ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

No. 18-1250

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

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

B. RULING UNDER REVIEW

The Union seeks review of the Authority's decision in *National Treasury Employees Union*, 70 FLRA (No. 144) 724 (2018).

C. RELATED CASES

This case was not previously before this Court or any other court. There are no related cases currently pending before this Court or any court of which counsel for Respondent is aware.

/s/ Rebecca J. Osborne
Rebecca J. Osborne
Acting Deputy Solicitor
Federal Labor Relations Authority

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GLOSSARY OF ABBREVIATIONS

Agency	U.S. Department of Homeland Security, U.S. Customs and Border Protection
APA	Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2018)
Authority	Respondent, the Federal Labor Relations Authority
Br.	Petitioner's Opening Brief
Decision	The decision of the Authority in this case, dated July 19, 2018
FTR	Federal Travel Regulation, 41 C.F.R. Parts 300 to 304
GSA	General Services Administration
JA	The Joint Appendix
NTEU	Petitioner, the National Treasury Employees Union
OPM	U.S. Office of Personnel Management
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
Union	Petitioner, the National Treasury Employees Union

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is about whether the Federal Labor Relations Authority ("Authority") reasonably concluded that the U.S. Department of Homeland Security, U.S. Customs and Border Protection ("Agency") had no statutory obligation to bargain with the National Treasury Employees Union ("Union") over a collective-bargaining proposal concerning travel compensation.

The Union's proposal stated that the parties would use "road miles" to determine the appropriate travel compensation for bargaining-unit employees. As relevant here, the Agency argued that the proposal was non-negotiable because it was contrary to Federal Travel Regulations ("FTR"). The Authority concluded that the proposal was contrary to 41 C.F.R. § 300-3.1 of the FTR and, therefore, was outside the Agency's duty to bargain under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) ("Statute").

The Union now seeks review of the Authority's decision, *National Treasury Employees Union*, 70 FLRA 724 (2018) (the "Decision"), and argues that the Authority erred in finding that the proposal was non-negotiable. As the Authority reasonably concluded that the proposal was non-negotiable, this Court should deny the Union's Petition for Review.

The Authority had subject matter jurisdiction over this negotiability case pursuant to Section 7105(a)(2)(E) of the Statute. 5 U.S.C. § 7105(a)(2)(E). The

Authority's Decision and Order is published at 70 FLRA (No. 144) 724 (2018). A copy of the Decision is included in Joint Appendix ("JA") at JA 151-58. The Authority's Order is final with respect to all parties, and the Court has jurisdiction to review final orders of the Authority pursuant to Section 7123(a) of the Statute. The Union's Petition for Review was timely filed within 60 days of the Authority's Decision. 5 U.S.C. § 7123(a).

STATEMENT OF ISSUES PRESENTED

Whether the Authority reasonably concluded that a collective-bargaining proposal requiring the Agency to calculate bargaining-unit employees' travel compensation by measuring "50 road miles from [their] official duty station in every direction" is non-negotiable because it is contrary to 41 C.F.R. § 300-3.1.

RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are contained in the attached Statutory Addendum.

STATEMENT OF THE CASE

This case arises out of a negotiability proceeding under Section 7117 of the Statute. During term negotiations, the Union, the exclusive representative of a unit of Agency employees, submitted two proposals addressing travel compensation for bargaining-unit employees. (JA 152.) Under Section 7117(a)(1) of the Statute, federal agencies have no duty to negotiate over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. § 7117(a)(1). On

that basis, the Agency declared the proposals non-negotiable, and in response, the Union filed a negotiability appeal with the Authority under Section 7105(a)(2)(E) of the Statute. (JA 1.) The Agency filed a statement of position (JA 44-96), to which the Union filed a response (JA 97-128). The Agency then filed a reply to the Union's response. (JA 129-150.)

The Authority (Chairman Kiko and Member Abbott, Member DuBester concurring, in part, and dissenting, in part) concluded that both of the Union's proposals were outside the Agency's statutory duty to bargain. (JA 154-57.) The Union now seeks review of the Authority's Decision concerning one of those proposals.

STATEMENT OF THE FACTS

A. Background

The General Services Administration ("GSA") promulgates the FTR, published at 41 C.F.R. Chapters 300 to 304. Under the FTR, federal civilian employees who perform official travel outside of their "official station," as defined in 41 C.F.R. § 300-3.1, may be entitled to certain types of travel compensation, including per diem, lodging allowances, and relocation allowances. *See* 41 C.F.R. Pt. 301-11 (per diem); 41 C.F.R. § 301-11.102 (lodging allowances); 41 C.F.R. Ch. 302, Subch. B (relocation allowances).

