ORAL ARGUMENT SCHEDULED FOR FEBRUARY 7, 2005

No. 04-1137

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 OF THE FEDERAL LABOR RELATIONS AUTHORITY

_____

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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ORAL ARGUMENT SCHEDULED FOR NOVEMBER 19, 2005

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the National Treasury Employees Union (NTEU) and the United States Department of the Treasury, Customs Service, Washington, D.C. (Customs). NTEU is the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *United States Department of the Treasury, Customs Service, Washington, D.C. and National Treasury Employees Union*, Case No. O-AR-3636, decision issued on February 27, 2004, reported at 59 F.L.R.A. (No. 128) 703.

C. Related Cases

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

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

GLOSSARY

ACT	*Association of Civilian Technicians v. FLRA*, 353 F.3d 46 (2004)
Authority	Federal Labor Relations Authority
Bastrop	*Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 F.L.R.A. 848 (1999)
Chevron	*Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)
COPRA	Customs Officers Pay Reform Act
Customs Miami District	*United States Customs Service Region IV, Miami District, Miami Fla.*, 38 F.L.R.A. 838 (1990)
Customs or agency	United States Customs Service
Dep't of Justice	*FLRA v. United States Dep't of Justice*, 994 F.2d 868 (D.C. Cir. 1993)
E.O.	Executive Order
Interior	*NFFE & FLRA v. Dep't of the Interior*, 526 U.S. 86 (1999)
Marine Corps Logistics Base	*Dep't of the Navy, Marine Corps Logistics Base, Albany, Ga. v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992)
NTEU or union	National Treasury Employees Union
Pet. Br.	Petitioner's brief
POPA	*Patent Office Prof'l Ass'n v. FLRA*, 699 F.2d 1280 (D.C. Cir. 1995)

GLOSSARY
(Continued)

Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
Wright Patterson AFB	*United States Dep't of the Air Force, Headquarters, Air Force Base, Ohio*, 36 F.L.R.A. 524 (1990)

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STATEMENT OF JURISDICTION

The decision under review in this case was issued by the Federal Labor Relations Authority (Authority) on February 27, 2004. The Authority's decision is published at 59 F.L.R.A. 703. A copy of the decision is included in the Joint Appendix (JA) at JA 271-296. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(H) 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.

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

STATEMENT OF THE ISSUE

Whether the Authority reasonably determined that the United States Customs Service had no obligation to bargain over a union proposal requiring Customs to combine impact and implementation bargaining over an exercise of a reserved management right with the negotiation of a term agreement.

STATEMENT OF THE CASE

This case arose as an arbitration proceeding conducted pursuant to § 7121 of the Statute and the collective bargaining agreement between National Treasury Employees Union ("NTEU" or "union") and the United States Customs Service ("Customs" or "agency").[2] The union filed a grievance alleging that Customs violated § 7116(a)(5) of the Statute and relevant collective bargaining agreements when Customs unilaterally implemented a revised National Inspectional Assignment Policy. After the arbitrator held that Customs improperly implemented the revised policy, Customs filed exceptions with the Authority pursuant to § 7122 of the Statute. On exceptions, the Authority determined that the arbitrator had erred in his determination and set aside the award.

[2] At the time this case was initiated, Customs was a Bureau within the Department of the Treasury. Pursuant to the Homeland Security Act of 2002 (Pub. L. 107-296; 6 U.S.C. §§ 101 *et seq.*), the United States Customs Service transferred to the United States Department of Homeland Security, Customs and Border Protection. *See* 6 U.S.C. § 203(a)(1).

NTEU now seeks review of the Authority's decision and order pursuant to § 7123(a) of the Statute.

STATEMENT OF THE FACTS

A. Background

This case concerns a collective bargaining dispute that arose in July 2001 when Customs proposed to revise its National Inspectional Assignment Policy (NIAP). NTEU is the exclusive representative of a nationwide unit of Customs employees, including Customs inspectors. Although the national collective bargaining agreement (term agreement) had expired in 1999, the parties were adhering to its provisions when the instant dispute arose.[3] JA 272.

The NIAP had been developed in response to the 1993 enactment of the Customs Officers Pay Reform Act (COPRA), codified at 19 U.S.C. § 267. Subsequent to COPRA's enactment, NTEU and Customs established a joint labor-management committee to develop policies governing the assignment of inspectors to tours of duty and overtime work. The committee developed the NIAP, which

[3] Under well-established law, contract provisions concerning mandatory subjects of bargaining continue in effect after an agreement expires until those provisions are renegotiated. *United States Border Patrol, Livermore Sector, Dublin Cal.*, 58 F.L.R.A. 231, 233 (2002). However, provisions concerning permissive subjects of bargaining may be unilaterally terminated by either party upon expiration of the agreement. *Id.* at n.5.

