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

MEMORANDUM DATE:
July 13, 2007

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

Respondent

AND Case
No. WA-CA-06-0706

NATIONAL AIR TRAFFIC CONTROLLERS
ASSOCIATION

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

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FEDERAL LABOR RELATIONS AUTHORITY
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U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

Respondent

AND Case No. WA-CA-06-0706

NATIONAL AIR TRAFFIC CONTROLLERS
ASSOCIATION

Charging Party

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. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 13, 2007**, 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 13, 2007
Washington, DC

OALJ 07-17

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF TRANSPORTATION FEDERAL AVIATION ADMINISTRATION WASHINGTON, D.C. Respondent AND NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION Charging Party	Case No. WA-CA-06-0706

Thomas F. Bianco, Esq.
John F. Gallagher, Esq.
For the General Counsel

Patrick Daniel McGlone
Jessica Bartlett
For the Respondent

Sandra Riviears, Esq.
Marc S. Shapiro, Esq.
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On September 20, 2006, The National Air Traffic Controllers Association, AFL-CIO (Union) filed an unfair labor practice charge (GC Ex. 1(a)) against the U.S. Department of Transportation, Federal Aviation Administration, Washington, DC (Respondent or FAA). On January 31, 2007, the Regional Director of the Chicago Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1(b)) in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by refusing to participate in an arbitration proceeding in violation of §7121 of the Statute. The Respondent filed a timely Answer (GC Ex. 1(e)) in which it denied that it had committed the alleged unfair labor practice.[1/]

A hearing was held in Washington, DC on April 18, 2007. 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 all of the evidence and of the post-hearing briefs submitted by the parties.

Preliminary Issue

The General Counsel moved to exclude all of the Respondent's evidence because the Respondent did not file its Pre-hearing Disclosure 14 days prior to the hearing as required by §2423.23 of the Rules and Regulations of the Authority. In fact, the Respondent did not file its Pre-hearing disclosure until I suggested to its counsel that he do so during the course of the pre-hearing conference which was held one week before the hearing.

Counsel for the Respondent presented two excuses for the

[1/] Shortly after the commencement of the hearing the Respondent amended paragraph 12 of the Answer so as to admit, with an explanation, that it had refused to submit the grievance to Arbitrator Ross (Tr. 13, 14).

late filing. One was that he had "inherited" the case from another attorney; the other was that the case had moved between two regional offices of the Authority. Neither of those excuses have the slightest merit. As to the first excuse, the Respondent's Answer was signed by its current counsel, thus indicating that he had responsibility for the case well before the Pre-hearing Disclosure was due. As to the second excuse, there is no logical connection between the transfer of the case between the Washington and Chicago regional offices and the Respondent's failure to comply with the pertinent regulation.

The above factors notwithstanding, neither the General Counsel nor the Union could identify any significant prejudice arising out of the late filing. Therefore, in order to allow the case to proceed on its merits rather than on a narrow, although important, procedural issue, I allowed the Respondent to submit testimony and evidence in accordance with its Pre-hearing Disclosure. It would be a serious mistake to interpret this ruling as establishing a precedent.

Positions of the Parties

The General Counsel maintains that, by refusing to allow a pending arbitration to be resubmitted to Arbitrator Jerome Ross following a remand by the Authority, the Respondent breached its obligations under §7121 of the Statute. The General Counsel further maintains that the Respondent has failed to establish an affirmative defense under the collective bargaining agreement (CBA) between the parties. While, under the CBA, either party may unilaterally remove an arbitrator from the national panel, the CBA is silent as to the right of a party to unilaterally strike an arbitrator after selection. According to the General Counsel, the past practice of the parties is that an arbitrator may not be removed unilaterally after he or she has been selected to hear a specific grievance.

The Respondent maintains that the Authority's order of remand only requires that the pending grievance be resubmitted to arbitration, but not to any particular arbitrator. Therefore, the Respondent was entitled to exercise its contractual right to unilaterally remove Arbitrator Ross from the panel. The Respondent further maintains that the clear language of the CBA authorizes its action and that the parties have exercised their contractual right to unilaterally remove an arbitrator on numerous occasions.

