

MEMORANDUM

DATE: February 23, 1995

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: IMMIGRATION AND NATURALIZATION
SERVICE, WESTERN REGIONAL OFFICE,
LAGUNA NIGUEL, CALIFORNIA

Respondent

and

Case No. 8-CA-90614

NATIONAL BORDER PATROL COUNCIL,
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

IMMIGRATION AND NATURALIZATION SERVICE, WESTERN REGIONAL OFFICE, LAGUNA NIGUEL, CALIFORNIA Respondent	
and NATIONAL BORDER PATROL COUNCIL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case No. 8-CA-90614

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **MARCH 27, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

ELI NASH, JR.
Administrative Law Judge

Dated: February 23, 1995
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

IMMIGRATION AND NATURALIZATION SERVICE, WESTERN REGIONAL OFFICE, LAGUNA NIGUEL, CALIFORNIA Respondent	
and NATIONAL BORDER PATROL COUNCIL, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case No. 8-CA-90614

Scott Cooper, Esq.
For the Respondent

Lisa Miller, Esq.
For the General Counsel

Mr. T.J. Bonner
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

On September 11, 1992, the Acting Regional Director of the San Francisco Region of the Federal Labor Relations Authority (herein called the Authority), pursuant to a charge filed September 7, 1989, by the National Border Patrol Council, American Federation of Government Employees, AFL-CIO (herein called the Charging Party or Union), issued a Complaint and Notice of Hearing alleging that the Immigration and Naturalization Service, Western Regional Office, Laguna Niguel, California (herein called the Respondent), engaged in unfair labor practices within the meaning of Section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (herein called the Statute) by changing conditions of employment for unit

employees by ceasing a detail of employees from San Diego, California to McAllen, Texas, without providing the Charging Party with notice and an opportunity to negotiate the impact and implementation of the change.

Hearings on the Complaint were held on May 18, 1993 and July 7, 1993 respectively, in San Diego, California at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. All parties filed timely briefs which have been carefully considered.¹

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from all the testimony and evidence at the hearing, I make the following:

Findings of Fact

Sometime in early 1989, Respondent established a work detail referred to as "Operation Hold the Line" in Texas which was expected to last an indefinite period of time, until the need to face a large influx of Central Americans into this country had ceased. Respondent detailed at least three groups of San Diego sector employees to Texas to assist that sector in dealing with this influx. The third group of San Diego sector employees departed from San Diego to Texas in mid-March, 1989, but their participation did not last the anticipated 30 days.

Respondent recalled the San Diego sector employees from the Texas detail, terminating their participation earlier than had been scheduled at the outset. T.J. Bonner, Union President, who at the time had fifteen years of employment with the Border Patrol, stated that this type of early cessation of employee participation in a detail was not a common occurrence, which had never occurred before within Bonner's memory, and was not foreseeable. The unexpectedness of the shortened tour on the detail was repeated by Gilbert Aleman, a twelve-year Border Patrol agent in the San Diego sector, who testified that management told him that he was to be detailed to Texas for at least 30 days, possibly extending to 90 days.² According to Aleman, except for "Operation Hold the Line", on every detail which he worked in the past, his initial orders listed a specific return date, and he actually returned from the detail exactly on the initially listed date. On "Operation Hold the Line" however, instead of remaining in Texas for at

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The unopposed motions to correct transcript are granted.

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Aleman is a shop steward for the Local, which is a part of the National Border Patrol Council.

least 30 days, which he was expecting, he was recalled to the San Diego sector after only 21 days.

Bonner allegedly learned of Respondent's plan to detail other border patrol agents from Livermore, California to San Diego by letter dated March 17, 1989 from Respondent's Assistant Regional Commissioner, Douglas B. Hunter. On March 23, 1989, Respondent orally modified the plan to require that San Diego agents in Texas return to their regular duty stations prior to completing the entire 30-day detail. Bonner then assigned Western Regional Vice-President Tim Still to handle the matter. Thereafter on March 24, 1989, Still wrote Respondent, demanding to bargain over the early cessation of San Diego employee participation in the Texas detail.

