UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: July 19, 2005

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF HOMELAND SECURITY, BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION, NEW YORK, NEW YORK

Respondent

and Case No. BN-CA-04-0468

NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES BRANCH # 14

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF HOMELAND SECURITY, BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION, NEW YORK, NEW YORK Respondent	
and NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES BRANCH # 14 Charging Party	Case No. BN-CA-04-0468

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 22, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

_____

PAUL B. LANG
Administrative Law Judge

Dated: July 19, 2005

Washington, DC

OALJ 05-43

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF HOMELAND SECURITY, BORDER AND TRANSPORTATION SECURITY DIRECTORATE, BUREAU OF CUSTOMS AND BORDER PROTECTION, NEW YORK, NEW YORK Respondent	
and NATIONAL ASSOCIATION OF AGRICULTURE EMPLOYEES BRANCH # 14 Charging Party	Case No. BN-CA-04-0468

Laurie R. Houle, Esquire
For the General Counsel

Mary McGarvey-DePuy, Esquire
Todd F. Smith, Esquire
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On July 12, 2004, the National Association of Agriculture Employees, Branch #14 (Union) filed an unfair labor practice charge against the U.S. Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, New York, New York (Respondent or CBP). On October 27, 2004, the Regional Director of the Boston Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent had committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute) by failing to implement and repudiating the provisions of a local

supplemental collective bargaining agreement (CBA) which calls for the annual bidding of shifts by seniority on July 1 of each year. On December 9, 2004, the General Counsel moved to amend the Complaint by alleging, in the alternative, that, by implementing a change regarding shift bidding without providing the Union with notice and an opportunity to bargain to the extent required by the Statute, the Respondent had committed an unfair labor practice in violation of §7116(a)(1) and (5) of the Statute.

The General Counsel's motion to amend the Complaint was granted on January 5, 2005. The Respondent filed timely answers to both the original and the amended Complaint in which it denied that it had committed the unfair labor practices as alleged. A hearing was held in New York, New York on February 24, 2005. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Preliminary Issues

The General Counsel has filed a motion to strike footnote 7 of the Respondent's brief in which the Respondent requests that I take official notice of a letter from the Regional Director of the San Francisco Region dated April 30, 2004, refusing to issue a complaint against the Respondent. The General Counsel also moves to strike all references to the letter in the Respondent's brief. The Respondent filed an opposition to the General Counsel's motion along with a cross-motion to strike the portion of the General Counsel's brief in which he requests that I take official notice of the pendency of petitions filed by the Bureau of Customs and Border Protection (CBP) for clarification of bargaining units represented by the National Association of Agriculture Employees (NAAE) and two other labor organizations.

The scope of official notice, as recognized in administrative proceedings, is broader than that of judicial notice. Official notice may be taken, not only of public records and generally accepted facts, but also of matters within an agency=s area of special expertise, *Union Electric Co. v. F.E.R.C.*, 890 F.2d 1193, 1202 (D.C. Cir. 1989). There can be no valid doubt that the Authority's area of special expertise includes the existence of both the letter from the Regional Director and the pending petitions for unit clarification; the authenticity of these documents has not been challenged.

In support of their respective motions, the parties assert that the documents were not offered into evidence at the hearing and are not relevant to the issues in this case. §2429.5 of the Rules and Regulations of the Authority provide that, while the Authority will not consider evidence that was not offered before the Administrative Law Judge, it will "take official notice of such matters as would be proper." That language indicates that the regulations contemplate the taking of official notice after the close of the hearing record. With regard to the relevance of the documents, they will be given such weight as is deemed appropriate. Therefore, both of the motions to strike will be denied. I will take official notice of both the letter from the Regional Director and the petitions for unit clarification.

Positions of the Parties

General Counsel

The General Counsel maintains that, by failing to conduct the annual shift bidding in 2004, the Respondent repudiated Article XIX of the CBA between the Union and a component of the U.S. Department of Agriculture (USDA) by whom the affected members of the bargaining unit were employed prior to the creation of the Department of Homeland Security (DHS).