Customs implemented in 1995. The NIAP was developed independently of the parties' term agreement. JA 272-73.

At the time the NIAP was being developed, Executive Order (E.O.) 12871, 58 Fed Reg. 52,201 (Oct. 1, 1993), was in effect. E.O. 12871 directed federal agencies to bargain with exclusive representatives of their employees over the permissive subjects enumerated in § 7106(b)(1) of the Statute. However, E.O. 12871 was rescinded in February 2001 by E.O. 13203, 66 Fed. Reg. 11, 227 (Feb. 17, 2001). In July 2001, Customs informed NTEU that Customs would no longer bargain over § 7106(b)(1) matters. Subsequently, on August 2, 2001, Customs informed NTEU that Customs was no longer bound by provisions of agreements that pertained to § 7106(b)(1) matters. The notice also stated that the NIAP contained a number of such provisions and transmitted a revised NIAP for NTEU's consideration. The agency informed the union that it intended to implement the revised NIAP on September 30, 2001. JA 273-74.

On August 6, 2001, the union invoked its right to negotiate over the impact and implementation of the agency's decision to change the NIAP. Further, the union indicated that it was serving notice of its intent to renegotiate the expired term agreement. On August 16, 2001, the agency reiterated its desire to commence and conclude negotiations on the revised NIAP prior to its intended

implementation date of September 30, 2001. The following day, the union informed the agency that it intended to reopen negotiations on a number of provisions in the term agreement, contending that most of those provisions had a direct connection to the NIAP and the agency's determination to terminate matters pertaining to § 7106(b)(1). JA 273

On August 22, 2001, the agency responded that it was prepared to negotiate ground rules for the renegotiation of the term agreement, but stated there was no need to negotiate ground rules for bargaining over the revised NIAP negotiations because the parties were still bound by Article 37 of the expired agreement which provided ground rules for negotiating management-initiated changes. In response, the union proposed that the negotiations over the term agreement and the revised NIAP be combined. JA 273

By letter dated August 31, 2004, the Agency reiterated its position that it wished to implement the revised NIAP on September 30 and that negotiations over the NIAP were governed by Article 37 of the expired term agreement. Customs refused to combine the negotiations as requested by the union. Customs invited the union to present any proposals related to the NIAP, so that bargaining could be concluded in a timely manner. However, the union continued to press its position

that the revised NIAP should be addressed in conjunction with the term agreement negotiations. JA 273.

On September 6, the Customs Service informed the union that delaying implementation of the revised NIAP was unacceptable and that it would not delay implementation of the NIAP until the parties completed renegotiation of the term agreement. The agency also indicated that, notwithstanding its intent to implement the revised NIAP, it was willing to discuss the revised NIAP during term negotiations. JA 275.

Contending that the parties were at impasse over ground rules, the union sought assistance from the Federal Mediation and Conciliation Service on September 6, 2004. After one session with a mediator, the union requested assistance from the Federal Service Impasses Panel (Panel), claiming that the parties were at impasse over the union's proposal to simultaneously negotiate on the revised NIAP and the NLA.[4] JA 275.

On October 1, Customs implemented the revised NIAP. Because the union declined to bargain over NIAP separately from negotiations over the term agreement, no substantive negotiations over the policy were ever conducted. The Union subsequently filed a grievance alleging that the implementation of the

[4] The Panel ultimately declined to assert jurisdiction over the dispute. JA 275 n.8.

revised NIAP violated the NIAP, § 7116(a)(1) and (5) of the Statute, and various provisions of the parties' term agreement. After the parties could not resolve the grievance, it was submitted to arbitration. JA 275.

B. Arbitrator's Award

According to the arbitrator, the principal issue before him was whether Customs violated § 7116 of the Statute and various collectively bargained provisions when it implemented the revised NIAP. The arbitrator held that the NIAP was a product of negotiations and could only be revised through negotiations. Further, the arbitrator stated that he "[wa]s not convinced" that Customs was entitled to revise the NIAP "solely as an exercise of its management rights." Finding that negotiations had not been exhausted, the arbitrator concluded that Customs improperly implemented the revised NIAP. JA 275-76

As to remedy, the arbitrator concluded that a status quo ante remedy would be unduly disruptive and would affect public safety. Accordingly, the arbitrator found that an order for prospective bargaining would be appropriate. JA 276.

Both NTEU and Customs filed exceptions to the arbitrator's award with the Authority.

C. The Authority's Decision

On exceptions, the Authority set aside the arbitrator's award.[5] According to the Authority, the issue in the case was whether Customs could legally refuse to bargain over the union's proposal requiring Customs to combine the proposed impact and implementation bargaining over the revised NIAP with the renegotiation of the term agreement. The Authority concluded that the union's proposed ground rule constituted a permissive subject of bargaining and, accordingly, Customs was under no obligation to bargain over combining negotiations over the NIAP with bargaining over the National Agreement. Because Customs had the right to insist that the bargaining over the NIAP proceed independently, it was authorized to implement the NIAP in the face of the union's insistence on bargaining the NIAP in conjunction with term negotiations. JA 283-84.

