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**Department of the Treasury, U.S.
Customs Service, Region I, Boston, MA
and NTEU**

Federal Labor Relations Authority

1-CA-20060; 1-CA-20063; 16 FLRA No.
97; 16 FLRA 654

November 30, 1984

Judge / Administrative Officer

**Before: Frazier, Acting Chairman; Haughton,
Member**

Related Index Numbers

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Case Summary

THE 11TH HOUR SUBMISSION OF PROPOSALS WAS UNTIMELY. THEREFORE, THE EMPLOYER'S UNILATERAL IMPLEMENTATION OF NEW WORKING CONDITIONS WAS LAWFUL. The ALJ dismissed one refusal-to-bargain complaint when he found that the past practice had always been to consolidate seaport overtime assignments whenever possible and that the employer had not changed that practice. However, the ALJ also found a practice that when an inspector had completed a seaport overtime assignment, he would go home, unless he had already

been given a second assignment. Therefore, the order to inspectors to call the Airport Supervisor before going home was a change in past practice. It made it more likely that an inspector would be required to work for the whole eight hours of his overtime tour. The foreseeable effect of more work and less money was substantial. Therefore, the employer was obligated to give the union notice and an opportunity to bargain. The employer sent the union notification, which was received on 11/05/81 and announced a proposed implementation date of Sunday 11/15/81. The ALJ found that the union had 10 days to request bargaining and that this was adequate notice. The union submitted its request to bargain and its proposals on 11/13/84, two days before implementation. The ALJ determined that this "11th hour" submission was untimely. Therefore, the employer's implementation of the change without prior bargaining was not an unfair labor practice.

Full Text

DECISION AND ORDER

The Administrative Law Judge issued the attached Decision in the above-entitled proceeding finding that the Respondent had not engaged in the unfair labor practices alleged in the consolidated complaint and recommending that the consolidated complaint be dismissed. The General Counsel filed exceptions limited to the Judge's Decision in Case No. 1-CA-20063, and the Respondent filed an opposition thereto.

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Authority has reviewed the rulings of the Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Judge's Decision and the entire record, the Authority hereby adopts the Judge's findings, conclusions and Recommended Order dismissing the allegations of the consolidated complaint in Case No. 1-CA-20060, noting particularly the absence of exceptions, and the

Judge's findings, conclusions and Recommended Order dismissing the allegations of the consolidated complaint in Case No. 1-CA-20063, based upon the particular circumstances presented therein.

ORDER

IT IS ORDERED that the consolidated complaint in Case Nos. 1-CA-20060 and 1-CA-20063 be, and it hereby is, dismissed.

Issued, Washington, D.C., November 30, 1984

Henry B. Frazier III, Acting Chairman
Ronald W. Haughton, Member
FEDERAL LABOR RELATIONS AUTHORITY

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, herein referred to as the Statute, 92 Stat. 1191, 5 U.S.C. 7101, et seq. It was instituted by the Regional Director of the First Region of the Federal Labor Relations Authority by the issuance of a Complaint and Notice of Hearing dated July 9, 1982, based upon an unfair labor practice charged filed on December 2, 1981 in Case No. 1-CA-20060 and an unfair labor practice charge filed on December 3, 1981 in Case No. 1-CA-20063. An Order Consolidating Cases was also issued on July 9, 1982.*1 The foregoing charges were filed by National Treasury Employees Union, herein referred to as NTEU, Union or Charging Party. The Respondent in each case is the Department of Treasury, U.S. Customs Service, Region I (Boston, Massachusetts).

In Case No. 1-CA-20060 (paragraph 8(a) of the Complaint), Respondent is alleged to have violated Sections 7116(a)(1) and (5) by the following conduct:

(a) On or about September 13, 1981, and on October 11, 18 and 25, 1981 and other subsequent dates, Respondent unilaterally changed existing conditions of employment by consolidating waterfront overtime assignments without furnishing the Union with notice and/or an opportunity to bargain concerning the impact and implementation of

said change.*2

In Case No. 1-CA-20063 (paragraph 8(c) of the Complaint), Respondent is alleged to have violated Sections 7116(a)(1) and (5) by the following conduct:

(c) On or about November 15, 1981, Respondent unilaterally changed existing conditions of employment by consolidating waterfront overtime assignments with airport overtime assignments without furnishing the Union with notice and/or an opportunity to bargain concerning the impact and implementation of said change.

Respondent denies committing any statutory violations and raises a number of issues, including inter alia, whether there was a change in conditions of employment, whether the alleged change had a substantial impact, whether the Union failed to make a timely request to bargain, and whether, in fact, Respondent refused to bargain after receipt of the Union's "untimely" request.

A hearing was held in Boston, Massachusetts, at which time the parties were represented by counsel and afforded full opportunity to adduce evidence, to call, examine and cross-examine witnesses, and to argue orally. Briefs filed by the General Counsel and Respondent have been duly considered.

