

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

TRANSDEV SERVICES, INC.,

Employer,

and

Case No. 05-RC-137335

**AMALGAMATED TRANSIT UNION
LOCAL 689, associated with
AMALGAMATED TRANSIT UNION,
AFL-CIO**

Petitioner.

**TRANSDEV SERVICES, INC.'S REQUEST FOR REVIEW OF
THE REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION
AND CERTIFICATE OF REPRESENTATIVE**

COMES NOW Transdev Services, Inc. [hereinafter "Transdev" or the "Company"], by its attorneys, pursuant to the National Labor Relations Board Rules and Regulations, as amended, Section 102.67, and hereby submits its Request for Review of the Regional Director's Supplemental Decision and Certificate of Representation [hereinafter "Supplemental Decision"] dated July 19, 2016 (attached hereto as Attachment 1).¹

¹ Although the Regional Director's Supplemental Decision is dated July 19, 2016, it was not served on counsel for Transdev until August 2, 2016, the day its Request for Review was due. Despite repeated inquiries by Transdev's counsel about issuance of the Supplemental Decision, the Region did not provide Transdev's counsel with a copy of the Supplemental Decision until August 2, 2016, via e-mail. The Region informed counsel for Transdev on August 2, 2016 that it served the Supplemental Decision on July 19, 2016 via facsimile and U.S. mail, but counsel for Transdev never received either a facsimile transmittal or paper copy of the Supplemental Decision, and has no record of receiving such a facsimile transmittal. The Region has failed to provide Transdev's counsel with a copy of any facsimile document indicating that the Region successfully served the Supplemental Decision via facsimile on July 19, 2016, despite Transdev's counsel's request for such a document and, in fact, the Region admitted to Transdev's counsel that it has no method of determining whether the facsimiles it sends, including the one it purportedly sent on July 19, 2016, successfully reach their destinations.

I. STATEMENT OF THE CASE

A. Procedural History

1. Representation Petition.

On August 6, 2014, Amalgamated Transit Union Local 689 [hereinafter “Union”] filed a Representation Petition with the National Labor Relations Board Region 5 [hereinafter “Region”] seeking to become the collective bargaining representative of Road Supervisors, Safety and Training Supervisors, and Safety Trainers employed by Transdev at its facilities located at 3201 Hubbard Road in Hyattsville, Maryland and 2219 Adams Place NE in Washington, D.C.² On August 29, 2014, the Union withdrew its Petition, which was approved by the Regional Director. On September 23, 2014, the Union re-filed a Representation Petition to become the collective bargaining representative of the above described unit. In accordance with NLRB procedures, the Board conducted a one-day hearing on October 7, 2014, before Hearing Officer Jason Usher.

During the hearing and on the record, the Union amended its pending Petition to the extent the Union was no longer seeking to represent the Safety and Training Supervisors and Safety Trainers. The Union sought in its amended Petition to only represent the Road Supervisors and Lead Road Supervisors, excluding Safety and Training Supervisors and Safety Trainers among others. As a result of the Union’s partial withdrawal of its Petition, Transdev moved for the Regional Director to issue an Order approving the withdrawal of the Union’s Petition seeking to represent the full-time and regular part-time Safety and Training Supervisors and Safety Trainers pursuant to Rule 102.60 of the National Labor Relations Board Rules and Regulations. The issue at hearing was whether the Road Supervisors the Union sought to

² Transdev’s Operators that are supervised by the Road Supervisors are represented by two separate unions, the Amalgamated Transit Union, Local 1764 and the International Brotherhood of Teamsters, Local 639.

represent were statutory supervisors under Section 2(11) of the Act. Transdev and the Union filed post-hearing briefs on October 16, 2014.

2. Failure to Give Notice.

The Region failed to provide notice of the October 7, 2014 hearing to the two unions that represented Transdev's operators. Notice to the ATU, Local 1764 and Teamsters, Local 639 was required pursuant to Rule 102.63(a) of the National Labor Relations Board Rules and Regulations as they are labor organizations that represent employees that would be affected by these proceedings. Road Supervisors perform driving work which is under the exclusive jurisdiction of the bargaining units represented by the ATU, Local 1764 and Teamsters, Local 639. However, proper notice of the representation hearing was not provided to these parties who should be or otherwise were affected by the proceeding and the Regional Director's Decision and Order in this matter.

3. The Regional Director's Decision and Order in 2014.

On October 27, 2014, the Regional Director for Region 5 issued a Decision and Order, wherein the Regional Director correctly concluded that Transdev's Road Supervisors were statutory supervisors pursuant to Section 2(11) of the Act because, among other things, the Road Supervisors exercised independent discretion to discipline operators. In reaching this conclusion, the Regional Director went through an exhaustive legal and factual analysis of all applicable Board precedent and relevant facts that were specific and exclusive to the Road Supervisors employed by Transdev.

4. The Board's 2016 Decision on Review and Order

The Union thereafter filed its Petition for Review with the Board, contending that the Regional Director's October 27, 2014 Order was incorrect. On May 12, 2016, the Board issued

its Decision on Review and Order, reversing the Regional Director's decision, concluding that Transdev's Road Supervisors were not statutory supervisors under Section 2(11) of the Act. 363 NLRB No. 188 (May 12, 2016). The Board remanded the proceeding to the Regional Director "for further appropriate action consistent with this Decision and Order." *Id.*

5. The Election

The Region thereafter ordered an election to be held at Transdev's facility in Hyattsville, Maryland on July 1, 2016. The election was held two years after any showing of interest by Road Supervisors and Lead Road Supervisors that they wished the Union to represent them.

The polls were open from 11:15 a.m. to 12:15 p.m. and 2:00 p.m. to 4:00 p.m. Upon the conclusion of the election, the Region determined that 11 votes were cast for the petitioning labor organization. There were no challenged ballots.

On July 8, 2016, Transdev filed its Objections To Election and Written Offer of Proof Supporting Its Objections To Election. The Regional Director issued his Supplemental Decision and Certificate of Representation on July 19, 2016.³

B. Statement of Facts

Transdev's Written Offer of Proof Supporting Its Objections To Election demonstrated that during the two years between the Union's first Petition and the election, Transdev has experienced significant turnover of Road Supervisors and Lead Road Supervisors. In fact, many of the employees who signed authorization cards are no longer employed at Transdev. Of the twelve employees who would constitute the bargaining unit, only six were employed as Road Supervisors or Lead Road Supervisors at the time the Union filed its Petition. An additional six did not become Road Supervisors until well after the showing of interest and the Petition were

³ As noted above, the Region did not serve Transdev's counsel with a copy of the Supplemental Decision until two weeks after the date of its issue, on August 2, 2016.

filed. (See Exhibit A to Transdev's Offer of Proof, attached hereto as Attachment 2). Because of the significant turnover in Road Supervisors and Lead Road Supervisors during the two years the Union's Request for Review was pending at the Board, six (6) employees who voted in the election were not employed as Road Supervisors in 2014 and did not sign authorization cards.

II. BASIS FOR REQUEST FOR REVIEW

The undersigned respectfully submit, pursuant to the National Labor Relations Board Rules and Regulations, Section 102.67 that the granting of this Request for Review is mandated in this matter based upon the following grounds:

- 1) Substantial questions of law or policy are raised because the Regional Director's Supplemental Decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of the parties inasmuch as the Regional Director ignores facts dispositive to the proper conclusion.
- 2) There are compelling reasons for the reconsideration of Board policy regarding the timing of a Union's showing of interest.

Based on these reasons, Transdev requests that the Board review the Supplemental Decision and Order.

III. SUMMARY OF THE ARGUMENT

The Regional Director's Supplemental Decision is clearly erroneous because it disregards the undisputed evidence that the Union's showing of interest was stale at the time of the election. Because of the passage of time between the filing of the Union's Petition in 2014 and the Board's decision on the supervisory status of Road Supervisors and Lead Road Supervisors in May 2016 and the election, and because of the significant turnover of employees at Transdev during that time period, there was no current showing of interest at the time of the election in July 2016. Moreover, the Union's misconduct interfered with the bargaining unit employees' free choice of representative. The Regional Director committed clear error in rejected Transdev's Objection To Elections and issuing the Certificate of Representative.

In addition, Board policy regarding employer objections to elections on the basis that the showing of interest is untimely or stale should be reversed because it is inconsistent with the Casehandling Manual and the purposes of the National Labor Relations Act (“NLRA”), 29 U.S.C. § 157 *et seq.* Permitting employer objections based on the timeliness of the showing of interest would further the safeguards protecting the expenditure of agency resources.

IV. ARGUMENT

A. The Regional Director’s Decision Is In Error Because It Was Clearly Erroneous On The Record.

1. The Undisputed Evidence Demonstrated That The Union’s Showing of Interest Was Stale.

A timely showing of interest is essential to serve the purposes of the NLRA because it is “an important safeguard against the potential for misuse of election procedures and waste of Agency resources.” *See* Office of the General Counsel Memorandum GC-1508 (Revised) (Oct. 25, 2015). According to the Board’s Representational Casehandling Manual, a petitioning party must provide evidence showing that the petition has the support of at least 30% of the bargaining unit before an election will be held. 79 Fed. Reg. at 74421. The reason for the rule, according to General Counsel, is “to determine whether the conduct of an election serves a useful purpose under the statute, i.e., whether there is sufficient employee interest to warrant the expenditure of the Agency’s time, effort and resources in conducting an election.” Office of the General Counsel Memorandum GC-1508 (Revised) (Oct. 25, 2015).

The Casehandling Manual also states that “the age of the [authorization] cards will sometimes be material.” Representational Casehandling Manual § 11027.4. It explains, “For example, where a union’s disclaimer of interest or withdrawal request in a prior case has resulted in action with 6 months’ prejudice to the filing of a new petition by the union (Sec. 11112), it must submit a current interest in support of any petition it files after the period has expired. Sec.

11118.3.” *Id.* The Board’s Casehandling Manual also provides that, before an election, “the date on which the showing of interest signatures were obtained must be established.” Representational Casehandling Manual § 11027.3.

The Board has noted that when a Union held only “stale designation cards” by a portion of a bargaining unit, the Board “could neither direct an election nor issue a bargaining order on their behalf.” *Professional Ambulance Serv., Inc.*, 232 NLRB 1141, 1150 (1977). Similarly, in his dissent in *Reliant Energy aka Etiwanda LLC*, 357 NLRB 2098, 2104 n.4 (2011), Member Hayes noted that when there was turnover at a facility between elections, the showing of interest may become “stale,” and “the unit may no longer be appropriate.” Member Hayes in *Reliant Energy* stated that when the showing of interest was stale, “[t]he Sec. 7 rights of the current . . . employees, therefore, would best be served by having the Union compile and present a new showing of interest. Then if the Union can obtain such a showing and still wants to represent the . . . employees, a new election could be run based on a timely showing of interest.” *Id.*

Moreover, an employer may not rely on a “stale” showing of interest for decertification as a basis for withdrawal of recognition of a union. *See Jackson Newspapers, Inc.*, 1986 WL 65441 (NLRB G.C. Advice Memorandum 1986). The General Counsel in *Jackson Newspapers* advised that an employer could not withdraw recognition from a union eight months after a decertification petition had been filed because the employer’s unlawful conduct and the passage of time rendered the decertification showing of interest “unreliable and a stale indicator of Union support.” *Id.*

In this case, there was no dispute that the Union's showing of interest occurred two years before the election took place. Between the time the Union filed its Petition in August 2014 and the time the Board ordered the election in May 2016 (22 months later), Transdev experienced a

significant turnover in its Lead Road Supervisors and Road Supervisors. Many of the employees who signed authorization cards in 2014 were no longer employed by Transdev at the time of the election. The purported bargaining unit consisted of twelve employees at the time of the election. Of those, only six were employed as Road Supervisors or Lead Road Supervisors at the time the Union filed its Petition. The other six employees did not become Road Supervisors until after the showing of interest and the Petition were filed. (See Attachment 2). As Attachment 2 shows, three of the six new Road Supervisors did not obtain their positions until 2015 and the other three until 2016, all at least one year after the showing of interest. Thus 50% of those voting were not even in the potential bargaining unit when the Union solicited authorization cards.

The election was not, therefore, based on a current showing of interest, as required by the Board's Casehandling Manual. Because there was a 22-month gap between the time the Petition was filed and the Board issued its order on May 12, 2016, and because of the high turnover rate of Road Supervisors at Transdev during that time, the initial showing of interest of the six employees employed at the time of the Union's Petition in 2014 was rendered stale and ineffective, just as in *Professional Ambulance Service* and *Reliant Energy*.

The Regional Director's Supplemental Decision, therefore, was clearly erroneous on the record because it ignored the Board's own regulations, as set forth in the Casehandling Manual, as well as General Counsel's opinion in Memorandum GC-1508. There was no showing by the Union, at the time of the election, that the Union had the support of at least 30% of the bargaining unit, as required by Board regulations. 79 Fed. Reg. at 74421. Because the age of the authorization cards is "material" according to the Casehandling Manual, the Regional Director's

dismissal of Transdev's Objections To Election on the grounds that the showing of interest was stale was contrary to the Board's policy and directives.

The Regional Director also erred when he disregarded the undisputed evidence that Transdev's counsel repeatedly requested from the Board Agent a showing of interest for Union representation of current Road Supervisors and Lead Road Supervisors. Because the Board Agent repeatedly refused counsel's request, the election proceeded without the required showing of interest by current Road Supervisors and Lead Road Supervisors. By rejecting Transdev's arguments in this regard, the Regional Director again disregarded the Board's own Casehandling Manual.

The Board's own rules require a showing of interest within six months of the election, but no such showing was made in this case. It is undisputed in this case that the Union made no attempt to demonstrate a showing of interest of at least 30% of Employer's current Road Supervisors and Lead Road Supervisors after the Board's Order prior to the election. The Union's initial showing of interest was rendered unreliable and stale because of the passage of time and the high turnover rate of Road Supervisors and Lead Road Supervisors. The gap of time between the Petition and the election was completely discounted by the Regional Director in the Supplemental Decision, in contradiction of the law. Because his decision was clearly erroneous on the undisputed facts, the Board should grant Transdev's Request for Review.

2. The Union's Own Misconduct Compelled Setting Aside The Election Results.

The Regional Director also erred when he determined that the election should not be set aside because of the Union's own misconduct and non-compliance with the NLRA and the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). It is undisputed that while the Board was considering the Union's Request for Review, the Department of Labor was

investigating and prosecuting the Union for non-compliance and violation of the LMRDA, 29 U.S.C. §§ 481-84. *See Perez v. Local 689, Amalgamated Transit Union*, No. 8:16-cv-02052-GJH (D. Md.). In that case, the Department of Labor determined that there was sufficient evidence to charge the Union with violating the quasi-criminal provisions of the LMRDA due to the Union's misconduct during its December 2, 2015 election of Union officers. *Id.*, ¶ 1. The Secretary of Labor investigated allegations of impropriety by the Union and found probable cause to believe that the Union failed to mail proper election notices to all members, failed to conduct its election in accordance with its bylaws by denying individuals who were eligible for candidacy the right to be nominated and run for office, failed to apply its candidacy qualification in a uniform manner during the conduct of the election, permitted ineligible members to vote, and failed to count the ballots of eligible members. *Id.*, ¶¶ 27, 28, 29, 30). The Secretary of Labor determined that these violations affected the outcome of the Union's election and had not been remedied by the time the lawsuit was filed, on June 13, 2016. *Id.*, ¶¶ 26, 31.

It is also undisputed that the Board ruled that the Union itself violated the NLRA in 2015 – while the Union's Petition for Review in this case was pending – when it threatened one of its own employees with discharge if she filed a grievance. *Amalgamated Transit Union, Local 689*, 363 NLRB No. 43 (Dec. 1, 2015). The Board found that the Union also instructed the employee not to discuss working conditions with other employees or shop stewards and retaliated against the employee for filing a grievance and engaging in protected activity. *Id.* On December 1, 2015, the Board affirmed the Administrative Law Judge's ruling that the Union, as an employer, violated the NLRA, and ordered the Union to cease and desist from its illegal activities. *Id.*

In the Supplemental Decision, the Regional Director rejected Transdev's objection to the election on the basis of the Union's misconduct on the grounds that there was insufficient

evidence to conclude that the Union's misconduct affected the outcome of the election. (Attachment 1, Supplemental Decision, at 4). The Regional Director's Supplemental Decision was clearly erroneous in this regard because it failed to take into account the factors to be applied to the Union's conduct, to determine whether the conduct "reasonably tended to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 869 (1984). Those factors include, among other things, the number and severity of incidents of misconduct, the temporal proximity of the misconduct to the election date, and the degree to which the misconduct can be attributed to the union. *Avis Rent-A-Car System*, 280 NLRB 580 (1986); see also *Midway Hosp. Center, Inc.*, 330 NLRB 1420 (2000). In this case, the conduct complained of by Transdev was directly attributable to the Union, was close to the election date, and was sufficiently severe to interfere with the employees' free and uncoerced choice in the election. The Union's violation of the LMRDA affected its own election of its officers and that misconduct affected its conduct of elections elsewhere. The Union's misconduct, combined with the failure to demonstrate a showing of interest of current employees, tainted the election and resulted in an unreliable indicator of Union support. The Regional Director's failure to even consider the *Avis* factors demonstrates that the Supplemental Decision was clearly erroneous.

