

UNITED STATES OF AMERICA  
FEDERAL LABOR RELATIONS AUTHORITY  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
WASHINGTON, D.C. 20424

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UNITED STATES CUSTOMS SERVICE, .  
SOUTHWEST REGION, .  
EL PASO, TEXAS .  
Respondent .  
and . Case Nos. 6-CA-10556  
6-CA-10557  
NATIONAL TREASURY EMPLOYEES UNION .  
Charging Party .  
.....

David P. Lindsey, Esq.  
For the Respondent

Walter E. Dresslar  
For the Charging Party

Christopher J. Ivits, Esq.  
For the General Counsel

Before: SALVATORE J. ARRIGO  
Administrative Law Judge

DECISION

Statement of the Case

This matter arose under the Federal Service Labor-Management Relations Statute, chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon unfair labor practice charges having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Dallas Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by changing "the shift/tour of duty" of various bargaining unit employees without providing the Union with

adequate notice and an opportunity to negotiate the impact and implementation of the changes.

A hearing on the Complaint was conducted in El Paso, Texas at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally.<sup>1/</sup> Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

#### Findings of Fact

At all times material the National Treasury Employees Union has been the exclusive collective bargaining representative of various of Respondent's employees including U.S. Customs Inspectors working in the El Paso, Texas area. Approximately 200 Inspectors are employed at Respondent's Port of El Paso operation. At various locations in the El Paso area Customs Inspectors working in Cargo Operations inspect cargo in trucks crossing the border from Mexico for drugs and other contraband materials. Inspectors generally rotate among the various locations on a monthly basis and rotate among the various shifts every two weeks. If an overtime assignment exists, pursuant to the parties collective bargaining agreement it is offered to the Inspector who indicates availability for overtime and has earned the least overtime at the time the assignment is made in accordance with an "Availability List".

On February 19, 1991 Kenneth Squires was assigned the position of Chief Inspector for Cargo Operations in the El Paso area. Chief Inspector Squires testified he was convinced that an "emergency situation" existed in that illegal drugs were coming across the border in the El Paso area, and Inspectors were overworked and had become complacent. Squires perceived imbalance existed in the assignment of shifts to Inspectors based upon the traffic patterns of cargo crossing the boarder. Squires concluded that some shifts had an excess of personnel given the amount of cargo to be inspected while other shifts lacked personnel

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<sup>1/</sup> I hereby correct the reporters error in the transcript of these proceedings to reflect the receipt of General Counsel's Exhibit No. 4.

to adequately facilitate the expeditious inspection of cargo coming to the border. Squires decided to implement some shift changes to increase the number of cargo examinations and, by memorandum to the Union dated February 19, 1991, which testimony indicated was received by the Union on Friday, February 22, 1992, Squires announced a change in shift assignments would occur at the "Import Lot" at the Bridge of the Americas (BOTA). The memorandum stated:

Effective February 25, 1991, I intend to implement the following changes in shift assignments within the Cargo Branch (BOTA):

The (12am) to (8am) shift presently employs (3) inspectors Monday through Sunday. The change will employ (2) inspectors (12am) to (8am) and (1) inspector (6am) to (2pm) Monday through Friday. On Saturdays only (2) inspectors will be assigned to (12am) to (8am) instead of (3).

The (4pm) to (12am) shift presently employs (3) inspectors Monday through Sunday. The change will employ (2) inspectors (4pm) to (12am) and (1) inspector (2pm) to (10pm) Monday through Friday. On Saturday only (2) inspectors will be assigned to (4pm) to (12am). Further on Sundays (2) inspectors will be assigned (4pm) to (12am) instead of three.

. . . . .

These changes are intended to allow management to employ reasonable manpower coverage as the work load dictates. I consider these intended actions to be a valid response to an emergency situation.

Your immediate attention in this matter, should you desire to respond, would be appreciated.

By memorandum to the Union dated February 21, 1991, received by the Union on February 22, Chief Inspector Squires gave a "courtesy advisement" to the Union of a shift change at another cargo inspection facility, the Cargo Enforcement Station (CES), also known as the Commerce Street facility. At that facility there had been two cargo

Inspectors on a 9:00 a.m. to 5:00 p.m. shift.<sup>2/</sup> The "advisement" announced that "effective immediately" there would be one Inspector assigned to the 9:00 a.m. to 5:00 p.m. shift and one Inspector assigned to a new 11:00 a.m. to 7:00 p.m. shift and both Inspectors would be supported by unarmed National Guard personnel.