Upon consideration of the entire record in this case,*3 including my evaluation of the testimony and evidence presented at the hearing, and from my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommended order:

Findings of Fact and Conclusions of Law

1. The National Treasury Employees Union is a labor organization within the meaning of Section 7103(a)(4) of the Statute and, at all times material herein, has been the exclusive bargaining representative of employees in the following unit:

All non-professional employees assigned to the Office of Regulations and Rulings and to the Headquarters Office, and to Regions, I, II, III, IV, V, VI, VII, VIII and IX of the U.S. Customs Service, excluding all professional employees; all employees

assigned to the Office of Investigations, the Office of Internal Affairs, and the Office of the Chief Counsel; management officials; employees engaged in Federal Personnel work in other than a purely clerical capacity; confidential employees; guards; and supervisors as defined in the Act.

2. The Respondent is an agency within the meaning of Section 7103(a)(3) of the Statute and, at all times material herein, the following named persons occupied positions set opposite their respective names, and have been and are now supervisors or agents of the Respondent in Boston, Massachusetts.

Thomas Gleason, Director, Labor Relations and Safety Officer Ralph Batchelder, Director, Inspection and Control Division Donald Tilton, Supervisor, Inspection and Control Division

3. The Boston District, Region I, U.S. Customs Service consists of the Port of Boston, Fall River, Springfield, Worcester, Gloucester and Methuen, Massachusetts. This proceeding involves the Port of Boston which covers Logan Airport, the Boston-area waterfront and trucking terminals within the Boston area. For purposes of assignment of Customs inspectors, the Port of Boston has two different divisions: the seaport division and the airport division. The seaport division consists of approximately 16 different work locations to which Customs inspectors can be assigned to perform a variety of inspectional functions. The seaport division consists of two subdivisions: the Moran terminal in Charlestown and the Castle Island terminal in South Boston. Generally, Moran covers vessels and trucking terminals north of downtown Boston and Castle Island covers those south of downtown Boston. Moran and Castle Island are approximately six miles apart. Nearly all of the vessels handled at the seaport division are freight vessels rather than passenger vessels.

Case No. 1-CA-20060: Alleged Consolidation of Overtime Work in the Seaport Division

4. Approximately 50 Customs inspectors are assigned to the Port of Boston. They rotate their

positions within the Port of Boston every 2 weeks. Their regular duty hours are 8:00 a.m. to 5:00 p.m. for which they receive an hourly wage. Overtime is paid for any hours worked outside of these regular duty hours. Half of all overtime work occurs on Sundays. If assigned to perform overtime work, a Customs inspector is guaranteed to be paid for 8 hours of overtime (even if he or she actually works only one hour) at a double time rate. Thus, an overtime assignment results in 16 hours pay or approximately \$160.

5. This overtime to which a Customs inspector is entitled is referred to as "1911 overtime," referring to the Act of 1911 which established it (see 19 U.S.C. 1451), and is payable both for overtime worked during the week and that worked on Sundays and holidays. The Government itself does not pay the 1911 overtime. Rather, it is paid by the carrier which requests the services of the Customs inspector outside of the normal hours of work. Therefore, this overtime is also commonly referred to as "reimbursable overtime." Thus, if one inspector works for only one carrier during his overtime tour, that carrier must then pay the entire amount of overtime earned by the employee during that shift. However, if that inspector, during a single overtime tour, works for two different carriers, he would then earn the same amount of overtime but the two carriers would split the overtime costs between them, resulting in a 50 percent savings to each. In order to cut down these expenses for carriers who request inspectional services outside of the normal business hours, the Customs Service HAS ESTABLISHED A STRONG POLICY of prorating assignments among carriers whenever possible and, I find that Respondent's PRACTICE has been consistent with such policy. The foregoing is clear from my review of Respondent Exhibits 2 and 5 and the testimony, which I credit, of Supervisory Customs Inspector Donald Tilton the management official responsible for the assignment of reimbursable overtime on the Boston seaport since February 1980.