B. There Are Compelling Reasons For Reconsideration Of Board Policy Regarding The Timing Of A Showing Of Interest.

In rejecting Transdev's Objections to the election on the grounds that the showing of interest was not current when the election was held, the Regional Director relied on Board precedent that the showing of interest was "a matter for administrative determination," was "not litigable by the parties," and that it was "exclusively within the Board's discretion to determine whether a party's showing of interest is sufficient to warrant processing a petition." (Attachment

1, Supplemental Decision, at 2) (relying on *Barnes Hospital*, 306 NLRB 201 n. 2 (1992); *Globe Iron Foundry*, 112 NLRB 1200 (1955); *Potomac Electric Power Co.*, 111 NLRB 553 (1995); *S.H. Kress & Co.*, 137 NLRB 1244 (1962)). To the extent the Board has determined that an employer may not object to an election based on the Union's failure to demonstrate a timely showing of interest, that Board policy should be reconsidered.

As noted above, a timely showing of interest is essential to serve the purposes of the NLRA because it is "an important safeguard against the potential for misuse of election procedures and waste of Agency resources." See Office of the General Counsel Memorandum GC-1508 (Revised) (Oct. 25, 2015). The Casehandling Manual also provides that the age of authorization cards may be material, and that before an election, "the date on which the showing of interest signatures were obtained must be established." Representational Casehandling Manual § 11027.3. See also *Stockton Roofing Co.*, 304 NLRB 699 (1991) ("the purpose of a showing of interest is to save the time and expense of an election where there is insufficient employee interest in the representation issue to warrant an election").

By classifying the required showing of interest as a "matter for administrative determination," particularly with respect to the timeliness of the showing, the current policy frustrates the purpose of the NLRA to avoid unneeded election procedures and waste of agency resources. The very purpose of the rule requiring a timely showing of interest is to "determine whether the conduct of an election serves a useful purpose under the statute, i.e., whether there is sufficient employee interest to warrant the expenditure of the Agency's time, effort and resources in conducting an election." Office of the General Counsel Memorandum GC-1508 (Revised) (Oct. 25, 2015). When an employer may not object to the timeliness of the showing of interests, there is a less effective safeguard against conducting elections based on stale authorization cards.

Permitting employers to object to elections based on the untimeliness of a showing of interest adds a needed protection to the purposes of the NLRA to conduct elections in a timely manner.

In this case, Transdev's objections to the election were based on its good faith belief that the Union's showing of interest was stale because of the passage of time between the time the Petition was filed and the issuance of the Board's decision on the supervisory status of Road Supervisors and Lead Road Supervisors.⁴ It should be noted that Transdev voluntarily recognized the ATU as the bargaining representative of its operators and that there have been no unfair labor practice findings against it during the time period at issue in this case. Transdev chose to stand its ground with respect to the supervisory status of its Road Supervisors and Lead Road Supervisors based on its belief that the law supported its position. It should not be punished because of the Board's delay in determining that issue.⁵

The Board itself has stated that it should not order an election or issue a bargaining order when authorization cards are "stale." *Professional Ambulance Serv., Inc.*, 232 NLRB 1141, 1150 (1977) *see also Reliant Energy aka Etiwanda LLC*, 357 NLRB 2098, 2104 n.4 (2011) (Member Hayes dissenting). As noted above, Member Hayes in *Reliant Energy* noted that when a showing of interest is stale, employees' Section 7 rights "would best be served by having the Union compile and present a new showing of interest." *Id.*

The purposes of the NLRA would thus be better fulfilled by permitting employers to object to elections based on the untimeliness of the showing of interest. Where, as here, the

⁴ Transdev does not waive, and reasserts its position that the Road Supervisors and Lead Road Supervisors are supervisors within the meaning of Section 2(11) of the NLRA, and that the Board erred in determining that they were not supervisors.

⁵ It should also be noted that during the same time period, the Board itself was found guilty of violating the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7131-7135, when it refused to negotiate with its employees' bargaining representative regarding the terms and conditions of their employment when it relocated its headquarters. *National Labor Relations Board and National Labor Relations Board Union*, Case No. WA-CA-14-0534 (Feb. 11, 2016) (attached hereto as Attachment 3).

showing of interest was made well over six months prior to the election, the goals of the NLRA, as well as the Section 7 rights of employees, are better served by the presentation of a current showing of interest. Consequently, compelling reasons, including furtherance of the purposes of the NLRA, require a reconsideration of Board policy on this issue.

IV. CONCLUSION

WHEREFORE, for the reasons stated above, the Supplemental Decision issued by the Regional Director is clearly erroneous inasmuch as the application of the accurate facts to the controlling law mandates that the Regional Director should have granted Transdev's Objections To Election, and there are compelling reasons for reconsideration of the Board's policy on employer objections to elections based on the timeliness of the Union's showing of interest. Therefore, the Regional Director's July 19, 2016, Supplemental Decision and Certification of Representative must be reversed in accordance with the arguments raised herein.

Respectfully submitted,

McMAHON BERGER, P.C.

/s/ James N. Foster, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 2nd day of August, 2016, a true and correct copy of the foregoing was filed electronically on the Board's website and was served upon the following by United States mail, first class, postage prepaid, addressed as follows:

Charles L. Posner
Regional Director
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 S. Charles Street
6th Floor
Baltimore, MD 20201

LOCAL 689, Amalgamated Transit Union
2701 Whitney Place
Forestville, Maryland 20747

/s/ James N. Foster, Jr.

UNITED STATES OF AMERICA
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Petitioner

SUPPLEMENTAL DECISION AND
CERTIFICATION OF REPRESENTATIVE

Pursuant to a Board-directed election,¹ an election by secret ballot was conducted on July 1, 2016, with the following results:

Approximate number of eligible voters.....	12
Void Ballots.....	0
Votes cast for Petitioner.....	11
Votes cast against participating labor organization.....	0
Valid votes counted.....	11
Challenged ballots.....	0
Valid votes counted plus challenged ballots.....	11

On July 8, 2016, Transdev Services, Inc.², herein called the Employer, timely filed objections to conduct of the election,³ a copy of which is attached as Exhibit A.

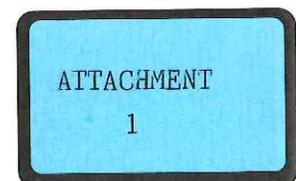
Objection No. 1:

The Amalgamated Transit Union, Local 689 (“Union”) failed to demonstrate a showing of interest of 30% of current Road Supervisors and Lead Road

¹ The Unit is “all full-time and regular part-time road supervisors and lead road supervisors employed by the Employer at its facility currently located at 3201 Hubbard Road in Hyattsville, Maryland, who were employed by the Employer during the payroll period ending May 8, 2016.” Excluded from the Unit are “all other employees, guards and supervisors as defined in the Act.”

² Following the Board’s Decision on Review and Order in 363 NLRB No. 188 (2016), the Employer informed the Regional Office that its legal name had changed from Veolia Transportation Services, Inc. d/b/a Veolia Transportation to Transdev Services, Inc.

³ The petition was filed on September 23, 2014. I will consider on its merits only the alleged interference which occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Co.*, 138 NLRB 453 (1962).



Supervisors after the Board's May 2016 Order and prior to the election. The Union's prior showing of interest occurred outside the six-month limitation period and because of the high turnover rate of Employer's Road Supervisors and Lead Road Supervisors, and the passage of time between the Union's Petition and the election, the 2014 showing of interest was unreliable and a stale indicator of Union support.

In support of Objection No. 1, the Employer submitted material which states that, in the period since the petition's filing, the Employer experienced turnover of its employees. The Employer provided a current list of employees in the Unit, which includes each employee's date of transfer to the Unit. Six of the listed employees transferred to the Unit after the petition was filed. The Employer argues that the election was not based upon a current showing of interest since fifty percent of the Unit members who voted in the election were not part of the Unit at the time the petition was filed. The Employer also relies on an affidavit of its attorney, which states that prior to the election, he "repeatedly requested from the Board agent a showing of interest for Union representation of current Road Supervisors and Lead Road Supervisors."

The sufficiency of a petitioner's showing of interest is a matter for administrative determination and is not litigable by the parties. *Barnes Hospital*, 306 NLRB 201 fn. 2 (1992); *Globe Iron Foundry*, 112 NLRB 1200 (1955); *Potomac Electric Power Co.*, 111 NLRB 553, 554 (1995). It is exclusively within the Board's discretion to determine whether a party's showing of interest is sufficient to warrant processing a petition. *S. H. Kress & Co.*, 137 NLRB 1244, 1248 (1962). In fact, the purpose of a showing of interest is to determine whether the conduct of an election serves a useful purpose under the statute—that is, whether there is sufficient employee interest to warrant the expenditure of time, effort, and funds to conduct an election. *Stockton Roofing Co.*, 304 NLRB 699 (1991). In *Quick Find*, 259 NLRB 1051, 1062 (1982), the Board noted:

The requirement of a “showing of interest” is not jurisdictional or statutory; it is merely a self-imposed rule employed by the Board to determine whether there is a demonstration of enough genuine employee interest in a union to justify the expenditure of agency resources for an election. Once an election has been held, as here, that inquiry becomes pointless.

To the extent that the Employer sought the showing of interest from the Board agent, the Employer’s request for the showing of interest was properly denied. The showing of interest is confidential and the Board agent cannot disclose it to another party. *See In re Irving*, 600 F.2d 1027 (2nd Cir. 1979). Assuming the Employer sought a check of the showing of interest, pursuant to Casehandling Manual § 11025.1, the payroll list used to check a showing of interest “should be of those employees as of a date about the time of or immediately preceding the filing of the petition.” Changes to the employee composition between the petition and election do not change the adequacy of the showing of interest submitted at the time the petition was filed. Moreover, the Tally of Ballots clearly reflects that a majority of the employees expressed their desire to be represented by the Petitioner. *See Casehandling Manual § 11028.4* (“After an election has been held, the adequacy of the showing if interest is irrelevant. *Gaylord Bag Co.*, 313 NLRB 306 (1993). Accordingly, challenges to the adequacy of the showing of interest may not be raised after an election has been held.”). For these reasons, Employer’s Objection No. 1 is overruled.

Objection No. 2:

The requisite laboratory conditions for a fair election were not present for the July 1, 2016 election referenced above inasmuch as the Secretary of Labor investigated and prosecuted for a violation of the Labor-Management Reporting and Disclosure Act of 1959.

Objection No. 3:

The requisite laboratory conditions for a fair election were not present for the July 1, 2016 election referenced above inasmuch as the Board determined that

the Union as an employer had committed unfair labor practices in violation of the National Labor Relations Act against its own employees.

In as much as they are related, I will consider Employer's Objections 2 and 3 together.

In support of Objection Nos. 2 and 3, the Employer submitted material which describes a Department of Labor Complaint against the Petitioner for conduct which is alleged to have occurred in December 2015. The Employer also presented material about a Board Order against the Petitioner for the Petitioner's unfair labor practice conduct against its own employees. The Employer submitted copies of the referenced Department of Labor Complaint in Case 8:16-cv-02052-GJH, filed June 13, 2016, and the Board Order that issued on December 1, 2015, *Amalgamated Transit Union, Local 689, 363 NLRB No.43*.

In order for the Board to set aside an election because of misconduct by a union, the "[c]onduct upon which an election is set aside must be found to have affected the outcome of the election, i.e., likely to coerce prospective voters to cast their ballot in a particular manner." *Professional Research, Inc., d/b/a West Side Hospital*, 218 NLRB 96 (1975); *Great Atlantic and Pacific Tea Company, Inc.*, 177 NLRB 942 (1969). No probative evidence was presented from which to conclude that the employees knew of the Department of Labor Complaint or the Board Order at the time of the election. Without citing a legal basis, the Employer appears to argue that simply because the Petitioner committed certain acts involving its own employees, it is not qualified to represent the employees of the Employer. The Employer also failed to present evidence that these unrelated proceedings actually had any adverse effect on the election.⁴ Rather, the Employer's objections amount to allegations of *per se* objectionable conduct warranting that an election be set aside. As a result, the Employer's submission is insufficient to

⁴ The Employer did not request an extension of time to provide additional evidence in support of its objections. *Star Video Entertainment*, 290 NLRB 1010 (1988).

support its Objections Nos. 2 and 3. For these reasons, Employer's Objections Nos. 2 and 3 are overruled.

Objection No. 4:

By these and other similar acts, the Union prevented a fair election process from occurring consistent with the Act.

The Employer includes Objection No. 4 as a "catchall objection," namely an objection where no specific evidence is advanced and lacks specificity contemplated by the Board's Rules; hence, it must be overruled. *See Smithfield Packing Co.*, 344 NLRB 1, 172 (2004); *Airstream*, 288 NLRB 220, 229 (1988). Accordingly, I recommend that Objection No. 4 be overruled in its entirety.

SUMMARY

The Employer's objections are overruled in their entirety, and I am issuing the appropriate Certification of Representative.

CERTIFICATION OF REPRESENTATIVE

IT IS HEREBY CERTIFIED that a majority of the valid votes has been cast for AMALGAMATED TRANSIT UNION LOCAL 689, associated with AMALGAMATED TRANSIT UNION, AFL-CIO, and that said Union is the exclusive representative of the employees in the unit involved, herein, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

Under the provisions of Section 102.69 of the Board's rules and Regulations, a request for review of this Supplemental Decision, if filed, must be filed with the Board in Washington, DC. Pursuant to Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of challenges and which are not included in the Supplemental Decision, are not a part of the record before the

Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Supplemental Decision shall preclude a party from relying upon that evidence in any subsequent related unfair labor practice proceeding. The request for review must be received by the Board in Washington by **August 2, 2016**.

Consistent with the Agency's E-Government initiative, parties are encouraged, but not required, to file a request for review electronically. Section 102.114 of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the Efiling system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request for review. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement

that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Dated at Baltimore, Maryland this 19th day of July 2016.

/s/ Charles L. Posner

Charles L. Posner, Regional Director
National Labor Relations Board, Region 5
Bank of America, Tower II
100 S. Charles Street, Suite 600
Baltimore, MD 20201

Last Name	First Name	Middle Name	FT/PT	Date of Transfer
Gbadamosi	Idris	M	Road Supervisor	8/31/2015
Gillus	Rubard		Road Supervisor	6/6/2013
Hickson	James	S	Road Supervisor	10/16/2015
Hill	Charles	M	Road Supervisor	7/13/2015
Holtz	Thomas		Road Supervisor	7/1/2013
Parker	Latisha	D	Road Supervisor	3/6/2016
Pendergast	Chantai		Road Supervisor	3/6/2016
Redd	Arvetta		Road Supervisor	3/6/2016
Thompson	William	B	Road Supervisor	9/23/2013
Hall	Dominic		Lead Road Supervisor	6/9/2013
Smith	Shala		Lead Road Supervisor	10/7/2013
Fisseha	Daniel		Road Supervisor	7/9/2013

ATTACHMENT
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EXHIBIT
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PENGAD 800-631-6989



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 16-16

NATIONAL LABOR RELATIONS BOARD

RESPONDENT

AND

Case No. WA-CA-14-0534

NATIONAL LABOR RELATIONS BOARD UNION

CHARGING PARTY

Gary W. Stokes
For the General Counsel

Barry F. Smith
For the Respondent

Stephen M. Sloper
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

When the National Labor Relations Board announced that it would be moving its headquarters to a new building in a different part of the District of Columbia, the National Labor Relations Board Union asked to bargain over the relocation, and the parties ultimately signed a ground rules agreement providing for two days of bargaining. Substantive bargaining did not begin until the second day, at which time the parties discussed most of the forty-one proposals submitted by the Union. During these negotiations, the Agency spokesman stated that the Agency did not have information on, and had not made decisions about, several issues raised in the Union's proposals, including matters relating to the office furniture to be used at the new headquarters.