Section 300-3.1 of the FTR defines an employee's "official station" as:

> [a]n area defined by the agency that includes the location where the employee regularly performs his or her duties . . . . The area may be a mileage radius around a particular point, a geographic boundary, or any other definite domain, provided no part of the area is more than 50 miles from where the employee regularly performs his or her duties . . . . If the employee's work involves recurring travel or varies on a recurring basis, the location where the work activities of the employee's position of record are based is considered the regular place of work. (JA 154 (citing 41 C.F.R. § 300-3.1).)

The Union submitted the proposal at issue here to the Agency during term negotiations. (JA 152.) The parties agreed to sever the proposal from the parties' new national collective-bargaining agreement ("the agreement"), which went into effect on October 1, 2017. (*Id.*) Article 16 of the agreement concerns travel. (JA 14.) The Union proposed that the following language be added to Article 16, Section 2 of the agreement:

> C.1. For applicable travel compensation purposes, (e.g., mileage, lodging, per diem, overtime), the official duty station extends 50 road miles from the employee's official duty station in every direction. The 50 road mile rule for determining travel compensation should not be applied to local travel procedures and mileage reimbursements contained in Section 5.

(JA 152.)

Under Article 16, Section 2.A of the agreement, the parties defined "official duty station" as "the location where the employee normally reports for the workday." (*Id.* (citing Art. 16, § 2.A); *see* JA 14.) The Union explained that the intent of the proposal here is "to use the parties' definition of 'official duty station' from the [agreement] and then extend the 50 road miles from the actual location where employee[s] normally report[] for the workday." (JA 102 n.1.) The parties agree that

the operative meaning of the proposal would require the Agency to calculate travel compensation for bargaining-unit employees by using "road miles instead of the straight-line (or 'as the crow flies') standard." (JA 152.)

B. The Authority's Decision

In its statement of position to the Authority, the Agency argued, among other things, that the proposal is contrary to 5 C.F.R. §§ 550.112(j) and 551.422(d), and Section 300-3.1 of the FTR. (JA 153; *see* JA 46-54.) Specifically, the Agency claimed that those regulations provide it with "the authority to decide the geographic boundaries of the official duty station" and that the definition of official station in the proposal does not constitute a "definite domain," as required by Section 300-3.1 of the FTR. (JA 153 (internal quotation marks omitted).) The Union argued that the proposal is negotiable because its definition of official station qualifies as a "definite domain" under the FTR. (*Id.*)

The Authority found that 50 "road miles" is not a "mileage radius around a particular point" or a "geographic boundary" within the meaning of Section 300-3.1 of the FTR. (JA 154.) The Authority noted that the parties disagreed as to whether the proposal's language of "50 road miles from the employee's official duty station in every direction" constitutes a "definite domain" under Section 300-3.1 of the FTR. (*Id.*) The Authority considered the plain wording of Section 300-3.1 and explained that the FTR does not define the term "definite domain." (*Id.* at n.22.) The Authority found that the dictionary defines the term "definite" as "clearly stated or decided; not

vague or doubtful," and defines the term "domain" as "[t]he territory over which sovereignty is exercised." (*Id.*) Relying on those meanings, and reading the regulatory text as a whole, the Authority found that 50 "road miles" does not constitute a "definite domain" because "[i]t is not a definite area, and could extend more than fifty miles from where the employee regularly performs his or her duties or vary with every employee and every trip." (JA 154-55.) Thus, the Authority determined that the proposal is contrary to Section 300-3.1. (*Id.*) Under Section 7117(a)(1) of the Statute, federal agencies have no duty to negotiate over proposals that are inconsistent with government-wide regulation; the Authority therefore found the proposal non-negotiable. (*Id.*)

Given that conclusion, the Authority found it unnecessary to address the Agency's remaining arguments about why the proposal was non-negotiable. (JA 153 n.10.) Specifically, the Agency argued that the proposal: interferes with management's right to determine its organization under Section 7106(a)(1) of the Statute, is contrary to 5 C.F.R. § 550.1403, and conflicts with the Agency's "sole and exclusive discretion" to determine what constitutes an employee's official station for travel compensation purposes. (*Id.*)

The Union filed a petition seeking review of the Authority's determination of non-negotiability.

SUMMARY OF THE ARGUMENT

The Authority reasonably concluded that the proposal was contrary to Section 300-3.1. That section defines an employee's "official station" as "[a]n area defined by the agency that includes the location where the employee regularly performs his or her duties." 41 C.F.R § 300-3.1. Section 300-3.1 further provides that an employee's "official station" may be "a mileage radius around a particular point, a geographic boundary, or any other definite domain." *Id.*

This case turns on the meaning of "definite domain" under Section 300-3.1. The Union proposed to define official station in the parties' agreement as "50 road miles" in every direction from where employees regularly perform their work. (JA 152.) Applying the plain wording of the regulation, the Authority reasonably concluded that the Union's proposal is contrary to Section 300-3.1. The Authority determined that the Union's proposal does not satisfy the requirement for a "definite domain" under Section 300-3.1 because the proposal would not create a definite geographic area.

