ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1269

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority ("FLRA," "Respondent," or "Authority") were the National Treasury Employees Union ("NTEU," "Petitioner," or "Union") and the United States Department of Homeland Security, United States Customs and Border Protection ("CBP" or "Agency"). NTEU is the petitioner in this Court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision and Order in *National Treasury Employees Union and United States Department of Homeland Security, U.S. Customs and Border Protection,* Case No. 0-AR-4661, decision issued on April 26, 2012, reported at 66 F.L.R.A. (No. 116) 611.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court that are related to this case within the meaning of Circuit Rule 28(a)(1)(C).

TABLE OF CONTENTS

Page No.

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUE 2

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

- **A. Background** 4
- **B. The Union's Grievance** 6
- **C. The Arbitrator's Award** 7
- **D. The Authority's Decision** 8

STANDARD OF REVIEW 10

SUMMARY OF ARGUMENT 11

ARGUMENT 13

THE AUTHORITY REASONABLY HELD THAT THE AGENCY'S FAILURE TO PROVIDE SPECIFIC NOTICE OF SUBSTANTIVE BARGAINING PROPOSALS BEFORE BARGAINING OVER GROUND RULES FOR A TERM COLLECTIVE BARGAINING AGREEMENT WAS NOT A PER SE UNFAIR LABOR PRACTICE UNDER 5 U.S.C. § 7116.

- **A. The Authority Correctly Held that the Agency did not Commit a Per Se ULP by Failing to Provide Specific Notice of its Substantive Proposals Prior to Ground-Rules Negotiations.** 15
  - **1. The Authority has never required unilateral disclosure of term bargaining positions before**

ground-rules negotiations as part of the duty to bargain in good faith. 16

2. The Authority properly considered its holding in *Griffiss* as weighing against adoption of the unilateral disclosure rule. 18

3. The Authority correctly determined that the Union's arguments did not support a change in the specific notice requirement. 21

a. Bargaining over management-initiated changes is distinct from bargaining over ground rules preparatory to term negotiations. 21

b. The Union's cited cases do not control this issue and, in fact, support the Authority's decision. 25

B. The Union's Remaining Equitable Arguments do not Provide a Basis for Granting the Petition for Review. 29

C. The Court Should not Grant the Union's Requested Relief Because Doing so would Overrule the Authority's Longstanding Test for Determining Bad-Faith Bargaining ULPs. 33

CONCLUSION 35

D.C. CIRCUIT RULE 32(a) CERTIFCATION

CERTIFICATE OF SERVICE

Addendum A (Relevant Statutes and Regulations)

ADDENDUM

	Page No.
Relevant statutory provisions	**A-1**

TABLE OF AUTHORITIES

CASES

Am. Distrib Co. v. NLRB, 715 F.2d 446 (9th Cir. 1983) 26

Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89 (1983) 10

Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 10

City of Lawrence, Mass. v. C.A.B., 343 F.2d 583 (1st Cir. 1965) 18

Fed. Commc'n Comm'n v. Fox Television Stations, Inc., 556 U.S. 502 (2009) 17

Fed. Deposit Ins. Corp. v. FLRA, 977 F.2d 1493 (D.C. Cir. 1992) 11

Fort Stewart Schools v. FLRA, 495 U.S. 641 (1990) 28

Nat'l Fed'n of Fed. Emps., FD-1 v. FLRA, 369 F.3d 548 (D.C. Cir. 2004) (*NFFE*) 25, 26, 27

Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of the Interior, 526 U.S. 86 (1999) 11

Nat'l Treasury Emps. Union v. FLRA, 910 F.2d 964 (D.C. Cir. 1990) 28

NLRB v. Transport Serv. Co, 973 F.2d 562 (7th Cir. 1992) (*Transport Service*) 26, 28

Pension Benefit Guar. Corp. v. FLRA, 967 F.2d 658 (D.C. Cir. 1992) (*PBGC*) 10, 11

Santos v. United States, 461 F.3d 886 (7th Cir. 2006) 16

Stone Boat Yard v. NLRB, 715 F.2d 441 (9th Cir. 1983) 26

Teague v. Lane, 489 U.S. 288 (1989) 17

United States v. Heredia, 483 F.3d 913 (9th Cir. 2007) 16-17

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

Am. Fed'n of Gov't Emps., Nat'l Council of HUD Locals 222, 54 F.L.R.A. 1267 (1998) 8

Am. Fed'n of Gov't Emps., Local 12, 60 F.L.R.A. 533 (2004) 13

Am. Fed'n of Gov't Emps., Local 12, 61 F.L.R.A. 209 (2005) (*AFGE, Local 12*) 13, 31

Army & Air Force Exchange Serv., 52 F.L.R.A. 290 (1996) 33

Davis-Monthan A.F.B., Tucson, Ariz., 53 F.L.R.A. 445 (1997) 31

Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson A.F.B., Ohio, 51 F.L.R.A. 1532 (1996) (*Wright-Patterson*) 22, 26, 27

* *Dep't of the Air Force, Griffiss A.F.B., Rome, N.Y.*, 25 F.L.R.A. 579 (1987) (*Griffiss*) 9, 12, 16, 17, 18, 19, 20

Dep't of Commerce, U.S. Patent & Trademark Office, 60 F.L.R.A. 869 (2005) 24

Dep't of Def. Dependents Schools, 14 F.L.R.A. 191 (1984) (*DODDS*) 13, 14

Dep't of Health & Human Servs., Region VII, Kansas City, Mo., 14 F.L.R.A. 258 (1984) 14

Dep't of Health & Human Servs., Soc. Sec. Admin. and Office of Hearings & Appeals, Region II, 17 F.L.R.A. 368 (1985) 14

Dep't of Health & Human Servs., Soc. Sec. Admin. and Soc. Sec. Admin. Field Operations, N.Y. Region, 24 F.L.R.A. 94 (1986) 20

Nat'l Treasury Emps. Union, 63 F.L.R.A. 183 (2009) 6

Nat'l Treasury Emps. Union, Chapter 24, 50 F.L.R.A. 330 (1995) 8

Ogden Air Logistics Center, Hill A.F.B., Utah and Air Force Logistics Command, Wright–Patterson A.F.B., Ohio, 41 F.L.R.A. 690 (1991) 22

Soc. Sec. Admin., 64 F.L.R.A. 293 (2009) 30

Sw. Div. Naval Facilities Eng'g Command, San Diego, Cal., 44 F.L.R.A. 77 (1992) 31

U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn., 53 F.L.R.A. 79 (1997) (*Army Corps of Eng'rs*) 22, 23

U.S. Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson A.F.B., Ohio, 36 F.L.R.A. 524 (1990) 33

