66 FLRA No. 90

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
AFL-CIO
(Respondent)

and

MARK SANTA CRUZ, AN INDIVIDUAL
STEVEN DUNLAP, AN INDIVIDUAL
MICHAEL MEKARA, AN INDIVIDUAL
JIM H. HENDRICKSON, AN INDIVIDUAL
SCOTT D. DEVANE, AN INDIVIDUAL
JULIE IRELAND, AN INDIVIDUAL
DAVID JOHNSON, AN INDIVIDUAL
CALVIN BROWN, AN INDIVIDUAL
WILLIAM D. AYNES, AN INDIVIDUAL
(Charging Parties)

SF-CO-09-0001
SF-CO-09-0030
AT-CO-09-0040
CH-CO-09-0076
CH-CO-09-0111
CH-CO-09-0304
CH-CO-09-0313
DA-CO-09-0014
DE-CO-09-0018

AND

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.
(Respondent)

and

CALVIN BROWN, AN INDIVIDUAL
(Charging Party)

DA-CA-09-0061

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DECISION AND ORDER

February 13, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This consolidated unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (the Judge) filed by the National Air Traffic Controllers Association (NATCA) and the General Counsel (GC). The GC filed an opposition to NATCA's exceptions, and NATCA and the Federal Aviation Administration (FAA)[1] filed oppositions to the GC's exceptions.[2]

This case involves nine charging parties who allege that NATCA violated § 7114(a)(1) and § 7116(b)(1) and (8) of the Federal Service Labor-Management Relations Statute (the Statute), and one charging party who alleges that the FAA violated § 7116(a)(1) and (8) of the Statute. The Judge found that NATCA violated the Statute with regard to eight of nine charging parties, and that the FAA did not violate the Statute.

For the reasons that follow, we: (1) deny NATCA's exceptions; (2) deny the GC's exceptions regarding the alleged violations by the FAA and, thus, dismiss the complaint against the FAA; (3) grant in part and deny in part the GC's exceptions regarding remedies; and (4) leave for compliance proceedings the determination of employees' individual entitlements to relief.

II. Background

When NATCA and the FAA failed to reach a new collective-bargaining agreement, the FAA cited 49 U.S.C. § 40122(a)(2) and imposed new work rules on bargaining-unit employees.[3] This action "infuriated NATCA." Judge's Decision at 9.

Like the parties' prior collective-bargaining agreements, the new work rules continued to grant NATCA the authority to determine the method for

[1] This consolidated ULP case involves allegations against NATCA and allegations against the FAA; both are Respondents.

[2] The parties also filed several supplemental submissions, which are discussed *infra* Part V.

[3] 49 U.S.C. § 40122(a)(2) provides, in pertinent part:

> If the Administrator [of the FAA] does not reach an agreement . . . with [an] exclusive bargaining representative[] . . . [and] the services of the Federal Mediation and Conciliation Service do not lead to an agreement, the Administrator's proposed change to the [FAA's] personnel management system shall . . . take effect . . . [sixty] days . . . after the Administrator has transmitted the proposed change . . . to Congress.

calculating bargaining-unit employees' seniority. Judge's Decision at 4; *see also NATCA, MEBA/AFL-CIO*, 55 FLRA 601, 601 (1999). Seniority, in turn, affected employees': (1) annual leave selections, *see* "Contract between [NATCA] and the [FAA]" (June 5, 2006) at 59 (Art. 24, § 8); (2) holiday-duty assignments, *id.* at 70 (Art. 28, § 7); (3) watch schedules and shift assignments, *id.* at 75 (Art. 32, § 2); (4) temporary assignments, *id.* at 96 (Art. 44, § 1); (5) reassignments or retraining, *id.* at 98 (Art. 46, §§ 4-5); and (6) overtime-work opportunities, *see* Judge's Decision at 22.

At the time that the FAA imposed the new work rules, NATCA's national constitution provided, as relevant here, that employees' "[c]umulative NATCA" seniority would be "derived by totaling all [of the employee's] time . . . spent in [any] . . . NATCA bargaining units." *Id.* at 4-5. Under this policy, an employee who left a NATCA bargaining-unit position and later returned to such a position would receive "[c]umulative" seniority credit for all of her or his prior service. *Id.*

More than two years after the new work rules took effect, delegates to NATCA's national convention voted to amend their constitution. The amendment provided that any employee who left a NATCA bargaining-unit position and thereafter worked for the FAA in "a supervisor/management job" would lose all previously acquired NATCA bargaining-unit seniority, and his or her "cumulative seniority date" would be reset to the day on which he or she returned to the unit. *Id.* at 5.

NATCA applied this amendment retroactively to the date on which the new work rules took effect. *Id.* at 9-10. As a result, all former NATCA bargaining-unit employees who had worked for any length of time in an FAA "supervisor/management job" following the imposition of the new work rules – including those who were reassigned or temporarily promoted by the FAA – lost their previously acquired NATCA seniority, even if they had already returned to the unit before the amendment was adopted. *Id.* The FAA then recalculated unit employees' seniority "[c]onsistent with NATCA's guidance" on the amendment's intended operation. *Id.* at 5.

Nine parties filed ULP charges against NATCA, and one party filed a charge against the FAA. *Id.* at 1. The GC issued a consolidated complaint against NATCA and a separate complaint against the FAA, both of which were consolidated before the Judge. *Id.* at 1-2. The GC, NATCA, and the FAA each filed with the Judge a motion or cross-motion for summary judgment. *Id.* at 2.

III. Judge's Decision

A. Consolidated Complaint against NATCA

Before the Judge, the GC argued that NATCA breached its duty of fair representation under § 7114(a)(1)[4] and thereby violated § 7116(b)(1) and (8).[5] *See* GC's Mot. for Summary Judgment at 1-2. In particular, the GC argued that NATCA amended the seniority policy and applied that amendment *retroactively* in order "to punish any bargaining[-]unit employee who, in NATCA's view, had betrayed [NATCA]'s cause by accepting a management or supervisory position." GC's Br. in Support of Mot. for Summary Judgment at 1. *See also id.* at 7 (asserting that policy was amended to "single out" certain employees for punishment); *accord* Judge's Decision at 7. The GC explained that it did "not challenge or question [NATCA's] ability" to apply the amendment *prospectively*. Judge's Decision at 7.

In response, NATCA argued that its "action in punishing bargaining[-]unit members who escaped the unconscionable terms and conditions unilaterally imposed by the FAA . . . by going to work for FAA management . . . falls within the bounds of deference afforded unions in exercising their duty of [fair] representation." *Id.* at 8. NATCA argued that its constitutional amendment served two legitimate purposes: (1) "discourag[ing] the actions of bargaining[-]unit members who sided with, and joined the ranks of FAA management"; and (2) "encourag[ing] and reward[ing] Union solidarity among employees who remained in the . . . bargaining unit." *Id.*

To resolve these arguments, the Judge applied the standard set forth in *National Federation of Federal Employees, Local 1453*, 23 FLRA 686 (1986) (*Local 1453*), which asks "whether the union deliberately and unjustifiably treated one or more bargaining[-]unit employees differently from other employees in the unit . . . [by] act[ing] arbitrarily or in bad faith . . . [in a

[4] Under § 7114(a)(1), "[a]n exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership."

[5] Section 7116(b)(1) and (8) provides in relevant part:

> (b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization–
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> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
>
> . . . .
>
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

manner that] resulted in disparate or discriminatory treatment of a bargaining[-]unit employee." Judge's Decision at 12 (quoting *Local 1453*, 23 FLRA at 691) (internal quotation marks omitted). The Judge found that, as a result of NATCA's "infuriat[ion]" over the FAA's imposition of new work rules, any "employee who worked as a part of management in any capacity after the date the new work rules were implemented became the subject of wrath, scorn, spite, and ultimately [NATCA's] vindictive retribution." *Id.* at 9. He found "no doubt . . . that NATCA deliberately [and maliciously] changed its seniority policy . . . to punish bargaining[-]unit employees" whom NATCA felt had "sided with, and joined the ranks of management." *Id.* at 13 (internal quotation marks omitted).

The Judge found NATCA's argument that it amended the policy to reward "solidarity among employees who remained in the . . . unit" to be pretextual, for two reasons. *Id.* First, the amendment did not strip seniority from all employees who left the unit – only from those who "assisted the FAA in achieving its mission by serving in a supervisory or management position." *Id.* Second, the Judge found that employees who were harmed by the retroactive application of the amended policy could not have known, when they left the unit, that they would lose their seniority for doing so. *Id.* Consequently, the amendment's retroactive application could not have influenced any of those employees' earlier decisions about whether to work outside of the unit. *Id.* Thus, the Judge concluded that NATCA had failed to justify the retroactive application of the amended policy in a manner consistent with its duty of fair representation. *Id.* at 13, 15.

The Judge also rejected NATCA's argument that he should defer to the convention delegates' decision to amend the policy because he found that NATCA's amendment of the policy in order to disadvantage certain bargaining-unit employees did not merit the same degree of deference as would a compromise or concession agreed to as the result of negotiations. *Id.* at 16. Instead, the Judge concluded that the retroactive application of the amendment was a "vindictive abuse of [NATCA's] power" as an exclusive representative, *id.* at 11, which breached its duty of fair representation under § 7114(a)(1), and thereby violated § 7116(b)(1) and (8), *id.* at 15, with respect to eight of the nine charging parties against NATCA.

However, the Judge recommended dismissing Charging Party Steven D.'s allegations against NATCA because, when NATCA amended its constitution, Steven D. was working in a non-unit position to which he had been temporarily promoted. *Id.* at 18-19, 26. In this regard, the Judge stated that unions do not owe a duty of fair representation to employees who are not in the unit, including those employees who are temporarily promoted out of the unit. *Id.* at 18 (citing *McTighe v. Mech. Educ. Soc'y of Am., Local 19*, 772 F.2d 210, 213 (6th Cir. 1985); *Cooper v. Gen. Motors Corp.*, 651 F.2d 249, 250 (5th Cir. 1981); *NATCA, MEBA/AFL-CIO*, 55 FLRA at 601; *Int'l Ass'n of Machinists & Aerospace Workers, Lodge 2424*, 25 FLRA 194, 195-96 (1987); *IRS, Fresno Serv. Ctr., Fresno, Cal.*, 7 FLRA 371, 372-73 (1981), *enforcement denied on other grounds sub nom. IRS, Fresno Serv. Ctr., Fresno, Cal. v. FLRA*, 706 F.2d 1019 (9th Cir. 1983)).

B. Complaint against the FAA

Before the Judge, the GC argued that the FAA "should have known that [NATCA's] change in seniority policy . . . was discriminatory and in bad faith, and based upon established case law, [should have] know[n] that applying the policy retroactively was inconsistent with the duty of fair representation." Judge's Decision at 22. The GC also asserted that a "reasonable employer" would not have implemented the unlawful policy or used it to determine leave, schedules, or overtime. *Id.* The GC contended that, by doing so, the FAA interfered with, restrained, or coerced employees in the exercise of their rights under § 7102 of the Statute, and thereby violated § 7116(a)(1) and (8).[6] *Id.*; GC's Mot. for Summary Judgment, Attach., GC's Ex. 3 ("Complaint [DA-CA-09-0061] and Notice of Hearing") at 3.

In response, the FAA argued that, under the work rules that it had implemented, it "had no authority to determine seniority" or to refuse to implement NATCA's amendment to the seniority policy. Judge's Decision at 23. The FAA contended that there was "no clear declaration of law, rule[,] or regulation" that precluded NATCA from adopting the amendment or applying it retroactively, and, thus, the FAA would have committed a ULP if it had declined to implement the amendment. *Id.*

[6] Section 7102 provides, in pertinent part: "Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." Section 7116(a)(1) and (8) provides, in relevant part:

> (a) For the purpose of this chapter, it shall be [a ULP] for an agency–
>
> > (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
> >
> > . . . .
> >
> > (8) to otherwise fail or refuse to comply with any provision of this chapter.

The Judge found that by expecting the FAA to "protect[] bargaining[-]unit employees from" NATCA's actions, the GC was "invit[ing] activity that is precluded by § 7116(a)(3)"[7] and trying to impose "paternalistic expectations [on the FAA that would] eviscerate the exclusive recognition and representation rights and duties provided [to NATCA] under the Statute." *Id.* The Judge found further that, by designating NATCA as the sole authority for determining seniority policy, the FAA had "surrendered the right to negotiate over any change to seniority policy [that] NATCA proposed." *Id.* at 23. Rejecting the GC's reliance on *U.S. Air Force, Loring Air Force Base, Limestone, Maine*, 43 FLRA 1087 (1992) (*Loring*), *see* Judge's Decision at 23-24, the Judge found that the FAA did not violate the Statute as alleged, *id.* at 26.

C. Remedies for NATCA's ULP

Turning to the appropriate remedies for NATCA's ULP, the Judge found that one of the charging parties, Jim H., had been temporarily detailed to a supervisory position after the new work rules went into effect. *Id.* at 19. Because Jim H. had returned to the bargaining unit before NATCA amended the seniority policy and applied it retroactively to reset Jim H.'s cumulative seniority, the Judge found that NATCA's actions breached the duty of fair representation that it owed to Jim H. *Id.* However, the Judge found further that, more than a year after NATCA's ULP, Jim H. "accepted a permanent position as a . . . [m]anager," and thereby deliberately put himself within the *prospective* application of the amended policy. *Id.* Because the GC had alleged only that the *retroactive* application of the amended policy violated the duty of fair representation – and Jim H., by leaving the unit after the amendment was adopted and implemented, forfeited his seniority anyway under the *prospective* application of the amended policy – the Judge found no remedy appropriate for Jim H. *See id.* at 19-20.

