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

MEMORANDUM DATE: July 9, 2008

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
TAMPA AIR TRAFFIC CONTROL TOWER
TAMPA, FLORIDA

Respondent

AND Case No. AT-CA-07-0488

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

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U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
TAMPA AIR TRAFFIC CONTROL TOWER
TAMPA, FLORIDA
Respondent

AND

Case No. AT-CA-07-0488

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION
Charging Party

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by 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. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **August 11, 2008**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

PAUL B. LANG
Administrative Law Judge

Dated: July 9, 2008
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION TAMPA AIR TRAFFIC CONTROL TOWER TAMPA, FLORIDA Respondent	
AND	Case No. AT-CA-07-0488
NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION Charging Party	

Lorraine Hoffmann-Polk, Esquire
For the General Counsel

Barbara A. Ellison
For the Respondent

Sandra Riviears, Esquire
For the Union

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On August 23, 2007, the National Air Traffic Controllers Association (Union) filed an unfair labor practice charge against the Federal Aviation Administration (FAA), Tampa Tower (GC Ex. 1(a)). On February 26, 2008, the Regional Director of the Atlanta Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1 (c)) in which it was alleged that the U.S. Department of Transportation, Federal Aviation Administration, Tampa Air Traffic Control Tower, Tampa, Florida (Respondent) committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by refusing the Union's request to negotiate over changes to the Respondent's radar room. The Respondent filed a timely Answer (GC Ex. 1(g)) in which it denied that it had

committed an unfair labor practice.

A hearing was held in Tampa, Florida on April 23, 2008. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence and of the post-hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel maintains that the Respondent effected a change to the configuration of the radar room, also known as the TRACON, which resulted in a change in conditions of employment of bargaining unit employees. Such changes were greater than *de minimis* and gave rise to a duty by the Respondent to negotiate with the Union upon request, to the extent required by the Statute. The Respondent's refusal to negotiate after a request by the Union was an unfair labor practice.

The Respondent maintains that the changes to conditions of employment caused by the reconfiguration of the radar room were no more than *de minimis* and that, consequently, it was not required to negotiate over the changes. The Respondent further maintains that, although there were no formal negotiations over the alleged changes, it entered into informal discussions with the Union which are continuing to date.

In addition, the Respondent asserts that, even if it is found to have failed to negotiate with the Union within the meaning of §7116(a)(5) of the Statute, it did not violate §7116(a)(1) inasmuch as it did not take any action which had a chilling effect on employees' exercise of their rights under the Statute.

Findings of Fact

The Respondent is an agency as defined in §7103(a)(3) of the Statute. The Union is a labor organization within the meaning of §7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining (GC Exs. 1(c) and 1 (g), ¶¶2 and 3).

The Radar Room

The Respondent's facility includes a radar room that is staffed by Air Traffic Controllers (ATCs) who are members of the bargaining unit.[1] The radar room is approximately 58 feet long and 16 feet wide (Tr. 122). Each ATC on duty in the radar room is assigned to one of eleven radar scopes (each with a separate letter designation) at which he or she monitors individual sectors of the airspace controlled by the Respondent and communicates with pilots in order to maintain separation between aircraft, thereby minimizing the danger of collisions. The radar room also contains a supervisor's desk which has its own radar scopes so as to enable the supervisor to monitor the activities of the ATCs (GC Ex. 9; Tr. 28, 30).

Seven of the radar scopes are typically open during daytime hours with an ATC stationed at each scope. In addition there are "developmentals" (three as of the time of the hearing) who are training to become ATCs. Each of the developmentals is stationed at a scope along with the ATC who is acting as an instructor (Tr. 126, 127). The number of ATCs on duty varies throughout the day, presumably in accordance with the volume of air traffic. For example, Michael Yuska, the Operations Manager, testified that he voluntarily works as an ATC starting at 5:30 a.m. on Saturdays, at which time there are three ATCs, in addition to the supervisor, on duty in the radar room (Tr. 115, 116).

Employees and visitors can access the radar room through either a front or a rear entrance. ATCs coming on duty or returning from a break report to the supervisor for assignment to a radar scope. Other personnel also come to the supervisor's desk, including training personnel and secretaries. In addition, management and maintenance personnel and visitors may enter the radar room (Tr. 122-28).