Citing *Dep't of the Navy, Marine Corps Logistics Base, Albany, Ga. v. FLRA*, 962 F.2d 48, 50 (D.C. Cir. 1992) (*Marine Corps Logistics Base*), the Authority noted that where, as in this case, an agency action constitutes the exercise of a management right under § 7106(a) or 7106(b)(1) of the Statute, the agency's obligation is limited to bargaining over the procedures governing the

[5] Because the Authority set aside the arbitrator's award, it did not address the union's exceptions that concerned the remedy.

exercise of the right, under § 7106(b)(2) of the Statute, and appropriate arrangements for employees adversely affected by the exercise of the right, under § 7106(b)(3).[6] According to the Authority, this limitation reflects a compromise between management's right to act within certain specified areas and the union's right to provide input into any decision affecting the conditions of employment of bargaining unit employees (citing *Marine Corps Logistics Base*, 962 F.2d at 50 n.1). Further, the Authority stressed that under these circumstances the agency is required to bargain only over matters that address the particular change proposed (citing *United States Dep't of the Interior, Minerals Management Serv., New Orleans, La.*, 969 F.2d 1158, 1162 (D.C. Cir. 1992)). JA 284-85.

The Authority looked to this Court's decision in Dep't of Justice for further guidance, noting that in that case, the Court held that an agency did not commit an unfair labor practice by failing to bargain over a matter that was unrelated to the change in working conditions that triggered the obligation to bargain impact and implementation. The Court held, the Authority stated, that the scope of impact bargaining does not extend to proposals that do not address "the reasonably

[6] The obligation to bargain over the effects of the exercise of a management right is referred to as "impact and implementation" bargaining. *See FLRA v. United States Dep't of Justice*, 994 F.2d 868,872 (D.C. Cir. 1993) (*Dep't of Justice*).

foreseeable adverse effects that flow from some management action" (citing *Dep't of Justice*, 994 F.2d at 872). JA 286-87.

The Authority then stated that this limitation on the scope of impact and implementation bargaining is no different when the question, as here, concerns an agency's obligation to bargain over the ground rules for negotiating over the impact and implementation of an exercise of a management right. In this regard, the Authority noted that the negotiation of ground rules is a part of the collective bargaining process and the mutual obligation of the parties to negotiate in good faith (citing *Harry S. Truman Memorial Veterans Hospital, Columbia, Mo.*, 16 F.L.R.A. 944, 945 (1984)). The Authority further noted, however, that this principle has an important qualification attached; namely, that because "the obligation to bargain over ground rules is inseparable from the parties' mutual obligation to bargain in good faith, . . . a party may not insist on bargaining over ground rules which do not enable the parties to fulfill their mutual obligation" (quoting *United States Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 F.L.R.A. 912, 916 (1990). According to the Authority, the duty to bargain over ground rules must be consistent with the parties' obligation to bargain in a particular case. JA 287-88.

Applying these principles to the instant case, the Authority framed the issue to be decided as whether the union's proposed ground rule is consistent with the parties' mutual obligation to bargain the impact and implementation of the proposed revisions to the NIAP. The Authority found that it was not. The union proposed, as a condition precedent to bargaining over the impact and implementation of the revised NIAP, that the agency agree to bargain that matter as a part of bargaining over a new term agreement. Examining the record, the Authority found that bargaining over a new term agreement would extend beyond the narrow scope of issues related to the procedures and appropriate arrangements governing implementation of the revised NIAP. The Authority noted in this regard that although NTEU identified provisions of the term agreement that related to the NIAP that it wished to discuss in term negotiations, it also demanded to bargain over provisions of the term agreement unrelated to the NIAP. Accordingly, the Authority concluded that the union's proposed ground rule exceeded the scope of impact and implementation bargaining, and the agency had no obligation to bargain over that ground rule. JA 288.

Moreover, the Authority held that the union's proposed ground rule would constitute a waiver of the Agency's right to bargain only over those procedures and appropriate arrangements that address the revised NIAP. Accordingly, the

Authority concluded that the ground rules proposal concerned a permissive subject of bargaining (citing *United States Food and Drug Admin., Northeast and Mid-Atlantic Regions*, 53 FLRA 1269, 1274 (1998) for the proposition that a proposal requiring a party to waive a statutory right is a permissive matter). The Authority concluded therefore that because the union had conditioned bargaining over the impact and implementation of the revised NIAP on the agency bargaining over a new term agreement, a matter outside the scope of the agency's impact and implementation bargaining obligation, the agency did not violate the Statute by implementing the revised NIAP on October 1, 2001. JA 288-89.

