UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, MEBA/AFL-CIO Respondent	
and ROBERT S. RUCKMAN Charging Party, an Individual AND ANDREAS LIEBRECHT Charging Party, an Individual AND KEVIN T. SERRATT Charging Party, an Individual AND SCOTT W. WINNEKER Charging Party, an Individual AND FEDERAL AVIATION ADMINISTRATION Charging Party	Case Nos. AT-CO-70017 AT-CO-70147 CH-CO-70081 SF-CO-70086 WA-CO-70004

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 under-

signed 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 **AUGUST 18, 1997**, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: July 17, 1997
Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: July 17, 1997

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, MEBA/AFL-CIO
Respondent

and Case Nos. AT-CO-70017
AT-CO-70147
ROBERT S. RUCKMAN CH-CO-70081
Charging Party, SF-CO-70086
an Individual WA-CO-70004
AND

ANDREAS LIEBRECHT
Charging Party,
an Individual
AND

KEVIN T. SERRATT
Charging Party,
an Individual
AND

SCOTT W. WINNEKER
Charging Party,
an Individual
AND

FEDERAL AVIATION ADMINISTRATION

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

FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C.

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, MEBA/AFL-CIO Respondent	
and ROBERT S. RUCKMAN Charging Party, an Individual AND ANDREAS LIEBRECHT Charging Party, an Individual AND KEVIN T. SERRATT Charging Party, an Individual AND SCOTT W. WINNEKER Charging Party, an Individual AND FEDERAL AVIATION ADMINISTRATION Charging Party	Case Nos. AT-CO-70017 AT-CO-70147 CH-CO-70081 SF-CO-70086 WA-CO-70004

William W. Osborne, Jr., Esquire
Marguerite L. Graf, Esquire
For the Respondent

Mr. Scott Kallman
For the Federal Aviation Administration

Christopher M. Feldenzer, Esquire
Michelle Ledina, Esquire
For the General Counsel

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., principally concerns whether Respondent violated its duty of fair representation, under § 14(a)(1) of the Statute, by determining the seniority to be used at the local level, as permitted by Article 83 of the Agreement of the Parties, at its National Convention, as a matter of uniform national policy, by the vote of dues-paying members only, which is alleged to have violated §§ 16(b)(1) and (8) of the Statute. In addition, a separate § 16(b)(1) violation is alleged as the result of a letter from a Regional Vice President of Respondent to a non-member, in which he stated, in part, as follows:

> ". . . If you and 99 other non members were NATCA members and had voted against a National Seniority System this resolution would have failed . . . If you want to change this resolu-tion, you have an opportunity to do so at the 1998 Convention in Seattle. I suggest you join the Union, become active and submit a resolution which either amends R96-015 or does away with a National Seniority Policy altogether." (G.C. Exh. 1(k), Par. 25; (G.C. Exh. 10).

This case was initiated by a charge filed in Case No. WA-CO-70004 on October 2, 1996 (G.C. Exh. 1(a)); by a charge filed in Case No. AT-CO-70017 on October 8, 1996 (G.C.

[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 7114 (a)(1) will be referred to, simply, as, "§ 14(a)(1)".

Exh. 1(b)); by a charge filed in Case No. CH-CO-70081 on November 7, 1996 (G.C. Exh. 1(c)); by a charge filed in Case No. SF-CO-70086 (G.C. Exh. 1(d)) on November 12, 1996; and by a charge filed in Case No. AT-CO-70147 on November 22, 1996 (G.C. Exh. 1(e)). By Order dated November 14, 1996 (G.C. Exh. 1(f)), Case No. SF-CO-70086 was transferred to the Washington Region; by Order dated November 19, 1996 Case No. AT-CO-70017 was transferred to the Washington Region (G.C. Exh. 1(g)); by Order dated November 20, 1996, Case No. CH-CO-70081 was transferred to the Washington Region (G.C. Exh. 1(h)); and by Order dated December 4, 1996, Case No. AT-CO-70147 was transferred to the Washington Region (G.C. Exh. 1(I)). On December 17, 1996, a First Amendment charge was filed in Case No. SF-CO-70086 (G.C. Exh. 1(j)).

The Consolidated Complaint and Notice of Hearing issued March 7, 1997 (G.C. Exh. 1(k)), and set the hearing for May 14, 1997, pursuant to which a hearing was duly held on May 14 and 15, 1997, in Washington, D.C., 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, by agreement of the parties, June 23, 1997, was fixed as the date for mailing post-hearing briefs. Respondent and General Counsel each filed an excellent brief on June 23 and Charging Party Federal Aviation Administration timely mailed a brief, received on June 27, 1997, which have been carefully considered. Upon the basis of the entire record2, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

2
General Counsel's motion to correct the transcript, to which no objection was made, and which is wholly meritorious, is granted and the transcript is hereby corrected as follows: (1) in the caption, "Robert Zuckerman" is changed to: "Robert S. Ruckman"; "Andreas Liebrecht, Charging Party/An Individual" is inserted following, "Robert S. Ruckman, Charging Party/An Individual"; "Keith Seratt" is changed to "Kevin T. Serratt"; following "Federal Aviation Administration", delete "Charging Party/An Individual" and insert, "Charging Party/Agency"; change "SF-CO-70886" to SF-CO-70086" and "WA-CA-70004" to WA-CO-70004" (2) page 107, line 20 and page 108, lines 11, 15
change "breech" to "breach"; (3) page 108, line 3, change, "debar" to "(d) bar".

1. The National Air Traffic Controllers Association, MEBA/AFL-CIO (hereinafter, "Respondent" or "NATCA"), is the exclusive representative of a nationwide unit of air traffic control specialists located at terminal and center facilities of the Federal Aviation Administration (FAA), whose primary duty is the separation of air traffic (G.C. Exh. 1(k) & (l), Par. 11).

2. A national Agreement between FAA and Respondent became effective August 1, 1993, for a term of four years (G.C. Exh. 2; Tr. 63). Article 83 of the Agreement provides, in relevant part, that,

"ARTICLE 83
"SENIORITY

> "**Section 1.** Except as provided for in Article 47 [Reduction-in-force], seniority will be determined by the Union at the local level. ...." (G.C. Exh. 2, Art. 83, Sec. 1).

3. It is admitted that Respondent, pursuant to Article 83 of the Agreement, has sole and exclusive authority to determine seniority at the local level[3], except seniority used in connection with a reduction in force, and that seniority determined by Respondent governs: watch schedules, shift assignment, holiday leave, temporary assignments and reassignments to fill vacant positions (G.C. Exh. (1)(k) & (l), Par. 14). It is further admitted that before September, 1996, seniority had been determined at the local level by Respondent's agents at each FAA facility (G.C. Exh. 1(k) & (l) Par. 15). The record showed that when seniority was determined locally there was no uniformity (Res Exh. 3, pp. 43, 45, 46; Res. Exh. 5, pp. 6-7; Tr. 23).

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[3] Paragraph 14(b) of the Complaint so states (G.C. Exh. 1(k)) and Respondent by its Answer and Amended Answer (G.C. Exh. 1 (l) and 1(l)-1, Par. 14) so admits.

4. Article IV of Respondent's Constitution,[4] in pertinent part, provides as follows:

> **"Section 1.** The National Convention shall be the Supreme Body with full and complete author-ity over all the affairs of the Association.
> ..." (Res. Exh. 1, Article IV, Sec. 1; Tr. 125)

The Constitution further provides that, "The Association shall meet in National Convention every two (2) years . . . ." (Res. Exh. 1, Article VIII, Sec. 1); that, "Only duly elected delegates or their alternates may conduct the business of the Convention. Any member in good standing may attend the Convention and speak on any issue." (id., Sec. 2); "Delegates must be members in good standing of the Association and of their respective Locals. . . ." (id., Sec. 3); and that, "Each Local shall be entitled to one delegate. Each Local shall be entitled to an additional delegate for every 50 members in good standing over and above 100 members. Each delegate shall be entitled to cast a number of votes equal to the number of members in good standing in his or her Local thirty (30) days in advance of the opening of the Convention, divided by the number of delegates representing the Local." (id., Sec. 5) (Emphasis supplied).