For a similar reason, the Judge denied the GC's request to order NATCA to restore to "*all* of its bargaining[-]unit employees . . . the . . . seniority they would have had absent" the policy's amendment. *Id.* at 21 (emphasis added). In this regard, the Judge found that only those employees who were in the bargaining unit when NATCA amended the seniority policy and who "experienced . . . adverse impact . . . [attributable solely to the] retroactive application" of the changed policy were entitled to a remedy for NATCA's ULP. *Id.* The Judge further limited his recommended remedy to those individual charging parties who satisfied those criteria.[8] *Id.* The Judge also denied the GC's request for an order of backpay because he found it unsupported. *Id.* at 21-22.

IV. Positions of the Parties

A. NATCA's Exceptions

NATCA argues that the change in seniority policy was an appropriate response to the actions of unit employees who "elected to transfer to FAA supervisory positions outside of the bargaining unit" to "evade[] the . . . 'unconscionable' terms and conditions" that the FAA unilaterally "imposed on . . . bargaining[-]unit members." NATCA's Exceptions Memorandum (EM) at 6. In addition, NATCA claims that it is "well settled" that "any change in . . . seniority policy" will adversely affect some employees while benefitting others, *id.* at 11 (citing *Humphrey v. Moore*, 375 U.S. 335, 349 (1964)), and that unions "are entitled" to deference when establishing the terms of contractual seniority policies, as long as they fall within a "'wide range of reasonableness,'" *id.* (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)). In this regard, NATCA asserts that the GC has failed to show that NATCA's decision to change seniority policy was "wholly 'irrational' and 'arbitrary,'" as required by the highly deferential "'wide range of reasonableness'" standard. *Id.* (quoting *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 78 (1991)); *see also id.* at 18 (quoting *NATCA, MEBA/AFL-CIO*, 55 FLRA at 604; *Loring*, 43 FLRA at 1099-1100).

As for those unit employees who were working in FAA supervisory positions when NATCA amended its constitution, NATCA argues that "unions owe no duty of fair representation to supervisors outside the bargaining unit." *Id.* at 10 (citing *McTighe*, 772 F.2d at 213); *see also id.* at 11-13. Further, NATCA asserts that it is permissible for unions to "seek and secure a provision . . . that eliminate[s] [the] accumulation of unit seniority by employees" who once worked in the unit but later worked "in a supervisory position," regardless of whether employees relied on prior methods of calculating seniority to their detriment. *Id.* at 12 (quoting *Cooper*, 651 F.2d at 250-51) (internal quotation marks omitted). Finally, NATCA contends that applying the change

[7] Section 7116(a)(3) provides that it shall be a ULP for an agency "to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status."

[8] Although the Judge referred to "eight" such employees, Judge's Decision at 21, his earlier determinations that NATCA did not owe a duty of fair representation to Charging Party Steven D. and that no remedy was appropriate for Charging Party Jim H. leave only seven charging parties who would qualify for the recommended remedy. Thus, it appears the Judge's reference to "eight" such employees was inadvertent. *Accord id.* at 27 (Recommended Order at 2(b)) (requiring restoration of seniority for "seven" bargaining-unit employees).

retroactively was not improper because seniority is not a "vested" right and is "always subject to re-negotiation and 'retroactive' modification." *Id.* at 15 (quoting *Cooper*, 651 F.2d at 251); *see also id.* at 16.

B. GC's Opposition to NATCA's Exceptions

The GC argues that *Cooper* does not support NATCA's position because *Cooper* involved only prospective, not retroactive, changes to seniority calculations. GC's Opp'n to NATCA's Exceptions at 3. The GC reiterates its contention that "a union may make changes to seniority provisions going forward, but not backwards." *Id.* at 4.

With regard to NATCA's claim that its actions fall within a "wide range of reasonableness," the GC asserts that, notwithstanding the deference afforded to unions to make decisions for the unit they represent, they must "serve the interests of all members of a bargaining unit without hostility or discrimination toward any, to exercise discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 5 (quoting *NATCA, MEBA/AFL-CIO*, 55 FLRA at 604 (internal quotation marks and citations omitted)). The GC argues that NATCA failed to satisfy that standard because the amendment to the seniority policy was intended to "punish" and "settle" a "score" with employees "who evaded . . . the 'unconscionable'" new work rules. *Id.* at 6 (quoting NATCA's EM at 6).

C. GC's Exceptions

The GC argues that the Judge erred by finding that the FAA did not violate the Statute. GC's Exceptions at 12-13. The GC asserts that retroactively stripping employees of years of seniority is an "obvious" violation of law, and the FAA should have recognized it as such. *Id.* at 13. The GC further asserts that without the FAA's involvement, employees would not have been harmed by "NATCA's clearly illegal scheme." *Id.* at 15. According to the GC, *Loring*, 43 FLRA 1087, requires finding that the FAA shares liability with NATCA for the amended policy, which "had no possible legitimate justification." GC's Exceptions at 14.

In addition, the GC argues that relief should not be limited to those employees who were in the unit when NATCA modified the seniority policy. *Id.* at 6-8. Specifically, the GC contends that relief should be provided to employees like Charging Party Steven D., who was temporarily working outside the unit when the policy was amended. *See id.* at 8-10. Further, the GC contends that Charging Party Jim H. should receive relief because he would not have worked as a supervisor after the policy was amended if he had not already lost his NATCA seniority due to the amendment's retroactive application. *See id.* at 10-12. Moreover, the GC contends that relief should be extended to "those who may yet suffer" if they return to the unit in the future. *Id.* at 12. Finally, the GC argues that the Judge should have awarded relief to all of the adversely affected employees that he acknowledged were entitled to relief, rather than limiting relief to certain charging parties. *Id.* at 3, 4-5 (citing *Loring*, 43 FLRA at 1102). In this regard, the GC requests that the Authority order compliance proceedings to identify affected individuals. *Id.* at 6.

D. FAA's Opposition to GC's Exceptions

The FAA asserts that it should not be found to have committed a ULP because if it had refused to implement the amended seniority policy, then it would have violated its contractual obligations to NATCA and, thereby, also violated the Statute. FAA's Opp'n to GC's Exceptions at 7. Moreover, the FAA contends that *Loring* is inapposite, *id.* at 2, because "the record contains no testimony and no direct evidence revealing any unlawful motivation behind NATCA's changed seniority policy (such as whether it was done . . . in bad faith) or the FAA's knowledge of any such unlawful motivation," *id.* at 3. *Accord id.* at 5 (making similar points). The FAA also argues that the Authority should deny the GC's requested remedies, *id.* at 13, and, in particular, that the Authority should not order compliance proceedings because such proceedings are appropriate only when backpay is owed, *id.* at 10-11.

E. NATCA's Opposition to GC's Exceptions

NATCA argues that the GC has conceded that the change in seniority policy is lawful, NATCA's Opp'n to GC's Exceptions at 2, and that the GC's remedial requests would depend on "entirely speculative" determinations and would be "substantially and unnecessarily disruptive of the FAA's operations," *id.* at 4.

V. Preliminary Matter: Supplemental Submissions

The GC requested permission to submit a brief replying to the FAA's and NATCA's oppositions, in order to clarify the scope of the remedies sought in the GC's exceptions, GC's Mot. Requesting Permission to File a Reply Br. at 1, but NATCA opposed the GC's request, *id.* at 2, unless "all parties" were permitted to file a reply brief "in this matter," NATCA's Resp. to GC's Mot. to File a Reply Br. at 1. The Authority's Office of Case Intake and Publication issued an order "grant[ing] the GC's and NATCA's [m]otions" to file supplemental submissions. Order (Aug. 24) at 2.

The GC filed a reply brief stating that the GC is "no[t] . . . seeking a back pay remedy." GC's Reply Br. at 1. Thereafter, NATCA filed a supplemental memorandum that it characterizes as both a "reply to the [GC]'s opposition . . . *and* [a] response to the [GC]'s reply." *See* Mem. by Resp't NATCA in Reply to the GC's Opp'n to NATCA's Exceptions & in Resp. to the GC's Reply Br. at 2-3. According to NATCA, the Authority's Order violated NATCA's due-process rights because it granted NATCA permission to file a response to the GC's reply brief but did not also grant permission to file a reply to the GC's opposition to NATCA's exceptions. *Id.* at 1 n.1.

The Authority's Order did not expressly preclude NATCA from making additional arguments in reply to the GC's opposition. Further, NATCA's supplemental memorandum merely reiterates arguments from its exceptions and its opposition to the GC's exceptions. Under these circumstances, we consider NATCA's supplemental memorandum.

VI. Analysis and Conclusions

A. NATCA violated § 7114(a)(1) and § 7116(b)(1) and (8) of the Statute.

Section 7114(a)(1) of the Statute provides that "[a]n exclusive representative is responsible for representing . . . all employees in the unit it represents without discrimination and without regard to labor organization membership." 5 U.S.C. § 7114(a)(1). This provision incorporates in federal labor relations the duty of fair representation recognized for unions in the private sector. *See NTEU v. FLRA*, 800 F.2d at 1165, 1171; *accord, e.g., AFGE, Local 1857, AFL-CIO*, 46 FLRA 904, 910 (1992). Under the duty of fair representation, unions are required to "serve the interests of all members [of a bargaining unit] without hostility or discrimination toward any, to exercise discretion with complete good faith and honesty, and to avoid arbitrary conduct." *NATCA, MEBA/AFL-CIO*, 55 FLRA at 604 (quoting *O'Neill*, 499 U.S. at 76 (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967))). "[W]hen a union uses a power which it alone can wield, it must do so for the benefit of *all* employees within its bargaining unit." *Id.* (quoting *AFGE v. FLRA*, 812 F.2d 1326, 1328 (10th Cir. 1987)) (emphasis added). In other words, in its role as exclusive representative, the "union assumes a heavy responsibility to exercise its [power] *on behalf of, rather than against* . . . employee[s]" it represents. *Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229, 1237 n.8 (8th Cir. 1980) (emphasis added) (citation omitted).

NATCA argues that its amendment to the seniority policy was not so far outside a "wide range of reasonableness" that it would constitute "arbitrary" conduct in violation of the duty of fair representation. NATCA's EM at 11. However, as mentioned above, the Supreme Court has held that a union may breach its duty of fair representation by acting arbitrarily, *or* discriminatorily, *or* in bad faith. *See O'Neill*, 499 U.S. at 75 (Court has "repeatedly identified three components of the duty" of fair representation); *Vaca v. Sipes*, 386 U.S. at 190-91; *Vaughn v. Air Line Pilots Ass'n, Int'l*, 604 F.3d 703, 709-10 (2d Cir. 2010). The "wide range of reasonableness" standard applies *only* to allegations that a union violated its duty of fair representation by acting arbitrarily – not to allegations that a union violated its duty by acting discriminatorily or in bad faith. *See O'Neill*, 499 U.S. at 67, 76-78; *accord AFGE, Local 3354, AFL-CIO*, 58 FLRA 184, 201-02 (2002) (citing *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 44 (1998)).[9] The Authority's test for violations of the duty of fair representation, as set forth in *Local 1453*, similarly recognizes a distinction between arbitrary conduct and discriminatory or bad-faith conduct. *See* 23 FLRA at 691. Unlike the "wide range of reasonableness" standard for allegedly arbitrary conduct – which involves an objective inquiry – determining whether a union acted discriminatorily or in bad faith requires a subjective inquiry into motives. *See Simo v. Union of Needletrades Emps., Sw. Dist. Council*, 322 F.3d 602, 617-18 (9th Cir. 2003) (citing *Crider v. Spectrulite Consortium, Inc.*, 130 F.3d 1238, 1243 (7th Cir. 1997)). Consequently, even an otherwise-permissible union action may violate the duty of fair representation if the union acted in bad faith. *See, e.g., Aguinaga v. United Food & Commercial Workers Int'l Union*, 993 F.2d 1463, 1470 (10th Cir. 1993) (deference to union's decisions not warranted where motives improper).[10]

The Authority has recognized that when "personal animosity" causes a union to "deliberately and

[9] *See also Merritt v. Int'l Ass'n of Machinists & Aerospace Workers*, 613 F.3d 609, 619 (6th Cir. 2010) (wide range of reasonableness standard used only to evaluate allegedly arbitrary conduct); *Vaughn*, 604 F.3d at 709-10 (same); *Simo v. Union of Needletrades Emps., Sw. Dist. Council*, 322 F.3d 602, 617-18 (9th Cir. 2003) (same); *Aguinaga v. United Food & Commercial Workers Int'l Union*, 993 F.2d 1463, 1471 (10th Cir. 1993) (same).

[10] *See also, e.g., James v. Int'l Bhd. of Locomotive Eng'rs*, 302 F.3d 1139, 1148-50 (10th Cir. 2002) (even if sanctioned by union constitution, acting in bad faith still breaches duty); *Local No. 48, United Bhd. of Carpenters & Joiners of Am. v. United Bhd. of Carpenters & Joiners of Am.*, 920 F.2d 1047, 1053 (1st Cir. 1990) (union's governing documents may not immunize bad-faith conduct); *cf. Allen v. United Transp. Union*, 964 F.2d 818, 821 (8th Cir. 1992) ("[a]bsent bad faith," court defers to union's reasonable interpretation of own constitution); *Monzillo v. Biller*, 735 F.2d 1456, 1458 (D.C. Cir. 1984) (same).

unjustifiably treat[]" some bargaining-unit members "differently from other unit employees," that animosity evidences bad faith that violates the duty of fair representation. *AFGE, Local 3615, AFL-CIO*, 53 FLRA 1374, 1388 (1998); *see AFSCME, Local 2477*, 22 FLRA 739, 753-54 (1986) (disadvantaging bargaining-unit employee because of "resent[ment]" or "animosity" violates § 7114(a)(1)). Several courts have reached similar conclusions regarding the duty of fair representation under the Railway Labor Act, 45 U.S.C. §§ 151-188, and the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169. *E.g.*, *Ramey v. Dist. 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 277 (2d Cir. 2004) ("[A] union *may not juggle the seniority roster* for no reason other than to advance one group of employees over another or *to punish a disfavored group*[.]" (emphasis added) (internal quotation marks omitted)); *Mumford v. Glover*, 503 F.2d 878, 885 (5th Cir. 1974) ("A legally cognizable breach . . . could stem from proof of [u]nion hostility towards the plaintiff class.")