In reaching this conclusion, the Authority observed that requiring agencies to bargain a ground rule conditioning impact and implementation bargaining on the negotiation of a term agreement would frustrate the compromise that Congress enacted in § 7106. Specifically, the Authority stated that a rule of this nature would tie the exercise of a management right to bargaining over objectives having nothing to do with the exercise of that right. Further, according to the Authority, if unions could condition impact and implementation bargaining on the completion of unrelated bargaining, unions would posses the power to unduly delay the exercise of management rights, a result inconsistent with Congress's goal of promoting an effective and efficient government. JA 289-90.

The Authority concluded that Customs' implementation of the revised NIAP, in the face of a proposal over which it was not obligated to bargain, was not a violation of the Statute. Because the Arbitrator erred as a matter of law in finding that the Agency improperly implemented the revised NIAP, his award was set aside.[7] JA 291-92.

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §7123(c), incorporating 5 U.S.C. § 706(2)(A); *Overseas Educ. Ass'n, Inc. v. FLRA*, 858 F.2d 769, 771-72 (D.C. Cir. 1988). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (*Chevron*). A court should defer to the Authority's construction as long as it is reasonable. See id. at 845.

As the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "'special function of applying the general

[7] In light of its determination, the Authority did not address Customs' alternative arguments, *i.e.*, that it was free to implement the revised NIAP to maintain the necessary functioning of the agency or because of the national emergency created by the attacks of September 11, 2001. JA 292 n. 21.

provisions of the [Statute] to the complexities' of federal labor relations." *NFFE & FLRA v. Dep't of the Interior*, 526 U.S. 86, 99 (1999) (internal citations omitted) (Interior). At issue in this case is whether the agency has an obligation to bargain over the union's proposal to merge impact and implementation bargaining over the revised NIAP with negotiations over the expired term agreement. In that regard, "Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Patent Office Prof'l Ass'n v. FLRA*, 47 F.3d 1217, 1220 (D.C. Cir. 1995) (POPA) (quoting *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983)).

SUMMARY OF ARGUMENT

As the Authority properly determined, the United States Customs Service had no obligation to bargain over the union's proposal requiring that Customs combine negotiations concerning the impact and implementation of its reserved decision to revise the NIAP with the renegotiation of the parties' multi-subject term agreement. Accordingly, Customs legally implemented the revised NIAP in the face of the union's refusal to proceed with any negotiations unless negotiations were combined. The Authority's determination is this regard is well-grounded in the language and purposes of the Statute.

1. It is well established that where, as here, an agency proposes to change conditions of employment as an exercise of its reserved rights under § 7106(a) and (b)(1) of the Statute, the agency's obligation to bargain is limited to the impact and implementation of that change. As this Court has firmly held, in the context of impact and implementation bargaining, an agency cannot be compelled to bargain over matters that are unrelated to the specific exercise of a management right that triggered the obligation to bargain in the first place. See *Dep't of Justice*, 994 F.2d at 872. Here, however, the union is attempting, through the use of a ground rules proposal, to require precisely what Dep't of Justice prohibits, i.e., the conditioning of impact and implementation bargaining on the negotiation of unrelated matters.

In enacting § 7106 of the Statute, Congress attempted to strike a delicate balance between the need for federal agencies to effectively and efficiently manage their operations and the rights of employees to participate, through their unions, in workplace decisions. The Authority reasonably held that permitting unions to condition negotiations over the exercise of a reserved right on wholly unrelated matters upsets the balance Congress so carefully crafted.

2. NTEU mistakenly contends that the Authority's decision rests on two erroneous premises. According to the union, the decision to revise the NIAP did not constitute an exercise of a reserved right and, in any event, this Court's

decision is *Dep't of Justice* has no application with respect to ground rules proposals. The union is mistaken on both counts.

A. The union does not (see Br. 30-31), and cannot, deny that the decision to revise the NIAP involved the exercise of management rights under § 7106(a) and (b)(1). Rather, the union contends that because certain specifics of the proposed revised NIAP implicated matters that, considered by themselves, were not the exercise of a management right, it is improper to hold, as the Authority did, that NIAP negotiations could not be limited to related impact and implementation matters. The union's position is unsupported and illogical.

First, NTEU points to no applicable precedent that sustains its position. Second, the union's theory would severely constrain an agency's exercise of its management rights. Under the union's theory, whenever an agency's exercise of a management right would implicate some conditions of employment that might be, considered apart from the agency's exercise of its right, substantively negotiable, the agency's bargaining obligation could be expanded beyond impact and implementation matters related to the exercise of the right. Adoption of such a theory would unduly constrain and perhaps nullify the ability to exercise management rights that Congress deemed a necessity. For example, in this case, permitting the union to insist to impasse that the agency complete bargaining not

only on the effects flowing from the agency decision, but also on a host of unrelated matters, could significantly delay implementation of the agency's decision.