6. In determining how to structure reimbursable overtime assignments Tilton has always followed the

policies established by the Customs Service Headquarters of prorating (or consolidating) these assignments whenever possible. Prior to establishing the overtime assignments at the seaport, Tilton reviews the requests for such services that had been received by his office from the various carriers and shipping agents. He considers the estimated time of arrival of the vessel for which services have been requested, the nature of the work expected to be performed on the vessel, the carrier's estimate of the length of time that work should take and the location of the vessel. If all these considerations result in a determination by Tilton that one inspector could cover more than one vessel in the course of an 8 hour tour, he consolidates two or more seaport assignments and assigns them to one inspector. These same factors are considered by Tilton when structuring reimbursable overtime assignments for weeknights as well as Sundays and holidays. However, in determining whether to consolidate assignments, Tilton would not assign one inspector to cover two vessels if there were any possibility that the first assignment would result in the inspector not arriving at the second assignment on time. Although the carriers in fact save money by having overtime assignments consolidated, they incur significantly greater costs if the unloading of the vessel is delayed awaiting the arrival of the inspector who may have been delayed by a prior assignment. Thus, to accommodate this economic reality, Tilton will consolidate assignments only if it is almost certain to not cause any delay. Even then there are times when he has consolidated assignments which later had to be divided between two inspectors because the first vessel was later than expected or the first assignments ran longer than expected. Tilton's practice has always been (since February 1980, when he became responsible for these assignments) to consolidate assignments when all of the above-referenced factors would permit him to do so. However, the opportunities for such consolidations are few and without any pattern.*4

7. The General Counsel conceded that the

Respondent did consolidate waterfront overtime assignments prior to September 13, 1981, but argued that these instances were only when the same vessel was at two different locations in the course of the tour of duty or when two different vessels were at the same location.*5 I find that this has never been the policy of the Boston District regarding consolidated assignments and that Tilton has always attempted to consolidate seaport assignments when time, location, and other circumstances permit. This included assignments involving two different vessels at two different locations. In fact, prior to September 13, 1981 (the earliest date charged by the General Counsel in its Complaint), the Agency had consolidated assignments which involved two different vessels at two different locations: On April 23, 1981, Inspector Bell performed overtime services for the Australian Envoy located at the Moran Pier, and for the Gulf Trader, located at the American Sugar House, two different locations. On May 18, 1981, Customs Inspector McGrath performed overtime services for the vessels Berglind and Godafoss, located at the Cold Water Fish Dock in Everett, and for the vessel American Archer, located at the Moran Piers in Charleston, two different locations. On September 1, 1981, Inspector O'Hara performed overtime services for the vessel Godafoss, located at the Cold Water Fish Pier in Everett, and for the vessel Broland, located at Exxon Oil in Everett, again two different locations. Each of these assignments were consolidated and their costs prorated among the carriers involved, in a manner in which the General Counsel contends did not occur until after September 13, 1981.

8. Tilton established the schedule for overtime assignments by 4:00 p.m. on weeknights and by 5:00 p.m. on Saturdays, for Sunday assignments. It was at this point that Tilton determined whether the assignments could be consolidated by assigning one man to two requests for services. At these times the inspectors who were scheduled to work were notified by phone and told to which vessels they were assigned and what time the vessels were scheduled to

arrive.

a. After the schedule had been established by Tilton and the individual inspectors notified of their assignments, several circumstances could change which would alter the time and duration of the assignments from how they were originally assigned. The arrival time of the vessel could change or the estimate of how long the assignment would take could be either too long or too short (e.g., there are circumstances in which a ship, intending to unload cargo, is unable to do so due to weather conditions). In addition there are occasions when the Customs Service receives requests for services from shipping agents after the schedule has already been established (e.g., after 5:00 p.m. on Saturday for service on Sunday). Such circumstances require adjustments in the overtime schedule after it has been established and the inspectors notified.

b. In order to avoid administrative complications and the "mass confusion" of attempting to re-contact all the inspectors involved, the Customs Service does not make major revisions in its schedule to accommodate these "post-scheduled" changes. The Agency's practice has always been not to attempt to consolidate assignments after the schedule has been established even if these "post-scheduled" changes would have permitted it to do so. Rather, the supervisor simply contacts the individual inspectors affected by the change, or calls in the next inspector on the overtime list.

c. The necessity to alter the schedule after it has been established and the inspectors notified is the rule rather than the exception, but I am only referring to the initial assignment. The arrival time of vessels are changed after the establishment of the overtime schedule approximately 50 percent of the time.*6 The estimates of the amount of time an assignment will take are inaccurate approximately 90 percent of the time.

d. Customs Form 6081, Register of Reimbursement Assignments, the document used extensively by the General Counsel in its attempt to establish a past practice, records only the hours of

reimbursable overtime actually worked by the Customs inspectors in the Boston seaport. These records do not indicate where any vessel was located during any given assignment. These records also do not show how the assignments on any given day were originally scheduled by Tilton; they do not indicate what assignments had been changed due to the late arrival of a vessel; nor do they show when the assignment was requested by the carrier after the schedule had been established. As a result, the records relied upon by the General Counsel, to establish a past practice different from that asserted by Respondent, are of limited value and not very persuasive to the undersigned. It is for this reason that the more significant evidence is the testimony of witnesses.