ATTACHMENT

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In the late afternoon, about an hour before bargaining was scheduled to end, the Agency's bargaining team submitted twenty-three counterproposals. About two hours later, the Union team submitted five of its own counterproposals, which the Agency rejected. The Union asked to submit its remaining counterproposals the following week, and to resume bargaining thereafter, since it had not had time to prepare a response on all issues. The Agency denied the request, insisting that the ground rules limited bargaining to two days. However, in an attempt to "reach an agreement" or at least "narrow the issues," the Agency offered to continue bargaining into the night. The Union declined to stay beyond 6:30 p.m., and the Agency declared that negotiations were terminated. A few days later, the Union tried to initiate mediation of the dispute, but the Agency refused to participate. In the weeks and months that followed, the Agency unilaterally made decisions about the design and layout of the new headquarters, including issues such as office furniture and other matters that had been discussed (but not resolved) during bargaining.

The issue before me is whether, by participating in the two days of negotiations called for in the ground rules agreement, the Agency fulfilled its statutory duty to bargain concerning the relocation. The Agency offers two primary justifications for its actions: it argues that the Union waived its right to further bargaining when it agreed to the ground rules, and it further insists that when the second day of bargaining ended, the parties had reached impasse.

Because the ground rules agreement cannot reasonably be interpreted as limiting the parties' bargaining period to two days, I conclude that the Union did not waive its right to bargain until either an agreement was reached or the parties had come to an impasse. Additionally, the evidence conclusively demonstrates that the parties had not reached impasse. The parties had only begun to discuss the many issues on the table, neither side had submitted a full range of counterproposals, and the Agency inexplicably refused even to attempt mediation. These factors establish that there was a strong potential for further and productive bargaining, if only the Agency had the patience to persist beyond its arbitrary deadline. Therefore, the Agency violated its duty to bargain and deprived the Union of a proper opportunity to negotiate the impact and implementation of the move to a new headquarters.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On May 19, 2014, the National Labor Relations Board Union (the Union or NLRBU) filed a ULP charge against the National Labor Relations Board (the Agency, NLRB or Respondent). GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Chicago Region issued a Complaint and Notice of Hearing on January 12, 2015, on behalf of the FLRA's General Counsel (GC), alleging that, "On May 15, 2014, the

Respondent . . . informed the Union that the Respondent had fulfilled its obligation to bargain over the effects of the Headquarters Office Move,” and that “[s]ince on or about May 15, 2014, the Respondent has failed and refused to negotiate with the Union over the Headquarters Office Move to the extent required by the Statute,” in violation of § 7116(a)(1) and (5) of the Statute. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on February 6, 2015, denying that it violated the Statute. GC Ex. 1(d).

A hearing was held in this matter on March 25-27, 2015, in Washington, D.C. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. On the first day of the hearing, the GC moved to amend the complaint to allege, “On April 25, 2014, and on May 15, 2014, the Respondent . . . informed the Union that the Respondent had fulfilled its obligation to bargain regarding the headquarters office move,” and that “[s]ince on or about April 25, 2014, and May 15, 2014, the Respondent has failed and refused to negotiate with the Union over the headquarters office move to the extent required by the [S]tatute,” in violation of § 7116(a)(1) and (5) of the Statute. The Respondent did not object to the motion, and I granted it. Tr. 10. Subsequently, the GC, the Charging Party, and the Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations..

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of two bargaining units of the Respondent’s employees. GC Exs. 1(c), 1(d).

The NLRB administers and enforces the National Labor Relations Act, conducting secret ballot elections to determine whether employees wish to be represented by a union, and resolving alleged ULPs committed by employers and unions in the private sector. About 450 people work at its headquarters office in Washington, D.C. Tr. 32, 264. At the time of the hearing, and for the previous twenty-one years, the Agency’s headquarters office was located in the Franklin Court Building, 1099 14th Street, N.W., Washington, D.C. (Franklin Court). GC Ex. 3 at 1.

The Union represents a bargaining unit of professional and nonprofessional employees who work for the Agency’s General Counsel (at the headquarters building and at its regional offices), as well as a second unit of nonprofessional employees who work for the Chairman and Members (the Board) at the headquarters building. GC Ex. 2; Tr. 32-33. At the Agency’s headquarters, the Union represents about sixty-two employees. Most of those employees work for the Agency’s General Counsel (including about eight or nine who work for the Washington Resident Office, also referred to as the WRO, which is a division of the Baltimore Regional Office); about fifteen work for the Board. Tr. 33, 42-43, 403; GC Ex. 39. Another union, the National Labor Relations Board Professional Association (the Professional Association), represents about 120 employees at headquarters. Tr. 403-04.

This dispute can be traced back to September 2010, when the Agency started considering what it would do in June 2013, when its lease at Franklin Court was set to expire. GC Ex. 3; Tr. 318. (As it turned out, the Agency would end up staying past its lease, becoming a holdover tenant. Tr. 322.) In accordance with directives from the General Services Administration (GSA), the Agency was authorized to lease no more than 155,000 rentable square feet of office space, nearly a 40% reduction from the 247,219 square feet it leased at Franklin Court. GC Ex. 3; Tr. 106.

As part of this process, the Agency established the Space Advisory Committee around November 2012. Tr. 324. The committee was led by Troy Crayton, the Agency's Facilities Chief, and it included representatives from each division of the Agency, as well as representatives from the Professional Association and the Union. Tr. 148-49, 168.

After receiving approval from Congress,¹ GSA signed a lease on behalf of the Agency, on January 29, 2014,² for the Agency's new headquarters space, located in a newly constructed building at 1015 Half Street, S.E., Washington, D.C. (Half Street). Tr. 43-44, 323, 404; GC Ex. 5. The Agency would have offices on the third through sixth floors. Tr. 53-54. Around this time, an architecture firm, WDG, was selected to design the interior space at Half Street. Tr. 326-27.

The relocation process involved a series of drawings that would increase in complexity as the project progressed. First would come drawings (referred to by witnesses and in documents as "preliminary drawings," "design drawings," or just "drawings") that were, essentially, floor plans, showing things like the location of walls and doors, and the size and location of offices and cubicles. See Tr. 334, 346, 382. Next would come design intent drawings, or DIDs, showing things like the location of power outlets. Tr. 80, 384. After the DIDs, even more complex drawings, including construction drawings showing the building materials to be used, would be drafted. Tr. 80, 374-75.

On January 31, the Union informed the Agency that it had assembled a team to bargain over the move. GC Ex. 6. The Union team consisted of Julia Durkin, an attorney at the Agency's Denver Regional Office, who served as a local president and had bargained over an office move in Denver (Tr. 30-31, 215-16); Lisabeth Luther, a compliance officer based in the Indianapolis Regional Office (Tr. 41, 217-18); Donna Nixon, an attorney in the Detroit Region and a district vice president of the Union (Tr. 41, 194); and Katrina Woodcock, a senior field attorney in the Washington Resident Office (Tr. 264).

Harry Jones, Assistant General Counsel for Labor and Employee Relations, represented management during the move. Tr. 401. During bargaining, Jones would be joined by Jessica Graham, Assistant Chief of the Space Management Section, Facilities Branch; Andrew Krafts, Deputy Chief Counsel to Member Nancy Schiffer; and Rachel Lennie, an Assistant General Counsel. GC Ex. 9; Resp. Br. at 7.

¹ Congressional approval was required because the lease exceeded \$1 million. Tr. 317.

² Hereafter, all dates are 2014, unless otherwise noted.

Information Requests and the Ground Rules Agreement

On February 5, Luther emailed Jones the Union's request to bargain over the relocation. GC Ex. 8. (All communication between the parties was by email, unless otherwise noted.) Luther also provided Jones with proposed ground rules for the negotiations. In the proposed ground rules, the Union called for "an initial bargaining session" GC Ex. 8 at 2.

Also on February 5, Durkin emailed Jones an information request, asking for "any and all documents and records showing the floor plan, layout and/or design," for the Half Street building, as well as a timeline for the relocation process. She also asked for "any and all documents" showing, for each bargaining unit employee as of July 1, 2013, the "square footage, whether by office, workstation, by cubicle or by work area allocated to each particular employee," among other things. GC Ex. 7 at 1-3.

Jones responded to Durkin's request on February 10, providing a timeline for the move and floor plans of the Franklin Court building. Jones stated that there were "no existing" drawings for Half Street, but he promised to provide such drawings "[o]nce the architects have completed the design." GC Ex. 11 at 1. (Despite receiving the floor plans on February 10, the Union would not receive information listing the size and type of each bargaining unit employee's workspace at Franklin Court until May 9. Tr. 162.) On February 25, Jones provided Durkin some additional information about Half Street, but still did not provide any drawings. GC Ex. 12; Tr. 53-54. On February 27, Durkin asked Jones about the drawings, and Jones said the Agency did not have any. GC Ex. 12 at 1. The two had similar exchanges on March 10 and 24. GC Exs. 13, 15. On March 10, Durkin noted that the construction schedule called for final DID's to be submitted by March 13, and for Agency review and approval to be completed by March 27, yet the Agency had not even begun ground rules negotiations with the Union; she asked how the Agency intended to provide a reasonable amount of time for bargaining with the Union, in light of these facts. GC Ex. 13 at 1. Jones replied that same day, conceding that "the process has fallen slightly behind schedule." *Id.* He said the Agency expected to have the architect's drawings within two weeks and to move forward quickly with bargaining at that time, but he felt that "we shouldn't attempt to schedule meetings until we have the drawings since the discussions will be focused on the architect's design." *Id.*

Notwithstanding the lack of drawings, Jones and Durkin began on March 12 to discuss ground rules and potential dates for negotiations. On March 14, Durkin proposed two consecutive days of face-to-face bargaining, to occur on April 16 and 17. GC Ex. 14 at 3. Jones suggested meeting April 15-17, with the first day spent touring Half Street and hearing from officials involved in the move, and Durkin agreed. *Id.* at 2. On April 1, Durkin provided Jones with revised ground rules proposals, which required receipt of drawings by April 4 and added an extra day (April 14) for the Union to inspect the work spaces at

Franklin Court.³ GC Ex. 16. On April 3, Jones told the Union, with regard to a walk-through of Franklin Court, that “people will be working and cannot be disturbed, so you should not plan on measuring/inspecting individual employee workspace or conversing with employees during duty time.” GC Ex. 17 at 1. With regard to the drawings, Jones stated, “We have not yet received the final drawings from the architect.” *Id.*

During this time period, the Agency’s Facilities Department was engaged in numerous communications with the WDG architects regarding the drawings. Specifically, the architects determined that the authorized space was insufficient to accommodate the Agency’s functional requirements, and the parties needed to get approval from GSA for about 8000 more square feet of space. GSA approved the increase, and the architects revised their drawings accordingly. Tr. 409; *see also* Tr. 107, 385-87; Jt. Ex. 4 at 9.⁴ On April 7, an architect from WDG emailed Crayton and Graham the “latest” drawings, for their review and comment. Jt. Ex. 4 at 9.

Meanwhile, Nixon and Luther pressed Jones about their need to obtain the drawings and review them in advance of negotiations, and about the Agency’s failure to respond to the Union’s proposed ground rules. On April 10, the three of them discussed these issues over the phone. GC Exs. 18, 19. Jones first stated that he still did not have the drawings, and he recommended that the bargaining sessions scheduled for the following week be postponed. Tr. 220. Later in the conversation, Luther testified, Jones said the Agency “wanted to share the drawings with all of the parties at the same time, but they didn’t have a sufficient number of the drawings at that point. They had just a few of the drawings.” Tr. 221. Luther testified that this “surprised” her, because it “contradicted what he had said at the beginning of the conversation.” *Id.* Jones said the Agency had been “working very closely with GSA and with the architects[,]” and “there were problems with the space” which had led the Agency to decide to rent additional space. Tr. 220-21. Jones kept referring to the drawings as being “finalized,” prompting Luther to ask whether changes could be made to them. Jones said “there could only be minor tweaks” to the drawings, but “[t]here could not be any major changes once they had the finalized drawings.” Tr. 221. When the Union insisted that it have a role in shaping these plans, Jones stated that it would be “premature to include the Union[]” in design discussions at that point, because it would involve “too many people,” and because the Union bargaining team was “new” and “would be coming in cold.” *Id.*

³ The Union later withdraw this demand. *See* GC Ex. 19.

⁴ The discrepancies in the record regarding square footage cannot be fully reconciled, except that they may be due in part to the difference between rentable space and usable space. *See, e.g.*, the different space totals authorized by GSA in Joint Exhibit 5 at 3, 21, and 39; the amount cited by a WDG official in Joint Exhibit 4 at 9; and the figure cited by Jones at Tr. 409; *see also* Tr. 106. In the three versions of the lease contained in Joint Exhibit 5, the total usable space increased from 129,000 s.f. in November 2013 to 135,741 s.f. in February 2015, and the total rentable space increased from 143,116 s.f. to 150,965 s.f. *Id.* at 3, 39.

The Agency finally responded to the Union's proposed ground rules with its own draft of a ground rules agreement on April 14. Tr. 72-73; GC Ex. 22 at 3-5. Unlike the Union's proposed ground rules, the Agency's proposals did not refer to an "initial bargaining session." See GC Ex. 9 at 3. Instead, the Agency draft stated, "The parties will conduct two bargaining sessions" on April 23 and 24, and it further provided that "[b]y mutual agreement, the parties may agree to additional dates for face-to-face bargaining." GC Ex. 22.

Also on April 14, an architect at WDG provided Jones with "updated" drawings for Half Street. Jt. Ex. 3 at 2. When Jones forwarded these drawings to the Union the same day, it was the first time the Union had seen any drawings or floor plans for the new building. Tr. 74-75; GC Ex. 23. Some of the drawings were dated April 9 (GC Ex. 23 at 11-12, 15-16, 27-32), and some were dated April 11 (*Id.* at 7-8, 19-20, 24-26, 33-36). Later that day, Crayton led a Space Advisory Committee meeting, in which Durkin and other Union representatives participated, to discuss the move. Tr. 72-75, 410; GC Ex. 23. During the presentation, the Agency announced that attendees could submit comments on the preliminary drawings to the Agency; the comments would be forwarded to the architects, who would then draft design intent drawings.⁵ Tr. 335-36. Graham, who attended the meeting and who worked closely with the GSA contract officer, testified that once the comments on the preliminary drawings were submitted, it would have been difficult, if not impossible, for architects to change certain aspects of the design, such as the location of walls or the number or size of workspaces. Tr. 382-83.

On April 16, the Union submitted a second information request, asking for documents showing the specific spaces and offices assigned to bargaining unit employees and to the Union in the new building; the rooms and spaces assigned for common purposes and as other than personal workspace; and the locations and dimensions of these spaces. GC Ex. 24.

On April 17, the Union and the Agency exchanged communications (both verbally and in writing) that ultimately resulted in their reaching a ground rules agreement. Tr. 85-88; GC Ex. 25. Nixon sent Jones a Union counterproposal, Jones rejected it, and the Union then accepted the Agency's latest draft, which was signed that same day. GC Ex. 25. The agreement provided, in pertinent part:

2. The parties will conduct two bargaining sessions at the Agency's current headquarters on the following dates:

April 23, 2014 from 9:00 a.m. to 5:00 p.m.

April 24, 2014 from 9:00 a.m. to 5:00 p.m.

....

⁵ While a deadline for submitting comments was not announced at the April 14 meeting, GSA subsequently announced a deadline of May 9. Tr. 338-40.

7. By mutual agreement, the parties may agree to additional dates for face-to-face bargaining. In that event, the Agency will pay lodging, travel, and per diem expenses for the Union negotiators for the agreed-upon dates for face-to-face bargaining and for the travel dates immediately preceding and following the bargaining dates.

....

13. If complete agreement is not reached after the conclusion of negotiations, either party may request mediation from the Federal Mediation and Conciliation Service (FMCS). . . . If mediation assistance takes place, but no agreement is reached, either party may thereafter request assistance from the Federal Service Impasses Panel. . . .

Id. at 4-6.

The ground rules agreement also provided, among other things, that on April 22 there would be a tour of Half Street, a "full visual inspection" of employee work areas at Franklin Court, and then a briefing from GSA and the architects; the Union would submit its bargaining proposals by noon on April 21, and the Agency would submit counterproposals within three days thereafter; and caucus time could be taken, but no party would caucus for more than one hour, absent mutual agreement. *Id.*

On Monday, April 21, the Union submitted forty-one bargaining proposals.
GC Ex. 26.

