995). Where, however, a change in a condition of employment entails the exercise of a management right under section 7106 of the Statute, the agency has a statutory obligation to bargain concerning the impact and implementation of such change but only if the change would result in an impact on employees that is more than *de minimis* in nature. See, e.g., *id.*

In this case, the Respondent argues that the alleged change involved the exercise of several management rights. During opening argument at the hearing in this case, the General Counsel conceded that the decision on whether to board vessels either in-stream or dockside is a management right. (Tr. 17-18.) Moreover, the General Counsel's argument that the *de minimis* principle applies in this case further demonstrates acknowledgment that the alleged change involved the exercise of management rights. I find it is not in dispute that the Respondent's action permitting in-stream/midstream boardings only where extraordinary reasons exist and designating the Director, Field Operations, as the official responsible for authorizing such boardings involved the exercise of management rights.¹⁰ The questions whether that action (1) constituted a change in conditions of employment of bargaining unit employees that (2) was greater than *de minimis* remain.

Respondent's action constituted a change in conditions of employment

Based on the instant record, I find that the number of boardings overall was in decline prior to the issuance of the October 2001 Directive. The major factor producing this decline was the Customs Modernization Act. A contributing factor with respect to the decline of in-stream/midstream boardings in particular may have been the provision in the 1991 Directive that such boardings would not be done as a matter of course. Put another way, that directive provided that in-stream boardings were not to occur as a common practice. I find that the 2001 Directive, however, imposed an even more restrictive practice with respect to in-stream boarding of vessels; specifically, in-stream boardings would

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Although I am not convinced that all of the management rights cited by the Respondent are implicated, some of them no doubt are. Accordingly, I find that it is unnecessary to the disposition of this complaint to determine which particular management rights actually are involved.

not occur unless extraordinary reasons warranted them. I also find that this shift from the language used in the 1991 Directive communicated an increase in the degree to which in-stream boardings were discouraged.

It was the foreseeable and likely effect of the more stringent language used in the 2001 Directive that in-stream boardings would be less likely to happen than before. That this indeed came to pass is confirmed by anecdotal evidence showing that after the directive issued, very few in-stream/midstream boardings have taken place.

Respondent's attempt to distinguish this case from *APHIS is, in my opinion*, unpersuasive. The critical point to be taken from *APHIS* is not whether the in-stream/midstream boarding policy was brand new but whether it constituted a change in conditions of employment. Here, the Respondent's action imposing further limitations than previously practiced on the extent to which in-stream/midstream boardings would occur, amounted to a change in conditions of employment.

Even though dockside boardings remained as a job function and were unaffected by the 2001 Directive, the curtailment of in-stream/midstream boardings constituted a change. Although many features of in-stream/midstream boardings and dockside boardings are the same, some are different. Clearly, the methods of reaching the vessel to be boarded are different. The testimony that in-stream/midstream boardings afford the Customs inspectors conducting the boardings the potential for more independence in carrying out their responsibilities is persuasive. This potential for independence appears to be largely a consequence of the fact that vessels are less accessible when in-stream/midstream and, consequently, supervisory support and scrutiny are diluted. Beyond that, it appears from the record that job duties and skills required are pretty much the same in both types of boardings. Thus, although in many respects matters relating to the job functions of Customs inspectors remained the same, in other respects they changed as a consequence of the loss of features associated with in-stream/midstream boarding.

The effect of the change on bargaining unit employees was de minimis

In determining whether the effect of a change in conditions of employment is more than *de minimis*, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment.

See, e.g., *U.S. Department of the Treasury, Internal Revenue Service*, 56 FLRA 906, 913 (2000).