NATCA excepts to the Judge's finding that it amended the seniority policy and applied that amendment retroactively because it wanted to "punish" those employees who left the bargaining unit and worked in supervisory or managerial positions with the FAA. NATCA's Exceptions at 2-3. However, NATCA explicitly stated before the Judge that it changed the seniority policy to "discourage the actions of bargaining unit members who sided with, and joined the ranks of FAA management." Mem. in Support of Resp't NATCA's Mot. for Summary Judgment at 11. In this regard, NATCA provides no reason to recognize a legally significant distinction between "discouraging" and "punishing" employees in the circumstances of this case, and § 2429.5 of the Authority's Regulations precludes NATCA from changing, in its exceptions, the position it took before the Judge regarding its motives for amending the seniority policy and applying the amendment retroactively. *See* 5 C.F.R. § 2429.5; *U.S. Dep't of Justice, Fed. Bureau of Prisons, FCI Danbury, Danbury, Conn.*, 55 FLRA 201, 204-05 (1999) (*FCI Danbury*). Moreover, NATCA's assertion that its actions were not designed to "punish" particular employees is belied by the Judge's finding – to which NATCA does not except – that for more than two years *prior to* the amendment of the seniority policy, any "employee who worked as a part of management in any capacity . . . became the subject of [NATCA's] wrath, scorn, [and] spite." Judge's Decision at 9. In this regard, such a lengthy period of ongoing NATCA hostility toward the same group of employees harmed by the amended seniority policy (i.e., employees who worked in a "supervisor/management job") supports the Judge's finding that NATCA amended its constitution to "punish" employees "vindictive[ly]." *Id.* at 9, 11. Consequently, we adopt the Judge's findings regarding NATCA's motives – specifically, that NATCA acted in bad faith when it "deliberately [and maliciously] changed its seniority policy . . . to punish bargaining[-]unit employees" whom NATCA saw as having "sided with, and joined the ranks of management." *Id.* at 13 (internal quotation marks omitted).[11]

As for NATCA's assertion that it changed the seniority policy to encourage unit solidarity, the Judge found this explanation to be pretextual because NATCA stripped seniority from only certain employees who left the unit – specifically, those employees who took supervisory or managerial positions with the FAA. *See id.* As the Judge explained, employees who left the unit to work for another agency or to work in the private sector did not lose their cumulative seniority for prior work in NATCA bargaining-unit positions. *Id.* Further, the Judge found that retroactively applying the changed policy could not incentivize unit solidarity because employees would not have known, when they left the unit, that they would lose their seniority for doing so. *Id.* NATCA's exceptions do not address, or identify any record evidence that undermines, these findings of pretext. As such, we adopt the Judge's finding that NATCA's assertion that it amended its seniority policy in order to promote unit solidarity is pretextual.

For the foregoing reasons, we: (1) find that NATCA acted in bad faith by deliberately amending its seniority policy and applying the amendment retroactively in order to harm certain bargaining-unit employees to whom NATCA owed a duty of fair representation; and (2) deny NATCA's exceptions to the Judge's findings that its conduct violated § 7114(a)(1) and § 7116(b)(1) and (8). In doing so, we emphasize that we do not question the discretion due to NATCA when dealing with seniority matters generally. However, in this case, NATCA breached the duty of fair representation required by § 7114(a)(1) because of its bad-faith motives for amending the seniority policy and discriminatorily and retroactively applying that amendment.

B. The FAA did not violate § 7116(a)(1) and (8) of the Statute.

According to the GC, the Authority's decision in *Loring*, 43 FLRA 1087, requires finding that the FAA violated the Statute. GC's Exceptions at 13-14. In *Loring*, a union provided an agency with a list of employees entitled to receive a portion of an

[11] NATCA's bad-faith conduct establishes by itself that, under the standards of *Vaca v. Sipes* and *Local 1453*, NATCA violated §7114(a)(1) and § 7116(b)(1) and (8). Thus, we find it unnecessary to adopt the Judge's alternative reasoning for finding NATCA in violation the Statute.

environmental-differential-pay settlement, and the agency at first rejected the list as inaccurate. 43 FLRA at 1089. When the union provided a revised list, agency "officials *specifically discussed and questioned* . . . [the amounts distributed to union officials] and '*suspected* . . . *impropriety*,'" but they nevertheless distributed the settlement in accordance with the list. *Id.* at 1100 (emphasis added). Under those circumstances, the Authority found that the agency "knew, or should have known, that [its] actions were unlawful." *Id.* at 1101.

The circumstances of this case are distinguishable from those in *Loring*. As the FAA correctly observes, "the record contains no testimony and no direct evidence . . . [of] the FAA's *knowledge* of any . . . unlawful motivation[]" behind NATCA's change to the seniority policy. FAA's Opp'n to GC's Exceptions at 3 (emphasis added). Although the GC argues that the FAA "should have known," GC's Exceptions at 14, that NATCA's decision to retroactively apply the changed seniority policy was "obvious[ly]" unlawful, *id.* at 13, absent proof of arbitrariness, discrimination, or bad faith, unions may retroactively deprive employees of previously accrued seniority without breaching the duty of fair representation, *see, e.g.*, *Hass v. Darigold Dairy Prods. Co.*, 751 F.2d 1096, 1099 (9th Cir. 1985) ("A union . . . may renegotiate seniority provisions . . . *even though the resulting changes are essentially retroactive*." (emphasis added)).[12] Although we have found that NATCA acted in bad faith, the GC did not establish that *the FAA* knew or should have known that NATCA's actions constituted arbitrary, discriminatory, or bad-faith conduct in violation of § 7114(a)(1). Thus, we reject the GC's argument that the Judge should have found the FAA in violation of § 7116(a)(1) and (8).

We do not mean to suggest that agencies act unlawfully *merely* because they know or should know that an exclusive representative of their employees has acted unlawfully. In this regard, we note that private-sector precedent generally suggests that an employer does not act unlawfully unless it takes actions that amount to cooperation in a union's unlawful purpose. *See, e.g.*, *Davenport v. Teamsters*, 166 F.3d 356, 362 (D.C. Cir. 1999) (noting requirement that "employer somehow acted improperly and infringed the rights of the individual aggrieved employees" (quoting *Am. Postal Workers Union, Headquarters Local 6885 v. Am. Postal Workers Union*, 665 F.2d 1096, 1109 (D.C. Cir. 1981))). Similarly, in *Loring*, we found that the agency violated § 7116(a)(1) and (2) not just because it "was aware" that a distribution of EDP funds might be unlawful but because the agency also controlled the distribution of the settlement funds, and therefore could be deemed to have cooperated in the union's unlawful purpose. 43 FLRA at 1100.

For the foregoing reasons, we dismiss the complaint against the FAA.

C. We grant in part and deny in part the GC's exceptions to the Judge's recommended remedies, and we adopt the Judge's recommended dismissal of the allegations in Case No. SF-CO-09-0030.

The GC asserts first that relief for NATCA's ULP should be extended beyond those employees who were unit members when the seniority policy was amended and the amendment was applied retroactively. GC's Exceptions at 6-10, 12.

NATCA's duty of fair representation extends only to those employees in the unit, and the duty attaches only when NATCA is acting as their exclusive representative. *See, e.g.*, *Merk v. Jewel Companies, Inc.*, 848 F.2d 761, 766 (7th Cir. 1988) (because union does not have duty to represent former bargaining-unit employees *at all*, it does not have a duty to represent them *fairly*).[13] Consequently, at the time NATCA amended the seniority policy and decided to apply that amendment retroactively, NATCA did not owe a duty of fair representation to former members of the unit, and it did not owe an anticipatory duty of fair representation to future members of the unit. *See, e.g.*, *Allen v. CSX Transp., Inc.*, 325 F.3d 768, 770-71, 772, 775 (6th Cir. 2003) (union for trainmen owed no duty to former trainmen who became engineers, even though engineers retained their trainmen seniority and could be furloughed

[12] *See also Schick v. NLRB*, 409 F.2d 395, 397-99 (7th Cir. 1969) (absent bad faith, entering into agreement that required the transfer of certain employees with a *total loss of seniority* did not breach duty of fair representation); *Int'l Longshoremen's & Warehousemen's Union v. Kuntz*, 334 F.2d 165, 171 (9th Cir. 1964) (although contract amendment that stripped clerks of preferred seniority status operated "ex post facto," clerks had to show "bad faith motive[or] intent to hostilely discriminate" to obtain relief from amendment (internal quotation marks omitted)); *Hardcastle v. W. Greyhound Lines*, 303 F.2d 182, 184-87 (9th Cir. 1962) (no breach of duty of fair representation where union executed contract in 1959 that retroactively deprived bus drivers hired after June 1, 1957, of "divisional seniority rights" to which they were entitled under prior agreement).

[13] *See also Felice v. Sever*, 985 F.2d 1221, 1228-29 (3d Cir. 1993) (no cause of action where union's "power over" plaintiff's "employment did not stem from its position as his exclusive bargaining representative"); *Rumbaugh v. Winifrede R.R. Co.*, 331 F.2d 530, 534 (4th Cir. 1964) ("Because the duty extends only to those employees whom the union is empowered to represent . . . , an employee must establish, as part of his case, that he is a member of the designated bargaining unit.").

back to trainmen positions).[14] The same principle regarding the absence of a duty to former unit members applies even in those cases – such as that of Charging Party Steven D. – where a unit employee accepts a supervisory position in reliance on the seniority rules that exist at that time. Employees working in supervisory positions are not unit members, and, thus, the union owes them no duty of fair representation when changing its seniority rules. *See Cooper*, 651 F.2d at 250. Because the remedy sought in this case is for NATCA's breach of its duty of fair representation, and as NATCA owes a duty only to members of the unit it represents, we find that the only employees whose rights were violated – and the only employees entitled to relief – are those who both left and returned to the unit by the time NATCA amended the seniority policy and decided to apply that amendment retroactively, and we deny the GC's exception arguing otherwise. As Steven D.'s rights were not violated, we adopt the Judge's recommended dismissal of the allegations in Case No. SF-CO-09-0030.

The GC contends further that the Judge erred by recommending against relief for employees like Charging Party Jim H. GC's Exceptions at 10-12. The Judge found no remedy appropriate for such employees because they worked in supervisory positions *after* the policy was amended and thereby knowingly forfeited their NATCA seniority, including any seniority that might have been restored as relief for the improper retroactive application of the amended policy. Judge's Decision at 19-20. The Judge's decision to exclude these employees from the scope of recommended relief is consistent with the GC's position before the Judge that the GC did "not challenge or question [NATCA's] ability" to apply the amended policy prospectively. *Id.* at 7. To the extent that the GC is attempting to change that position in its exceptions, as stated earlier, the Authority's Regulations preclude the GC from doing so. *See* 5 C.F.R. § 2429.5; *FCI Danbury*, 55 FLRA at 204-05. Therefore, we deny the GC's exception contending that relief should be afforded to those employees who lost seniority as a result of the prospective application of the amended seniority policy.

The GC also argues that the Judge erred by limiting his recommended remedies to named charging parties, rather than providing relief to all bargaining-unit employees affected by NATCA's ULP. GC's Exceptions at 3, 4-5. The GC requests that the Authority order compliance proceedings to determine employees' individual entitlements to relief. *Id.* at 6. The FAA argues that the Authority should deny the GC's request for compliance proceedings because such proceedings are appropriate only when backpay is owed. *See* FAA's Opp'n to GC's Exceptions at 10-11.

The Judge did not explain why he recommended limiting relief to named charging parties, and the Authority's case law does not support such a limitation. *See U.S. Dep't of Justice, Immigration & Naturalization Serv., L.A., Cal.*, 59 FLRA 387, 389 (2003) (*DOJ*) (ordering leave restoration for all employees adversely affected by ULP, despite that record did not identify any specific employees who lost leave); *cf. Dep't of Def. Dependents Schs.*, 54 FLRA 259, 270 (1998) (rejecting judge's recommended denial of relief to two affected employees, since they were "entitled to be placed in the positions they would have been in had the [ULP] not occurred"). In this regard, the Authority has ordered relief for all individuals adversely affected by a ULP even when the original ULP charge named only a single such individual. *See Marine Corps Logistics Base, Barstow, Cal.*, 33 FLRA 196, 204 (1988) (ordering agency to "[m]ake whole *any* employee, *including but not limited to* [the employee identified in the charge], for any charge to annual leave" resulting from ULP (emphasis added)).

In addition, because compliance proceedings are available to determine the specific remedial entitlements of affected employees, the Authority has rejected the argument that a remedy is inappropriate unless its contours can be precisely identified when resolving exceptions to a judge's decision. *Loring*, 43 FLRA at 1101-02; *accord DOJ*, 59 FLRA at 389 (ordering compliance proceedings to determine the specific leave-restoration entitlements of affected employees). For example, in *Loring*, the Authority ordered that the "entire [settlement] distribution" be recalculated and found that any questions about implementing that remedy could be "appropriately . . . resolved in compliance proceedings." 43 FLRA at 1101-02.

As for the FAA's contention that the Authority's compliance proceedings are limited to cases involving backpay, it is not supported by Authority precedent. *See, e.g., Dep't of Veterans Affairs, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 60 FLRA 446, 446 (2004)

[14] *See also Bensel v. Allied Pilots Ass'n*, 387 F.3d 298, 314 (3d Cir. 2004) ("[I]t is *actual* inclusion in the bargaining unit – not 'impending' inclusion – that triggers . . . duty of fair representation."); *Spenlau v. CSX Transp., Inc.*, 279 F.3d 1313, 1314-16 (11th Cir. 2002) (former trainmen promoted to engineers retained their trainmen seniority rights, but union for trainmen did not owe engineers a duty of fair representation), and sources cited therein; *McNamara-Blad v. Ass'n of Prof. Flight Attendants*, 275 F.3d 1165, 1170-72 (9th Cir. 2002) (union did not owe duty of fair representation to flight attendants, who had been represented by a different union prior to merger, until date on which merging airlines became a "single carrier"); *McTighe*, 772 F.2d at 213 (as union did not owe former unit member a duty of fair representation when he was terminated from supervisory position, it "follows that the [u]nion owed [him] no duty several months later, when he sought to be reemployed").