U.S. Dep't of the Army, Womack Med. Ctr., Fort Bragg, N.C., 63 F.L.R.A. 524 (2009) 23

U.S. Dep't of Justice, Exec. Office for Immigration Review, N.Y.C., N.Y., 61 F.L.R.A. 460 (2006) 31

* *U.S. Dep't of the Treasury, Internal Revenue Serv., Wash., D.C.*, 64 F.L.R.A. 426 (2010) (*IRS*) 7, 9, 16, 17, 18, 21, 22, 25

U.S. Geological Survey, Caribbean Dist. Office, San Juan, P.R., 53 F.L.R.A. 1006 (1997) (*USGS*) 8, 33

U.S. Immigration & Naturalization Serv., Wash., D.C., 55 F.L.R.A. 69 (1999) 28

DECISIONS OF THE FEDERAL SERVICE IMPASSES PANEL

Dep't of Homeland Security, U.S. Customs & Border Protection, Wash., D.C., 07 F.S.I.P. 108 (2007) 6

Dep't of the Treasury, Internal Revenue Serv., Wash., D.C., 80 F.S.I.P. 68 (1980) 31

Nat'l Treasury Emps. Union, 02 F.S.I.P. 182 (2003) 31

STATUTES

5 U.S.C. § 7105(a) 1, 17

* 5 U.S.C. § 7114 15

5 U.S.C. § 7116 2, 28

5 U.S.C. § 7122 2, 3

5 U.S.C. § 7123(a) 2

***** Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

AFGE, Local 12	*Am. Fed'n of Gov't Emps., Local 12*, 61 F.L.R.A. 209 (2005)
Army Corps of Engineers	*U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.,* 53 F.L.R.A. 79 (1997)
CBP or Agency	U.S. Customs and Border Protection
DODDS	*Dep't of Def. Dependents Schools*, 14 F.L.R.A. 191 (1984)
FMCS	Federal Mediation and Conciliation Service
FLRA, Respondent, or Authority	Federal Labor Relations Authority
FSIP or Panel	Federal Service Impasses Panel
FSLMRS or Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2006)
Griffiss	*Dep't of the Air Force, Griffiss A.F.B., Rome, N.Y.*, 25 F.L.R.A. 579 (1987)
IRS	*U.S. Dep't of the Treasury, Internal Revenue Serv., Wash., D.C.*, 64 F.L.R.A. 426 (2010)
JA	Joint Appendix
NFFE	*Nat'l Fed'n of Fed. Emps., FD-1 v. FLRA*, 369 F.3d 548 (D.C. Cir. 2004)
NTEU, Petitioner, or Union	National Treasury Employees Union
PB	Petitioner's Brief

PBGC	*Pension Benefit Guar. Corp. v. FLRA*, 967 F.2d 658 (D.C. Cir. 1992)
Transport Service	*NLRB v. Transport Serv. Co*, 973 F.2d 562 (7th Cir. 1992)
ULP	unfair labor practice
USGS	*U.S. Geological Survey, Caribbean Dist. Office, San Juan, P.R.*, 53 F.L.R.A. 1006 (1997)
Wright-Patterson	*Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson A.F.B., Ohio,* 51 F.L.R.A. 1532 (1996)

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FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority ("FLRA," "Respondent," or "Authority") on April 26, 2012. The Authority's decision is published at 66 F.L.R.A. (No. 116) 611. A copy of the decision is included in the Joint Appendix (JA) at 640-44. The Authority exercised jurisdiction over the case in accordance with § 7105(a)(2)(H) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135

(2006) ("FSLMRS" or "Statute").[1] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute. Although the Authority's decision in this case was on review of an arbitrator's award, the Authority's order "involves an unfair labor practice" (ULP) under 5 U.S.C. § 7116, and so 5 U.S.C. § 7123(a)(1)'s jurisdictional exception does not apply.

STATEMENT OF THE ISSUE

Whether the Authority reasonably held that the agency's failure to provide specific notice of substantive bargaining proposals before bargaining over ground rules for a term collective bargaining agreement was not a per se ULP under 5 U.S.C. § 7116.

STATEMENT OF THE CASE

This case arises out of exceptions to an arbitrator's award that were filed by Petitioner, the National Treasury Employees Union ("NTEU," "Petitioner," or "Union"), under § 7122 of the Statute. Following the creation of U.S. Customs and Border Protection ("CBP" or "Agency") and the Union's certification as exclusive representative of CBP employees, the parties set about negotiating a new term collective-bargaining agreement. The parties reached impasse during negotiations over the ground rules that would govern principal negotiations over the new agreement. The Union and the Agency ultimately filed grievances against

[1] Pertinent statutory provisions are set forth in Addendum A to this brief.

each other, each claiming that the other had violated an existing agreement between the parties and/or committed ULPs in the course of their negotiations and pursuit of remedies. JA 72-82. The Arbitrator denied the Agency's grievance; she granted the Union's grievance in part and denied it in part. JA 112.

Pursuant to § 7122 of the Statute, the Union filed exceptions to the Arbitrator's award with the Authority, arguing that the award was contrary to law. As relevant here, the Union maintained that the Arbitrator erred as a matter of law when she held that the Agency did not commit a ULP by refusing to provide the Union – as part of ground-rules negotiations – specific notice of the changes that the Agency intended to propose during the principal negotiations for the new master agreement. JA 42-54.

The Authority denied the Union's exceptions, holding that the Arbitrator's decision was consistent with the Statute and Authority precedent. JA 640-44.

The Union now seeks review of the Authority's decision, arguing that the Authority erred by not agreeing with the Union's view that agencies must, as a condition precedent to bargaining over ground rules for term bargaining agreement negotiations, provide specific notice of each and every proposal that the agency contemplates offering during term agreement negotiations, and that failure to do so is a violation of the statutory duty to bargain in good faith. Petitioner's Brief (PB) 13.

STATEMENT OF THE FACTS

A. Background

In 2007, following a mail ballot election, the Authority certified NTEU as the exclusive representative of all professional and non-professional employees at CBP. JA 73, 640. This new bargaining unit contained employees who – prior to the Department of Homeland Security's creation in 2002 – had been employed by the Department of the Treasury's U.S. Customs Service, the Department of Justice's Immigration and Naturalization Service, and the Department of Agriculture's Agricultural Plant Health and Inspection Service. Also, CBP employees had previously been represented by a number of different unions, including chapters of NTEU and locals of the American Federation of Government Employees. JA 72-73, 640.