April 22-25: The Parties Meet to Discuss and Bargain Over the Relocation

On the morning of Tuesday, April 22, the Union bargaining team, and Jones, Graham, and Lennie, toured Half Street, whose interiors were still mostly empty. Tr. 96-97. Later that morning, Jones and Graham escorted the Union team through Franklin Court. Tr. 98-99. At various times during the Franklin Court walk-through, Durkin and Luther attempted to measure employee workspaces, and Durkin attempted to ask at least one employee about his workspace. Tr. 100-01, 230-31. Jones asked Durkin and Luther not to, saying, "You agreed to a visual inspection and that's what we expect this to be." Tr. 425. Durkin and Luther complied.

In the afternoon, bargaining teams from the two unions (along with several interested NLRB managers) attended a series of briefings. Hiro Isogai, a designer at WDG, showed slides of each floor's layout, explained their details; and answered questions. He indicated that at that point in the process, major changes, such as adding movable walls or more bathroom stalls, would be difficult, if not impossible. Tr. 105, 233. When some alternative features were suggested, he said, "no, we've tried that . . . and it didn't fit." Tr. 104. Isogai indicated that there had been "a number of iterations of the drawings" (Tr. 233), and officials of both unions asked that they be given copies of the "exercises" that had been done, so that the unions could evaluate the feasibility of different alternatives. Tr. 105.

Larry Sutton, the GSA representative on the project, spoke next. According to Durkin, Sutton stated that the project was running "behind schedule in design plans;" at a later phase of the process, after construction drawings were made, "they'd decide on furniture." Tr. 106-07. According to Luther, Sutton also said that "there had been a great deal of work with [various Agency officials] . . . and . . . that the Agency had had the drawings for a month at that point in time." Tr. 233-34. Also, according to Durkin, Lennie told attendees that "they had been working with the architects for months to try to fit everything in, and that they had received design drawings a month prior and . . . the design drawings were not adequate . . ." Tr. 107.

NLRB Deputy General Counsel Jennifer Abruzzo and Chief Financial Officer Ron Crupi then informed the union officials about financial aspects of the move. According to Durkin, Abruzzo stated that the project was up to \$20 million over budget and that "the more delay there is, the more this will cost." Tr. 108. This briefing concluded the day's activities.

On Wednesday, April 23, the Union's bargaining team met with Agency representatives Jones and Graham.⁶ Tr. 109. The Union team had not seen the entire Franklin Court facility the previous day, so the parties agreed to spend the morning continuing Tuesday's walk-through. Tr. 109-10, 256-57. After lunch, the Union team met with Graham to ask her questions about the design plans. The Union team then met up with the remainder of the Agency's bargaining team. Durkin and Nixon asked more questions, most of them directed at Graham, regarding changes that could be made to the drawings. Tr. 110-12, 363-64. Durkin suggested that the Agency install an additional nursing room on the third floor, and asked whether workstations could be moved next to a window. Graham and Lennie responded that the Agency was requesting those changes. Durkin also asked if the Agency could put offices or workstations in space slated for socializing; the Agency did not have a response to that request. Tr. 112-14, 169. The Union team also asked about furniture. Graham told them, "[W]e don't know about furniture because the Agency doesn't have money," adding that the Agency planned to purchase furniture using a monthly payment plan administered by GSA. Tr. 366. Describing this part of the bargaining session, Durkin testified that "it appeared that the design was fluid," and that changes were "still being contemplated . . ." Tr. 113.

Before the day's session ended, Jones asked Durkin why the Union had not spent the day talking about its written proposals. Durkin replied that "we anticipate continuing bargaining," and that the Union was "focusing here now on time sensitive issues like the size of offices, but we anticipate bargaining over these things into the future." Tr. 115. According to Durkin, Jones said "no, we're not going to continue bargaining. He said there is not going to be ongoing bargaining. He said today and tomorrow; that's it." *Id.* Durkin testified, "At that point, both myself and Donna Nixon spoke up quite forcefully and said, no, the Agency has to continue bargaining. It's your bargaining obligation to continue bargaining over these aspects." Tr. 115-16. Jones replied, "no, we're not going to continue meeting on

⁶ Luther was not able to attend on April 23. Tr. 109.

these things. . . . there has to be an end point. We can't continue meeting on these things. We'll meet today and tomorrow [April 23-24], and that's it." Tr. 116. Durkin and Nixon reiterated their disagreement, with Nixon telling Jones, "we don't have your proposals even." Tr. 117. Jones replied that the design plans were the Agency's proposals. *Id.* The April 23 session ended at that point; the parties "left it that we disagree[]" as to whether bargaining would continue beyond the next day. Tr. 116.

Bargaining on Thursday, April 24, began with Jones and other members of the Agency team giving their initial reactions to most of the Union's forty-one proposals. Durkin testified about several of the proposals discussed that day. With regard to Proposal 1, which required the Agency to keep the Union informed about the relocation, "Jones said it has always been our intention to keep the Union informed. We're not withholding any information." Tr. 121. But, he continued, "there is not going to be ongoing bargaining. . . . we can't bargain all of these day-to-day decisions." *Id.* Nixon and Durkin insisted, "those are exactly what you have to involve us in, that's bargaining." *Id.*; *see also* GC Ex. 51 at 1. When Jones suggested that the Union could address ongoing issues through its role on the Space Advisory Committee, Nixon responded that a committee acting by consensus was not a substitute for bargaining. The issue was left unresolved. Tr. 121-22.

With respect to Union Proposal 9 – that employees who had worked in offices at Franklin Court would continue to have offices at Half Street (as opposed to the cubicles shown in the floor plans) – Jones responded that Washington Resident Office employees would have offices, but that all of the support staff would be in 48 s.f. cubicles. Tr. 122. In response to Proposal 12 – that employees who had window offices at Franklin Court would have the same at Half Street – Jones stated, "we'll try to see how many window offices we can get in the Washington Resident Office, but again they are the only people who have offices." *Id.*

The parties discussed the number of stalls needed in the men's and women's restrooms (Union Proposal 31), and the Union team argued the Agency's floor plan was grossly inadequate. Tr. 126-28. The Agency negotiators explained that the size of restroom facilities was based on a formula in an "international code," while the Union's "math is not based on anything; you're just coming up with numbers." Tr. 127-28. However, Lennie indicated that the Agency would "look into seeing" whether they could find additional space for more stalls. GC Ex. 51 at 7.

With regard to Proposal 14 – that interior office windows have an opaque glaze or frosted glass – Jones said, "we haven't chosen yet to frost or not frost, but we want it to be uniform, so we can't have individual people in individual offices choosing whether to have theirs frosted or not." Tr. 123-24. Graham indicated that this decision didn't need to be made until the move-in date, prompting Durkin to argue, "this is why we need to continue bargaining after today. The Agency isn't even prepared to make decisions on these aspects[]" of the relocation. *Id.* Similarly, Jones and Graham told the Union that decisions had not yet been made regarding the height of cubicle walls (Union Proposal 20) or the type of interior lighting (Proposal 24), and the Union reiterated that the parties would need to negotiate these issues at an appropriate time in the future. Tr. 124-25.

The teams made it through about thirty of the Union's proposals before breaking for lunch. Tr. 126. Asked to describe this portion of bargaining, Luther testified that there were "a number of proposals during the course of the day where the Agency's response was, well, we don't know; we don't know about the furniture [Proposal 36]; we don't know about film on the glass [Proposal 14]; we don't know about coat hooks [Proposal 28]; we don't know about these things yet, which would indicate at some point, there would need to be further discussion about them . . ." Tr. 237-38. When asked at the hearing whether the Agency had made decisions with regard to furniture at the time of the April negotiations, Jones said, "No." Tr. 469.

After lunch, Jones stated that the Agency was willing to bargain late into the day on April 24, but they would not bargain after that day. Tr. 129. Durkin reiterated that the Union disagreed with that position. Tr. 134. The Union told Jones that "there were a number of ways to bargain. It didn't have to be face-to-face. It could be by teleconference or videoconference. There's a lot of technology out there that you can use for that sort of thing." Tr. 237.

Immediately upon returning from lunch at 1:10 p.m., the Agency team requested a caucus, so that it could prepare counterproposals. GC Ex. 51 at 7. The caucus lasted from approximately 1:15 to 4:00 p.m., at which time the Agency transmitted a list of twenty-three counterproposals to the Union by email. Tr. 135, 429; GC Ex. 29. Jones testified that his team "tried to find areas where we could compromise[,] but he acknowledged that they did not provide specific counterproposals for each Union proposal. "[T]here were some [Union] proposals that were left out of our counter that we weren't able to agree to." Tr. 428. One example of such a proposal was Union Proposal 36, requiring bargaining over furniture at a later time. Although the Agency's counterproposals didn't address this issue, and the Agency's existing floor plans contained no details about furniture, Jones testified that this could have been negotiated on April 24, and the Agency would have entertained Union furniture proposals on April 24, if the Union had demanded specific types of desks or chairs. But the Agency would not defer bargaining about furniture to a later time, as that would be like "buying a pig in a poke." Tr. 468-71; *see also* Tr. 477.

Upon receiving the Agency's counterproposals, the Union team caucused to prepare its own response. Tr. 137; GC Ex. 29 at 1. The Union team found several of the Agency proposals vague, as the Agency offered to "use its best efforts" to obtain certain design features (for example, Proposal 8) and agreed to other features only "to the extent [that] the architects [WDG] can incorporate" them into the drawings (for example, Proposals 19 and 20). Tr. 138-39; GC Ex. 29 at 3-4. The Union team attempted to "see what the differences were" between the Union's proposals and the Agency's counterproposals. Tr. 236. Even after receiving permission to extend their caucus beyond the allotted hour, the Union negotiators "realized that we were rushing and we were not going to be able to do a very thorough job of reviewing the proposals and that concerned us. So what we decided to do . . . was to see where there was common ground, to see what we could agree on. And so we went through . . . the Agency's counterproposals" to find "the things that we could agree on." Tr. 236.

At 6:11 p.m., the Union sent the Agency a document titled "Union's Initial response to Agency's counterproposal of 4/24/14." Tr. 141; GC Ex. 30. The document began, "The Union has not had sufficient time to create a complete counterproposal to the Agency's counterproposal of 4/24/14. However, we are willing to tentatively agree to the following parts of the Agency's counterproposal, with the following changes." GC Ex. 30 at 3. It then listed five Union counterproposals (which are set forth in the appendix). Of those, Union Counterproposals 2 (ergonomic chairs), 3 (lockable storage), and 5 (storing paper and toner) were identical to Agency Counterproposals 13, 15, and 21, respectively. Union Counterproposal 1, pertaining to an office for the Washington Local,⁷ was very similar to Agency counterproposal 10, except that the Union's counterproposal specifies that the office would be "consistent with the current design reflecting 108SF." Further, Union counterproposal 4 (coat hooks) is similar to Agency counterproposal 16, except that the Union added that it "reserves the right to bargain and make proposals for other Unit employees who may have offices or cubicles in the new building." GC Exs. 29, 30.

The Union asserted that its "tentative agreement" to the counterproposals "does not limit or waive the Union's right to submit proposals and/or counterproposals, and to engage in bargaining regarding headquarters relocation. Nor should it be construed . . . as a full agreement." GC Ex. 30 at 3. As for further bargaining, the Union stated that it was

willing to continue bargaining regarding the headquarters relocation by various means, including but not limited to face-to-face bargaining, telephonic bargaining, email and video conferencing. Accordingly, the Union will submit a proposal and/or counterproposal to the Agency's 4/24/14 counterproposal on April 30, 2014. The Union stands ready and willing to continue good faith bargaining regarding the HQ relocation at mutually agreeable future times and dates.

Id. At 6:33 p.m., Jones replied, "We do not accept your counterproposal. As we have stated, we are willing to work late this evening to try to reach an agreement. However, if the Union is unwilling to continue, the negotiations are concluded in accordance with the provisions of the ground rules agreement." GC Ex. 31 at 1. Jones further mentioned that the NLRB General Counsel would be "available to meet with you tomorrow morning to informally discuss the HQ relocation." *Id.*

The Union caucused briefly to consider what to do next. At the hearing, Durkin recalled:

[W]e were incensed. I mean, we had done everything to try to continue bargaining, to ask for continued bargaining. We had stated directly in our proposals for a tentative agreement that we were willing to bargain by any

⁷ The Washington Local includes unit employees who work at headquarters, other than those who work in the WRO. Tr. 193.

means. And then Harry Jones turns around and emails and suggests that we weren't willing to continue bargaining, and suggested that our ground rules agreement somehow limited bargaining to those two days, which we disagreed with.

Tr. 144-45.

Shortly after Jones sent his email, the Union and Agency teams met briefly to gather their things and leave. Tr. 199. Durkin testified that around this time, the Union team told the Agency team that they were "willing to continue bargaining, but we can't continue and expect to wrap up bargaining that night." Tr. 202. Asked to explain why the Union team did not stay, Durkin stated:

[W]e couldn't continue that evening. Donna Nixon was scheduled to be on a flight that night. We had bargained all day. We were quite exhausted. And at that time, at 6:30, the Agency had already rejected its own proposals. So I don't know – we didn't know where to go from there with the Agency rejecting its own proposals; how we could have productively bargained fully that night. . . . And we expressed those things in our response back to him as to why we weren't going to stay longer that night with [no] reasonable expectation of concluding all bargaining.

Tr. 200.

At 12:58 a.m. on April 25,⁸ Durkin emailed the Agency team, thanking them for their time and stating, "We could not reach a complete agreement by this evening, having not received the Agency's counter-proposals until 4:00 p.m. We will thoroughly review those proposals in the coming days in order to submit an appropriate response on April 30." GC Ex. 32 at 1. Durkin continued:

As we've stated over the past two days, we do not agree that negotiations have concluded entirely merely because our two face-to-face bargaining *sessions* concluded without complete agreement on all issues relating to the HQ relocation, including those issues that the Agency itself does not even fully know of or have sufficient information on (as represented in our sessions). The Union was not and is not *unwilling* to continue negotiations, we simply did not have sufficient time over the course of the evening to fully review the

⁸ Although the time stamp on the email says 10:58 p.m., April 24, Durkin testified that her Outlook account was set to Mountain Time, meaning that it was 12:58 a.m. Eastern Time on April 25 when she sent it. See Tr. 135, 146.

Agency's counter-proposals and reach an agreement on all of the subjects encompassed in those proposals. The Union is most certainly willing to continue negotiations by any reasonable means . . . and we explicitly request continued bargaining.

Id. at 2. Jones replied at 9:00 a.m. on April 25:

I guess we will have to agree to disagree about any further bargaining. . . . In the afternoon, our team worked as quickly as possible to prepare a good-faith counterproposal in which we tried to address the Union's concerns. As we said several times throughout the course of the day, we were willing to work late last evening in an attempt to reach an agreement, or narrow the issues, but the Union team was unwilling to continue beyond 6:30. Our bottom line view at this point is that we have fulfilled our obligation to bargain under the terms of [the] ground rules agreement.

Id. at 1.

Later that day, Woodcock met with NLRB General Counsel Griffin in his office. They were joined by Lennie, Abruzzo, and Robert Schiff, the Chairman's Chief of Staff. Tr. 274. Woodcock testified that Griffin "started out by discussing . . . the background and history of the move," and "talked about it being a very tight timeline, tight monetary restrictions." Tr. 274-75. Griffin also referred to "competing concerns from the different divisions within the Agency." Tr. 275; *see also* Tr. 281, citing "competing interest, and the GSA . . ." Asked at the hearing whether she advised Griffin of the Union's objections to the Agency's bargaining tactics, Woodcock said she did not, adding that she didn't feel comfortable objecting to "the three most powerful people" at the Agency. Tr. 280, 283. Asked whether the Union considered the meeting with Griffin to constitute bargaining, Woodcock replied, "No, absolutely not." Tr. 276.

Events Between April 25 and the Filing of the ULP Charge

On April 28, Lennie offered "further discussions about the BU's concerns" that week, and the Union accepted. GC Exs. 33, 35. The next day, Luther informed Jones, "In light of your rejection of our . . . counterproposal," the Union was withdrawing its counterproposal and reverting to its original proposals of April 21. Luther also stated that the Union would be contacting the FMCS for assistance. GC Ex. 34. Later that day, Stephen Sloper, a member of the Union's Executive Committee, asked FMCS Mediator Kurt Saunders to mediate the dispute. GC Ex. 37 at 2. In an exchange of emails between the Union and Saunders on May 5, Luther reiterated the Union's interest in mediation "to assist us in resolving the issues" with the Agency, and she suggested the week of May 13th for that purpose. GC Ex. 37.