(proceedings to implement status quo ante remedy regarding parking); *Dep't of the Air Force, Scott Air Force Base, Ill.*, 51 FLRA 675, 694 (1995) (proceedings to determine scope of agency's obligation to provide documentation to union); *Marine Corps Logistics Base, Barstow, Cal.*, 47 FLRA 454, 457 (1993) (proceedings to determine which vending machines were affected by order to lower price of soda purchased by bargaining-unit employees).

Therefore, we grant this portion of the GC's exception to the Judge's recommended remedies and leave for compliance proceedings the determination of employees' individual entitlements to relief.[15]

VII. Order

Pursuant to § 2423.41 of the Authority's Regulations and § 7118 of the Statute, NATCA shall:

1. Cease and desist from:

(a) Failing to perform its duty of fairly representing all bargaining-unit employees by retroactively applying an amendment to the seniority policy in NATCA's constitution in order to reset the cumulative seniority of unit employees who left the unit after June 6, 2006, returned to the unit before the amendment was adopted, and worked in managerial or supervisory positions for the Federal Aviation Administration (FAA) between June 6, 2006, and the date on which the amendment was adopted.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal.

(c) In any like or related manner, failing or refusing to comply with its obligations under the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Represent the interests of all employees in the exclusive bargaining unit that NATCA represents without discrimination and without regard to labor organization status or membership.

(b) Restore the cumulative seniority of all unit employees who were working in unit positions when NATCA amended its seniority policy and decided to apply that amendment retroactively, and who had their cumulative seniority reset solely as the result of the retroactive application of that amendment.

(c) Post at the NATCA business offices, and in normal meeting places where unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of NATCA and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

IT IS ALSO ORDERED that the allegations against Respondent NATCA in Case No. SF-CO-09-0030 be, and hereby are, dismissed.

IT IS FURTHER ORDERED that the complaint against Respondent FAA, Case No. DA-CA-09-0061, be, and hereby is, dismissed.

[15] We note that, for the reasons already discussed, the only employees entitled to relief are those who were in the unit when NATCA amended its constitution and who lost their seniority solely as the result of the *retroactive* application of that amendment.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the National Air Traffic Controllers Association, AFL-CIO (NATCA) violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail to perform our duty of fairly representing all bargaining-unit employees by retroactively applying an amendment to the seniority policy in NATCA's constitution in order to reset the cumulative seniority of unit employees who left the unit after June 6, 2006, returned to the unit before the amendment was adopted, and worked in managerial or supervisory positions for the Federal Aviation Administration (FAA) between June 6, 2006, and the date on which the amendment was adopted.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal.

WE WILL NOT, in any like or related manner, fail or refuse to comply with our obligations under the Statute.

WE WILL represent the interests of all employees in the exclusive bargaining unit that we represent without discrimination and without regard to labor organization status or membership.

WE WILL restore the cumulative seniority of all unit employees who were working in unit positions when NATCA amended its seniority policy and decided to apply that amendment retroactively, and who had their cumulative seniority reset solely as the result of the retroactive application of that amendment.

_____
(NATCA President)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of the posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, then they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 356-5000.

_____

Office of Administrative Law Judges

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, AFL-CIO
Respondent

AND

MARK SANTA CRUZ, An Individual
STEVEN DUNLAP, An Individual
MICHAEL MEKARA, An Individual
JIM H. HENDRICKSON, An Individual
SCOTT D. DEVANE, An Individual
JULIE IRELAND, An Individual
DAVID JOHNSON, An Individual
CALVIN BROWN, An Individual
WILLIAM D. AYNES, An Individual
Charging Parties

AND

FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.
Respondent

AND

CALVIN BROWN, An Individual
Charging Party

Case Nos. SF-CO-09-0001
SF-CO-09-0030
AT-CO-09-0040
CH-CO-09-0076
CH-CO-09-0111
CH-CO-09-0304
CH-CO-09-0313
DA-CO-09-0014
DE-CO-09-0018

Stefanie Arthur, Esq.
For the General Counsel

William W. Osborne, Jr., Esq.
Natalie C. Moffett, Esq.
For the Respondent NATCA

Cabrina S. Smith, Esq.
For the Respondent FAA

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

STATEMENT OF THE CASES

These cases arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), Part 2423.

The cases at bar were initiated by nine individual unfair labor practice (ULP) charges against respondent National Air Traffic Controllers Association (NATCA) in five regions of the FLRA. Case No. SF-CO-09-0001 was filed with the San Francisco Regional Director on October 1, 2008, by Mark Santa Cruz. Case No. SF-CO-09-0030 was filed with the San Francisco Regional Director on October 16, 2008, by Steven Dunlap. Case No. AT-CO-09-0040 was filed with the Atlanta Regional Director by Michael Mekara on October 31, 2008, and transferred to the San Francisco Regional Director on October 28, 2009. Case No. CH-CO-09-0076 was filed with the Chicago Regional Director by Jim H. Hendrickson on October 30, 2008, and transferred to the San Francisco Regional Director on October 28, 2009. Case No. CH-CO-09-0111 was filed with the Chicago Regional Director by Scott D. DeVane on November 19, 2008, and transferred to the San Francisco Regional Director on October 28, 2009. Case No. CH-CO-09-0304 was filed with the Chicago Regional Director by Julie Ireland on February 24, 2009, and transferred to the San Francisco Regional Director on October 28, 2009. Case No. CH-CO-09-0313 was filed with the Chicago Regional Director by David Johnson on March 6, 2009, and transferred to the San Francisco Regional Director on October 28, 2009. Case No. DA-CO-09-0014 was filed with the Dallas Regional Director by Calvin Brown on October 27, 2008, and transferred to the San Francisco Regional Director on October 30, 2009. Case No. DE-CO-09-0018 was filed with the Denver Regional Director by William D. Aynes on October 14, 2008, and transferred to the San Francisco Regional Director on November 2, 2009.

A consolidated complaint based upon the nine individual charges filed against NATCA was issued by the San Francisco Regional Director on December 14, 2009. The consolidated complaint alleges that NATCA failed to comply with its duty to fairly represent

employees in the bargaining unit under 5 U.S.C. § 7114(a)(1), and committed unfair labor practices in violation of 5 U.S.C. § 7116 (b)(1) and (8).

On December 24, 2008, an unfair labor practice charge was filed against the Department of Transportation, Federal Aviation Administration (FAA) by Calvin Brown in Case No. DA-CA-09-0061. The charge was filed with the Dallas Regional Director and transferred to the San Francisco Regional Director on October 30, 2009. A complaint based upon this charge was issued by the San Francisco Regional Director on December 29, 2009. The complaint alleges the FAA "… interfered with, restrained or coerced employees in the exercise of their right[s] under § 7102 of the Statute to refrain from 'forming, joining or assisting a labor organization' freely and without free of reprisal."[1], and thus committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (8).

On January 27, 2010, the Regional Director of the San Francisco Region consolidated Case No. DA-CA-09-0061, the unfair labor practice complaint filed against respondent FAA, with Case No. SF-CO-09-0001 *et al.*, the consolidated complaint covering the nine unfair labor practice charges filed against respondent NATCA that was issued on December 14, 2009. The Regional Director consolidated the ten cases because they all relate to an amendment of NATCA's Constitution adopted on September 12, 2008, which altered the national seniority policy for the bargaining unit. In essence, the nine charges against NATCA stem from its adoption and implementation of a new seniority policy, and the charge against the FAA stems from its application of the new seniority policy.

The cases were set for hearing in San Francisco on February 22, 2010. On January 11, 2010, respondent NATCA filed an answer to the consolidated complaint in Case No. SF-CO-09-0001 *et al.*, and on January 19, 2010, respondent FAA filed an answer to Case No. DA-CA-09-0061. On February 3, 2010, respondent NATCA filed an unopposed motion to change the location and to postpone the hearing, seeking to move the hearing to Washington, D.C. On February 4, 2010, an order rescheduling the hearing to April 26, 2010, in Washington, D.C., was issued and on March 19, 2010, the hearing was indefinitely postponed to permit the parties to file motions for summary judgment.

On April 5, 2010, the General Counsel filed a motion for summary judgment and a brief in support of the motion along with documents and affidavits, contending that Case No. SF-CO-09-0001 *et al.*, and Case No. DA-CA-09-0061, were suitable for summary judgment. On April 8, 2010, NATCA filed an unopposed motion to extend time for response to the General Counsel's motion and an order extending the time to respond was issued on April 9, 2010. That order gave the respondents until April 19, 2010, to respond to the General Counsel's motion for summary judgment. On April 16, 2010, respondent NATCA filed a motion for summary judgment along with a memorandum, documents and a declaration from NATCA president Paul Rinaldi in support of its motion and in opposition to the General Counsel's motion in Case No. SF-CO-09-0001 *et al*. On April 16, 2010, respondent FAA filed a response and cross motion for summary judgment along with a supporting brief and other exhibits in Case No. DA-CA-09-0061. On April 26, 2010, the General Counsel filed an opposition to respondents' motions in the respective cases. In their motions for summary judgment, the parties agreed that there are no material facts in dispute and each contends that it is entitled to summary judgment as a matter of law.

MOTIONS FOR SUMMARY JUDGMENT

The Authority has held that motions for summary judgment filed under 5 C.F.R. § 2423.27 of its regulations serve the same purpose and are governed by the same principles as motions filed in the United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995); *Dep't of the Navy, U.S. Naval Ordnance Station, Louisville, Ky.*, 33 FLRA 3, 4-5 (1988) (*NOS, Louisville*), *rev'd on other grounds*, No. 88-1861 (D.C. Cir. Aug. 9, 1990). The motion is to be granted if the "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *NOS, Louisville*, 33 FLRA at 4, quoting Rule 56(c). After reviewing the pleadings, affidavits, declarations, documents and exhibits submitted by the parties, I agree that there is no genuine issue of material fact with respect to the consolidated complaints before me. Accordingly, it is unnecessary to hold a hearing in these cases, and it is appropriate to decide the cases on the motions for summary judgment. The summary of the undisputed material facts, my conclusions of law, and recommendations are set forth below.

FINDINGS OF FACT

Respondent NATCA is a labor organization under 5 U.S.C. § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide unit of

[1] The relevant language of 5 U.S.C. § 7102 states: "Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal …." Thus, the "without free of reprisal" language in paragraph 17 of the complaint appears to be an error that inaccurately restates § 7102.

employees appropriate for collective bargaining. (GC Exs. 1, 2, 3, 4).

Respondent Federal Aviation Administration is an agency under 5 U.S.C. § 7103(a)(3) of the Statute. (GC Exs. 1, 2, 3, 4).

In March 1996, section 437 of the Department of Transportation and Related Appropriations Act (Transportation Act) exempted the FAA from portions of Title 5 and provided that it should develop and implement a personnel management system. Pub. L. No. 104-50, Title iii, § 347(b), 109 Stat. 460 (1995), as amended by Pub. L. No. 104-122, 110 Stat. 876 (1996) (codified at 49 U.S.C. § 106). Immediately thereafter, the Federal Aviation Reauthorization Act of 1996 (FAA Act) was passed, providing that "[i]n developing and making changes to the personnel management system . . . the Administrator shall negotiate with the exclusive bargaining representatives of employees of the [FAA] under section 7111 of title 5[.]"

The Agency's collective bargaining obligations in the context of this new personnel system are codified at 49 U.S.C. § 40122 *et. seq*. and the Congressional authorization to negotiate wages is a significant departure from the typical federal pay scheme set forth in the Civil Service Reform Act, 5 U.S.C. § 7101 *et. seq*.

49 U.S.C. § 40122 provides:

(a) In general –

> (1) Consultation and Negotiation. In developing and making changes to the personnel and management system initially implemented by the Administrator of the Federal Aviation Administration on April 1, 1996, the Administrator shall negotiate with the exclusive bargaining representatives of employees of the Administration certified under section 7111 of title 5 and consult with other employees of the Administration.
>
> (2) Mediation - If the Administrator does not reach an agreement under paragraph (1) with the exclusive bargaining representatives, the services of the Federal Mediation and Conciliation Service shall be used to attempt to reach such agreement. If the services of the Federal Mediation and Conciliation Service do not lead to an agreement, the Administrator's proposed change to the personnel management system shall not take effect until 60 days have elapsed after the Administrator has transmitted the proposed change, along with the objections of the exclusive bargaining representatives to the change, and the reasons for such objections, to Congress. The 60-day period shall not include any period during which Congress has adjourned *sine die*.

Although the parties were able reach agreement upon contract negotiations for a period of time after the implementation of the law, negotiation of a new contract proved unsuccessful in 2006, and on June 5, 2006, the FAA implemented changes pursuant to 49 U.S.C. § 40122 over the objection of NATCA. Although the new work rules were styled as a contract, the work rules set forth therein were unilaterally implemented by the FAA. (Declaration of Rinaldi and Ex. 4). Hereinafter, the work rules imposed by the FAA via unilateral action will be referred to as the "White Book".

Article 83 of the White Book covers seniority and Section 1 of that article provides that seniority will be determined by NATCA. Section 2 of the article gave NATCA the authority to change seniority one (1) time during the life of the agreement. (White Book, p. 150 and Ex. 4 of Rinaldi Declaration; GC Ex. 15C).