B. Contrary to the union's contentions, the Authority properly applied its own precedent and that of this Court. As discussed above, the Authority's decision represents a reasonable application of the principles set forth in Dep't of Justice. The union cites no precedent for the proposition that it could accomplish through ground rules what *Dep't of Justice* prohibits. Further, the Authority's decision is consistent with precedent specifically related to the negotiability of ground rules. Under such precedent, ground rules proposals must "further, not impede, the bargaining for which the ground rules are proposed." *Wright-Patterson AFB*, 36 F.L.R.A. at 533. The Authority reasonably held that conditioning impact and implementation bargaining on unrelated matters impedes the impact and implementation bargaining.

ARGUMENT

THE AUTHORITY REASONABLY DETERMINED THAT THE UNITED STATES CUSTOMS SERVICE HAD NO OBLIGATION TO BARGAIN OVER A UNION PROPOSAL REQUIRING CUSTOMS TO COMBINE IMPACT AND IMPLEMENTATION BARGAINING OVER AN EXERCISE OF A RESERVED MANAGEMENT RIGHT WITH THE NEGOTIATION OF A TERM AGREEMENT

The Authority correctly held that the agency was not required to bargain over the union's proposal requiring that impact and implementation bargaining over the revised NIAP be combined with the renegotiation of the term agreement. Consequently, the Authority was also correct when it ruled that the agency's implementation of the NIAP in the face of that proposal was not a violation of the Statute.

The union's arguments to the contrary are without merit. NTEU disagrees with the Authority's holding, contending (Br. 21) that the Authority's decision rests on two "legally erroneous premises," namely, that the proposed revision to the NIAP constituted an exercise of a reserved management right and that under this Court's reasoning in *Dep't of Justice*, there was no obligation to bargain over the union's proposal. The union's contentions are based on a faulty understanding of the legal principles applicable to this case and should be rejected.

A. The Authority's Decision Is Consistent With Applicable Law And Precedent

The Authority's decision, holding that the union's proposal was outside the agency's obligation to bargain, is well grounded in the precedent of the Authority and this court. Initially, the extent to which an agency is required to bargain over changes in conditions of employment depends on the nature of the proposed change. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 F.L.R.A. 848, 852 (1999) (*Bastrop*); see also *Marine Corps Logistics Base*, 962 F.2d at 50. Where, as here, an agency decision to change conditions of employment entails the exercise of a reserved management right under § 7106 of the Statute, that decision is not itself negotiable and the bargaining obligation is limited to the impact and implementation of that decision. *Bastrop*, 55 F.L.R.A. at 852; *Marine Corps Logistics Base*, 962 F.2d at 50. Phrased in terms of the proposals falling within an agency's obligation to bargain, it is well established that where the obligation to bargain is triggered by an agency's determination to change conditions of employment pursuant to its management rights, the agency is required to bargain only over proposals that address the effects of that change. See, e.g., *Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 22 F.L.R.A. 502, 506 (1986); see also *Dep't of Justice*, 994 F.2d at 872.

The contested proposal in this case was a ground rules proposal. That is, the proposal does not pertain to the effects of the agency's proposed change, but rather sought to establish the "framework" for the impact and implementation bargaining to follow. *Dep't of Health and Human Serv., Region VII, Kansas City, Mo.*, 14 F.L.R.A. 258, 259 (1984). The Authority's determination that the union's ground rules proposal was outside the agency's obligation to bargain was consistent with the Authority's precedent concerning the negotiability of ground rules proposals. As the Authority emphasized, the obligation to bargain ground rules is part of the obligation to bargain in good faith. Thus, a party may not insist to impasse on ground rules that do not enable the parties to fulfill the underlying obligation to bargain. See *United States Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 F.L.R.A. 912, 916 (1990). Accordingly, the allowable scope of mandatorily negotiable ground rules proposals depends on the nature of the obligation to bargain in any particular case.

In this regard, to the extent the revised NIAP was a product of the agency's exercise of its management rights, the obligation to bargain was limited to the impact and implementation of the revised policy. Because the union's ground rules proposal conditioned that bargaining on unrelated matters, namely the negotiation of the multi-subject term agreement, the ground rules proposal went

beyond, and was inconsistent with, the agency's underlying bargaining obligation in this case. Accordingly, the agency was under no obligation to bargain over the matter.[8] By continuing to insist that the negotiations be combined and declining to negotiate any aspect of the NIAP separately, the union acted at its peril.