5. A National Convention was scheduled for September 9-11, 1996, in Pittsburgh, Pennsylvania, and in preparation for the Convention a number of seniority proposals were submitted to Respondent's Constitution Committee by members of various Locals (Tr. 129). Respondent prepared a "Proposed Amendments Package" (G.C. Exh. 3) of proposed amendments to the Consti-tution and

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[4] At the hearing, I rejected Respondent Exhibit 1, Respondent's Constitution, for the reason that, "We're not contesting the -- the operation of the union vis-a-vis the convention." (Tr. 120). Upon further reflection, it is clear that I was in error. Respondent's Constitution, because it governs all aspects of its National Conventions, including, for example, eligibility of delegates, attendance of members and voting, is material and directly determinative of General Counsel's assertion that "Only dues-paying members were permitted to attend the Respondent's convention and the business of the convention was conducted by delegates elected only by dues-paying members . . . ." (Tr. 24). Accordingly, on my own motion, I hereby reverse my previous ruling and Respondent Exhibit 1 is hereby received into evidence.

proposed resolutions to be considered at the Pittsburgh Convention of which at least Resolution Numbers 96-006, 014, 015, 021 and 022, concerned seniority. The Proposed Amendments Package was mailed to members about June, 1996 (Tr. 63, 156). At least at some facilities, such as the Fort Worth Center (Tr. 155-156), copies of the Proposed Amendments Package were made and posted on the Union bulletin board and also placed in the break room so that all members of the bargaining unit, not merely members of NATCA, were informed, in particular, of the seniority proposals. Mr. John Tune, Facility Representative at Kansas City Center stated that the seniority proposals were also posted on the Union bulletin board (Tr. 165) and were, in addition, "laying around the facility" (Tr. 165). Further, "The NATCA Voice", a publication of Respondent (Tr. 123), is distributed to each facility and copies are placed in the break room and are available to all members of the bargaining unit (Tr. 124, 165, 166, 173, 178, 179, 186, 187, 199-200, 207-208, 215, 216, 221). The June (Res. Exh. 2) and August (Res. Exh. 3) issues discussed seniority and the August issue not only discussed seniority (p. 42) but set forth the text of R96-006, R96-014, R96-015, R96-021 and R96-022 (Res. Exh. 3, pp. 43, 45, 46-47).

6. Mr. Barry Krasner, who has been President of Respondent about six years (Tr. 12, 117), testified that the Agreement (i.e. Article 83) did not require a poll or vote with respect to seniority, ". . . That's the unilateral determination of the union." (Tr. 129). Mr. Krasner further testified that there was no rule, policy or program by which Locals conducted polls or votes before the Convention, that delegates were not bound to cast their votes one way or another; and there was no policy with respect to soliciting the views of non-members (Tr. 134). Mr. Krasner stated that Respondent's National Executive Board voted unaminously against adoption of a national seniority system and voted unaminously against the adoption of the seniority policy ultimately adopted by the Convention (Res. Exhs. 7 (pp. 9-10) & 9 (last page); Tr. 136-137).

7. Mr. William Shedden, President of Fort Worth Center Local (Facility), stated that there are about 330 air traffic controllers at Ft. Worth, about 55% of whom are members of the Union (Tr. 154); however, on the eligibility date to vote at the convention, there were only 138 members, i.e. 138 votes (Tr. 160, 161). Mr. Shedden stated that he held five meetings of the Local to consider the resolutions and Constitutional Amendments to be voted on at the Convention, four of which were open to non-members -- indeed, he said that most of the people who, ". . . showed up at those four meetings were non-members." (Tr. 158); that

he took their views into considera-tion in deciding how he should vote at the Convention; that he cast 138 votes against the Resolution that there be a national seniority policy [R96-014] (Tr. 159); but, when that Resolu-tion was adopted, he voted for the second Resolution as to the type of seniority [R96-015] (Tr. 159). Mr. Shedden stated that the majority of the people he had talked to had indicated they wanted him to vote as he did (Tr. 162).

8. Mr. John Tune, President of the Kansas City Center Local (Tr. 164), which has between 350 to 360 Unit members, about half of whom are Union members (Tr. 164), stated that the views of union members and of non-union members were solicited; but no poll was taken (Tr. 164-165). A Notice to all bargaining unit employees of a meeting on August 28, 1996, with seniority debates scheduled for 8:30 p.m. (Res. Exh. 10) was posted (Tr. 168, 238-239, 240-241, 243, 246) and at least two non-members attended (Tr. 243). At the August 28th meeting, it was voted that, effective July 29, 1996, local (Kansas City) bargaining unit time shall govern (Res. Exh. 10; Tr. 245). The Executive Board of the Kansas City Local on August 14, 1996, had voted for R96-014 and R96-015 (Res. Exh. 9, Attachment; Tr. 243, 244) and at the Convention. Mr. Tune cast all of Kansas City's votes for R96-014 and
R96-015 (Tr. 166). He stated that the vote of the Executive Committee of the Local was only a recommendation, ". . . This document [Ex. Comm's Recommendation, Res. Exh. 9, Attachment] did not make me decide how to vote at the convention floor. I had to make those decisions based upon the information at the convention floor. You mentioned that there was a local vote. My basis for voting for the seniority policy at the convention was based upon input and information I got from everyone." (Tr. 244).

9. Mr. Jerry Whittaker, Vice-President for the Alaskan Region (Tr. 171), which includes Fairbanks, Anchorage, Merrill, Kodiak, Juneo and Keenai (Tr. 171, 172) stated that the Region has about 189 Controllers, of whom about 172 are Union members (Tr. 175). Mr. Whittaker testified that he instructed each facility representative (i.e., each Local President), that if a meeting was held to discuss the seniority proposals, ". . . they had to give a notice to everybody that they were going to have a meeting and that members and non-members would be -- would have to be included . . . because it dealt with the seniority issue." (Tr. 174). Mr. Whittaker further testified that he told each facility representative that, ". . . if they were going to conduct any kind of polling whatsoever that they would have to send out polls or ballots to everybody in the facility including non-members." (Tr. 174). Mr. Whittaker

said that, as far as he knew, his instructions were carried out (Tr. 175).

10. Mr. John Carr, President of the Chicago O'Hare TRACON local, in September, 1996, which has about 80 air traffic controllers, 73 of whom are members of the Union (Tr. 177, 178), testified that he did two things with regard to the seniority proposals. First, he posted, addressed to all bargaining unit members, all the information that was available to him and, in addition, put it in the reading binder in the TRACON for anyone who was interested to read (Tr. 178). Second, he prepared a sample ballot which listed all issues that he knew would be addressed by the Convention and asked for one of three responses: aye; nay; or delegate's discretion. This was confirmed by Mr. Joseph M. Bellino, current President of the Chicago TRACON Local (Tr. 73). Mr. Carr stated that he put a ballot on the bulletin board, in a reading binding in the TRACON, in every member's mailbox, and put some on a table adjacent to the bulletin board (Tr. 179). Mr. Carr said that the ballots did not have to be signed and he had no idea who responded; but he got back about 50; that 35 of the ballots selected, "Delegate's discretion" on everything; that 12 to 15 were totally against national seniority; and 5 to 8 favored a national seniority policy (Tr. 180). Mr. Carr said that two non-member controllers, Mr. Ted Anderson and Mr. Nick Molson, came to the Union office and talked about seniority and ". . . our own little seniority thing that we really liked." (Tr. 181). Mr. Carr said that at the Convention he, ". . . voted my conscience . . ." (Tr. 181) and voted 73-0 against national seniority; and against what type of seniority [R96-015] (Tr. 181).

11. Mr. Terry Shell, Atlanta Tower Facility Representative [Local President] (Tr. 185), which now has 99 air traffic controllers and in September, 1996, had 92 (Tr. 185) of whom, in September, 1996, 78 were members of the Union, testified that the Atlanta Local did not conduct any vote or poll of any kind on the seniority issue prior to the Convention (Tr. 187); that at the membership meeting on Convention proposals, he excluded the seniority issue as a topic for discussion because, ". . . I just felt that the seniority issue, by law, if it came -- we had to, if we did a poll or a vote or anything, it had to include all the bargaining unit members. (Tr. 187). Mr. Shell said seniority was a "hot topic" and there was a lot of discussion at the facility. He said he specifically remembered discussing seniority with Mr. Warren [Buzz} Clark and Mr. David Behney, non-members (Tr. 188) with Mr. Fred Calhoun (Tr. 188-189) and Mr. Scherer, who had just come to the Atlanta Tower (Tr. 189). Mr. Shell stated that at the

Convention he split his vote with about 75% of the authorized votes against and about 25% for the seniority policy (Tr. 189) [the actual vote was 68 against, and 9 for (Tr. 196)]; that, ". . . It was a gut instinct on (sic) mine and feedback that I had received, or just people talking to me. I just felt that I knew -- I knew the facility wasn't 100 percent either way. I felt the facility was more against any kind of national seniority policy than they were in favor for (sic). And I just made a decision that, you know, I would split it accordingly." (Tr. 189-190). On the second issue, as to the type of policy [R96-015], "I voted against." (Tr. 190). Of course, he could vote only for dues-paying members (Tr. 196).