On February 22, 1991 Charles Guinta, National Vice-President of the Union and local Chief Steward, called Chief Inspector Squires and questioned him concerning the notifications of shift changes the Union received and informed Squires he was required to bargain with the Union on the changes. Squires indicated he received orders to proceed with the shift changes and the changes would be implemented immediately as he considered it to be an emergency situation. Guinta explained that Respondent's actions would violate the Statute and result in the Union filing an unfair labor practice charge. Squires replied that Guinta could take whatever legal action he wished but Squires considered the matter to be an emergency and the changes would be implemented.

At the CES facility the shift changes occurred on February 21, 1991, as scheduled. Thus instead of two Inspectors inspecting cargo on the 9:00 a.m. to 5:00 p.m. shift, thereafter one Inspector continued to work from 9:00 a.m. to 5:00 p.m. but one Inspector was assigned to a new 11:00 a.m. to 7:00 p.m. shift. This new arrangement continued for four months when the facility was closed.

Testimony disclosed that due to the dangerous circumstances of inspecting vehicles and cargo for drugs and other contraband material, the armed Inspectors normally carried out their duties working in pairs under a "buddy system" for safety purposes.<sup>3/</sup> As a result of the changes at CES, between the hours of 9:00 a.m. and 11:00 a.m. and between 5:00 p.m. and 7:00 p.m. only one Inspector was on duty to

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<sup>2/</sup> Squires testified that "to his knowledge" there had previously been only one inspector assigned to each of two separate locations at the CES facility. However, I credit the testimony of other witnesses who worked at that facility on rotation that there is only one cargo inspection location at CES where two Inspectors worked.

<sup>3/</sup> More suspicious vehicles were frequently routed to the CES facility for inspection.

carry out cargo inspection of vehicles. Thus during this four hour period Inspectors would not have the presence of a second armed Inspector available for mutual protection. In addition, credited employee testimony established another foreseeable adverse consequence of the change was the reduction of premium overtime pay to some Inspectors since employees frequently worked on overtime past 5:00 p.m. to finish inspections of trucks routed to the CES for inspection. After the start of an 11:00 a.m. to 7:00 p.m. shift, the work which might have been accomplished on overtime after 5:00 p.m. would be done by the Inspector working from 5:00 p.m. to 7:00 p.m. at straight-time pay.

The shift changes at the BOTA Import Lot were implemented on February 25, 1991 as scheduled and continued in effect for two months. The changes reduced the midnight to 8:00 a.m. shift from three to two Inspectors for the entire week and instituted a 6:00 a.m. to 2:00 p.m. shift for one Inspector from Monday through Friday. At this location the change also reduced the 4:00 p.m. to midnight shift from three to two Inspectors for the entire week and added a 2:00 p.m. to 10:00 p.m. shift for one Inspector from Monday through Friday.

As with the employees at the CES facility, a decrease in the number of Inspectors on duty during a shift presents similar foreseeable adverse consequences including the possibility of a greater risk of harm to employees inspecting trucks and cargo. Even though more than one Inspector was still assigned all shifts, one Inspector might nevertheless leave the area during lunch or other rest breaks. The more Inspectors present the greater the deterrent against a person taking an action harmful to an Inspector. In addition, one Inspector less was assigned to the Sunday shifts from midnight to 8:00 a.m. and 4:00 p.m. to midnight. Sunday work required premium pay. Thus two employees each Sunday were deprived of the opportunity to earn Sunday premium pay. Further, employees working between the hours of 6:00 a.m. and 6:00 p.m. receive an added hourly night pay differential. Since the change resulted in one position reassigned to the 6:00 a.m. to 2:00 p.m. shift from the midnight to 8:00 a.m., the employee

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4/ I find insufficient record evidence to establish an increase in workload was a direct result of less Inspectors being assigned to a shift since the record also reveals substantially more trucks were inspected during this period.

assigned to that position would receive six hours less night shift premium pay each shift. Similarly, the one employee reassigned to the 2:00 p.m. to 10:00 p.m. shift from the 4:00 p.m. to midnight shift would receive two hours less night shift premium pay for each shift.