The General Counsel further maintains that, even if it were determined that the Respondent is not bound by the CBA, it was still required, pursuant to §2422.34(a) of the Rules and Regulations of the Authority, to maintain conditions of employment pending the resolution of representation issues by the Authority. According to the General Counsel, DHS acknowledged its obligations by virtue of a memorandum from Janet Hale, the Under Secretary for Management of DHS, to management officials (Hale memorandum) shortly after the creation of DHS in which she reminded them that pre-existing collective bargaining obligations would remain in effect until a new human resources system was in place and pending further guidance.

The General Counsel also argues that the utilization of shift bids was a past practice which the Respondent was not entitled to change without providing the Union with notice and an opportunity to bargain.

The General Counsel maintains that the Respondent has not established any legitimate defense to its actions. Specifically, the Respondent has not shown that Article XIX

of the CBA is unenforceable or that the continuation of shift bids was incompatible with the necessary functioning of the agency.

Finally, the General Counsel argues that the Union fulfilled its prefiling obligations under the master collective bargaining agreement prior to the filing of the underlying unfair labor practice charge. Even if that were not so, the General Counsel does not concede that the Union's failure to meet the prefiling requirements would affect its statutory right to file an unfair labor practice charge.

According to the General Counsel, a *status quo ante* (SQA) remedy would be appropriate regardless of whether the Respondent is found to have repudiated the CBA or unilaterally changed a condition of employment. In either case, the Respondent should be ordered to implement the shift bidding procedure within 14 days of the date of the Order and to carry out the customary posting of a notice.

The Respondent

The Respondent maintains that the Complaint should be dismissed[1] because the Union failed to follow the requirements, as set forth in Article XI of the master agreement between NAAE and USDA, for attempting to resolve a dispute before filing an unfair labor practice charge.

The Respondent also maintains that the General Counsel has not met his burden of proof that the Respondent repudiated the CBA because there was no "clear and patent" breach. This is so because the Respondent could have reasonably assumed that it was not bound by the CBA since it was not a party. Furthermore, the Respondent's understanding of the Homeland Security Act was that it was only required to observe contractual provisions that were consistent with its operational needs. The Respondent argues that the General Counsel's position is not improved by the Hale memorandum since it was issued less than two weeks after the creation of DHS and was only intended for internal guidance. Furthermore, the Respondent reasonably believed that, since a shift bid had occurred in February of 2004, it was not obligated to hold another shift bid until February of 2005. Finally, the language of Article XIX of the CBA, upon which the General Counsel relies, vests

---

[1] The Respondent's motion to dismiss was denied without prejudice to its right to raise the same issues in its post-hearing brief.

management with the right to make the final decision on work assignments and to change work assignments when necessary.

The Respondent denies that it is bound by an established past practice and asserts that there is no evidence that such a practice existed after the creation of DHS. Although the Respondent conducted a shift bid in 2004, it only did so to settle an unfair labor practice case.

The Respondent also asserts that the termination of shift bids was in furtherance of the necessary functioning of the agency. According to the Respondent the continuation of shift bids would substantially interfere with its efforts to ensure that a sufficient number of qualified personnel is available to accomplish its mission and that it does not exceed the statutory limit on overtime compensation for customs officers.

According to the Respondent, a SQA remedy would be inappropriate inasmuch as it would disrupt or impair the efficiency of its operations. Furthermore, such a remedy would be unenforceable under DHS regulations.

Findings of Fact

The Respondent is an agency as defined in §7103(a)(3) of the Statute. NAAE is a labor organization within the meaning of §7103(a)(4) of the Statute and, at all times pertinent to this case, was the exclusive representative of a nationwide unit of employees of DHS which is appropriate for collective bargaining. The Union is an agent of NAAE for the purpose of representing certain employees of the Respondent. All or most of the employees represented by the Union were employed by USDA at the time of the creation of DHS on March 1, 2003, by virtue of the Homeland Security Act of 2002, 6 U.S.C. §101 *et seq. (Act).*

The Hale Memorandum

On March 12, 2003, Janet Hale, the Under Secretary for Management of DHS, issued a memorandum to the "DHS Management Team" on the subject of collective bargaining obligations (GC Ex. 2). The so-called "Hale memorandum" states, in pertinent part:

> As a reminder, all collective bargaining obligations that existed in the various components prior to the Department of Homeland Security (DHS) transfer carry forward and are still active. The use of the term "collective bargaining obligations" includes but is not limited to:

> • issuing notices and proposals to the union when contemplating changes in conditions of employment (which includes shift hours and tour coverage), and subsequent bargaining if the union seeks negotiations;
>
> . . .
>
> • honoring negotiated agreements by following the language in those agreements; and
>
> • observing principles of "good faith" bargaining.
>
> . . .
>
> . . . Until new guidance is issued, all DHS managers are expected to honor contractual and statutory obligations that are in place.

