ORAL ARGUMENT NOT YET SCHEDULED

No. 05-1230

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

WILLIAM R. TOBEY
Acting Solicitor

WILLIAM E. PERSINA
Attorney

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

ORAL ARGUMENT NOT YET SCHEDULED

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, Chapter 32 (NTEU) and United States Department of the Treasury, Internal Revenue Service, Denver, Colorado (IRS). The National Treasury Employees Union is the petitioner in this court proceeding and 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, Internal Revenue Service, Denver, Colorado and National Treasury Employees Union, Chapter 32*, Case No. 0-AR-3871, decision issued on January 14, 2005, reported at 60 F.L.R.A. (No. 114) 572; reconsideration denied, 60 FLRA (No. 165) 893 (May 4, 2005).

C. Related Cases

This case was prematurely filed before this Court and was voluntarily withdrawn (*NTEU v. FLRA*, No. 05-1085 (D.C. Cir., dismissed May 2, 2005)). Counsel for the Authority is unaware of any cases pending before this Court or any other court which are related to this case.

TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS
(Continued)

Page No.

ADDENDUM

Page No.

TABLE OF AUTHORITIES

CASES

Page No.

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

TABLE OF AUTHORITIES
(Continued)

Page No.

STATUTES

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

GLOSSARY

Authority	Federal Labor Relations Authority
Chevron	*Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)
DCAA	*U.S. Dep't of Defense, Defense Contract Audit Agency, Central Region, Irving, Tex.*, 57 F.L.R.A. 464 (2001)
Interior	*Nat'l Fed'n of Fed. Employees v. Dep't of the Interior*, 526 U.S. 86 (1999)
IRS	U.S. Department of the Treasury, Internal Revenue Service
JA	Joint Appendix
Marine Corps	*Department of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992)
NTEU	National Treasury Employees Union, Chapter 32
SSA	*U.S. Department of Health and Human Services, Social Security Administration, Baltimore, MD.*, 47 F.L.R.A. 1004 (1993)
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135 (2000)
ULPs	unfair labor practices
Union	National Treasury Employees Union
USPS	*NLRB v. U.S. Postal Serv.*, 8 F.3d 832 (D.C. Cir. 1993)

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 05-1230

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

STATEMENT OF JURISDICTION

The Federal Labor Relations Authority (Authority) issued the decision under review in this case on January 14, 2005. The decision is published at 60 F.L.R.A. (No. 114) 572, and is included in the Joint Appendix (JA) at JA 11. The Authority's decision denying reconsideration of its initial decision was issued on May 4, 2005, and is published at 60 F.L.R.A. (No. 165) 893. The decision on reconsideration is at JA 5. The Authority exercised

jurisdiction over the case pursuant to § 7105(a)(2)(H) of the Federal Service Labor-Management Relations Statute (Statute).[1] This Court exercises its jurisdiction pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUE

Whether the Authority reasonably set aside an arbitration award because the award erroneously held that the Internal Revenue Service committed unfair labor practices under § 7116(a)(1) and (5) of the Statute by refusing to negotiate on a bargaining proposal, when the proposal concerned a matter that was covered by an existing negotiated agreement.

STATEMENT OF THE CASE

This case arose as an arbitration proceeding conducted pursuant to § 7121 of the Statute, and a collective bargaining agreement between the National Treasury Employees Union (Union) and the U.S. Department of the Treasury, Internal Revenue Service (IRS). As relevant here, the Union filed a grievance under the parties' negotiated grievance procedure. The grievance alleged that the IRS committed statutory unfair labor practices (ULPs), under § 7116(a)(1) and (5) of the Statute, by refusing to negotiate on a Union bargaining proposal.

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

An arbitrator sustained the grievance, and ordered the IRS to bargain on the Union's proposal. The Authority set the award aside because, contrary to the Arbitrator's holding, it concluded that the parties' existing collective bargaining agreement expressly encompassed the matter addressed in the Union's bargaining proposal. The Union then filed the petition for review of the Authority's decision that is now before the Court.

