No. 03-74093

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH 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 THE FEDERAL LABOR RELATIONS AUTHORITY

DAVID M. SMITH
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

DAVID M. SHEWCHUK
Attorney

Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424
(202) 218-7999

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GLOSSARY

Add.	Addendum
agency	United States Department of the Treasury, Internal Revenue Service, Washington, D.C.
Authority	Federal Labor Relations Authority
Dep't of the Air Force	*United States Department of the Air Force v. FLRA*, 952 F.2d 446 (D.C. Cir. 1991)
DOL	Department of Labor
FLRA	Federal Labor Relations Authority
FLSA	Fair Labor Standards Act of 1938
IRS	United States Department of the Treasury, Internal Revenue Service, Washington, D.C.
JA	Joint Appendix
NTEU	National Treasury Employees Union
OPM	Office of Personnel Management
Pet. Br.	Petitioner's brief
petitioner	National Treasury Employees Union
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
union	National Treasury Employees Union

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority ("Authority" or "FLRA") on September 9, 2003. The Authority's decision is published at 59 F.L.R.A. (No. 22) 119. A copy of the decision is included in the Joint Appendix (JA) at JA 6-24. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management

Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute. The Authority agrees that the union timely petitioned for review in this Court. Petitioner's Brief (Pet. Br.) at 1-2.

STATEMENT OF THE ISSUE

Whether the Authority properly ruled that a union collective bargaining provision making home to work travel compensable as "hours of work" is inconsistent with an Office of Personnel Management government-wide regulation plainly stating that home to work travel is not "hours of work."

STATEMENT OF THE CASE

This case arises as a negotiability proceeding under § 7117 of the Statute. Negotiators for the National Treasury Employees Union ("union," "NTEU," or "petitioner") and the United States Department of the Treasury, Internal Revenue Service, Washington, D.C., ("IRS" or "agency") reached local agreement on a collective bargaining agreement. One provision, the focus of this case, would have required the IRS to compensate bargaining unit employees for time spent in home to work travel when employees are assigned to a temporary duty location within their

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[1] Pertinent statutory provisions are set forth in the attached Addendum (Add.) to this brief.

official duty station, and commuting to that temporary duty location takes longer than the employee's ordinary home to work commute.

Upon review of the agreement, the agency head disapproved the provision in question. The union appealed the disapproval to the Authority. The Authority held that the agency head properly disapproved the provision because compensation for home to work travel is contrary to a government-wide regulation issued by the Office of Personnel Management (OPM). Pursuant to § 7123(a), NTEU now seeks review in this Court of the Authority's decision and order.

STATEMENT OF THE FACTS

A. Background

In February 2002, negotiators for NTEU and the IRS executed a new collective bargaining agreement. One provision of the agreement, pertaining to temporary duty assignments, provided, in relevant part, that

> [w]hen an employee travels from his/her residence to a point of destination within his/her official duty station, he/she should not be required to leave home any earlier or arrive home any later than he/she does when he/she travels to and from his/her usual assigned place of business.[2]

JA 7. Consistent with § 7114(c) of the Statute, the agency head reviewed the

[2] The entire provision may be found at JA 7 and Pet. Br. 4.

agreement and disapproved the language above.[3] The union appealed that disapproval to the Authority.

B. The Authority's Decision

The Authority[4] determined that the home to work travel compensation provision was properly disapproved under § 7114(c), as it is contrary to a government-wide regulation.

It is undisputed that, by its own terms, the provision requires the agency to shorten the work day of employees whose home to work travel time to a temporary duty location takes longer than the employees' usual commutes. As pertinent to the instant case, the union conceded that where the agency could not or would not shorten an employee's work day, the agency would be required to pay compensation corresponding to the increased commute. JA 9, 11. The Authority agreed with this interpretation: "[W]e interpret the provision as requiring the [a]gency to compensate

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[3] Pursuant to § 7114(c) of the Statute, collective bargaining agreements are reviewed by agency heads prior to implementation in order to determine if any language conflicts "with the provisions of this chapter and any other applicable law, rule, or regulation . . . ." § 7114(c)(2). If any part of the proposed agreement is contrary to law, or to government-wide rule or regulation, it may be disapproved. *Id.* *See, e.g., Defense Language Inst. v. FLRA*, 767 F.2d 1398, 1399-1400 (9th Cir. 1985). *See also* § 7117(a)(1) ("the duty to bargain in good faith . . . [applies] to the extent not inconsistent with any Federal law or any [g]overnment-wide rule or regulation . . . .").