Meanwhile, the relocation project moved forward. On April 30, Larry Sutton informed Jones and others at the Agency advising that the GSA needed to receive "any Management and Union changes to the space plan/layout . . . to be incorporated into the final Design Intent Drawings" by May 9. Jones added that the "DID process should have started approximately three weeks ago." GC Ex. 36 at 1; *see also* R. Ex. 2. Jones forwarded the email to Luther. GC Ex. 36 at 1.

On May 6, the Union submitted an information request asking for information about the size and type of workspace each employee had at Franklin Court, and the size of building space at Franklin Court not specifically assigned as personal workspace, among other things. GC Ex. 38. Durkin testified at the hearing that she had already requested much of this information, but had not received it, in earlier requests. Tr. 159, 162. The next day, May 7, most of the Union team participated in a videoconference with NLRB General Counsel Griffin and Rachel Lennie, which focused primarily on the Union's pending information requests and its need to have this information in order to bargain properly. Tr. 278-79; GC Ex. 52. Griffin "acknowledged that that was a problem . . . and agreed to get it to us as soon as he was able to." Tr. 278. On May 9, Lennie gave the Union a list of the location and size of each employee's workspace at Franklin Court. Tr. 159-61; GC Ex. 39. On May 16, Jones provided an additional response to the May 6 information request, forwarding to the Union a variety of drawings for Half Street, including some dated March 26 (GC Ex. 43 at 9, 23, 29, 36, 49), and others dated April 2 (*id.* at 10-18, 24-28, 30-32, 38-43, 50-55).

On May 10, Graham submitted the Agency's revised floor plan drawings to GSA, with its comments regarding suggested changes. Jt. Ex. 2. Graham testified that the Agency's comments to GSA "incorporated . . . some of the areas [of] discussions that we had with the Union," such as the Union's suggestion to have a second nursing room. Tr. 367; *see also* Tr. 169. The Union did not provide any additional comments or suggested changes to the floor plans, beyond those it had submitted to the Agency in its April 21 bargaining proposals and its April 23 counterproposals. Tr. 206. On May 14, Jones emailed the Union team a copy of the revised drawings and a summary of comments sent to GSA. GC Ex. 41 at 1. Once the architect received the drawings from GSA and the NLRB, it could begin the process of drafting design intent drawings. Tr. 466.

On May 13, FMCS Mediator Saunders emailed the Union, saying that he had discussed the Union's mediation request with the Agency, but that there was "no mutual agreement to mediate." GC Ex. 40. Since the Union had been actively pursuing mediation, the Union team understood this to mean that the Agency was refusing to engage in mediation. Tr. 166. This conclusion was verified by an exchange of emails on May 15 and 16. In response to an inquiry about the Union's recent information request, Jones told the Union team: "Once again, I want to make our position clear that we have fulfilled our obligation to bargain over the effects of the headquarters relocation under both the Statute and the ground rules agreement. Unfortunately, we were not able to reach agreement." GC Ex. 42 at 1. Later that day, Sloper reminded Jones of the provision in the ground rules agreement for mediation and asked whether the Agency believed that "mediation has been completed according to the terms of the ground rules agreement." *Id.* Sloper reiterated that the Union was prepared to meet with the Agency in the next two weeks. Jones responded the next

morning: "Bargaining has concluded, and there has been no mediation. Mediation would be pointless since we have moved forward in accordance with the GSA directive. We don't intend to waste our time, and that of a mediator, to engage in a useless undertaking." *Id.*

On May 19, the Union filed the ULP charge.

Events Following the Filing of the ULP Charge

The architects finalized design intent drawings in August. Tr. 375. At a Space Advisory Committee meeting on October 15, Crayton and WDG briefed the members about the construction schedule and options for furniture and window frosting at Half Street. Tr. 182-86; GC Ex. 45. Based on feedback from committee members at the October 15 meeting, the Agency successfully appealed to GSA officials for expanded furniture options; the Agency needed to solicit and obtain employee preferences regarding types of furniture by December 3. GC Ex. 47 at 1.

On Friday afternoon, November 21, Jones informed the Union that that the Agency was finalizing its furniture order for Half Street. Jones offered the Union a chance to bargain over furniture by telephone, adding, "As you may recall, we had some discussions about furniture during the negotiations that took place in April, and you may want to review the Agency's counterproposal of April 24" Jt. Ex. 14 at 3. The next day, Woodcock informed Jones that the Union would be willing to meet with him to discuss furniture, but that the meeting would not constitute bargaining or a satisfaction of the Agency's bargaining obligation, in light of ongoing efforts to settle the underlying ULP charge previously filed by the Union. *Id.* at 2; Tr. 499-500. The Union and the Agency did hold a teleconference regarding furniture on November 24.⁹ *Id.* at 1. The next day, Crayton emailed members of the Space Advisory Committee, describing the furniture options employees would have for their offices and asking committee members to solicit the preferences of employees in their units. GC Ex. 47 at 1.

Over the weekend of December 13 and 14, the Agency needed to vacate a portion of its office space at Franklin Court to enable the new tenants to move in; this required employees in the vacated space to move into the remaining Agency space at Franklin Court. Tr. 300, 439-41. Prior to this "swing move" occurring, the Agency and the Union engaged in formal negotiations and executed a Memorandum of Agreement on the subject on December 11. Jt. Ex. 12.

⁹ Jones indicated in his testimony that this meeting occurred in late September, but it appears more likely that he is describing the meeting of November 24. The November 24 date is corroborated by Joint Exhibit 14; Jones's description of the meeting is very similar to that which is outlined in Joint Exhibit 14; and it does not appear that there were two meetings on this issue. The evidence further suggests that furniture plans had not progressed sufficiently in late September to have such a meeting with the Union. GC Exs. 44 & 45.

On December 23, Jones sent Woodcock an email, offering “one additional bargaining session in January in an attempt to resolve all outstanding issues related to the headquarters relocation.” GC Ex. 58 at 2. At the same time, negotiations were also underway with the Union, Agency and FLRA to settle the Union’s ULP charge. *Id.* at 1. Woodcock replied that the Union wanted to return to the bargaining table, but preferred to do so in the context of a settlement resolving the ULP charge. *Id.* On December 29, the Agency advised the Union that it would not settle the charge, and on January 7 and again on January 21, 2015, the Union advised the Agency that it would only negotiate as part of an overall settlement. GC Ex. 59 at 2; Jt. Ex. 15.

At the time of the hearing, the relocation of the NLRB headquarters was scheduled to take place by June 2015.¹⁰ Tr. 323.

Additional Issues Discussed at the Hearing

With regard to the effect of the relocation on bargaining unit employees, it was undisputed that approximately 450 NLRB employees (including approximately 62 members of the NLRBU bargaining unit) would be required to work in a new building location in a different area of the city. It was further agreed that all employees will be working in a space about 40% smaller than the offices they have occupied for the past twenty-one years. Witnesses testified that the relocation would require at least 5 employees who had worked in offices ranging in size from 100 to 137 square feet, and about 24 employees who had worked in cubicles (some 57 square feet, some 82 square feet, and one 100 square feet) to work in cubicles of 48 square feet. Tr. 162, 250, 285-86, 349-52, 474, 477; GC Ex. 39.

With respect to the Agency’s obligation to bargain over the relocation, Jones testified, “We gave them the drawings. We said we gave them notice of the change and conditions of employment. We’re moving. We’re moving from [Franklin Court] to . . . Half Street. They requested bargaining. Fine, we’re obligated to bargain. That’s a change in conditions. Nobody disputes that.” Tr. 479.

Jones was asked whether he had “any version of the drawings, draft or otherwise,” that he was not disclosing. Jones replied, “Not on April 10th. We didn’t get them – I didn’t get them till April 14th, when Troy Crayton passed them out to everyone.” Tr. 418. Jones also stated that he was relying on Crayton and Graham to provide him the drawings. Tr. 486-87.

With regard to whether the ground rules agreement limited bargaining to April 23-24, Jones testified that he removed the word “initial” from the Union’s proposed ground rules, stating, “I wanted people to understand . . . that these are the bargaining sessions and that if we need more, we can agree mutually to have more; but I didn’t want anybody to think that we were agreeing to just have two opening sessions . . .” Tr. 413.

¹⁰ On July 13, 2015, the Agency issued a press release announcing the opening of its headquarters offices at Half Street. <https://www.nlr.gov/news-outreach/news-story/nlr-opens-new-southeast-dc-headquarters>.

As for whether the parties had reached impasse by the end of the April 23-24 bargaining session, Durkin stated that they had not, noting that neither party submitted last best offers or asserted they were at impasse. Tr. 146-47. Jones, by contrast, testified that the parties reached impasse on April 24, "[w]hen the Union got up and walked out." Tr. 465.

Asked why the Agency rejected the Union's counterproposals, when those counterproposals largely accepted Agency positions, Jones stated:

We weren't going to start bargaining piecemeal, at least not at that point. I think the idea was we would exchange . . . full proposals. If there came a point where we could start initialing off on things, then we would have done that, but we were too early on. We had only exchanged two proposals.

Tr. 431. Similarly, when Jones was asked whether the Union gave "any oral supplementation" to its counterproposals, he stated:

I don't really recall. My reaction to this was that we rejected this because it wasn't a comprehensive proposal. But I, again, reiterated to them that we were willing to stay late to try to hammer out an agreement. I certainly – if we had agreed to stay late and continue the bargaining into Thursday evening and we had been making progress, if progress had been made on Thursday evening, I certainly had the authority to say to them book another night in your hotel; let's pick up on Friday; change your airline tickets to fly back on Saturday. We certainly would have done that.

Tr. 433-34.

As for whether the parties discussed the issue of furniture, Jones stated, "When we walked through the initial proposals of the Union . . . [on] the 24th, we walked through each of these and there was some general discussion. But we had no specific proposals about furniture." Tr. 470. Also, Jones acknowledged that "[t]here wasn't a deadline on furniture for May 9th." Tr. 472.

With regard to the dates for bargaining, Durkin testified that the ground rules agreement went into detail concerning face-to-face bargaining, but not concerning other types of bargaining such as by email or teleconference. "[I]t was not necessary to explicitly lay out those types of bargaining, because they don't involve the same logistics that face-to-face bargaining does." Tr. 90-91. Durkin added, "We've used email exchanges, teleconference exchanges, and videoconference exchanges with the Agency numerous times, at the drop of a hat, including over this relocation process" and over the ground rules. Tr. 91. By contrast, Jones testified that it was "never contemplated that we would do this any other way than face-to-face." Tr. 451. Jones added that bargaining other than face-to-face bargaining would present a number of practical difficulties, saying, "We couldn't possibly try to negotiate a subject as complicated as the complete relocation of the Agency's headquarters by email or telephone. It just wouldn't work." Tr. 450.

As for whether the parties reached agreement, Woodcock testified that the parties "didn't come close to or even come to any kind of agreement or deal" (Tr. 288), and Graham and Jones both acknowledged that no agreement was reached. Tr. 367, 465.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that the Respondent violated § 7116(a)(1) and (5) of the Statute when, "on and after April 25, it unilaterally terminated bargaining with the Union regarding its relocation of its headquarters." GC Br. at 41.

As an initial matter, the GC asserts that the Respondent had a duty to bargain over the relocation, and that this duty arose when the Agency signed the lease for the new office building on January 29. *Id.* at 26-27; see *U.S. Dep't of HHS, Soc. Sec. Admin., Region I, Bos., Mass.*, 47 FLRA 322, 324 (1993) (*SSA Region I*); *U.S. Dep't of HHS, Soc. Sec. Admin., Balt., Md.*, 41 FLRA 339, 340 n.*, 350-51 (1991) (*SSA Baltimore*).

The General Counsel claims that the Agency was required to bargain until either an agreement or impasse was reached, citing *U.S. Dep't of the Navy, Naval Aviation Depot, Jacksonville, Fla.*, 63 FLRA 365, 369-70 (2009); *U.S. Dep't of Justice, Immigration & Naturalization Serv.*, 55 FLRA 892, 902-03 (1999); *Dep't of Def., Dep't of the Navy, Naval Ordnance Station, Louisville, Ky.*, 17 FLRA 896, 897 (1985) (*Naval Ordnance Station*). Thus the Agency committed an unfair labor practice when it terminated bargaining on April 25, before either of these events occurred. GC Br. at 27, 31. In this regard, the GC argues that management had not even submitted counterproposals until the afternoon of April 24, and did not claim at the time that the parties were at impasse. *Id.* at 32. The GC further argues that on May 15 and 16, the Agency reiterated that bargaining was over and refused to participate in mediation.

In the months after unilaterally and unlawfully terminating bargaining on April 25 and refusing mediation on May 16, the GC asserts that the Agency proceeded to make and implement unilateral decisions concerning the relocation – decisions on issues that were addressed (but not resolved) in the April negotiations, and that should have been negotiated with the Union. In this vein, the Agency continued to submit changes to the design drawings to GSA and to make decisions about furniture options (most significantly, adopting GSA's "FIT" program, which drastically limited the remaining furniture choices), window and glass treatments, lighting, and cubicle height. *Id.* at 32-34. Both the Union and Agency negotiators recognized in April that these issues could not be addressed at that time, but the Agency refused to negotiate with the Union later, when the issues became ripe for decision. The General Counsel further argues that the Agency failed to negotiate in good faith by: (1) withholding preliminary drawings from the Union; (2) preventing the Union team from getting baseline measurements at Franklin Court on April 22; and (3) giving the Union drawings that were "largely fixed" and "present[ing] the Union with a *fait accompli*." *Id.* at 28-31.

The General Counsel contends that the ground rules agreement does not excuse the Respondent's actions. In this regard, the GC asserts that there was no clear and unmistakable waiver of the Union's right to bargain to agreement or impasse. *See id.* at 35-37 (citing *U.S. Dep't of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 63 FLRA 524, 527 (2009); *U.S. Dep't of the Treasury, IRS*, 56 FLRA 906, 912-13 (2000); *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 53 (2000) (*Interior*)). The GC notes that the Union team asserted throughout negotiations that it had a right to bargain beyond April 24. In addition, the GC argues that the ground rules agreement envisioned bargaining after April 24, since it allowed either party to request mediation "[i]f complete agreement is not reached after the conclusion of negotiations. . . ." GC Br. at 35. Moreover, the GC argues that the Respondent is in no position to request a strict interpretation of the ground rules agreement, since it violated the agreement by caucusing for more than an hour without permission from the Union. *Id.* at 36. The GC also claims that the ground rule setting bargaining for April 23 and 24 applied only to face-to-face bargaining and did not prevent the parties from continuing to bargain using email (as they had when negotiating the Ground Rules Agreement) or other electronic means. *Id.* at 35.

Similarly, the Respondent cannot blame GSA for its unlawful bargaining. The NLRB, not GSA, "instigated" the May 9 "deadline" for submitting comments on the floor plans, and the Agency had many months thereafter in which it continued to make significant decisions regarding the relocation, despite having already terminated bargaining with the Union. *Id.* at 38.

Finally, the GC submits that the Respondent's "[h]alf-hearted, delayed (by months) and qualified" bargaining offers in November 2014 and January 2015 did not cure its previous refusals to bargain. In light of the fact that the bargaining offers were made in the midst of trilateral settlement negotiations, and that the Respondent was unwilling to settle the underlying ULP complaint against it, the offers were inadequate, using the NLRB's own case precedent as a benchmark. *See Passavant Mem'l Area Hosp.*, 237 NLRB 138-39 (1978).

With regard to a remedy, the GC asks that I order retroactive bargaining. *Id.* at 42; *see FAA, Nw. Mountain Region, Renton, Wash.*, 51 FLRA 35 (1995) (*FAA*). The GC also argues that because the violation affected employees serving in two separate bargaining units under the Agency's General Counsel and Chairman, both the NLRB General Counsel and Chairman should sign the notice to employees. *Id.* at 43. Finally, the GC requests a nationwide posting. *Id.* at 44.

Charging Party

The Charging Party argues that the Respondent violated the Statute and that the Respondent should be ordered to return to the bargaining table participate in mediation conducted by the FMCS, if requested by the Union, and participate in proceedings before the Federal Service Impasses Panel, if agreement is not reached during renewed negotiations. Ch. P. Br. at 1, 5; *see U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 60 FLRA 456 (2004) (*Army*); *FAA*, 51 FLRA at 35.

Respondent

The Respondent contends that it fulfilled its bargaining obligation under the Statute. It did so by negotiating ground rules for bargaining over the relocation, and then by negotiating with the Union for the time allotted to negotiations in those ground rules.