Further, the Authority's conclusion in this case, namely that an agency cannot be compelled to combine negotiations over the impact and implementation of the exercise of a management right with negotiations over unrelated matters is consistent with the language and underlying policies of § 7106 of the Statute. As this Court has recognized, by reserving certain management rights to agencies, but tempering the exercise of those rights through the requirement of impact and implementation bargaining, Congress sought to strike a compromise between an agency's need to manage itself efficiently and the employees' right to participate in the decisions that affect them. *Marine Corps Logistics Base*, 962 F.2d at 50-51 n.1. The court characterized this compromise as a delicate balance that could be "easily upset by an untoward shift of power to either party[.]" Id.

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[8] As the Authority properly concluded, the Agency could have agreed to combine the negotiations. But because the agency had the right under the Statute to limit negotiations relating to the exercise of its management rights to the impact and implementation of the change, the union's proposal concerned a permissive subject of bargaining. *See United States Food and Drug Admin., Northeast and Mid-Atlantic Regions*, 53 F.L.R.A. 1269, 1274 (1998) (holding that proposals requiring the waiver of a statutory right are permissibly negotiable). See JA 288-89.

Permitting impact and implementation bargaining to be conditioned on the negotiation of unrelated matters as the union proposes here upsets this balance. Tying impact and implementation bargaining to negotiations, and perhaps impasse resolution procedures, on unrelated matters impedes the agency's ability to exercise its rights in a timely and effective manner without appreciably furthering the union's statutory prerogatives. The Authority has previously recognized the potential for adverse consequences of overly expansive ground rules, noting that "ground rules proposals must, at a minimum, be designed to further, not impede, the bargaining for which the ground rules are proposed." *United States Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 36 F.L.R.A. 524, 533 (1990) (*Wright Patterson AFB*).

B. The Union's Arguments are Without Merit

As noted above, the union contends that the Authority's reasoning is flawed because it rests on two erroneous premises, namely that: 1) Customs was exercising a reserved management right when it proposed to revise NIAP; and 2) this Court's reasoning in *Dep't of Justice* supports the conclusion that there is no obligation to bargain over a ground rules proposal combining impact and implementation bargaining with negotiations over a multi-subject term agreement. Neither of the union's contentions have merit.

1. The Authority Correctly Determined That the Decision to Revise the NIAP Involved the Exercise of a Reserved Management Right

Contrary to the union's contentions, the Authority properly determined that Customs' decision to revise the NIAP involved the exercise of Customs' reserved management rights. As the Authority determined (JA 285 n. 16) and the union concedes (Br. 30 and 31), the revised NIAP includes criteria for the assignment of work, reserved to agency management under § 7106 (a)(2)(A) of the Statute, and matters within the scope of § 7106(b)(1).[9] Further, the actual determination to revise the NIAP was triggered by Customs' decision to exercise its right under the Statute to disavow all agreements relating to § 7106(b)(1) matters. JA 27, 46. As noted above (p. 3 n.3), once an agreement expires, a party may unilaterally terminate provisions concerning permissive subjects of bargaining.[10] *United States Border Patrol, Livermore Sector, Dublin Cal.*, 58 F.L.R.A. 231, 233 n. 5. (2002).

[9] The subjects enumerated in § 7106(b)(1) are matters agencies may, but are not required to, bargain over, *i.e.*, permissive subjects of negotiation. A decision related to 7106(b)(1) matters is an exercise of a management right that triggers an obligation to bargain impact and implementation. *See Ass'n of Civilian Technicians, Mont. Air Chapter v. FLRA*, 756 F.2d 172, 180 (D.C. Cir. 1985).

[10] The union has not contested either before the Authority or the Court that terminating the permissive provisions of the NIAP was within the agency's right.

Accordingly, the Authority properly determined that the agency's decision to revise the NIAP involved the exercise of its rights reserved under the Statute.

The union objects, however, that because some of the provisions of the revised NIAP proposed by Customs do not themselves constitute an exercise of a management right, the basic decision to revise the NIAP cannot constitute an exercise of a management right. The union's position is not supported by precedent or logic and is contrary to the intent of Congress.

Precedent does not support the proposition that an agency decision to exercise a management right and make a change triggers more than the obligation to bargain over the impact and implementation of that change. The case relied upon by NTEU, *United States Dep't of the Treasury, Customs Service Region IV, Miami District, Miami, Fla.*, 38 F.L.R.A. 838 (1990) (*Customs Miami District*) is inapposite. Unlike the case here, the entirety of the proposed change in conditions of employment in that case constituted a fully negotiable matter.