[4] Member Pope dissented from the Authority's decision.

an employee for commuting time within the employee's official duty station to the extent that the commute to or from a temporary assigned work location increases the employee's usual commute." JA 13-14. The Authority defined "commuting time" as "'home to work' travel." JA 14.

Based on this interpretation, the Authority held that the provision runs afoul of an OPM regulation, 5 C.F.R. § 551.422(b). OPM's government-wide regulation expressly specifies that "normal 'home to work' travel" "is not hours of work." *Id*. Thus, such travel time is excluded from the calculation of hours of work for compensation purposes. *Id.*

The Authority also relied on *United States Department of the Air Force v. FLRA*, 952 F.2d 446 (D.C. Cir. 1991) (*Dep't of the Air Force*). In *Dep't of the Air Force*, the D.C. Circuit discussed the effect of an OPM regulation specifying that certain activities of federal employees were not hours of work for the purpose of compensation. 952 F.2d at 450-53. As relevant here, the court held that a regulation in Part 551, the same part of OPM's regulations that includes the regulation here involved, rendered a union bargaining proposal non-negotiable, despite the fact that a different result would obtain in private sector bargaining under the Portal-to-Portal Act. *Id.* at 451.

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 and Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983).

In ruling on negotiability issues, the Authority "exercise[s] its 'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations. Its determination therefore deserves considerable deference." *Defense Language Inst.*, 767 F.2d at 1401, quoting *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (internal citations omitted). Courts "also owe deference to the FLRA's interpretation of [a] union's proposal." *Nat'l Treasury Employees Union v. FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994).

The Authority's interpretation of OPM regulations, while not entitled to deference, should be followed so long as the Authority's reasoning is "sound." *Nat'l Ass'n of Gov't Employees v. FLRA*, 179 F.3d 946, 950 (D.C. Cir. 1999) (quoting *Dep't of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988)).

SUMMARY OF ARGUMENT

The Authority correctly held that a locally negotiated provision compensating employees for home to work travel was properly disapproved by the agency head

under § 7114(c). A government-wide regulation promulgated by OPM prohibits compensating employees for "home to work travel." The language of that regulation, 5 C.F.R. § 551.422(b), is clear and unambiguous: "'Home to work' travel . . . is not hours of work" and, therefore, is not compensable.

The Authority's decision is consistent not only with the regulation's plain language, but also with the Authority's own case law and with Comptroller General decisions. In the latter regard, the Comptroller General has interpreted § 551.422(b) on a number of occasions, and has consistently ruled that home to work travel is uncompensable. Moreover, the Comptroller General has not recognized any exceptions to OPM's government-wide rule.

Furthermore, there has been judicial recognition that OPM government-wide regulations implementing the Fair Labor Standards Act of 1938 (FLSA) and Portal-to-Portal Act may properly preclude bargaining over compensation subjects that would be bargainable in the private sector under those laws. The D.C. Circuit, in *Dep't of the Air Force*, considered an analogous OPM prohibition against compensation for post-shift activities. Facing arguments similar to those asserted by the union in this case, the D.C. Circuit ruled that OPM's regulation foreclosing bargaining over theses matters was consistent with the FLSA and the Portal-to-Portal Act.