This Court should reject the Union's argument that its proposed official station is "definite" because the number of road miles that employees travel is ascertainable through applications like Google Maps. (Br. at 13-14.) That argument ignores the uncertainties inherent in using map applications and variations in travel routes, as well as the regulation's plain text, which requires that an employee's "official station" be

both "definite" *and* a "domain," i.e., a definite geographic area. *See* 41 C.F.R. § 300-3.1.

Similarly unavailing is the Union's argument that the Decision is inconsistent with the federal travel compensation scheme. (Br. at 17.) The FTR are intended to enable agencies "to minimize administrative costs" and communicate travel policies "in a clear manner to Federal agencies and employees." 41 C.F.R. § 300-1.2. As the proposal would result in an indefinite official station, the proposal would increase, rather than minimize, administrative costs by encouraging disputes as to which roads employees should travel on any given assignment. Further, implementation of the proposal would result in a lack of uniformity, predictability and consistency that would frustrate the FTR's stated purpose of communicating travel policies "in a clear manner" to agencies and employees.

Finally, the Union erroneously claims that the Authority violated the canon against surplusage by allegedly concluding that "'definite domain' must be measured in the same exact manner as a 'mileage radius.'" (Br. at 15.) That argument rests on a misreading of the Authority's Decision. The Authority did not conclude that "definite domain" can *only* be measured as a mileage radius; rather, the Authority determined that the Union's proposal does not fall within the meaning of "definite domain."

For all of these reasons, the Authority respectfully requests that the Court deny the Petition for Review.

STANDARDS OF REVIEW

This Court reviews an Authority decision "in accordance with section 10(e) of the Administrative Procedure Act" and will uphold the decision unless it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) (quoting *Am. Fed'n of Gov't Emps., Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998)); *see also* 5 U.S.C. §§ 706(2)(A), 7123(c) (incorporating Administrative Procedure Act standards of review). The scope of such review is narrow. *See, e.g.*, *Am. Fed'n of Gov't Emps., Local 2303 v. FLRA*, 815 F.2d 718, 722 (D.C. Cir. 1987) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)).

In ruling on negotiability issues under Section 7117(a)(1) of the Statute, the Authority is tasked with interpreting and administering its own Statute. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). This Court defers to the Authority's construction of the Statute, *U.S. Department of the Air Force v. FLRA*, 949 F.2d 475, 480 (D.C. Cir. 1991), and upholds the Authority's negotiability conclusions so long as they are "reasonable and defensible," *Department of Treasury, Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, 857 F.2d 819, 821 (D.C. Cir. 1988).

The Court reviews the Authority's interpretations of other agencies' regulations *de novo*. *Soc. Sec. Admin. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000). The Authority's

interpretation of GSA regulations, while not entitled to *Chevron* deference, should be followed so long as the Authority's reasoning is "sound." *Ass'n of Civilian Technicians v. FLRA*, 250 F.3d 778, 782 (D.C. Cir. 2001) (quoting *Dep't of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988)).

ARGUMENT

THE AUTHORITY REASONABLY CONCLUDED THAT THE UNION'S PROPOSAL IS NON-NEGOTIABLE BECAUSE IT IS CONTRARY TO 41 C.F.R. § 300-3.1

The Statute confers collective-bargaining rights on federal civilian employees and governs collective bargaining between those employees and management. *See generally Am. Fed'n of Gov't Emps. v. FLRA*, 778 F.2d 850, 851-52 (D.C. Cir. 1985). Under the Statute, an agency is required to bargain with the exclusive representative of its employees to the full extent of its discretion. 5 U.S.C. § 7117(a); *Am. Fed'n of Gov't Emps., Locals 3807 & 3824*, 55 FLRA 1, 2 n.3 (1998). However, the Statute also provides that an agency has no duty to bargain a proposal that is "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. § 7117(a)(1); *see Ass'n of Civilian Technicians v. FLRA*, 370 F.3d 1214, 1217 (D.C. Cir. 2004).

In this case, the Authority reasonably concluded that the Union's proposal requiring the Agency to define employees' "official station" by measuring "50 road miles in every direction from" where employees regularly perform their work is inconsistent with 41 C.F.R. § 300-3.1.

