

**The Collective**  
**Bargaining Process**  
**In-Depth**  
**Part 6**

**The bargaining process**  
**Beginning to end (Continued)**

Hello NWP Members and Reps;

Welcome to LR Chronicles number 36. In the last edition of the LR Chronicles, I began the explanation of the “bargaining process from beginning to end.” In this edition, I will complete the explanation and finish that process. As you will recall, I ended the last edition with a discussion and case law regarding ground rules. In this edition, I will begin with the next step in the process; the discussion surrounding substantive proposals, whether or not you negotiate a ground rules agreement. I will then continue with the process to the very end, which hopefully concludes with a signed agreement between the parties. Should it not end with that signed agreement, I will explain the various options, available to the Union, in a future edition of the LR Chronicles.

**Substantive Proposals:**

Your substantive proposals are those proposals that go to the “meat” or “heart” of the “change in working conditions.” In other words, substantive proposals address the change in working conditions that brought about the negotiations in the first place. Do not confuse the term “substantive” with the term “substance negotiations.” Substantive proposals are the “impact and implementation portion of bargaining and/or the substance. Unless the agency agrees to bargain those permissive subjects, your substantive proposals fall under procedures and appropriate arrangements as contained in 5 USC 7106(b)(2) and (3). Additionally, “substance bargaining” is covered in Article 7, Section 1 of our CBA, which states in part “*the provisions of this Article also apply to substance bargaining, if appropriate...*” Therefore, your “substantive proposals” are NOT substance bargaining per se, but they are your proposals that go to the “heart” of the matter being negotiated.

Please remember that your impact and implementation bargaining are MANDATORY subjects of bargaining and, even though the parties are not compelled to reach an agreement or to make a concession, these subjects are appropriate for bargaining. This is in contrast to permissive subjects of bargaining are “at the election of the agency.” Additionally, the agency, at the local level will, more likely than not, propose a “sunset clause.” This clause places a time limit on the duration of your agreement. In other words, the agency will propose a “termination” of any agreement that you reach at the local level. For example, the agency may propose something like this; “*this agreement shall terminate on the last day of the leave year.*” NATCA is not opposed to having a sunset provision in an agreement. However, the provision must be appropriately tailored to ensure the longevity of the agreement and to preserve the intent of the agreement. Should the agency propose a sunset clause in any of your local negotiations, you

should contact your RVP or Regional LR Lead for appropriate guidance on how to respond to a sunset clause.

**Submission of ground rules proposals and substantive proposals:**

Once again, FLRA case law states that the negotiation of ground rules is meant to further and not impede substantive negotiations. Therefore, in accordance with FLRA case law, both your ground rules and your substantive proposals must be submitted simultaneously, unless you agree with management otherwise. As stated in the last edition of the LR Chronicles, if you DO have an agreement with the agency on this issue, get it in writing.

**Actual substantive negotiations:**

The proposals for your substantive negotiations, as well as your ground rules proposals, need to be formatted in a manner that can be easily understood by a third party. Every proposal should be treated as if it will be a signed agreement that binds NATCA and the FAA. This will help with the drafting of proposals, the actual negotiation of the proposals, and help resolve any possible conflict or issue of interpretation in any future proceeding. There are specific ways to label your proposals in order for the agency to be required to properly respond to your proposals. As stated in a previous edition of the LR Chronicles, it is extremely important to document ALL of your negotiations, which includes all of your submissions as well as all of your bargaining sessions. When a proposal is submitted to the agency, it should contain the language that you desire (within the bounds of the CBA and the law) as well as a label for each proposal. Depending on what is agreed upon in your ground rules (should you negotiate a ground rules agreement), the following suggestions apply regardless of whether they are ground rules proposals or substantive proposals. There are certain ways to label proposals and certain ways to label proposals that are agreed upon. Below is an example of the way to format your proposals. Although this is just an example, this is the format that is used between NATCA and the FAA at the national level:

**Memorandum of Understanding**  
**Between the**  
**National Air Traffic Controllers Association**  
**And the**  
**Federal Aviation Administration**

*This Agreement is made by and between the National Air Traffic Controllers Association, herein after referred to as (“NATCA” or “Union”) and the Federal Aviation Administration, herein after referred to as (“FAA” or “Agency”) and collectively known as “the Parties.” This Agreement represents the complete understanding between the Parties at the Anytown Tower (XXX) concerning the bidding procedures for the 2009 Basic Watch Schedule (BWS) as outlined in Article 32 of the Parties collective bargaining agreement (CBA). This Agreement shall be determined a valid exception to, and shall supersede any existing or future Agency rules, regulations, directives, orders, policies and/or practices which conflict with this Agreement, whether or not promulgated at the local level.*

**Section 1:** *The language which you desire.*

**Section 2:** *The language which you desire.*

**Section 3:** *The language which you desire.*

When submitting a proposal to management, in addition to the language that you desire, it should also be labeled appropriately. This will eventually become part of your “bargaining history.” The first proposal from the Union should be labeled “U-1” which stands for “Union proposal number 1.” Then, in response to U-1, the FAA’s first proposal should be labeled “A-1” or “M-1” which stands for “Agency” or “Management” proposal number 1. The above example is ONLY if it was the Union which submitted the first proposal. If it was the agency that submitted the first proposal, then the FAA’s response to U-1 would be A-2 or M-2. Then, each succeeding proposal will be labeled in succession; U-2, U-3, U-4, or A-2, A-3, and A-4.

