

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

PORTSMOUTH NAVAL SHIPYARD
PORTSMOUTH, NEW HAMPSHIRE

Respondent

and
PORTSMOUTH FEDERAL EMPLOYEES

Case No. BN-CA-20811

METAL TRADES COUNCIL

Charging Party

Ms. Marcia-Ann Pogar

For the Respondent

Peter F. Dow, Esquire

For the General Counsel

Mr. Richard Draper

For the Charging Party

Before: WILLIAM B. DEVANEY

Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.⁽¹⁾, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent violated §§ 16(a)(5) and (1) of the Statute by unilaterally implementing a program to train and license all OSOT members to operate, on base, trucks used by OSOT. Respondent asserts, inter alia, that it had no duty to bargain because: a) the training was merely an extension of their OSOT work assignment; b) training had no actual or reasonably foreseeable adverse impact on OSOT

employees and was no more than a de minimis change. For reasons fully set forth hereinafter, I find that Respondent violated §§ 16(a)(5) and (1) of the Statute as charged.

This case was initiated by a charge filed on April 15, 1992 (G.C. Exh. 1-A); the Complaint and Notice of Hearing issued on July 29, 1992, and set the hearing for October 23, 1992; however, on October 22, 1992, at the opening of the hearing in related cases, 1-CA-10493 and BN-CA-20137, the parties agreed that the hearing in Case No. BN-CA-20811 should immediately follow completion of the hearing in 1-CA-10493 and BN-CA-20137, and, accordingly, the hearing in Case No. BN-CA-20811 was duly held on October 22, 1992, in Portsmouth, New Hampshire, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, November 23, 1992, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, initially on motion of Respondent, to which the other parties did not object, for good cause shown, to January 22, 1993, and thereafter on motion of General Counsel, to which the other parties did not object, for good cause shown, to February 10, 1993. Respondent and General Counsel each timely mailed a brief, received on, or before, February 12, 1993, which have been carefully considered. Upon the basis of the entire record,⁽²⁾ including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings of Fact

1. The Portsmouth Federal Employees Metal Trades Council (hereinafter, "Union") is the certified exclusive represent-ative of a unit of employees appropriate for collective bargaining at the Portsmouth Naval Shipyard, Portsmouth, New Hampshire (hereinafter, "Respondent").
2. For more than 12 years, Respondent has maintained a team of employees known as the "On Scene Operations Team"⁽³⁾ (OSOT) which consists of approximately 17 bargaining unit employees. The purpose of OSOT is to respond to the recovery of oil and chemical spills caused by Respondent, or by the Navy, and OSOT responds to spills which occur both on and off the Shipyard's premises. Team membership is a collateral duty and the team is called out only when there is an actual spill or for training (Tr. 11-12, 47-48). With exceptions that are not material to this case, OSOT originally was an all-volunteer group. However, when the HAZMAT handler position description was written in 1989, team membership was made a requirement for holding that job (Res. Exh. 2, Tr. 42-45, 47-48, 50). Nevertheless, members of OSOT by no means are all HAZMAT handlers as some are: fuel plant distributors, warehouse workers, motor vehicle operators in the storage branch, boat operators, etc. (Tr. 14, 45, 47-48).⁽⁴⁾ OSOT members all undergo intense training including: self-contained breathing apparatus, boat training, first-aid (each must be CPR qualified), decontamination, and a 40 hour course with EPA (Tr. 62).
3. It is undisputed that, prior to April, 1992, the only person licensed or assigned to operate the OSOT's two-ton rack body truck was the vehicle operator member of the team (Tr. 51). That is, the other members of OSOT, including HAZMAT handlers, were not trained, licensed or assigned to operate the truck.
4. In April, 1992, the Supply Department nominated all members of the OSOT to begin a Truck Safety Course in order to obtain a license to drive a two-ton rack truck onboard the base. The OSOT truck is used by the Team to haul its equipment to the site of spill recovery operations. It is also equipped with a trailer hitch to haul a trailer and a 15 - 20' boat known as a "skimmer" which is utilized during oil spill recovery work on water.⁽⁵⁾

5. Mr. Thomas Guillory, Head of Materials Operations, which includes OSOT, explained that Respondent had experienced difficulty in meeting its spill responsibilities on the off-shift (after 4:00 p.m.) and on weekends because the Team had only one person who was licensed to operate OSOT's two-ton rack truck and, on occasion, he would be unavailable. As a result, ". . . people would come in and they could not deploy the truck to the spill site because they didn't have a license. So we felt it necessary, it was part of the oil spill equipment, that we should license everybody. . . . So that if someone came in during the off-hours, they would be able to get the truck and bring it to the site." (Tr. 51). As noted, this license would not authorize OSOT members to operate the truck off the premises of the Shipyard (Tr. 54). Mr. Guillory explained that when OSOT goes "off-shipyard" Respondent is hired by the Coast Guard and there is advance notice so that the transportation office can bring the equipment (Tr. 54).