Before September, 1996, Atlanta had used a formula for seniority under which one point per month was given for FAA time; and five points per month was given for Atlanta time (Tr. 101). This resulted in the seniority list dated May 28, 1996 (G.C. Exh. 12) on which Mr. Shell was No. 28, with 409.19 points, and Mr. Andreas Liebrecht was No. 67, with 321.83 points [the bottom person was Mr. Ron Renner, No. 93 and immediately above him was a Mr. Vince Polk, No. 92]. Under the national seniority policy, after September, 1996, the Atlanta seniority list was reconfigured and the list dated April 14, 1997 (G.C. Exh. 13) shows Mr. Shell is now No. 35 with 179.33 points, i.e., he lost seven places on the seniority list (Tr. 192); Mr. Liebrecht is now 91, with 106.70 points, he lost 24 places on the seniority list [the bottom person now is Mr. Lonnie Wilson, No. 99 (Mr. Renner moved up to No. 48, with 174.47 points) and Mr. Polk, immediately above Mr. Wilson, is now No. 98].

12. Mr. Timothy T. Nelson, Facility Representative of the Roseville, California facility [Sacramento], which has about 35 air traffic controllers, only 30 to 40 percent of whom are members of the Union (200, 201), testified that he had copies of the proposed amendments and resolutions made and he posted one copy on the Union bulletin board and placed another copy in the Union reading binder (Tr. 199-200); that he conducted a meeting of the Local, to which all bargaining unit employees were invited, to consider the seniority resolutions (Tr. 201, 204); that the meeting was held at his house (Tr. 203) and only about five members showed up (Tr. 201). Mr. Nelson said he took a straw vote, which was not binding (Tr. 201) and, "What I did on the straw vote is I drew up the resolutions . . . put them out to union members and said, this is how I'm voting. And if I don't hear --
get anything back then my vote is your vote." (Tr. 205). Mr. Nelson said he heard from only one or two controllers who agreed with him (Tr. 205); that he later actively

solicited the views of non-union controllers (Tr. 202); and that at the Convention he voted against each seniority resolution (i.e. R96-014 and R96-015) (Tr. 201).

13. Mr. Jimmy D. Wright, Jr., Facility Representative of the Charlotte, North Carolina, Tower, which has 72 air traffic controllers, of whom 53 were members of the Union in September, 1996 (Tr. 206, 207, 211), testified that he posted copies of the resolutions to be considered at the Convention on the Union bulletin board (Tr. 207), and put copies throughout the break room (Tr. 207, 208); that he excluded seniority in soliciting views of members on issues to be considered at the Convention, because, ". . .it was illegal for me to take just union members' view on seniority . . . ." (Tr. 209). Mr. Wright said he listened to what bargaining unit employees said, including Messrs. Mike Manning and Noland Ray, non-union controllers, who came up to him and expressed their opinion, Mr. Manning wanted only service computation date (Tr. 209) and Mr. Ray questioned national seniority (Tr. 210). At the convention Mr. Wright and his Vice President decided to split their vote with a slight majority in favor of national seniority (the actual vote was 28 for and 25 against (Tr. 211)) because, ". . . most of the input I received was they wanted a national seniority system, the majority of the input." (Tr. 211). Mr. Wright said that he and his Vice President somewhat arbitrarily split the vote 28 to 25 because we,". . . discussed it, how many votes we had, the input we had received, and we decided that's the way we would go. A slight majority of the people that gave input wanted a national system, so that's why we voted 28 to 25." (Tr. 212).

14. Mr. Stephen McCoy, Facility Representative of Bay TRACON, Oakland, California, which had 70 air traffic controllers, 68 of whom were members of the Union (Tr. 216), testified that the seniority resolutions were discussed at meetings of the Local, but no polls or surveys were taken because, ". . . we're well aware that if we do poll our (sic) ballot that we have to poll non-members" (Tr. 215). Mr. McCoy said he, ". . . got the impression everybody was in favor of a national seniority policy just because everybody always had a story about somebody with a lot of time in the FAA losing seniority because they weren't from a certain facility or anther (sic) facility." (Tr. 216-217), and, accordingly, at the Convention he cast all of his votes for the resolution (i.e., R96-014 and R96-015) (Tr. 217).

15. Mr. Michael Blake, Facility Representative at Boston, which has about 270 air traffic controllers of whom about 80 percent were members of the Union in September,

1996 (Tr. 221), testified that the seniority resolutions were considered in "an open discussion" by the Local but there was no poll taken (Tr. 222). He stated that Mr. Donald Ossinger and Mr. Paul Codispoti, had been the Local's delegates at the Convention; and that one delegate cast all of his votes (about 108) in favor and the other delegate split his vote (about 54 for and 54 against), so that, in total, the vote was basically 75 percent for national seniority and 25 percent against (Tr. 223).

16. Mr. Robert S. Ruckman[5], a non-member controller at Orlando, Florida (Tr. 36), testified that Union member Robert Deese in the first week of September told him that the seniority issue was going to be raised at the NATCA Convention in Pittsburgh; that non-members would not have a vote on the issue; and that there had been a poll of dues-paying members at Orlando concerning the seniority issue (Tr. 37-38).[6] Mr. Ruckman said that he tried to verify Mr. Deese's information with Mr. Brian Matyas, President of the Orlando Local (Tr. 38, 39), that week but was not able to contact Mr. Matyas until September 26 (Tr. 39, 53). Mr. Ruckman testified that on September 26,

> ". . . I asked him three questions, number one, were the non-union members excluded from the poll because of their non-union status. His answer to that question was yes.
>
> "The second thing I asked him was if he was acting on the guidance or direction from the NATCA national office and his answer to that was yes. And then I asked him if the vote he cast at the convention in Pittsburgh was based on the poll that he had taken at Orlando, and his answer to that question was yes." (Tr. 39-40).

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5 Mr. Ruckman has been an air traffic controller since February, 1975 (Tr. 37); and has been at Orlando 13 years (Tr. 36). Previously, Mr. Ruckman had been seven or eight on the seniority list; under the national seniority policy, he has advanced to four or five (Tr. 43).

6 Mr. Ruckman stated that a co-worker told him the questions asked by Mr. Matyas in his poll were: ". . . number one, are you in favor of a national seniority policy? Number two, if you did have a national seniority policy, how would you like it implemented whether it be FAA time, bargaining unit time, or so on. And number three, should employees returning to the bargaining unit from a non-bargaining unit position be penalized in regard to their seniority?" (Tr. 60).

Under date of October 7, 1996, a joint memorandum of the FAA manager of the Orlando ATC Tower and the Orlando NATCA Facility Representative (Local President) issued and was distributed to all employees (Tr. 40). The memorandum, signed by Mr. Brian Matyas, Facility Representative and by Ms. Donna Gropper, Tower Manager, provided, in part, as follows:

> "At the NATCA National Convention votes were cast on three different subject:
>
> (1) National or local seniority
>
> (2) Method of determining national seniority and
>
> (3) Option to penalize for leaving the bargaining unit
>
> "In accordance with the input by NATCA members prior to the convention, Brian voted for national seniority, current method of determin-ing seniority, and against penalties for leaving the bargaining unit. He was one of 900 voting delegates at the convention. The result we have today is the result of the democratic process used at the convention." (G.C. Exh. 7).