STATEMENT OF THE FACTS

A. Background

The Union and the IRS are parties to a collective bargaining agreement that covers a nationwide bargaining unit of IRS employees. (Agency Exceptions to Arbitration Award, Exh. No. 2.) This nationwide agreement covers a wide array of working conditions, including employee use of annual leave. (*Id.* at 2.) In relevant part, the annual leave article of the agreement, Article 32, § 1.C. (JA at 24), states as follows:

> Subject to its right to assign work, the Employer will resolve a conflict in requests by employees in the same occupation for scheduled annual leave by granting preference to the employee with the most service as determined by enter on duty (EOD) date. An employee's approved annual leave will not be disapproved if an employee with an earlier EOD date subsequently requests leave for the same period.

National Treasury Employees Union (NTEU), Chapter 32, administers this nationwide agreement for the Union in the State of

Colorado, including an IRS "call site" located in Denver. (JA at 43, Transcript (Tr.). at 23; JA at 59, Tr. at 151.) This call site provides responses to taxpayer telephone calls concerning tax law and taxpayer accounts. (*Id.*) There are approximately 290 employees at the call site, almost all of whom answer taxpayer telephone calls. (JA at 59, Tr. at 152.)

Based on call site staffing levels, the IRS determines centrally the volume of telephone calls to be directed to each site, including Denver. (JA at 60, Tr. at 154-55.) The IRS also centrally determines the specific staffing levels for each site, including tax law expertise, for any given time period. (*Id.*)

Given the scheduling demands imposed by the Denver call site's mission, it often occurred that employees would submit more requests for annual leave than could be granted consistent with operational needs. (JA at 44, Tr. at 32-33.) Accordingly, management at the Denver call site divided the year up into three segments (January – June, July – September, and October – December), and asked employees in advance for their leave plans during each of these periods. (JA at 60, Tr. at 156.)

Management at the Denver site would then determine if there were more leave requests for any given period of time than could be granted consistent with anticipated staffing needs. (JA at 60, Tr. 156-57.) If

conflicts did arise, they would be resolved, consistent with Article 32, § 1.C. of the national agreement, by the employees' entry on duty (EOD) date. (JA at 60, Tr. 157.) That is, a request from the employee with the earliest EOD date would prevail in case of a conflict.

The results of these leave conflict resolutions occasionally left employees dissatisfied. For example, an employee may ask for a week off, but be granted only four of the five days. (JA at 50, Tr. 82.) This dissatisfaction caused employees to be absent without leave, resulting in disciplinary actions and grievances. (JA at 44, Tr. at 33.)

In order to address the problems arising in this area, the top management official at the Denver call site, Patience Ellis, directed a subordinate manager to convene a joint union/management group to come up with suggestions to address the problems. (JA at 60, Tr. 160-61.) The group developed recommendations, and presented them to Ellis. (JA at 61, Tr. 163-64.) Included among these recommendations was a "leave-swapping program," by which an employee who had previously approved leave could transfer that leave to an employee with the same job skills who had not received approval for that time off. (JA at 27.) Employee EOD dates played no role in this leave-swapping proposal. (*Id*.)

Representatives of NTEU Chapter 32 considered these recommendations to be a collective bargaining agreement. (JA at 46, Tr. 48.) Thus, when Denver management refused to recognize the recommendations as such, NTEU Chapter 32 submitted many of the recommendations, including the leave-swapping program, to management as bargaining proposals.[2] (JA at 52, Tr. 96-97.) Denver management refused to bargain on these proposals, asserting that Article 32 of the national agreement covered the matters addressed in the proposals. (JA at 47, Tr. 55-56.)

NTEU Chapter 32 then filed a grievance alleging, as relevant here, that management's refusal to bargain over the leave-swapping proposal constituted statutory ULPs under § 7116(a)(1) and (5) of the Statute. (JA at 23.) The grievance was eventually submitted to arbitration.[3]

---

[2] Although the level of exclusive recognition was with the Union and the IRS at the national level, the parties' nationwide agreement allowed for local negotiations on matters of concern at the local IRS activity. (Agency Exceptions to Arbitration Award, Exh. No. 2, at p. 144.)