Case No. 1-CA-20063: Alleged Consolidation of Overtime Work Between the Seaport Division and the Airport Division

9. In October 1981, David Emmons, Labor Relations Specialist, United States Customs Service, had a discussion with John Linde, District Director of Customs, Boston District regarding the consolidation of Sunday overtime assignments between the Boston seaport and Logan Airport. Linde explained to Emmons at that time that he was concerned that inspectors who were working Sunday overtime assignments at the Boston seaport were going home at the completion of their seaport assignments even when there might be a need for the inspectors at Logan Airport. Linde explained to Emmons at that time that he was concerned that inspectors who were working Sunday overtime assignments at the Boston seaport were going home at the completion of their seaport assignments even when there might be a need for the inspectors at Logan Airport during the remaining hours of the inspectors' tours. Linde felt that this practice was contrary to the Customs Service policy as established by a Customs Service Headquarters Manual Supplement dated June 12, 1979 (Resp. Exh. No. 5). A pertinent paragraph in that Supplement is as follows:

(5) Inspectors, or other employees assigned to inspectional overtime on Sundays or holidays, will

hold themselves available for the full eight hours (or nine, when a one hour meal break is applicable) of the assigned tour, and shall be "available" in the sense of being readily reached and in a location and state of readiness enabling themselves to report for duty upon short notice. The time allowed for travel in reporting back to duty will be determined by local and district management.

The foregoing regulation does not impose any requirement for an inspector, upon completion of his or her assignment, to notify anyone; it only requires them to be available in the sense of being readily reached, and clearly did not preclude them from going home.

a. To rectify this situation Mr. Linde has decided to institute a policy which would require inspectors, upon completion of their Sunday seaport assignments, to call the Supervisory Inspector at Logan Airport to see if there was a need for the inspector's services at the Airport. Prior to instituting this policy of calling the Airport Supervisor, District Director Linde was notifying Emmons so that appropriate steps could be taken to properly notify the Union about the intended change in practice. Subsequent to his conversation, Linde formally requested the Customs Labor Relations Office to notify the Union of the change in practice (Resp. Exh. No. 6). Emmons drafted the following letter to Richard Stevens, Secretary-Treasurer of Chapter 133 of NTEU.

This is to notify you of our intention to require, in accordance with the provisions of Manual Supplement 2132-05 of June 12, 1979, that employees assigned to inspectional overtime on Sundays or holidays will hold themselves available for the full eight hours.

Accordingly, when an inspector completes an overtime assignment prior to the end of the 8 hour time-frame in the Port of Boston on a Sunday or holiday, he is still liable for additional assignments, either at the Seaport or Airport. Therefore, upon completion of an assignment within the port, each inspector will call the Airport Supervisor to indicate his availability.

The above will be effective on Sunday, November 15, 1981.

b. As noted previously (para. 8.b. supra), the Agency's practice has always been not to attempt to consolidate assignments after the schedule has been established even if these "post-scheduled" changes would have permitted it to do so (see Resp. brief at p. 7). Therefore, notwithstanding the regulations requiring inspectors to be "available" for additional assignments, the practice generally was not to make such assignments and Linde correctly concluded inspectors were going home. Therefore, Respondent's November 3 notice essentially is intended to change a past practice whereby inspectors performing overtime work in the seaport division could go home upon completion of their assignment to a new practice whereby they were more vulnerable to an additional assignment during their tour of duty, either in the seaport division or at the airport. The new requirement of calling the airport supervisor was merely the procedure whereby the individual inspector's availability (or vulnerability) became known to the supervisor. The purpose of the change was to save money for the carriers by utilizing inspectors who already were in an overtime status and would continue to be paid whether or not they performed any additional duties.

10. This letter Jt. Exh. No. 3, was sent to Stevens on November 3, 1981. Under normal circumstances the notice would have been sent to Stephen Emmanuel, the NTEU local chapter President, but Emmons was aware that Emmanuel, who had recently suffered a heart attack, was incapacitated. There is conflicting testimony as to the date this letter was received by the Union. Stevens said he received it around November 7; William Milton, the NTEU National Field Representative, testified that Stevens called him on November 6, and indicated that he had just received the letter that day. However, in both the Charge dated November 30, 1981, filed with the Federal Labor Relations Authority in connection with this action (GC Exh. No. 1(e)) and in a letter to the Federal Mediation and Conciliation Service dated

December 4, 1981 (Jt. Exh. No. 7), Milton stated that the Union had received notice of this proposed change on November 5, 1981. Since this earlier correspondence was closer in proximity to the event in question, and not being persuaded by the testimony of either Stevens or Milton, I find that a responsible Union official received notice of the intended change on November 5, 1981.

11. Article 37 of the parties' collective bargaining agreement states in pertinent part, as follows:

Section 4. If the union wishes to negotiate concerning the implementation or impact on employees of the proposed change(s), the union will submit written proposals to the employer within a reasonable period after notification of the proposed change(s). The Union agrees that any proposals submitted in the context of impact bargaining will be related to the proposed change(s) and will not deal with extraneous matters. Negotiations will normally begin within seven (7) calendar days after receipt by the employer of the union's proposals.