The Hale Memorandum was introduced into evidence through the testimony of William P. Tommasini, a member of the bargaining unit and the President of the Union from January of 2003 to May of 2004. Neither Tommasini nor any other witness testified as to how the memorandum came into possession of the Union. The memorandum was not addressed to any representative of either NAAE or the Union, nor was it executed on behalf of any labor organization or its agent.

Bargaining History

At all times pertinent to this case NAAE and USDA, Animal and Plant Health Inspection Service, Plant Protection and Quarantine, were parties to a nationwide collective bargaining agreement (Jt. Ex. 1).[2] Pursuant to the nationwide agreement, the Union and Area II, NER (the unit of USDA which was located at JFK Airport) were parties to the CBA (Jt. Ex. 2). Article XIX of the CBA (Jt. Ex. 2, p. 7), entitled "Shift Bids", states:

> On July 1 of each year, a seniority list and a master schedule without names will be posted at each work site and terminal. Each officer, in

[2] It is unclear whether the entire bargaining unit transferred from USDA to DHS. In any event, the subject of shift bids is not addressed in the nationwide agreement (Tr. 73).

order of seniority, will have 48 hours to indicate his/her preferred shift selection and notify the IAE supervisor. If after 48 hours after notification, an officer does not indicate his/her preferred shift selection, the following officer will be notified to indicate his/her preferred selection.

Management retains its right to make the final decision on employee work assignments and to change an employee's work assignment when necessary.

If annual shifts are to be changed, they will usually be changed during the first pay period of the fiscal year.

NIAP

On October 1, 2001, the Customs Service[3] promulgated a change to its National Inspectional Assignment Policy (NIAP) (Jt. Ex. 3; Tr. 125). The policy states, in pertinent part that:

1. PURPOSE

The purpose of this Handbook is to revise and update the policy governing the assignment of Inspectional and Canine personnel. This policy is created to provide outstanding service at the least cost to the government and public; . . . to maximize the effective use of overtime; and to provide uniformity, efficiency, and fairness in the assignment of employees.

2. BACKGROUND

The policies and procedures contained in this Handbook reflect the changes required by the provisions of the Omnibus Reconciliation Act of 1993, also known as the Customs Officer Pay Reform Act (COPRA).

3. PRECEDENCE AND FUNCTION

The policies and procedures contained in this Handbook take precedence over any and all other

[3] The Customs Service was part of the Department of the Treasury and was one of the agencies that were merged into DHS.

> agreements, policies, or other documents or practices executed or applied by the parties[4] previously, at either the national or local levels, concerning the matters covered within this Handbook.
>
> The policies and procedures contained in this Handbook reflect the parties' full and complete agreement on the matters contained and addressed herein. No further obligation to consult, confer, or negotiate, either upon the substance or impact and implementation of any decision or action, shall arise upon the exercise of any provision, procedure, right or responsibility addressed or contained within this Handbook.

Section 5A of NIAP, entitled "General Scheduling and Staffing Principles", authorizes agency managers at each location to determine the length of the work week, work hours, days off, scheduling, and staffing, including the authority to assign employees from one facility to another. This authority is to be exercised as required to meet operational needs and/or budgetary limitations.

Section 5B, entitled "Overtime Assignment Principles", authorizes agency managers to require employees to perform overtime work when necessary to meet operational needs. The section also establishes a method of calculating the earnings of Customs Officers on a prorated basis so as to "ensure the full range of numbers, types and grades of personnel required by the Service throughout the fiscal year." The calculation is to be applied to Customs Officers who have reached 50% of the statutory cap on earnings, which is a combination of premium and overtime pay. The section further provides that, "The Officer's normal work schedule shall be adjusted to prevent the Officer's overtime and premium pay exceeding the cap."