6. The acknowledged procedure for notifying the Union of proposed changes in working conditions, by advance written notice to the President (G.C. Exh. 8A-E; Tr. 21-22), was not followed with respect to the April, 1992, qualification of all Team members to drive the OSOT truck - Respondent did not tell the Union but just started the training (Tr. 59). When, on April 2, 1992, the Union discovered that Respondent had implemented its new program, the Union sent a written bargaining request to Respondent (G.C. Exh. 5; Tr. 28-29) and, in addition, Mr. Paul Feeney, Recording Secretary, also complained to Mr. Frank Harris, Employee Relations Specialist in Respondent's Industrial Relations Office, about Respondent's failure to notify the Union. Mr. Feeney stated that Mr. Harris told him he would have the program stopped immediately (Tr. 29-31); however, the program was not stopped and the Union filed the charge herein on April 15, 1992 (G.C. Exh. 1-A; Tr. 29-31). After the charge was filed, Respondent did stop the program (Tr. 65).

Conclusions

It is conceded that Respondent was free to require that all OSOT members be qualified to operate the two-ton rack truck for the transport of spill equipment to on-base spill sites. Nevertheless, it is plain that by requiring all OSOT members to have an Incidental Truck Operating License, Respondent changed the conditions of employment of OSOT members. This was a new qualification not previously required. Because Respondent changed conditions of employment, notwithstanding that it did so pursuant to a reserved management right, Respondent was, none the less, obligated to bargain concerning the impact and implementation of its decision, *i.e.*, to bargain concerning procedures and appropriate arrangements, in accordance with § 6(b)(2) and (3) of the Statute, if the reasonably foreseeable effects of the change on unit employees' conditions of employment were more than *de minimis*. Department of Health and Human Services, Social Security Administration, 24 FLRA 403, 407-408 (1986); Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, El Paso, Texas, 39 FLRA 1325, 1330-1332 (1991); United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas, 47 FLRA No. 15, 47 FLRA 225, 230-232 (1993); Veterans Administration Medical Center, Phoenix, Arizona, 47 FLRA No. 33, 47 FLRA 419, 422-423 (1993). Unlike Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 45 FLRA 574, 576 (1992), where the Authority found that Respondent's decision to discontinue recertification training was not more than *de minimis* because any concerns that the effect of the change was more than *de minimis* were speculative, rather than reasonably foresee-able, here, the concerns about the effect of the change were reasonably foreseeable. The change added a new qualification and, as OSOT membership is a requirement of the job descriptions of every member but the warehouseman, Mr. Gregory, possession of the required incidental truck driving license was an immediate concern of all OSOT members, both as to their status as continuing members of OSOT and, except Mr. Gregory, continued employment with Respondent. I am aware that Mr. Guillory testified that if an OSOT member decided not to continue OSOT duties, the employee would not lose employment with Respondent (Tr. 50). Nevertheless, until clarified and made certain, there was reasonably foreseeable concern about continued employment in the event of the

failure to obtain the incidental truck driving license or, if obtained, its loss for reasons of health. The Union amply demonstrated justification for its concern by the facts that: a) there were OSOT members with physical limitations caused by heart and high blood pressure ailments (Tr. 28); and b) one OSOT member was not licensed to drive an automobile (Tr. 38). Of course, continued membership on OSOT was important to the Team members and, even if continued employment by Respondent were not a concern, as noted above, there was reasonably foreseeable concern about obtaining and/or retaining the required incidental truck driving license for OSOT membership.

The Union had a significant concern about safety; reasonably had concern that persons licensed to drive the truck would not pose a hazard to themselves or to others when driving the truck; and reasonably had concern, as noted above, from the standpoint of safety, of licensing persons to drive who had physical limitations. The Union had reasonable concern about the impact of the program, to license all members of OSOT to drive the truck, both on the makeup of OSOT in the future as well as operations of OSOT thereafter. For example, one member of OSOT had been an employee classified as a truck driver. With all members of OSOT licensed would the need for an employee so classified become redundant?; with all members of OSOT licensed there would be a foreseeable impact on drivers, such as Mr. Feeney, who were not members of OSOT, since there would be no need to call for a replacement for on- base deployment of the truck (cf., G.C. Exh. 8-D)); and with all members of OSOT licensed who would be responsible for deployment of the truck, and in what order?