Section 5.A. Reasonable extensions of time under this article will be made for good cause shown such as delays in receipt of necessary and relevant information as defined in Section 8(4), provided that the total time involved does not cause an unreasonable delay or impede the employer in the exercise of its management rights.

12. The record does not indicate that Stevens, Milton, or any other Union official attempted to personally contact or telephone any Respondent representative to request bargaining about the change, to request additional information, or to protest the change. In particular, the Union did not promptly communicate with Respondent and request additional time to prepare its bargaining proposals, to postpone the effective date of the changes, or to at least protest that the time interval between November 5 and November 15 was inadequate to prepare bargaining proposals and/or complete bargaining on the change before the November 15 effective date.

13. One week later on Thursday, November 12, a letter containing 14 bargaining proposals prepared by Milton was received at the Post Office in Washington, D.C. at 5:00 p.m. as indicated by the Express Mail receipt. The following morning, it was received in Boston between 10:30 a.m. and 11:00 a.m. by David Emmons, the management official responsible for negotiations regarding the proposed changes. Of course, since this was Friday, November 13 it was the last workday before the effective date of the change on Sunday, November 15.*7 Absent a change of mind by Respondent, it was also the last day upon which to notify its employees of the change to become effective Sunday, November 15.

14. Respondent did not respond on that date to the Union's bargaining request and obviously chose to treat it as untimely, as argued herein. Accordingly, on the same day that Respondent received the Union's bargaining request, Respondent officially notified the Boston inspectors of the new procedure to call the Airport Supervisor after completion of their seaport assignments to indicate their availability.

15. Thereafter, on November 20, 1981, Emmons had a conversation with Milton regarding several matters pertaining to labor relations including the seaport/airport overtime issue in the Port of Boston. During this conversation (which initially involved other matters), Emmons expressed his willingness to negotiate the proposals submitted by Milton (TR 238-239, Resp. Exh. No. 7) but refused to return to the status quo. However, Milton never took Emmons up on this offer and never entered into negotiations with Emmons on this issue.*8

16. The Union's bargaining proposals are set forth in Joint Exhibit No. 5 and will be referred to later.

Discussion and Conclusions of Law

Case No. 1-CA-20060

It is well established that an agency, prior to exercising a reserved management right, must provide the union with adequate notice of its decision so that the union will have a meaningful opportunity to

bargain about the impact and implementation of the decision.*9 In order for the above principle to apply, it must be shown that the agency has an obligation to bargain in the first instance. As applied to this case, it is incumbent upon the General Counsel to establish by a preponderance of the evidence that the agency in fact changed a condition of employment established by past practice. If the activity complained of is simply a continuation of an ongoing practice then there is no obligation to notify the union or negotiate in connection therewith.*10

In its brief, Respondent summarizes the pertinent evidence on this issue and persuasively argues that its past practice always has been to consolidate seaport overtime assignments whenever possible and, based upon Tilton's credible testimony, I agree. Further, Respondent argues that the General Counsel has failed to establish the existence of a different past practice, namely, that overtime assignments were only consolidated where either the same vessel or same location was involved. In the interest of brevity, I shall incorporate by reference Respondent's entire argument on this issue as set forth in its brief at page 12 through 22, inclusive. Respondent points out, *inter alia*, the following: (1) The testimony of Stevens and Pacewicz cannot be relied upon; (2) Customs Form 6001 are unreliable since they do not show location of vessels, do not show whether the actual arrival time of vessels was the same as originally anticipated at the date of assignment, do not show whether the actual hours worked is the same as originally anticipated; and do not show last-minute requests by shipping agents for services of inspectors after overtime assignments have already been made; and (3) the Respondent's evidence that 3 weeknight overtime assignments involving at least two vessels at two different locations were consolidated, in a manner which the General Counsel alleged did not exist prior to September 13, 1981.

Accordingly, I conclude that the credible evidence establishes that the Respondent did not change its method of assigning reimbursable overtime on or after September 13, 1981 as alleged in the

Complaint. Therefore, I recommend that Case No. 1-CA-20060 be dismissed.

Case No. 1-CA-20063

The Respondent, raises a number of issues which will be discussed *seriatim*.

A. Change in Past Practice

As previously found (*supra*, para. 9.b), the past practice was for inspectors to complete their seaport overtime assignments and then return home, unless already having been given a second assignment. Respondent offered no evidence to show that it ever implemented its own regulations and telephoned inspectors at their home and actually gave additional assignments to inspectors who were technically "available." As a practical matter, when a customs inspector completed his or her overtime assignment he or she was through for the day. It is for this reason that the Respondent's agent, Linde, realistically concluded that the most practical way to identify possible recipients of an additional assignment was to require inspectors to call the Airport Supervisor before they went home. Thus, the November 3 notice was, in fact, a notification concerning a real change in working conditions, rather than a reaffirmation of existing policy and practice. The new procedure required inspectors to do something which previously was not required of them. Therefore, I reject Respondent's contention that there was no change in conditions of employment.