The Respondent argues that, even if the Authority contemplated the remand of the grievance to Arbitrator Ross, the parties would not have been relieved of their obligation to proceed to arbitration if Arbitrator Ross was unavailable for any reason. The Respondent's exercise of its contractual right of unilateral removal rendered Arbitrator Ross unavailable, thereby obligating the parties to choose a different arbitrator. The Respondent emphasizes that it is not attempting to evade its obligation to resubmit the grievance to arbitration and has consistently expressed its willingness to cooperate with the Union in selecting another arbitrator. Furthermore, the Respondent was not motivated by a desire to influence the outcome of the pending grievance. Rather, it removed Arbitrator Ross because he engaged in unauthorized interest arbitration in another grievance.

The Respondent suggests that, since Arbitrator Ross is

aware of his removal from the panel, his reinstatement would have a "negative affect [*sic*]" on the outcome of a future decision involving the Respondent and cites precedent in support of the proposition that an arbitrator may be removed because of the appearance of bias. The Respondent further states that, if the pending grievance is remanded to Arbitrator Ross and if he sustains the grievance, it will appeal on the grounds of prejudice arising out of this case. Such an appeal would further delay the resolution of the underlying dispute.

Findings of Fact

The Respondent is an agency within the meaning of §7103 (a)(3) of the Statute. The Union is a labor organization as defined by §7103(a)(4) of the Statute. At all times pertinent to this case the Union and the Respondent were parties to a CBA (Resp. Ex. 1). Article 9 of the CBA, entitled "**GRIEVANCE PROCEDURE**", states, in Section 11, Step 2 (p. 26):

> The Parties will create a national panel of three (3) mutually acceptable arbitrators. Each Party may unilaterally remove an arbitrator from the panel and another arbitrator shall be mutually selected to fill the vacancy. Within seven (7) calendar days after receipt of the request [to arbitrate], an arbitrator shall be selected from the panel by the Parties or by alternately striking names until one (1) remains or as otherwise mutually agreed.

The Order of Remand

The facts surrounding the grievance at issue are undisputed. On March 9, 2004, the Union filed a grievance alleging that the Respondent wrongfully failed to upgrade the level of its Atlanta facility. The grievance was eventually referred to Arbitrator Ross and the parties agreed to bifurcate the grievance between the issues of arbitrability and merits. Arbitrator Ross ruled that the grievance was arbitrable and the Respondent thereupon filed exceptions. On July 27, 2006, the Authority directed the parties to resubmit the grievance to arbitration. (GC Ex. 1(b) and 1(e), ¶¶8-11).

Michael Herlihy, Respondent's Manager of Third Party Services for headquarters, testified that, at some point prior to the Authority's ruling on the Respondent's exceptions, the Respondent notified Arbitrator Ross and the Union that the Respondent was removing him from the panel (Tr. 32, 34).[2/] The Respondent apparently did not inform the Authority of the removal (Tr. 18).

The order of remand by the Authority is to be found at 61 FLRA 634 dated July 27, 2006. The first sentence of the decision, under "Statement of the Case", refers to "Arbitrator Jerome H. Ross", but his name is not mentioned again. The decision contains a number of references to "the Arbitrator"; in the final sentence, under "Decision", the Authority states:

> The grievance is remanded to the parties for resubmission to the Arbitrator, absent settlement, for further findings consistent with this decision.

Past Practice

Although the evidence regarding past practice is also undisputed, the parties differ as to its significance. Marc S. Shapiro, an attorney for the Union, testified that, to the best of his understanding, the parties have in the past agreed to change an arbitrator after his selection but before he issued a decision. Shapiro further testified that he was unaware of any instance where such removal was effected unilaterally (Tr. 25).

Robert Taylor, the Director of Contract Administration and Training for the Union, described three incidents in which the parties agreed to remove an arbitrator after his selection (Tr. 39, 40).[3/] Taylor also testified that, on August 21, 2002, as Director of Labor Relations for the Union, he sent a

[2/] The General Counsel's Pre-hearing Disclosure (GC Ex. 2) cites a letter from the Respondent to Arbitrator Ross dated October 12, 2005, by which he was removed from the panel. The letter itself is not in evidence.