Changes to the Radar Room

On or about February 9, 2007,[2] Patrick McCormick, who was then President of the local Union, received a memorandum from Laurie Zugay, the Air Traffic Manager and head of the Tampa facility (GC Ex. 2). The final paragraph of the memorandum

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[1]/ ATCs also are assigned to the control tower.

[2]/ All subsequently cited dates are in 2007 unless otherwise indicated.

states, in pertinent part:

> Facility Modernization:
> You will be seeing contractors throughout the building in the next several months. They will be painting, installing new carpet, moving FDR [Flight Data Radar] to the front of the TRACON and the watch desk to the back of the TRACON and building an Operation Manager office in the back of the TRACON. . . .

On February 15 McCormick responded to Zugay with a memorandum (GC Ex. 3) in which he stated:

> Concerning your letter to the Union dated February 9, 2007; The construction you are proposing will have an adverse impact on all bargaining unit employees who work in the radar room. The Union requests a briefing from the agency concerning the proposed construction in the TRACON and an opportunity to negotiate appropriate[] arrangements for effected [*sic*] bargaining unit employees. The Union expects status quo until all statutory and contractual rights are afforded the Union and effected [*sic*] employees.

Zugay responded with a memorandum dated February 21 (GC Ex. 4) stating:

> I.A.W Article 7 Section 2 of the 2006 NATCA-FAA CBA [collective bargaining agreement], "All bargaining shall be at the national level, except where specifically authorized by this Agreement or otherwise agreed to by the Parties at the national level."
>
> In coordination with Labor Relations at the Service Area, this notification is in process.[3] Once the appropriate level of bargaining has been agreed to by the Parties, NATCA will be given the opportunity to submit negotiable proposals on this issue at that level. I will be working closely with the Agency's lead[ership] to ensure minimal impact to my employees.

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[3]/ Presumably, this means that Zugay was conferring with Labor Relations at the national level of the FAA.

There apparently was no communication between the parties, at least at the local level, until McCormick received a memorandum from Zugay dated March 28 (GC Ex. 5), the subject of which was "Article 7 Proposal: TRACON Modernization". The memorandum states, in pertinent part:

> Per Article 7 on [*sic*] the NATCA-FAA 2006 Collective Bargaining Agreement (CBA)[4], this letter serves as official notification of the Agency's intent to change the working conditions of the bargaining unit employees.
>
> Specifically, as part of the ongoing facility modernization, construction will begin in the TRACON. The Flight Data Radar position will be moved to the existing watch desk location; the watch desk will be moved to the existing Flight Data Radar location; and, an Operations Managers' office will be built next to the R scope and across from the existing Flight Data Radar position. All operational equipment currently used by the watch desk and Flight Data Radar will be relocated.
>
> [Description of the scheduling of the construction work and efforts to minimize impact of noise. Description of other renovations not pertinent to this case.]
>
> We consider the above changes to be deminimus [*sic*] in nature and therefore do not raise any issues that require bargaining.
>
> [Description of elevator outage, intention to solicit volunteers for temporary reassignments and solicitation of "Union input" to minimize impact of elevator outage.]
>
> You may, under Article 7, submit negotiable proposals regarding the impact and implementation of this change within thirty (30) days of the date you receive this notice. You may also request a briefing within fifteen (15) days of the date you receive this notice, prior to submission of your proposals. If such a briefing is held, your proposals must be submitted within ten (10) days of

[4]/ Neither Article 7 nor any other part of the collective bargaining agreement was offered in evidence by either party.

the date of the briefing.

> The point of contact for negotiations is Richard C. Anderson, Labor Relations Specialist . . . or Barbara Ellison, Labor Relations Specialist . . .[5]

(Tr. 24-27).

Zugay's memorandum of March 28 served the laudable purpose of informing the Union of the impending changes to the radar room and other locations while expressing a willingness to address employee concerns to some extent. However, the invitation to the Union to submit "negotiable proposals" on a subject over which the Respondent disclaimed a duty to bargain has a somewhat surreal quality. The memorandum reads as if it had been intended as a prelude to negotiations, whether on the national or local level, concerning the impact and implementation of the reconfiguration of the radar room.[6] Yet, the invitation to submit proposals is rendered meaningless by the statement that the reconfiguration had only a *de minimis* effect on conditions of employment.