Mr. Ruckman further testified that at a public forum on October 15, 1996, conducted by Ms. Gropper and Mr. Matyas about the issues covered by the October 7 memorandum, Mr. Matyas was fielding questions along with Ms. Gropper and Mr. Matyas responded, in part, as follows:

> "A One of the things he said was that he had discussed how to handle the poll with facility reps from other facilities. . . ." (Tr. 40)

Mr. Ruckman emphasized that he had no opportunity to give his opinion on national seniority before its implementation (Tr. 41); had no opportunity to vote on the issue and had no opportunity to vote in any poll conducted (Tr. 41). Finally, he affirmed that the new national seniority policy is in effect at Orlando (Tr. 41).

17. Mr. Scott Winneker, an Air Traffic Controller at Sacramento, California, and a non-member of the Union (Tr. 76), testified that he did not see the "Proposed Amendment Package" (G.C. Exh. 3) before the hearing, i.e.,

he had not seen it at the worksite (Tr. 76); that he learned of the change on seniority by word of mouth (Tr. 77); and that when he asked Mr. Tim Nelson, the Facility Representative, what went on at the Convention about seniority, Mr. Nelson told him that he had voted "no" for the dues-paying members on the seniority issue (Tr. 77). Mr. Winneker further stated,

> ". . . Tim told me that he had polled the dues-paying members by putting a leaflet in their mailbox. And it said, I'm going to vote no -- Tim said he was going to vote no on the issue unless they came to him with a different kind of a vote. And I had -- and as a matter of fact, a couple weeks ago when Tim told me he was going to come here to testify he reiterated to me that he did not poll any of the dues -- non-dues-paying members because their vote -- he couldn't take a vote with them anyway. So he thought it was useless to ask anybody." (Tr. 78).

Mr. Winneker said that Mr. Nelson posted on the Union bulletin board a memorandum about the October meeting of the Local which stated, in part, as follows:

> "The seniority issue has settled down and been finalized with no change to what is posted on the board. To all those non members who are unhappy with the product, join the union and get involved. I had only 14 votes to cast against the proposal and the proposal passed with less than a hundred votes separating the outcome." (G.C. Exh. 8).

Mr. Winneker wrote Mr. Owen Bridgeman, Western Pacific Region NATCA President, on October 1, 1996, and asked him to explain why his, Winneker's, FSS time does not count toward seniority while a co-worker gets his FSS time counted (G.C. Exh. 9). Mr. Bridgeman on October 31, 1996, responded as follows:

> "Thank you for your letter. The resolution as passed, grandfathers anybody hired in the Terminal or En-Route option who was a training failure and reassigned to FSS then rehired in the terminal or en-route option. It also grandfathers anyone who was fired during the strike and either won their appeal or was rehired. Unfortunately as passed, your situation is one which loses seniority.

"I am curious as to why you do not belong to NATCA, but yet immediately blame the Union for this resolution. If you and 99 other non members were NATCA members and had voted against a National Seniority System this resolution would have failed and you would have no complaint. If you want to change this resolution, you have an opportunity to do so at the 1998 Convention in Seattle. I suggest you join the Union, become active and submit a resolution which either amends R96-015 or does away with a National Seniority Policy altogether.

"Sorry for the delay in answering your letter." (G.C. Exh. 10).

Mr. Winneker stated that the national seniority policy is not in effect at Sacramento, but will become effective July, 1997 (Tr. 81, 85). On the local Sacramento roster he was No. 10 and under the new national seniority policy he will be about No. 21, the result of his loss of two years seniority in Flight Service (Tr. 82, 84, 86-87). Because of his drop on the seniority roster, Mr. Winneker said, "There's a good probability that I'll be forced to take Sundays off. I like to work Sundays because there's a 25 percent premium pay for working Sundays." (Tr. 83). If, as he anticipates, he loses Sunday work, his loss for each Sunday's differential would be $166.00, or about $4,000.00 per year (G.C. Exh. 11; Tr. 83-84).

Mr. Winneker, although not now a member of the Union, has been a member, "For four years -- four years out of my 17 years." (Tr. 89). Indeed, when he quit the Union to enter a staff position, he had been Vice President of the Sacramento Approach local (Tr. 89-90).

18. Mr. Andreas Liebrecht, an air traffic controller at Atlanta (Tr. 98), testified that he neither received a copy of, nor had seen before the hearing, the "Proposed Amendments Package" (G.C. Exh. 3)(Tr. 99); that Mr. Terry Shell, President of the Atlanta Tower Local, did not ask his opinion about the national seniority policy before the Convention (Tr. 99); that Mr. Shell did not ask for his vote on the national seniority policy before the Convention (Tr. 100); and that he personally had asked every other non-union controller at Atlanta, including Messrs. David Behney, Joel Leson and Eddie Mesdak, and no one had been counseled or asked their opinion about the seniority policy (Tr. 100).

Mr. Liebrecht stated that, as the result of his dropping from No. 67 on the local seniority roster (G.C. Exh. 12; Tr. 103) to No. 91 on the present roster (G.C. Exh. 13; Tr. 104), his anticipated loss of AWS slot, extra activities, such as Sun and Fun and Atlantic City which are based on seniority (Tr. 101), selecting days off, vacation days off, etc., he estimated his loss may be about $700.00 per year (G.C. Exh. 14; Tr. 105-107, 115). On the other hand, Mr. Shell testified that Mr. Liebrecht,

> ". . .gets his Sunday pay, he gets all of his holiday pay, he gets all of his differential pays, so I don't see absolutely any kind of economical impact on him." (Tr. 192).

CONCLUSIONS

Paragraph 16(b) of the Complaint alleges that, ". . . Respondent, through its agents at the local level, discussed with and polled its dues-paying members on the draft resolutions that provided for establishment of a national seniority policy." (G.C. Exh. 1(k), Par. 16(b)). Respondent denied the allegations of Paragraph 16(b) of the Complaint (G.C. Exh. 1(l)), Answer and Amended Answer (G.C. Exh. 1 (l)-1, Par. 16(b)); but, despite its denial, the record establishes beyond question that the resolutions dealing with national seniority were, indeed, discussed with dues-paying members. For example, Mr. Blake, Facility Representative at Boston testified that they were considered in "an open discussion" by the Local (Tr. 222); see, also Mr. McCoy, Facility Represen-tative at Oakland, California (Tr. 215); Mr. Nelson, Facility Representative at Sacramento, California (Tr. 201, 204); Mr. John Tune, Facility Representative at Kansas City (Tr. 164-165); and Mr. Shedden, Facility Representative at Fort Worth (Tr. 158). What the Complaint infers, but does not say, is that the seniority proposals were discussed only with members and that only members were polled. However, the record shows that the seniority proposals were also discussed with non-members. For example, at Fort Worth, Kansas City and Sacramento, non-members were specifically invited to meetings to discuss the seniority resolutions; at Atlanta and Charlotte, seniority was excluded as an agenda item at meetings of the Locals, nevertheless, the issue was a hot topic of discussion at the facility and Facility Represen-tatives Shell and Wright listened and received comments from non-members as well as members. The record does not show whether any meetings were held in the Alaskan Region on seniority, but Mr. Whittaker, Regional Vice President, testified that he personally instructed each Facility Representative in the Alaskan Region that if a

meeting was held to discuss seniority, all bargaining unit employees must be invited.

Fort Worth, Atlanta, Charlotte, Oakland and Boston showed a keen awareness of the proscription on member only voting, and/or polling, and complied by having no voting or polling at all. Alaska showed the same awareness of the proscription and Mr. Whittaker testified that he instructed each Facility Representative that if there were a vote or poll on seniority, non-members must be included; but the record does not show whether there were, or were not, any votes or polls taken. Nevertheless, there were votes or polls at four facilities. At Orlando, Florida, Facility Representative Brian Matyas conducted a poll of members only and, on the basis of the poll, at the Convention voted for national seniority. Mr. Ruckman, testified, without contradiction, that this is what Mr. Matyas told him on September 26, 1996. Mr. Ruckman was an entirely credible witness and, in addition, his testimony was fully confirmed by a joint memorandum, dated October 7, 1996, and signed by Mr. Matyas and by Ms. Donna Gropper, Tower Manager, which, in part, stated, "In accordance with the input given by NATCA members prior to the convention, Brian voted for national seniority . . . ." (G.C. Exh. 7). Kansas City is interesting and, at the same time, somewhat of an enigma. On August 14, the Executive Board of the Local voted for national seniority (i.e., for Resolutions R96-014 and R96-015), but Mr. Tune, Facility Representative, said that this was only a recommendation and was not binding on him at the Convention." A meeting was held on August 28 to consider seniority; all bargaining unit employees were invited (Res. Exh. 10 Attachment); and some non-members attended. At this August 28 meeting, a question of local seniority was at issue and it was voted that, "Effective 7/29/96, ZKC seniority shall be based on continuous ZKC-2152 bargaining unit time . . . ." (Res. Exh. 10). Although this vote was not a vote on the seniority resolutions to be considered at the Convention, it appeared to be a strong affirmation of bargaining unit employees preference for prevalence of local Kansas City bargaining unit time in determining seniority. Nevertheless, at the Convention Mr. Tune cast all of Kansas City's votes for a national seniority policy. At Chicago's O'Hare TRACON, a sample ballot, with three choices: aye; nay; or delegate's discretion, was prepared and, while a copy of the ballot was placed in each member's mailbox, a copy was posted on the Union bulletin board, a copy was put in the reading binder and copies were placed on a table adjacent to the bulletin board for any one to use. Mr. Carr, the Facility Representative, said he got 50 ballots returned on which 35 selected, "Delegate's discretion"; 12-15 were against