Clearly Respondent revised its plans to add staff to the Texas detail more than once, but San Diego employees nevertheless were ordered to depart the ongoing Texas detail prior to the scheduled end of their participation, and each time San Diego sector employees were affected by Respondent's change in plans, Bonner insisted on bargaining over the changes.³

Bonner's concerns, regarding the impact, if the San Diego employees were going to be pulled off the Texas detail, were twofold. First, that the affected employees would be losing out on an opportunity to work significant amounts of overtime while on the detail, which agents desired, and second, that these affected employees might miss out on an opportunity to earn a valuable Officer Corps rating point for their participation in that detail. In fact, Respondent solicited volunteers to remain longer on the ongoing Texas detail, but specifically excluded San Diego employees from the list of volunteers, including Aleman.

Work hours for all San Diego employees on the Texas detail were long. In early March, 1989, Aleman was first detailed to Texas, and his time and attendance reports

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Although Supervisory Labor Relations Specialist Thomas F. Feeney stated that the Union did not direct to him any request to bargain on the changes, the record discloses that on March 24, 1989, the Union sent Hunter a letter requesting bargaining, suggesting that it begin immediately. Likewise, while Feeney testified that the Union did not submit proposals to the Respondent regarding the impact of changes to the detail before those changes were implemented, he admitted that the Respondent did not engage in any negotiations with the Union prior to implementation because Respondent was under no duty to do so.

covering that time period reveals that while on detail, he and the other San Diego sector employees worked ten hours per day, six days per week, for the length of his entire participation in the detail, including mandatory overtime. If his time and attendance reports are representative of the complement of detailed San Diego sector employees' hours of work, and there is no record evidence to indicate that it is not, then these employees including Aleman, earned 11 hours per week of 45 Act overtime, and nine hours of Administratively Uncontrollable Overtime (herein called AUO) per week. The difference between 45 Act overtime and AUO is, 45 Act overtime is, paid at time plus one half for the actual hours the employee works under that program, while AUO pays at the lower rate of up to a maximum of twenty-five percent of the employee's base salary. Thus, some employees like Aleman preferred to work the 45 Act overtime available in Texas, over AUO, because 45 Act overtime obviously pays more. Furthermore, Aleman's time and attendance records show that Respondent made only negligible and short-lived 45 Act overtime available to him when he returned to San Diego from "Operation Hold the Line". His records also disclose that a majority of overtime after he returned to the San Diego sector after cancellation of his participation in "Operation Hold the Line" was almost solely the less desirable and lower paying AUO.⁴

While Feeney testified that San Diego employees returning to San Diego prior to the scheduled end to their participation in the Texas detail had the same opportunity for overtime as if they had remained on it, referring specifically to Aleman, Respondent, however, failed to provide any documentation to support this assertion, despite the fact that Feeney allegedly had personally reviewed Aleman's time and attendance records immediately prior to

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Aleman's time and attendance records for the pertinent period reveal that after his return from Texas to San Diego, the more desirable 45 Act overtime dropped from 32 hours over the three weeks in Texas to 8 hours of 45 Act overtime in San Diego to no 45 Act overtime at all, leaving only the less desirable AUO available for Aleman to work.

trial.⁵ Likewise, Feeney's belief about the availability of overtime to San Diego employees after their early recall back to San Diego was greater in San Diego than in Texas, is based exclusively on his recollection of a single conversation with San Diego management officials which took place some four years prior to the hearing, a conversation that he was not sure what other matters were discussed at that meeting.

Sometime around July 17, 1989, Hunter wrote to Bonner stating that a total curtailment of overtime was in effect.⁶

The record disclosed however, that employees who remained on the Texas detail, after the San Diego employees were recalled, continued to work mandatory, 45 Act overtime through at least April 22, 1989.