A. The Union's proposed definition of official station is not a "definite domain" under 41 C.F.R. § 300-3.1 because it does not provide for a definite area

In this case, the sole question for the Court to decide is whether the Union's proposal of "50 road miles from the employee's official duty station in every direction" qualifies as a "definite domain" under 41 C.F.R. § 300-3.1. (*See* Br. at 22; JA 154.) The resolution of this case therefore begins with the plain text of Section 300-3.1. That section defines "official station" as:

> [a]n area defined by the agency that includes the location where the employee regularly performs his or her duties . . . . The area may be a mileage radius around a particular point, a geographic boundary, or any other definite domain, provided no part of the area is more than 50 miles from where the employee regularly performs his or her duties . . . . If the employee's work involves recurring travel or varies on a recurring basis, the location where the work activities of the employee's position of record are based is considered the regular place of work.

41 C.F.R. § 300-3.1.

It is uncontested that the FTR does not define the term "definite domain," and no judicial or administrative decisions appear to have construed the term. (Br. at 12 n.2.) Therefore, to determine the proper meaning of the term "definite domain," the Authority examined dictionary definitions of both words separately.

As the Authority observed, the *New Oxford American Dictionary* lists the first definition of "definite" as "clearly stated or decided; not vague or doubtful." (JA 154 n.22 (citing *Definite*, NEW OXFORD AM. DICTIONARY (3d ed. 2010).) That dictionary also defines "definite" as "having exact and discernable physical limits or form." *Id.*

Likewise, *Webster's Third New International Dictionary* lists the primary definition of "definite" as "having distinct or certain limits." *Definite*, WEBSTER'S THIRD NEW INT'L DICTIONARY (2002).

The Authority further observed that *Black's Law Dictionary* defines "domain" as "[t]he territory over which sovereignty is exercised." (JA 154 (citing *Domain,* BLACK'S LAW DICTIONARY (10th ed. 2014).) In addition, *New Oxford American Dictionary* lists the first definition of "domain" as "an area or territory owned by or controlled by a ruler or government." *Domain*, NEW OXFORD. Further, *The American Heritage Dictionary of the English Language* lists the first definition of "domain" as "[a] territory or range of rule or control; realm." *Domain*, THE AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1976). The origin of the word "domain" explains why the first dictionary definition of the word "domain" often refers to sovereignty. *See Domain,* NEW OXFORD (tracing "domain" from the Latin "*dominus*," which means "lord"); *Domain*, AMERICAN HERITAGE (same).

The word "domain," however, has additional meanings. For example, *Webster's Third New International Dictionary* lists the fifth definition of "domain" as "a region distinctively marked or wholly overspread or dominated by some physical feature." *Domain*, WEBSTER'S. Another law dictionary lists its second definition of "domain" simply as "territory." *Domain*, BARRON'S LAW DICTIONARY (2d ed. 1984). Based on

those definitions, the Authority correctly determined that the Union's proposal was contrary to Section 300-3.1 because it would not create a definite area. [1]

The Union urges that its proposal need only be "definite" to meet the regulatory requirement. (Br. at 13.) Specifically, the Union asserts that because the driving distance between two locations is ascertainable through applications like Google Maps, the Union's proposed definition of official station is "definite," and, thus, falls within the meaning of "definite domain." (*Id.* at 14.) The Union's argument fails because the proposal would result in official duty stations that are neither domains, nor definite.

The Union's proposal would not create a "domain." The text of Section 300-3.1 shows that, for an area to qualify as a "definite domain," it must be a "domain,"

[1] The history of the regulatory definition of "official station" further supports the Authority's conclusions concerning the definition of a "definite domain." In 1998, GSA first promulgated the FTR's definition of "official station." 41 C.F.R. § 300-3.1 (1998), 63 Fed. Reg. 15,950, 15,952-53 (Apr. 1, 1998). At that time, the FTR defined the term "official station" as "the location of the employee's . . . permanent work assignment." *Id.* The regulation defined the "geographic limits" of an employee's "official station" as either the "corporate limits of the city or town where the employee [wa]s stationed," or if the employee was not stationed in a city or town, the "reservation, station, or established area . . . having definite boundaries where the employee [wa]s stationed." *Id.* Thus, under the previous definition of "official station," the geographic limits of the area were "established" and had "definite boundaries." *Id.* In other words, like the current definition, the previous definition required that an employee's "official station" be a definite geographic area.

In 2010, GSA revised the definition of "official station" to the one on which the Authority relied in its Decision. *See* 75 Fed. Reg. 72,965, 72,966-67 (Nov. 29, 2010). The Federal Register notice offers no explanation for the revision. However, it is apparent from the current definition's plain wording that GSA intended to retain the requirement that an "official station" be a definite geographic area.