national seniority; and 5 to 8 favored national seniority. At the Convention, Mr. Carr voted against national seniority (i.e. against R96-014 and R96-015). Finally, at Sacramento, all bargaining unit employees were invited to a meeting to discuss the seniority issue at Facility Representative Nelson's home; but only five members showed up, so Mr. Nelson said he took a "straw vote" of those present and posted a notice on the bulletin board which stated that he intended to vote at the Convention against national seniority and if he didn't hear, ". . . get anything back then my vote is your vote." (Tr. 205). Mr. Nelson heard from only one or two controllers each of whom agreed with him. At the Convention, Mr. Nelson voted against Resolutions 96-014 and 96-015.

Respondent asserts,

> ". . . . Bratton [National Federation of Federal Employees, Local 1827 and Catherine Bratton, 49 FLRA 738 (1994)] stands for the narrow principle that when, and only when, a binding poll is conducted to determine seniority or any other matter left to the discretion of the union, all bargaining unit members must be given an opportunity to participate. 49 FLRA at 748. In the instant case, the record plainly establishes that no binding polls were ever taken . . . And regardless of how one characterizes the pre-Convention deliberations at the local level, it is undisputed that the delegates were not bound by them. (Krasner 131-132; Shedden 157; Tune 166; Carr 182; Shell 188; Nelson 201; Wright 210; McCoy 217; Blake 223)." (Respondent's Brief, p. 23).

Each stated that he was "a free spirit" in deciding how to vote on the resolutions, and certainty, a vivid example of a complete reversal of the expressed preference of the bargain-ing unit for local seniority was Mr. Tune's vote at the Convention for national seniority. But having said that no local expression, including a Local's Executive Board vote, as at Kansas City, was binding, every one stated that his vote reflected the wishes of the facility. Thus, Mr. Tune said his vote, ". . . was based upon information from an executive board meeting and just my general feelings of how the facility would want me to vote." (Tr. 166); Mr. Carr said, ". . . I voted the best that I was able for the people that I represented. I voted 73/0 against national seniority." (Tr. 181); Mr. Shell stated, ". . . I actually split my vote. I voted the majority of my votes,

approximately 75 percent . . . against the seniority policy. And approximately about 25 percent for . . . It was a gut instinct on (sic) mine and feedback that I had received . . . I knew the facility wasn't 100 percent either way. I felt the facility was more against any kind of national seniority policy than they were in favor . . . ." (Tr. 189); Mr. Nelson said that because he got no adverse comment to his posted notice of his intended vote, that was the way he voted (Tr. 205); Mr. Wright said, ". . . A slight majority of the people that gave input wanted a national system, so that's why we voted 28 to 25." (Tr. 212); and Mr. McCoy stated that he cast his vote all in favor, "Because it was my impression that that's what my facility wanted." (Tr. 217) [Mr. Blake did not attend the Convention (Tr. 222)].

In any event, I do not consider the pre-Convention deliberations at the local level either controlling or determinative. Votes at the Convention were only for the dues-paying members, and only for those who were members on the eligibility date. Accordingly, even if the comments of non-members were heard, no vote could be cast for them. The controlling and determinative consideration is the fact that voting on seniority was by delegates voting for dues-paying members only and the corollary fact that non-dues paying members of the bargaining unit had no part in the determination of seniority.

A. CONSTRAINED TO FIND THAT CONVENTION DETERMINATION OF SENIORITY VIOLATED §§ 16(b)(1) and (8) OF THE STATUTE.

1. Duty of Fair Representation

Under the Statute, the exclusive representative's duty of fair representation is set forth in the second, and concluding, sentence of § 14(a)(1) as follows:

> ". . . An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." (5 U.S.C. § 7114(a)(1)).

In Fort Bragg Association of Educators, National Education Association, Fort Bragg, North Carolina, 28 FLRA 908 (1987), the Authority stated, in part, as follows:

> We have reexamined the scope of the duty of fair representation under the Statute. We now conclude, in agreement with the court in NTEU II [National Treasury Employees Union v. FLRA, 800

> F.2d 1165 (D.C. Cir. 1986)], that 'Congress adopted for government employee unions the private sector duty of fair representa-tion.' 800 F.2d at 1171. In our view, the manner in which the duty is expressed in section 7114(a)(1) closely parallels the judicial formulation of the duty in the private sector. Similarly, the function and significance of the duty in the labor-management relations system created by the Statute parallels that of the duty in private sector labor-management relations. Moreover, there is no indication in the legislative history of the Statute that Congress intended the scope of the duty under section 7114(a)(1) to differ from that in the private sector . . ." (28 FLRA at 916).

The Authority further stated that,

> ". . . we conclude that section 7114(a)(1) is intended by Congress to incorporate the private sector duty. As a result, we will analyze a union's responsibilities under section 7114(a)(1) in this and future cases in the context of whether or not the union's representational activities on behalf of employees are grounded in the union's authority to act as exclusive representative. Where the union is acting as the exclusive representative of its unit members, we will continue to require that its activities be undertaken without discrimination and without regard to union membership under section 7114(a)(1). We will not, however, extend those statutory obligations to situations where the union is not acting as the exclusive represen-tative, nor will we continue to decide these cases based on whether or not the union's activities relate to conditions of employment of unit employees. Previous Authority decisions to the contrary will no longer be followed." (28 FLRA at 918)(Emphasis supplied).

To like effect: American Federation of Government Employees, AFL-CIO, 30 FLRA 35 (1987); Antilles Consolidated Education Association, 36 FLRA 776, 786-789 (1990) (hereinafter, "Antilles"); U.S. Air Force, Loring Air Force Base, Limestone, Maine, 43 FLRA 1087, 1093-1094, 1097 (1992); and American Federation of Government Employees, Local 1857, AFL-CIO (Sacramento Air Logistics Center, North Highland, California), 46 FLRA No. 81, 46 FLRA 904, 909-911 (1992)(hereinafter, "Sacramento ALC"), where the Authority stated, in part, that,

". . . As the court stated in NTEU, 'Congress adopted for government employee unions the private sector duty of fair representation.' 800 F.2d at 1171. The result is that 'a union with an exclusive power cannot use that power coercively or contrary to the interests of an employee who has no representative other than the union.' American Federation of Government Employees v. FLRA, 812 F.2d 1326, 1328 (10th Cir. 1987). . . ." (46 FLRA at 910).

The court stated in National Treasury Employees Union v. FLRA (NTEU II), supra, as follows:

". . . the duty of fair representation was imposed upon the NLRA by courts reasoning from the NLRA's equivalent to the first sentence of section 7114 (a)(1). Subse-quently, Congress wrote the Federal Service statute and added a second sentence that capsulates the duty the courts had created for the private sector. The inference to be drawn from Congress' use of the language of the judicial rule of fair representation is not that Congress wished to avoid that rule. To the contrary, the inference can hardly be avoided that Congress wished to enact the rule.

The duty of fair representation was first formulated by the Supreme Court in Steele v. Louisville & Nashville R.R., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944). The Court found the duty to be inferred from the union's status as exclusive representative of the employees in the bargaining unit. Thus, the Court said, 'Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, but it has also imposed on the representative a corresponding duty.' Id. at 202, 65 S.Ct. at 232 (citation omitted). The Court stated it was 'the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.' Id. at 202-03, 65 S.Ct. at 231-32.