Almost immediately after the Authority certified NTEU, CBP and the Union began discussing how to go about entering a single term bargaining agreement to replace the patchwork set of agreements inherited by CBP and NTEU. JA 73, 640. The parties explored several possibilities for quickly signing a new agreement, including simply "adopt[ing] the expired agreement between NTEU and the former Customs Service," JA 73, or negotiating over a scaled-back, or "focused," agreement that covered only a small number of critical topics while reserving remaining articles for subsequent negotiations. JA 74. Neither of these

possibilities was fruitful "for reasons that cannot be ascribed solely to CBP," JA 102 (*see also* JA 74 at n.2, n.3), and the parties turned their efforts to negotiating the ground rules that would cover their negotiations over the new, all-encompassing, term bargaining agreement.

CBP provided its ground-rules proposals to the Union on June 13, 2007, and the Union reciprocated on June 26, 2007. JA 74; *see also* JA 433 (Agency ground-rules proposal). However, negotiations were stymied by, among other things, "the Union's insistence" that CBP provide it with "advance notice of substantive bargaining proposals … before the parties negotiated over ground rules." JA 75. The parties sought the assistance of a Federal Mediation and Conciliation Service (FMCS) mediator, JA 76, but "reached impasse over several of the ground[-]rules proposals; as a result, the Agency requested the assistance of the Federal Service Impasses Panel [("FSIP" or "Panel")]." JA 640. Ultimately, the parties reached agreement on a number of ground rules, including one providing for the exchange of substantive bargaining proposals:

> 4. **Scope of Bargaining.** NTEU shall provide a complete list of proposals that it wishes to address during negotiation of the [term bargaining agreement] to CBP … within five (5) days of execution of this ground[-]rules agreement. Within five (5) days of receipt of the NTEU bargaining proposals, CBP shall provide proposals on any additional topics it wishes to raise in negotiations. …

JA 436 (Nov. 28, 2007 "Agreed Ground[-]Rules Proposals"), JA 76. The remaining ground-rules issues, over which CBP and NTEU were unable to reach

agreement, were resolved by a FSIP Decision and Order three months later, on March 4, 2008. JA 494-517 (*Dep't of Homeland Security, U.S. Customs & Border Protection, Wash., D.C.*, 07 F.S.I.P. 108 (2007)).[2]

B. The Union's Grievance

Less than a week before FSIP issued its decision and order resolving the remaining ground-rules disputes, NTEU filed a grievance alleging that CBP had violated the expired Customs collective bargaining agreement and committed ULPs by (1) failing to provide requested information; (2) failing to include a negotiated grievance procedure in the parties' ground-rules agreement and not providing "specific notice of the bargaining subjects it intended to raise during term negotiations;" and (3) taking inconsistent positions during bargaining. JA 79-80, 640.

The Agency denied the Union's grievance, and later filed a grievance of its own, alleging that the Union's invocation of arbitration was, itself, a violation of the parties' agreement and a ULP. JA 81. The grievances were consolidated for arbitration. *Id.*

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[2] NTEU did not submit its bargaining proposals as required by the agreed-upon ground rules. JA 78. Rather than comply with the agreed-upon ground rules, as supplemented by those imposed by FSIP, NTEU unsuccessfully challenged the FSIP decision before the Authority, alleging that the Panel's imposed ground rules were contrary to law and requesting a stay of the decision. JA 519-527 (*Nat'l Treasury Emps. Union*, 63 F.L.R.A. 183 (2009)).

C. The Arbitrator's Award

The Arbitrator denied the Agency's grievance, JA 87-90, and granted the Union's grievance in part and denied it in part. As relevant here, the Arbitrator held that CBP did not commit a ULP by failing to provide the Union with notice of the substantive changes in conditions of employment that it would propose during term negotiations. JA 641.

With respect to the Union's specific notice argument, the Arbitrator "relied on Authority precedent resolving the same issue." JA 641 (citing *U.S. Dep't of the Treasury, Internal Revenue Serv., Wash., D.C.*, 64 F.L.R.A. 426 (2010) (*IRS*)). In *IRS*, the Union had pressed an identical argument, asking the Authority to adopt a new rule under which agencies would be required to disclose their substantive term bargaining positions to unions before requesting negotiations over ground rules. The Authority rejected that aproach in *IRS*, and the Arbitrator observed that she was "constrained to follow FLRA case law in resolving the same issue" in the instant case. JA 103.

The Union filed exceptions to the Arbitrator's award with the Authority, claiming, in relevant part, that the Arbitrator erred as a matter of law when she held that the Agency did not bargain in bad faith by refusing to provide the Union – as part of ground-rules negotiations – specific notice of the changes that the Agency

intended to propose during the principal negotiations for the new master agreement. JA 42-54.

D. The Authority's Decision

The Authority denied the Union's exception. JA 644. The Authority prefaced its analysis by noting that it applies a de novo standard of review on review of arbitrators' legal conclusions, JA 642 (citing *Nat'l Treasury Emps. Union, Chapter 24*, 50 F.L.R.A. 330, 332 (1995)), but defers to arbitrators' findings of fact, which the Authority will not supplement by engaging in its own fact-finding. *Id.* (citing *Am. Fed'n of Gov't Emps., Nat'l Council of HUD Locals 222*, 54 F.L.R.A. 1267, 1275 (1998)).

The Authority next reminded the parties that "[w]hether a party has bargained in good faith" is not a black and white question, but rather "depends on the totality of the circumstances." JA 643 (citing *U.S. Geological Survey, Caribbean Dist. Office, San Juan, P.R.*, 53 F.L.R.A. 1006, 1012 (1997) (*USGS*)).

The Authority then evaluated the Union's argument that failing to give specific notice of intended bargaining subjects before requesting bargaining over ground rules constitutes a *per se* violation of the duty to bargain in good faith. It began by referring the Union to the earlier *IRS* decision, in which "the Authority considered arguments similar to those the Union makes. Specifically, the union in *IRS* argued that the Statute did not distinguish between term collective bargaining

and bargaining over management-initiated changes, and that specific notice was required" in both contexts. JA 644 (citing *IRS*, 64 F.L.R.A. at 430).

In the instant case, the Authority again rejected the Union's arguments. The Authority explained, including through reference to *IRS*, that

> (1) the obligation to bargain over ground rules for term bargaining agreements has never been conditioned upon specific notice of the other party's intended proposals;
>
> (2) the Authority declines to adopt the Union's rule of law, having rejected a similar theory in *Department of the Air Force, Griffiss Air Force Base, Rome, N.Y.*, 25 F.L.R.A. 579 (1987) (adopting the legal conclusions of the Administrative Law Judge) (*Griffiss*); and
>
> (3) the Union's attempt to equate ground-rules bargaining with management-initiated change bargaining (in which specific notice of management's proposed change is required) is unpersuasive.

JA 644. As the Authority explained in *IRS*, "ground rules do not implicate the same requirements as bargaining over management-initiated changes. In this regard, ground[-]rules [negotiations] inherently precede [negotiations over] changes in conditions of employment, which occur as a result of negotiation or renegotiation of a term agreement." *IRS*, 64 F.L.R.A. at 431-32.