(i.e., an "area," "region," or "territory"), and it must have geographic limits that are "definite," (i.e., "exact," "discernable," or "distinct"). Because, as the Authority held, the Union's proposal would not result in a definite area, it is contrary to the regulation. (JA 154.)

The flaws in the Union's proposal are demonstrated by the following examples. Under the proposal, the measurement to determine an employee's "official station" would begin where the employee regularly performs her or his official duties ("point A"), and would end at exactly the 50-mile point of the road on which the employee traveled ("point B"). The distance in road miles between point A and point B may be discernable. However, it is unclear whether, under the proposal, any point or area outside the line connecting point A to point B would also be included as part of the employee's official station. Put another way, while the Union's proposal may be certain with respect to roads miles, it does not amount to a definite geographic *area* (i.e. domain) apart from those roads.

At best, the Union's proposal would result in an employee's official station that resembles an amoeba, with the center point (point A) being where the employee regularly performs her or his duties and the outer points being 50 road miles away using every road that connects to point A (points B, C, D, and so forth). It is unclear, however, whether any secondary roads that branch off of the specific roads connected to point A would be included as part of the employee's official station and whether travel on those secondary roads would be subject to the 50-mile rule. If routes taken

by road branches were subject to the 50-mile rule, Union's proposal would not result in an official station that is a definite "domain." That is because destinations both at the edges and inside the body of the amoeba could constitute the end of the official duty station.

The Union's proposed official station also presents too many variables and unknowns to be considered a definite geographic area. Under the Union's proposal, employees' official stations could vary with each assignment and route taken. Contrary to the Union's arguments, the use of a map application does not create a definite route between two locations. Different applications will often give different routes to the same location; indeed a single application may provide different routes to the same location. Moreover, the boundaries of employees' official stations could change due to unforeseeable factors, such as road closures, road construction, traffic congestion, detours, and weather conditions. Given those factors, employees' official stations would be literally unknowable until their travel was completed. As employees' official stations would fluctuate based on new and different routes, the Authority correctly found that Union's proposal would not result in a "definite" domain under Section 300-3.1.

This is why the Court should reject the Union's argument that the Authority erred by concluding that the proposal could result in a duty station that "could extend more than fifty miles from where the employee regularly performs his or her duties."

(Br. 16) The Union's quotation of that phrase takes it out of context. Viewed as a whole, the sentence reads:

> Our reading of the plain wording of this regulation finds that fifty "road miles" is not a mileage radius around a particular point, a geographic boundary, or an "other definite domain," as required by § 300-3.1.22. *It is not a definite area, and could extend more than fifty miles from where the employee regularly performs his or her duties or vary with every employee and every trip.* Therefore, "fifty road miles" is contrary to the prescribed official station area definitions outlined above.

(*See* JA 154 (emphasis added).) The sentence thus merely states concisely the deficiencies described in more detail above: two trips from point A to point B could be greater or fewer than 50 miles depending on the route taken by a driver. That highlights the proposal's primary deficiency: defining an official duty station by the road miles it is not sufficiently definite because it could "vary with every employee and every trip." (*See* JA 154.)

In short, the plain text of Section 300-3.1 and its regulatory history support the Authority's conclusion that the Union's proposed definition of official station does not amount to a "definite domain" within the meaning of Section 300-3.1. The Union's Petition for Review should therefore be denied.

B. The Authority's Decision is consistent with the FTR's purposes

The Authority's conclusion that the proposal is contrary to Section 300-3.1 is consistent with the FTR's purposes. The FTR was enacted to: (a) interpret travel requirements "in a manner that balances the need to assure that official travel is conducted in a responsible manner with the need to minimize administrative costs;"

and (b) "communicate the resulting policies in a clear manner to Federal agencies and employees." 41 C.F.R. § 300-1.2.

The Union's proposal would create a result that is directly at odds with the intent of the FTR. The proposal would foster disputes as to which routes are the ordinary, usual, and expeditious ways for each employee to travel on any given assignment. Further, the proposal eliminates predictability by hampering the Agency's ability to determine travel compensation before employees complete their travel. Under the FTR, if an employee travels by an indirect route to reach an authorized destination, the employee's reimbursement is limited to the cost of travel by a direct route. 41 C.F.R. § 301-10.8. Under the Union's proposal, if an employee failed or was unable to travel by a certain direct route, the Agency would have to investigate what the employee did during the travel to determine how much of the employee's travel was compensable. In such situations, the Agency would not be able to discern how much of the employee's travel was compensable until after the employee had completed travel. Burdening the travel compensation process with such controversies increases, rather than minimizes, administrative costs. Moreover, the proposal's lack of uniformity, predictability, and consistency frustrates the FTR's purpose of communicating travel policies "in a clear manner" to agencies and employees. *See* 41 C.F.R. § 300-1.2.