'So long as a labor union assumes to act as the statutory representative of a craft,

> it cannot rightly refuse to perform the duty, which is insepar-able from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to repre-sent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith.'
>
> Id. at 204, 65 S.Ct. at 233.
>
> . . .
>
> "This view of the duty as arising from the power and hence coterminous with it is expressed again and again in the case law:
>
> > "Because '[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit,' Vaca v. Sipes, 386 U.S. 171, 182 [87 S.Ct. 903, 912, 17 L.Ed.2d 842] (1987), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, 'the responsibility of fair representa-tion.' Humphrey v. Moore, [375 U.S. 335] at 342 [84 S.Ct. 363, 368, 11 L.Ed.2d 370 (1964)]. . . . Since Steele v. Louisville & N.R. Co., 323 U.S. 192 [65 S.Ct. 226, 89 L.Ed. 173] (1944), . . . the duty of fair repre-sentation has served as a 'bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.' Vaca v. Sipes, supra, 386 U.S. at 182, 87 S.Ct. at 912.
>
> Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 564, 96 S.Ct. 1048, 1056, 47 L.Ed.2d 231 (1976) . . . ." (800 F.2d at 1169-1170)

The Court concluded that,

". . . when Congress came to write section 7114 (a)(1) it included a first sentence very like the first sentence of section 9(a) and then added a second sentence which summarized the duty the Court had found implicit in the first sentence. In short, Congress adopted for government employee unions the private sector duty of fair representation." (800 F.2d at 1171).

In American Federation of Government Employees, AFL-CIO, Local 916 v. FLRA, supra, the Court further stated that,

"'fair representation' means that when a union uses a power which it alone can wield, it must do so for the benefit of all employees within its bargaining unit." (812 F.2d at 1328).

The Supreme Court most recently has restated the duty of fair representation as follows:

"'[T]he exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf.' Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202, 65 S.Ct. 226, 232, 89 L.Ed. 173 (1944).

"The duty of fair representation is thus akin to the duty owed by other fiduciaries to their beneficiaries. For example, some Members of the Court have analogized the duty a union owes to the employees it represents to the duty a trustee owes to trust beneficiaries . . . Others had likened the relationship between union and employee to that between attorney and client . . . The fair representation duty also parallels the responsibilities of corporate officers and directors toward share-holders. Just as these fiduciaries owe their beneficiaries a duty of care as well as a duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith. . .

. . .

"Although there is admittedly some variation in the way in which our opinions have described the unions' duty of fair representation, we have repeatedly identified three components of the duty, including a prohibition against 'arbitrary'

conduct. Writing for the Court in the leading case in this area of the law, JUSTICE WHITE explained:

> 'The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimina-tion by unions certified as exclusive bargaining representatives under the Railway Labor Act, see Steele v. Louisville & N.R. Co., 323 U.S. 192 [65 S.Ct. 226]; Tunstall v. Brother-hood of Locomotive Firemen, 323 U.S. 210 [65 S.Ct. 235, 89 L.Ed. 187 (1944)], and was soon extended to unions certified under the N.L.R.A., see Ford Motor Co. v. Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore, 375 U.S. [335], at 342 [84 S.Ct. 363, at 367, 11 L.Ed.2d 370 (1964)]. It is obvious that Owens' complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action.' Vaca v. Sipes, 386 U.S., at 177, 87 S.Ct., at 910.

"This description of the 'duty grounded in federal statutes' has been accepted without question by Congress and in a line of our decisions spanning almost a quarter of a century . . . We have repeatedly noted that the Vaca v. Sipes standard applies to 'challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well.' . . . We have also held that the duty applies in other instances in which a union is acting in its representative role, such as when the union operates a hiring hall . . . Finally, some union activities subject to the duty of fair representation fall into neither category. See Breininger, 493 U.S., at 87, 110 S.Ct. at 436-438." Air Line Pilots Association, International v. O'Neill, 499 U.S. 65, 74-77, 111 S.Ct. 1127, 1133-1135 (1991).

2. The Bratton Decision

Bratton, supra, involved an Agreement which provided that when the employee's Federal SCD [Service Computation Date] is not required by law or government-wide regulations and is not otherwise specified in this Agreement, seniority will be determined by the employee and/or the union, at the option of the union. The agency was Defense Mapping Agency (DMA) and a division of DMA was Graphic Arts Negative Engraving (GAN). For some years, seniority of GAN employees had been based on continuous DMA time. In 1991, the Union undertook, at the request of GAN employees, a re-determination of GAN seniority. In the past, the union had polled unit employees to determine the type of seniority desired, but in 1991 it polled only its members and Ms. Bratton, a member of the bargaining unit but not a member of the union, because she was not a member was not permitted to vote. General Counsel asserted that where a condition of employee -- i.e., seniority -- is left to the sole discretion of the exclusive representative and the union conducts a poll which ultimately determines that condition of employment, the union must poll all members of the bargaining unit, not just members of the union.

As I stated in my decision in Bratton,

> " . . . the Union, in selecting the seniority to be used, acted as the exclusive representative of unit members and there is no question that it was subject to the duty of fair representation . . . pursuant to which duty, the Union could not act coercively or contrary to the interests of non-members of the Union who have no repre-sentative other than the Union. But here, General Counsel's focus is not on the act of the Union but, rather, on how the Union arrived at its decision to act and asserts, in effect, that a Union can not have resort to views of its members concerning the exercise of a delegated power to fix a condition of employment unless it permits all members of the bargaining unit to take part in the decision to act. . . ." (49 FLRA at 767).

Applying the duty of fair representation, as it has been conceived and formulated by the United States Supreme Court, for reasons fully set forth at 49 FLRA 768-784, I concluded that,

> ". . . Respondent's conduct was not contrary to its duty of fair representation, pursuant

> to § 14(a)(1) of the Statute, and it did not violate § 16(b)(1) or (8) of the Statute. Accordingly, pursuant to PATCO (footnote omitted), supra, [Professional Air Traffic Controllers Organization, MEBA, AFL-CIO, Local 301, Aurora, Illinois, A/SLMR No. 918, 7 A/SLMR 896 (1977)] it is recommended . . . The Complaint . . . be . . . dismissed." (49 FLRA at 783-784).

I pointed out that the National Labor Relations Board, in Branch 6000, National Association of Letter Carriers, 232 NLRB 263 (1977) [which the Authority subsequently refers to as, "Letter Carriers I"], aff'd sub nom. Branch 6000, National Association of Letter Carriers v. National Labor Relations Board, 595 F.2d 808 (D.C. Cir. 1979)[which the Authority subsequently refers to as, "Letter Carriers II"], had reached a contrary result in a case involving a choice between fixed days or rotating days off and the union conducted a meeting, from which non-members were excluded, at which a vote was taken to decide the choice. The Board held, in part that,

> "Limiting to union member unit employees only the right to participate in a referendum which determines an aspect of working conditions necessarily discriminates against nonunion unit employees. Where the matter at issue is of importance to all unit employees, a direct consequence of denying the right to participate to nonmembers is to encourage nonmember unit employees to join the Union. Such conduct is clearly proscribed by Section 8(a)(1) and 8(b)(1)(A) of the Act. . . . Accordingly, we find that Respondent, by denying nonunion unit employees the right to vote in a referendum conducted to determine specific terms and conditions of employment affecting all unit employees, violated Section 8(b)(1)(a) of the Act." (232 NLRB at 263).

I had further pointed out that the Board more recently had applied its Branch 6000 (Letter Carriers I) decision in International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmith Forgers and Helpers, Local 202 (Henders Boiler & Tank Company) and William O. Colvin, 300 NLRB 28 (1990) and, on the same day, distinguished and explained its non-application in American Postal Workers Union, Pittsburgh Metro Area Postal Workers Union, AFL-CIO (United States Postal Service) and Blair Gorczya, 300 NLRB 34 (1990).

The Court, in affirming the decision of the Board in Branch 6000, viewed the use of a poll of members as,

> ". . . an abdication of the representative function that violated the duty of fair representation. . . ." (595 F.2d at 812) (Emphasis supplied).