By memorandum of March 29 to Zugay (GC Ex. 6) McCormick requested a briefing on the impending changes. He also asserted that the proposed changes to the radar room would have more than a *de minimis* effect on foot traffic and lighting as well as on heating and cooling. McCormick referred to a communication (which is not in evidence) on March 7 from the FAA to a Mr. Shapiro, the Union's Director of

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[5]/ According to Zugay, she consulted with Anderson and Scott Malon, another Labor Relations Specialist, in Atlanta. They advised her that the effect of moving the supervisor's desk was de minimis and that she was not authorized to negotiate with the Union (Tr. 122). Barbara Ellison is the Respondent's representative in this case with an office in College Park, Georgia.

[6]/ The Respondent's use of the phrase "impact and implementation" as well as the Union's demand for an opportunity to negotiate "appropriate arrangements" (GC Ex. 3) suggests that there was a tacit agreement by the parties that the reconfiguration of the radar room was an exercise of a management right within the meaning of §7106 of the Statute and, consequently, was not substantively negotiable.

Labor Relations, in which the FAA allegedly set forth deadlines for a request for a briefing and the submission of proposals. According to McCormick's memorandum, the FAA also indicated that negotiations could be carried out on the local level. Since there was no testimony regarding the alleged communication of March 7, I have assigned no weight to the reference in McCormick's memorandum.

Around the end of March or beginning of April, Zugay invited McCormick to a pre-construction meeting which took place on or about April 9. The meeting was held in the office of Mr. Forbes, the Airway Facility Manager who is in charge of maintenance. It was attended by Zugay and was conducted by Mr. Woods, the resident engineer. Woods laid out some blueprints and gave a brief overview of the changes after which McCormick was allowed to ask questions. According to McCormick he asked a lot of questions, all of which apparently were answered. The meeting lasted about a half hour. As McCormick and Zugay left the meeting, she told him that she would, "take your suggestions". When McCormick asked if she would negotiate, she said that she would not (Tr. 32-39).

About a week later Zugay came to the Union office, apparently because she was in the area. According to McCormick, this was not unusual. McCormick mentioned his concerns about the effect on the ATCs of the placement of monitors on top of the supervisor's console[7] and the effect of foot traffic from people who would have to walk the length of the radar room to get to the supervisor's desk. McCormick suggested that there be a test of the lighting so as to determine whether there could be a reduction, if necessary, of its effect on the ATCs ability to maintain the separation of aircraft. Zugay said that she would explore the possibility of having personnel not involved with air traffic enter the radar room from the rear entrance. She did not respond to McCormick's comments about the lighting. McCormick had no other meetings with Zugay to discuss the renovation and made no other suggestions. Zugay did not initiate a test of the lighting. (Tr. 39-41).

Effect of the Changes

McCormick testified that the renovation of the radar room began about two weeks of his meeting with Zugay in his office. Within 24 hours of the completion of the renovation he began

[7]/ The terms "console" and "desk" denote the supervisor's work station and are used interchangeably.

to receive oral and written complaints from ATCs that the light from the relocated supervisor's console was creating glare on the radar scopes and that there was noise from the passage of secretaries and other non-air traffic personnel through the radar room (Tr. 41, 42).

Some of the complaints resulted in the submission of Unsatisfactory Condition Reports (UCRs) by individual employees. An employee may submit a UCR form to his or her supervisor who will give the employee a copy as a receipt. Another copy is eventually returned to the employee with an indication of the action, if any, which has been taken by the FAA. Because the Union is not in the distribution chain for UCR forms, McCormick relied on bargaining unit members who submitted the UCRs to provide him with copies (Tr. 42-44).

The parties submitted the following five UCR forms as joint exhibits.[8] Each of them refers to conditions in the radar room subsequent to the reconfiguration:

Jt. Ex. 1(a) - Complains of distractions from the passage of persons walking through the radar room to the supervisor's console.

Jt. Ex. 1(b) - Response states, "This UCR is combined with UCR 525482."[9]

Jt. Ex. 2(a) - Complains of reflections on radar scopes from monitors in and around the supervisor's console. Also complains of shadows caused by movement behind radar positions.

Jt. Ex. 2(b) - Response states, "The monitors at the supervisor's desk have been reposition[ed]. So as not to cast a reflection on the RADAR scopes. This issue is closed."

Jt. Ex. 3(a) - Complains of foot traffic through radar room.