Finally, contrary to the Union's claims, the Authority's Decision does not create a barrier to compensating "actual and necessary" travel. (Br. at 12 (citing 5

U.S.C. § 5702(a)(1)).) The FTR provides that agencies "[m]ust limit the authorization and payment of travel expenses to travel that is necessary to accomplish [their] mission[s] in the most economical and effective manner." 41 C.F.R. § 301-70.1(a). As discussed above, the Union's proposal is antithetical to an "economical and effective" system for administering travel expenses. Therefore, the Authority's conclusion that the proposal does not fall within the meaning of "definite domain" is consistent with the FTR's purposes. Accordingly, the Union's argument must fail.

C. The Authority's conclusion that the proposal is contrary to 41 C.F.R. § 300-3.1 does not violate the canon against surplusage

This Court should reject the Union' argument that the Authority violated the canon against surplusage by concluding that "'definite domain' must be measured in the same exact manner as a 'mileage radius.'" (Br. at 15.) The Union's argument is without merit because the Authority never drew such a conclusion.

The canon against surplusage, while "not an absolute rule," *Marx v. General Revenue Corp.,* 568 U.S. 371, 385 (2013), dictates that a statute or a regulation "ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 669 (2007) (applying the canon against surplusage to regulatory interpretation)).

The Union's claim that the Authority's Decision violates the canon against surplusage is based on a misreading of the Decision. The Authority did not determine that "definite domain" can *only* be measured as a "mileage radius." As discussed above, the Authority found that the Union's proposal would not create a "definite area" and, thus, did not fall within the meaning of "definite domain" under Section 300-3.1. (JA 154.) The Authority's conclusion that the proposal is not a definite domain does not mean that an employee's official station *must* be measured as a mileage radius. Nor does the Authority's Decision foreclose the possibility that other proposals may fit within the meaning of "definite domain" under Section 300-3.1. The Authority held only that the Union's proposed definition of official station would result in an area that did not qualify as a "definite domain" under the FTR. The Union's argument is thus unpersuasive and the Petition for Review should be denied.

D. If this Court decides that the proposal is not contrary to 41 C.F.R. § 300-3.1, then the Court should remand the case to the Authority to address the Agency's additional arguments

As the Authority concluded that the proposal is contrary to Section 300-3.1, the Authority found it unnecessary to address the Agency's additional arguments that the proposal is contrary to law and a different government-wide regulation. (JA 153 n.10.) If this Court decides that the proposal is not contrary to Section 300-3.1, then the Court should remand the case to the Authority so that the Authority may consider the Agency's additional arguments. *See Synovus Fin. Corp. v. Bd. of Governors of Fed.*

Reserve Sys., 952 F.2d 426, 433 (D.C. Cir. 1991) ("courts must not decide issues left open by the agency"); *Baton Rouge Marine Contractors, Inc. v. Fed. Mar. Comm'n*, 655 F.2d 1210, 1211 n.2 (D.C. Cir. 1981) (when an agency's decision "is overturned on review, remand is required; the [agency], not the court, must determine the relevant facts and initially explicate and apply the law thereto). Remand is particularly appropriate here because certain Agency arguments would require the Authority to interpret its own Statute. (*See* JA 153 n.10 (finding it unnecessary to address the Agency's argument that the proposal is non-negotiable because it allegedly impermissibly interferes with management's right to determine its organization under Section 7106(a)(1) of the Statute)).

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that this Court deny the Union's Petition for Review in its entirety.

Respectfully submitted,

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REBECCA J. OSBORNE
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FED. R. APP. P. RULE 32(a) CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 4,914 words excluding exempt material.

/s/ Rebecca J. Osborne
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Acting Deputy Solicitor
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Rebecca J. Osborne
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Acting Deputy Solicitor
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ADDENDUM

Relevant Statutes and Regulations

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5 U.S.C. § 706

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C.A. § 7106

Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws--

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 5702(a)

Per diem; employees traveling on official business

(a)(1) Under regulations prescribed pursuant to section 5707 of this title, an employee, when traveling on official business away from the employee's designated post of duty, or away from the employee's home or regular place of business (if the employee is described in section 5703 of this title), is entitled to any one of the following:

(A) a per diem allowance at a rate not to exceed that established by the Administrator of General Services for travel within the continental United States, and by the President or his designee for travel outside the continental United States;

(B) reimbursement for the actual and necessary expenses of official travel not to exceed an amount established by the Administrator for travel within the continental United States or an amount established by the President or his designee for travel outside the continental United States; or

(C) a combination of payments described in subparagraphs (A) and (B) of this paragraph.