B. Impact of the Change

Under the existing regulations, inspectors had to be "reachable" for an additional overtime assignment and therefore it may be argued that they always were vulnerable to performing more work and depriving another inspector of the opportunity to receive an overtime assignment. In practice, however, the existing regulation was not enforced and when an inspector completed his original assignment, he was through for the day. Thus, the new procedure was an effort to revive and strengthen the regulation requiring inspectors to be "reachable."

Respondent attempts to minimize the new

procedure by saying it merely required a telephone call. Respondent knows full well the purpose of the telephone call was to make the inspector vulnerable to an additional assignment during his or her tour of duty. The whole purpose of this new procedure was to save money for the carriers. From this it follows that inspectors would ultimately receive less money. However salutary the purpose of Respondent's change in existing practice may be for the carriers, the effect for inspectors was likely to be more work and less money. As a result of this change, and as correctly pointed out by Pacewicz, overtime work itself lost some of its attractiveness, at least for those inspectors who might wish to pass up an opportunity to earn 16 hours' pay for a tour of duty normally less than a full 8 hours' work. Because the Respondent's change had the foreseeable impact of more work and less money, I find the change was substantial and that Respondent had an obligation to provide the Union with adequate notice of the proposed change.*11

C. Adequacy of Respondent's Notice

The Authority's law in this area is being made on a case-to-case basis and whether or not an agency's notice is reasonable and adequate seems to depend upon the facts of each case. The Authority had held that as few as 4 days is adequate in which to request bargaining AND to have "an opportunity to bargain concerning the impact and implementation of the decision prior to its effectuation."*12 Thus, in Fort Sam Houston, the Authority found that the Union was notified on Thursday, July 26, 1979 that the work performed by bus drivers had been contracted out, and that a meeting was scheduled for Monday, July 30 to present RIF notices to the 12 employees affected. The Union did not attend the meeting and did not request bargaining until a few days after the meeting. The Authority held that the Union was given adequate notice of the decision to conduct a RIF and an opportunity to bargain concerning impact and implementation PRIOR TO its effectuation.

By way of comparison, the Authority held in another case,*13 that notice from Tuesday, November 25 to Monday, December 1 (including a holiday and a

weekend) was inadequate notice, especially noting the Union's prompt request for bargaining on November 26 and the agency's decision to postpone implementation of its decision for only 2 days where no overriding exigency existed which required such hasty implementation. One critical difference between these cases is that in Bureau of Government Financial Operations Headquarters, the Union did submit a bargaining request as soon as it reasonably could and the failure to have time to complete bargaining was solely because the agency had no overriding exigency for refusing to delay the date of implementation. However, in Fort Sam Houston, the Union failed to submit a bargaining request prior to the effective date and failed to attend the meeting when the bus drivers were given their RIF notices. The Authority apparently concluded that the short time provided by the agency was justified in the particular circumstances of that case.

Here, the November 3 notice was received by a responsible Union official on Thursday, November 5, announcing an effective date of Sunday, November 15. Contrary to Respondent's contention, I would not count November 3 and 4 because the Union had not yet received the notice. I also would not count November 15, the effective date of the change. This leaves a time frame of 10 days (November 5-14, inclusive) in which the Union had an opportunity to request bargaining and submit proposals. The issue to be resolved is whether this time frame was reasonable in the circumstances of this case.

In my opinion, both Respondent and the Union have conducted themselves in a manner resulting in the creation of legal issues for the Authority to decide. It is not the function of the Authority to encourage parties to litigate matters best resolved by good faith collective bargaining. The facts of this case show that Respondent's agent, Emmons knew on October 19 that notice to the Union was required but he delayed until November 3, to issue the notice to the Union. Thus, the General Counsel correctly points out that Respondent "could have" issued its notice earlier and thus established a longer time frame. Nevertheless,

the issue remain whether the time frame eventually established was reasonable and adequate, considering the facts of this case.

Since the Authority was willing to conclude that 4 days' notice in Fort Sam Houston was adequate, I am constrained to conclude that the 10 days' notice here is also adequate. This is especially so when one observes that the change in Fort Sam Houston was of a more serious nature, i.e. a Reduction-in-Force of several employees, in contrast to the new procedure here requiring inspectors to place a phone call to the Airport supervisor. If the Union here wanted to bargain about this change as quickly as possible, all it had to do was make a phone call on the day Stevens received notice on Thursday, or on Friday when Stevens informed Milton, or even as late as Monday when Milton received the copy of the written notice, (I reject the Union's argument that Milton could take no action until he actually read the short, simple and uncomplicated notice.) Had Milton called Respondent's representative he could have discussed whether there was time to bargain prior to the effective date of the change or whether the change could be temporarily postponed.