By letter of June 22, 2004, from Tonia A. Brown for Sheila H. Brown, the Respondent's Director of Labor Relations, to Michael Randall, the President of NAAE (Resp. Ex. 2) the Respondent informed the NAAE, and thereby the Union, that COPRA and NIAP would be applied to all employees occupying the CBP Agriculture Specialist position as of July 25, 2004.

The Implementation of Shift Bids

---

[4] Apparently this refers to collective bargaining agreements between the Customs Service and labor organizations.

On December 19, 2003, the Regional Director of the Boston Region of the Authority issued a Complaint and Notice of Hearing in Case No. BN-CA-03-0643 (Jt. Ex. 5). The Charging Party and the Respondent were the same as in this case. In the Complaint it was alleged that, on and after July 1, 2003, the Respondent repudiated Article XIX of the nationwide agreement by failing to implement the shift bidding process.5 It was also alleged that DHS and NAAE were parties to the nationwide collective bargaining agreement. The Answer to the Complaint, if one was filed, is not in evidence.

On January 28, 2004, the parties to the foregoing case entered into a settlement agreement (Jt. Ex. 6) which was approved by the Regional Director of the Boston Region. The agreement provided, in pertinent part, that:

> The Agency will honor Article XIX (Shift Bids) of the collective bargaining agreement . . . that it has with the National Association of Agricultural Employees, Branch # 14. In so doing it will allow employees to bid on shifts.
>
> The seniority list and master schedule without names, normally posted by July 1 in accordance with Article XIX, will be posted within two weeks upon execution of this agreement, or within a reasonable time if an exigency or emergency exists, to allow for the bidding process to proceed.
>
> Within a reasonable time after the completion of the bidding process as described in paragraph B, the Agency will implement the bid assignments in accordance with Article XIX and the parties' past practice.
>
> Nothing in this agreement shall be interpreted in a manner which interferes with management's rights under the Statute.
>
> By entering into this agreement, neither party waives any rights or arguments in other pending unfair labor practices or grievances.

---

5 Article XIX of the nationwide agreement between NAAE and DHS concerns promotions; there is nothing in that agreement which addresses shift bidding. It has not been alleged in this case that DHS has ever entered into a collective bargaining agreement with NAAE or any of its subordinate units.

Pursuant to the settlement agreement the shift bid process was implemented in February of 2004. As of the time of the hearing bargaining unit employees were still working on the shifts to which they were assigned as a result of the bidding (Tr. 44, 45). There is no evidence as to whether the Respondent exercised its prerogative under Article XIX to change assignments.

On or about May 25, 2004,[6] Thomas Gary, the recently elected President of the Union, and members of the Union Executive Committee[7] attended a meeting with Camille Polimeni, the Area Director for Customs and Border Protection, and other management representatives. The purpose of the meeting was for the newly elected Union representatives to introduce themselves and to discuss a number of issues. When Gary broached the subject of shift bids, Polimeni stated that there would not be shift bids that year and that the subject was non-negotiable under the terms of NIAP. Polimeni also stated that she had to request a waiver of the overtime cap because people were exceeding the limit on account of the night shift differential (Tr. 63-67).

The Union subsequently requested a town hall meeting which was held on or about June 17. The purpose of a town hall meeting is to provide an opportunity for employees to ask questions of management representatives. Among the questions asked was when the Scheduling Committee[8] would meet. Polimeni responded that shift bidding would not take place because, according to NIAP, all negotiations on bidding, tours of duty and scheduling were to be conducted at the national level. Polimeni also stated that it would be necessary to balance out shift assignments so that a single group of employees would not be accruing shift differential pay, thereby limiting their availability to work overtime without exceeding the cap (Tr. 71, 72).

By letter of June 24 (GC Ex. 4) Gary referred Polimeni to the settlement agreement (Jt. Ex. 6) and to the requirement of holding shift bids in accordance with

---

6 All subsequently cited dates are in 2004 unless otherwise indicated.

7 Gary testified that he had also invited one or more representatives of the "previous union".

8 The Scheduling Committee is a joint labor-management committee which attends to preliminary details for the shift bid process.

Article XIX of the CBA. On June 25 Gary sent another letter to Polimeni (GC Ex. 3) stating that the Union had to set up all of the committees named in the CBA with special emphasis on the Schedule Committee which is responsible for meeting with management to establish tours of duty for the annual bid selection. Gary further stated that this needed to be accomplished as quickly as possible so that the annual bid selection could be published by July 1.[9]

Neither party contends that there were further discussions or negotiations regarding the shift bid.