Finally, the union argues without merit that this Court should rely on § 551.422(b)'s regulatory and statutory context and interpret § 551.422(b) contrary to its plain language. However, where the language of a regulation is plain and unambiguous, as here, consideration of extrinsic sources is inappropriate. The union also faults the Authority for not examining the validity of § 551.422(b). This argument is flawed. As the D.C. Circuit held in the *Dep't of the Air Force* case, the Authority's role is simply to consider whether a collective bargaining provision is prohibited by government-wide rule or regulation. OPM is not a party to these proceedings, and the validity of OPM's regulation is not a part of this case.

Accordingly, the petition for review should be denied.

ARGUMENT

THE AUTHORITY PROPERLY RULED THAT A UNION COLLECTIVE BARGAINING PROVISION MAKING HOME TO WORK TRAVEL COMPENSABLE AS "HOURS OF WORK" IS INCONSISTENT WITH AN OFFICE OF PERSONNEL MANAGEMENT GOVERNMENT-WIDE REGULATION PLAINLY STATING THAT HOME TO WORK TRAVEL IS NOT "HOURS OF WORK"

A. The Authority Correctly Held That the Provision was Non-Negotiable Because it is Inconsistent with 5 C.F.R. § 551.422(b)

The Authority correctly held the union's home to work travel compensation provision non-negotiable because it was inconsistent with a government-wide

regulation. As discussed above, *supra* note 3, agencies may disapprove provisions that conflict with federal law or government-wide rules or regulations. In this case, the union's proposal requiring compensation for time spent in home to work travel runs afoul of 5 C.F.R. § 551.422(b), a government-wide regulation categorically excluding home to work travel from the calculation of "hours of work," and, as a result, rendering the travel time uncompensable. The Authority's decision is also consistent with Comptroller General decisions, and with the D.C. Circuit's decision in *Dep't of the Air Force*.

1. The Authority correctly determined that the union's provision is contrary to 5 C.F.R. § 551.422(b), a government-wide regulation

The Authority correctly determined that the union's home to work travel compensation provision is contrary to the plain language of an OPM regulation published at 5 C.F.R. § 551.422(b). OPM promulgated Part 551 in order to "supplement[] and implement[] the [Fair Labor Standards] Act . . . ." 5 C.F.R. § 551.101(b). The Fair Labor Standards Act of 1938 was enacted in part to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for . . . [the] general well-being of workers." 29 U.S.C. § 202(a). In response to "wholly unexpected liabilities, immense in amount and retroactive in operation," the FLSA's expansive entitlement program was curtailed in 1947 by the

Portal-to-Portal Act. 29 U.S.C. § 251(a). Among other things, the Portal-to-Portal Act relieved employers of liability for compensating employees for routine home to work travel. *Id.* at § 254(a). The FLSA and, by extension, the Portal-to-Portal Act were applied to federal employees in 1974. 29 U.S.C. § 203(e)(2)(A).

In relevant part, OPM "supplemented and implemented" the FLSA and the Portal-to-Portal Act by providing, simply, that

> (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*. . . .

5 C.F.R. § 551.422(b) (emphasis added). Thus, in plain, clear, unambiguous language, OPM has determined that home to work travel is not to be considered hours of work. Therefore, home to work travel time is not compensable.

Nothing in Part 551 of OPM's regulations modifies this blanket prohibition or offers any exception. *Compare* 29 C.F.R. § 785.34, a Department of Labor (DOL) regulation implementing the Portal-to-Portal Act for the private sector, which *does* acknowledge the possibility of "express contract or custom" making activities which would not otherwise be hours of work compensable. If OPM had intended for federal employees' home to work travel to be subject to compensation by agreement, one would expect similar language in Part 551. There is no such language; OPM's silence on this point refutes the union's contention that "there is . . . no evidence that OPM

. . . intended that this particular regulation operate as an absolute bar to compensation for commuting time." Pet. Br. 24.

Regarding the regulation's application, the union's provision would have required the IRS to compensate employees for home to work travel time, by including that time in the calculation of "hours of work." As the union concedes in its brief, "[i]t is not disputed that the contractual language would provide compensation for extra time spent commuting from home to a temporary work site . . . ." Pet. Br. 4. Based on § 551.422(b)'s plain language, and as the Authority concluded, "[s]ince the provision in this case would require the [a]gency to compensate employees for increased commute time to a work site within their official duty station, the provision is inconsistent with 5 C.F.R. § 551.422(b)." JA 15.