Jt. Ex. 3(b) - Response states, "Allof [*sic*] the staff has been briefed to use the rear entry when going to the watch desk. Management, controllers and visitors are all there to

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[8]/ Each of the exhibits has a document number and consists of two pages, identified as (a) and (b) respectively. The first sheet is the form submitted by the employee; the second sheet is the response by the FAA over the signature of Richard Nesbitt, who is identified as OPS Manager.

[9]/ The cited UCR is not in evidence.

either be a part of the operation or to observe the operation. We consider this issue closed."

Jt. Ex. 4(a) - Complains of glare and noise.

Jt. Ex. 4(b) - Response states, "The staff has been briefed to use the rear door to the TRACON. The light from the equipment at the new supervisor's desk has been reduced by the adjustment of the displays. This issue is closed."

Jt. Ex. 5(a) - Complains of excessively bright light and shadows from supervisor's console around D and F radar scopes. Recommends installation of black ceiling tiles around the supervisor's work station.

Jt. Ex. 5(b) - Response states, "The monitors at the supervisor's disk [*sic*] have been reposition[ed]. So as not to cast a reflection on the RADAR scopes. This issue is closed."

While the Respondent's responses to the UCRs might have been intended as no more than attempts to mollify its employees, those actions also suggest that the Respondent recognized that the reconfiguration of the radar room resulted in changes, whether or not *de minimis*, to the working environment. The corrective actions by the Respondent, *i.e.*, the repositioning of certain radar monitors[10] and the redirection of foot traffic, while not major changes, were not trivial and suggest that the effects of the reconfiguration were more than *de minimis*.

The evidence indicates that the reconfiguration of the radar room resulted in changes to the lighting conditions and to the noise level due to foot traffic from ATCs and other personnel proceeding between the front entrance to the radar room and the supervisor's console. McCormick testified that, while working on the F scope, he could see that there was glare on the R scope which he himself also experienced.[11] McCormick further testified that the effect of the glare can be reduced by adjustments to the intensity of the illumination of the radar scopes. However, the movement of personnel to the supervisor's console creates shadows which affect the image on the scopes and, therefore, the ability of the ATCs to

[10]/ It is unclear how many monitors were involved or how far they were moved.

[11]/ Zugay testified that the R scope was opened for only about six hours over the past 16 months (Tr. 131-32).

maintain separation of aircraft (Tr. 46, 47). According to McCormick, there is a lighting problem rather than a glare problem on the other side of the room where the G and M scopes are located. He described an incident when he taped a piece of paper to the side of his reading glasses to block the light

when he was working at the G scope. The light problem exists at the S, G and M scopes and is progressively worse for positions closer to the supervisor's console. The M scope is visible in Respondent's Exhibit 2. There is also a noise problem at the G scope (Tr. 64, 66, 67).

Mark Kerr is an ATC and has been the Union's Facility Representative or local President since February 1, 2008. According to Kerr, all but one of the radar monitors at the supervisor's console were either below the desk level or facing away from the radar scopes prior to the move. Since the supervisor's console was moved to the rear of the radar room there are, as shown in Respondent's Exhibit 2, seven monitors above desk level (Tr. 77, 78). Kerr generally corroborated McCormick's testimony about the effects of increased glare and foot traffic; he estimated that foot traffic has increased by from 40 to 50 percent (Tr. 80-82).

On cross-examination, Kerr acknowledged that, while the F scope is routinely open, the W and E scopes are used as back-ups and are seldom opened. The R scope is also a back-up and is rarely opened. Furthermore, he has not worked at the W, E and R scopes since the supervisor's console was moved. Kerr also acknowledged that there was foot traffic in the vicinity of the supervisor's console prior to the move (Tr. 89-91).

James Jarvis, an ATC and former Union officer, testified that on August 31 he was assigned to the R scope but told the supervisor that he could not accept the position because of the reflection of light from the supervisor's console. The supervisor placed a partition behind Jarvis' work station and adjusted it until conditions were satisfactory. However, the partition partially blocked the aisle. Jarvis has also experienced glare at the F scope (Tr. 93, 94, 98-100).

On cross-examination, Jarvis acknowledged that he has not worked at the R scope since August 31, that he did not have problems maintaining separation on that date and that he has never been disciplined for an operational error. Furthermore, he did not submit a UCR because of the glare. (Tr. 102, 103).