Although the Court recognized that membership decision-making was proper in some circumstances,

> "This does not mean that exercise by the union membership of the decision making responsibility would violate the duty of fair representation under all circumstances." (595 F.2d at 812),

it concluded that the duty of fair representation was violated because,

> ". . . each union member would vote his personal preferences, evidence of disparate impact is unnecessary to prove that the interests of non-members have been ignored. . . . Where . . . it appears to the Board that as a practical matter one segment of the bargaining unit has been excluded from consideration, it may find a breach of the duty of fair representation." 595 F.2d at 813).

In my decision, I stated, inter alia,

> "With all deference, the statements by the Board and by the Court set forth above distort the duty of fair representation, i.e., to represent "the interests of all employees in the unit it represents without discrimination and without regard to labor organization member-ship." Of course, Section 9(a) of the NLRA, 29 U.S.C. § 159(a), provides that, "Repre-sentatives designated or selected for the purpose of collective bargaining by the majority of employees in a unit appropriate for such purpose, shall be the exclusive representative of all the employees in such unit. . ." and the first sentence of § 14(a)(1) even more clearly provides, "A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit

it represents and is entitled to act for . . .

all employees in the unit." (5 U.S.C. § 7114 (a)(1)). Of course, as the Authority has stated, "'a union with an exclusive power cannot use that power coercively or contrary to the interests of an employee who has no repre-sentative other than the union.'" Sacramento ALC, supra, 46 FLRA at 910. Plainly, as the Supreme court noted in NLRB v. Financial Institution Employees of America, Local 1882, supra, ". . . a union makes many decisions that 'affect' its representation of nonmember employees . . . dissatisfaction with representation is not a reason for requiring the union to allow nonunion employees to vote on union matters . . . Rather, the Act allows union members to control the shape and direction of their organization, and '[n]on-union employees have no voice in the affairs of the union.'" (475 U.S. at 205-206)." (49 FLRA at 782-783).

The Authority did not agree and held,

"Contrary to the Judge, we conclude that the administration of the contract clause granting the Respondent the discretion to determine the type of seniority to be used for calculating seniority-based benefits, without further negotiations with the Agency, directly affected all unit employees and, therefore, was not a matter relating to the Respondent's internal affairs. Rather, we conclude that, like the situation in Antilles, the Respondent undertook in its bargaining agreement the obligation to administer the system of seniority to be used for determining certain seniority-based benefits. Applying the rationale of Antilles to the circumstances of this case, the Respondent was required to administer that system in a manner that did not discriminate on the basis of Union membership. When it polled only its members to determine the method of computing seniority, the Respondent neglected the interests of the nonmembers who would be affected by the new computations.

"Consistent with the reasoning of the court in Letter Carriers II, we find that, in the circumstances of this case, the Respondent

abdicated its representative function by conducting a poll only of Union members, and thereby breached its duty of fair representation under section 7114(a)(1) of the Statute. In so finding, we agree with the General Counsel that PATCO, in which the union took a poll of its members to determine a negotiating proposal, is distinguishable from the instant case. Similarly, cases involving ratification of an otherwise agreed-upon contract are distinguish-able because "[ratification] settles no term or condition of employment [but] merely calls for an advisory vote . . . ." National Labor Relations Board v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 350 (1958). See also Letter Carriers I, 232 NLRB at 263, n.1 (distinguishing the ratification of a collective bargaining agreement, deemed "an internal union matter," from polling used as "a substitute for negotiation"). Accordingly, we conclude that by its conduct the Respondent violated section 7116(b)(1) and (8)." (49 FLRA at 747-748).

3. Application of Duty of Fair Representation to Respondent's Conduct

Here, the seniority issue was decided by the vote of delegates[7] at Respondent's 1996 National Convention, the Convention being the Supreme Body with full and complete authority over all affairs of Respondent (Res. Exh. 1, Art. IV, Sec.1). Various resolutions dealing with seniority had been submitted in advance of the Convention; had been sent to each Local of Respondent for consideration; the Resolutions were discussed and, while most Locals took no poll or vote, delegates to the Convention arrived at an impression of the wishes of the facility. Whether wishes of non-members were heard, and the views of some plainly were, no vote could be cast for them. The votes at the Convention were only for dues-paying members and, as General Counsel states, ". . . Respondent permitted its members to participate in the decision to determine the method of computing seniority, while denying non-members equal participation in the decision."
(General Counsel's Brief, p. 10).

If this were a case of first impression, for the reasons set forth in my decision in Bratton, supra, at 49 FLRA 762-784, I would find that determination of seniority by vote of delegates at Respondent's Convention, notwithstanding that they voted only for dues-paying members, was not contrary to Respondent's duty of fair representation, pursuant to § 14(a)(1) of the Statute, and that Respondent did not violate § 16(b)(1) or (8) of the Statute. Indeed, as noted above, the District of Columbia Circuit Court of Appeal, in Letter Carriers II, recognized

[7] Interestingly, Respondent's National Executive Board voted unanimously against national security and voted unanimously against adoption of the seniority policy ultimately adopted (i.e., R96-014 and R96-015)(Res. Exh. 7, (pp. 9-10) and 9 (last page); Tr. 136-137).

Further, as Respondent states,

> ". . . the FAA filed a grievance under the collective bargaining agreement over NATCA's adoption of a national security policy. The grievance alleged that NATCA violated the provision of the collective bargaining agreement which stated that 'seniority will be determined by the Union at the local level' . . . As the FAA chose to pursue this issue through the arbitration process, it was foreclosed from including it in its unfair labor practice charge. 5 U.S.C. § 7116(d)."
> (Respondent's Brief, p. 14, n. 9).

that membership decision making was proper in some circumstances, 595 F.2d at 812, and here: (a) Respondent had given non-members full and complete information on the seniority Resolution by posting, by articles in its publications which were placed in the break room of every facility, and by information placed in reading files for all employees; (b) Local Unions gave notice to all employees -- members and non-members -- of meetings on the seniority issue; (c) Views of non-members were solicited and received; (d) delegates did not vote their personal preferences, e.g., Mr. Shell (Atlanta) dropped in seniority, from 28 under local seniority to 35 under national seniority (G.C. Exhs. 12, 13); (e) the Convention vote for national seniority constituted a policy decision appropriate for resolution by the Union membership; and (f) the seniority decision was employee neutral, i.e., was wholly unrelated to membership or non-membership in the Union.

But this is not a case of first impression. This case differs from Bratton, as I view it, only in the sense that the vote moved from the local level to a national convention (There is no legal distinction between a poll and a vote when the outcome governs establishment of a condition of employ-ment). As in Bratton, the legal issue is the same, namely
did Respondent, where a negotiated Agreement gave it the unilateral right, except in RIFs, to determine seniority, violate its duty of fair representation, pursuant to § 14(a)(1) of the Statute, when it established a new seniority policy at its Convention by the vote of dues-paying members only? The Authority in Bratton held that when the union, ". . . polled only its members to determine the method of computing seniority, the Respondent neglected the interests of the nonmembers who would be affected by the new computations. Consistent with the reasoning of the court in Letter Carriers II, we find that . . . the Respondent abdicated its represen-tative function by conducting a poll only of Union members, and thereby breached its duty of fair representation under section 7114(a)(1) of the Statute. . . ." (49 FLRA at 748). Indeed, the Board, in Letter Carriers I, had, even more succinctly stated that, "Limiting to union member unit employees only the right to participate in a referendum which determines an aspect of working conditions necessarily discriminates against nonunion unit employees . . . ." (232 NLRB at 263). I am constrained, in light of the Authority's decision in Bratton, to conclude that Respondent violated its duty of fair representation under § 14(a)(1) and thereby violated §§ 16(b)(1) and (8) of the Statute.

4. Remedy

General Counsel seeks, "A return to the status quo ante, including a full make-whole relief for unit employees who suffered any loss of pay, benefits, and differentials, as the result of the Respondent's unlawful conduct . . . ." (General Counsel's Brief, p. 13). I fully agree that a status quo ante order is appropriate, Bratton, supra, 49 FLRA at 748-749; F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA No. 17, 52 FLRA 149, 160 (1996); but I do not agree that a make-whole remedy for all bargaining unit employees who suffered any loss of pay, benefits, etc., in appropriate. The only bargaining unit employees injured by Respondent's unlawful conduct were non-dues paying members of the Union who were denied the right to participate in the vote which determined seniority and they are the only bargaining unit employees who should be made whole for the loss of pay, benefits and differentials. Dues paying members, through their delegates, voted at the Convention and it would be inequitable, improper and would not effectuate the purposes or policies of the Act to recompense them for the choice they freely made through the lawful processes of Respondent. Accordingly, I shall order payment for loss of pay, benefits and differential lost be limited to non-dues paying members of the bargaining unit.[8]

Where, as here, Respondent has, unlawfully, conducted a national referendum which established a national seniority policy, in order to remedy the unfair practice, Respondent must be required to conduct a poll, vote or referendum in each local union in which every member of the bargaining unit within the jurisdiction of each local union of Respondent is permitted to participate fully.