In *Customs Miami District*, the agency proposed a revision to its inspectional rotational policy, i.e., the length of time an employee would be assigned to a specific class of duties (e.g. baggage inspection) before being "rotated" to a different class of duties (e.g., cargo inspection). 38 F.L.R.A. at 839. The Authority held in *Customs Miami District* that proposals concerning the length

of rotation assignments of equally qualified employees do not interfere with management's right to assign work and consequently the union's proposal was fully negotiable. Id. at 842-843. Because *Customs Miami District* dealt with a fully negotiable matter, it is inapposite. Moreover, it clearly does not support the proposition for which the union cites it: namely that where, as here, agency notice concerning the exercise of a management right implicates procedures and other specific matters related to that decision that themselves do not constitute the exercise of the right, the agency decision can no longer be properly characterized as an exercise of a management right.

The union's error is that it conflates the agency's bargaining obligation regarding the agency's exercise of its reserved rights under the Statute with the negotiability of specific matters affected by the agency's exercise of those rights. Here the agency exercised its management rights when it determined to revise the NIAP's work assignment policies and terminate the NIAP's provisions concerning permissive subjects of bargaining. Although this determination may have affected matters related to the NIAP as to which the agency had a bargaining obligation, the agency is still entitled to implement the revision subject only to the obligation to bargain over negotiable proposals related the change.

The union appears to argue that in exercising its reserved management rights, an agency may alter only matters that interfere, to some extent, with the management right at issue. By the union's logic, other fully negotiable matters also affected by the exercise of the right could not be changed, or for that matter, bargained. The argument has two principle flaws. First, it would unduly constrain, and in some instances nullify, an agency's ability to exercise its reserved rights. Second, it would place unnecessary limits on the bargaining obligation resulting from the exercise of the right. In this regard, if in exercising a reserved management right an agency alters either a matter affecting its right or a fully negotiable matter the union is entitled to bargain over either matter. In any event, there is no legal basis for implying that the union has a right to include in these negotiations whatever matters the union may have an interest in bargaining, regardless of how unrelated those matters might be to the change proposed by the agency that created the bargaining obligation in the first place.

The union is also mistaken in its contention that the union's ground rules proposal did not affect Customs' exercise of its management's right. As indicated above, Customs' determination to revise the NIAP created a bargaining obligation, extending to a variety of matters related to the change that Customs proposed. However, the union seeks to augment the agency's statutory bargaining obligation

by conditioning implementation of the revised NIAP on unrelated matters, i.e., combined impact and implementation and term negotiations bargaining. This attempt to expand the agency's obligation to bargain in the context of impact and implementation bargaining is inconsistent with the balance Congress intended in § 7106 of the Statute.

2. The Authority Properly Applied Applicable Precedent Concerning The Negotiability Of Ground Rules And This Court's Decision In Dep't Of Justice

The union contends that, even if the agency's decision involved the exercise of a management right, the agency was nonetheless obligated to bargain over the ground rules proposal. In that regard, the union argues that the proposal meets the test for negotiable ground rules proposals established by the Authority and this Court, and that, contrary to the Authority's reasoning, this Court's decision in *Dep't of Justice* has no bearing on the issues in this case. The union's argument is based on an overly narrow reading of the relevant precedent.

The union argues (Br. 24, 42-46) that under this Court's decision in *Association of Civilian Technicians v. FLRA*, 353 F.3d 46 (D.C. Cir. 2004) (*ACT*), ground rules proposals are mandatory subjects of bargaining where they are offered in good faith and are "designed to further the bargaining process" (quoting from *ACT*, 353 F.3d at 51). The union argues that its ground rules proposal met

this test. Implicit in the union's argument is the claim that no other limitations are applicable to ground rules proposals.

Contrary to the union's arguments, the Authority reasonably held that the permissible scope of negotiable ground rules may be limited by other legal principles generally applicable to the negotiability of collective bargaining proposals. First, there is no reason to infer from either *ACT* or the Authority precedent the Court cited (*Wright-Patterson AFB*, 36 F.L.R.A. at 533) that the criteria established in those cases for the negotiability of ground rules proposals were to be exhaustive. Neither of those cases considered the issue presented to the Authority here: whether an agency can be required to bargain over a ground rules proposal requiring combining impact and implementation bargaining over a specific exercise of a management right with other unrelated bargaining. This issue was, as the Authority acknowledged (JA 284), presented here as one of first impression.

Second, the Authority's decision is wholly consistent with *Wright-Patterson AFB* and, by extension, *ACT*. The Authority reasonably held that the determination of whether a ground rules proposal "furthers" the bargaining process may be context-dependent. That is, what qualifies as furthering the bargaining process will depend upon the nature of the bargaining. As the Authority expressed

it, "the duty to bargain over ground rules must be consistent with the parties' obligation to bargain in a particular case." JA 288.