For these reasons, the Authority held that the Arbitrator did not err when she held that CBP had not committed a bad-faith-bargaining ULP when it did not provide the Union with specific notice of its term bargaining proposals during ground-rules negotiations. JA 644. The Union now petitions for review in this Court.

STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983) (internal quotation marks omitted); *see also Pension Benefit Guar. Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992) (*PBGC*).

"[I]f the statute is silent or ambiguous with respect to the specific question, the issue for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–843 (1984). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, then the Authority's construction should be upheld. *See id.* at 844. A court should defer to the Authority's construction as long as it is reasonable. *See id.* at 845.

As the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "special function of applying the general provisions of the [Statute] to the complexities of federal labor relations." *Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of the Interior*, 526 U.S. 86, 99 (1999) (internal citations and quotation marks omitted). Furthermore, this Court has noted that it "accord[s] considerable deference to the Authority when reviewing an unfair labor practice determination, recognizing that such determinations are best left to the expert judgment of the FLRA." *Fed. Deposit Ins. Corp. v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (internal quotation marks and citations omitted). As a result, the Court's "scope of review is limited." *PBGC*, 967 F.2d at 665.

SUMMARY OF ARGUMENT

This is the second case in the last two years in which the Union has attempted, unsuccessfully, to persuade the Authority to adopt a radical new rule of law: that an agency's failure to provide a union with specific notice of the agency's substantive term bargaining proposals as a condition precedent to ground-rules negotiations both relieves the union of its bargaining obligation and automatically violates the agency's duty to bargain in good faith. The Authority reasonably rejected the Union's proposed rule in the instant case, and this Court should do the same.

The Union's error stems from not understanding the difference between two different bargaining contexts: the first, bargaining over management-initiated changes in conditions of employment; the second, bargaining over ground rules preparatory to substantive term agreement negotiations. In the context of management-initiated changes, the Authority requires agencies to provide "specific notice" to unions in order to provide the union with the understanding that it needs to decide whether to offer proposals or, instead, waive its right to bargain and thereby permit the agency to implement the change.

Neither the Authority, nor the National Labor Relations Board, nor the courts have ever imputed this specific notice requirement to the second context, though, and required agencies to disclose their substantive term agreement bargaining positions as a condition precedent to ground-rules bargaining. And the Authority was neither arbitrary nor capricious in declining to do so here. As explained in the Authority's decision and in more detail below, the Authority reasonably relied upon (1) its long history of not requiring specific notice of substantive changes as part of ground-rules bargaining, (2) an earlier decision, *Griffiss*, in which the Authority rejected an agency's request for a similar rule that would have imposed a condition precedent to bargaining, and (3) the irrelevance of the Union's cited case law.

Because the Authority's decision was reasonable and adequately explained, and because the Union's equitable arguments are unconvincing and its desired remedy would needlessly overturn the Authority's test for determining bad-faith bargaining, the Union's petition for review should be denied.

ARGUMENT

THE AUTHORITY REASONABLY HELD THAT THE AGENCY'S FAILURE TO PROVIDE SPECIFIC NOTICE OF SUBSTANTIVE BARGAINING PROPOSALS BEFORE BARGAINING OVER GROUND RULES FOR A TERM COLLECTIVE BARGAINING AGREEMENT WAS NOT A PER SE UNFAIR LABOR PRACTICE UNDER 5 U.S.C. § 7116.

"Ground rules" are those "preliminary arrangements such as the scheduling of the time, place, length, and agenda" of bargaining sessions between a union and an agency for negotiations over terms and conditions of employment. *Dep't of Def. Dependents Schools*, 14 F.L.R.A. 191, 193 (1984) (*DODDS*).

The Authority has been markedly consistent in its approach to ground rules. For instance, "[t]he Authority has long held that ground rules affect conditions of employment of bargaining unit employees … [and therefore] ground[-]rule negotiations are not separate from the collective bargaining process and the parties' mutual obligation to bargain in good faith." *Am. Fed'n of Gov't Emps., Local 12*, 60 F.L.R.A. 533, 539 (2004) (internal citations omitted). Because ground rules affect conditions of employment, they are a mandatory subject of bargaining. *Am. Fed'n of Gov't Emps., Local 12*, 61 F.L.R.A. 209, 217 (2005) (*AFGE, Local 12*).

And, like other bargaining agreements, agreements on ground rules must be executed upon request. *Dep't of Health & Human Servs., Region VII, Kansas City, Mo.*, 14 F.L.R.A. 258, 259 (1984).

Ground-rules negotiations have been held to be appropriate in multiple contexts, including both negotiations over term bargaining agreements (the archetypal "collective bargaining agreement" in which both agency and union may present and discuss any topic they desire, resulting in an agreement that generally lasts for a fixed term), *e.g.*, *DODDS*, 14 F.L.R.A. at 193, and negotiations over management-initiated changes (in which negotiations are limited to the scope of management's proposed change), *e.g.*, *Dep't of Health & Human Servs., Soc. Sec. Admin., and Office of Hearings and Appeals, Region II*, 17 F.L.R.A. 368 (1985).

What the Authority has *never* done, however, and what it reasonably declined to do in this case, is hold that agencies (and only agencies) automatically commit a bad-faith-bargaining ULP when they do not give unions specific notice of their intended term bargaining proposals as a condition precedent to negotiating ground rules. For the reasons discussed below, the Authority's decision to reject the Union's desired rule was a reasonable one.

A. The Authority Correctly Held that the Agency did not Commit a Per Se ULP by Failing to Provide Specific Notice of its Substantive Proposals Prior to Ground-Rules Negotiations.

Under the Union's theory, an agency that does not provide specific notice of its intended term bargaining proposals prior to opening ground-rules negotiations automatically violates its duty to bargain in good faith. PB 9; JA 27. Nothing in the Statute compels such a rule of law. The Statute merely requires parties to "meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement," 5 U.S.C. § 7114(a)(4), and provides that the duty to bargain in good faith includes the obligations

> (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement; [and]
> …
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays[.]

5 U.S.C. § 7114(b). The Statute is silent on the issue of when and in what circumstances an agency or union must provide the other party with notice of its term bargaining positions. This issue, then, falls squarely within the Authority's responsibility to interpret and resolve ambiguities in its enabling legislation.

In this case, the Authority applied its expertise to the issue, and reasonably disagreed with the Union's proposed rule, citing three reasons: first, the Authority has never required unilateral specific notice of substantive term bargaining proposals prior to negotiating ground rules; second, the Authority disfavors

erecting artificial barriers to negotiations and *per se* tests for good faith, as reflected in its *Griffiss* decision; and, third, the Union offered no apposite legal reasoning demonstrating that the Statute or Authority precedent requires such a rule. Each of those considerations will be discussed further, below.