Due to competitiveness within the Border Patrol for promotions and transfers, loss of an opportunity to earn an Officer Corps rating point for participation in the Texas detail could appear significant to an employee. There is no question that the Rating Panel was created by contract. Under the point rating system created by the parties,

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The General Counsel moved to disregard certain testimony by Respondent's witnesses concerning the availability of overtime in San Diego, since Respondent chose not to produce the records about which it introduced extensive testimony, and also moved that the undersigned infer that these documents do not support Respondent's position. *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 FLRA 891, 900 (1990); *Watson v. United States*, 224 F.2d 1323 (4th Cir. 1979). It is Respondent's obligation to meet its burden of proof on this issue and to produce documentation, if any. Respondent's failure to produce such records leaves the undersigned with little option other than to disregard the testimony in question.

With respect to overtime, the Union produced actual overtime records, which showed that 45 Act overtime was not readily available outside of the Texas detail, and that employee Aleman was unable to and did not work very much 45 Act overtime after he returned to San Diego, and was, in fact, limited to just a few hours on a single occasion. Moreover, it was shown that 45 Act overtime continued to be available in Texas even after the San Diego employees departed the detail.

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Hunter while testifying that generally availability of overtime fluctuates, never really addressed the issue of 45 Act overtime versus the less desirable AUO available in San Diego to the employees who returned prematurely from Texas to San Diego.

employees earn cumulative points based on their experience, length of employment, grade and education. More importantly, employees can receive points by participating in work details which Respondent labels "significant", specifically, details within the continental United States, lasting 30 days or longer.

In this same manner, employees who work details may become eligible for an additional point to be applied to their Officer Corps Ratings Panel evaluations when applying for promotions and other jobs, but Aleman, as well as other employees whose details were canceled did not receive a rating point for participation in "Operation Hold the Line". Aleman also says that the opportunity to earn a point does not occur that frequently, and that San Diego employees did not have the opportunity to participate in details very often.

The Union selects a single delegate to the Officer Corps Ratings Panel (herein called the Panel), although numerous individuals serve on the Panel at one time. Steven Garcia, a Union representative and thirteen-year veteran of the Border Patrol was the Union's representative to the 1991 Panel. The Panel considered awarding points to employees participating in details and other activities, including the Texas detail. According to Garcia, Respondent instructed the Panel participants that a significant detail in the United States was of 30 days duration, minimum. The Panel considered reducing the length of a significant detail for which points could be awarded from 30 days to some shorter length of time, but Respondent informed the Panelists that they were not allowed to reduce the amount of time required for an agent to earn a point for participation in "Operation Hold the Line" to less than 30 days. Rather, Respondent instructed the Panelists that any recommendation of this sort had to first go through Respondent for consideration and approval before it could be enacted, as Respondent set the boundaries within which the Panelists could act. None of this changes the fact that the Panel was an instrument created by agreement between the parties.

According to Hunter, Respondent details individuals in response to the changing manpower needs of the Respondent. Hunter was aware of an influx of aliens referred to as "Other than Mexicans" (herein called OTMs) anticipated in Texas, and so Respondent responsively detailed employees from the San Diego sector to Texas. Respondent later became concerned that the tide of OTMs might subsequently reach the San Diego sector, based on two intelligence reports.

Hunter received the earlier report on about March 3, 1989 but he knows the author of that report, frequently eats

lunch with him, and actually had knowledge of any possible influx of OTMs even earlier than March 3, 1989. Mr. Ezell, then the Regional Commissioner, made the decision to recall the San Diego employees from the detail, and probably had knowledge of the OTM situation at about the same time as Hunter himself. It is noteworthy that also on or about March 3, 1989, Respondent actually detailed San Diego employees out of San Diego, and away from this possible problem area, to Texas, while at the same time, based on the intelligence report, Respondent already knew that it was facing the alleged "exigency" of a possible influx of OTMs at San Diego, the ostensible reason that San Diego employees were not allowed to complete their full detail in Texas, and the reason why Respondent could not bargain with the Union prior to implementation of the recall.

