

**The Collective  
Bargaining Process  
In-Depth  
Part 3**

**The three (3) subjects of  
Bargaining and Article 7**

Hello NWP Members and Reps;

Welcome to LR Chronicles number 33. This edition will focus on the three (3) separate and distinct subjects of bargaining, explain each one, and outline the relevant FLRA case law that applies to each one. Even mandatory subjects of bargaining, those which the FAA must negotiate, come with caveats of which you must be aware if you will negotiate on behalf of NATCA. I will also cover and briefly explain “Union-initiated bargaining.” In accordance with both the CBA and the FAA’s white book, the Union may initiate bargaining on personnel, policies, practices, and matters affecting working conditions that are not covered-by the CBA. However, considering the fact that matters such as the basic watch schedule and annual leave negotiations are handled in accordance with the CBA, thus differentiating them from traditional Union-initiated proposals, I will only cover the highlights of Union-initiated bargaining.

In order to understand the laws, as they apply to the three (3) subjects of bargaining, there are two definitions with which you should be aware, especially as you read the relevant case law below. Those definitions are:

- ***Proposal*** – A matter offered for bargaining that has not been agreed to by the parties;
- ***Provision*** – A matter that is used to refer to a clause that is contained within a labor agreement; and
- ***Provision*** – Also used to define a matter that has been disapproved by the Agency Head pursuant to 5 USC 7114(c). **(I will explain “Agency Head Review” in a later edition.)**

As mentioned in LR Chronicles number 31, there are three (3) subjects within the scope of bargaining. They are:

- Prohibited;
- Permissive;
- Mandatory.

As a review, prohibited subjects of bargaining, as contained in 5 USC 7106(a), means that the FAA cannot, even at their election, negotiate the substance of any of these reserved rights. However, the Agency must negotiate the procedures and appropriate arrangements (explained later) surrounding these rights.

Permissive subjects of bargaining, as contained in 5 USC 7106(b)(1), means that the FAA may, but cannot be forced to negotiate the substance of any of these rights. Just like prohibited

subjects of bargaining, the FAA must negotiate the procedures and appropriate arrangements (explained later) surrounding these rights. Thus, it is possible to approach a permissive subject of bargaining, through other mechanisms that the Agency does not elect to negotiate.

Mandatory subjects of bargaining, as contained in 5 USC 7106(b)(2) and (3) are required subjects of bargaining by the FAA, regardless of whether or not these subjects may infringe on a prohibited or permissive subject of bargaining. However, the mere fact that bargaining is required on a particular subject does nothing to guarantee agreement on a proposal. As mentioned in a previous edition of the LR Chronicles, neither the FAA nor the Union is required to reach agreement over a proposal. Instead, both Parties must engage the bargaining process in good faith. Should the Parties fail to reach agreement on a particular proposal, they have a variety of avenues to seek redress. The FLRA has issued very relevant case law regarding these subjects of bargaining. In general, a proposal affects the exercise of a management right ONLY if it prohibits, requires, or restricts the exercise of a management right.

### **FLRA Case Law applying to the three subjects of bargaining:**

#### **Regarding prohibited subjects of bargaining; 5 USC 7106(a):**

- Agency managers are not authorized to waive these statutory rights, or to agree to provisions that effectively negate their ability to exercise them. However, the statute permits the negotiation of procedures and appropriate arrangements for the exercise of these rights that actually limit these Agency rights. (*44 FLRA 1405*)
- The Agency's right to assign employees includes the right to determine which employees will be assigned to a particular position. (*44 FLRA 1405*)
- The fact that a proposal will cause an increase in the cost of Agency operations, will not in itself, render the proposal non-negotiable. (*47 FLRA 980*)
- If the proposal would result in substantial additional costs to the Agency which are not offset by compensating benefits, it is outside the obligation to bargain. (*47 FLRA 980*)
- The negotiation and use of official time for representational purposes under 5 USC 7131(d) exists as an exception to the right to assign and direct employees. (*51 FLRA 1371*)
- The Agency's right to determine the number of employees relates to the total number of employees of an agency, not to the placement of employees within an agency. (*36 FLRA 298*)
- The right to assign work includes the right to determine when work will be performed, and the employees or positions to which work will be assigned. (*60 FLRA 785*)