The Authority's interpretation of 5 C.F.R. § 551.422(b) is consistent with its earlier interpretation of the same regulation in *American Federation of Government Employees, AFL-CIO, Local 3232*, 31 F.L.R.A. 355 (1988). In that case, the Authority held non-negotiable a proposal that would have given employees administrative leave when traveling to a temporary duty location within their permanent duty station. As the Authority held in the instant case, "[w]ith some exceptions not relevant to this case, commuting time, that is, 'home to work' travel, is not an activity

which constitutes hours of work and therefore, is not compensable." *Id.* at 358, citing 5 C.F.R. § 551.422(b).

The union argues erroneously that the plain language of OPM's regulation should not be held to mean what it says, because that language is not as "categorical" as similar language appearing in a different OPM regulation discussed in the *Dep't of the Air Force* case. Specifically, the union suggests that the language in § 551.412 is more "categorical" than the "[]ambiguous" language in 5 C.F.R. § 551.422. Pet. Br. 20.

Contrary to the union's contentions, there is nothing "ambiguous" about the OPM regulation that the Authority relied upon in this case. As discussed previously, the regulation (5 C.F.R. § 551.422(b)) states plainly and simply that certain activity (home to work travel) "is not hours of work." Although using other words, the OPM regulation discussed in *Dep't of the Air Force* is equally clear. It states that certain activity ("postliminary time") "is excluded from hours of work and is not compensable." 5 C.F.R. § 551.412(b). Because it is undisputed that in all cases time that is not "hours of work" "is not compensable," the omission of the latter phrase from § 551.422(b) is merely a distinction without being a difference. The union's flawed suggestion to the contrary should therefore be rejected.

2. The Authority's interpretation of 5 C.F.R. § 551.422(b) is consistent with Comptroller General decisions prohibiting compensation for home to work travel

The Authority's decision is consistent with Comptroller General decisions applying § 551.422(b). The Comptroller General [5] has consistently held that federal agencies may not compensate employees for home to work travel, save for the exceptions contained in Part 551, such as travel outside the limits of one's official duty station. *See* 5 C.F.R. § 551.422(b).

The Comptroller General has held, for instance, that "the general rule [is] that employees are not entitled to be compensated for the time spent in normal home to work travel." *Matter of: Reclamation Drill Rig Operators -- FLSA Overtime Pay for Travel as Passengers*, 70 Comp. Gen. 380, 381 (1991); *see also Matter of: Carlos Garcia*, Comp. Gen. Decision B-245,486, 1992 WL 63457, *3 (Mar. 18, 1992) (holding that "[u]nder the FLSA, 5 C.F.R. § 551.422(b), normal 'home to work' travel is not hours of work. Accordingly, under the FLSA . . . travel time from [work] to [an employee's] residence is not compensable as overtime."); *Matter of: Charleston*

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[5] This Circuit has previously treated Comptroller General decisions as being equivalent to binding government-wide rules or regulations. *See United Power Trades Org. v. FLRA*, 60 F.3d 835 (table), 1995 WL 314697, **2 (9th Cir. 1995) (unpublished) (pursuant to Local Rule 36-3, not cited as binding precedent). A copy of this case is attached at Add. B-1.

Naval Shipyard Employees – Claim for Overtime Compensation, Comp. Gen. Decision B-227,695, 1987 WL 102909, *23 (Sept. 23, 1987) ("'home to work' travel . . . is not considered as compensable hours of work under the FLSA."). The Comptroller General's decisions are pertinent here as much for what they do not state as for what they do. Specifically, there is no mention whatsoever in these cases, nor in any other Comptroller General case discussing § 551.422(b), that § 551.422(b)'s prohibition could be overcome through contractual agreement.