[3] Other matters alleged in the grievance, such as whether it was a statutory ULP for management to refuse to recognize the joint group's recommendations as a collective bargaining agreement, are not at issue in this case. They will not therefore be considered further in this brief.

B. The Arbitrator's Award

The arbitrator held that Article 32, § 1.C. of the nationwide agreement between the Union and IRS did not cover the leave-swapping proposal. (JA at 35.) In this connection, the arbitrator said that Article 32, § 1.C. "does not speak to the situation in which an employee chooses not to use approved leave." (*Id.*) Rather, he held, it governs "how the agency will initially assign leave." (*Id.*)

According to the arbitrator, the leave-swapping proposal, on the other hand, concerns "an entirely different subject," i.e., what happens when an employee does not want to use approved leave. (JA at 36.) Thus, the arbitrator held (*id.*), although an employee's EOD date resolves conflicts between employees who want annual leave at the same time, the leave-swapping proposal does not involve such conflicts. Rather, the proposal involves only "voluntary swaps among willing employees." (*Id.*) The EOD date is not relevant in such situations, the arbitrator held. (*Id.*)

Based on this holding, the arbitrator concluded that the IRS violated § 7116(a)(1) and (5) of the Statute when it refused to bargain on the leave-swapping proposal. (JA at 37.) He directed that the Agency bargain in good faith with the Union over the proposal. (*Id.*)

C. The Authority's Initial Decision

The Authority held that the arbitrator's award was deficient and set it aside. (JA at 17.) The Authority began its analysis by noting that in a grievance like the one in this case, alleging a statutory ULP under § 7116 of the Statute, the union bears the burden of proving all elements of the ULP violation by a preponderance of the record evidence.[4] (JA at 15.) The Authority also noted that a well-established defense to a ULP alleging a refusal to bargain in good faith is that the matter proposed to be negotiated is "covered by" a previously negotiated agreement. (*Id.*)

The Authority then set out the elements of the "covered by" doctrine. Under the first prong of the doctrine, if a party to an existing negotiated agreement seeks to negotiate on a matter that is "expressly addressed by the terms" of the agreement, then the other party may properly refuse to bargain over the matter. (JA at 15.) Under the second prong of the doctrine, if the matter proposed for bargaining is not "expressly addressed" in the existing agreement, but is nonetheless "inseparably bound up with and, thus, an

---

[4] Under § 7103(a)(9) of the Statute, a "grievance" that can be arbitrated under a negotiated grievance procedure is defined broadly as including, among other things, a complaint concerning any "claimed violation . . . of any law . . . affecting conditions of employment." Thus, as was done in this case, a grievance alleging a statutory ULP violation under § 7116(a) of the Statute is arbitrable. *E.g., U.S. Customs Serv.* v. *FLRA*, 43 F.3d 682, 684 (D.C. Cir. 1994).

aspect of" a subject covered by the agreement, then the other party may also properly refuse to bargain over the matter. (JA at 15-16.)

The Authority next considered NTEU Local 32's leave-swapping proposal. The Authority observed that the proposal would allow an employee with approved annual leave to transfer that leave to another employee, without regard to whether the employee had approved leave for that time period or whether management has approved the employee's absence. (JA at 16.) Thus, contrary to the arbitrator's conclusion, the Authority noted that the proposal dealt, not only with the disposition by an employee of previously approved leave, but also with granting leave to an employee who had not received prior approval for it. (*Id.*)

The Authority then considered Article 32, § 1.C. of the nationwide agreement. The Authority said in this connection, again contrary to the arbitrator, that by its plain terms, that provision is not just limited to the initial grant of leave, but rather concerns the Agency's role in both granting and denying leave. (JA at 16.) The agreement provision further dictates that, in the case of competing leave requests, the most senior employee must be granted the requested leave. (*Id.*)

Based on the foregoing analysis of the leave-swapping proposal and Article 32, § 1.C. of the nationwide agreement, the Authority concluded that

the proposal would "circumvent the process" established by Article 32, § 1.C., for granting leave. (JA at 16.) This was so, the Authority held, because the proposal allowed an employee with approved leave to "grant annual leave to any employee, whether or not there is a more senior employee who has requested leave for that same period." (*Id.*) Thus, because the Authority found that the standards for granting annual leave were "expressly addressed" by Article 32, § 1.C., it held that the leave-swapping proposal was covered by the agreement, and the Agency had no duty to bargain on the proposal.[5] (*Id.*) Therefore, the Authority set aside the portion of the arbitrator's award finding a ULP violation for the Agency's refusal to bargain on the leave-swapping proposal. (JA at 17.)