1. The Authority has never required unilateral disclosure of term bargaining positions before ground-rules negotiations as part of the duty to bargain in good faith.

In both *IRS* and the instant case, the Authority explained its disagreement with the Union, in part, by pointing out that it has "never conditioned the obligation to bargain over ground rules on specific notice of the changes a party intended to propose to the term agreement." JA 644; *IRS*, 64 F.L.R.A. at 431. The Union, while seeming to acknowledge the accuracy of this statement, dismisses it as irrelevant, calling it "an illogical explanation" and claiming that "having not done something in the past is no explanation" for not changing course at the Union's request. PB 19.

To the contrary, that for thirty years the Authority has not required notice of this type as part of the obligation to bargain in good faith is a perfectly valid consideration for not adopting that rule now. "[U]psetting the stability and predictability of the law is not something that should be taken lightly." *Santos v. United States*, 461 F.3d 886, 894 (7th Cir. 2006); *see also United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007) ("Overturning a long-standing

precedent is never to be done lightly, and particularly not in the area of statutory construction, where Congress is free to change interpretation of its legislation.").

This is particularly true where the Authority has considered and rejected an argument (as it did here in *Griffiss* and, more directly, in *IRS*), thereby giving direction to Federal agencies and unions as to their rights and obligations, as the Authority is charged with doing under 5 U.S.C. § 7105(a)(1). Indeed, placating the Union by adopting a new unilateral rule would run afoul of basic decision-making principles: "[*S*]*tare decisis* … demands respect in a society governed by the rule of law … because it fosters predictability in the law, permitting litigants and potential litigants to act in the knowledge that precedent will not be overturned lightly and ensuring that they will not be treated unfairly as a result of frequent or unanticipated changes in the law." *Teague v. Lane*, 489 U.S. 288, 331-32 (1989) (Brennan and Marshall, JJ., dissenting)

This is no less true for administrative agencies like the Authority. Although agencies may change positions within the limits of their relevant statute, an agency that does so "must show that there are good reasons for the new policy … and that the agency believes it to be better[.]" *Fed. Commc'n Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). As the Authority's decision in this case demonstrates, at this time, the Authority plainly does *not* believe that the Union's approach is "better" than the current state of law. *See also City of Lawrence,*

Mass. v. C.A.B., 343 F.2d 583, 589 (1st Cir. 1965) (Aldrich, C.J., dissenting) ("The principles that an administrative agency must have standards, must not depart from them in an individual case, and should not make a general change lightly … seem to me as important as the basic proposition that its findings and reasoning must be set forth sufficiently to permit intelligent review.").

For all of these reasons, the Authority reasonably considered its thirty years of precedent in declining to impose a new unilateral disclosure rule as part of the obligation to bargain in good faith.

2. The Authority properly considered its holding in *Griffiss* as weighing against adoption of the unilateral disclosure rule.

In holding that the Arbitrator did not err in her legal analysis, the Authority referred the Union to its earlier decision in *Griffiss*, in which the Authority "specifically rejected th[e] proposition" that bargaining over ground rules is conditioned upon "specific notice of the changes a party intended to propose to the term agreement." *IRS*, 64 F.L.R.A. at 431; JA at 644. The Union faults the Authority for citing to a "distinguishable" case. PB 21. However, this misses the forest for the trees: the Authority correctly analogized *Griffiss* and its holding to the current case, and identified that earlier decision as rejecting the sort of technicality-dependent bargaining that the Union seeks with its new rule.

As an initial matter, it is true that *Griffiss* and this case did not arise from identical sets of facts. In *Griffiss*, it was an agency – not a union – that attempted

to condition bargaining on receiving specific notice of what the other side sought to bargain. Also, in *Griffiss* the bargaining in question was not over ground rules, but rather the parties' return to substantive term negotiations after the parties' first agreement was not approved by union members on a ratification vote. *Griffiss*, 25 F.L.R.A. at 589-90.

These factual differences are irrelevant to the point that *Griffiss* stands for, though: "[a]bsent a clear and unequivocal waiver, [a party's] obligation under the Statute remains, as it has always been, to [approach negotiations] with a sincere resolve to reach agreement[,]" and without insisting on other preconditions. *Id.* at 594. In *Griffiss*, the Authority specifically rejected the agency's attempt to erect barriers to negotiations:

> Respondent's argument that it needed an explanation from the Union as to what articles needed to be discussed before it could resume negotiations pursuant to the Union's request is without merit. … There is no requirement in the Statute that all proposals must be in writing. … [T]here is no evidence that the parties agreed upon any conditions which required the Union to justify its bargaining request or resubmit proposals in advance of negotiations.

Id. at 595-96.

Just as the agency in *Griffiss* attempted to condition its bargaining on a condition precedent (i.e., notice of which articles required further discussion), the Union here seeks to condition its ground-rules bargaining on receiving specific

notice of the Agency's substantive term agreement proposals. This flies in the face of Authority precedent – not only *Griffiss*, but also the Authority's enjoinder that

> it must be recognized that [good faith] collective bargaining is a dynamic and functioning relationship that must be judged in light of the overall circumstances present. The conduct can not effectively be viewed in terms of a series of *per se* rules and obligations.

Dep't of Health & Human Servs., Soc. Sec. Admin. and Soc. Sec. Admin. Field Operations, N.Y. Region, 24 F.L.R.A. 94, 106 (1986) (adopting Administrative Law Judge's legal conclusions).

The factual differences between this case and *Griffiss*, then, do not make the Authority's citation to that case unreasonable. The lesson from *Griffiss* is that parties must bargain in good faith, without conditioning their willingness to bargain on the other party's compliance with arbitrary formalities. Good faith is determined by "the totality of the circumstances[,]" JA 643, and the Authority – following *Griffiss* – disfavors attempts such as the Union's to erect barriers to the "dynamic and functioning relationships" that characterize successful collective bargaining and to create *per se* rules for evaluating whether a party is bargaining in good faith.

3. The Authority correctly determined that the Union's arguments did not support a change in the specific notice requirement.

The Authority concluded its analysis by rejecting the Union's argument, JA 45, that the issue in this case is controlled by existing case law under which agencies, when changing conditions of employment, must give unions specific notice of the nature and extent of the intended change. As the Authority correctly explained in its decision (JA 644) and in *IRS* (*IRS*, 64 F.L.R.A. at 431), the Union stretches these cases too far. The specific notice requirement cited by the Union applies to management-initiated changes, but not to the negotiation of ground rules preparatory to term negotiations. The difference between these contexts is significant, and renders the Union's arguments unconvincing.

a. Bargaining over management-initiated changes is distinct from bargaining over ground rules preparatory to term negotiations.