Thus, although the Authority did not rely upon Comptroller General decisions in deciding the case, these are instructive authorities that support the Authority's interpretation of 5 C.F.R. § 551.422(b).

3. The D.C. Circuit's ruling in *Dep't of the Air Force* supports the Authority's determination to apply OPM's express exclusion of home to work travel time from "hours of work," despite the existence of a different rule in the private sector under the Portal-to-Portal Act

The Authority properly applied the plain meaning of OPM's regulation to the union's proposal, rather than the private sector rule under the Portal-to-Portal Act. As the Authority held: "[A] contract provision that requires the [a]gency to compensate an employee in a manner contrary to Part 551 of OPM's regulations is contrary to a

[g]overnment-wide rule or regulation, despite any exception created by . . . the Portal-to-Portal Act." JA 15.

The D.C. Circuit's decision in *Dep't of the Air Force* supports the Authority's conclusion. In *Dep't of the Air Force*, as here, the issue was presented whether to apply an OPM regulation excluding certain activities from "hours of work," in the face of FLSA and Portal-to-Portal Act private sector rules permitting parties to bargain to make those activities "hours of work." The *Dep't of the Air Force* court rejected the claim that OPM's regulation should be disregarded:

> In the case of the private employer, § 4(b) of the Portal-to-Portal Act's amendments does indeed leave open the possibility that a provision in a collective bargaining contract may provide for more. *The government employee, however, is in an altogether different situation.* A separate statute, the [Statute], governs collective bargaining between federal employees and government agencies, and § 7117 of [the Statute] specifically bars negotiation over proposals that are inconsistent with government-wide regulations. The OPM has been ceded the authority to make government-wide regulations under the [Statute] as well as the FLSA and the FEPA. And it has issued such regulations barring compensation for [such activities] under the [Statute] as well as the FLSA and the FEPA.

Dep't of the Air Force, 952 F.2d at 451 (emphasis added). The Court went on to specifically approve OPM's right, derived from its authority to promulgate regulations under all three statutes, "to rule out such bargaining." *Id.*

The union misses the point when it challenges (Pet. Br. 21) the Authority's reliance on *Dep't of the Air Force*.[6] Contrary to the union's contentions, the Authority did not hold that *Dep't of the Air Force* was apposite because of the similarity of the collective bargaining provisions at issue. Rather, the Authority relied on *Dep't of the Air Force* because of the D.C. Circuit's cogent analysis of the impact of OPM's regulations on Authority negotiability determinations under § 7117 of the Statute (JA 15-16), a matter that the union does not address.

B. The Union's Remaining Arguments are Without Merit

1. The union's statutory and regulatory interpretation arguments lack merit

The union raises a number of arguments claiming that the Authority's application of 5 C.F.R. § 551.422(b)'s plain meaning is contrary to the regulation's "regulatory context." Pet. Br. 22; *see generally* Pet. Br. 12-14, 17, 22-24. However, it is well established that where, as here, a regulation's language is unambiguous, and its meaning clear, no further examination is appropriate. "[T]he plain meaning of a

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[6] NTEU raises the same arguments to this Court that were rejected in *Dep't of the Air Force*. The union invites the Court to ignore its stated policy that "'[a]bsent some good reason to do so, we are disinclined to create a direct conflict with another circuit,' . . . especially 'in an area of federal law which calls for uniformity.'" *Dep't of Health and Human Services, Region IX, San Francisco, Cal. v. FLRA*, 894 F.2d 333, 334 n.1 (9th Cir. 1990) (internal citations omitted).

regulation governs . . . ." *Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv.*, 307 F.3d 1214, 1219 (9th Cir. 2002); *see also Meeks v. West*, 216 F.3d 1363, 1366 (Fed. Cir. 2000) ("In construing a statute or regulation, we begin by inspecting its language for plain meaning. If the words are unambiguous, it is likely that no further inquiry is required.") (internal citations omitted).

