

The Collective Bargaining Process Overview

Hello NWP Members and Reps;

Welcome to LR Chronicles number 29. This edition of the LR Chronicles will be a “crash course” in bargaining and negotiations. This edition will basically be a “bargaining 101” class. Considering the fact that we have many new FACREPs in our region, this edition will be mainly for them, but also will be a possible refresher for some of our more seasoned FACREPs. I will only cover the highlights of bargaining in this edition. Whether I use the term “bargaining” or the term “negotiations,” for this edition of the LR Chronicles, those terms are synonymous.

Beginning with this edition, I want to ensure that ALL FACREPs are properly and appropriately prepared to conduct bargaining on the basic watch schedule (BWS) and annual leave MOUs. To that end, the next several editions of the LR Chronicles will be dedicated to this very important issue. Recognizing the fact that this edition is a “crash course” in bargaining, the next edition will be a full explanation of the different types of Alternative Work Schedules (AWS). All FACREPs have the right to negotiate the use of AWS as part of their basic watch schedules. However, as per our CBA, the use of AWS has limitations for certain facilities.

Beginning with the May edition of the LR Chronicles (LR Chronicles number 31), there will be a multiple-part edition in which all of the different facets of the collective bargaining process will be broken down and explained in-depth. Bargaining to reach agreement on an issue is a very complex and extensive subject that has many nuances.

To ensure that all FACREPs have all of the information that they need in order to prepare for and conduct their respective BWS and annual leave negotiations, beginning with this edition of the LR Chronicles, I will be sending out two (2) editions per month. You can expect one at the end of each month (as usual) and you can also expect one in the middle of each month. My goal is to get all relevant information to you by the end of June or the middle of July. There will be more editions after that regarding the collective bargaining process, but they will focus on what happens if you cannot reach agreement or if you feel the Agency has engaged in “bad-faith bargaining.” Both of which will more likely than not, be handled above the facility level.

To begin, there are several federal laws that encompass bargaining. Additionally, our own CBA, as well as the Agency’s imposed conditions of employment (ICE) cover bargaining during the mid-term. However, the vast majority of rights and responsibilities of bargaining in the federal sector emanate from case law issued by the Federal Labor Relations Authority (FLRA). One of the responsibilities charged to the FLRA is the interpretation of federal law that covers bargaining. The FLRA does this in many ways, including, but not limited to previously issued FLRA case law, previously issued Court decisions, and reviewing Congressional intent of federal law.

Title 5, Chapter 71 Laws that cover collective bargaining:

Several laws cover collective bargaining under the Federal Service Labor-Management Relations Statute (FSLMRS), otherwise known as “Title 5, Chapter 71” or “The Statute.” It is extremely important that everyone who will negotiate with the Agency on behalf of NATCA and our membership become familiar with these provisions of law. They are:

- 5 USC 7103(a)(12) (*Definition of collective bargaining*)
- 5 USC 7103(a)(14) (*What is a condition of employment*)
- 5 USC 7106 (All of it) (*Management Rights*)
- 5 USC 7114(b)(4) (*Information Requests*)
- 5 USC 7116(a)(5) (*Refusal to negotiate in good faith*)
- 5 USC 7116(a)(6) (*Refusal to cooperate in impasse proceedings*)
- 5 USC 7117(a)(1) (*Duty to bargain in good faith*)
- 5 USC 7119(a) and (b) (*Utilizing the Federal Mediation and Conciliation Service (FMCS)*)
- 5 USC 7119(c)(1) (*Utilizing the Federal Service Impasses Panel (FSIP)*)
- 5 USC 7119(c)(5)(A), (B), and (C) (*Reaching agreement at impasse proceedings*)
- 5 USC 7131(a) (*Official time for negotiations*)

Level of Recognition for Negotiations:

In accordance with FLRA case law, it is well established that the Agency is only required to bargain with an exclusive representative at the level of “exclusive recognition.” To negotiate beyond the level of recognition is only done at the election of the Agency. That kind of subject of negotiations is a “permissive subject of bargaining” in accordance with 5 U.S.C. 7106(b)(1). In the case of NATCA and the FAA, the level of exclusive recognition is at the “national level.”

During the negotiations for the CBA in 1997 and 1998, the FAA elected to agree to local and regional level bargaining for all issues. During the negotiations in 2005 and 2006, the agency elected only to bargain below the national level for a few issues, such as the basic watch schedule, annual leave, recognition and awards, and distribution of overtime.