The Union – in its arguments to the Arbitrator, to the Authority, and now to the Court – attempts to conflate management-initiated change bargaining with bargaining over ground rules. However, the Authority consistently and reasonably treats the two as distinct:

> The Union offers no case support for its claim that the same notice requirements that apply in management-initiated change cases apply to negotiating ground rules. *Moreover, ground rules do not implicate the same requirements as bargaining over management-initiated changes.* In this regard, ground[-]rules [negotiations] inherently precede [negotiations over] changes in conditions of employment,

> which occur as a result of negotiation or renegotiation of a term agreement.

IRS, 64 F.L.R.A. at 431-32 (emphasis added). Similarly, in its cases describing the obligation to bargain in good faith, the Authority speaks of three distinct types of bargaining: bargaining "(1) during term negotiations for a collective bargaining agreement; (2) in response to union-initiated mid-term proposals; and (3) when management proposes to change existing conditions of employment[,]" each with distinct obligations and rights. *Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson A.F.B., Ohio*, 51 F.L.R.A. 1532, 1535 (1996) (*Wright-Patterson*).

In the case of management-initiated changes, a special body of rules has developed, under which agencies are required to give "sufficiently specific and definitive" notice to "apprise the [union] of the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change." *U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 F.L.R.A. 79, 82 (1997) (*Army Corps of Engineers*) (citing *Ogden Air Logistics Center, Hill A.F.B., Utah and Air Force Logistics Command, Wright–Patterson A.F.B., Ohio*, 41 F.L.R.A. 690, 698-699 (1991)). The essential requirement is that a union be given enough information to understand what it will

lose if it does not request bargaining, and the agency proceeds according to its plans.[3] *Army Corps of Eng'rs*, 53 F.L.R.A. at 82.

Providing this notice "triggers the [union's] responsibility to request bargaining over the change." *Id.* The union must either request bargaining over the change or waive its right to bargain, in which case the agency is allowed to implement the change as described to the union without further delay.

The Authority does not casually find waivers of bargaining rights. Under its precedent, only "clear and unmistakable" waivers will suffice to allow unilateral implementation of a management change. *E.g., U.S. Dep't of the Army, Womack Med. Ctr., Fort Bragg, N.C.*, 63 F.L.R.A. 524, 527 (2009). The specific notice requirement is an integral part of this waiver analysis because it serves to ensure that a union understands what it has to lose by sleeping on its right to bargain over a change. Where an agency has explained, in detail, what it intends to change and how that change will affect bargaining unit employees, and the union does not

[3] Throughout its brief, Petitioner describes its entitlement as "specific notice of the changes" that an agency wishes to make through bargaining over the term agreement. *E.g.*, PB 13. It is not clear whether the Union believes that specific notice would entitle it to the Agency's actual proposals, or something else. Either way, there seems to be little meaningful difference between a description of the "scope and nature" of a desired change that is sufficiently detailed to constitute specific notice under the Authority's management-initiated change precedent and the actual proposal itself. The result is that the Union's proposed rule of law would likely require agencies to provide unions with either their actual bargaining proposals or something so similar as to be functionally equivalent, while imposing no equivalent obligation on unions.

timely request to bargain, then it is reasonable to treat the union as having waived its bargaining rights in a way that might not be reasonable if the agency had not provided the union with the information that it needed to understand the consequences of inaction.

However, the Union has not, and cannot, explain how this line of precedent leads to the conclusion that agencies must provide specific notice of their substantive term bargaining proposals in order to bring a union to the bargaining table on the topic of ground rules for term negotiations. Even if the concept (i.e., that unions must be informed of what will be lost if they do not request bargaining) was extended to ground-rules negotiations, the Union would still not get what it demands in this case. At most, before ground-rules negotiations, an agency would be required to give the union specific notice of its proposed ground rules. The agency's substantive proposals would not be part of the "specific notice" that the union receives because the content of the ground rules – not of the agency's substantive proposals – is what the union stands to lose if it does not bargain ground rules. *See, e.g., Dep't of Commerce, U.S. Patent & Trademark Office*, 60 F.L.R.A. 869, 872 (2005) (agency informing union that refusal to bargain over agency's ground-rules proposal would be viewed as waiver of right to bargain over ground rules).

For the reasons above, the requirement that agencies provide specific notice before bargaining over management-initiated changes does not impute a similar requirement to negotiations over the ground rules pertaining to term contract bargaining. Ground rules, as the Authority pointed out in *IRS*, are merely preparatory to the principal, substantive, negotiations. Moreover, specific notice in the management-initiated change context serves a particular purpose (ensuring that the union understands the consequences of inaction) that would not be served by requiring agencies, and only agencies, to disclose their substantive bargaining proposals prior to negotiating over term agreement ground rules. And even if the same principles were applied in the two very different contexts, the result would be nothing more than a requirement that agencies provide unions with specific notice of their *ground-rules* proposals (not their substantive bargaining positions) prior to ground-rules negotiations.

b. The Union's cited cases do not control this issue and, in fact, support the Authority's decision.

Each of the federal and private sector cases cited in the Union's brief relates to management-initiated changes and charges of unlawful implementation, *not* – as relevant in this case – ground-rules negotiations and the requirements of good-faith bargaining.[4] Indeed, there is no allegation anywhere in the record of this case that

[4] PB 13 (citing *Nat'l Fed'n of Fed. Emps., FD-1 v. FLRA*, 369 F.3d 548 (D.C. Cir. 2004) (*NFFE*) (holding that agency had unlawfully implemented closure of day

CBP unlawfully implemented anything. Because the Union's cited cases are off-point, the Authority properly rejected the Union's argument, JA 45, that its cited cases compel the Authority to extend its specific notice requirement as the Union prescribes.

Several of these cases, though, warrant further discussion because they bring the Union's error into sharper focus. In the Court's decision in *NFFE*, for instance, the Court faulted an agency for implementing a day care closure years after the agency had originally notified the union of the intended change. The Court recited the Authority's requirements for specific notice in the context of management-initiated changes, *id.* at 552, and paused to emphasize the importance of collective bargaining:

> Congress passed the Federal Labor Relations Act to encourage collective bargaining between federal employees and their employers. It did so after finding that such bargaining is "in the public interest" because, among other things, it "contributes to the effective conduct

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care facility when change occurred several years after agency's initial notice, and union was not given opportunity to bargain before actual closure) and *Wright-Patterson*, 51 F.L.R.A. 1532 (1996) (holding that agency did not commit ULP by unilaterally implementing award program after giving notice because union had waived rights by announcing that it had no bargaining proposals and, only after the change's implementation, requested to bargain)); PB 24-25 (citing *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983) (holding that employer committed ULP by implementing changes before impasse and without giving union notice), *NLRB v. Transport Serv. Co*, 973 F.2d 562 (7th Cir. 1992) (*Transport Service*) (employer committed ULP by implementing changes because lack of notice to union meant that parties were not at impasse), and *Am. Distrib.Co. v. NLRB*, 715 F.2d 446 (9th Cir. 1983) (ULP for employer to implement change without express notice to union)).