D. The Authority's Decision On Reconsideration

The Authority denied the Union's request for reconsideration of the Authority's initial decision. (JA at 10.) The Union argued, in relevant part, that the Authority failed to defer to the arbitrator's interpretation of Article 32, § 1.C. of the nationwide agreement. (JA at 6.)

The Authority pointed out that the Union confused two different issues. (JA at 8.) First, there was the Authority's obligation to defer to the

[5] Given this holding, the Authority noted that it did not have to consider the second prong of the "covered by" doctrine, i.e., whether the matter sought to be bargained is "an aspect of matters already negotiated." (JA at 17.)

arbitrator's interpretation of a negotiated agreement provision. Second, there was its obligation to consider *de novo* the consequences of such an interpretation in the context of resolving a statutory ULP involving application of the "covered by" doctrine. (JA at 8-9.)

In this connection, the Authority held that the arbitrator had interpreted Article 32, § 1.C. as requiring the IRS to grant leave based on seniority when there is a conflict between leave requests. (JA at 9.) The Authority said that it had, in its initial decision, accepted the arbitrator's interpretation of the agreement provision. (*Id.*) The Authority pointed out that it had simply reached a different conclusion than the arbitrator as to whether Article 32, § 1.C. "covered" the leave-swapping proposal. Thus, the Authority concluded that it disagreed with the arbitrator's application of the "covered by" doctrine, not his agreement interpretation. (*Id.*)

The Authority also rejected the Union's claim that it had not had the opportunity to address the first prong of the "covered by" test, because the IRS only raised a second-prong "covered by" argument to the Authority. (JA at 9.) The Authority first held that the IRS had, in fact, raised the first-prong issue. (*Id.*) Second, and in any event, the Authority pointed out, its finding that the leave-swapping proposal was "expressly covered" by Article

32, § 1.C. effectively constitutes a holding under the second prong, i.e., that the matter is "an aspect of" that agreement provision. (JA at 10.)

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." *Am. Fed'n of Gov't Employees, 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 provisions of the [Statute] to the complexities' of federal labor relations." *Nat'l Fed'n of Fed. Employees, Local 1309* v. *Dep't of the Interior*, 526 U.S. 86, 99 (1999) (internal citations omitted) (*Interior*). At

issue in this case is whether the IRS has an obligation to bargain over NTEU, Chapter 32's leave swapping proposal. 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) (quoting *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983)).

SUMMARY OF ARGUMENT

This case involves application of the "covered by" doctrine, articulated by this Court in *Department of the Navy, Marine Corps Logistics Base* v. *FLRA*, 962 F.2d 48 (D.C. Cir. 1992). As relevant to the instant case, this doctrine provides that an agency employer under the Statute need not bargain on a matter, if that matter is "expressly contained in" an existing negotiated agreement. Exact congruence of language between a bargaining proposal and an existing agreement provision is not required for application of the doctrine. Rather, if a "reasonable reader" would conclude that the negotiated provision "settles the matter in dispute," then the doctrine applies, and there is no duty to bargain on the proposal. *U.S. Dep't of Health and Human Serv., Soc. Sec. Admin., Balt., Md.*, 47 F.L.R.A. 1004, 1018 (1993).

The Authority in the present case correctly ruled that the leave-swapping bargaining proposal at issue concerned a matter that was "covered by" Article 32, § 1.C. of the nationwide collective bargaining agreement between the Union and IRS. In this connection, as the Authority recognized, the seniority system created in the national agreement for resolving conflicting leave requests would be "circumvent[ed]" (JA at 16) by the leave swapping proposal. More particularly, the proposal would allow an employee granted leave under the agreement provision to turn around and transfer that leave to another employee who would not have been eligible to receive the leave under the agreement. As the Authority reasonably concluded, any bargaining proposal that would effectively nullify the operation of an existing agreement provision in this way is properly deemed to concern a matter that is "expressly contained in" the agreement provision.