Because there were reasonably foreseeable effects of this change on bargaining unit employees' conditions of employment which were more than de minimis, Respondent violated §§ 16(a) (5) and (1) of the Statute by its unilateral implementation of the program and by its failure and refusal to bargain concerning the impact and implementation of the program. Nor does Respondent's suspension of the program after the filing of the unfair labor practice charge render Respondent's violation moot or cure the violation. Department of the Air Force, 47th Flying Training Wing, Laughlin Air Force Base, Texas, 2 FLRA 213, 214 (1979); Veterans Administration, Veterans Administration Center, Laboratory Service, Temple, Texas, 2 FLRA 920, 932 (1980); Action, 26 FLRA 299, 301 (1987); Bureau of Engraving and Printing, Washington, D.C., 44 FLRA 575, 580-581 (1992). However, inasmuch as Respondent has suspended the program, it is unnecessary to order, and General Counsel has not sought to order, a return to the status quo ante.

Accordingly, having found that Respondent violated §§ 16(a)(5) and (1) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R § 2423.29, it is hereby ordered that the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain in good faith with the Portsmouth Federal Employees Metal Trades Council (hereinafter, "Union") concerning the impact and implementation of any decision to train and license On Scene Operations Team (OSOT) members to operate, on base, trucks used to haul OSOT equipment to

spill sites prior to implementation of any such program.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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

(a) Provide the Union with reasonable advance notice of any proposed change in working conditions of bargaining unit employees by the training of OSOT members to operate trucks.

(b) Upon request of the Union, bargain in good faith concerning the impact and implementation of any decision to train and license OSOT members to operate, on base, trucks prior to implementation of any such program.

(c) Post at its facilities at the Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 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 Commanding Officer of the Shipyard, 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 section 2423.30 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: October 21, 1993

Washington, DC

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

**AND TO EFFECTUATE THE POLICIES OF THE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE**

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to bargain in good faith with the Portsmouth Federal Employees Metal Trades Council (hereinafter, "Union"), the exclusive representative of our employees, concerning the impact and implementation of any decision to train and license On Scene Operations Team (OSOT) members to operate, on base, trucks used to haul OSOT equipment to spill sites prior to implementation of any such program.

WE WILL NOT refuse to provide an opportunity for the Union to bargain, to its extent consonant with law and regulation, with respect to the impact and/or implementation of any proposed change in working conditions of bargaining unit employees by the training of OSOT members to operate trucks.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL give the Union reasonable advance notice of any proposed change in working conditions of bargaining unit employees by the training of OSOT members to operate trucks.

WE WILL, upon request of the Union, bargain in good faith concerning the impact and implementation of any decision to train and license OSOT members to operate, on base, trucks prior to implementation of any such program.

(Activity)

Date: _____ 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 of the Federal Labor Relations Authority, Boston Region, whose address is: 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, and whose telephone number is: (617) 424-5730.

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(a)(5) will be referred to, simply, as, "§ 16(a)(5)".
2. Motion of General Counsel to incorporate as part of the record the corrected exhibit file, prepared by General Counsel at the request of the Office of Administrative Law Judges, to which the other parties did not object, is granted and the corrected exhibit file is hereby incorporated as the Exhibit file in this case.
3. Also referred to as the "Oil Spill Operations Team" (Tr. 11).
4. OSOT duty is now, and was in April, 1992, included in the job descriptions of all current OSOT members except the warehouseman, Gene Gregory (Tr. 54).
5. Mr. Paul Feeney, a motor vehicle operator, but not now, nor in the past, a member of OSOT (Tr. 10, 19), testified that hazardous materials are carried on the truck (Tr. 17, 26). Mr. Thomas Guillory, Head of Materials Operations, including OSOT, testified that, "There are no chemicals ever transported on that truck. Only oil spill equipment." (Tr. 51) [hazardous waste operators come and take the recovery drums to hazardous waste (Tr. 52)]; that, while it was conceivable that hazardous materials were carried on the truck that he didn't know about (Tr. 66), he stated that, "I wouldn't allow it." (Tr. 66). It is unnecessary to resolve this conflict since, obviously, Respondent has not undertaken the training of employees to do that which it prohibits, i.e., the carriage of hazardous materials on the OSOT truck.