[3/] It is unclear whether Shapiro and Taylor were referring to the removal of an arbitrator from the panel or simply from the adjudication of an individual grievance.

letter (GC Ex. 3) to Arbitrator Robert Harris notifying him that the Union was unilaterally removing him from the panel. Taylor was subsequently informed by William Osborne, outside counsel for the Union, that he could not unilaterally remove an arbitrator after his selection to hear a grievance. Taylor thereupon sent another letter to Arbitrator Harris on August 23 (GC Ex. 4) in which he rescinded the unilateral removal. Some time after Taylor sent the two letters to Arbitrator Harris he received a letter from Elizabeth J. Head, a Labor Relations Specialist for the Respondent, (GC Ex. 5) protesting the Union's attempt to unilaterally remove Arbitrator Harris and expressing the assumption that the Union would honor its contractual obligations by proceeding with the grievance that was before Arbitrator Harris. According to Taylor, this was the only prior instance in which either of the parties attempted to unilaterally remove an arbitrator after he had been selected to hear a grievance (Tr. 40-45).

Herlihy testified that the parties have unilaterally removed arbitrators on a number of occasions. However, he only cited the instance involving Arbitrator Harris as an example of either party even attempting to unilaterally removing an arbitrator after his selection to hear a grievance (Tr. 31).

Discussion and Analysis

The Authority has long held that the failure of a party to proceed to and participate in arbitration is inconsistent with the intent of §7121 of the Statute and is an unfair labor practice in violation of §7116(a)(1) and (8), *Department of Labor, Employment Standards Administration/Wage and Hour Division, Washington, D.C.*, 10 FLRA 316, 320 (1982). However, this case does not present a classic instance of a refusal to arbitrate since the General Counsel does not contest the fact that the Respondent has consistently indicated its willingness to proceed with the pending grievance before an arbitrator other than Arbitrator Ross. The disagreement between the parties centers on the meaning of the order of remand by the Authority and the intent of Article 9, Section 11 of the CBA.

The Respondent is correct in its assertion that the order of remand does not specifically address the issue of the effect of its unilateral removal of Arbitrator Ross. That is

so because, whether by design or oversight, the Respondent did not raise the issue with the Authority. Simple logic indicates that the Authority assumed that the grievance would be remanded to Arbitrator Ross unless he became unavailable for reasons other than the unwillingness of one of the parties to use his services. If the Respondent was convinced that it was contractually entitled to unilaterally remove the Arbitrator during the pendency of the grievance, it could have informed the Authority of its action prior to the issuance of the decision, thus affording the Authority the opportunity to eliminate any purported ambiguity.

The aforementioned factors notwithstanding, the threshold issue is whether the Respondent was contractually entitled to unilaterally remove Arbitrator Ross from the panel or, more precisely, whether his unilateral removal had any effect on his status with regard to the pending grievance. In *Dept. of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina*, 57 FLRA 495, 498 (2001) the Authority held that, in ascertaining the meaning of contractual language, the Administrative Law Judge is to follow standards and principles applied by arbitrators and federal courts. It is axiomatic that contractual intent must, whenever possible, be determined from the language of the contract itself. Extrinsic evidence of past practice may only be considered to resolve ambiguous contract language, *Quick v. NLRB*, 245 F.3d. 231, 247 (3d Cir. 2001).

While the contractual language in question does not specifically state whether the parties may unilaterally remove an arbitrator during the pendency of a grievance, it can hardly be considered to be ambiguous. In the first place, the paragraph which establishes the right of unilateral removal from the panel then goes on to describe the procedure for the selection of an arbitrator from the panel to adjudicate an individual grievance. This language demonstrates the intent of the parties to distinguish the process of removing arbitrators from the panel, which allows for unilateral action, from that of selecting arbitrators for grievances, which requires joint action. It strains credibility to suppose that the parties intended to allow the unilateral removal of an arbitrator from consideration of a pending grievance, a highly unusual procedure, without specifically saying so. There is nothing in the record to rebut the Respondent’s assertion that it sought to remove Arbitrator Ross for reasons having nothing to do with the pending

grievance. Nevertheless, to accept the Respondent's construction of the CBA would be to allow for the removal of an arbitrator for any reason, including dissatisfaction with his preliminary rulings in a pending grievance or a desire to redo the arbitration hearing.