The seniority policy for NATCA is contained in Article XV, Section 1 of the NATCA National Constitution. In 2004, delegates to NATCA's convention adopted the following policy:

> Section 1. The following shall be used to determine seniority for the National Air Traffic Controllers Association:
>
> a) Cumulative NATCA Bargaining Unit Time;
> b) First Tie Breaker: NATCA Bargaining Unit Time;
> c) Second Tie Breaker: EOD/FAA;
> d) Third Tie Breaker: SCD;
> e) Fourth Tie Breaker: Lottery. The lottery shall be determined at the local level.
>
> For the purpose of facility release policies, seniority will be determined by facility time only as a bargaining unit member at that present facility. NATCA Bargaining Unit Time is defined as the total time in a given bargaining unit represented by NATCA and as defined by the FLRA petition for representation of that unit. Cumulative NATCA Bargaining Unit Time is derived by totaling all time together spent in each of the NATCA bargaining units.

(GC Ex. 15A)

Although unfair labor practice charges were filed over the seniority policy adopted at the 2004 national convention, none of those charges filed resulted in a Regional

Director issuing a complaint. (Declaration of Rinaldi with Exs. 1 & 2).

At the NATCA national convention on September 12, 2008, delegates utilized the seniority change provision authorized by Article 83 of the White Book to adopt Resolution A08-19, which altered the seniority policy set forth in Article XV of their National Constitution by adding the following provision as Section 3 of that article:

> "Any bargaining unit employee who accepted a supervisor/management job after June 6, 2006 . . . and returns to the bargaining unit will have his/her cumulative seniority date set to the day he/she returns."

(GC Ex. 15A; Declaration of Rinaldi).

On September 19, 2008, NATCA President Patrick Forrey notified Robert Sturgell, Acting Administrator of the FAA that NATCA had altered the seniority policy at its most recent convention to include the language set forth in Section 3 of the NATCA constitution. (GC Ex. 16(a)). On September 24, 2008, union president Forrey sent a second letter to Administrator Sturgell that incorporated the language of Section 2, which had been omitted from the prior letter due to oversight. (GC Ex. 16(b)).

Upon receiving the notice of seniority policy modification from union president Forrey, the FAA implemented the change in policy as directed by NATCA. (FAA Response). Consistent with NATCA's guidance, the FAA implemented the alteration of seniority policy by treating the date the bargaining unit employee returned to the bargaining unit as his or her new cumulative seniority date if the employee had accepted a supervisory or management position after June 6, 2006. Thus, said employees lost all seniority that had been accumulated prior to their return date. (GC Ex. 6-14).

Charging Party Mark Santa Cruz was an employee under 5 U.S.C. § 7103(a)(2) and was in the bargaining unit represented by NATCA at the time the seniority policy set forth in the NATCA constitution was altered on September 12, 2008. Between April 15, 2007 and June 19, 2008, Mark Santa Cruz was a supervisor or management official under 5 U.S.C. § 7103(a)(2)(iii), returning to a bargaining unit position on June 20, 2008. As of September 11, 2008, Mark Santa Cruz's cumulative NATCA seniority date was March 23, 1987. (GC Ex. 6).

Charging Party Steve Dunlap was not an employee under 5 U.S.C. § 7103(a)(2) and was not in the bargaining unit represented by NATCA at the time the seniority policy set forth in the NATCA constitution was altered on September 12, 2008. Between May 11, 2008 and September 27, 2008, Steve Dunlap was a supervisor or management official under 5 U.S.C. § 7103(a)(2)(iii), returning to a bargaining unit position on September 28, 2008. As of September 11, 2008, Steve Dunlap's cumulative NATCA seniority date was May 5, 1986. (GC Ex. 7).

Charging Party Michael Mekara was an employee under 5 U.S.C. § 7103(a)(2) and was in the bargaining unit represented by NATCA at the time the seniority policy set forth in the NATCA constitution was altered on September 12, 2008. Between February 16, 2007 and February 6, 2008, Michael Mekara was a supervisor or management official under 5 U.S.C. § 7103(a)(2)(iii), returning to a bargaining unit position on February 7, 2008. As of September 11, 2008, Michael Mekara's cumulative NATCA seniority date was January 27, 1991. (GC Ex. 8).

Charging Party Jim H. Hendrickson was an employee under 5 U.S.C. § 7103(a)(2) and was in the bargaining unit represented by NATCA at the time the seniority policy set forth in the NATCA constitution was altered on September 12, 2008. Between January 13, 2007 and May 9, 2007, Jim H. Hendrickson was a supervisor or management official under 5 U.S.C. § 7103(a)(2)(iii), returning to a bargaining unit position on May 10, 2007. As of September 11, 2008, Jim H. Hendrickson's cumulative NATCA seniority date was June 12, 1989. In October 2009, Jim H. Hendrickson accepted a permanent supervisory position with FAA and ceased to be in the bargaining unit represented by NATCA. (GC Ex. 9).

Charging Party Scott D. DeVane was an employee under 5 U.S.C. § 7103(a)(2) and was in the bargaining unit represented by NATCA at the time the seniority policy set forth in the NATCA constitution was altered on September 12, 2008. Between June 10, 2007 and July 19, 2008, Scott D. DeVane was a supervisor or management official under 5 U.S.C. § 7103(a)(2)(iii), returning to a bargaining unit position on June 20, 2008. As of September 11, 2008, Scott D. DeVane's cumulative NATCA seniority date was September 11, 1992. (GC Ex. 10).

Charging Party Julie Ireland was an employee under 5 U.S.C. § 7103(a)(2) and was in the bargaining unit represented by NATCA at the time the seniority policy set forth in the NATCA constitution was altered on September 12, 2008. Between August 5, 2007 and January 30, 2008, Julie Ireland was a supervisor or management official under 5 U.S.C. § 7103(a)(2)(iii), returning to a bargaining unit position on January 31, 2008. As of September 11, 2008, Julie Ireland's

cumulative NATCA seniority date was March 30, 1991. (GC Ex. 11).

Charging Party David Johnson was an employee under 5 U.S.C. § 7103(a)(2) and was in the bargaining unit represented by NATCA at the time the seniority policy set forth in the NATCA constitution was altered on September 12, 2008. Between June 10, 2007 and April 26, 2008, David Johnson was a supervisor or management official under 5 U.S.C. § 7103(a)(2)(iii), returning to a bargaining unit position on April 27, 2008. As of September 11, 2008, David Johnson's cumulative NATCA seniority date was October 22, 1989. (GC Ex. 12).

Charging Party Calvin Brown was an employee under 5 U.S.C. § 7103(a)(2) and was in the bargaining unit represented by NATCA at the time the seniority policy set forth in the NATCA constitution was altered on September 12, 2008. Between April 26, 2007 and November 28, 2007, Calvin Brown was a supervisor or management official under 5 U.S.C. § 7103(a)(2)(iii), returning to a bargaining unit position on November 29, 2007. As of September 11, 2008, Calvin Brown's cumulative NATCA seniority date was a date in February 1996. (GC Ex. 13).

Charging Party William D. Aynes was an employee under 5 U.S.C. § 7103(a)(2) and was in the bargaining unit represented by NATCA at the time the seniority policy set forth in the NATCA constitution was altered on September 12, 2008. Between October 13, 2007 and April 13, 2008, William D. Aynes was a supervisor or management official under 5 U.S.C. § 7103(a)(2)(iii), returning to a bargaining unit position on April 14, 2008. As of September 11, 2008, William D. Aynes' had approximately 20 years of seniority. (GC Ex. 14).

DISCUSSION AND ANALYSIS

The Unfair Labor Practice Complaints Against NATCA

Position of the Parties

A. General Counsel

The GC contends that Respondent NATCA failed to comply with its duty to fairly represent employees in the bargaining unit as required by 5 U.S.C. §7114(a)(1). The GC argues that NATCA committed an unfair labor practice when it altered its seniority policy to cause bargaining unit employees who served in a supervisory or management position to lose their accumulated bargaining unit seniority and then applied the change retroactively to a date which preceded adoption of the change in seniority policy. The GC asserts that it does not challenge or question the Respondent's ability to adopt a seniority policy that reset bargaining unit employees' seniority to the date they return to the unit from a supervisory or management position so long as the change in policy is applied prospectively. (GC Brief at 1, 14).

B. Respondent NATCA

Respondent NATCA asserts that it did not breach its duty of fair representation because it's action in punishing bargaining unit members who escaped the unconscionable terms and conditions unilaterally imposed by the FAA White Book by going to work for FAA management after the imposition of those work rules falls within the bounds of deference afforded unions in exercising their duty of representation. NATCA argues that the pay freezes, drastic cuts to benefits and altered working conditions suffered by their fellow bargaining unit members gave those who remained in the unit reason to authorize delegates to the convention to change the seniority policy "to encourage and reward Union solidarity among employees who remained in the adversely affected NATCA bargaining unit and to discourage the actions of bargaining unit members who sided with, and joined the ranks of FAA management." (NATCA Brief at 11). Respondent NATCA also contends that Charging Party Steven Dunlop was not in the bargaining unit as of September 12, 2008, and that Charging Party Jim Hendrickson ceased to be a bargaining unit member in October 2009. (*Id.* at 4).

Discussion and Analysis

A. The Complaint as it Relates to the Charges Against NATCA Filed by Charging Parties Mark Santa Cruz, Michael Mekara, Jim H. Hendrickson, Scott D. DeVane, Julie Ireland, David Johnson, Calvin Brown and William D. Aynes

I. NATCA Constitutional Amendment as Interpreted by NATCA

In addition to demonstrating the complexity that arises when cases with different, albeit similar facts are consolidated into a jumbled mishmash of legal theories involving different charging parties, respondents and differing outcomes, the charges that make up this complicated bundle of litigation exemplifies labor relations run amok within the federal sector. When an agency unilaterally implements conditions of employment that give a union unrestrained power to determine seniority and the union then uses that power to negate management's right to assign employees and work, a perfect storm of abdication and abuse of power has formed. That it occurred within one of the few labor relationships in the federal sector where wages are

negotiable should frighten anyone who pays federal taxes. Furthermore, the facts and circumstances of these complaints present a sterling example of how labor law in the federal and private sectors differs and why legal authority from the private sector which does not contemplate the management rights granted under the Statute provide little that can be used to resolve federal sector disputes.

To understand the multitude of issues arising from these eight varied charges, it is important to understand the context in which they arose. In 1996, Congress authorized the FAA to develop its own personnel system. Flowing from this authorization was a requirement to bargain collectively with exclusive representatives and the ability to negotiate wages for the represented employees was one of the rights provided in the legislation. While not exclusive to this agency, the ability to negotiate wages is a significant departure from the wage determination process used for the great majority of federal employees whose wages are determined each year by Congress and implemented by the Executive. That this unusual system of wage determination was given to air traffic controllers, a group of federal employees whose vocation is virtually limited to the federal sector speaks more to the political might of their exclusive representative than it does competition the FAA faces from the private sector for such services. Nonetheless, Congress authorized collective bargaining over the wages of a workforce whose primary employer is the federal government and in doing so, the tracks for this train wreck were in place.

For several years after passage of the legislation, the FAA received sufficient appropriations from Congress to secure labor peace by agreeing to increase the salaries of air traffic controllers until they became one of the most well compensated position descriptions within the federal sector. However, a change in the Executive brought a change in FAA leadership, and in 2005, the FAA attempted to rein in the escalation of labor costs by offering new bargaining proposals that imposed a wage freeze upon the air traffic controllers represented by NATCA. When NATCA and the FAA were unable to reach an agreement upon the new proposals, the FAA unilaterally implemented its bargaining proposals in the form of the White Book issued on June 5, 2006, which, among other things, arrested the escalation of wages for air traffic controllers.[2] Among the changes in pay implemented by the White Book was a phase out of Controller Incentive Pay.

Although unilateral implementation was contemplated and authorized by Congress when the FAA's new personnel system was authorized in 1996, the FAA's unilateral implementation of new work rules in response to the failure to reach a negotiated agreement infuriated NATCA and the bargaining unit employees they represented. As a result, any bargaining unit employee who worked as a part of management in any capacity after the date the new work rules were implemented became the subject of their wrath, scorn, spite, and ultimately their vindictive retribution. On September 12, 2008, the NATCA constitution was amended to change how seniority was calculated so that those bargaining unit employees who worked as a supervisor or manager after the work rules were implemented would lose their seniority.

Under the terms of that change as interpreted by NATCA, no matter the length of the period and even if it was pursuant to a temporary promotion made by management as an assignment of work, any bargaining unit employee who left the unit to serve in a management position after the White Book was implemented lost all accumulated seniority earned prior to that point when the employee returned to the unit. Most importantly, the change was interpreted by NATCA as applicable to bargaining unit employees who had served in a management position after the White Book was issued, even if they had returned to the bargaining unit prior to the adoption of the policy change. As presented by the GC, one of the questions to be answered by this decision is whether this retroactive application of the change to seniority policy constitutes an unfair labor practice because it violated the exclusive representative's duty of fair representation.

For the reasons outlined below, I conclude that NATCA committed unfair labor practices when it retroactively altered the seniority date for bargaining unit employees who worked in management positions after June 6, 2006, but returned to the bargaining unit prior to the time the seniority policy in the NATCA constitution was changed on September 12, 2008. Furthermore, the limits of this decision should not be interpreted as an agreement or concurrence with the GC's contention that a prospective application of a change in seniority policy that punished bargaining unit employees for temporarily serving in management positions pursuant to the exercise of a management right would survive review. As explained in the discussion related to charging party Jim H. Hendrickson set forth below in Section C, the language of this particular change and the circumstances surrounding an employee's performance of management duties are considerations that make a blanket declaration of approval for prospective application of such a punitive provision improper. Within the federal sector, a union's ability to determine seniority must be assessed in conjunction with its impact upon management's right to

[2] While some have characterized them as "economic take-backs, in the name fiscal prudence that constituted unprecedented draconian reductions in compensation, bordering on the unconscionable", given the current federal pay freeze they were more prescient than draconian. *FAA and NATCA Mediation Panel Opinion,* August 6, 2009. (NATCA Ex. 3).

assign employees and work and while unions are given substantial latitude to determine seniority within the bargaining unit they represent, seniority provisions that interfere with management's right to direct work and assign employees cannot be negotiated. *Fraternal Order of Police, Lodge 1F (R.I.) Federal*, 32 FLRA 944 (1988)(*FOP*).