Instead, Milton waited until the last minute in submitting his proposals, and as a result Respondent received them on Friday, November 13, only two days before the effective date. It is clear from Milton's own testimony that he had no reasonable expectation of bargaining prior to the effective date. It is suggested by the Respondent that Milton was intentionally (i.e. in bad faith) delaying submission of his request hoping that it would cause Respondent to postpone the effective date of the new procedure. Just as the Respondent "could have" provided its notice earlier, the Union also "could have" replied sooner. Thus, this is not like the Bureau, case, *supra*, where the Union had no choice but to make a last-minute request. Here, by not requesting bargaining as promptly as possible the Union lulled the agency into believing the Union had accepted the new procedure and elected not to bargain. Here, by waiting until the very last working day before the effective date of the

new procedure, the Union gave the impression, correctly or incorrectly, that its real desire was not to bargain but, rather, to delay implementation of the change.

Apparently recognizing that the Union could have made a bargaining request earlier than it did, the General Counsel contends in its brief that under the collective bargaining statement, a request to bargain in itself does not obligate the agency to bargain. I disagree. The contract contains no clear and unmistakable waiver of the Union's right to request bargaining, independent from its submission of written proposals. Indeed, the contract even provides for obtaining reasonable extensions of time. Accordingly, I find this to be an unacceptable explanation for the Union's failure to more promptly request bargaining. Assuming, *arguendo*, that it was necessary for the Union to first submit written proposals in order to "perfect" its bargaining request, and agreeing with the General Counsel that the time frame should allow time to prepare such proposals, I would nevertheless conclude that the Union here had sufficient time to comply with the contract requirements, given the nature of the proposed change and the 10 days provided by Respondent. As pointed out by Respondent, there was no need here for extensive analysis of the change prior to formulating its proposals for negotiations. Some of the proposals were not even relevant to the change, as required by Article 37, Section 4 of the contract. I reject any contention that the Union required a substantial amount of time to prepare proposals. Thus, while at first glance the Union's request and list of proposals may appear to evidence a complex, many-faceted issue, a closer analysis of the Union's proposals demonstrates that the Union was simply offering a "boiler plate" response to the Respondent's intended change, in many instances proposing to negotiate the very language that the parties had already agreed to in their National Contract. Moreover, some proposals were unrelated to the issue, as pointed out in Respondent's brief (pages 26-28).

Where an agency has notified the union of a

forthcoming change, it is incumbent upon the union to avail itself of this opportunity and either request bargaining or request more time to consider the change.*14 Where the union fails to request bargaining until after the change is implemented its request is untimely and there is no unlawful refusal to bargain.*15 Where the union's request to bargain is submitted prior to the change, but at the 11th hour, it has also been held to be untimely,*16. and it is this case law which governs this proceeding.

Having concluded that Respondent gave adequate notice to the Union, and that the Union's bargaining request was untimely, I find that Respondent's implementation of the new procedure on November 15 was not unlawful, and Respondent did not thereby violate Sections 7116(a)(5) and (1). Accordingly, I recommend dismissal of Case No. 1-CA-20063.*17

The General Counsel also contends that there was "no exigent reason why Management had to push ahead with implementation immediately" The General Counsel asserts that Respondent had the burden of presenting evidence to establish why it "could not endure a few more weeks of a practice it had condoned for 2 years, until impact bargaining was completed." I reject this argument and conclude that Respondent's "burden" does not arise until after the Union submits a timely bargaining request, and then only if the bargaining cannot be completed prior to the implementation date. In such event the agency has to either change the date or justify its refusal to do so. Since it is the agency itself which initially established the time frame from November 5 to November 15, I believe it is not unreasonably to impose upon the agency the burden of insuring that bargaining can be completed prior to the proposed date of implementation and, if not, it surely must justify whether an overriding exigency prevents it from delaying implementation.*18 Here, however, the Respondent was free to proceed with implementation because it had already satisfied its obligation to provide the Union with reasonable and adequate notice of its change in conditions of employment.

ORDER

It is hereby ordered that the Complaint in Case Nos. 1-CA-20060 and 1-CA-20063 be, and it hereby is, dismissed.

FRANCIS E. DOWD Administrative Law Judge

Dated: June 14, 1983 Washington, DC

1. At the hearing, the General Counsel moved to sever Case No. 1-CA-20059 from this proceeding based upon a prehearing settlement. Respondent did not object and the motion was granted. As a result, paragraph 8(b) of the Complaint was deleted.