Michael Yuska, the Operations Manager, testified on

behalf of the Respondent that he is in the radar room every day so as to provide management oversight to the supervisors. He also works as an ATC three times a month. He is not required to do so, but he enjoys the work and wants to

maintain familiarity with current procedures. While working as an ATC, Yuska has noticed a reflection, but no glare, on the radar scope. This reflection can bother an ATC but is no different than it was before the relocation of the supervisor's console. The reflection has never affected his ability to maintain separation of aircraft.

Yuska enters the radar room through the back entrance so that he does not have to wait for his eyes to become adjusted to the dark. Typically, the ATCs and occasionally, the Air Traffic Manager enter through the front. He does not consider the total amount of foot traffic to be heavy and, if anything, it has decreased since the reconfiguration of the radar room. This is because there is now an internet web schedule which obviates the necessity of personal requests for leave (Tr. 107-10). According to Yuska the R scope is hardly ever used. It might be opened if there were a lot of practice approaches at Lakeland Airport[12] or during the Sun and Fun event which occurs during the first or second week of April (Tr. 110-11).

On cross-examination, Yuska stated that he generally uses the B scope which, according to the diagram in General Counsel's Exhibit 9, is on the opposite side of the radar room from the relocated supervisor's console; the B scope is the first one opened. Yuska also acknowledged that he works as an ATC starting at 5:30 a.m. when he is the first ATC in the radar room and there is not much foot traffic. He works four hours a month in the radar room and four hours a month in the control tower. On redirect examination, Yuska stated that he has observed that, later in the day, the secretaries enter the radar room by the rear entrance (Tr. 118-19).

Zugay testified that, in response to McCormick's concern about foot traffic, she initiated a series of briefings over one or two weeks which resulted in staff members entering the radar room by the rear entrance in order to conduct business

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[12]/ Lakeland Airport is approximately 35 to 40 miles east of Tampa (Tr. 117).

at the supervisor's console.[13] Employees using the rear entrance include staff members, secretaries and training department personnel. According to Zugay, the front entrance is still used by the ATCs, supervisors, other operational employees and her (Tr. 124-26).

Zugay further testified that, while a failure to maintain separation is considered to be an operational error, she has never fired an ATC for such an error. Discipline would only be imposed if there was a cover-up, which she has never encountered. On cross-examination, Zugay acknowledged that operational errors are recorded and that a second error would be considered more serious than the first. Operational errors might lead to retraining or decertification (Tr. 129, 130, 137).

Upon consideration of the evidence, I find as a fact that the reconfiguration of the radar room resulted in changes to the lighting conditions and to the pattern, if not the amount, of foot traffic. I further find that, while the effect of those changes varied according to the time of day and the location within the radar room, the overall result had a measurable impact on the conditions of employment of bargaining unit ATCs. As will be shown, the significance of the changes is not diminished by the fact that the Respondent took subsequent action which might have ameliorated their impact, wholly or in part.

In making these findings, I have assigned significant weight to the testimony of ATCs who work in the radar room for full shifts. The contrary testimony of supervisors is based on only sporadic observations and is, consequently, less reliable.

Discussion and Analysis

The Legal Framework

It is well settled that, before implementing changes to the conditions of employment of bargaining unit employees, an agency is obligated to inform the cognizant labor organization and afford it the opportunity to negotiate, *United States Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, PA*, 57 FLRA 852, 855 (2002). There is, however, no duty to bargain over *de minimis* changes to conditions of employment, *Social Security Administration,*

[13]/ This occurred after the Respondent had disclaimed a duty to negotiate.

Office of Hearings and Appeals, Charleston, SC, 59 FLRA 646 (2004).

In determining whether a change in conditions of employment[14]

has more than a *de minimis* effect, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change, *United States Department of the Air Force, Air Force Materiel Command*, 54 FLRA 914, 919 (1998)(*Materiel Command*). In applying the *de minimis* test, the number of employees affected will not be a controlling factor. Rather, it will be applied to expand rather than limit the number of situations where bargaining will be required, *Department of Health and Human Services, Social Security Administration*, 24 FLRA 403, 407 (1986). In *Veterans Administration Medical Center, Phoenix, Arizona*, 47 FLRA 419 (1993)(VA) the Authority found that a one hour adjustment to the work schedule of a single employee gave rise to a duty to bargain. Accordingly, the Respondent would not be relieved of its duty to bargain even if only a few of the ATCs were affected by the reconfiguration.