(2) Any per diem allowance or maximum amount of reimbursement shall be established, to the extent feasible, by locality. The Secretary of Defense shall not alter the amount of the per diem allowance, or the maximum amount of reimbursement, for a locality based on the duration of the travel in the locality of an employee of the Department.

(3) For travel consuming less than a full day, the payment prescribed by regulation shall be allocated in such manner as the Administrator may prescribe.

5 U.S.C. § 7105(a)(2)

Powers and duties of the Authority

(a)(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.

5 U.S.C. § 7117(a)

Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which

are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

5 U.S.C. § 7123(a), (c)

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.

5 C.F.R. § 550.112(j)

Computation of overtime work.

The computation of the amount of overtime work of an employee is subject to the following conditions:

(j) Official duty station. An agency may prescribe a mileage radius of not greater than 50 miles to determine whether an employee's travel is within or outside the limits of the employee's official duty station for determining entitlement to overtime pay for travel under paragraph (g) of this section except that—

(1) An agency's definition of an employee's official duty station for determining overtime pay for travel may not be smaller than the definition of "official station and post of duty" under the Federal Travel Regulation issued by the General Services Administration (41 CFR 300–3.1); and

(2) Travel from home to work and vice versa is not hours of work. When an employee travels directly from home to a temporary duty location outside the

limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work.

5 C.F.R. § 550.1403

Definitions.

In this subpart:

Accrued compensatory time off means the compensatory time off earned by an employee that has not been used or forfeited.

Agency means an Executive agency as defined in 5 U.S.C. 105.

Authorized agency official means the head of the agency or an official who is authorized to act for the head of the agency in the matter concerned.

Compensable refers to periods of time that are creditable as hours of work for the purpose of determining a specific pay entitlement, even when that work time may not actually generate additional compensation because of applicable pay limitations.

Compensatory time off means compensatory time off for travel that is credited under the authority of this subpart.

Official duty station means the geographic area surrounding an employee's regular work site that is the same as the area designated by the employing agency for the purpose of determining whether travel time is compensable for the purpose of determining overtime pay, consistent with the regulations in 5 CFR 550.112(j) and 551.422(d).

Regular working hours means the days and hours of an employee's regularly scheduled administrative workweek established under 5 CFR part 610.

Scheduled tour of duty for leave purposes means an employee's regular hours for which he or she may be charged leave under 5 CFR part 630 when absent. For full-time employees, it is the 40–hour basic workweek as defined in 5 CFR 610.102. For employees with an uncommon tour of duty as defined in 5 CFR 630.201, it is the uncommon tour of duty.

Travel means officially authorized travel—i.e., travel for work purposes that is approved by an authorized agency official or otherwise authorized under established agency policies. Time spent traveling in connection with union activities is excluded.

Travel status means travel time as described in § 550.1404 that is creditable in accruing compensatory time off for travel under this subpart, excluding travel time that is otherwise compensable under other legal authority.

5 C.F.R. § 551.422

Time spent traveling.

(a) Time spent traveling shall be considered hours of work if:

(1) An employee is required to travel during regular working hours;

(2) An employee is required to drive a vehicle or perform other work while traveling;

(3) An employee is required to travel as a passenger on a one-day assignment away from the official duty station; or

(4) An employee is required to travel as a passenger on an overnight assignment away from the official duty station during hours on nonworkdays that correspond to the employee's regular working hours.

(b) An employee who travels from home before the regular workday begins and returns home at the end of the workday is engaged in normal "home to work" travel; such travel is not hours of work. When an employee travels directly from home to a temporary duty location outside the limits of his or her official duty station, the time the employee would have spent in normal home to work travel shall be deducted from hours of work as specified in paragraphs (a)(2) and (a)(3) of this section.

(c) An employee who is offered one mode of transportation, and who is permitted to use an alternative mode of transportation, or an employee who travels at a time other than that selected by the agency, shall be credited with the lesser of:

(1) The actual travel time which is hours of work under this section; or

(2) The estimated travel time which would have been considered hours of work under this section had the employee used the mode of transportation offered by the agency, or traveled at the time selected by the agency.

(d) Except as provided in paragraph (b) of this section, an agency may prescribe a mileage radius of not greater than 50 miles to determine whether an employee's travel is within or outside the limits of the employee's official duty station for determining entitlement to overtime pay for travel under this part. However, an agency's definition of an employee's official duty station for determining overtime pay for travel may not be smaller than the definition of "official station and post of duty" under the Federal Travel Regulation issued by the General Services Administration (41 CFR 300–3.1).

41 C.F.R. § 300–1.2

What is the purpose of the FTR?

There are two principal purposes:

(a) To interpret statutory and other policy requirements in a manner that balances the need to assure that official travel is conducted in a responsible manner with the need to minimize administrative costs;

(b) To communicate the resulting policies in a clear manner to Federal agencies and employees.