The Nationwide Agreement

Article XI of the nationwide agreement (Jt. Ex. 1, p. 13), entitled "UNFAIR LABOR PRACTICE", provides that, "prior to filing a charge of Unfair Labor Practice with the FLRA, [the parties] shall meet to discuss and attempt resolution." The article also establishes time frames for Union and management officials at various levels to attempt to achieve resolution. Section 3, entitled, "Union Responsibility", states that:

> When an intent of a ULP is filed the parties shall seriously and diligently seek a resolution. If no resolution is possible a written explanation shall be provided to the charged party.

The General Counsel does not dispute the Respondent's contention that the Union did not attempt to have any other meetings with Polimeni or any other management representative with regard to the termination of shift bids. The General Counsel also acknowledges that the Union did not provide the Respondent with a formal notice of its intent to file an unfair labor practice charge. This is in contrast to a letter dated May 6, 2004 (Exhibit 5 to GC Ex. 1(i)), from Tommasini, who was then the Union President, to George Jelinek, the Port Director. The subject of the letter is "Intent to File An ULP, Change in working conditions, Sunday Supervision." In his letter Tommasini set forth in detail the basis of the Union's position; he also requested a meeting within ten days to attempt the resolution of the

---

[9] Gary also referred to Article IX of the CBA. This might have been a typographical error since Article IX deals with the contracting agency's obligation to provide information to the Union which is "pertinent to effective labor-management relations and/or conditions of employ-ment". Article XIX deals with shift bids; the identity and makeup of committees is addressed in Article V.

dispute and that the *status quo* be maintained in the interim.

Discussion and Analysis

The Legal Framework

In order to show that the Respondent repudiated the CBA the General Counsel must show that the CBA was breached, that the breach was clear and patent and that the nature of the breach goes to the heart of the agreement, *Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 40 FLRA 1211, 1218 (1991) (*Warner Robins*). In determining whether a breach is clear and patent, it is necessary to determine whether a breach occurred in the first place and then whether the offending party acted according to a reasonable interpretation of the contract, *United States Department of the Air Force, Seymour Johnson Air Force Base*, 57 FLRA 772, 774 (2002).

§2422.34(a) of the Rules and Regulations of the Authority provides that:

> (a) *Existing recognitions, agreements, and obligations under the Statute.* During the pendency of any representation proceeding, parties are obligated to maintain existing recognitions, adhere to the terms and conditions of existing collective bargaining agreements, and fulfill all other representational and bargaining responsibilities under the Statute.

In order to show the existence of a past practice, the General Counsel must prove that the practice has been consistently exercised over a significant period of time and followed by both parties, or followed by one party and not challenged by the other, *U.S. Patent & Trademark Office*, 57 FLRA 185, 191 (2001) (*Patent Office*).

The Status of the CBA and the National Agreement

The Authority has not yet addressed the question of whether a successor employer[10] is bound by the collective bargaining agreements of its predecessor. However, in *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272, 282, 32 L.Ed.2d 61 (1972) (*Burns*) the Supreme Court held that, while a successor employer is obligated to bargain with the previously certified labor organizations, it is not bound by collective bargaining agreements negotiated by its predecessor. In so holding, the Court reasoned that a contrary conclusion would run counter to the language of the National Labor Relations Act, 29 U.S.C. §158(d) which states that the duty to bargain collectively, "does not compel either party to agree to a proposal or require the making of a concession." The holding of the Court in *Burns* is reflected by the ruling of the National Labor Relations Board in *Ideal Chevrolet, Inc.*, 198 NLRB 280 (1972) (*Ideal Chevrolet*).

The Statute, under the definition of "collective bargaining" in §7103(a)(12), states that, "the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession." In view of the close similarity between the language of the Statute and that of the National Labor Relations Act it appears likely that the Authority would come to the same conclusion as the National Labor Relations Board in *Ideal Chevrolet*. I therefore conclude that neither DHS nor CBP became bound by the nationwide or the local agreement which NAAE and the Union had negotiated with USDA or its components by virtue of their status as successor employers.