The Respondent alleges that after meeting with the Union negotiating team on April 22 and then bargaining with them on April 23 and 24, the parties had reached impasse, as "neither party had budged an inch on its proposals on the size and configuration of space." Resp. Br. at 14. To support this claim, the Respondent asserts that: (1) the parties had agreed in their ground rules to "only three days of meetings and negotiations" (*id.* at 12);¹¹ (2) the Union's proposals were "focused almost entirely on the maintenance of the size of current office space and configuration[.]" the Agency "rejected the Union's space proposals," the Union "did not retreat from its position on maintaining current size and configuration of office space" in its "partial counter," and the Agency rejected the Union's counterproposals (*id.*); (3) the Union rejected the Agency's invitation to continue bargaining into the evening on April 24; (4) the parties did not agree to further bargaining sessions; (5) the Union withdrew its counterproposals on April 29; (6) there was no mutual agreement to mediate; and (7) the Union did not provide comments on the drawings by the May 9 deadline. *Id.* at 7, 12-13. Further, the Respondent argues that impasse should be viewed through the "unique circumstances" it faced: that the Agency was a holdover tenant at Franklin Court; the lease had only been signed in January; GSA had to procure additional space; a delay in finalizing the preliminary drawings would have delayed the relocation; the Respondent needed to provide comments on the preliminary drawings by May 9. *Id.* at 13-14.¹²

¹¹ The Respondent emphasized, in the statement of facts of its brief, that Jones removed "the modifier 'initial' in defining the bargaining sessions," so that, instead of providing for "an initial bargaining session" on April 23 and 24, the ground rules agreement provided for "two bargaining sessions" on those dates. Resp. Br. at 6-7; compare GC Exs. 8, 22, 25.

¹² Based on the opening statement by Counsel for the Respondent (Tr. 25-26, 29) and on its brief, it is not clear whether the Respondent is defending its bargaining conduct solely on the existence of an impasse, or whether it is also claiming that the Union waived its statutory right to bargain over the office relocation after April 24. Respondent's Answer to the Complaint (GC Ex. 1(d)) does not raise any affirmative defenses, although it does assert that "following the bargaining sessions called for under the ground rules agreement, . . . it had fulfilled its duty to bargain." GC Ex. 1(d) at ¶11. In its brief, Respondent explains at length why it believes the parties had reached impasse by April 25, but it never explicitly asserts that the Union waived a right to bargain beyond April 24, nor does it cite any case law regarding waiver of bargaining rights. It would be easy, therefore, to infer that the Respondent has abandoned a waiver argument, but I believe that would be too simplistic. In its own, indirect, way, Respondent has continued to argue that the ground rules agreement (GC Ex. 25 at 4-6) limited the parties' bargaining obligation to negotiating sessions on April 23 and 24. I interpret this to mean that the Respondent defends its conduct on the language of the ground rules agreement, and that by agreeing to the terms of that agreement, the Union waived any right to bargain beyond April 24.

The Respondent contends that if a violation is found, retroactive relief, including a retroactive bargaining order, would be inappropriate. *Id.* at 15-16 (citing *NTEU v. FLRA*, 910 F.2d 964, 969 (D.C. Cir. 1990) (en banc)). To support this claim, the Respondent argues that the Union declined the Respondent's post-charge offers to bargain. *Id.* at 16.

ANALYSIS AND CONCLUSIONS

The General Counsel argues that the Agency violated § 7116(a)(1) and (5) when it refused to negotiate with the Union over the headquarters relocation on and after April 25.

Before implementing a change in conditions of employment, an agency must provide a union with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain, if the change will have more than a de minimis effect on conditions of employment. *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 173 (2009) (*Kirtland AFB*).

In determining whether the Respondent violated § 7116(a)(1) and (5), the "first inquiry" is whether it had an obligation to bargain at all in these circumstances. *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50-51 (2003) (*PBGC*). The Respondent does not contest this. Jones and his bargaining team recognized the Agency was required to notify the Union of the relocation, and it did so. Tr. 479. Similarly, the Agency began bargaining with the Union. Moreover, the Agency did not claim at any point that any of the Union's bargaining proposals were nonnegotiable. *See, e.g., U.S. Dep't of HUD*, 58 FLRA 33, 34 (2002).

Utilizing the analytical framework of *92 Bomb Wing, Fairchild AFB, Spokane, Wash.*, 50 FLRA 701, 704 (1995), it is clear that the relocation of NLRB headquarters from Franklin Court to Half Street would significantly change the conditions of employment for all employees. The Authority has stated that "the location in which employees perform their duties, as well as other aspects of employees' office environments, are 'matters at the very heart of the traditional meaning of conditions of employment.'" *Kirtland AFB*, 64 FLRA at 175-76 (quoting *Library of Congress v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983)); *see also Envtl Prot. Agency & Envtl Prot. Agency Region II*, 25 FLRA 787, 789-90 (1987). Specifically, the Authority has found that office relocations involve changes in conditions of employment, and that agencies must negotiate the impact and implementation of such moves -- that is, the procedures to be followed in implementing the relocation and appropriate arrangements for employees affected by the move. *SSA Baltimore*, 41 FLRA at 350-51. The obligation to bargain over a relocation arises when a lease is signed (if not earlier) and the union requests to bargain. *SSA Region I*, 47 FLRA at 324 (*see also* the judge's discussion of the agency's duty to "allow a reasonable time for the bargaining process to occur", *id.* at 329); *SSA Baltimore*, 41 FLRA at 340 n.*. Based on the above precedent, I find that the planned relocation to a new building involved a change in conditions of employment. Thus, when the Union asked to bargain on February 5, the Agency was required to do so.

The duty to negotiate in good faith includes the obligation to “approach the negotiations with a sincere resolve to reach a collective bargaining agreement” and to “meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays.” 5 U.S.C. § 7114(b)(1), (3) (emphasis added). Further, § 7103(a)(12) of the Statute defines “collective bargaining” as the “performance of the mutual obligation . . . to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment” In determining whether a party has fulfilled its bargaining responsibilities, the Authority considers the totality of the circumstances of the case. *AFGE, Council of Prison Locals 33, Locals 1007 & 3957*, 64 FLRA 288, 290 (2009).

When an agency has an obligation to bargain, it must continue bargaining until (1) the parties have reached agreement on all negotiable proposals; (2) an impasse has been reached following good faith bargaining, with no timely invocation of the statutory impasse procedures; or (3) the union has waived its bargaining rights. *Davis-Monthan AFB, Tucson, Ariz.*, 42 FLRA 1267, 1279 (1991) (*Davis-Monthan AFB*); *U.S. Dep't of the Air Force, 832D Combat Support Group, Luke AFB, Ariz.*, 36 FLRA 289, 298 (1990).¹³ When parties are engaged in bargaining over a proposed change in conditions of employment, an agency is generally required to maintain the status quo pending the completion of the entire bargaining process, including the opportunity to pursue impasse resolution procedures.¹⁴ *U.S. Sec. & Exch. Comm.*, 62 FLRA 432, 451 (2008), *enf'd sub nom. SEC v. FLRA*, 568 F.3d 990 (D.C. Cir. 2009); *U.S. Immigration & Naturalization Serv., U.S. Border Patrol, San Diego Sector, San Diego, Cal.*, 43 FLRA 642, 652-53 (1991). An agency that implements a change without completing good faith bargaining will be found to have violated § 7116(a)(1) and (5) of the Statute. *See, e.g., Davis-Monthan AFB*, 42 FLRA at 1278-80.

Once the Agency and the Union began negotiating in this case, it is clear that they did not reach agreement. Tr. 288, 367, 465. Yet on May 10, Agency officials submitted final comments on the floor plans to GSA and the architects, which paved the way for construction of the new offices to begin; and in subsequent months the Agency made other decisions on structural and design aspects of Half Street without negotiating with the Union. Notwithstanding the lack of an agreement with the Union on the impact and implementation of the relocation, the Agency asserts that it fulfilled its bargaining obligation because (1) the Union had waived its right to bargain beyond April 24 by signing the ground rules agreement, and (2) the negotiations reached impasse on April 24.

¹³ In *PBGC*, 59 FLRA at 50, the Authority articulated a similar principle, but it did not list waiver of bargaining rights. But since the rule was stated in terms of an agency's satisfaction of its bargaining obligation, I believe that waiver by the union was implicit in the list of ways that an agency satisfies its obligation. If a union has waived its right to bargain, partially or in full, then the agency no longer has a duty to bargain.

¹⁴ As the Authority explained in *U.S. Immigration & Naturalization Serv., Wash., D.C.*, 55 FLRA 69, 72-73 (1999): “One result of the additional impasse resolution procedures imposed by the Statute is that an agency is required to delay making proposed changes to working conditions not only while bargaining is ongoing, but also after an impasse in bargaining has been reached, during impasse procedures.”

The Ground Rules Agreement Did Not Justify the Respondent's Actions

The Agency's chief negotiator asserted frequently during the bargaining sessions, and again at the hearing, that because the ground rules agreement specified that bargaining would occur on April 23 and 24, the Agency was entitled to stop bargaining after April 24, without regard to whether the parties had bargained to agreement or impasse, and without regard to whether further changes in conditions of employment occurred after April 25. Tr. 121, 413, 448-49; GC Ex. 32 at 1. In its opening statement at the hearing, Respondent's counsel similarly asserted that it had no further bargaining obligations regarding the relocation after it bargained on April 23 and 24. See note 12 above. I reject this argument.

In *IRS, Wash., D.C.*, 47 FLRA 1091, 1103 (1993), the Authority set forth the standard for contract defenses to ULP charges, stating:

[W]hen a respondent claims as a defense to an alleged unfair labor practice that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly.

The Respondent has the burden of proving any affirmative defenses. 5 C.F.R. § 2423.32.

In determining the meaning of an agreement, it is appropriate to consider whether (as the Agency insists here) the agreement constitutes a waiver of a statutory right to bargain. "When parties agree to language that expressly waives the statutory right to bargain, the Authority will find that such language constitutes a waiver." *NTEU*, 64 FLRA 982, 985 (2010) (citation omitted). The test for whether there has been a waiver by bargaining history is whether the matter has been "fully discussed and consciously explored during negotiations" and whether the Union has "consciously yielded or otherwise clearly and unmistakably waived its interest in the matter." *Interior*, 56 FLRA at 53 (quoting *Headquarters, 127th Tactical Fighter Wing, Michigan Air Nat'l Guard, Selfridge Air Nat'l Guard Base, Mich.*, 46 FLRA 582, 585 (1992)). This is particularly relevant in a case such as ours, where the Agency seeks to limit the number of times they are required to bargain, because the statutory language suggests exactly the opposite: § 7114(b)(3) requires parties to meet "as frequently as necessary" to reach an agreement.

In order to evaluate this defense, I consider the meaning of the ground rules agreement, using the standards and principles of interpreting agreements applied by arbitrators and the federal courts. *U.S. Dep't of Labor, Office of the Assistant Sec'y for Admin. & Mgmt., Dall., Tex.*, 65 FLRA 677, 680 (2011). This involves a consideration of the express terms of the agreement, as well as the parties' intent – as established by the wording of the clause itself, by inferences drawing from the contract as a whole, or by extrinsic evidence. See *AFGE, Local 2192, AFL-CIO*, 68 FLRA 481, 483 (2015) and cases cited therein.

The ground rules agreement states, "The parties will conduct two bargaining sessions" on April 23-24, from 9:00 a.m. to 5:00 p.m. GC Ex. 25. It also provides that there may be "additional dates for face-to-face bargaining," but this requires the "mutual agreement" of the parties. GC Ex. 25 at 5, ¶7. By specifying the dates on which negotiations would occur, and by eliminating language proposed by the Union that referred to the sessions as "initial bargaining," this language suggests that these were the only two days on which bargaining was required, and that further bargaining would be scheduled only by mutual consent. But this interpretation requires an emphasis on selective phrases in the agreement, at the expense of its context. Thus, paragraph 2 states, "The parties will conduct two bargaining sessions at the Agency's current headquarters on the following dates:" April 23 and 24. In other words, the paragraph simply specified the dates on which bargaining would be conducted at the headquarters building. This interpretation is supported by reading it in conjunction with paragraph 7 of the agreement, which states, "By mutual agreement, the parties may agree to additional dates for face-to-face bargaining[.]" and requires the Agency to pay lodging, travel, and other expenses of the Union team. The Union negotiators testified that mutual agreement was required for face-to-face bargaining, at the Washington headquarters, because it would entail significant time and expense to the Agency. The Union and the GC argue that the agreement is entirely silent about other means of bargaining, including exchanging proposals by email, meeting by telephone, and video conferencing, because (1) mutual consent was not required for these other forms of bargaining; (2) the parties had utilized these other forms of bargaining at other times; and (3) the agreement was not intended to set a deadline for all forms of bargaining. I agree.

The Agency's proposed interpretation of the ground rules also ignores paragraph 13, which states that "either party may request mediation from the Federal Mediation and Conciliation Service (FMCS)." Mutual consent is not required for mediation. Mediation is, without a doubt, a form of bargaining. Thus the April 23 and 24 bargaining sessions scheduled in paragraph 2 were clearly not the only negotiations that the parties anticipated. Nonetheless, when the Union requested mediation, the Agency refused to participate.¹⁵ It makes no sense for the Agency to use the ground rules to declare that bargaining was over, when those very ground rules enabled either party to initiate mediation.

When the parties began face-to-face negotiations on April 23, they had signed off on the ground rules less than a week earlier. Nonetheless, their disagreement about the meaning of paragraph 2 of the ground rules agreement became evident almost immediately. After the Union team spent most of April 23 touring the Franklin Court building, Jones expressed his impatience with the lack of actual bargaining and emphasized that negotiations would conclude at the end of the day on April 24. Durkin (along with Nixon and later Luther) responded, "[N]o, the Agency has to continue bargaining. It's your bargaining obligation to continue bargaining over these aspects." Tr. 115-16. The fact that the parties disagreed

¹⁵ Separate and apart from interpreting whether the ground rules agreement fixed April 24 as the last day for bargaining, the Agency's rejection of the Union's mediation request was arguably a violation of its duty to bargain in good faith in itself. Indeed, even if I were to agree with the Agency that the ground rules set April 24 as the last day of negotiations, the Agency's refusal to mediate the "impasse" would stand out as an even more blatant defiance of its statutory and contractual obligations.

immediately as to whether there was a fixed deadline for the end of bargaining suggests strongly to me that there was never a meeting of the minds on that provision. I believe that by deleting the word "initial" from the Union's draft language of paragraph 2, Jones intended to phrase the ground rules to suggest a fixed period for bargaining, but there is no evidence that this point was actually discussed by the parties during the negotiation of the ground rules. Indeed, it appears that the ground rules were hammered out entirely by exchange of email, rather than by telephone or face-to-face discussions. Jones did not articulate his understanding of paragraph 2 to the Union team until substantive negotiations had begun on April 23, and the Union immediately disputed his understanding. Accordingly, the evidence does not support the notion that in negotiating the ground rules, the Union made a conscious choice, after a full discussion of the issue, to establish a strict time limit of April 24 for negotiations. See *Interior*, 56 FLRA at 53.

If the parties had truly intended to establish a fixed time period for the negotiation of all issues related to the Agency's relocation, it could have done so, simply by stating that April 24 would be the last day for bargaining and by further specifying a fixed period for engaging in mediation and invoking FSIP assistance. The Agency insists that a fixed date for concluding negotiations is implied in the ground rules, but the law requires such a waiver of the Union's statutory rights to be explicit.¹⁶

Based on the foregoing, I conclude that the ground rules agreement did not justify the Respondent's decision to end bargaining prior to reaching agreement or impasse.

The Negotiations Over the Relocation Never Reached an Impasse

If the Union did not waive its right to bargain beyond April 24, the Agency was required to bargain until it reached agreement or impasse. The Authority has defined impasse as "that point in negotiations at which the parties are unable to reach agreement." *Naval Ordinance Station*, 17 FLRA at 897. In applying this principle, the Authority examines the entire course of negotiations. In *U.S. Dep't of the Air Force, Space Sys. Div., L.A. AFB, Cal.*, 38 FLRA 1485, 1504 (1991) (*L.A. AFB*), for instance, the judge reviewed the parties' bargaining sessions and concluded that at no time had the parties' positions become so fixed that "no further negotiations would be productive." He further noted that the parties had continued to discuss counterproposals made by the other, and that the "record does not reflect particular disagreements as to the terms or an unwillingness to modify them." *Id.* at 1503 (emphasis omitted). The analysis of the judge (affirmed by the Authority) in *Davis-Monahan*

¹⁶ As the GC notes, the NLRB's own case law is identical with regard to waiver of bargaining rights. See *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1357-58 (D.C. Cir. 2008), where the court cites both NLRB precedent and FLRA case law (*Dep't of the Navy, Marine Corps Logistics Base, Albany, Ga. v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)) to construe such waivers narrowly. See also *Omaha World-Herald*, 357 NLRB No. 156 (2011). This may explain why the Respondent was reluctant to explicitly argue waiver here.