In addition, the March 3, 1989 report, which Hunter knew about even before this date, recommended that Respondent increase manpower in the San Diego sector at certain "hot spots", at about the same time that Respondent decided to detail San Diego agents away from these same San Diego hot spots, to Texas. Even assuming that Hunter had to act quickly in this instance, Hunter admitted that even after the San Diego employees returned from Texas, he could not recall contacting the Union to bargain over any impact on unit employees as a result of the recall. Further, Respondent's witnesses do not deny that it never bargained with the Union prior to implementation of the early recall of San Diego agents for Texas.

A later intelligence report, dated April 5, 1989, after the San Diego employees had already left Texas and returned to San Diego, states that OTM traffic into Texas had been diminished for over a month, dating back to at least March 5, 1989, the approximate date when Aleman and other San Diego employees were first being detailed out of San Diego to Texas to handle the then apparently decreased influx of these OTMs. This report also recommended that in response to the month old decrease in OTM traffic in Texas, San Diego employees be sent back to their own work sites, almost a week after Aleman had returned home to San Diego.

After learning of the Respondent's plan to recall the San Diego employees early from the Texas detail, and after requesting immediate face-to-face bargaining on the change but receiving no return pledge to bargain, on March 29, 1989 Bonner sought the assistance of the Federal Mediation and Conciliation Service (FMCS), in order to facilitate bargaining between the parties, based on his belief, drawn from conversations with the Respondent, that the Respondent was not intending to bargain with the Union over the changes to employee working conditions engendered by the recall.

Respondent did not bargain with the Union, so on March 29, 1989, in an effort to initiate bargaining prior to implementation of the recall, Bonner sought the assistance of the Federal Service Impasses Panel (herein called FSIP) to assist the parties in completing bargaining.

On March 31, 1989, Respondent pulled all of the San Diego agents off of the Texas detail and returned them to the San Diego sector, prior to entering into any negotiations. Clearly there was no bargaining between the parties prior to the Respondent's unilateral recall of the San Diego employees from Texas on March 31, 1989, but they finally did meet, for the first time, on May 11, 1989, before the mediator.

The events leading up to their first meeting reveal that Respondent contacted the Union by letter dated April 11, 1989, offering to discuss the issues associated with the recall during consultations in late May, 1989, although the words "negotiate" and "bargain" appear nowhere in this letter.⁷ Subsequently, on April 19, 1989, Respondent wrote the FSIP denying that the parties were at impasse, and the FSIP declined jurisdiction, but did order the parties to negotiate on a concentrated schedule. On April 20, 1989, the Union informed Respondent that the mediator was available for negotiations in the second week of May, 1989.

More than a month after Respondent removed the San Diego employees from the ongoing Texas detail, Respondent met with the Union before a mediator to discuss its concerns over Bonner's two issues, the loss of overtime opportunities and an Officer Corps rating point, on May 11, 1989. The mediator requested that the Respondent write a draft letter to the Officer Corps Ratings Panel regarding awarding a point for San Diego employee participation, to see if this would be acceptable to the Union on that issue, although the parties reached no agreement at that session on any remaining bargaining issues, and the mediator stated that he might schedule another mediation session between the parties. Feeney admitted, however, that the Respondent failed to forward a draft letter to the Union on the ratings point issue, but rather sent the unapproved letter directly to the Ratings Panel, despite the fact that the Respondent delayed the dispatch of that letter by five days.