In reviewing the complaint based upon the charges made against NATCA, it is important to note that each charge was filed by a bargaining unit employee who had his or her seniority date reset to a later date as a result of working in a management position pursuant to a temporary promotion. Such migration between working as a bargaining unit employee and working in a management position is not uncommon in the federal sector and is but one of the ways the federal sector differs from the world of labor relations in the private sector. Gaining experience as a manager in a temporary capacity serves to benefit both the agency and the employee, giving each an opportunity to see if the employee is capable of performing as a manager and likes supervisory work, all while assisting the agency in the completion of its mission.

In federal labor law, the conflict between seniority provisions and management's right to direct work and assign employees frequently arises as a negotiability dispute when a union tenders a bargaining proposal that would require management to use seniority whenever a position has to be filled via a temporary promotion. The Authority has repeatedly found such proposals nonnegotiable because they interfere with management's right to assign work. *FOP*, 32 FLRA at 944; *Am. Fed. of Gov't Employees, AFL-CIO, Int'l Council of U.S. Marshals Serv. Locals*, 8 FLRA 268 (1982); *Int'l Org. of Masters, Mates, and Pilots*, 11 FLRA 115 (1983). While the Authority has held that a union may not insist that seniority be blindly used in making temporary promotions, it has ruled that seniority based assignments are within the duty to bargain and enforceable so long as the agency retains the right to determine employee qualifications. *Am. Fed. of Gov't Employees, AFL-CIO, Local 987*, 35 FLRA 265 (1990); *Am. Fed. of Gov't Employees, AFL-CIO, Local 738*, 33 FLRA 380 (1988)(*Combined Arms Center*). In the *Combined Arms Center* case, the Authority held that a proposal which required the agency to reassign either a volunteer or the least senior employee from among those in positions affected by a realignment of an engineering technician position from one division to another was nonnegotiable. The Authority found that the proposal directly interfered with management's right to assign employees because it did "not allow the Agency to make any judgment on the qualifications of those employees, relative to each other or to other employees, to perform the work of the position[.]" *Id.* at 382.

In the case at bar, Article 43 of the White Book, covers temporary promotions and requires the FAA to solicit qualified volunteers from the facility when a temporary promotion will be needed. Of course, after NATCA passed a constitutional amendment requiring that anyone accepting a supervisor or management job have his or her cumulative seniority date reset, it could be argued that seeking volunteers would be an exercise in futility. Perhaps the better question would be what happens when no one volunteers, but a unit employee is detailed to the position as an assignment of work pursuant to management's rights? Or, what if the employee so detailed is a union representative because there were no volunteers as contemplated by Section 3 of Article 43? While answering such questions is beyond the purview of this decision, existence of such questions, like the imprecise language used in the provision adopted at the convention, demonstrates the lack of forethought given to this vindictive abuse of power exercised against bargaining unit employees who did nothing more than assist the agency in achieving its mission for a flying public whose tax dollars fund FAA operations. Allowing those employees to suffer punishment in the form of lost seniority merely because they volunteered for agency assignments of work using the process originally established through the negotiation of Article 43 by NATCA would be inconsistent with the requirement of an effective and efficient Government. 5 *U.S.C.* § 7101. A union's latitude to determine seniority within the federal sector does not permit it to establish seniority policies that encroach upon and eviscerate the management rights set forth in the Statute and a union violates its duty of fair representation when a seniority policy singles out for punishment, only those bargaining unit employees who leave the unit to assist the agency by temporarily filling a vacant management position.

In the federal sector, an exclusive representative owes a duty of fair representation to all employees in the bargaining unit it represents without regard to labor organization membership, but owes no duty to one who is not in the unit. *Nat'l Air Traffic Controllers Assoc., MEBA/AFL-CIO*, 55 FLRA 601 (1999)(*NATCA I*). The duty of fair representation imposed by the Statute in § 7114(a)(1) incorporates into federal labor relations the duty of fair representation first recognized for unions in the private sector. *NATCA I*, 55 FLRA at 604. However, unlike the private sector which is governed by the National Labor Relations Act, within the federal sector, there is no private cause of action for such a violation. Only the General Counsel of the FLRA may bring an unfair labor practice for a violation of that duty. *Karahalios v. NFFE, Local 1263*, 109 S.Ct. 1282 (1989). In this case, it is the General Counsel for the FLRA who contends that NATCA violated its duty of fair representation. However, the GC contends that NATCA violated its duty not in the way it changed its seniority policy, but in the retroactive manner in which it applied

the change to punish bargaining unit employees for actions undertaken and completed prior to their knowing that their actions would result in draconian adjustments to their seniority date.

Unlike the private sector, where an employee typically remains in the bargaining unit unless he or she becomes a permanent part of management, an employee's movement between bargaining unit and non-bargaining unit positions is a common practice in the federal sector. It is well settled under the Statute that when a bargaining unit employee is promoted to a supervisory position, even on a temporary basis, the employee moves outside the bargaining unit, the collective bargaining agreement ceases to be applicable, and the withholding of union dues is not permitted. *Internal Revenue Serv., Fresno Serv. Ctr., Fresno, Cal.*, 7 FLRA 371 (1981) (*Fresno*); *Int'l Assoc. of Machinists and Aerospace Workers, Lodge 2424*, 25 FLRA 194 (1987) (*IAM&AW*). Of the nine individuals who filed an unfair labor practice charge against NATCA over their loss of accumulated seniority, eight were no longer serving in a detail to a temporary promotion as a manager or supervisor pursuant to a management assignment of work and had returned to the bargaining unit at the time NATCA enacted the change in its seniority policy. These eight bargaining unit employees were owed a duty of fair representation by NATCA at the time the union's constitution was amended on September 12, 2008. The charge filed by Steven Dunlop, the one charging party who had not returned to the unit at the time the constitution was amended is discussed separately in Section B below.

With respect to the eight charging parties to whom a clear duty of fair representation was owed by NATCA because they were working in the bargaining unit when the change in seniority policy was enacted, the standard for determining whether an exclusive representative has breached its duty of fair representation under § 7114(a)(1) of the Statute was set forth by the Authority in *Nat'l Fed. of Fed. Employees, Local 1453*, 23 FLRA 686 (1986)(*Local 1453*). Initially, it should be noted that the change in seniority policy adopted at the NATCA convention did not limit its scope to those bargaining unit employees who were not members of the union. Thus, union membership was not a factor in the application of the change. In *Local 1453*, the Authority held that where union membership is not a factor in the action under review, the test is:

> "whether the union deliberately and unjustifiably treated one or more bargaining unit employees differently from other employees in the unit. That is, the union's actions must amount to more than mere negligence or ineptitude, the union must have acted arbitrarily or in bad faith, and the action must have resulted in disparate or discriminatory treatment of a bargaining unit employee."

Id. at 691.

This standard was reaffirmed by the Authority in *U.S. Air Force, Loring Air Force Base, Limestone, Me.*, 43 FLRA 1087, 1094 (1992)(*Loring*), and it is the test against which the actions of NATCA must be measured.

With respect to the first requirement that the union act with deliberation, there is no doubt under the facts that NATCA deliberately changed its seniority policy and did so to punish bargaining unit employees who crossed the bargaining unit line and "sided with, and joined the ranks of management" after the work rules set forth in the White Book were unilaterally implemented by the FAA. In fact, the change was undertaken with premeditation and malice aforethought specifically aimed at punishing those who "exempted themselves from the unconscionable terms and conditions of employment imposed by the FAA's White Book." As was made clear in NATCA's brief, the union's action was deliberate, thus, the question turns to whether the action was unjustifiable.

In assessing NATCA's justification for changing its seniority policy in the manner in which it did, it is important to understand what the change did not do. Although NATCA argues that it made the seniority change "to encourage and reward Union solidarity among employees who remained in the adversely affected NATCA bargaining unit …", the change it made did not apply to all employees who left the bargaining unit after the White Book was implemented. Instead, the change applied only to those employees who left the unit by going to a supervisory or management position within the FAA. Any bargaining unit employee who left for a permanent position at another federal agency or who exempted himself from the "unconscionable" White Book by taking up a new career as a hot dog vendor would have his cumulative NATCA bargaining unit time awaiting him if he returned to the unit. Thus, the new policy was discriminatory because not all who left when the times supposedly got tough were punished for cutting and running. Rather, only those who assisted the FAA in achieving its mission by serving in a supervisory or management position were singled out and discriminated against for gaining an exemption from the plight of their peers. Even when they left the unit for a temporarily promotion of limited duration on a detail to a supervisory or management position made pursuant to management's assignment of employee and work, under the seniority change as enacted and interpreted by NATCA, they lost their accumulated seniority time when they returned to the unit. While justification of a prospective application of a seniority policy that punishes bargaining unit employees who are detailed to management positions by

the exercise of a management right is dubious, the unjustifiable element of the Authority's test for breach of the duty of fair representation is clearly met when NATCA applied such a policy retroactively to bargaining unit employees who volunteered for such positions without knowing the action would result in their loss of accumulated seniority and volunteered pursuant to a process NATCA had established through prior negotiations.

Declaring an act improper and imposing punishment only after the fact is typically an abuse of power exercised in the realm of dictators and kings rather than democratic organizations. Our forefathers found the exercise of *ex post facto* laws so antithetical to the rule of law, our social compact and democratic principles that they included a ban upon the ability of Congress and the states to pass such laws in Sections 9 and 10 of Article I of the Constitution. Ironically, a discussion of the forefather's disregard for bills of attainder and *ex post facto* laws is part of the decision in *U.S. v. Brown*, 381 U.S. 437 (1965), a case in which the Supreme Court struck down as unconstitutional a statute that made it a crime for a member of the Communist party to serve as an officer or employee of a labor union. In the case of these eight charging parties, they had their accumulated seniority wiped out by a change in seniority policy that was enacted and applied to them only after they:

1) were solicited by a process originally negotiated by NATCA;
2) volunteered, were found qualified and selected for the detail by the FAA;
3) served in the supervisory position to which they were temporarily promoted; and
4) returned to the bargaining unit with their cumulative seniority intact.

It was only later, on September 12, 2008, that NATCA delegates voted to change the seniority policy so that those who "accepted a supervisor/management after June 6, 2006 [the date the FAA implemented the White Book] and returns to the bargaining unit will have his/her cumulative seniority date set to the day he/she returns."[3]

In this case, the FAA solicited volunteers from the bargaining unit for temporary promotions to management positions in accordance with Article 43 of the White Book. While NATCA contends that the FAA unilaterally imposed terms and conditions of employment that were unconscionable, in reality, other than altering those portions of the prior Green Book related to pay and compensation, the agency left in place most of the rights and benefits previously negotiated by NATCA in earlier agreements. Thus, Article 43 and its requirement to solicit qualified volunteers from the bargaining unit for temporary promotions remained in place and was the process the FAA used when it needed to temporarily fill higher-level supervisory positions. Having created the bargaining unit employee's right to volunteer for a temporary promotion into a supervisory position, NATCA's treating those who volunteered for a temporary promotion as if they had accepted an offer of permanent employment as a manager or supervisor is unjustifiable. Volunteering for a temporary promotion given as an assignment of work by management is not the same as accepting a permanent position and NATCA's treating them as one and the same, cannot be justified.

Had NATCA interpreted the alteration of its seniority policy as one that prospectively mandated a resetting of seniority for bargaining unit employees who returned to the bargaining unit after accepting a permanent position as a supervisor or manager, an argument that it falls within its right to determine seniority would be present even within the unique nature of personnel law covering the federal sector. However, by interpreting the alteration as a change that applied retroactively to bargaining unit members who volunteered for a temporary promotion given as an assignment of work, implementation of the change in seniority policy unjustifiably treated one or more bargaining unit employees differently from other employees in the unit and constituted an unfair labor practice under the precedent established by the Authority in *Local 1453* and *Loring*, as contended by the GC.

To see the folly, error and lack of foresight present by NATCA's interpretation of the language adopted by the convention delegates, one only has to follow the logical consequences of its application. If, as NATCA asserts, the new seniority policy requires that any bargaining unit employee who serves in supervisory or management position after June 6, 2006, have his or her seniority date reset to the date he or she returns to the unit, this punitive result would ensure that no bargaining unit employee would volunteer for a temporary promotion under Article 43 of the White Book. However, that does not mean that supervisory positions would remain unfilled. Within the federal sector, filling a vacant supervisory position on a temporary basis would be an exercise of management's right to assign employees and work even when there are no volunteers. In fact, in accordance with Section 3 of Article 43 and consistent with Authority precedent, a union representative may be detailed into a temporary promotion to a supervisory position if no there are no other qualified bargaining unit employees available. Under its interpretation, NATCA has enacted a provision

[3] That an employee who is assigned to perform work in a temporary detail or promotion pursuant to the exercise of management rights is not entitled to accept or decline said assignment is a fact that seems to have escaped NATCA, the FAA and the General Counsel, and is but one of the problems with the language of the constitutional amendment as further discussed below.

that would result in punishment of a bargaining unit employee who did not volunteer for the temporary promotion, but accepted management's assignment thereof in lieu of discipline or resignation, because his or her seniority would be reset upon returning to the unit. While harshly punishing a bargaining unit employee for crossing the line between union and management may have some legitimate purpose within the private sector, it has no place in the federal sector when it discourages an employee from assisting an agency in the completion of its mission on behalf of the taxpayers who fund its operations, or punishes bargaining unit employees for accepting and performing an assignment of work lawfully given. Requiring a bargaining unit employee to choose between accepting an assignment of work he has been given and losing his seniority for doing so, or facing discipline for declining to perform the work in order to preserve his seniority, is a choice that is unjustifiable and indefensible, and NATCA violates its duty of fair representation by implementing a seniority policy that creates such a choice for its bargaining unit employees.