2. The charge dated November 12, 1981 only mentioned the date of October 25, 1981; the Complaint cited three additional dates. I disagree with the Respondent's contention that the Complaint raises issues not previously raised by the charge. The issues are the same. Moreover, a charge is not a pleading; it merely serves to initiate an investigation. Like the National Labor Relations Board, the Authority has considerable leeway to found a Complaint on events other than those specifically set forth in the charge, the only limitation being that it may not get "so completely outside . . . the charge that it may be said to be initiating the proceeding on its own motion." *Texas Industries, Inc.*, 336 F.2d 128 (CA-5); *Fant Milling Co.*, 360 U.S. 301; *Kohler Co.*, 220 F.2d 3, 7 (CA-7). Accordingly, I reaffirm my ruling denying Respondent's motion for partial dismissal of the Complaint.

3. The following correction of the transcript is hereby made. TR 50, line 12 "an hour long" is changed to "by an R. Long."

4. See Joint Exhibit No. 8 and comments thereon by Respondent in its brief at pages 4 and 5.

5. As a practical matter these instances of consolidation are the best examples of when it is easiest to order consolidations but it does not necessarily follow that these are the only occasions when Respondent has required consolidation or that it has limited itself to only these situations.

6. Customs Inspector Pacewicz, the General Counsel's own witness, testified that individual assignments were changed at the last minute due to changes in vessel arrival times "all the time." It happens so often in fact that Inspector Pacewicz takes it upon himself to call the tugboat to verify the arrival time of the vessels before he leaves for an assignment.

7. Milton's incredible explanation for the delay in responding to Respondent is accurately set forth in Respondent's brief at pages 9 and 10 and the record speaks for itself. Suffice to say, Milton demonstrated that he had no sense of urgency about submitting his bargaining request and, as he noted at TR 132, was content to have Respondent receive his proposals by "close of business" Friday, November 13. But Milton also testified (at TR 250-251) that he could not recall any occasion when negotiations had commenced the same day or within one day of management's receipt of proposals. Therefore, I conclude that Milton had no expectations that bargaining could be completed before the effective date of the change.

8. These findings are based upon the persuasive testimony of Emmons whom I found to be an honest and credible witness. I do not accept Milton's unconvincing testimony to the contrary.

9. Federal Railroad Administration, 4 A/SLMR 497, A/SLMR No. 418; Jacksonville District, Internal Revenue Service, Jacksonville, Florida, 7 A/SLMR 758, A/SLMR No. 893; Bureau of Government Financial Operations Headquarters, 11 FLRA No. 68, 11 FLRA 334, Scott Air Force Base, 5 FLRA No. 2.

10. Internal Revenue Service, Cleveland, Ohio, 6 FLRA No. 40, 6 FLRA 240; Social Security Administration, Mid-America Service Center, Kansas City, Missouri, 9 FLRA No. 33, 9 FLRA 229.

11. I reject Respondent's contention that ACTUAL impact is necessary. It is only necessary for the General Counsel to show that substantial impact was reasonably foreseeable. Department of Health and Human Services, Social Security Administration, Field Assessment Office, Atlanta, Georgia, 11 FLRA No. 78; Internal Revenue Service and Brookhaven

Service Center, 12 FLRA No. 7. For an extensive discussion of the "reasonable likelihood" or "reasonably foreseeable" test see the Administrative Law Judge's decision in U.S. Government Printing Office and Joint Council of Unions, GPO, Case No. 3-CA-549, OALJ-81-083 (April 9, 1981), pending before the Authority.

12. United States Department of Defense, Department of the Army, Headquarters, Fort Sam Houston, Texas, 8 FLRA No. 112 (1982), 8 FLRA 623.

13. Bureau of Government Financial Operations Headquarters, 11 FLRA No. 68 (1983), 11 FLRA 334.

14. Department of the Navy, Portsmouth Naval Shipyard, A/SLMR No.

508, 5 A/SLMR 247; Department of Transportation, Transportation Systems Center, Cambridge, Massachusetts, A/SLMR No. 1031, 8 A/SLMR 486; Internal Revenue Service (IRS) and Brooklyn District Office, IRS, 2 FLRA No. 76, 2 FLRA 587; United States Department of Navy, Bureau of Medicine and Surgery, Great Lakes Naval Hospital, Illinois, A/SLMR No. 289, 3 A/SLMR 375; Division of Military and Naval Affairs, State of New York, Albany, New York, 8 FLRA No. 71, 8 FLRA 309, at 320. cf. Department of Treasury, Internal Revenue Service, Southwest Region, Dallas, Texas, A/SLMR No. 1144, 8 A/SLMR 1203.

15. Department of the Army, U.S. Military Academy, West Point, New York, A/SLMR No. 1138, 8 A/SLMR 1163.

16. Headquarters, 63rd Air Base Group, U.S. Air Force, Norton Air Force Base, California, A/SLMR No. 761, 6 A/SLMR 679; Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 960, 8 A/SLMR 33.

17. Ibid.

18. Bureau of Government Financial Operations Headquarters, 11 FLRA No. 68, 11 FLRA 334.