The Union misapprehends the issue in this case. It insists that the Authority improperly failed to accord deference to the arbitrator's interpretation of a negotiated agreement provision. In fact, what the Authority properly declined to defer to was the arbitrator's legal conclusion that the agreement provision did not "cover" the subject matter of the leave swapping proposal. The Union thus seeks to extend the arbitral deferral rule to the arbitrator's legal conclusions about whether a ULP was committed.

However, this is a province where, under the Statute, the Authority gets the final word. The Union's effort to extend arbitral deference to the arbitrator's legal conclusions should be rejected, and the Authority's decision should be upheld.

ARGUMENT

THE AUTHORITY REASONABLY SET ASIDE AN ARBITRATION AWARD BECAUSE THE AWARD ERRONEOUSLY HELD THAT THE I.R.S. COMMITTED UNFAIR LABOR PRACTICES UNDER § 7116(a)(1) AND (5) OF THE STATUTE BY REFUSING TO NEGOTIATE ON A BARGAINING PROPOSAL, WHEN THE PROPOSAL CONCERNED A MATTER THAT WAS COVERED BY AN EXISTING NEGOTIATED AGREEMENT.

A. Governing Legal Principles

The Authority held that the IRS was not obligated to bargain under the Statute on the leave-swapping proposal because, under the first prong of its "covered by" doctrine, that matter was expressly addressed in Article 32, § 1.C. of the parties' nationwide collective bargaining agreement. A brief consideration of the pertinent legal principles concerning that doctrine, as well as the principles governing Authority review of an arbitrator's resolution of statutory ULPs, will demonstrate the correctness of the Authority's holding.

1. This Court discussed the "covered by" doctrine at length in *Department of the Navy, Marine Corps Logistics Base* v. *FLRA*, 962 F.2d 48 (D.C. Cir. 1992) (*Marine Corps*). In that decision, the Court noted the Statute's policy of promoting the negotiation of collective bargaining agreements. *Marine Corps*, 962 F.2d at 59. It further observed that implicit in this statutory purpose is the need to provide parties to an agreement with "stability and repose" as to matters included in the agreement. *Id.* In short, when a party has bargained on a matter, it does not, as a matter of law, have to bargain on it again so long as the agreement provision is in effect. *Cf. NLRB* v. *U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993) (*USPS*) ("[u]nless the parties agree otherwise, there is no continuous duty to bargain during the term of an agreement with respect to a matter covered by the contract"); *Enloe Med. Ctr.* v. *NLRB*, Case No. 04-1388, 178 L.R.R.M. 2718 (D.C. Cir., Dec. 23, 2005), slip op. at 6 (to the same effect).

To promote this statutory purpose, the Court concluded in *Marine Corps* that it was too restrictive to require that a bargaining proposal be virtually identical to an existing agreement provision, in order to allow a party to refuse to bargain on the matter a second time. *Marine Corps*, 962 F.2d at 59-60. A more expansive approach was required. *Id.* at 61. The Court declined, however, to establish a definitive test for determining when

a proposal is "covered by" an existing negotiated agreement. *Marine Corps*, 962 F.2d at 62.[6]

The Authority subsequently developed such a test. In *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Md.*, 47 F.L.R.A. 1004 (1993) (*SSA*), cited by the Authority in this case (JA at 15), the Authority stated that it would decide whether a matter on which a party seeks to bargain is covered by an existing agreement by first considering whether the matter is "expressly contained" in the agreement. *SSA*, 47 F.L.R.A. at 1018. As to this first prong of the "covered by" test, and most important to resolution of the instant case, the Authority said that it "will not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute."