The Respondent's reliance on past practice is misplaced. The undisputed evidence shows that, although the Union attempted to unilaterally remove an arbitrator after his selection to hear a grievance, it was advised by Union counsel that it could not do so and a responsible representative of the Respondent espoused the same position. Even if I were to accept the far-fetched proposition, as put forward by the Respondent, that Head, as a Labor Relations Specialist, was not high enough on the management ladder to commit the Respondent to a contractual interpretation, the most that can be said is that past practice is neutral. The fact remains that the Union rescinded its unilateral removal of the arbitrator and that its decision to do so was not merely because it had a change of heart. The fact that the arbitrator later recused himself, almost certainly because of the Union's action, (Tr. 31) reinforces my conclusion that the parties did not intend to allow for unilateral removal of an arbitrator after his selection to hear a grievance.

I have dismissed out of hand any consideration of the Respondent's assertion that it will appeal an adverse decision by Arbitrator Ross because of the possibility of bias and that such an appeal would further delay the resolution of the underlying grievance. To do otherwise would be to assume that Arbitrator Ross lacks the integrity to put aside any personal feelings he might have because of his removal from the panel by the Respondent. The fact that the Respondent has made such an argument raises the question of whether it is attempting to induce the Union to abandon its position and to allow the grievance to go before another arbitrator.

Either party has the right to seek review of an arbitral award pursuant to §7122 of the Statute. However, it is unlikely that the Authority would set aside an award merely because of the possibility of bias arising out of a situation created by the Respondent.

The Remedy

It would be unrealistic not to anticipate the possibility that Arbitrator Ross might be unwilling or otherwise unavailable to hear the remainder of the grievance. I will therefore recommend an Order which requires the Respondent to cooperate in the submission of the grievance to another arbitrator if necessary.

For the foregoing reasons, I have concluded that the Respondent committed an unfair labor practice in violation of §7116(a)(1) and (8) of the Statute by refusing to allow the pending grievance to be resubmitted to Arbitrator Ross. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that U.S. Department of Transportation, Federal Aviation Administration, Washington, DC (Respondent), shall:

1. Cease and desist from:

(a) Refusing to participate in proceedings before Arbitrator Jerome Ross in the 2004 grievance concerning the Respondent's failure to upgrade the Air Traffic Control (ATC) level of its Atlanta facility (ATC grievance).

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Participate fully in the proceedings before Arbitrator Ross concerning the ATC grievance.

(b) In the event that Arbitrator Ross is unavailable, cooperate in the selection of another arbitrator and participate fully in the proceedings before that arbitrator concerning the ATC grievance.

(c) Post at all of its facilities at which bargaining unit employees represented by the National Air Traffic Controllers Association are assigned copies of the attached Notice on forms to by furnished by the Authority. Upon receipt of such forms, they shall be signed by the Administrator of the Federal Aviation Administration and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced or covered by other materials.

(d) Pursuant to §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Chicago Region of the Authority, in writing, within 30 days of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, July 13, 2007.

PAUL B. LANG

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Transportation, Federal Aviation Administration, Washington, DC, violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to participate in proceedings before Arbitrator Jerome Ross in the 2004 grievance concerning the Respondent's failure to upgrade the Air Traffic Control (ATC) level of its Atlanta facility (ATC grievance).

WE WILL NOT, in any like or related manner, interfere with, restrain or coerce its employees in the exercise of their rights assured by the Statute.

WE WILL participate fully in the proceedings before Arbitrator Ross concerning the ATC grievance.

WE WILL, in the event that Arbitrator Ross is unavailable, cooperate in the selection of another arbitrator and participate fully in the proceedings before that arbitrator concerning the ATC grievance.

_____
(Agency)

Dated: _____ By:_____
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, whose address is: Federal Labor Relations Authority, 55 West Monroe Street, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: 312-886-3465.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CA-06-0706, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT	**CERTIFIED NOS:**
Thomas F. Bianco, Esq. Counsel for the General Counsel Federal Labor Relations Authority 1400 K Street, NW, 2nd Floor Washington, DC 20424-0001	7004 1350 0003 5175 2676
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Patrick Daniel McGlone Jessica Bartlett Federal Aviation Administration Labor Relations Team, AHL-200 800 Independence Ave., SW, Room 519 Washington, DC 20591	7005 2570 0001 8450 2323
Sandra Riviears, Esq. Marc S. Shapiro, Esq. National Air Traffic Controllers Association, AFL-CIO 1325 Massachusetts Avenue, NW Washington, DC 20005	7005 2570 0001 8450 2330

DATED: July 13, 2007
Washington, DC