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[8] By way of example only, Mr. Liebrecht testified that by reason of dropping from No. 67, on the local Atlanta seniority roster, to No. 91 on the present roster, he anticipated loss of AWS slot, extra activities, etc., and an estimated loss of overtime, holiday pay, differential, etc., of $700.00 per year (G.C. Exh. 14; Tr. 105-107, 115); however, Mr. Shell, Atlanta Facility Representative, testified that Mr. Liebrecht ". . . gets his Sunday pay, he gets all of his holiday pay, he gets all of his differential pays, so I don't see absolutely any kind of economical impact on him." (Tr. 192).

As the new seniority policy will not become effective at Sacramento until July 1997, Mr. Winneker could only speculate that his loss of about eleven places (No. 10 to about No. 21) could result in the loss of Sunday work with a differential of $166.00 per week.

B. CONSTRAINED TO FIND THAT, BY OCTOBER 31, 1996, LETTER, RESPONDENT VIOLATED § 16(b)(1) OF THE STATUTE.

Mr. Winneker said that Facility Representative Nelson had posted a memorandum about the October 1996, meeting of the Local which stated, in part, as follows:

> ". . . To all those non members who are unhappy with the product, join the union and get involved. I had only 14 votes to cast against the proposal and the proposal passed with less than a hundred votes separating the outcome." (G.C. Exh. 8).

This is not alleged to have been in violation of § 16(b)(1). At about the same time, Mr. Winneker, on October 1, 1996, wrote Mr. Bridgeman, Western Pacific Region NATCA President, and asked him to explain why his, Winneker's, FSS time does not count toward seniority while a co-worker's does. Mr. Bridgeman, by letter dated October 31, 1996, responded as follows:

> "Thank you for your letter. The resolution as passed, grandfathers anybody hired in the Terminal or En-Route option who was a training failure and reassigned to FSS then rehired in the terminal or en-route option. It also grandfathers anyone who was fired during the strike and either won their appeal or was rehired. Unfortunately as passed, your situation is one which loses seniority.
>
> "I am curious as to why you do not belong to NATCA, but yet immediately blame the Union for this resolution. If you and 99 other non members were NATCA members and had voted against a National Seniority System this resolution would have failed and you would have no complaint. If you want to change this resolution, you have an opportunity to do so at the 1998 Convention in Seattle. I suggest you join the Union, become active and submit a resolution which either amends R96-015 or does away with a National Seniority Policy altogether.
>
> "Sorry for the delay in answering your letter." (G.C. Exh. 10).

Because the Authority, in Bratton, has, as a part of the duty of fair representation under § 14(a)(1), created a

right of non-dues paying members of the union to participate in any referendum which determines a condition of employment of the bargaining unit, I am constrained to conclude that denial of the right to participate except by joining the Union interfered with Mr. Winneker's protected rights, inter alia , to enjoy the right as a member of the bargaining unit to participate in any referendum to determine a condition of employment and/or the right not to join the Union. As the Board stated in Letter Carriers 1, ". . . a direct consequence of denying the right to participate to nonmembers is to encourage nonmember unit employees to join the Union. . . ." (232 NLRB at 263). Such conduct is clearly proscribed by §§ 2 and 16(b)(1) of the Statute. Accordingly, I find that Respondent violated § 16(b)(1) of the Statute.

Having found that Respondent violated §§ 16(b)(1) and (8) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the National Air Traffic Controllers Association, MEBA/AFL-CIO, Washington, D.C., shall:

1. Cease and desist from:

(a) Denying non-dues paying members of the nationwide bargaining unit of air traffic control specialists employed by the Federal Aviation Administration the right to participate in any poll, vote or referendum to determine a condition of employment of the bargaining unit.

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

(c) In any like or related manner, interfering with, restraining, or coercing unit 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) Forthwith rescind and withdraw all implementation of a national seniority policy.

(b) Forthwith suspend, withdraw and nullify implementation and/or operation of Resolution Numbers R96-014 and R96-015, adopted at Respondent's 1996 National Convention.

(c) Forthwith resume the determination of seniority for the purpose of Article 83 of Respondent's national Agreement with the Federal Aviation Administration, at the local level, i.e., specifically by each Local Union.

(d) To determine seniority for the purposes of Article 83, each Local Union shall conduct a poll, vote, or referendum of all members of the bargaining unit for which it is the agent of Respondent.

(e) Make whole any non-dues paying member of the bargaining unit for any loss of pay, benefits or differentials suffered by such employees as the result of the implementation of Resolutions R96-014 and R96-015, adopted by the 1996 National Convention of Respondent.

(f) Give personal notice to every member of the bargaining unit of any future intent to establish any national seniority policy.

(g) Afford every member of the bargaining unit the opportunity to participate fully in any poll, vote, or referendum to determine any future proposal relating to national seniority policy.

(h) Post at its national office, at the business office of each of its local Unions, and at each facility at which air traffic control specialists are employed, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the President of Respondent and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to Air Traffic Controllers are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced or covered by any other material.

(i) Submit appropriate signed copies of the Notice, as the Administrator of the Federal Aviation Administration may request, to the Federal Aviation Administration, Washington, D.C., for posting in conspicuous places where unit employees represented by Respondent are located. Copies of the Notice should be maintained for a period of 60 consecu-tive days from the date of posting.

(j) Pursuant to § 2423.30 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the Washington Region, Federal Labor Relations Authority, 1255 22nd Street, N.W., 4th Floor, Washington, D.C. 20037-1206, 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: July 17, 1997
Washington, DC

NOTICE TO ALL OUR MEMBERS

AND TO ALL OTHER AIR TRAFFIC CONTROLLERS

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

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

WE HEREBY NOTIFY OUR MEMBERS AND ALL OTHER AIR TRAFFIC CONTROLLERS EMPLOYED BY THE FEDERAL AVIATION ADMINISTRATION THAT:

WE WILL NOT discriminate against non-dues paying members of the nationwide bargaining unit of air traffic control specialists employed by the Federal Aviation Administration, by denying them the right to participate in any poll, vote or referendum to determine a condition of employment of the bargaining unit.

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

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

WE WILL FORTHWITH rescind and withdraw all implementation of a national seniority policy.

WE WILL FORTHWITH suspend, withdraw and nullify implementation and/or operation of Resolution R96-014 and R96-015, adopted at our 1996 National Convention.

WE WILL FORTHWITH resume the determination of seniority, for the purposes of Article 83 of our national Agreement with the Federal Aviation Administration, at the local level, i.e., specifically by each Local Union.

WE WILL, at each Local Union determine seniority, for the purposes of Article 83, by conducting a vote of all members of the bargaining unit for which the Local is our agent for the purpose of administering our Agreement with the Federal Aviation Administration.

WE WILL make whole any non-dues paying member of the bargaining unit for any loss of pay, benefits or differentials suffered by such employees as the result of the implementation of Resolutions R96-014 and R96-015, adopted by our 1996 National Convention.

WE WILL give personal notice to every member of the bargaining unit of any future intent to establish any national seniority policy.

WE WILL afford every member of the bargaining unit the opportunity to participate fully in any poll, vote, or referendum to determine any future proposal relating to national seniority policy.

National Air Traffic Controllers Association, MEBA/AFL-CIO

Date: By:

President

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, Washington Region, whose address is: 1255 22nd Street, N.W., 4th Floor, Washington, D.C. 20037-1206, and whose telephone number is: (202) 653-8500.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case Nos. AT-CO-70017, AT-CO-70147, CH-CO-70081, SF-CO-70086 and WA-CO-70004, were sent to the following parties in the manner indicated:

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National Air Traffic Controllers
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Dated: July 17, 1997

Washington, DC