In defense of its action, NATCA cites several cases drawn from the private sector which hold that unions are entitled to a "wide range of reasonableness" when reviewing the exercise of its duty of fair representation while negotiating collective bargaining agreements and argues that a breach can only be found when a provision "can be fairly characterized as so far outside a wide range of reasonableness that it is wholly irrational and arbitrary." NATCA also contends that Congress did not intend that federal agencies sit in judgment on specific terms and conditions of negotiated collective bargaining agreements. While the cases cited by NATCA stand for such legal principles, the legal precedent provided by those cases is inapplicable because the provision at bar was not achieved through collective bargaining. Rather, this provision was passed by the union as an amendment to its own constitution. Thus, it is appropriate for a federal agency given responsibility for carrying out the purpose of the Statute to assess the provision, and the provision is not entitled to the same latitude given to one developed within the give and take of adversarial negotiation.

When assessing whether a union violated its duty of fair representation by imposing a provision upon the bargaining unit employees it represents, there is a substantial difference between provisions accepted as part of collective bargaining and those imposed by the union's own unilateral action. Had the union accepted a brutally punitive seniority provision that applied to all bargaining unit employees without discriminating in return for something else obtained at the bargaining table, justification for a wide range of reasonableness would exist. However, the latitude afforded seniority provisions that are negotiated would be misplaced if applied to a seniority provision enacted by the union on its own volition which punished only a portion of the bargaining unit employees who left the unit. Thus, the cases cited by NATCA are unpersuasive when assessing its conduct in adopting a change in seniority policy that singled out only those bargaining unit employees who temporarily left the unit for management positions.

II. The Language of the NATCA Constitutional Amendment

The provision of the NATCA Constitution passed on September 12, 2008, which spawned these ten cases reads as follows:

> Any bargaining unit employee who **accepted** a supervisor/management **job** after June 6, 2006 and **returns** to the bargaining unit will have his/her cumulative seniority date set to the day he/she **returns**. (Emphasis added).

Since its passage, NATCA has interpreted the language of this change to its seniority policy to require that the cumulative seniority date of bargaining unit members who served in management positions after June 6, 2006 be reset to the date they returned to the unit, even when they served in such a position pursuant to management's right to assign the employee work under a temporary promotion and even if they returned to the bargaining unit prior to the date this change was enacted.

While NATCA's interpretation of this language was not challenged by the FAA when it was notified of the change on September 19, 2008, the General Counsel asserts that NATCA's retroactive application of the provision violates the union's duty of fair representation. For the reasons outlined below, I find that NATCA's interpretation of the provision is inconsistent with the language as drafted and approved at the constitutional convention and that its application to bargaining unit employees who **returned** to the bargaining unit prior to its enactment is a deliberate and unjustifiable act that violates the union's duty of fair representation under *Local 4153* and *Loring*.

To call the language that was added to Article XV of the NATCA Constitution by vote of the delegates on September 12, 2008, imprecise and poorly chosen would be an understatement if the provision was intended to authorize what NATCA has interpreted as its meaning since its passage. The fact that the General Counsel deems its clear and unambiguous is difficult to comprehend. (GC Brief at 20). First, within the federal sector, an employee who is detailed to a temporary promotion does not **accept** such a position. It is an assignment of work made pursuant to the rights given to management by the Statute. Refusal to perform that

assignment is not an option lest the employee face discipline or tender a resignation. Thus, there is legitimate reason to question whether this provision should even apply to a situation where an employee was detailed to a supervisory or management position, rather than one where the employee accepted an offer of permanent employment as a supervisor or manager. Because neither the FAA nor General Counsel raised this as an issue, further discussion is not appropriate, however, it does provide additional reason to conclude that the action undertaken by NATCA against these charging parties was unjustifiable.

Second, **job** is vernacular expression whose initial entry in *Webster's* reads as follows:

> **1 a**: a piece of work; *esp*: a small miscellaneous piece of work undertaken on order at a stated rate.

The use of such vernacular in a world of federal personnel regulations replete with descriptive terms of art like detail, position and temporary promotion, makes this provision all the more difficult to interpret and apply. The failure to distinguish and make clear which supervisory or management "**jobs**" would result in a loss of seniority demonstrates the lack of consideration given to the change in seniority that was made and gives reason to question whether the delegates fully understood the meaning of the provision they approved. Had the provision clearly indicated that a loss of seniority would be levied in response to details and temporary promotions assigned by management in addition to being levied against employees who accepted a permanent position with management, NATCA's interpretation would be supported. Whether the change would have been adopted were such outcomes made clear is unknown, but the plain language of the provision that was passed appears to apply only to those employees who accepted a permanent position rather than those who were assigned a temporary detail or promotion.

Third, there is legitimate reason to question whether the delegates approved a retroactive provision even if that was the intent as contended by NATCA. In this regard it is clear from the past tense used for the word **accepted** that the intent was to make the provision applicable to management positions **accepted** after June 6, 2006, rather than just those accepted after passage of the change. However, the second clause of the provision related to the resetting of seniority dates was drafted only in the present tense. Unlike the first clause, the second clause resets the seniority date only for an employee who subsequently **returns** to the bargaining unit. Thus, it is not evident that the delegates who approved the proposal intended for it to apply to those who had already **returned** to the bargaining unit prior to the vote on September 12, 2008.

Given the present and prospective application that is implied by the use of the present tense in describing when a return to the bargaining unit would require an employee's seniority to be reset, NATCA's interpretation that the constitutional change permitted and required retroactive application is unjustifiable. In using only the present tense to establish when a bargain unit employee's return would result in an adjustment of seniority, the meaning of the language as drafted and approved by the delegates is clear and supports only a prospective application. To make it clear that the change in seniority policy mandated an adjustment of seniority for employees who previously returned to the unit from temporary detail would have required nothing more than the use of both **returned** and **returns** rather than the singular use of the present tense **returns.** The consequences for failing to incorporate language that made the retroactive nature of the provision clear must fall onto NATCA, who drafted and submitted Resolution A08-19 to the delegates for constitutional amendment. As discussed *supra*, if the retroactive application of the provision had been clear, its application to these eight charging parties would still violate the union's duty of fair representation because they were the only bargaining unit employees punished for leaving the unit. However, the fact that retroactive application was not clearly authorized by the language of the provision that changed the seniority policy and is inconsistent with the present tense language that appears in the provision further demonstrates why a retroactive application of the change to these eight charging parties was unjustified and violates the union's duty of fair representation.

B. Complaint of Charging Party Steven Dunlap

A union owes a duty of fair representation only to the employees who are in the bargaining unit for which it is the exclusive representative. *NATCA I*, 55 FLRA at 601. A union owes no duty of fair representation to an employee who is in a supervisory position. *McTighe v. Mechanics Educ. Soc'y of Am., Local 19*, 772 F.2d 210, 213 (6th Cir. 1985); *Cooper v. General Motors Corp.*, 651 F.2d 249, 250 (5th Cir. 1981). On September 12, 2008, the date NATCA changed its seniority policy by amending its constitution, Steven Dunlap was serving as a manager at the FAA's Los Angeles Air Route Traffic Control Center under a temporary promotion that started on May 11, 2008 and terminated on September 27, 2008. Under Authority precedent, a temporary promotion or detail into a management position removes an employee from the bargaining unit. *Fresno*, 7 FLRA at 371; *IAM&AW*, 25 FLRA at 194. Thus, at the time the NATCA altered its seniority policy and at the time it notified the FAA that its interpretation of the alteration required that any bargaining unit employee have his or her cumulative seniority date reset, Dunlap was not an employee assigned to the bargaining unit. Because

Dunlap was not a bargaining unit employee at the time NATCA passed and implemented its new seniority policy, NATCA did not owe and could not violate a duty of fair representation with respect to Dunlap.

In reaching this conclusion, it should be noted that the General Counsel's consolidated complaint and brief in support of its motion for summary judgment asserted that Dunlap's seniority date was dropped to September 28, 2008, upon implementation of NATCA's September 12, 2008, retroactive seniority policy. More specifically, the consolidated complaint cited the adoption of the policy on September 12, 2008, and the letter to the FAA implementing the policy on September 19, 2008, as the dates upon which NATCA failed to comply with its duty to fairly represent employees in the bargaining unit under 5 U.S.C. § 7114 (a)(1). Because charging party Dunlap was not in the bargaining unit at the time the acts identified as violations in the General Counsel's complaint occurred, NATCA did not violate its duty of fair representation with respect to charging party Dunlap.

C. Complaint of Charging Party Jim H. Hendrickson

Charging party Hendrickson initially returned to the bargaining unit prior to the passage and implementation of the seniority change by NATCA. Hendrickson was detailed to a temporary supervisory position from January 13, 2007, until May 9, 2007, thus, in September 2008, he was a bargaining unit employee to whom the union owed a duty of fair representation and that duty was violated when his cumulative seniority date was retroactively reset to May 10, 2007, as a result of the change adopted and implemented late September 2008.

However, in October 2009, Hendrickson accepted a permanent position as a Front Line Manager in Area 7 at the Indianapolis Air Route Traffic Control Center. When Hendrickson accepted this permanent management position, not only did NATCA no longer owe him a duty of fair representation, he placed himself within a prospective application of the change in seniority policy passed by the NATCA delegates on September 12, 2008, because he accepted an offer of permanent employment in a supervisory or management position with the FAA after June 6, 2006.

While the enactment of a seniority provision that forces a bargaining unit employee to refuse an assignment of work or face the loss of his cumulative seniority when management exercises the right to assign work is an unjustifiable violation of a union's duty of fair representation when it is retroactively applied; a seniority provision that makes it clear to unit employees that a personal choice to leave the unit for a permanent position with management will result in a loss of all prior cumulative seniority earned should they return to the unit at a later date would be a much closer question. Whether punishing only those bargaining unit employees who leave the unit to take a permanent position with management while allowing others who leave the unit to re-establish their seniority upon a return is an acceptable exercise of a union's right to determine seniority that does not unjustifiably limit a bargaining unit employee's career options would be a legitimate question for the Authority to answer were it properly presented. However, that is not a question presented by the General Counsel in this case. Because the provision passed by NATCA on September 12, 2008, can be interpreted as being limited to those situations wherein a bargaining unit employee accepts a management position on a permanent basis, charging party Hendrickson lost all cumulative seniority he had accumulated within the unit when he accepted the management position with the FAA in October 2009, and under the terms of the modified seniority policy his seniority would not be restored should he return to the unit.

Although a total loss of seniority might discourage some unit employees from seeking or accepting the offer of a permanent position within management, the adverse impact it might have upon filling management positions does not interfere with a management right nor does it foist the employee into a situation where she has to make choices under circumstances beyond his or her control. Rather, the adverse impact such a seniority policy would have upon getting the best candidates to apply for management positions would be more appropriately addressed in the give and take of negotiation over a seniority article in a collective bargaining agreement.

Of course, that would require that the parties actually engage in collective bargaining and that the agency not be so oblivious to the impact that seniority policy can have upon its recruitment and the exercise of its management rights that it completely foregoes its ability to protect against such negative consequences. In this case, such failure is all the more egregious because the FAA gave NATCA *carte blanche* to determine seniority not through negotiation, but through its own unilateral imposition of work rules. As a result of the FAA's largesse, NATCA was free to make whatever change to seniority it liked and had they not violated the duty owed to their bargaining unit employees, the FAA would be powerless to do anything about the changes in seniority that were not illegal. As Authority precedent makes clear, within the federal sector, seniority is not a matter solely within the province of the union. The fact that an agency so completely abdicated its responsibility to exercise oversight and abandon its ability to challenge seniority policies that infringed upon its management rights and did so via unilateral surrender is difficult to understand. But when applied prospectively to only

those bargaining unit employees who accept a permanent management position outside the unit, the cumulative seniority cancellation provision enacted by NATCA's seniority policy change was not challenged by the GC as a violation of the duty of fair representation and charging party Hendrickson is subject to the reset of seniority that the policy mandates based upon his subsequent departure from the bargaining unit.

III. Remedy for Violating the Duty of Fair Representation

As a remedy for violating its duty of fair representation, the GC contends that NATCA should be ordered to rescind the changes in seniority that were made pursuant to a retroactive application of seniority policy that was modified on September 12, 2008. After the charging parties' cumulative seniority is restored, the GC requests that NATCA be required to inform the FAA of the newly corrected seniority dates and that the FAA be required to rebid any shifts, schedules, or leave are impacted by the correction of seniority dates. In addition, without identifying the employees or citing any particular evidence, the GC alleges that, "evidence offered in support of this motion which establishes that employees suffered monetary harm as a result of implementation of NATCA's September 12, 2008 retroactive seniority policy" should result in said employees being made whole for any loss of pay, benefits, or differentials suffered as a result of the policy change.

For the reasons set forth below, it is recommended that NATCA be ordered to restore the cumulative seniority date of the eight charging parties who were in the bargaining unit at the time the seniority policy was changed and who had their seniority date retroactively reset to a date that preceded adoption of the seniority change. Said restoration shall include all cumulative bargaining unit time earned through the date of the restoration, and upon restoration the total cumulative seniority time accrued by the eight charging parties shall be used in all subsequent determinations wherein seniority is used by NATCA or the FAA.

Because the GC argues that the provision that was approved at the NATCA convention on September 12, 2008, violated the duty of fair representation only when the change was applied retroactivity, the GC's request that NATCA be directed to ensure that all of its bargaining unit employees are credited with the accumulated seniority they would have had absent the passage and implementation of Resolution A08-19 is inappropriate. Under the theory of the case presented by the GC, the union's duty of fair representation was not violated with respect to all bargaining unit employees adversely affected by this change in seniority policy. As the GC argued that only those who experienced the adverse impact as a result of retroactive application had the duty owed to them infringed, that is the only class of bargaining unit employees entitled to a remedy under this decision. Thus, ordering a corrective action for all employees adversely affected by the change would be inappropriate and this recommended decision requires that the seniority be restored only for those eight charging parties who were in the bargaining unit when the change was made and who had their seniority altered retroactivity for serving in a temporary promotion to management that ended prior to the time the change in seniority policy was made.