Furthermore, regulatory interpretation draws from rules of statutory interpretation. *See, e.g., Resnik v. Swartz*, 303 F.3d 147, 152 (2d Cir. 2002) (citing authority for the proposition that "rules of statutory construction also govern the interpretation of administrative regulations."); *Sekula v. FDIC*, 39 F.3d 448, 457 (3d Cir. 1994) ("the regulation's meaning can be satisfactorily established by applying standard principles of statutory construction . . ."); and *Valley Camp of Utah, Inc. v. Babbitt*, 24 F.3d 1263, 1270 (10th Cir. 1994) (in interpreting a regulation, "we employ the standard rules of statutory construction, beginning with the plain meaning of its terms."). Thus,

> in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (internal citations omitted).

As discussed previously, 5 C.F.R. § 551.422(b)'s injunction is plain and unambiguous: home to work travel "is not hours of work." Accordingly, resort to the "regulatory context" is unnecessary.

2. Contrary to the union's assertions, the validity of OPM's regulations is not at issue

The union suggests throughout its brief that the Authority's interpretation of 5 C.F.R. § 551.422(b) cannot be upheld because to do so would bring the regulation into direct conflict with FLSA, the Portal-to-Portal Act, and/or OPM's statutory authorization. *See, e.g.,* Pet. Br. 14, 23-26. The D.C. Circuit's *Dep't of the Air Force* opinion rebuts the union's claim: "Whether the OPM regulation, properly interpreted, would be invalid because of a conflict with [an applicable statute] is irrelevant to the negotiability question the Authority faced. The OPM has not been a party to . . . this proceeding and the validity of its regulation is not at issue in this dispute." *Dep't of the Air Force*, 952 F.2d at 453. As the D.C. Circuit also noted, "the FLRA has authority only to address the question of *negotiability* of the union proposal." *Id*. at 452 (emphasis in original).

The union nevertheless argues that "OPM is to act in a manner consistent with DOL's implementation of the FLSA." Pet. Br. 14. As an initial matter, it is by no means apparent that OPM has acted in a manner *inconsistent* with the Department of Labor. Admittedly, 5 C.F.R. Part 551 is not a mirror image of DOL's regulations in 29 C.F.R.. However, it is not self-evident that Congress intended for the regulations to be completely identical in all respects. In any event, where the interpretation of a regulation is clear and straightforward, the FLRA is without authority to resolve collateral attacks.

Similarly, the union incorrectly claims that precluding bargaining in this case violates OPM's obligation to "administer its regulations in a manner that is consistent with the 'meaning, scope, and application' of the FLSA." Pet. Br. 23. Again, *Dep't of the Air Force* is instructive, holding that "OPM appears in this instance to have exercised its broad authority under all three acts [FLSA, Portal-to-Portal, the Statute] to rule out such bargaining; if so, the absolute language prohibiting compensation in [5 C.F.R.] § 551.412(b) is in no disharmony with the FLSA." *Dep't of the Air Force*, 952 F.2d at 451. Therefore, this union claim should also be rejected.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

____
DAVID M. SMITH
Solicitor

____
WILLIAM R. TOBEY
Deputy Solicitor

____
DAVID M. SHEWCHUK
Attorney

Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424-0001
(202) 218-7999

February 2004

STATEMENT OF RELATED CASES

Counsel for the Authority hereby certify that they are aware of no related cases currently pending in this Court.

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 03-74093

I certify that:

Pursuant to Fed. R. of App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 4,147 words.

____
Date

____
David M. Shewchuk
Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION, Petitioner	)	
v.	)	No. 03-74093
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief for the Federal Labor Relations Authority has been served this day, by mail, upon the following:

Gregory O'Duden
National Treasury Employees Union
1750 H Street, N.W.
Washington, D.C. 20006

Barbara A. Atkin
National Treasury Employees Union
1750 H Street, N.W.
Washington, D.C. 20006

____
Tracy Arcaro
Paralegal

February 27, 2004

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§ 7105. 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) resolve 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.

* * *

§ 7114. Representation rights and duties

* * *

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 7117. 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.

*** * ***

§ 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.