41 C.F.R. § 300–3.1

What do the following terms mean?

Official station—An area defined by the agency that includes the location where the employee regularly performs his or her duties or an invitational traveler's home or regular place of business (see § 301–1.2). The area may be a mileage radius around a particular point, a geographic boundary, or any other definite domain, provided no part of the area is more than 50 miles from where the employee regularly performs his or her duties or from an invitational traveler's home or regular place of business. If the employee's work involves recurring travel or varies on a recurring basis, the location where the work activities of the employee's position of record are based is considered the regular place of work.

Official travel—Travel under an official travel authorization from an employee's official station or other authorized point of departure to a temporary duty location and return from a temporary duty location, between two temporary duty locations, or relocation at the direction of a Federal agency.

Temporary duty (TDY) location—A place, away from an employee's official station, where the employee is authorized to travel.

41 C.F.R. § 301–10.8

What is my liability if, for personal convenience, I travel by an indirect route or interrupt travel by a direct route?

Your reimbursement will be limited to the cost of travel by a direct route or on an uninterrupted basis. You will be responsible for any additional costs.

41 C.F.R. § 301–11.102

What is the applicable M&IE rate?

For days of travel which		Your applicable M&IE rate is
Require lodging		The M&IE rate applicable for the TDY location or stopover point.
Do not require lodging, and	Travel is more than 12 hours but less than 24 hours	The M&IE rate applicable to the TDY site (or the highest M&IE rate applicable when multiple locations are involved).
	Travel is 24 hours or more, and you are traveling to a new TDY site or stopover point at midnight	The M&IE rate applicable to the new TDY site or stopover point.
	Travel is 24 hours or more, and you are returning to your official station	The M&IE rate applicable to the previous day of travel.

41 C.F.R. § 301–70.1

How must we administer the authorization and payment of travel expenses?

When administering the authorization and payment of travel expenses, you—

(a) Must limit the authorization and payment of travel expenses to travel that is necessary to accomplish your mission in the most economical and effective manner, under rules stated throughout this chapter;

(b) Should give consideration to budget constraints, adherence to travel policies, and reasonableness of expenses;

(c) Should always consider alternatives, including teleconferencing, prior to authorizing travel; and

(d) Must require employees to use the ETS to process travel authorizations and claims for travel expenses once you migrate to the ETS, but no later than September 30, 2006, unless an exception has been granted under § 301–73.102 or § 301–73.104 of this chapter.

63 Fed. Reg. 15,950, 15,952-53 (Apr. 1, 1998)

Federal Travel Regulation, General Guides and Temporary Duty (TDY) Travel Allowances

Official station—The official station of an employee or invitational traveler (see §301-1.2) is the location of the employee's or invitational traveler's permanent work assignment.

The geographic limits of the official station are:

(a) For an employee:

(1) The corporate limits of the city or town where stationed or if not in an incorporated city or town;

(2) The reservation, station, or other established area (including established subdivisions of large reservations) having definite boundaries where the employee is stationed.

(b) For an invitational traveler:

(1) The corporate limits of the city or town where the home or principal place of business exists or if not in an incorporated city or town;

(2) The reservation, station, or other established area (including established subdivisions of large reservations) having definite boundaries where the *15953 home or principal place of business is located.

75 Fed. Reg. 72,965, 72,966-65 (Nov. 29, 2010)

Federal Travel Regulation; Removal of Privately Owned Vehicle Rates; Privately Owned Automobile Mileage Reimbursement When Government Owned Automobiles Are Authorized; Miscellaneous Amendments,

PART 300-3—GLOSSARY OF TERMS

1. The authority citation for 41 CFR part 300-3 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C 121(c); 49 U.S.C. 40118; 5 U.S.C. 5738; 5 U.S.C. 5741-5742; 20 U.S.C. 905(a); 31 U.S.C. 1353; E.O. 11609, as amended; 3 CFR, 1971-1975 Comp., p. 586, OMB Circular No. A-126, revised May 22, 1992.

41 CFR § 300-3.1

2. Amend § 300-3.1 by revising the definition of "official station" to read as follows:

41 CFR § 300-3.1

§ 300-3.1 What do the following terms mean?

* * * * *

Official station—An area defined by the agency that includes the location where the employee regularly performs his or her duties or an invitational traveler's home or regular place of business (see § 301-1.2). The area may be a mileage radius around a particular point, a geographic boundary, or any other definite domain, provided no part of the area is more than 50 miles from where the employee regularly performs his or her duties or from an invitational traveler's home or regular place of business. If the employee's work involves recurring travel or varies on a recurring basis, the location where the work activities of the employee's position of record are based is considered the regular place of work.

* * * * *