



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

PROFESSIONAL AIRWAYS SYSTEMS
SPECIALISTS

Respondent

AND

FEDERAL AVIATION ADMINISTRATION

Charging Party

Case No. WA-CO-06-0356

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 4 2007**, and addressed to:

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

A handwritten signature in cursive script, reading "Richard A. Pearson".

RICHARD A. PEARSON
Administrative Law Judge

Dated: July 31, 2007
Washington, DC

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Charging Party

Thomas F. Bianco
Sarah Whittle-Spooner
For the General Counsel

Joseph E. Kolick, Jr.
For the Respondent

Michael Herlihy
Donna L. Lewis
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423. It poses a question that has never been squarely addressed by the Authority: does a union commit an unfair labor practice by actively recommending that its membership reject a contract proposal that its negotiators have just accepted?

On March 31, 2006, the Federal Aviation Administration (the Charging Party, Agency or FAA) filed an unfair labor practice charge against the Professional Airways Systems Specialists (the Respondent, Union or PASS), alleging that the Union had violated its duty to bargain in good faith by

stopping negotiations to conduct a ratification vote on a tentative agreement that the Union was recommending its members disapprove. G.C. Ex. 1(a). On June 9, 2006, the FAA filed an amended charge, alleging that PASS leaders had engaged in bad faith bargaining by stating they do not support contract proposals that they had previously agreed to, and that the Union had tainted the ratification process by seeking to ensure that the proposed contract would be voted down. G.C. Ex. 1(b). After conducting an investigation, the Regional Director of the Washington Region of the Authority issued a complaint against the Respondent on January 10, 2007, alleging that the Union violated its duty to bargain in good faith under section 7114(a)(4) of the Statute, thereby committing an unfair labor practice under section 7116(b)(1) and (5), by sending communications to Union members and to the Agency stating that the Union opposed the tentative contract and recommending that its members reject ratification. G.C. Ex. 1(c). On February 7, 2007, the Regional Director filed a First Amended Complaint, alleging the same essential unfair labor practice but adding additional examples of unlawful communications. G.C. Ex. 1(i).

The Respondent filed timely answers to the Complaint and the First Amended Complaint, both times admitting that Union officials had communicated with its members to encourage them to vote against the tentative agreement, but denying that this conduct violated the duty to bargain in good faith or otherwise violated the Statute. The Respondent further asserted affirmative defenses that the statements and actions of its officers constituted free speech and truthful statements of fact or opinion, protected under the United States Constitution and the Statute. A hearing was held in the matter on March 27, 2007, in Washington, D.C., at which time all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel, the Respondent, and the Charging Party subsequently filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

PASS is the exclusive collective bargaining representative for five bargaining units of approximately

11,000 employees of the FAA (G.C. Ex. 2 at 1).^{1/} The instant case involves one of those bargaining units, consisting of about 7,000 employees, referred to in previous years as the Airway Facilities unit, and more recently as the Technical Operations unit (Tr. 39, 177). These employees maintain all of the equipment utilized by the FAA for air traffic control. Tr. 157-58. PASS and the FAA are parties to a collective bargaining agreement (CBA) (G.C. Ex. 26(a) and (b)) for this unit, which by its terms was effective from July 2, 2000, to July 2, 2005, and which has remained in effect in the absence of a new agreement. G.C. Ex. 26(a) at 97.

The events in this case occurred primarily between January and August of 2006, as the parties attempted to negotiate a new CBA. But in order to properly understand the events of 2006, they must be viewed in the broader context of the unique collective bargaining environment that exists at the FAA. Beginning in 1996, Congress passed a series of laws that authorize the FAA to establish its own personnel management system, one which is not subject to most provisions of title 5 of the United States Code. 49 U.S.C. § 40122(g)(1). However, Congress expressly made chapter 71 of title 5 (the Statute) applicable to the Agency. 49 U.S.C. § 40122(g)(2)(C). The new laws also established a unique process for negotiating changes to this personnel management system, a process that requires the Agency to bargain with the unions representing its employees, but when such negotiations are unsuccessful, the FAA is not required to submit its proposals to the Federal Service Impasses Panel (the Panel); instead, the Agency is free to implement its proposed changes 60 days after it has transmitted the proposals to Congress. 49 U.S.C. § 40122(a)(2). Moreover, in carrying out her duty to fix compensation for its employees, the FAA Administrator is instructed not to "engage in any type of bargaining, except to the extent provided for in section 40122(a)". 49 U.S.C. § 109(l)(1).

The exact meaning of these changes has been hotly contested between the FAA and its various unions, and both the Authority and the Federal courts have begun to interpret the disputed provisions. Thus the Authority has held that the FAA, unlike most Federal agencies, "is required to negotiate pursuant to the Statute with exclusive bargaining representatives concerning the compensation of its employees." *United States Department of Transportation, Federal Aviation*

^{1/} Other unions, principally the National Air Traffic Controllers Association (NATCA), represent other units of employees and bargain separately with the FAA.