* * *

29 U.S.C. § 202. Congressional finding and declaration of policy

(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

* * *

29 U.S.C. § 203. Definitions

* * *

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means--

(A) any individual employed by the Government of the United States--

(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the Government Printing Office;

* * *

29 U.S.C. § 251. Congressional findings and declaration of policy

(a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

* * *

29 U.S.C. § 254. Relief from liability and punishment under the Fair Labor Standards Act of 1938 . . .

(a) Activities not compensable. Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act [enacted May 14, 1947]--

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom. Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either--

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

* * *

5 C.F.R. § 551.101. General

* * *

(b) This part contains the regulations, criteria, and conditions that the Office of Personnel Management has prescribed for the administration of the Act. This part supplements and implements the Act, and must be read in conjunction with it.

5 C.F.R. § 551.412. Preparatory or concluding activities

(a)(1) If an agency reasonably determines that a preparatory or concluding activity is closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than 10 minutes per workday, the agency shall credit all of the time spent in that activity, including the 10 minutes, as hours of work.

(2) If the time spent in a preparatory or concluding activity is compensable as hours of work, the agency shall schedule the time period for the employee to perform that activity. An employee shall be credited with the actual time spent in that activity during the time period scheduled by the agency. In no case shall the time credited for the performance of an activity exceed the time scheduled by the agency. The employee shall be credited for the time spent performing preparatory or concluding activities in accordance with paragraph (b) of §§ 551.521 of this part.

(b) A preparatory or concluding activity that is not closely related to the performance of the principal activities is considered a preliminary or postliminary activity. Time spent in preliminary or postliminary activities is excluded from hours of work and is not compensable, even if it occurs between periods of activity that are compensable as hours of work.

5 **C.F.R. § 551.422. Time spent traveling**

* * *

(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.

* * *

29 C.F.R. § 785.34. Effect of section 4 of the Portal-to-Portal Act

The Portal Act provides in section 4(a) that except as provided in subsection (b) no employer shall be liable for the failure to pay the minimum wage or overtime compensation for time spent in "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Subsection (b) provides that the employer shall not be relieved from liability if the activity is compensable by express contract or by custom or practice not inconsistent with an express contract. Thus traveltime at the commencement or cessation of the workday which was originally considered as working time under the Fair Labor Standards Act (such as underground travel in mines or walking from time clock to work-bench) need not be counted as working time unless it is compensable by contract, custom or practice. If compensable by express contract or by custom or practice not inconsistent with an express contract, such traveltime must be counted in computing hours worked. However, ordinary travel from home to work (see §§ 785.35) need not be counted as hours worked even if the employer agrees to pay for it.

UNPUBLISHED NINTH CIRCUIT DECISION

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.

UNITED POWER TRADES ORGANIZATION
Petitioner,
v.
FEDERAL LABOR RELATIONS AUTHORITY
Respondent.

No. 93-70827.

Argued and Submitted March 17, 1995.
Decided May 23, 1995.

Petition to review a decision from the Federal Labor Relations Authority, FLRA No. 48-FLRA291.

FLRA

AFFIRMED.

Before: FLETCHER, REINHARDT, and NOONAN, Circuit Judges.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

****1** The United Power Trades Organization (Union) contests a determination by the Federal Labor Relations Authority (FLRA) that a bargaining proposal regarding license fees conflicted with federal law or a government-wide rule or regulation and was therefore non-negotiable under section 7117(a)(1) of the Federal Service Labor-Management Statute Act.

Background

During collective bargaining between the Union and the United States Department of the Army, Army Corps of Engineers (Army), the Union sought to negotiate with the Army over the following proposal:

> The Agency shall reimburse bargaining unit employees for any license fees they are required to pay, i.e.: motor vehicle licenses, sewage treatment licenses, and the like, provided that the employer requires the employees to hold such licenses as a condition of employment.