AFB adopts similar guidelines in concluding that no impasse had been reached: among the factors cited were that neither party had actually declared an impasse; the parties had modified their proposals and demonstrated a "responsiveness to the bargaining process"; and the parties had not yet had "a reasonable opportunity to invoke the processes of FSIP." 42 FLRA at 1279-80.

The key question is whether additional bargaining (in which the good faith of both parties is presumed) might produce an agreement. In answering that question, it is important to evaluate whether the parties have thoroughly discussed the disputed issues and all ways of reaching a compromise on those issues. As the judge noted in *L.A. AFB*, "Whether an impasse exists after negotiations may be difficult to determine, particularly in view of protracted discussions between parties as well as the exchange of various proposals and counterproposals." 38 FLRA at 1501. It is precisely because the parties in our case did not engage in "protracted discussions" that it is apparent the parties did not reach impasse. Instead, it is clear that the Agency terminated bargaining prematurely.

There are a number of signs indicating that the parties were still in the early stages of bargaining when the Agency walked away from the table. First, on the morning of April 24, the Agency revealed that it lacked information on, and had not made decisions about, issues pertaining to frosted glass (Union Proposal 14), cubicle height (Proposal 20), task lighting (Proposal 24), coat hooks (Proposal 28), and furniture (Proposal 36). At that point, it was apparent to both parties that these decisions could not be made until much later in the relocation process, and indeed Union Proposals 35 and 36 sought to commit the parties to negotiations when they possessed the necessary information to resolve them, rather than in April, when both sides were "buying a pig in a poke." Tr. 471. Therefore, it could hardly be said on April 24 that further negotiations would be fruitless; on the contrary, further negotiations were inevitable¹⁷ (a fact the Agency belatedly understood several months later, when it offered to return to the table), and the Agency's termination of bargaining in April was arbitrary and unreasonable.

Second, the Agency effectively gave the Union a matter of hours – 3:52 to 6:33 p.m., or perhaps a bit longer, if the Union had agreed to continue bargaining into the evening – to analyze the Agency's twenty-one counterproposals and provide written responses to them. I agree with the Union that this was not sufficient time for the Union to respond fully to the Agency's counterproposals. And even if the Union had been able to write up a full set of responses that evening, the parties would have needed much more than that day to properly address them and try to reach compromises. The Agency cut bargaining off before this could happen.

¹⁷ The Agency's counterproposal (GC Ex. 29 at 4, ¶23) on furniture and other design questions – that the Union could participate in the Space Advisory Committee's deliberations – falls far short of enabling the Union to negotiate on those issues. As a mere member of a large committee, the Union would not have been able to negotiate directly with the Agency. This proposal was tantamount to asking the Union to waive its statutory right to bargain, and it is an unfair labor practice to bargain to impasse on such a permissive subject.

Third, the Agency failed to respond in writing to all of the Union's proposals, including the Union's proposal on furniture (Proposal 36). Tr. 428, 477. While the Union might have been able to figure out, from Jones's repeated assertions, that the Agency would not agree to the Union's proposals calling for further bargaining (Union Proposals 35-40), it would nevertheless have been reasonable for the Agency to give specific written responses to the Union's proposals, or to offer its formula for handling these problems, so the Union could know where it stood. This is especially true for proposals calling for future bargaining over specific issues, such as furniture (Proposal 36), boxes for moving personal items (Proposal 37), and commuting grace periods (Proposal 37).

Fourth, the parties were close to agreement on a number of issues. As Luther described in her testimony, the five issues addressed in the "Union's Initial response to Agency's counterproposal of 4/24/14" (GC Ex. 30 at 3) were highlighted by the Union team in the late afternoon of April 24, because these were issues "where there was common ground . . . things that we could agree on." Tr. 236, 238. Three of the Union's counterproposals were identical to the Agency's, and the other two were very close. If the Agency had not cut off bargaining, the parties could easily have reached agreement on these points. The Union's two other counterproposals were very similar to Agency proposals, indicating that further discussions could have led to an agreement. Similarly, it is apparent that the parties were a few short conversations away from reaching agreement on the issue of an additional nursing room; compare GC Ex. 26 at 5, ¶32 with GC Ex. 29 at 4, ¶20.

Jones himself admitted that the parties were still in the early stages of bargaining when the Agency left the table. When asked why the Agency rejected the five counterproposals offered by the Union late on April 24, Jones stated, "[W]e were too early on. We had only exchanged two [sets of] proposals." Tr. 431. Jones also acknowledged on the morning of April 25 that there was more bargaining for the parties to do, when he faulted the Union for ending talks at 6:30 p.m. He said that when the management team caucused after lunch on the 24th, "we were only able to begin discussion of the Union's 40+ proposals . . ." GC Ex. 32 at 1. He repeated management's view that if the parties had continued negotiating, they might have been able to "reach an agreement, or narrow the issues . . ." *Id.* These are not the statements of a negotiator who has reached an impasse.

Similarly, neither side used the term "impasse" or described proposals as a "last best offer." Although invoking the word "impasse" does not magically produce one, it is common for negotiators to advise their counterparts when they believe progress has been deadlocked. Declaring an impasse is significant, because it communicates to the opposing side that the time for invoking impasse procedures has arrived. See, e.g., the judge's discussion in *Davis-Monthan AFB*, 42 FLRA at 1279-80. While Jones made a point of emphasizing to the Union that the time for bargaining was running out, none of the testimony describing the April 24 session suggests that he saw no room for movement in the parties' positions. In fact, Jones's email to the Union team the next morning asserts just the opposite. Management's late afternoon counterproposals on April 24 (GC Ex. 29 at 3-5), and the Union's response a couple of hours later (GC Ex. 30 at 3), demonstrated movement by both sides on several

issues. The Union offered to submit a counterproposal on the remaining issues by April 30, and it requested that bargaining continue, using all technological means at the parties' disposal, including telephone and videoconferences, in addition to face-to-face meetings. GC Exs. 30 at 3 & 32 at 1-2. The Agency refused to continue bargaining – not because the parties had reached impasse, but because the agency believed it had satisfied its duty to bargain, a position I have already rejected.

Between April 29 and May 12, Union officials attempted to initiate mediation of the dispute with the FMCS. See GC Exs. 34, 37, 40. These efforts further demonstrate that the Union continued to believe that the parties could come to an agreement. Notwithstanding Jones's earlier statements that the Agency had fulfilled its obligation to bargain, Lennie told the Union on April 28 that management was still "amenable to further discussions about the BU's concerns . . ." GC Ex. 35 at 1. But any hopes of further progress were dashed on May 16, when Jones said the Agency would not engage in mediation, as it "would be pointless . . . [a] waste [of] time . . . useless . . ." GC Ex. 42 at 1. Even in this letter, however, Jones does not claim the negotiations had reached an impasse; rather he says mediation would be pointless "since we have moved forward in accordance with the GSA directive." *Id.* In other words, compromise was impossible only because of the Agency's unilateral implementation of the floor plan changes.

The evidence thus shows overwhelmingly that the parties had not reached impasse at any time, and that mediation might have been exactly what the parties needed to bridge their differences. In a similar context, the judge in *L.A. AFB* cited the definition of "impasse" used by FSIP in its regulations, 5 C.F.R. § 2470.2(e): "that point . . . at which the parties are unable to reach agreement, notwithstanding their efforts to do so by direct negotiations and by the use of mediation or other voluntary arrangements for settlement." (Emphasis added). Although a resort to mediation is not a prerequisite for reaching impasse, the Union's requests for FMCS assistance are additional evidence that at least one party saw room for compromise and agreement.

The Respondent argues that negotiations were deadlocked because the Union's proposals "focused almost entirely on the maintenance of the size of current office space and configuration[.]" the Agency rejected the Union's proposals on these issues, and neither side altered its position. Resp. Br. at 12. The premise of this argument is false: many of the Union's original proposals – including Proposals 14 (frosted windows), 15 (locks on office doors), 20 (height of cubicles), 24 (task lighting) 25 (ergonomic task chairs), 26 (desks), 27 (storage), 28 (coat hooks), 29 (phones), 30 (printers), 31 (restrooms), 32 (lactation rooms), 33 (storage for printers), 35 (color and style of flooring, carpeting, and walls), 36 (furniture), and 37 (moving arrangements) – had little or nothing to do with the size or configuration of offices. Even if the parties had been deadlocked on office size and configuration, there were plenty of other issues to discuss when negotiations broke down. The Agency's counterproposals, presented to the Union late on April 24, addressed some of these "non-size-related" issues, and the Union's response two hours later laid out compromises on five of them and promised to submit others within a week. This rapprochement should have

marked the opening to broader compromises, but the Agency chose instead to close the book on bargaining. By terminating negotiations before the Union had a chance to submit a full set of counterproposals, the Agency undercut its claim that negotiations were at an impasse. The Agency could not sincerely claim that the parties were at impasse until they had engaged in full-fledged negotiations over those additional counterproposals.

The Respondent notes next that the Union withdrew its five initial counterproposals on April 29. GC Ex. 34. However, the Union's action was precipitated by the Agency's rejection of those counterproposals, even though they reflected nearly full agreement on those five issues, and by the Agency's declaration that bargaining was over. More importantly, the Union continued to keep its original forty-one proposals on the table. All events occurring after April 25 are tainted by the Agency's termination of bargaining on that date, and all events after May 16 are similarly tainted by the Agency's refusal to join in mediation.

The Respondent argues that its actions were justified, given the fact that it was under pressure to give the architects comments on the preliminary drawings by May 9. But the Union had offered to provide the Respondent its counterproposals by April 30, and it is likely that the parties could have resolved many, if not all, of their disputes by May 9. Further, almost half of the Union's original proposals (the same sixteen that I enumerated above) were not tied to the May 9 "deadline"¹⁸ for commenting on the design drawings for Half Street. Many of these proposals were not related to the size of individual offices or cubicles, and indeed the Agency itself had no way of properly or knowledgeably negotiating many of these subjects (such as the height of cubicle walls, frosting on glass, and options for furniture, flooring, and walls) in April or May. These issues could and should have been addressed by the parties through bargaining at subsequent times over the next several months, right up to the date the NLRB finally moved to Half Street. Accordingly, the relocation process and its accompanying deadlines did not excuse the Respondent's refusal to continue bargaining between April 25 and May 9 or thereafter.

¹⁸ As noted by the GC at page 21 of its brief, the May 9 date established by GSA for the Agency to finalize its comments on the preliminary design drawings for Half Street was fixed at the Agency's request. Tr. 338-40. While there is no doubt that GSA (at the behest of the Half Street landlord) was pressuring the NLRB to submit its comments as quickly as possible, it is also clear that the landlord, GSA, and the architects had already delayed the timeline for the project several times, and GSA had authorized the NLRB to lease an additional 8,000 square feet of office space at Half Street, because the January 29 lease was proven to be inadequate for the Agency's needs. Agency officials advised GSA's Sutton that he should set a firm date for comments, rather than simply asking for them as soon as possible, and that he should put the demand in writing. In light of these facts, I find that the Agency did not initially have a firm deadline of May 9, by which it needed to conclude negotiations on the floor plans for Half Street; rather, the timeline for exchanging comments on the floor plans was a matter of negotiation between the NLRB, GSA and the landlord. Thus the matter was at least partially within the discretion of the NLRB, and it suited the Agency's tactical negotiating interests to encourage GSA to set a firm deadline. If the Agency had chosen to engage in full negotiations with the Union concerning the size and configuration of the office space, it could have either started the negotiations earlier than April, continued them beyond April, or both.

In sum, the parties could have engaged in productive discussions over the Union's proposals after April 24. By walking away from the table before there was a deadlock, and by then implementing unilateral decisions concerning conditions of employment at the new building, the Agency violated its duty to bargain in good faith and thus violated § 7116(a)(1) and (5) of the Statute.

Other Actions by the Respondent Demonstrating its Failure to Bargain in Good Faith

The primary way in which the Respondent violated its duty to bargain in good faith was (as already discussed) its premature termination of negotiations on April 25. However, other actions by the Agency on and before April 25 contributed to the failure and ultimate breakdown of negotiations. These include the Agency's refusal to furnish necessary information to the Union prior to April 23 and delaying the start of bargaining until many of the most significant decisions affecting the size and configuration of the new headquarters offices had been made.¹⁹

Starting in January and continuing through (and beyond) April, Agency officials engaged in extensive discussions with GSA, the new landlord, and the architects regarding the amount of space it would occupy in the new building, and the configuration of that space, and the Agency consciously froze the Union out of this process entirely. As a result, when formal bargaining with the Union began on April 23, the floor plans were "largely fixed," as the GC claims. GC Br. at 30. Jones and Graham advised the Union team that they could only make minor changes or "tweaks" to the floor plans, which had first been shown to the Union only nine days earlier. The most important decisions – allocating space to each of the Agency's various departments, determining the size and number of offices, cubicles, and break rooms – had already been made by the time the Union first saw the floor plans on April 14. Then the Agency advised the Union that GSA was forcing them to finalize all prospective changes to the floor plans within a matter of days. In other words, the Agency left the Union (actually two unions) in the dark and delayed bargaining with them until the eleventh hour, and then claimed that its hands were tied by GSA, so that negotiations had to be concluded in an unreasonably short period of time.

It is instructive at this point to take a step back and look at the *SSA Region I* case, not just for its narrow holding but for its larger implications, and to compare it with *SSA Baltimore*. Both of these cases involved agencies that had, at least tentatively, made decisions to relocate their offices. In *SSA Region I*, the Union demanded to bargain once it was notified that the agency had received a floor plan from GSA and the branch manager told

¹⁹ The General Counsel does not allege, nor do I find, that these were separate unfair labor practices committed by the Respondent, other than the Agency's refusal since May 15 to negotiate with the Union over the relocation of Agency headquarters, to the extent required by the Statute. However, these actions contributed to the events of April 23 to May 16, during which the Union was given inadequate information and inadequate time to negotiate an agreement on an arbitrarily confined range of issues.

employees “they thought they would move” by September to a specific location. 47 FLRA at 326-27. But the agency told the union that “no final decision” had been made about the relocation, and indeed the relocation did not occur. Nonetheless, the union and the GC argued that the agency was obligated to begin bargaining once the relocation was “contemplated.” *Id.* at 327. The judge and the Authority rejected this theory and held that while “it might be desirable from the Union’s viewpoint to be a participant in the decision-making process at an earlier stage, it is difficult to envision an obligation on SSA’s part . . . to negotiate before a firm decision had been made to relocate.” *Id.* at 330. In response to the union’s argument that excluding it from negotiations with the prospective landlord would prevent it from contributing to the important decisions affecting the relocation, the judge said:

Since it is the responsibility of an agency seeking to make the change to insure that it has fulfilled its bargaining obligation before implementation . . . , the agency must allow a reasonable time for the bargaining process to occur. But since this is the agency’s problem and not the union’s, the union often has only a more or less passive interest in how the agency arranges to fulfill its obligation – as long as it does fulfill it. Therefore the union can usually rest in at least a legal assurance that, whenever the agency notifies it of a proposed change and gives it the opportunity to bargain, its opportunity will be adequate.

Id. at 329-30. Then, citing *SSA Baltimore* and the Authority’s use of a signed lease as the starting point for the duty to bargain, the judge pointed out that “[u]nder some circumstances, however, a contemplated change may be so close to implementation that the agency’s silence, or its refusal of a request to bargain, may be inconsistent with the duty to negotiate in good faith” 47 FLRA at 330.

The hypothetical situation outlined in *SSA Region I* became real in our case; and the Union’s “legal assurance” that it would be afforded an adequate opportunity to bargain over details of the size and configuration of the Half Street offices was caught between a rock (the Agency’s protracted discussions with GSA and the architect between January 29 and April 14) and a hard place (GSA’s purported deadline of May 9 for proposing changes to the floor plans). The Union recognized that it needed to obtain precise measurements of the existing office layout and the proposed new layout in order to properly prepare bargaining proposals, and that it needed to be able to negotiate with the Agency while there was still time to make more than minor changes or tweaks in the floor plans. Notwithstanding the Union’s persistent demands, the time and information that the Agency gave the Union, between April 14 and May 9, was not sufficient to allow the Union to properly represent its members.