Respondent's letter to the Panel was not acceptable to the Union for several reasons, including the fact that the

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The letter also stated that participation of the San Diego employees in the detail was cut short based on a directive from higher headquarters in Washington, D.C.

letter incorrectly referred to agents seeking incentives, and was not an implementation of any agreement with the Union. Pursuant to the FSIP's directive to bargain, by letter dated June 15, 1989, more than two months after the end of the San Diego employees' participation in the detail, Respondent requested further proposals from the Union. On June 27, 1989, the parties again met before the mediator, who requested that the Union write a proposal to settle the matter, which it did. Respondent then stated it would respond to the Union's proposal in writing, and the meeting ended. The Union's proposal was not its last best offer, the Union and Respondent had reached no agreements, and nothing had been resolved. The Respondent then provided a written rejection to the Union proposals. To date, Respondent has not completed bargaining with the Union over the changes it allegedly implemented regarding the San Diego employees' participation in the Texas detail.⁸

The Union then requested that Respondent provide a statement of non-negotiability on the issues remaining for bargaining, which the Respondent declined to provide, citing the pendency of the case at bar, filed on September 6, 1989. Thereafter, on November 21, 1989, the Union filed a request for an expedited review of the negotiability of six pending settlement proposals which it had proposed and which had not yet been resolved. On December 6, 1989, the Authority ordered the Union to submit materials distinguishing between the unfair labor practice case and the negotiability appeal, which the Union did by letter of December 12, 1989.

On February 15, 1991, the Authority issued its negotiability decision in *American Federation of Government Employees, National Border Patrol Council*, 39 FLRA 675 (1991), finding that all six of the Union's proposals were negotiable. However, the Respondent appealed to the Ninth Circuit, which ruled that the underlying issues of the obligation to bargain needed to be resolved before the negotiability issues could be addressed, vacating the Authority's February 1991 decision, actions which the Authority subsequently upheld by order dated November 3, 1991.

Conclusions

The abrupt ending of the March 1989 detail of San Diego sector employees in Texas, is characterized by the General

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The FSIP, subsequently, declined jurisdiction over the matter based on the Respondent's assertion that no bargaining obligation remained, although Bonner's position was that the parties had not completed bargaining, as there was no agreement of any kind.

Counsel as a new change, separate from the initial change, which resulted in a new and separate bargaining obligation on Respondent. This new change had, in the General Counsel's opinion, a greater than **de minimis** impact on employee working conditions because the employees involved were not allowed to work the Texas detail as originally set out in their work assignments.⁹ Thus, the General Counsel contends that the shortening of the detail, suddenly and unforeseeably, severely limited the amount of the more desirable 45 Act overtime agents could work and, that because the details were abbreviated certain employees lost rating points¹⁰ which help determine grade, pay, and work location for employees since these rating points are considered by agency promotion panels.¹¹ In sum, not only did these agents lose immediate remuneration, but they also lost a possible stepping-stone for furtherance of their careers.

The General Counsel also contends that Respondent was not free to implement prior to completing bargaining based on any exigency theory that it might assert. In this regard, the General Counsel cites the lack of evidence that any exigency existed and that if it did, the Union was never informed by any representative of the Respondent that it would not be bargaining prior to implementation of the recall based on an exigency, prior to implementing the recall.

Lastly, the General Counsel seeks to head off any contention by Respondent that it somehow discharged its

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A duty to bargain over the impact and implementation of any exercise of its rights under section 7106 exists if such exercise results in more than **de minimis** impact on unit employees. *Department of Health and Human Services*, 24 FLRA 403 (1986); *Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Denver District, Denver, Colorado*, 27 FLRA 664 (1987); *Veterans Administration Medical Center, Phoenix, Arizona*, 47 FLRA 419 (1993).

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The evidence disclosed that opportunities for San Diego agents to earn a rating point for participation in a detail outside their sector are rare, because their sector is usually one of the busiest. The inference here being that San Diego agents are not usually available for details to other sectors and the possibility of earning a rating point to enhance transfer and promotion chances is always welcome.

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Although a rating point is never guaranteed, employees can reasonably expect that some details hold out at least a possibility of award of a point, which can affect an employee's decisions whether to accept certain details.

bargaining responsibilities in this case. In this regard, the General Counsel simply asserts that even though the Union made several proposals, including awarding a point to employees who were recalled early from the detail as well as overtime for these employees, bargaining was never completed over the proposals. Respondent did not even meet with the Union until ordered to do so by the FSIP sometime later.¹²

The Charging Party casts the case as containing the issues of whether or not Respondent was obligated to bargain, and whether it was free to implement the proposed changes as occurred here.