Contrary to the union's claims, *Dep't of Justice* is relevant to this case. *Department of Justice* deals with the statutory scope of bargaining over the exercise of a management right. In *Dep't of Justice*, this Court held that in the course of bargaining over the exercise of a management right, an agency is not obligated to bargain over matters unrelated to the exercise of that right. 994 F.2d at 871. Thus, there is no obligation to bargain over matters that are not either procedures to be observed in exercising the involved right or appropriate arrangements for employees adversely affected by the exercise of the right.

A ground rules proposal that would require a party to bargain over matters outside the party's obligation to bargain does not further the bargaining process. Rather, it impedes it. In that regard, the union's ground rules proposal would have required the agency to bargain over matters that were neither related procedures nor appropriate arrangements, as a precondition to satisfying the agency's impact and implementation bargaining obligation over the revised NIAP. Under *Dep't of Justice*, in the absence of such a ground rule, the union could not force the agency to bargain on unrelated matters. Plainly, the union's ground rules proposal seeks to accomplish indirectly what it could not do directly, i.e., to force the agency to

bargain, perhaps to impasse, over unrelated matters prior to being able to legally implement its decision to revise the NIAP. It is well established that a party may not achieve indirectly what the law prohibits achieving directly. See, e.g., *Bricklayers and Stone Masons Union, Local No. 2 v. NLRB*, 562 F.2d 775, 787 (D.C. Cir. 1977) (NLRB properly refused to permit union to do "by indirection what they can't obtain directly.").

NTEU does not contend that the Authority has misstated *Dep't of Justice.* Rather, NTEU contends because *Dep't of Justice* did not concern ground rules proposals, it has no application here. Although it is true that *Dep't of Justice* did not concern ground rules, that fact alone does not render *Dep't of Justice* irrelevant in a ground rules case. As discussed immediately above, *Dep't of Justice* is relevant here because it identifies a statutory limit on the scope of bargaining over the exercise of a management right and the union's proposal is inconsistent with that limitation. The Authority properly concluded that because the union's ground rules proposal permits what *Dep't of Justice* prohibits, Customs was under no obligation to bargain over the ground rules proposal.

Finally, NTEU argues that, notwithstanding the legal principles set forth in *Dep't of Justice*, its ground rules proposal should be held negotiable because it

furthers the bargaining process.[11] Essentially, NTEU contends that combining term and impact and implementation bargaining furthers the bargaining process because it would reduce redundancies, preserve resources of both parties, and provide the union with greater leverage in accord with congressional intent.

The union's comments in this regard are inapposite. Under the Authority's reasonable construction of the Statute, "ground rules proposals must, at a minimum, be designed to further, not impede, the bargaining for which the ground rules are proposed." *Wright Patterson AFB*, 36 F.L.R.A. at 533 (emphasis added). The union's ground rules proposal was in response to the agency's determination to exercise its management rights by revising the NIAP. Although it could be argued that combining negotiations may have some utility when considered in the context of term negotiations, the union fails to demonstrate how combining negotiations would facilitate bargaining over the revised NIAP, the bargaining for which the proposal was offered.[12]

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[11] The Union did not specifically contend before the Authority that the agency was obligated to bargain over its ground rules proposal because the proposal would further the bargaining process. Accordingly this argument is not properly before the Court. 5 U.S.C. § 7123(c); *see also Equal Employment Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986). Nonetheless as discussed herein, the union's arguments are unavailing.

[12] That the agency had a contemporaneous obligation to bargain over the term agreement is irrelevant. The obligation to bargain over the impact and

In sum and as demonstrated above, the Authority properly applied its precedent to determine that Customs had no obligation to bargain over the union's ground rules proposal and to conclude that Customs legally implemented the revised NIAP.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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November 2004

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implementation of the revised NIAP arose independently of the obligation to bargain over the expired term agreement.

CERTIFICATION PURSUANT TO FRAP RULE 32

Pursuant to Federal Rule of Appellate Procedure 32, I certify that the attached brief is proportionately spaced, utilizes 14-point serif type, and contains 6356 words.

_____

James F. Blandford

November 8, 2004

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

NATIONAL TREASURY EMPLOYEES UNION,	)	
Petitioner	)	
	)	
v.	)	**No. 04-1137**
	)	
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Respondent	)	

CERTIFICATE OF SERVICE

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

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_____

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November 8, 2004

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' 7105. 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 AuthorityC

* * * * * * *

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

* * * * * * *

§ 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.

' 7116. Unfair labor practices

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

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

* * * * * * *

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

* * * * * * *

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e) and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that—

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order—

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph
(A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating

to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have

been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

(4) For the purpose of this subsection, a person shall be considered to have elected—

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(h) Settlements and awards under this chapter shall be subject to the limitations in section 5596(b)(4) of this title.

§ 7122. Exceptions to arbitral awards

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

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

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

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

' 7123. Judicial review; enforcement

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

(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 side 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.

* * * * * * *