This is not to say that DHS or CBP could not have assumed the contractual obligations of USDA either by operation of any other law or by the actions of those agencies. The subject of labor-management relations is addressed in the Act in 6 U.S.C. §412. That section generally deals with the status of existing bargaining units and the applicability of the Statute to employees who were transferred to DHS. There is no language in the section or in any other portion of the Act which deals with the assumption of collective bargaining agreements. Therefore,

---

[10] For the purposes of this Decision I will assume that DHS and CBP are successor employers. The Respondent has not challenged the status of NAAE or the Union in this case and the Authority has not found that NAAE no longer represents a majority of the employees in the bargaining unit. Furthermore, the General Counsel has not alleged that DHS is the alter ego of USDA, thereby making DHS a party to the nationwide agreement.

I conclude that the assumption of prior collective bargaining agreements is not required by the Act.

The General Counsel has not alleged that either DHS or CBP has taken any action, other than the issuance of the Hale memorandum (GC Ex. 2), which amounts to an assumption of prior collective bargaining agreements. The language of the Hale memorandum does not support the General Counsel's position. While the memorandum could have been worded more precisely, its timing (only 11 days after the creation of DHS), language and the circumstances of its issuance strongly suggest that it was intended to provide only interim guidance to management representatives. The second to last paragraph is especially instructive:

> Conflicts between programmatic necessities and collective bargaining obligations will invariably arise in DHS, as they did before the Department's creation. Skilled communication between managers and union representatives can often minimize disharmony and prevent situations from escalating to grievances or unfair labor practice charges. *We are looking very carefully at the labor-management relationship in our eventual redesign of the human resources management system. Until new guidance is issued, all DHS managers are expected to honor contractual and statutory obligations that are in place.*
> (Emphasis supplied.)

The clear import of that language is that DHS would maintain the *status quo* until it determined that it would do otherwise. Although the Hale Memorandum cannot shield DHS from the consequences of all unilateral action, it falls far short of constituting a voluntary assumption by DHS of collective bargaining agreements negotiated by other agencies. This conclusion is supported by the fact that the memorandum was not addressed to the representatives of any of the labor organizations with which DHS has a bargaining relationship, nor was it countersigned on behalf of any of those labor organizations. There is no evidence of any other oral or written statement by DHS or CBP which is alleged to be an assumption of any collective bargaining agreement.

In view of the foregoing, I have concluded that there is nothing that places either DHS or CBP beyond the scope of the decisions in *Burns* and *Ideal Chevrolet*. Neither DHS nor CBP are bound by the nationwide collective bargaining agreement with USDA or by the CBA with a component of USDA.

The Respondent Did Not Repudiate the CBA

Since the Respondent was not a party to the CBA it could not have breached it. Therefore, the General Counsel cannot, as a matter of law, establish the first element of repudiation as set forth in *Warner Robins*. Accordingly, it is not necessary to examine the other elements of the offense; the Respondent could not have repudiated the CBA.

Even if it were found that the Respondent had somehow assumed obligations under the CBA its breach was not clear and patent. While the General Counsel correctly maintains that the terms of the CBA are unambiguous, the status of the Respondent as a party to the agreement is, as has been shown above, far from clear.

The Complaint is Not Subject to Dismissal

The Respondent's argument for dismissal is based upon the Union's alleged failure to comply with Article XI of the nationwide agreement. The principle of mutuality of obligation is a fundamental element of contract law, *Henke v. U.S. Dept. of Commerce*, 83 F.3d 1445, 1450 (D.C. Cir. 1996). Since, as stated above, the Respondent is not bound by the nationwide agreement, neither is the Union. Therefore, the Union was under no obligation to comply with Article XI before filing the underlying unfair labor practice charge. Consequently, the Complaint is not subject to dismissal.

Even if the Union were obligated by Article XI of the nationwide agreement, its language does not establish a specific procedure by which the parties are required to attempt the resolution of disputes. More significantly, there is nothing in Article XI which mandates the dismissal of an unfair labor practice charge, much less the resulting Complaint. It has long been held by the Authority that, while parties may waive their statutory rights, those waivers must be clear and unmistakable, *Social Security Administration and American Federation of Government Employees, AFL-CIO* (Leahy, Arbitrator), 31 FLRA 1277, 1279 (1988). The language upon which the Respondent relies falls short of that standard.