The Significance of the Reconfiguration

It is self-evident that interruptions in the concentration of ATCs can, at the very least, affect the ease with which they maintain separation of aircraft. It is also evident that increased light from monitors above the level of the relocated supervisor's console as well as shadows across the radar scope from a change in the pattern of foot traffic can affect the concentration of the ATCs. In some cases such changes can be only minor annoyances, but in other cases, especially when air traffic is heavy, they can have a greater effect.

The corrective action taken by the Respondent in response to the UCRs was a tacit admission that there was substance to the Union's concerns. The repositioning of radar monitors, while not a drastic adjustment, was not a trivial change and was necessitated, not only by the relocation of the supervisor's console, but by the fact that a number of monitors were above desk level for the first time. Similarly, the redirection of certain employees to the rear entrance to the radar room was, according to Zugay, only accomplished after briefings over a period of one or two weeks.

[14]/ The Respondent does not dispute the premise that a change in the configuration of a work space can affect conditions of employment. Zugay's memorandum of March 28, refers to "working conditions" which, at least for the purposes of this case, is equivalent to conditions of employment.

Another significant factor is the testimony describing the effect of shadows across at least some radar scopes resulting from foot traffic. Even if the foot traffic was not increased by the relocation of the supervisor's console, it was changed so as to affect different radar scopes. Furthermore, the effect of the shadows was increased by the increased lighting from the supervisor's console. Those shadows could adversely effect the images on the radar scopes and, consequently, the ability of ATCs to maintain separation of aircraft. Zugay testified that a loss of the required separation is an operational error which goes on an ATC's record and is taken into account in the event of future operational errors. Even though no ATC was disciplined for operational errors during Zugay's tenure and there is no evidence that an operational error was caused by the reconfiguration, it is logical to assume that ATCs are concerned about avoiding such errors on their records with the resulting possibility of retraining and, in extreme cases, decertification.

It is not surprising that the Authority has not established a precise definition of a *de minimis* change in conditions of employment since a determination of the effect or the reasonably foreseeable effect of a change, as required under *Materiel Command*, must be made according to the facts of the particular case, *VA*, 47 FLRA at 422. However, a review of Authority precedent supports the proposition that a duty to bargain may arise from even minor changes. For example, in *Air Force Logistics Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 53 FLRA 1664 (1998), the Authority held that the agency was required to bargain over the movement of a telephone.

As stated in *Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 45 FLRA 574, 575 (1992), in determining the existence of a duty to bargain over a proposed change, the appropriate inquiry is, "what the Respondent knew, or should have known, at the time of the change". As shown above, Zugay invited McCormick to a briefing about two weeks before the start of construction. The briefing included an examination of a blueprint which presumably set forth the details of the reconfiguration of the radar room and the redesign of the supervisor's console. There can be no legitimate doubt that the Respondent was in a position to accurately assess the impact of the reconfiguration by that time. Yet, it persisted in its refusal to bargain while relying on the premise that the impact would be *de minimis*. The Respondent has not alleged that the changes that it actually

implemented were different than those contemplated at the time of the briefing.

The Respondent seems to imply that the Union somehow waived its right to negotiate because it did not accept Zugay's invitation to submit written proposals on the national level. While a failure to submit bargaining proposals may, at times, constitute such a waiver, *U.S. Army Corps of Engineers, Memphis District, Memphis, Tennessee*, 53 FLRA 79, 82 (1997),

the Union was not required to go through the motions in the face of the Respondent's unequivocal statement that it did not recognize that it had a duty to bargain. Zugay was at pains to emphasize to McCormick that, while she hoped to address the Union's concerns at the local level, she had no authority to bargain.

The Respondent's *de minimis* argument is not enhanced by its efforts to reduce the impact of the reconfiguration through its response to the UCRs. The unfair labor practice occurred when the Respondent implemented the changes without having afforded the Union an opportunity to bargain, *United States Department of Housing and Urban Development*, 58 FLRA 33, 34 (2002). The Respondent's subsequent unilateral changes did not retroactively cure the effect of its actions. It goes without saying that the processing of the UCRs did not, in itself, constitute collective bargaining. Even if the Respondent had not disclaimed its duty to bargain, the UCRs were processed without the participation or notification of the Union. The standard closing phrase that, "This issue is closed", is hardly indicative of the good-faith bargaining contemplated in §7103(12) of the Statute.