Respondent makes several arguments in contending that the theory of the Complaint and what was actually prosecuted by the General Counsel was flawed. First, Respondent contends that its action in detailing the agents from San Diego to Texas did not constitute a "change" in conditions of employment, and even assuming that it did, its action in returning them to their regular duty stations in San Diego served to restore rather than change their conditions of employment. Secondly, it asserts that even assuming its return of the agents constituted a change over which there was a duty to bargain, it cannot be faulted because the Union's actions prior to March 31, 1989 foreclosed any possibility of bargaining prior to that time, or to insist on bargaining over the substance of the decision. Thirdly, it argues that it had no obligation to

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Immigration and Naturalization Service, 44 FLRA 1065 (1992) *status quo* must be maintained while the matter is pending before the FSIP, even if the FSIP does not assert jurisdiction). The Authority has held on numerous occasions that when an agency exercises its rights under section 7106 and declines to bargain over the change itself, an agency has an obligation to bargain over procedures to be observed by it in exercising its authority and appropriate arrangements for employees adversely affected by management's exercise of its authority. See, *inter alia*, *Department of the Air Force, Scott Air Force Base, Illinois*, 33 FLRA 532, 543 (1988).

bargain on a subject already covered by Article 2613 of the collective bargaining agreement and by its negotiated merit promotion plan, as the latter encompassed the function of the jointly staffed Officer Corps Rating Panel. Fourth, that there was no more than a **de minimis** impact on bargaining unit employees. In addition, it argues that the alleged change was "necessary with the functioning of the agency" and, therefore, its subsequent bargaining with the Union met the requirements of the Statute. Finally, Respondent denied that it engaged in any post-implementation bad faith bargaining.

While the General Counsel and Charging Party see this as a simple, uncomplicated violation of the Statute, where a respondent refused to bargain over a "change". In this case, protracted litigation surrounding the matter undermines any straightforward theory that this Respondent merely ignored its obligation to bargain. Furthermore, case law governing disputes when a respondent claims a specific provision of the contract as a defense to an unfair labor practice has changed. Now, the "Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly."¹⁴ Neither the Charging Party nor the General Counsel addressed the collective bargaining agreement in framing the alleged

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ARTICLE 26 - Travel and Per Diem

A. Travel or any extension thereof will, to the maximum extent possible, be authorized or ordered in advance in sufficient time for the employee to have in his possession a travel advance prior to starting such travel.

B. The Agency agrees to make every effort to avoid requiring employees to perform continuous automobile travel for more than eight hours in any work day or to travel on assigned days off.

C. Except for training courses, details away from the normal duty station will not exceed 35 calendar days, unless the employee volunteers for a longer period.

D. The Agency agrees that for operational details requiring advance planning, as much advance notice as possible will be given to employees selected for the detail.

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Internal Revenue Service, 47 FLRA 1091 (1993); see also, *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993); *Department of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992).

bargaining obligation here. Despite their silence, it seems to me that the dispositive issue here is whether the matters involved are "covered by" the parties collective bargaining agreements.¹⁵ In arriving at the conclusion that the matter is "covered by" negotiated agreements between the parties, my ultimate conclusion is that no violation occurred in this case.

In my view, the record supports a finding that the parties had heretofore bargained over the procedures to be followed and the appropriate arrangements used when details are ordered, including questions arising particularly over the rating points and again about overtime issues related to details. Consequently, it is my opinion that Respondent's actions surrounding the termination of the Texas detail, including returning agents to their regular duty sector without AVO or before they could serve the required amount of time to earn a rating point, are "covered by" the collective bargaining agreement and, therefore, Respondent was privileged to take the disputed actions without providing the Union with notice and an opportunity to bargain.