If the matter to be bargained on is not "expressly contained" in an existing agreement, the Authority will proceed to consider whether it is "inseparably bound up with," and thus "plainly an aspect of" a subject

---

[6] The Court went on to reverse Authority holdings that matters the union sought to bargain on were not covered by an existing negotiated agreement. *Marine Corps*, 962 F.2d at 62. The Court held that the employing agency in that case did not have to negotiate on the impact and implementation of employee details that the agency had made, because the matter of details was covered by an existing agreement. Thus, the agency employer in the case did not commit ULPs by refusing to bargain on the matter prior to making the details. *Id.*

expressly covered in by the agreement. *SSA*, 47 F.L.R.A. at 1018. In *National Treasury Employees Union* v. *FLRA*, 399 F.3d 334, 337 (D.C. Cir. 2005), this Court cited with approval the two-prong "covered by" test the Authority established in *SSA*.

2. This case also involves an arbitrator's resolution of a statutory ULP under § 7116 of the Statute. In such cases, the arbitrator "must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding under § 7118" of the Statute.[7] *U.S. Dep't of Defense, Defense Contract Audit Agency, Central Region, Irving, Tex.*, 57 F.L.R.A. 464, 465 (2001) (*DCAA*). Thus, the Authority will review an arbitrator's conclusions of law *de novo*. *E.g., Nat'l Treasury Employees Union, Chapter 24 and U.S. Dep't of the Treasury, Internal Revenue Serv.*, 50 F.L.R.A. 330, 332 (1995).

Moreover, a union in such cases has the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *DCAA*, 57 F.L.R.A. at 466. However, as in arbitration review cases not involving statutory ULPs, the Authority will defer to the arbitrator's interpretation of a negotiated agreement provision, unless that interpretation is irrational or

[7] Section 7118 of the Statute, entitled "Prevention of unfair labor practices," prescribes procedures and standards for the Authority's General Counsel, the Authority, and its administrative law judges to follow in prosecuting and deciding ULPs enumerated in § 7116 of the Statute.

implausible. *Nat'l Treasury Employees Union, Chapter 168 and U.S. Dep't of the Treasury, Customs Serv., Port of Baton Rouge, La.*, 55 F.L.R.A. 237, 241-42 (1999).

B. The Authority's Decision To Set Aside The Arbitrator's Award Was Reasonable

The central holding in the Authority's decision in this case is that NTEU Chapter 32's leave-swapping proposal would "circumvent the process" established in Article 32, § 1.C. of the nationwide agreement for leave approval. (JA at 16.) Accordingly, the Authority properly concluded, the subject matter of the proposal is "expressly addressed" by the agreement provision. (*Id.*) This holding is correct, and should be affirmed.

The Authority began its analysis by noting, accurately, that the leave-swapping proposal involved both the disposition of leave already granted to one employee, and the receipt of that leave by another employee who had not been authorized to take that leave. The Authority then noted, also accurately, that Article 32, § 1.C. of the national agreement involved both granting leave to one employee, and denying leave to another employee.

Based on these observations, the Authority correctly rejected the arbitrator's conclusion that the leave-swapping proposal and Article 32, § 1.C. are hermetically sealed off from one another, each dealing with matters wholly unrelated to the other. In fact, as the Authority effectively

recognized (JA at 16), the leave-swapping proposal would in many cases operate as a substitute for the method agreed to in Article 32, §1.C., for deciding which unit employees would have their leave requests approved.

Put another way, by agreeing to Article 32, § 1.C., the IRS and the Union agreed to resolve conflicting leave requests among similarly qualified employees on the basis of seniority, that is, employees' EOD dates. However, as the Authority correctly recognized (JA at 16-17), that system would be completely undone by a subsequent agreement to allow the employee receiving the leave approval under Article 32, § 1.C. to then turn around and transfer that leave to someone else of the employee's choosing, regardless of seniority.

This direct interrelationship between the leave-swapping proposal and Article 32, § 1.C. is further underscored by the fact that the proposal stemmed directly from problems the Denver call center was having in implementing that article. Thus, as set out at p. 5, above, the leave-swapping proposal arose from a union/management committee that developed recommendations designed to address problems resulting from the operation of Article 32, § 1.C. at the Denver site.