#### **Regarding permissive subjects of bargaining; 5 USC 7106(b)(1):**

- A proposal is permissive if the language explicitly relates to the numbers, types, or grades of employees. (*55 FLRA 1145*)
- A proposal is permissive if its integral relationship to the numbers, types, or grades would determine those numbers, types, or grades. (*55 FLRA 1145*)

- Although an Agency cannot be compelled to bargain over the substance of 7106(b)(1) matters, it is still required to bargain concerning the impact and implementation of them. (54 FLRA 360)
- A Party may withdraw from the negotiation of a permissive matter at any point prior to agreement. (52 FLRA 677) (24 FLRA 56)
- Because 7106(b)(1) is an exception to section 7106(a), an Arbitrator's award enforcing an agreement made under 7106(b)(1) will not be disturbed even though it affects a management right contained in 7106(a). (62 FLRA 90)
- A contrary to law exception will not be applied to an Arbitrator's award enforcing a provision concerning a permissively negotiated matter. (61 FLRA 377)
- A proposal interfering with a management right and at the same time falling within the permissive scope of bargaining is permissively negotiable. (Montana ACT, 22 F. 3d 1150)
- Work means the particular objectives that the Agency was established to accomplish. (61 FLRA 48)
- Means is any instrumentality, including an agent, tool, device, measure, plan, or policy used by the Agency for accomplishing or furthering the performance of the Agency's work. (19 FLRA 1180)
- Technology is the technical method that will be used in accomplishing or furthering the performance of the Agency's work. (19 FLRA 1180)
- A method is the way an Agency chooses to accomplish its work. (19 FLRA 1180)
- An agency or a Union may elect to cease bargaining on a permissive topic at any time prior to reaching agreement, without committing an unfair labor practice. (21 FLRA 1046)
- A "method" is the way an Agency performs its work, while a "means" is an instrumentality, such as an agent, tool, measure, plan, or policy used by an agency to further its mission. (55 FLRA 1145)
- A method describes "how" while a means specifies "with what." (61 FLRA 48)

### **Regarding Mandatory subjects of bargaining; 5 USC 7106(b)(2) and (3):**

These are known as procedures and appropriate arrangements, otherwise known as impact and implementation bargaining. Since these subjects of bargaining are entitled "mandatory" subjects of bargaining, please remember that the FAA MUST negotiate these subjects with you, regardless of whether or not the matter encompasses a reserved management right (5 USC 7106(a)), or a permissive subject of bargaining (5 USC 7106(b)(1)). This is because the FLRA has determined that procedures and appropriate arrangements are an exception to both reserved (prohibited) as well as permissive management rights.

### **Procedures – 5 USC 7106(b)(2):**

This is the "implementation" portion of "impact and implementation" bargaining. A procedure is defined as those "procedures" that management must observe in exercising their rights as enumerated in 5 USC 7106(a) and 5 USC 7106(b)(1). Please remember that a procedure is an exception to both prohibited and permissive management rights. To put it simply, if your proposal addresses how management rights will be exercised by management, it may constitute a

negotiable procedure. The threshold used by the FLRA in order to determine whether or not a proposal constitutes a negotiable procedure is that the proposal does not “*directly*” interfere with the exercise of that management right.

The following represents some FLRA case law regarding procedures in accordance with 5 USC 7106(b)(2):

- The fact that a proposal will cause an increase in the cost of Agency operations will not, in itself, render the proposal non-negotiable. (*47 FLRA 980*)
- In order to establish that a proposal directly interferes with an Agency’s right to determine its budget, the Agency must show either that it; a) would prescribe the allocation of a specific amount of funds to a program or function, or b) would create additional costs that are significant, unavoidable, and not offset by compensating benefits. (*36 FLRA 894*)
- A proposal does not qualify as a procedure if it directly interferes with the exercise of a management right. (*49 FLRA 1408*)
- The FLRA will adopt the Union’s interpretation of its proposal where that interpretation is consistent with the wording of the proposal. (*62 FLRA 1*)
- Proposals addressing the use of part-time employees do not conflict with an agency’s right to determine “types” of employees used to conduct operations. (*38 FLRA 211*) **(It must be remembered here that NATCA and the FAA have negotiated a contract provision regarding part-time employees. Be careful of the “covered-by” issue here.)**

The basic watch schedule is a perfect example of a possible “procedure.” Often times, when bidding a specific schedule, bargaining unit employees will want to know which supervisor will be responsible for a specific shift and/or crew. A proposal that the FLRA has deemed to be an acceptable procedure is having the Agency require their management officials bid their schedule prior to bidding by bargaining unit employees. This procedure does not interfere with management rights to have the schedule bid in a timely manner. Instead, by having management officials bid and then having bargaining unit employees bid their schedules, the Parties have merely agreed to a “procedure” for bidding.