#### Additional Findings, Discussion and Conclusions

The General Counsel contends the facts herein support the allegation that Respondent's conduct of failing and refusing to negotiate with the Union on the changes in tours of duty and shifts violated section 7116(a)(1) and (5) of the Statute and the remedy for such should encompass an order requiring payment of backpay to employees for loss of weekday overtime and Sunday overtime pay and night differential pay to adversely affected employees. Respondent contends its actions were occasioned by an emergency situation and, in any event, resulted in no change to conditions of employment to unit employees. At best, Respondent urges, the change of shifts had only a de minimus impact on unit employees. Indeed, Respondent suggests that after the shift changes, employees received more rather than less premium pay.<sup>5/</sup>

Prior to the hearing in this matter a Subpoena Duces Tecum was issued by the Regional Director for the Dallas Regional Office of the Authority directing "David P. Linsey, Agency Representative, and/or Custodian of the Records" to appear and testify in this proceeding and produce: "(1) Copies of the work schedules and time and attendance cards for employees who work the graveyard and morning shifts in the trucks inspection lot at Respondent's Bridge of the Americas facility for the following periods: (A) Five months prior to February 25, 1991, (B) Five months subsequent to February 25, 1991. (2) Copies of the work schedules and time and attendance cards for inspectors assigned to the Truck Inspection Station on Commerce Street, El Paso, Texas, for the following period: (A) Five months prior to February 22, 1991, (B) Five months subsequent to February 22, 1991". At the hearing the General Counsel contended the subpoenaed documents would establish changes

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<sup>5/</sup> In argument Respondent suggests that somehow the change did not carry with it the obligation to negotiate under terms of the parties' collective bargaining agreement. I find no support for a waiver of its obligation to bargain on the change herein.

in shifts, the duration of the changes and that the changes produced a "substantial impact on employees' overtime, holiday pay (and) night differential . . ." Respondent did not produce the documents and, after denying Respondent's untimely Petition to Revoke, I ordered that the documents be provided to the General Counsel subsequent to the hearing so they would be available when the parties were drafting their briefs. Documents were subsequently furnished to the General Counsel. After receipt of the documents the General Counsel filed a motion to close the record and receive the documents as General Counsel's Exhibit 8 for the limited purpose of possible compliance use should a backpay remedy be ordered. The General Counsel avers that the documents produced do not identify what location they cover, contain no overtime schedules, that sufficient evidence already exists on the issues and therefore it is not necessary to spend the time and effort to now clarify the documents. Respondent urges the documents be received without limitation as to use and indeed relies on certain documents to support its contention that the changes in work schedules did not result in any loss to Inspectors of night shift differential or overtime earnings.

I found the subpoenaed documents, without sworn testimony to explain them, to be confusing and apparently incomplete with regard to the issues being litigated herein. Further, I find Respondent's references to matters contained in the documents to support its arguments to be inconclusive and unpersuasive. Accordingly, I shall admit the documents as General Counsel's Exhibit No. 8 for the limited purpose of reflecting Respondent's response to and compliance with the General Counsel's subpoena but will not rely on them in reaching my findings and conclusions.

Turning now to the underlying allegations herein, I find and conclude that Respondent changed staffing on shifts and added tours of duties as indicated above without providing the Union with an opportunity to negotiate on the changes in employees' conditions of employment and indeed refused to bargain with the Union on the changes. Respondent was obligated to negotiate with the Union on the impact and implementation of the changes prior to implementation and unless otherwise privileged, its failure to do so would constitute a violation of section 7116(a)(1) and (5) of the Statute. See Department of Health and Social Security, Social Security Administrative, 24 FLRA 403 (1986) (HHS, SSA) and Department of the Air Force, Scott Air Force Base, Illinois, 33 FLRA 532 (1988).

I also find the facts herein do not establish any emergency or overriding exigency existed which would permit Respondent to circumvent its Statutory obligation to bargain with the Union on the impact and implementation of the changes before the changes were effectuated. Thus the record reveals the situation Respondent sought to cure by the changes in tours of duty and shifts existed for some months prior to Squires appointment as Chief Inspector and his precipitous and unilateral implementation of the changes. Accordingly, Respondent's contention is without merit. See Bureau of Government Financial Operations Headquarters, 11 FLRA 334, 343-344 (1983).