The GC also seeks back pay and makes a general assertion that evidence offered in support of its motion supports such an award, citing *Nat'l Fed. of Fed. Employees, Local 1827,* 49 FLRA 738 (1994)(*Bratton*). Although *Bratton* involved a change in seniority policy and the Authority ordered a make whole remedy that included loss of pay, benefits or differentials in response to an improper change, the facts of *Bratton* can be distinguished and demonstrate that the broad relief the Authority granted in that case is not appropriate for the present case. In *Bratton*, the union used a poll to determine the changes that were made in seniority policy but prevented any bargaining unit employee who was not a member of the union from voting in the poll. Thus, the Authority found that the union violated the duty of fair representation by improperly using union membership. As the GC points out in its brief, union membership is not an issue in the present matter.

In addition to making a change in seniority policy that was not based upon union membership, the facts of this case demonstrate that the seniority changes that were made did not always result in lost wages, benefits or differentials. In some cases, the charging parties lost the ability to avoid working on Saturdays and Sundays, thus, they earned premium pay when they would not have otherwise, had they been free to choose weekday work. (Affidavits of Ireland, Dunlap, DeVane, Mekera). Some employees lost the ability to avoid holiday work and thus earned premium pay (Affidavit of Santa Cruz, Dunlap). While some complain of not being able to work on Sunday when premium pay was available (Affidavit of Brown) or not being able to work overtime on holidays (Affidavits of Johnson and Mekara), it is not clear how many or which premium days they would have chosen to work if they had the seniority to do so. In fact, charging party Brown's affidavit complains about not being able to work Sundays in one scheduling period and complains about having to work weekends in the next scheduling period. (Brown's Affidavit). As the facts in this case demonstrate, seniority was used by some to avoid shifts that would earn premium pay, was used by others to deliberately select shifts where premium pay was available, and was used by some to do both. In short, determining after the fact, who would have worked when would be an exercise in speculation, especially

when those decisions would also be impacted by the choices of other bargaining unit employees with similar seniority. When the loss of pay is nothing more than speculation, the award of such is improper. *U.S. Dep't of Health and Human Serv., Soc. Sec. Admin., Baltimore, MD*, 37 FLRA 278 (1990). Therefore, it is concluded that the GC's request for make whole relief in the form of lost wages, benefits and differentials is not supported by the evidence in the record. Although the award of lost wages, benefits and differentials is not supported by the record, were it possible to ascertain such damages, there would be no need to apportion them between Respondents because as discussed below, the FAA did not violate the Statute and thus, committed no unwarranted personnel action. In that regard, it should be noted that most cases wherein a union is required to pay a portion of damages that resulted from the union's violation of its duty to fairly represent involve a situation where the agency's unwarranted personnel action prompted an obligation under the Back Pay Act that was enlarged by the union's improper failure to represent the employee in the matter. Thus, the precedent of *Bratton* is an exception, rather than the rule and its precedent should not be expanded beyond those situations where the union's duty of fair representation was violated by discriminating on the basis of union membership.

The Unfair Labor Practice Complaint Against the FAA

Position of the Parties

A. General Counsel

The GC contends that Respondent FAA should have known that the change in seniority policy made by NATCA on September 12, 2008, was discriminatory and in bad faith, and based upon established case law, would know that applying the policy retroactively was inconsistent with the duty of fair representation. The GC argues that a reasonable employer would not have permitted the NATCA to implement its discriminatory seniority policy or used it to determine leave, work schedules or overtime. The GC asserts that by retroactively implementing the seniority policy, the FAA interfered with employees who had exercised their right under § 7102 of the Statute to refrain from assisting the union, and thereby committed an unfair labor practice in violation of § 7116(a)(1) of the Statute.

B. Respondent FAA

Respondent FAA asserts that it did not breach its duty of fair representation because it had no authority to determine seniority nor the right to refuse implementation of a change in seniority policy lawfully made by NATCA pursuant to rights granted it by the White Book. The FAA argues that a failure to apply the seniority policy change implemented by NATCA after receiving notice of it on September 19, 2008, would have violated its obligations under Article 83 of the White Book. Respondent FAA contends that while there was no clear declaration of law, rule or regulation which precluded NATCA from implementing a retroactive change in seniority policy, while the failure to comply with the change in seniority policy enacted by NATCA would have been a clear breach of Article 83 when there were "no legal grounds upon which the Agency could have justified not implementing NATCA's seniority policy…"

Discussion and Analysis

The question presented by the complaint the General Counsel issued against the FAA is an odd one. In essence, the complaint accuses the FAA of an unfair labor practice for not protecting bargaining unit employees from the evils perpetrated upon them by their exclusive representative when it unilaterally changed the seniority policy that applied to them. In the words of the GC, "…an employer cannot stand idly by and allow the union to implement a policy which so blatantly discriminated against a group (of) bargaining unit employees." Aside from the fact that a seniority policy will always involve discrimination between groups of bargaining unit employees, placing such paternalistic expectations upon an employer eviscerates the exclusive recognition and representation rights and duties provided under the Statute, and invites activity that is precluded by § 7116 (a)(3). While there are plenty of reasons to castigate the FAA for its part in creating this federal labor relations debacle, its implementation of NATCA's change in seniority policy is not one of them. Given that the FAA unilaterally surrendered the right to negotiate over any change to seniority policy NATCA proposed, the FAA gave the union free rein to make any change the union liked. Having given away the seniority farm, the FAA's implementation of NATCA's unilateral change did not violate the Statute and the General Counsel's assertions to the contrary are without merit.

The GC cites the case of *Loring* in support of its argument for finding the FAA in violation of the Statute. Like this case, *Loring* involved a consolidated complaint wherein a union was accused of violating its duty of fair representation while the activity was accused of violating the Statute for its role in the distribution of a settlement related to the payment of environmental differential pay (EDP) for asbestos exposure. In short, union officers rewarded themselves and other union members with larger shares of a settlement than those paid to bargaining unit employees who were not members of the union, and the amounts paid to bargaining unit employees who were not members varied substantially from the actual exposure the employees experienced with no clear reason for the variation other than union affiliation. The Authority found the union violated both prongs of the

duty of fair representation test because it improperly based payments upon union membership and arbitrarily and in bad faith discriminated between the bargaining unit employees who were not members.

While the Authority also found the Air Force in violation of Statute for its role in the settlement distribution scheme, there are differences which distinguish *Loring* from the present case. First, in *Loring* the Air Force retained control and oversight over the distribution of the settlement by requiring the union to submit the distribution plan for review and approval. While the FAA's action with respect to seniority in this case is subject to question as a matter of management practice, there is no doubt that when it unilaterally implemented the conditions of employment set forth in the White Book, it retained no element of control and oversight over the seniority policy determined by NATCA. In fact, upon implementing the White Book, the only limit placed upon NATCA in the determination of seniority was that the policy could be changed only once during the duration of the White Book. Therefore, the level of involvement which the Authority found on the part of the Air Force in *Loring* is not present when assessing the actions of the FAA in this case.

A second reason to distinguish *Loring* from the case at bar is the fact that not only did the Air Force actively participate in the development of the offending distribution scheme, the scheme patently violated the union membership prong of the duty of fair representation standard. In this case, the union membership element of the standard is not present and the FAA was not charged with a violation of § 7116(a)(2). Thus, even if it had retained the ability to exercise some control and oversight upon the seniority policy by requiring changes to be negotiated, an easy to identify case of discrimination on the basis of union membership was not present for the FAA to recognize and use as justification for refusing to implement the change.

In its attempt to hold the FAA responsible for the unjustified and discriminatory seniority policy adopted by NATCA, the GC argues that a reasonable employer would have recognized the change in seniority policy as unjustified and discriminatory and would not have permitted NATCA to implement it. However, the GC's argument that the policy change was a patently obvious violation of the union's duty of fair representation is belied by its own theory as to what constituted a violation in this case.

As argued by the GC, the seniority provision adopted by NATCA violated the Statute only when it was applied to bargaining unit employees in a retroactive manner. In other words, the GC's theory of the case dances upon the head of a retroactive pin, yet the GC contends that any reasonable employer should share its keen vision for pinhead pirouettes and refuse to honor a contractual obligation whenever a union violates its duty of representation in the course of exercising its rights under the contract. Should the agency fail to stop the union, it faces an unfair labor practice complaint for not refusing to honor the contract. Aside from turning the principles of collective bargaining and exclusive representation upon their head, the foolhardy nature of encouraging such action by punishing agencies when they don't protect bargaining unit employees from their representative is demonstrated by outlining additional viable reasons an agency could have used to resist the implementation of this change in seniority policy. Of course these additional reasons, in the eagle sharp eyes of the General Counsel, would not constitute violations of the duty of representation. Thus, under the GC's theory, these additional reasons would provide no defense to the FAA for refusing to implement the change NATCA adopted. The additional and equally viable reasons the FAA could have relied upon for refusing to implement the change in seniority policy include:

1) The language of the provision adopted on September 12, 2008, applies only to those who accept a permanent job and not to bargaining unit employees who are temporarily detailed to a management or supervisory position.

2) The language of the provision adopted on September was unjustified and discriminatory because it punished only those bargaining unit employees who left the unit for management positions at FAA but not those who left the unit for other details or positions.

3) The application of the change in seniority provision to those who volunteered for a temporary promotion pursuant to a process established by NATCA was unjustified.

4) The language of the provision adopted on September 12, 2008, was inconsistent with and did not support the interpretation NATCA provided for its implementation.

Through its pursuit of an unfair labor practice complaint against the FAA, the GC encourages agencies to engage in second guessing of a union's compliance with its duty to provide fair representation. However, as this list indicates, valid reasons for challenging the union's action in this case are not limited to the retroactive application reason that the GC ultimately found persuasive in determining that a violation of the duty had occurred.

Encouraging agencies to make their own determination about a union's compliance with its duty of fair representation in advance of the GC's review of the matter only invites disputes and rancor and is not conducive to effective and efficient labor relations in the federal sector.

As the FAA contends, the GC's complaint places them in the position of either implementing a change in seniority policy and being found in violation when the GC determines after the fact that the union violated its duty of fair representation in making the change, or, refusing to implement the change and having the refusal prompt a grievance and arbitration for failure to comply with the seniority article. While the Authority held in *Loring* that both a union and activity could commit an unfair labor practice as a result of a union's failure to honor its duty of fair representation, to effectively and efficiently carry out the purpose of the Statute, that precedent should be limit to those situations where a union engages in a patent violation of the duty on the basis of union membership and not those where the violation of the duty is a matter of interpretation where legitimate alternative reasons exist upon which reasonable minds can differ. Hindsight is 20/20, and while it may be clear for all to see now, when there was no clear precedent to indicate that the changes NATCA made to its seniority policy violated the duty of fair representation, the FAA did not violate the Statute by implementing those changes simply because it could not glean with laser like focus the head of the pin that the GC found compelling. Therefore, the complaint against the FAA should be dismissed.

For the reasons outlined above, I recommend that the Authority Grant the General Counsel's Motion for Summary Judgment in Case Nos. SF-CO-09-0001, AT-CO-09-0040, CH-CO-09-0076, CH-CO-09-0111, CH-CO-09-0304, CH-CO-09-031, DA-CO-09-0014 and DE-CO-09-0018; Grant Respondent NATCA's Motion for Summary Judgment in Case No. SF-CO-09-0030; and Grant Respondent FAA's Motion for Summary Judgment in Case No. DA-CA-09-0061.

Accordingly, it is recommended that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41 of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the National Air Traffic Controllers Association, AFL-CIO (Respondent NATCA) shall:

1. Cease and desist from:

(a) Failing to perform its duty of fairly representing bargaining unit employees by discriminating against bargaining unit employees who worked in management positions at the FAA after June 6, 2006, by resetting their cumulative seniority to the date they returned to the unit when said return preceded the change in seniority policy enacted on September 12, 2008.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Represent the interests of all employees in the exclusive bargaining unit that the Union represents without discrimination and without regard to labor organization status or membership.

(b) Restore the cumulative seniority date of the seven (7) bargaining unit employees (Santa Cruz, Mekara, DeVane, Ireland, Johnson, Brown, and Aynes) who were in the unit at the time the Union violated its duty of fair representation and who remain in the bargaining unit.

(c) Post at the National Air Traffic Controllers Association, AFL-CIO, business office and in normal meeting places, were bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President, National Air Traffic Controllers Association, AFL-CIO, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to §2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

It is Ordered that the complaints in Case Nos. SF-CO-09-0030 and DA-CA-09-0061 be, and hereby are, dismissed.

Issued, Washington, D.C., May 5, 2011.

CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the National Air Traffic Controllers Association, AFL-CIO (NATCA), violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY BARGAINING UNIT EMPLOYEES THAT:

WE WILL NOT fail to fairly represent bargaining unit employees by discriminating in the application of seniority policy by retroactively applying said policy only to bargaining unit employees who work in supervisory or management positions for the FAA.

WE WILL NOT interfere with, restrain, or coerce bargaining unit employees who are represented by the NATCA in the exercise of their rights to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

WE WILL represent the interests of all bargaining unit employees represented by NATCA without discrimination and without regard to labor organization status or membership.

WE WILL restore the cumulative seniority date of the seven bargaining unit employees (Santa Cruz, Mekara, DeVane, Ireland, Johnson, Brown, and Aynes) who were in the unit at the time we violated the duty of fair representation by discriminating between bargaining unit employees who left the unit to work as supervisors or managers for the FAA and those employees who left the unit for other reasons.

_____
(NATCA President)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, San Francisco Region, Federal Labor Relations Authority, and whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: 415-356-5000.