Notice of proposed changes to the Union and Duty to Bargain:

The first step in the bargaining process is a notice to the Union, from the Agency, should they contemplate any changes to working conditions of employees contained within the bargaining unit. However, in accordance with federal law as well as FLRA case law, the requirement for an agency to notify and bargain with the exclusive representative has a few caveats, including:

- The contemplated change must be a “condition of employment”
- The contemplated change must be more than “de minimis” in nature;
- The contemplated change must not already be “covered-by” the CBA.

“De minimis” is a Latin term meaning “trifling,” “minimal,” “insignificant.”

“Covered-by” is used as a defense to alleged failure to satisfy a statutory bargaining obligation. In order to determine whether an issue is covered-by the existing CBA, the FLRA applies a two-part test. Prong one is whether or not the matter is “expressly contained” in the agreement. If it is not, prong two is whether or not the matter is “inseparably bound up” with and thus, plainly an aspect of an issue covered by the CBA.

Union response to a notice of proposed change:

The second step of the bargaining process is the Union response to an Agency notice of proposed change. In accordance with our CBA, the Agency must give thirty (30) days notice of a proposed change, and once received; the Union has fifteen (15) days to request a meeting regarding the change. This request for a meeting/briefing should be done in writing and should use the following language: *“NATCA requests a full briefing on this matter. NATCA also reserves the right to request the initiation of formal bargaining over all negotiable matters related to this issue. In the interim, NATCA expects the Agency will not implement any proposed changes until a briefing has been provided and, if NATCA determines bargaining to be necessary, until the conclusion of any bargaining in accordance with the CBA and/or the Federal Service Labor-Management Relations Statute.”*

Regardless of whether or not they provide a briefing, or even respond to your letter/email, it is imperative that you submit negotiable proposals within the established timelines. Failure to do so may result in a determination that you waived your right to bargain.

No notice of impending change:

As stated above, when the Agency contemplates a change in working conditions that may only affect your facility, they may not notify you. The reason is due to their white book stating that all bargaining will be at the national level except for those issues which they choose to negotiate below the level of recognition. However, this does NOT relinquish their right to notify NATCA under the CBA and law. Therefore, should you become aware of any changes that affect your BUEs, it is extremely important that you contact your RVP or Regional LR Lead as soon as you become aware of the change. There is a procedure that is set up at the national level for these situations. Your RVP or Regional LR Lead will give you the appropriate guidance.

Meeting/Briefing regarding proposed changes:

The third step in the bargaining process is for the Union to receive a full and complete briefing regarding the change(s) contemplated by the Agency. The purpose of the briefing is for the Union to fully understand the proposed change, in its entirety. Once the Union has a full understanding of the issue, it can properly formulate and submit negotiable proposals. If you ask questions in the briefing that the Agency cannot answer, or answer to your satisfaction, contact your RVP or Regional LR Lead for the appropriate guidance. In accordance with the CBA, there are strict timelines for the submission of proposals, so make the contact sooner rather than later.

Submitting proposals regarding Ground Rules for bargaining:

Prior to the actual substantive bargaining for a change in working conditions, a Union has a right to propose and bargain the “Ground Rules” for the actual substantive bargaining. However, in accordance with FLRA case law, submitting a proposal for Ground Rules, does not remove the Union’s requirement to also submit substantive proposals within established timelines in accordance with our CBA, as mentioned above under **“Union response to a notice of proposed change.”** Ground rules form the basis for the substantive negotiations and cover such issues as:

- How many members on each respective negotiating team;
- Identifies each Chief Negotiator who will have the full authority to bind each respective side regarding any aspect of negotiations;
- Official time for the Union’s negotiators;
- When and where bargaining sessions will take place;
- How long a bargaining session will last;
- When a caucus may be called and by whom;
- When a break may be called and by whom.

In accordance with FLRA case law, there are specific requirements regarding ground rules negotiations. If you ever find yourself wanting or needing to negotiate ground rules, contact your RVP or Regional LR Lead for the appropriate guidance.

Submitting substantive proposals regarding changes in working conditions:

It is extremely important to document all of your proposal submissions as well as all of your bargaining sessions. When a proposal is submitted to management, it should contain the language that you desire, as well as a label for each proposal. Of course, the first proposal that is submitted is labeled “U-1.” The “U” stands for Union and the “1” indicates that it is the Union’s first proposal. Likewise, the proposals submitted to the Union by management should be labeled “M-1” or “A-1.” The “M” stands for management and the “A” stands for Agency.