> of public business" and "facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment." 5 U.S.C. § 7101(a) (2000).

Id. at 554. The Court then inveighed against the type of formalistic barriers to bargaining that NTEU asks for in this case, condemning

> an inappropriate willingness to erect barriers to collective bargaining that are inconsistent with the text and purposes of the statute. Thwarting Congress's intent to promote collective bargaining, such barriers are not "in the public interest" because they hamper realization of the benefits that such bargaining produces.

Id. And while the Union casts its argument in terms of obtaining information, PB 14, and planning ahead, PB 15, that does not change the fact that what the Union seeks is, in fact, a condition precedent to actual negotiations, and a barrier to collective bargaining.

Likewise, *Wright-Patterson* actually weighs against the Union's argument. In allowing the agency to unilaterally implement a time-off incentive awards program and holding that no ULP had been committed, the Authority observed that it has "consistently found that an agency need only provide 'reasonable notice' and that the adequacy of such notice is determined *in light of the facts and circumstances of a particular case*." *Id.* at 1536 (emphasis added). "[O]nce adequate notice is given, the union must act to submit proposals, request additional information, or request additional time." *Id.* Here, again, the Authority spoke

against rigid formalities and *per se* rules, recognizing that those do not enhance collective bargaining.

Finally, the cases that the Union cites under the private-sector National Labor Relations Act (NLRA) contain an important reminder of why "petitioner's … recourse to the [NLRA] for support seem[s] misdirected. … [A]lthough Congress looked to the NLRA when it drafted the [Statute], the differences are as significant as the similarities." *Nat'l Treasury Emps. Union v. FLRA*, 910 F.2d 964, 969 (D.C. Cir. 1990) (citing *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 648 (1990) (holding that the Statute "contains no indication that it is to be read *in pari materia*" with the NLRA)). Specifically, the Union's *Transport Service* case discusses employers' right under the NLRA to implement changes unilaterally upon reaching impasse. *Transport Service*, 973 F.2d at 564. Under the federal labor statute, though, not only are unions precluded from taking traditional economic actions, *see* 5 U.S.C. § 7116(b)(7), but they have binding impasse procedures available to prevent agencies from implementing at impasse, and implementation during impasse resolution can be a ULP, *see* 5 U.S.C. § 7116(a)(6); *U.S. Immigration & Naturalization Serv., Wash., D.C.*, 55 F.L.R.A. 69, 72-73 (1999). To the extent that the NLRB imposes stricter notice requirements, or requires notice in circumstances where the Authority does not, the interest in avoiding unnecessary economic actions and the lack of binding impasse

resolution in the private sector account likely bear upon the Board's different approach.

In sum, then, the very cases that the Union claims compel holding in its favor do no such thing; rather, they undermine several key components of the Union's argument.

B. The Union's Remaining Equitable Arguments do not Provide a Basis for Granting the Petition for Review.

Throughout its brief, the Union argues that it is unfair for it to have to bargain ground rules without first being afforded specific notice of the agency's intended term bargaining proposals.[5] As an initial matter, it is not clear whether these complaints bear upon the legal question before the Court. But even if they do relate to the question of whether the Authority was arbitrary or capricious in its ruling, the arguments are unconvincing.

First, the Union's lament of being "put at an unfair disadvantage," PB 15, is misplaced. In a management-initiated change, the agency is the only party who initially understands the intended change (having conceived of it), and so the agency comes into the bargaining process with superior information. In bargaining

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[5] *E.g.*, PB 14 (the Union was left "without the information it needed to bargain appropriate and informed ground rules"); 15 ("with no information about the agency's intentions, NTEU could not formulate a view of the appropriate number or length of bargaining sessions … NTEU was also put at an unfair disadvantage when the parties' ground[-]rules impasse was presented to the FSIP"); 16 ("[l]acking adequate information about the topics over which CBP intended to bargain, NTEU was … in no position to project those costs").

ground rules for term agreements, though, neither party has an information advantage. In term agreements, all legal bargaining topics are "on the table," and although CBP surely had a preferred approach to many bargaining topics, it stands to reason that NTEU did, as well. As a result, the Union may not have been able to anticipate every CBP substantive bargaining proposal, *but the opposite was equally true*. That is, the Union likely had numerous substantive bargaining subjects and proposals that were unknown to, and not anticipatable by, CBP.

Furthermore, even assuming that the inability to predict each of the other party's substantive proposals is a problem that the Statute requires to be fixed, the Union pressed the Authority, and now this Court, to fix only half of it, by arguing for a rule requiring agencies – but not unions – to share bargaining positions ahead of ground-rule negotiations. It is thus the Union's approach, and not the current state of the law, that would seem to create "unfair advantages."

Moreover, incomplete information about the other party's substantive term bargaining proposals is not an impediment to negotiating over, and reaching agreement on, ground rules. Authority case law is replete with examples of unions and agencies reaching ground-rules agreements without complete knowledge of what the other side will propose in the principal negotiations, and providing for substantive proposals to be exchanged only after the ground-rules agreement had been executed. *See, e.g., Soc. Sec. Admin.*, 64 F.L.R.A. 293 (2009), 2009 WL

4654557, *11 (ALJ's decision); *U.S. Dep't of Justice, Exec. Office for Immigration Review, N.Y.C., N.Y.*, 61 F.L.R.A. 460, 469 (2006) (ALJ's decision); *Davis-Monthan A.F.B., Tucson, Ariz.*, 53 F.L.R.A. 445, 451 (1997) (union proposed ground rules and requested agency's ground-rules counterproposals as antecedent to both parties submitting new term agreement proposals); *Sw. Div. Naval Facilities Eng'g Command, San Diego, Cal.*, 44 F.L.R.A. 77, 81 (1992).[6]

NTEU itself has successfully bargained ground-rules proposals without complete knowledge of the other party's substantive proposals. For example, in *Department of the Treasury, Internal Revenue Service, Washington, D.C.*, 80 F.S.I.P. 68, *3 (1980), NTEU proposed ground rules for mid-term negotiations arising during the life of the parties' term agreement. As the Union's proposal reflects, NTEU was able to intelligently and capably negotiate ground rules governing negotiations over changes that were completely unknown (and likely unforeseeable) to it. *See also Nat'l Treasury Emps. Union*, 02 F.S.I.P. 182 (2003) (Union proposed ground rules under which substantive proposals would be exchanged well after agreement on ground rules). The Union gives itself too little

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[6] If the Court is interested in seeing a fuller set of ground rules for term negotiations, and one in which the union contemplated exchanging contract proposals only after executing ground rules, the Authority refers the Court to *AFGE, Local 12*, 61 F.L.R.A. at 221-24. The ground rules set forth in the Appendix to the Authority's decision in that case were proposed by the union, and show the degree to which unions are able to anticipate and protect their interests in ground rules agreements even without complete knowledge of the other side's bargaining positions.

credit when it claims that the lack of specific notice prejudiced its ability to negotiate ground rules.