Having accurately identified the interrelationship of the proposal and the existing agreement provision, the Authority correctly held that a proposal

having such an effect has the "requisite similarity" to the provision involved to warrant application of the first prong of the "covered by" rule. *SSA*, 47 F.L.R.A. at 1018. That is, a "reasonable reader" would conclude that Article 32, § 1.C. "settles the matter" of deciding which employees are to be granted leave in the case of a conflict in requests. (*Id.*)

For the foregoing reasons, although there is not "exact congruence" of language between the proposal and Article 32, § 1.C., the Authority properly held that the matter addressed in the leave-swapping proposal was "expressly contained" in that article. *SSA*, 47 F.L.R.A. at 1018. Accordingly, the Authority correctly held that the arbitrator's legal conclusion concerning application of the "covered by" doctrine was in error, and set it aside.[8]

C. The Union's Arguments Are Without Merit, And Should Be Rejected

The Union essentially makes a single argument, in different variations, for reversal of the Authority's decision: that the Authority failed to appropriately defer to the arbitrator's interpretation of Article 32, § 1.C. of

[8] The accuracy of this conclusion is not affected by the fact that the leave-swapping proposal and the agreement provision can each apply in situations in which the other one does not. For example, an employee may transfer leave under the swapping proposal for a time period for which there was no conflict between employee leave requests. Such exact congruence of coverage has, however, never been required for application of the "covered by" doctrine. *E.g.*, *Marine Corps*, 962 F.2d at 61-62.

the national agreement. Thus, according to the Union (e.g., Union Brief (Br.) at 19), the Authority was required to adopt the arbitrator's conclusion that the agreement provision did not speak to the same situation as the leave swapping proposal, and thus the proposal was not "covered by" the agreement.

However, this argument flows from a faulty premise. As the Authority made clear in its decision on reconsideration (JA at 9), it took no issue with the arbitrator's interpretation of Article 32, § 1.C. Thus, the Authority took at face value the arbitrator's conclusion that the article dealt only with how agency management will resolve conflicting annual leave requests.

The key issue that the Authority addressed in the case was whether the leave swapping proposal was "covered by" the agreement provision, as interpreted by the arbitrator. As the Union concedes (Br. at 15), this is an issue on which the arbitrator is not entitled to deference. As discussed at pp. 19 to 21, above, the Authority correctly held, consistent with its *SSA* decision, that the undermining effect of the leave-swapping proposal on Article 32, § 1.C. meant that the matter addressed in the proposal was "covered by" the agreement. It was the arbitrator's legal conclusion as to

the interrelationship between the proposal and the agreement provision, not his interpretation of the agreement *per se*, that the Authority disagreed with.[9]

Once this fundamental distinction between the Union's argument and the Authority's decision is understood, much of the Union's argument is seen to be irrelevant. Thus, the Union makes much (Br. at 14) of the Authority's precedent holding that it must defer to the arbitrator's interpretation of a collective bargaining agreement. As demonstrated, the Authority fully observed this precedent in the present case.

The Union also places heavy emphasis (Br. 15-16) on the "core principles" derived from private sector labor law, concerning deference by reviewing bodies to an arbitrator's interpretation of an agreement provision. *E.g., United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29 (1987). Again, the Authority does not dispute the applicability of this principle in the instant case.

The Union points out (Br. 22) that the Authority stated in its initial decision (JA at 16) that, "contrary to the Arbitrator's conclusion," Article

[9] At page 23 of its Brief, the Union states that "[u]nder the Authority's interpretation of Article 32, § 1.C, the Agency is authorized and required to award leave to the senior employee *under all circumstances.*" (Emphasis in original.) However, this interpretation of Article 32, § 1.C. is no different than the arbitrator's. The difference between the Authority and the arbitrator lies in their conclusions as to the leave-swapping proposal's effect on the operation of that agreement article, i.e., the "covered by" issue. This is an area where the Authority, not the arbitrator, gets deference.

32, § 1.C. does not concern only the IRS' role in initially granting leave to an employee. Rather, the Authority pointed out, by resolving a leave conflict in favor of one employee, another employee's request will necessarily be denied. The Union cites this snippet from the Authority's decision as proof that the Authority departed from its stated intent of deferring to the arbitrator's interpretation of the agreement provision.