Depending on what is agreed between the parties regarding the submission of proposals, the appropriate exchange of proposals should be:

- U-1
- A-1
- U-2
- A-2
- U-3 and so on.

This example is used if it was the Union that submitted the first proposal. Do not negotiate with yourself. If you have submitted a “U-1”, then it is incumbent upon the agency to answer your proposal with their “A-1.” However, if you have discovered a problem with your preceding proposal and you need to correct it, you may do so as long as you do not receive the Agency’s response to that proposal. You can do this by submitting a “U-2r” or “U-3r.” The “r” stands for revised and you should also notify the agency in the form of a letter that you needed to make changes to the most recent proposal and that they should disregard the previous submission.

Tentatively Agreed Upon (TAU):

It is very important to document all of your bargaining sessions. You should have, at a minimum, one other person with you in all of your bargaining sessions. The function of the other person is to take notes during each session. The “note-taker” is responsible for getting everything in writing that is said by each negotiator in all sessions. This completed document will become the “bargaining history” for the issue that you are bargaining. Bargaining history is extremely important in any third party action. Without bargaining history, a third party is only left to decide any breach of an agreement based on the plain language of the Agreement and any testimony provided in a third party proceeding. It is never good to have bargaining history end up in a “he said/she said” scenario.

As you are in your bargaining sessions, if you and the Agency are in agreement on any specific provision of the proposal, you and the Agency’s Chief Negotiator should “TAU” that provision. This is done by either initialing or signing all provisions to which agreed, as well as noting the date on which the provision(s) was/were agreed.

Once you have the language that you want and you TAU that provision with the Agency, do not reopen that provision. There is a past practice in negotiations between NATCA and the FAA that a TAU’d provision can only be reopened by mutual agreement of the Parties. Should you ever find yourself needing or wanting to reopen a TAU’d provision, prior to doing so, contact your RVP or Regional LR Lead for guidance.

Agreement:

Once all provisions within a proposal have been TAU’d, you have an Agreement. In accordance with federal law (5 USC 7103(a)(12)), if requested by either Party, both Parties must sign the Agreement that is reached.

Agency Head Review:

The very last step in the bargaining process is afforded to the Agency under 5 USC 7114(c). This is where the Head of an Agency (or their designee) may approve or disapprove the negotiated Agreement within thirty (30) days of its execution (signed). An Agency Head may ONLY disapprove an executed Agreement if any provision within that Agreement violated federal law or a Government-Wide regulation.

Should the Agency Head not approve the Agreement AND serve the Union with its disapproval within the thirty (30) day requirement, the Agreement becomes in full-force and effect. However, should any provision within that Agreement be deemed contrary to law or Government-Wide regulation by a third party, that provision becomes unenforceable. If the Agency Head disapproves any portion of the Agreement, even just one word, then the entire Agreement is un-enforceable unless both NATCA and the FAA agree to otherwise.

****NOTE**** The following provision should be included in your Ground Rules proposal or your substantive proposal should you decide to not submit a Ground Rules proposal: *“Should the*

Agency Head determine that any provision of this Agreement be deemed contrary to law, the remaining provisions will be in full force and effect and binding on both Parties.”

Subjects of Bargaining:

In accordance with Title 5, Chapter 71, there are three (3) subjects of bargaining. They are as follows:

- Prohibited (5 USC 7106(a))
- Permissive (5 USC 7106(b)(1))
- Mandatory (5 USC 7106(b)(2) and (b)(3))

Impasse:

A bargaining “impasse” is reached when there is no further movement or concessions to be made by either the Union or the Agency. Federal law does not mandate that either the Union or the Agency to agree to or make concessions in bargaining. 5 USC 7103(a)(12) states in part “...*but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.*”

In accordance with federal law and FLRA case law, there are very strict rules and procedures that must be followed in the case of a bargaining impasse. If you ever find yourself at a possible impasse, contact your RVP or Regional LR Lead immediately.

As stated at the beginning, this edition of the LR Chronicles is meant to be a “crash course” in the collective bargaining process. In the coming months, I will fully explain, in detail, that which has been covered in this edition. I will also ensure that I have all future and relevant editions to you in time for your respective BWS and annual leave negotiations.

It is extremely important for all NATCA representatives that bargain on behalf of NATCA and our membership to be intimately familiar with all aspects of bargaining and negotiations. If you are ever in doubt as to a course of action, you need to contact your RVP or Regional LR Lead.

If there are any questions, please feel free to contact me.

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