The instant record, in my view, fails to show that employees suffered or are likely to suffer any loss of opportunity to earn overtime at levels that occurred prior to the issuance of the 2001 Directive. To begin with, evidence was inconclusive with respect to how much overtime employees actually earned from in-stream/midstream boarding before and after the 2001 Directive and how much of any decline in those earnings was attributable to that directive. It is clear that not all in-stream/midstream boardings occurred on overtime and that record keeping did not differentiate between in-stream/midstream boardings and other sources of overtime earnings such as dockside boardings. It is also clear that factors in addition to the 2001 Directive operated to reduce the number of in-stream/midstream boardings in recent years. The record reveals that both prior to and subsequent to the 2001 Directive, there have been other sources of overtime and that overtime assignments are not always staffed by volunteers. The evidence supports a finding that it is reasonably foreseeable that notwithstanding the ebb in overtime opportunities attributable to post-September 11 operations and to in-stream/midstream boardings, other sources of overtime will continue to provide ample opportunity to employees wishing to earn compensation at the same level as they did prior to October 2001. In this regard, evidence shows that there continues to be ample opportunity for Customs inspectors to work overtime in conjunction with airport operations, cruise ship operations, container examinations, etc. Moreover, there is no anticipated drop in amounts budgeted for overtime. In sum, I do not find that it is reasonably foreseeable that the October 2001 Directive will result in a drop in the amount of overtime compensation available to employees.

There is certainly evidence showing that some employees find in-stream/midstream boarding more desirable than other duties and, hence, preferable as a source of overtime earnings. However, this appears to be largely a matter of personal preference. That is, some employee witnesses expressed a preference for functioning in what they perceive as a more traditional law-enforcement role; some expressed a preference for working in a seaport environment; some expressed a preference for the greater degree of independence that they perceived in-stream/midstream boardings afforded them. In determining whether the 2001 Directive has produced an impact that is greater than *de minimis*, it is significant that although those employees may need to engage in duties that they perceive as less

preferable, it is clear they will still have the opportunity to earn overtime at levels comparable to what they did prior to October 2001. It is also significant that the decrease in the in-stream/midstream duties, which they find preferable, is not entirely attributable to the 2001 Directive.

The General Counsel maintains that reducing in-stream/midstream boarding deprives these employees of experience that will build their skills. Based on the record, the only skills apparent that are unique to in-stream/midstream boardings are using a Jacob's ladder or gangway to board one vessel from another. There was neither claim nor evidence that mastery of such skills affords any benefits or rewards such as compensation, promotion or advancement potential. Rather, the only apparent benefit of possessing well-developed skills in using Jacob's ladders and gangways during in-stream boardings is to reduce the potential for accidents while engaging in that activity. Although practice may increase skills that will decrease the likelihood of mishaps, limiting the use Jacob's ladders and gangways also limits the occasions for accidents to happen while using them. In my view, insofar as reducing the potential for accidents is concerned, cutting down on the number of in-stream boardings offsets any diminished opportunity to increase skill in using Jacob's ladders and gangways through experience. Accordingly, it is found that the loss of opportunity to use Jacob's ladders and gangways in in-stream boardings has minimal, if any, effect on the conditions of employment of Customs inspectors.

I conclude that the effect of limitations placed on in-stream/midstream boardings centered almost exclusively on individual personal preferences among the duties assigned to employees. Other than employees' personal preferences, the evidence does not reveal that the limitation had any real effect on their working conditions.

Because the effect of the change instituted in the October 2001 Directive was no more than *de minimis*, the Customs Service had no obligation to afford the Union notice and an opportunity to bargain and, therefore, I find did not violate section 7116(a)(1) and (5) of the Statute, as alleged.¹¹

¹¹

In view of this finding, it is not necessary to address the arguments that the Union waived bargaining rights with respect to in-stream/midstream boarding and that the matter is covered by the parties' collective bargaining agreement.

Based on all of the above, it is recommended that the Authority adopt the following:

ORDER

It is hereby ordered that the Complaint in WA-CA-02-0189, be and it, hereby is, dismissed in its entirety.

Issued, Washington, DC, June 27, 2003.

—

ELI NASH
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, Chief Administrative Law Judge, in Case No. WA-CA-02-0189, were sent to the following parties in the manner indicated:

CERTIFIED MAIL AND RETURN RECEIPT

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Dated: June 27, 2003
Washington, DC