The Union's hand-wringing seems particularly out of place because, as previously discussed, in this case *NTEU agreed to ground rules here that provided for a delayed exchange of proposals*. JA 436; *see supra* at 5-6. One would not expect NTEU to have voluntarily agreed to this arrangement if it were so disadvantageous to the Union; one might instead have expected that it would only accept such terms if they had been imposed by a third party.

Even if NTEU sincerely felt unable to formulate adequate ground-rules proposals in this case, a fundamental change in ULP law is still unnecessary. The existing legal framework provided NTEU with ample self-help opportunities. For example, NTEU could have proposed – in its ground-rules proposals – that details concerning bargaining teams, travel and per diem allowances, etc., be reserved for a second round of negotiations, following the exchange and evaluation of contract proposals. Or NTEU could have offered "scaled" proposals with respect to those details by, e.g., setting ratios between the number of contract articles that were ultimately offered for negotiation, or the number of negotiation sessions, and the number of representatives NTEU would be allowed and how much the agency would pay for their travel and per diem.

C. The Court Should Not Grant the Union's Requested Relief Because Doing so would Overrule the Authority's Longstanding Test for Determining Bad-Faith Bargaining ULPs.

In its brief, the Union is clear that it is asking the Court to impose a new *per se* rule upon the Authority, under which an agency's failure to provide specific notice of its substantive term bargaining proposals antecedent to ground-rules negotiations both relieves the union of its bargaining obligation and automatically violates the duty to bargain in good faith. *See* PB 8 ("CBP committed an unfair labor practice … by failing to inform NTEU …"); 28 ("[T]he Court should … reverse the decision of the Authority, and remand the case … [only] for an assessment of the Union's requested remedies.").

Grating the Union's relief would directly contravene the Authority's longstanding test for assessing bad-faith-bargaining ULP charges. As the Authority explained in its decision, it considers "the totality of the circumstances" to determine whether a party has violated its duty to bargain in good faith and thereby committed a ULP. JA 643 (citing *USGS*, 53 F.L.R.A. at 1012); *U.S. Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson A.F.B., Ohio*, 36 F.L.R.A. 524, 531 (1990). Individual acts of bargaining conduct may be "evidence of bad[-]faith[-]bargaining, but … [do] not establish *per se* an absence of good faith." *Army & Air Force Exchange Serv.*, 52 F.L.R.A. 290, 304 (1996); *see also USGS*, 53 F.L.R.A. at 1012 (listing "some of the indicia"

considered by the Authority in ascertaining bad faith). Rather, the analysis is intentionally broad enough to allow the fact-finder to view all relevant circumstances and both parties' behavior.

Therefore, even if the Court agrees with the Union that the specific notice requirements that apply to management-initiated changes should also apply to ground-rules negotiations preparatory to bargaining over term agreements, the Court need not – and should not – hold that CBP committed a ULP as a matter of law, as doing so would seem to effectively overturn the Authority's "totality of the circumstances" test in the process. Rather, the case should be remanded (if necessary) to consider whether the agency's refusal to provide specific notice of its bargaining proposals, when viewed as part of both parties' conduct during ground-rules bargaining, constitutes a bad-faith bargaining ULP.[7]

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[7] There is record evidence suggesting non-cooperativeness on both parties' parts. But, as the Arbitrator found, CBP at least sought the assistance of the FMCS and the FSIP "in an effort to resolve the impasse in ground rules negotiations."

> It participated fully in the Panel's impasse-resolution process. Within days after FSIP issued a final decision … the Agency submitted a package of substantive bargaining proposals. Conversely, by its own admission, the Union rejected the Panel's ground rules decision and order as unlawful and unfair; sought to have the FLRA issue a stay of that order; and throughout the remaining months of the certification year refused to submit its own substantive proposals to the Agency.

JA 102. *See also* JA 529 (Union's lead negotiator writing that "we are bargaining under protest. Your demand that we operate under the ground rules imposed by the right-wing, political pay-back thugs at the FSIP will be met with as little of a constructive response from us as the 'good faith bargaining law' will allow. Every minute in the room with us will likely amount to little more than a criminal waste

CONCLUSION

For the reasons stated above – the Authority correctly held that CBP did not commit a *per se* ULP by refusing to provide the Union with specific notice of the agency's term bargaining proposals antecedent to ground-rules negotiations, the Union's arguments to the contrary are unpersuasive, and the Union's remedy would overturn the existing test for determining bad-faith bargaining under the Statute – the Union's petition for review should be denied.

Respectfully submitted,

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of government funds by you unless you somehow have some plan for getting us out of this mess you created.").

D.C. Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Times New Roman font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 8,045 words excluding exempt material.

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Certificate of Service

I hereby certify that on this 5th day of November, 2012, I caused eight (8) hard copies of the foregoing Brief for Respondent to be filed with the Court and an original to be filed by way of the ECF filing system. I also caused the Brief to be served on counsel for the Union by way of the Court's ECF notification system, and provided a courtesy copy by U.S. Mail to:

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ADDENDUM A

Relevant Statutes

Addendum Page No.

5 U.S.C. § 7101	2
5 U.S.C. § 7105(a)	2
5 U.S.C. § 7114	3
5 U.S.C. § 7116	5
5 U.S.C. § 7122	6
5 U.S.C. § 7123	7

5 U.S.C. § 7101 – Findings and purpose

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

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5 U.S.C. § 7105(a) – Powers and duties of the Authority

(a)

(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise

administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;
(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;
(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117 (b) of this title;
(E) resolves issues relating to the duty to bargain in good faith under section 7117 (c) of this title;
(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117 (d) of this title;
(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;
(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and
(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

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5 U.S.C. § 7114 – Representation rights and duties

(a)

(1) 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, and negotiate collective bargaining agreements covering, all employees in the unit. 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.
(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or
(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—
(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

…

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

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5 U.S.C. § 7116 – Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;
(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;
(7)
(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or
(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or
(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

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5 U.S.C. § 7122 – Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121 (f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or
(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

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5 U.S.C. § 7123 – Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

> (1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or
> (2) section 7112 of this title (involving an appropriate unit determination), may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

…

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any,

for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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