Administration and Professional Airways Systems Specialists, AFL-CIO, 61 FLRA 750, 752 (2006), citing United States Department of Transportation, Federal Aviation Administration, Mike Monroney Aeronautical Center and American Federation of Government Employees, Local 2282, AFL-CIO, 58 FLRA 462, 463 (2003).

The FAA collective bargaining system was further tested when, in 2003, the FAA failed to reach contractual agreements with PASS for four bargaining units and with NATCA for 11 other bargaining units. The unions sought impasse assistance from the Panel, but the FAA argued that the legislative changes had eliminated FSIP jurisdiction over bargaining impasses. The unions, for their part, argued that the provisions in title 49 allowing the FAA to implement changes after submitting them to Congress are applicable only to "changes to the personnel management system" and not to negotiations on collective bargaining agreements. 49 U.S.C. § 40122(a)(1); unions' position summarized in *National Air Traffic Controllers Association, AFL-CIO v. FSIP*, 437 F.3d 1256, 1261, 1264 (D.C. Cir. 2006) (*NATCA v. FSIP*). The Panel declined to assert jurisdiction over the disputes, "because it is unclear whether the Panel has the authority to resolve the parties' impasse." *Department of Transportation, Federal Aviation Administration, Washington, DC and NATCA, AFL-CIO*, Case No. 03-FSIP 144 at 1 (January 9, 2004); *Department of Transportation, Federal Aviation Administration, Washington, DC and PASS, AFL-CIO*, Case Nos. 03-FSIP 149, 150, 151, and 157 at 1 (January 9, 2004). While the Panel did not decide whether it actually had jurisdiction of such cases, it ruled that it should not attempt to resolve the impasses until the jurisdictional issue had been resolved "in an appropriate forum". *Id.* at 4. The unions then went to Federal court seeking an order directing the Panel to assist them in resolving the impasses, but both the District Court and the District of Columbia Circuit refused to do so. Noting that "[b]oth the FAA and the Unions have raised compelling arguments regarding the proper interpretation of the disputed statutory provisions", the Circuit Court held that the Panel could not be found to have violated a clear and mandatory statutory directive; therefore, an injunction was improper. *NATCA v. FSIP*, 437 F.3d at 1264. While this litigation was pending in court, the FAA submitted its final bargaining proposals for the 11 NATCA bargaining units to Congress, and after Congress failed to act within 60 days, the Agency implemented the terms and conditions of the collective bargaining agreements on June 10, 2005. *Id.* at 1262; see also Tr. 144, 178.

It was in this environment that PASS and the FAA began the process of negotiating a new CBA for the 7,000 Technical Operations employees.^{2/} Thomas Valenti served as the Chief Negotiator for the Agency and Michael Derby served in a similar capacity for the Union. In April of 2005 the parties began ground rules negotiations, and those ground rules were finalized with the assistance of the FSIP, which directed the parties to participate in mediation-arbitration.^{3/} The Agency sought, among other things, to impose a specific termination date on the CBA negotiations, while the Union favored an open-ended bargaining period.^{4/} The Agency also resisted a Union proposal that the agreement would be subject to ratification by the Union membership. Tr. 54. During mediation in December 2005, the parties agreed on a schedule of six bargaining sessions, each of which would last two weeks, beginning on February 6, and ending on July 21, 2006,^{5/} and they agreed on compromise language stating that "The parties recognize there will be a ratification process by the PASS members." G.C. Ex. 3, Section 5 at 2, and Section 17 at 4; Tr. 54-55.

The one ground rule the parties could not resolve was whether a definite termination date for bargaining should be established; this question was thus decided by Panel Member Mark A. Carter, serving as arbitrator, on behalf of the Panel. G.C. Ex. 3, Section 5; G.C. Ex. 2. The arbitrator decided in favor of the Agency, finding that the establishment of a terminal date for negotiations was warranted, and that the date should be July 21, 2006, unless the parties mutually

^{2/} Throughout the period leading up to and including the CBA negotiations, PASS was also lobbying heavily in Congress to amend the statutes governing the FAA collective bargaining process in ways that would restrict the Agency's ability to implement a CBA unilaterally. See G.C. Ex. 9 at 1, 4-6; C.P. Ex. 16 at 1-3.

^{3/} There is nothing in the record to indicate why the FAA filed an impasse resolution request in this case, when it had argued in the 2003-04 cases that the Panel lacked jurisdiction over FAA bargaining impasses.

^{4/} It took the parties roughly three or four years to reach agreement on the 2000-2005 CBA (Tr. 201), and it is clear from the *NATCA v. FSIP* decision that contract negotiations in those units dragged on for at least a few years. 437 F.3d at 1261-62.

^{5/} Hereafter, all dates are 2006 unless otherwise noted.