In the first place, there is no basis to conclude that the arbitrator would actually disagree with the Authority's observation that Article 32, § 1.C operates both to grant leave to one employee and deny it to another. Indeed, it is difficult to see how he could. Moreover, taking the remark in context,[10] it is clear that the Authority intended it to apply to its legal conclusion as to the applicability of the "covered by" doctrine, not the arbitrator's interpretation of the agreement. Thus, because "we can discern the path of [the Authority's] reasoning and ultimate conclusion," the Union's claim concerning the significance of this brief phrase in the Authority's decision

[10] This context consists, among other things, of these factors: 1) the Authority's various statements, in both its initial and reconsideration decisions (JA at 15, 9), that it recognizes the principle of deferring to the arbitrator's agreement interpretation; 2) its statement (JA at 9) that the arbitrator's legal conclusion as to application of the "covered by" doctrine, and not his agreement interpretation, was the source of its disagreement with him; and 3) its clear statement in its initial decision (JA at 16) that it was the leave-swapping proposal's "circumvent[ing]" effect on Article 32, § 1.C. that formed the basis for its legal conclusion on the "covered by" issue.

should be rejected. *Dep't of the Interior, Bureau of Land Mgmt.* v. *FLRA*, 873 F.2d 1505, 1509 (D.C. Cir. 1989).

The Union also argues (Br. at 19-20) that the arbitrator relied on testimony of a Denver site management witness, Patience Ellis, at the arbitration hearing (JA at 63, Tr. at 182-83), to the effect that the local parties did not understand Article 32, § 1.C. to address leave-swapping situations.[11] In fact, the arbitrator did no such thing. In setting out his conclusion as to the "covered by" issue (JA at 35-36), the arbitrator made no reference to such witness testimony.

Even if he did, however, it would be of no significance. The kind of exact congruence between a bargaining proposal and an agreement provision that the Union's contention promotes is just the kind of "covered by" analysis that this Court rejected in *Marine Corps* and *USPS*. Rather, the Court has instructed in these types of cases that where there is a comprehensive negotiated scheme, such as the leave articles in the national

[11] The parties' intent in agreeing to a provision, as established in bargaining history, can be relevant to determining whether the second prong of the "covered by" doctrine applies, i.e., whether the matter proposed for bargaining is "inseparably bound up with" a subject covered in an existing agreement. *E.g., U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fl.*, 56 F.L.R.A. 809, 813-14 (2000). However, the Authority in the instant case relied on the first prong of the "covered by" doctrine, not the second. Further, there is no bargaining history evidence in the record of the present case.

agreement here involved, a union cannot negotiate on matters covered by the scheme while it is in effect.[12] The Authority's ruling in this case properly carries out the Court's teachings in this area, and the Union's contrary argument should be rejected.

In sum, the Union misapprehends the issue in this case. It insists that the Authority improperly failed to accord deference to the arbitrator's interpretation of a negotiated agreement provision. In fact, what the Authority properly declined to defer to was the arbitrator's conclusion that the agreement provision did not cover the subject matter of the leave swapping proposal. The Union thus seeks to extend the arbitral deferral rule to the arbitrator's legal conclusions about whether a ULP was committed. This is a province where, under the Statute, the Authority gets the final word, however. The Union's effort to extend arbitral deference to the arbitrator's legal conclusions should be rejected.

[12] The arbitrator himself recognized that various articles in the national agreement, including Article 32, "comprehensively deal[] with" leave. (JA at 35.)

CONCLUSION

The Union's petition for review should be denied.

Respectfully submitted.

_____
WILLIAM R. TOBEY
ACTING SOLICITOR

_____
WILLIAM E. PERSINA
ATTORNEY

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

FEBRUARY 2006

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

NATIONAL TREASURY EMPLOYEES UNION,	)	
Petitioner	)	
v.	)	No. 05-1230
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:

Gregory O'Duden, General Counsel
Barbara A. Atkin, Deputy General Counsel
Julie M. Wilson
Assistant Counsel
National Treasury Employees Union
1750 H Street, NW
Washington, D.C. 20006

_____
Thelma Brown
Paralegal Specialist

February 10, 2006