If, as alleged by the Respondent, the Union was concerned about lighting and foot traffic in the radar room even before the reconfiguration, it does not follow that the reconfiguration did not cause changes to conditions of employment above the *de minimis* level. The Respondent has cited no precedent in support of the proposition that prior bargaining on a particular subject (assuming that such bargaining actually occurred) forecloses future bargaining on the same subject in light of changed circumstances.

As stated in §7103(12) of the Statute, the duty to bargain collectively, "does not compel either party to agree to a proposal or to make a concession"[.] Indeed, the Respondent would not be compelled to concede even the

negotiability of any of the Union's proposals.[15] It may well be that the Respondent's unilateral adjustments through the UCR process have allayed most of the Union's concerns. However, the Respondent is not entitled to deprive the Union of an opportunity to bargain altogether.

The Applicability of §7116(a)(1) of the Statute

It is common practice for the General Counsel to allege violations of §7116(a)(1) of the Statute in all complaints against agencies and for the Authority to include findings of violations of that section whenever it concludes that an unfair labor practice has occurred. See, for example, *U.S. Department of Energy, Washington, D.C.*, 51 FLRA 124 (1995) (failure to follow order of Federal Service Impasses Panel) and *Naval Medical Center*, 54 FLRA 1078, 1080 (1998) (unreasonable delay in implementing arbitration award). While the Respondent has correctly observed that its actions in this case do not have the coercive or chilling effect on protected activity that is a classic "stand alone" violation of §7116(a)(1), its refusal to bargain, for whatever reason, interfered with and, to some degree, restrained the exercise of the right of the Union and consequently, of bargaining unit employees to bargain collectively. That right is protected under §7102(2) of the Statute.

For the foregoing reasons, I have concluded that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Statute by refusing to bargain with the Union over the changes to the radar room. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the U.S. Department of Transportation, Federal Aviation Administration, Tampa Air Traffic Control Tower, Tampa, Florida (Respondent) shall:

1. Cease and desist from:

[15]/ The Respondent deems it significant that most of the foot traffic through the front entrance to the radar room is by ATCs. That point may be raised during negotiations.

(a) Unilaterally implementing changes to the conditions of employment of employees in the bargaining unit represented by the National Air Traffic Controllers Association (Union), including the redesign of and construction within the Tampa radar room or TRACON, without first notifying the Union and affording it an opportunity to bargain to the extent consistent with law and regulations.

(b) 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 Statute:

(a) Upon the request of the Union, bargain to the extent consistent with law and regulations concerning the redesign of the supervisor's desk at the Tampa radar room or TRACON and the relocation of the desk without regard to the current status of those features.

(b) Post at the Tampa TRACON and Tower facilities, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Tampa Air Traffic Manager 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.

(c) Pursuant to §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Atlanta Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, July 9, 2008.

_____
Paul B. Lang
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 U.S. Department of Transportation, Federal Aviation Administration, Tampa Air Traffic Control Tower, Tampa, Florida (Respondent) violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally implement changes to the conditions of employment of bargaining unit employees represented by the National Air Traffic Controllers Association (Union), including the redesign of and construction within the Tampa radar room or TRACON, without first notifying the Union and affording it an opportunity to bargain to the extent required by law and regulations.

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

WE WILL, upon the request of the Union, bargain to the extent consistent with law and regulations concerning the redesign of the supervisor's desk at the Tampa radar room or TRACON and the relocation of the desk without regard to the current status of those features.

_____
(Agency/Activity)

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 its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Atlanta Regional Office, whose address is: 285 Peachtree Center Avenue, Suite 701, Atlanta, GA 30303, and

whose telephone number is: (404)331-5300.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. AT-CA-07-0488, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

Lorraine Hoffmann-Polk, Esq. **7004-1350-0003-5175-3130**
Federal Labor Relations Authority
285 Peachtree Center Avenue, Suite 701
Atlanta, GA 30303-1270

Barbara A. Ellison, LRS **7004-1350-0003-5175-3147**
Richard C. Anderson, LRS
DOT, Federal Aviation Administration, ASO-16
1701 Columbia Avenue
College Park, GA 30337

Sandra Riviears, Esq. **7004-1350-0003-5175-3154**
NATCA, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, DC 20005

REGULAR MAIL:

Mark Kerr, Representative
NATCA
P.O. Box 20141
Tampa, FL 33622

_____
Catherine Turner

Dated: July 11, 2008
Washington, DC