It can hardly be disputed that the Rating Panel issue is "covered by" the negotiated agreement between the parties. In this regard, the MP&RP (Merit Promotion and Reassignment Plan) and the collective bargaining agreement including Article 26 are instruments which confirm that the parties had already bargained over the procedures to be followed and the appropriate arrangements used when details are ordered, including any questions which may arise as to whether agents assigned to a particular detail for a specified amount of time should receive a rating point.

In reading the collective bargaining agreement as a whole and considering the record evidence concerning past experiences with overtime surrounding details, it is also my opinion that the overtime issue in this matter was also "covered by" the parties negotiated agreement. While Respondent did not mention Article 27¹⁶ of the collective bargaining agreement it concerns the distribution of

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Since it appears that the unfair labor practice cannot be resolved here without determining the meaning of the collective bargaining agreement, it is unnecessary for the undersigned to make findings on the straightforward approach suggested by the moving parties. Similarly, it is does not appear necessary to reach the arguments regarding Respondent's post-implementation bargaining obligation.

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Article 27 reads, in pertinent part, as follows: Overtime - (*other than uncontrollable overtime*). (Emphasis added.)

overtime, but specifically excludes AUO. Besides that, there is uncontroverted testimony from Hunter that, "every week or every pay period somewhere . . . a detail has been terminated early because it didn't go along as it might have been anticipated." Hunter's position being, that Respondent considers it a managerial privilege not to bargain over details of employees, admitting that the Respondent had never notified the Union in the past, and asserting that the Union had never requested to bargain in any other instance. Since the collective bargaining agreement was executed in 1976 it appears that for some time the parties followed the procedure outlined by Hunter, without incident. Thus, it is my view that overtime is plainly a routine aspect of details, that I believe was anticipated by the collective bargaining agreement. Since no contrary evidence was offered in this respect, one can certainly surmise that Respondent was following past procedures. Under all the circumstances, it is not unreasonable to conclude that the parties had worked out some agreement regarding early termination of such details including any loss of AUO resulting from the termination of details.

The Authority has made it clear that "collective bargaining agreements must be read in light of the realities of labor relations and considerations of federal labor policy, which make up the background against which such agreements are entered."¹⁷ Here, there is little doubt that AUO was discussed when the parties negotiated Article 27 and furthermore, the practice seems to have been that AUO indeed was a prerogative reserved to management. Accordingly, if the two topics were covered by the contract Respondent could have reasonably contemplated that the collective bargaining agreement precludes negotiations about overtime and rating points.

Although the collective bargaining agreement and MP&RP do not deal with all aspects of details, there is no requirement that negotiated agreements "contain the whole 'universe' of possible conditions that might pertain to employee details." The Authority has made it clear that even if the collective bargaining agreement does not expressly encompass a matter it would not "require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute." Therefore, where the matter is not expressly covered, the Authority will determine whether it is so commonly considered to be an aspect of the matter "that the subject is inseparably bound up with and plainly an aspect of a subject expressly covered by the contract". It will, if this is so, "conclude that

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Internal Revenue, supra, p. 1110.

the subject matter is covered by the agreement provision." *Social Security Administration, supra*, p. 1018. Details within this agency involving overtime are common practice and it is undisputed that those details have been administratively handled as privileged over the years. Notwithstanding that every aspect of such details and overtime is not covered in the agreement, it is my view that those subjects are plainly an aspect of a subject covered by the contract.

Social Security Administration, supra, would seem to favor the view that a reasonable reading of the instant collective bargaining agreement, when all circumstances are considered, would be that details are covered by the parties agreement and, therefore Respondent was allowed to make the disputed change without providing notice and an opportunity to negotiate the impact and implementation of the change.

In light of the foregoing, it is found that Respondent did not violate the Statute, as alleged in the Complaint in this case. Accordingly, it is recommended that the Authority adopt the following:

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 8-CA-90614 be, and it hereby is, dismissed.

Issued, Washington, DC, February 23, 1995

ELI NASH, JR.
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. 8-CA-90614, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: February 23, 1995
Washington, DC