Respondent claims the changes herein were de minimus and therefore it had no obligation to bargain with the Union on the matter. In HHS, SSA the Authority set forth various standards to be considered in determining whether a change in conditions of employment required bargaining. The Authority indicated it would carefully examine the pertinent facts and circumstances presented, placing principle emphasis on such general areas of consideration as the nature and extent of the effect or reasonably foreseeable effect of the change, taking "equitable considerations" into account when balancing the various interests involved. In the case herein two locations were involved, one for two months, the other for four months; one employee was removed from each of three shifts and three new tours of duty were established; the changes adversely affected the potential premium pay for numerous employees<sup>6/</sup>; and the changes exposed employees involved to a more dangerous working environment. In these circumstances I reject Respondent's contention that the effect of the changes on unit employees was de minimus. Id.

With regard to Respondent's contention that after the change employees received more rather than less overtime, it has not been established that if an increase in overtime occurred it was due to the changes herein since during this period Respondent substantially increased the workload of all employees by dramatically increasing the number of trucks inspected. Therefore the contention is rejected.

As to whether a backpay order would be appropriate, the Authority summarized its approach to situations when backpay is at issue in Department of Justice, U.S. Immigration and

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<sup>6/</sup> Since all Inspectors rotate into the jobs and shifts, almost 200 Inspectors could foreseeable have had been affected.



Naturalization Service, U.S. Border Patrol, El Paso, Texas,  
39 FLRA 1325 (1991). In that case the Authority stated at  
1333:

A backpay award under the Back Pay Act requires determinations that: (1) an employee was affected by an unjustified or unwarranted personnel action, (2) the action resulted in a withdrawal or reduction in the pay, allowances, or differentials of the employee, and (3) the withdrawal or reduction would not have occurred but for the unjustified action. In refusal-to-bargain cases, the causal nexus required by the Back Pay Act is established when the Authority finds that an agency's action that gave rise to the violation resulted in a withdrawal or reduction in the pay, allowances or differentials of employees. The Authority will order a backpay remedy where it is clear that the violation resulted in a loss of some pay, allowances or differentials. Where it is clear that the violation resulted in such a loss but the identity of the affected employees can not be ascertained in compliance proceedings, the Authority will, consistent with Federal Aviation Administration, Washington, D.C., 27 FLRA 230, 234 (1987), allow the parties to "establish the causal nexus required by the Back Pay Act by determining through negotiations the extent of the make-whole relief." U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and U.S. Department of Health and Human Services, Social Security Administration, Hartford District Office, Hartford, Connecticut, 37 FLRA 278, 292 (1990). Where the effect on employees is speculative, however, the Authority will deny make-whole relief. Id.

In the case herein the record establishes that Respondent's changes of tours and shifts without bargaining with the Union violated section 7116(a)(1) and (5) of the Statute and resulted in unit employees losing overtime and night differential pay. A judicious review of Respondent's records should disclose the specific identity of the adversely affected employees. Therefore the amount of backpay owed and related issues shall be a matter for compliance proceedings See Department of the Treasury, U.S. Customs Service and U.S. Customs Service, Region IX, Chicago, Illinois, 25 FLRA 161 (1987) and United States Customs Service Region IV, Miami District, Miami, Florida,

Accordingly, in view of the entire foregoing I conclude Respondent violated section 7116(a)(1) and (5) of the Statute and I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of the Treasury, United States Customs Service, Southwest Region, El Paso, Texas, shall:

1. Cease and desist from:

(a) Instituting any change in the tours of duty or work shifts of Inspectors in the El Paso Cargo Branch without affording the National Treasury Employees Union, the exclusive collective bargaining representative of its employees, the opportunity to negotiate the impact and implementation of such change.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.


2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Compensate those bargaining unit Inspectors who are entitled to backpay with appropriate premium pay for the periods during which tours of duty and work shifts were changed beginning in February 1991 for two months at the BOTA Import Lot and for four months at the CES Lot.

(b) Post at its facilities in the El Paso, Texas area copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner of the Southwest Region, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, February 14, 1992

  
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SALVATORE J. ARRIGO  
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute any change in the tours of duty, or work shifts of Inspectors in the El Paso Cargo Branch without affording the National Treasury Employees Union, the exclusive collective bargaining representative of our employees, the opportunity to negotiate the impact and implementation of such change.

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

WE WILL compensate those bargaining unit Inspectors who are entitled to backpay with appropriate premium pay for the periods during which tours of duty and work shifts were changed beginning in February 1991 for two months at the BOTA Import Lot and for four months at the CES Lot.

\_\_\_\_\_  
(Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Dallas Regional Office, whose address is: 525 Griffin Street, Suite 926, LB 107, Dallas, TX 75202, and whose telephone number is: (214) 767-4996.