As the GC has noted, between February 5 and April 14 the Union repeatedly requested preliminary drawings of the new office’s floor plans and details regarding the size and configuration of the existing offices of bargaining unit employees. While denying that it had floor plans of the existing offices, the Agency prevented Union officials from taking

measurements of those offices. Meanwhile, it withheld from the Union the ongoing dialogue between Agency officials and the new building's architects about the proposed plans for the new headquarters. Although Jones insisted in March and April that the Agency had not received preliminary drawings or floor plans for the new offices until April 14, the record demonstrates that the architects had submitted a series of proposed floor plans to the Agency prior to April 14, and that Agency officials had been engaged in detailed discussions with the architect and with GSA about the adequacy (or inadequacy) of the space being allocated to the NLRB. *See, e.g.,* Tr. 386-87; Jt. Ex. 4 at 9. The Agency found significant problems with the architect's early floor plans, which left the Agency with inadequate space "to accommodate all of our requirements" and forced the Agency to go back to GSA and obtain authorization to rent an additional 8,000 square feet of space at Half Street. Tr. 409; *see also* Jt. Ex. 5 at 21-37.

This evidence shows that there was a significant period of time prior to April 14 in which the Agency was able to make meaningful changes in the size and configuration of the office space at Half Street. During this period, Agency officials were negotiating with the architects how much space each division of the Agency needed, how large the offices and cubicles could be, and other meaningful design issues. It was during this period of time that the Union could have been afforded a similar opportunity to add its perspective and interests into the discussion that was going on between the Agency and the architects. If the Union had had the opportunity to argue for its proposals in February or March, it might have been able to persuade management, the architects, and GSA that the Agency needed an additional 10,000 or 12,000 square feet, rather than 8,000. By the time negotiations began with the Union on April 23, it was apparently too late for such changes: the Union was told it could only "tweak" the floor plans. All of the Union's proposals relating to size and configuration were dismissed out of hand by Jones, and the Union's refusal to accept his rejection of those proposals was interpreted as intransigence. Resp. Br. at 12, 14. To make matters worse, the Union was told that it only had a few days to make any further comments on the floor plans, and that all issues relating to the move had to be negotiated in that time — even issues that were not tied to the Agency's "final" comments on the floor plans.

As the judge in *SSA Region I* noted, 47 FLRA at 329, the Agency may not have been legally required to include the Union in its meetings and discussions with the architects, but it was "the agency's problem" to ensure that the Union would have enough time to engage in meaningful negotiations. However, by choosing to delay negotiations until April 23, the Agency ensured that any significant changes proposed by the Union in the size or configuration of the new offices would be impossible to accept. And by demanding that all negotiations over the relocation process be completed by April 24, the Agency further prevented the parties from engaging in any informed discussion of the other, non-size-related issues that were decided much later in the year. By compressing the bargaining process at the front and the back ends, the Agency left the parties with the nearly impossible task of reaching agreement in an arbitrarily restricted two-day period. Then the Agency further compounded this problem by refusing to engage in mediation of the dispute. Unfortunately, while this may have been "the Agency's problem," it was the Union that paid the price for the Agency's failure to resolve the problem lawfully.

For all of the above reasons, the Agency failed to bargain in good faith and violated § 7116(a)(1) and (5) of the Statute.

The Actions of the Parties in November 2014 Did Not Mitigate
the Respondent's Unfair Labor Practice

As already noted, the Respondent terminated negotiations on April 25. While the parties had some subsequent discussions about the relocation, no further negotiations occurred until at least November. Meanwhile, the Agency continued to make decisions with the architects concerning design aspects of the new offices, and while the Union participated in some discussions about these issues as members of the Agency's Space Advisory Committee, those discussions did not constitute bargaining within the meaning of the Statute. However, on November 21, Jones advised the Union negotiating team that the Agency was in the process of finalizing its furniture order for the new building, and he invited the Union to participate in bargaining by telephone over any Union proposals concerning furniture on November 24. Jt. Ex. 14 at 3. A conference call discussing furniture issues was conducted on that date, although the Union told Jones it did not consider the discussion to satisfy the Agency's statutory duty to bargain. *Id.* at 2. In late December 2014 and early January 2015, the parties simultaneously engaged in efforts to settle this ULP case while discussing the possibility of holding additional negotiations over any remaining issues related to the relocation. GC Exs. 58 & 59; Jt. Ex. 15. The Union indicated that it would engage in further negotiations only within the context of a settlement of the ULP, and the Agency refused to settle the complaint; as a result, no further negotiations were held.

The Authority has held on a number of occasions that after an agency has unilaterally implemented changes in conditions of employment, subsequent offers to bargain over the changes do not cure the statutory violation, and post-implementation actions are irrelevant. *U.S. Dep't of Transp.*, 40 FLRA 690, 705 (1991) (*DOT*). Moreover, a union is under no obligation to respond to an agency's belated offer to bargain and will not be considered to have waived its right to bargain by failing to accept such an offer. *Air Force Accounting & Fin. Ctr., Denver, Colo.*, 42 FLRA 1196, 1207 (1991) (*Air Force*).

By the time the Agency made its limited offer in November to bargain, it had already implemented many aspects of the relocation plans, by making commitments with GSA and the architects. During its negotiations with the Union in April, Agency negotiators told the Union team that all issues relating to the relocation had to be negotiated and finalized before the May 9 deadline given to them by GSA. On May 16, Jones advised the Union that mediation "would be pointless[,] since we have moved forward in accordance with the GSA directive." GC Ex. 42 at 1. Since seven months went by after that declaration, with no negotiations, the Agency's limited offer to bargain in November was far too little, and extremely late. It certainly does not change the fact that the Respondent had already violated its statutory duty to bargain.

On the other hand, if the Agency had not yet implemented its plans concerning furniture for the new headquarters in late November, the question arises whether its offer to bargain on this issue on November 24 satisfied its duty to bargain. At least in some respects, the November 24 teleconference offered the Union a hope of shaping the Agency's furniture choices before those choices were finalized in December. I conclude that the November bargaining offer was not sufficient, for two reasons. First, the Agency had already made the decision, with GSA, to utilize GSA's "FIT" program, which significantly narrowed the remaining options for furniture. Thus the November teleconference cannot truly be considered "pre-implementation." As with many of the decisions made between the Respondent and the architects in February and March, the Respondent had already narrowed the Union's ability to negotiate to a significant extent. Additionally, the "bargaining" with the Union over furniture lasted for only one day, November 24, and it ended without an agreement or evidence of an impasse. Thus, as with the April negotiations, the bargaining in November failed to satisfy the requirements of the Statute.

For the reasons laid out in *DOT* and *Air Force*, the Respondent's December and January offers to negotiate also do not mitigate the ULP arising from the Agency's longstanding refusal to negotiate in good faith. Those offers were part of negotiations involving the General Counsel, Respondent, and Union to settle the underlying ULP complaint, and it would be inappropriate to consider the actions of any party in such negotiations as evidence on the merits of the complaint.

REMEDY

Since the Respondent's ULP in this case was its improper termination of bargaining over the impact and implementation of the proposed relocation, it is clear that an appropriate remedy must (among other things) order the Agency to return to the bargaining table and resume negotiations from the point at which they ended on April 24. Neither the General Counsel nor the Union seeks a full status quo ante remedy, however, as everyone seems to recognize that the Agency cannot return to Franklin Court. The main dispute is what effect should be given to those terms on which the parties reach agreement: specifically, should they be effectuated retroactively or only prospectively? The GC and the Charging Party argue for a retroactive bargaining order, while the Respondent argues that a retroactive order would be inappropriate.

The Authority has held that a retroactive bargaining order is appropriate where a respondent's unlawful conduct has deprived the exclusive representative of an opportunity to bargain in a timely manner over negotiable conditions of employment affecting bargaining unit employees. *Army*, 60 FLRA at 457. In particular, implementing the results of their negotiations retroactively enables the parties to approximate the situation that would have existed had the Agency fulfilled its statutory obligations. It enables the parties to determine, through negotiations, the best way to provide relief for employees adversely affected by the original refusal to bargain. *Dep't of Veterans Affairs Med. Ctr., Asheville, N.C.*, 51 FLRA 1572, 1581 (1996) (*VA Asheville*); see also *Army*, 60 FLRA at 457. This type of remedy has been utilized most often in cases where some bargaining unit employees may have lost or

been deprived of monetary benefits as a result of an agency's unilateral action, but it has also been used to remedy an agency's unilateral selection and installation of interior design features such as carpeting and wall finishes at an airport's new control tower. *FAA*, 51 FLRA at 37. In *FAA*, the judge expressly stated that "if the collective bargaining process results in an agreement on selections that are different from the existing ones, they should be installed upon request." 51 FLRA at 45. Upon review, the Authority held that such an order "will effectuate the purposes and policies of the Statute by ensuring the substitution of any design features negotiated by the parties or imposed by the Panel, thereby approximating the situation that would have existed had the Respondent fulfilled its statutory obligations." *Id.* at 37.²⁰

In other cases, however, the Authority has found that a prospective bargaining order is better suited to the facts of the case. In *U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 989, 992-93 (1990) (*Customs Service*), for instance, the Authority stated that "a prospective bargaining order provides the parties with the flexibility to determine whether, and with regard to which matters, retroactivity best meets their needs."²¹

Once the Agency stopped bargaining on April 25, it began to unilaterally implement all manner of decisions related to the relocation. Although it kept the Space Advisory Committee apprised of what was happening with the construction and allowed the committee members to express their opinions at certain times, many of the committee members were not part of the Union's bargaining unit, and this process was not bargaining. Now that the relocation has been completed, and all employees are working at the Half Street building, it is not at all clear how many of the decisions unilaterally imposed by the Agency can be undone through retroactivity. But I find the determination of the Authority in the *FAA* case, in a fact

²⁰ In explaining its preference for retroactive, rather than prospective, bargaining orders, the D.C. Circuit Court of Appeals rejected the argument that "this arrangement is a zero sum game for employees: the agency will simply offer less, knowing it is bound to a retroactive extension of the terms to which it agrees." *NTEU v. FLRA*, 856 F.2d 293, 299 (D.C. Cir. 1988). While recognizing that employees may "sometimes be forced to give up at the bargaining table . . . the equivalent of what they have gained by retroactivity," the court doubted this will always be the case, and it preferred to leave those decisions to the bargaining process. *Id.* Expanding on earlier decisions by the same court in *AFGE, SSA Council 220 v. FLRA*, 840 F.2d 925 (D.C. Cir. 1988) (*Council 220*), and *AFGE v. FLRA*, 785 F.2d 333 (D.C. Cir. 1986) (per curiam), the Circuit Court said that the Statute expresses "a 'weighty preference' for individualized 'make whole' relief." 856 F.2d at 296 (quoting *Council 220*, 840 F.2d at 929-30). Prospective relief, on the other hand, "fails to deter noncompliance" and "is fundamentally at odds with the Authority's responsibilities[.]" because "[e]mployees are left to bear the losses and suffer the detriments of working under conditions ordained by management rather than fixed by bargaining." 856 F.2d at 297.

²¹ In reality, it appears that both retroactive and prospective bargaining orders can be flexible. The Circuit Court in *NTEU v. FLRA*, 856 F.2d at 297, noted that when the parties are ordered to bargain retroactively, the union always has "the privilege to retain or waive its right to retroactive application of bargaining terms." And in explaining its prospective bargaining order in *Customs Serv.*, 38 FLRA at 992, the Authority noted that it "would not preclude the parties from giving retroactive effect to any agreement reached."

situation strikingly similar to ours, to be instructive and persuasive. I also believe that in these factual circumstances, the Union should, as the court envisioned in *NTEU v. FLRA*, "retain . . . the advantage conferred by the privilege to retain or waive its right to retroactive application of bargaining terms." 856 F.2d at 299. Otherwise, if retroactivity of any term is dependent on the Respondent's consent, the negotiations are likely to be as fruitless as those on April 23 and 24.

Accordingly, the parties should negotiate fully and in good faith on all issues relating to the impact and implementation of the move to Half Street. When they have agreed on an issue, the presumption should be to implement it retroactively, although the Union will have to weigh the feasibility and the cost of retroactivity, insofar as it affects what the Agency may otherwise be able to agree to, in the overall agreement. Because the negotiating table is so steeply slanted toward the Agency (due to its unilateral implementation of so many details of the relocation), a presumption of retroactivity is needed to restore the conditions that existed when negotiations began. Finally, it should be emphasized, as the Authority did in *VA Asheville*, that if the parties cannot reach agreement, they will be expected to seek assistance expeditiously from the Federal Service Impasses Panel. 51 FLRA at 1581.

As for who should sign the notice, the Authority typically directs the posting of a notice to be signed by the highest official of the activity responsible for the violation. *U.S. Dep't of Veterans Affairs*, 56 FLRA 696, 699 (2000). By requiring the highest official to sign the notice, a respondent clearly acknowledges its obligations under the Statute and shows that it intends to comply with those obligations. *Id.* Given that the bargaining here involved two separate bargaining units, one working for the NLRB's Chairman and one working for the Agency's General Counsel, I find that both officials should sign the notice.

Finally, the GC requests a nationwide posting. *See* GC Br. at 44. In determining the scope of a posting requirement, the Authority considers the two purposes served by the posting of a notice. First, the notice provides evidence to unit employees that the rights guaranteed under the Statute will be vigorously enforced. Second, in many cases, the posting is the only visible indication to those employees that a respondent recognizes and intends to fulfill its statutory obligations. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 394-95 (1999). In applying these principles, a relevant factor is whether the national office of a respondent was involved in the unfair labor practice. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Swanton, Vt.*, 65 FLRA 1023, 1030 (2011).

Clearly, the Respondent's national office was involved in this ULP, which involved negotiations over the relocation of its national headquarters. The Agency's bargaining team consisted of managers based at headquarters, and the Agency's executive leadership inserted itself into the dispute more than once. But the ULP also involved, and was of concern to, the Union's members outside the Washington, D.C., area, as the bargaining units are nationwide in scope and many of the Union negotiators worked outside Washington. Finally, a nationwide posting will emphasize to employees that the agency that enforces labor laws in the private sector must itself comply with labor laws in the public sector.

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 (the Statute), the National Labor Relations Board (the Agency) shall:

1. Cease and desist from:

(a) Terminating bargaining over the relocation of its headquarters office prior to reaching an agreement or prior to reaching an impasse with the National Labor Relations Board Union (the Union).

(b) Unilaterally changing working conditions of bargaining unit employees represented by the Union concerning the relocation of Agency headquarters without notifying the Union and affording it the opportunity to negotiate to the extent required by the Statute.

(c) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured them by the Statute.

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

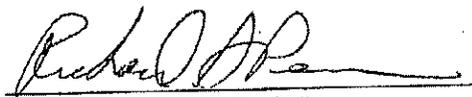
(a) Upon request, negotiate in good faith with the Union concerning the relocation of Agency headquarters to the extent required by the Statute, including participating in mediation under the auspices of the Federal Mediation and Conciliation Service, if requested by either party, and if requested and necessary to implement the results of any agreement reached or resolution imposed by the Federal Service Impasses Panel, replace or substitute any features located within the new headquarters building that are subject to bargaining under the Statute.

(b) Post at all offices of the Agency where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the General Counsel and the Chairman of the National Labor Relations Board, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted, nationwide. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) In addition to physical posting of paper notices, the Notice shall be distributed electronically, such as by email, posting on an intranet or internet site, or other electronic means, if the Agency customarily communicates with employees by such means.

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

Issued, Washington, D.C., February 11, 2016

A handwritten signature in black ink, appearing to read "Richard A. Pearson", written over a horizontal line.

RICHARD A. PEARSON
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 National Labor Relations Board violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this notice:

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT terminate bargaining over the relocation of our headquarters offices in Washington, D.C., prior to reaching an agreement or prior to reaching an impasse with the National Labor Relations Board Union (the Union).

WE WILL NOT unilaterally change working conditions of employees in the bargaining unit represented by the Union concerning the relocation of the Agency headquarters without notifying the Union and affording it an opportunity to negotiate to the extent required by the Statute.

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

WE WILL upon request, negotiate in good faith with the Union concerning the relocation of Agency headquarters to the extent required by the Statute, including participating in mediation under the auspices of the Federal Mediation and Conciliation Service, if requested by either party, and if requested and necessary to implement the results of any agreement reached or resolution imposed by the Federal Service Impasses Panel, replace or substitute any features located within the new headquarters building that are subject to bargaining under the Statute.

Date: _____ By: _____
Chairman, National Labor Relations Board
(Signature)

Date: _____ By: _____
General Counsel, National Labor Relations Board
(Signature)

This Notice must remain posted for sixty (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 Region, Federal Labor Relations Authority, whose address is: 224 S. Michigan Ave., Suite 445, Chicago, IL 60604, and whose telephone number is: (312) 886-3465.