Outlined below are some examples of how to turn a non-negotiable proposal into a negotiable procedure:

**Example 1:** You are negotiating your BWS and want a particular shift to be a flex shift, but management is resistant. You submit the following proposal;

*“All employees shall be afforded the opportunity to flex thirty (30) minutes on the 0700 shift.”*

As written, this proposal is non-negotiable as it directly interferes with the management right to assign work. However, you can make this a negotiable procedure by rephrasing the proposal to: *“All employees shall be afforded the opportunity to flex thirty (30) minutes on the 0700 shift, on a case-by-case basis, subject to management approval.”*

**Example 2:** You are negotiating your annual leave MOU and you submit the following proposal;

*“All employees shall be afforded the opportunity to take a minimum of five (5) consecutive or non-consecutive weeks of Prime Time annual leave.”*

As written, this proposal is non-negotiable because, among other things, it directly interferes with the management right to assign work. However, you can make it negotiable by adding four (4) words to the proposal:

*“Subject to staffing considerations, all employees shall be afforded the opportunity to take a minimum of five (5) consecutive or non-consecutive weeks of Prime Time annual leave.”*

### **Appropriate Arrangements – 5 USC 7106(b)(3):**

This is the “impact” portion of “impact and implementation” bargaining. An appropriate arrangement is defined as an “arrangement” that is narrowly tailored to benefit only those employees that may suffer an adverse affect by the exercise of a management right. Additionally, this “adverse affect” cannot be based merely on speculation that an employee “may” suffer an adverse affect. These “adverse affects” must outweigh the burden placed on management and their rights, nor can it prevent management from acting at all to exercise a management right. Based upon the above, if you craft your proposal properly, even if it limits or restricts management rights, it still may be considered, by the FLRA, as an appropriate arrangement. Lastly, the appropriate arrangement cannot “**excessively**” interfere with a management right. Just like “procedures,” an appropriate arrangement exists as an exception to both prohibited and permissive management rights. This means that if your proposal is crafted properly, it can “interfere” with those management rights as long as it does not “**excessively**” interfere.

When crafting your appropriate arrangement proposals, you need to take into consideration the following four (4) requirements as outlined by the FLRA:

- Identify the management right being exercised;
- Identify the adverse affect of that management right on employees;
- Identify the adversely affected employees;
- Develop the proposal that is “appropriately” and “narrowly” tailored.

These requirements, collectively, are known as the “excessive interference test.” If your proposal is confined to the four requirements above, the FLRA will apply a two-prong balancing test in order to determine the appropriateness of the “arrangement:”

- Determine whether the proposal interferes with the exercise of a management right(s);
- Weigh the benefits to the employees adversely affected against the intrusion on the exercise of the management right(s).

To summarize, a proposal is an arrangement if it is intended to apply only to employees somehow adversely affected by the exercise of a management right AND the proposal must provide a remedy to those adversely impacted.

Outlined below is FLRA case law as it pertains to appropriate arrangements:

- In order to constitute an appropriate arrangement, a proposal must mitigate the adverse affects flowing from the exercise of a management right, but cannot excessively interfere with its exercise. (*21 FLRA 24*)
- In order to constitute an appropriate arrangement, a proposal must be tailored to benefit employees suffering from a reasonably foreseeable adverse affect flowing from the exercise of a management right. (*92 FLRR 1-8030*)
- Proposals based on speculation as to future events do not constitute appropriate arrangements. (*53 FLRA 967*)
- A proposal or provision that would prevent management from acting at all to exercise a management right is not an appropriate arrangement. (*37 FLRA 309*)
- A proposal that would require the Agency to deviate somewhat from a desired policy, but would not preclude the accomplishment of the Agency's internal security objective, does not excessively interfere with the management right. (*62 FLRA No. 51*)
- Terms such as "fair and equitable" when used in proposals that govern the exercise of a management right constitute substantive limitations on the exercise of that right, and thus affect that right. (*53 FLRA 539*)
- To qualify as an appropriate arrangement, a proposal must deal with the adverse effects of a management action, not merely seek a general improvement in working conditions. (*29 FLRA 1587*)
- To qualify as an appropriate arrangement, a proposal must identify effects or reasonably foreseeable effects on employees that flow from the exercise of management's rights and how those effects are adverse. Proposals that are purely speculative or hypothetical about the effects on employees are not appropriate arrangements. (*56 FLRA No. 131*)
- Proposals that conflict with government-wide regulations generally don't qualify as appropriate arrangements, though in some cases they may. (*29 FLRA 380*)
- When an agency is required to take an action by law, application of the appropriate arrangement test is inappropriate. (*37 FLRA 500*)
- In order to have a disputed proposal considered as an appropriate arrangement, a Union must identify it as such. (*31 FLRA 988*)

Lastly, if a proposal is too broad in its scope and/or affects employees outside of those adversely affected by the exercise of the management right, the proposal will be found, by the FLRA, as outside the duty to bargain. Additionally, when an Agency refuses to bargain, a Union is not obligated to show it made negotiable proposals in order to prove it is entitled to bargain. The FLRA has concluded that the Agency could not avoid its bargaining obligation by objecting to proposals and remedies sought by the Union only after the Agency unlawfully refused to bargain.

The FLRA has found that proposals requiring compensation to employees whose training was delayed by the exercise of the management right to assign work, served as an appropriate

arrangement. The proposal was narrowly tailored to impact ONLY those employees whose raises were delayed due to the exercise of a management right. Because of the narrow tailoring, the FLRA determined that management was still able to exercise its rights without an overly burdensome consequence.

Outlined below is an example of how to turn a non-negotiable proposal into a negotiable appropriate arrangement:

**Example:** The agency is going to install a new piece of equipment at your facility and has agreed to negotiate its implementation at the local level. This piece of equipment is called DATR. You want the bargaining unit that you represent to be protected from possible disciplinary action as well as protect them from OEs/ODs etc. To that end, you submit the following proposal to management:

*“All employees shall be granted immunity from responsibility for all operational errors, operational deviations, technical violations, and other similar incidents for a period of sixty (60) days after DATR is operational.”*

As written, this proposal is non-negotiable for two main reasons; 1) it applies to ALL employees at the facility regardless of whether or not they will use DATR; and 2) the immunity period of sixty days applies regardless of the nature of the incident that created the error. You can make this into a negotiable appropriate arrangement and take care of BOTH issues by rephrasing the proposal to:

*“All employees, required by the agency to use DATR, shall be granted immunity from responsibility for all operational errors, operational deviations, technical violations, and other similar incidents for a period of sixty (60) days after DATR is operational. The sixty (60) day immunity period shall apply to any incident in which DATR has been determined to be a causal factor in the incident.”*

### **Union Initiated Bargaining:**

In accordance with our collective bargaining agreement, the Union may also initiate bargaining on changes to working conditions and other conditions of employment that are not contained within the CBA. This is a right established in Article 7, Section 6 of our CBA. This provision allows the Union to initiate bargaining at any level, local, regional and/or national. The FAA's imposed conditions of employment limits the Union initiated bargaining, like most other bargaining obligations, to the national level (the level of exclusive recognition.)

If you ever want to request Union initiated bargaining with the FAA at your facility, please contact your RVP or Regional LR Lead.

In this edition, I have covered an “in-depth” review of management rights. It must be remembered that all of your bargaining, regardless of the matter or subject of that bargaining, will, in some way affect the exercise of management rights. If you follow this edition of the LR

Chronicles when crafting your proposals and during negotiations, the ability for NATCA to prevail before a third party will be much greater.

It is very important to know and understand that if you are ever in doubt or ever have a question or a concern regarding any aspect of negotiations, you should contact your regional labor relations lead or you're RVP.

Mike Hull  
NWP LR Lead