The Holding of Shift Bids Was Not a Past Practice

The General Counsel maintains that the past practice of shift bidding was in existence since around 1983 and that, in 1987, in became "memorialized" in a local supplemental agreement. There are two flaws in that line of reasoning. In the first place, once the shift bidding was made part of the local agreement it changed from a past practice

(assuming that it was one in the first place) to a contractual provision. Even if that were not so, such a provision was not binding on DHS or CBP prior to March 1, 2003, because neither of them was in existence. Secondly, to obligate the Respondent to adhere to shift bidding as it existed prior to March 1, 2003, by calling it a past practice would be to impose contractual obligations indirectly in a manner contrary to the holdings in *Burns* and *Ideal Chevrolet*.

Regardless of the lack of significance of events prior to March 1, 2003, it is possible that a past practice came into being after that date. A past practice could have arisen from a course of conduct which began after the creation of DHS and CBP or it could have resulted from the Respondent's knowledge of and acquiescence to the continuation of a prior practice.

It is undisputed that the holding of shift bids preceded the transfer of bargaining unit employees to CBP. Although it is unclear whether the Respondent changed the shifts immediately upon the transfer of the bargaining unit employees, the Complaint in Case No. BN-CA-03-0643 includes the allegation that the Respondent did not implement the shift bidding procedure beginning on July 1, 2003 (Jt. Ex. 5, ¶¶11, 12 and 13). The Respondent has held one shift bid since its creation; that occurred in February of 2004 pursuant to the settlement agreement of January 28 (Jt. Ex. 6).[11] The General Counsel now alleges that the Respondent departed from a binding past practice on July 1.

The above evidence indicates that the practice of shift bids was not consistently exercised over a significant period of time since March 1, 2003, nor was the practice followed by one party and not challenged by the other. Therefore, the holding of shift bids is not a binding past practice within the meaning of *Patent Office* and other relevant decisions of the Authority.

The Respondent is Not in Violation of the Rules and Regulations of the Authority

§2422.34 of the Rules and Regulations of the Authority requires an agency to "continue to recognize the existing exclusive representative, and to fulfill its obligations to that exclusive representative, until the issues raised by a

---

[11] The General Counsel has not, at least in this case, alleged that the Respondent is in violation of the settlement agreement.

representation petition are resolved", *Department of the Navy, Naval Weapons Station, Yorktown, Virginia, et al.*, 55 FLRA 1112, 1114 (1999). Nowhere in either the Rules and Regulations or in decisions by the Authority is the duty of an agency enlarged beyond what it would have been had the representation petition not been pending.

It has not been alleged that the Respondent has failed to recognize either the Union or NAAE. As has been shown above, the Respondent has no contractual obligations to the Union and has not departed from a past practice. Therefore, the Respondent has not violated §2422.34 of the Rules and Regulations of the Authority.

In view of these findings it is not necessary to consider the issue of whether the implementation of the shift bid would have been inconsistent with the necessary functioning of the agency. Furthermore, this Decision should not be construed as a determination of the duty of the Respondent to bargain over the subject of shift bidding as part of term contract negotiations.

In view of the foregoing, I have concluded that the Respondent did not commit an unfair labor practice in violation of §7116(a)(1) and (5) of the Statute by failing to implement shift bids for bargaining unit employees. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

IT IS HEREBY ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, July 19, 2005

PAUL B. LANG
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. BN-CA-04-0468, were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

Laurie R. Houle, Esquire **7000 1670 0000 1175 6261**
Federal Labor Relations Authority
Thomas P. O'Neill, Jr. Federal Bldg.
10 Causeway Street, Suite 472
Boston, MA 02222

Mary McGarvey-DePuy, Esquire **7000 1670 0000 1175 6265**
Todd F. Smith, Esquire
Office of the Associate Chief Counsel
U.S. Customs and Border Protection
One Penn Plaza, 11th Floor
New York, NY 10119

REGULAR MAIL:

Mr. Ronald J. James
Chief Human Capital Officer
U.S. Department of Homeland Security
Office of the Chief Human
Capital Officer
Washington, DC 20528

Thomas Gary, President
NAAE, Branch # 14
146 North Woods Road
Manhasset, NY 11030

Dated: July 19, 2005
Washington, DC