The Army refused to bargain over the proposal, concluding that it was non- negotiable because the proposal was inconsistent with federal law. Under section 7117(a)(1) of the Federal Service Labor-Management Statute Act ("the FSLMS" or "the Act"), unions and government agencies may bargain only over matters that are "not inconsistent with any federal law or any government-wide rule or regulation." See also Bureau of Alcohol, Tobacco, and Firearms v. FLRA, 464 U.S. 89, 92 (1983). The Union subsequently sought and obtained a decision by the FLRA concerning the negotiability of the proposal. That decision did not aid the Union's cause.

The FLRA confirmed the Army's conclusion that the provision was non-negotiable because it conflicted with existing federal law. The FLRA based its conclusion upon its holding in National Association of Government Employees v. U.S. Department of the Navy, 47 FLRA 750, 755-56 (1993). In National Association of Government Employees, the FLRA concluded that a provision regarding license and permit fees was not negotiable because it was inconsistent with a government-wide rule or regulation; in reaching this conclusion, the FLRA relied upon the decisions of the Comptroller General, who had determined that such expenses constituted personal expenses that were not

reimbursable by the agency. Id. According to the Comptroller General, license fees and the like may be reimbursed only when explicit statutory authority provides for such payments. See, e.g., 61 Comp. Gen. 357; 49 Comp. Gen. 450; 36 Comp. Gen. 621.

The Union raises two arguments on appeal. First, it interprets section 7117 -- the provision of the FSLMS that requires bargaining proposals to be consistent with federal law or government-wide rules and regulations -- to apply only to proposals that are already governed by the rules or regulations of the negotiating agency. Under the Union's theory, because the Army has not promulgated any specific regulations concerning the reimbursement of license fees, the proposal in question does not conflict with the requirements of section 7117. This novel interpretation of section 7117, however, is contrary to existing Ninth Circuit and Supreme Court precedent, which hold that section 7117(a)(1) and other provisions of the FSLMS impose a general duty to bargain in good faith but prohibit government agencies from bargaining over any matter that is inconsistent with federal laws or government-wide rules or regulations; they do not limit this consistency requirement to matters that are the subject of a rule or regulation promulgated by the agency involved. See, e.g., Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 93 (1983); United States Department of Interior, 870 F.2d at 555; California National Guard v. FLRA, 697 F.2d 874, 877 (9th Cir. 1983). Indeed, the Union has failed to cite any authority in support of its novel proposition.

****2** Second, the Union argues that, even if section 7117 applies, the FLRA erred in rejecting the proposal because, in its own words, "the lack of any specific statutory authority to expend funds is no bar to negotiations over a proposal requiring the expenditure of funds where the Statutes (5 U.S.C. § § 5536 and 7117(a)) generally authorize negotiations over personnel policies, practices and general conditions of employment." In making this argument, however, the Union does not contest the Comptroller General's decisions that explicit statutory authorization for an agency is required to spend federal funds upon license fees, nor does it argue that the Comptroller General's decision is not a binding government-wide rule or regulation within the meaning of section 7117(a)(1). Indeed, the Union does not indicate that it wishes to contest or disturb the Comptroller General's decisions on this point in any way. Instead, it asks us to hold that the Act's general statutory authorization to bargain over conditions of employment -- which makes no mention of license or other fee payments and which expressly limits bargaining to topics that are consistent with existing government-wide rules and regulations -- satisfies the Comptroller General's requirement that a statute explicitly authorize payment of license fees in order to expend federal funds upon them. Given that the Union has failed to contest either the decisions of the Comptroller General regarding the need for an explicit provision authorizing the payment of license fees or the determination of the FLRA that those decisions represent a government-wide rule or regulation within the meaning of section 7117, we find the Union's argument that the general provisions of the FSLMS satisfy the Comptroller General's requirement to be unconvincing, as well as unsupported by the language or legislative history of the Act or by existing caselaw. Accordingly, the FLRA's decision that the license fee proposal is inconsistent with an existing government-wide rule or regulation, and therefore non-negotiable, is

AFFIRMED.

60 F.3d 835 (Table), 1995 WL 314697 (9th Cir.), Unpublished Disposition

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