Do NOT respond to your own previous submission. In other words, do not negotiate with yourself. If you have submitted a U-1 proposal, it is incumbent upon the agency to answer that U-1 proposal with an A-1 or A-2 proposal (depending on which party submitted the first proposal). If the agency has not responded to the U-1 submission with their next appropriate proposal, then it is inappropriate for you to submit a U-2 proposal. However, if you have discovered a problem with the language that you proposed or have obtained relevant information subsequent to the submission of the proposal, then you may submit a “revised” proposal whether or not you have received a counter-proposal from the agency. For example, if you submit to the agency a U-2 proposal, and then PRIOR to receiving the agency’s response to that U-2 proposal, you discover that you need different language in that U-2 proposal and you need to correct that language, you may submit a “U-2r” proposal. This means that you have needed to “revise” your U-2 proposal. Again, this ONLY applies if the agency has NOT responded to U-2. If they have responded to U-2, then you can fix the language in U-3. **(Be careful of regressive bargaining; see LR Chronicles number 34.)** Along with submitting U-2r, you also need to notify management of your revised proposal. You should send a letter or an email, along with the revised proposal, that U-2r replaces U-2 in its entirety and that they should disregard the previous U-2 submission.

### **Agreement of proposals:**

When you and the agency agree to language in a proposal, such as ALL of the language within a section of the proposed MOU, then the parties need to have a way to signify that agreement. This is done by “tentatively agreeing” to that language. This is otherwise known as a “TAU” or tentatively agreed upon. To do this, you and the FAA’s Chief negotiator need to initial and date the respective section agreed upon along with the letters “TAU.” Once again as mentioned above, this will become part of your bargaining history, should any portion of the provision/agreement come before a third party. You do NOT need to agree to the sections of the MOU in the order in which they appear. For example, if you have a proposal containing twelve (12) sections and you agree with the agency on the language in sections 3, 9, and 10, then those

sections should be TAU'd. Then, as you agree to the language in other sections, those also need to be TAU'd by initialing, dating, and entering the letters "TAU."

Once you have TAU'd a section with the agency, do NOT re-open that provision. More likely than not, this will be attempted by the agency due to "buyer's remorse." There is a very long-standing past practice in negotiations between NATCA and the FAA that a TAU'd provision can ONLY be re-opened by mutual agreement of the parties. This practice SHOULD be captured in your ground rules agreement if you have negotiated one.

**Full agreement and execution thereof:**

Once all sections within your MOU are agreed upon (TAU'd), then you have an agreement. In accordance with 5 USC 7103(a)(12), if requested by either party, BOTH parties must sign the agreement that is reached. You should ALWAYS demand that the agency sign the MOU.

There should be a line below all of the wording in the agreement. This is best done by using the words "For the Union" and "For the Agency." You should place a line underneath the wording where each signature will appear. Then, underneath each line, all names of all members of each negotiating team, as well as their position for the Union or for the Agency should be placed. For example:

***For the Union:***

***For the Agency:***

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*John C. Doe*  
*Principal Facility Representative*  
*Chief Negotiator*

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*Joseph G. Smith*  
*Air Traffic Manager*  
*Chief Negotiator*

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*Sharon H. Shadwell*  
*Vice President*  
*NATCA Negotiating Team*

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*Richard B. Jones*  
*Assistant Air Traffic Manager*  
*FAA Negotiating Team*

**Agency Head Review:**

5 USC 7114(c) establishes that any agreement shall be subject to the approval of the head of an agency. Thus, the law provides a built-in review process for all negotiated agreements. The head of the agency (or their designee) may approve or disapprove the negotiated and signed agreement within thirty (30) days of its execution. The agency head may ONLY disapprove an executed agreement if any provision within that agreement violates federal law or is otherwise inconsistent with a government-wide rule or regulation.

Once an agreement is reached, then the agency may begin its "agency head review." "Reaching agreement" has a specific meaning in accordance with FLRA case law. Although you should

ALWAYS insist the agency sign the agreement reached, it is not necessarily the signing of the agreement that actually “executes” the agreement. The FLRA has found that the “date of execution of a labor agreement is the day on which no further action is necessary to finalize the agreement.” In other words, if ALL proposals contained within the document are TAU’d, then the day of the last TAU starts the FAA’s thirty (30) day time clock.

If the negotiated agreement passes the agency head review process, either by the agency head providing affirmative approval of the agreement or by failing to disapprove the agreement, the terms of the agreement become in full force and effect. However, even agency head approval will not make a provision that is contrary to law or government-wide rule or regulation enforceable. Thus, if such language survives the agency head review process, it is still possible that a third party will determine such language to be unenforceable. If that occurs, the rest of the agreement remains in full force and effect.

Unless the agency head review disapproves specific sections of the agreement, the review may result in the ENTIRE agreement being determined disapproved and unenforceable. NATCA and the FAA may, however, agree to a different arrangement. Therefore, the following language should be included in your ground rules proposal, or in your substantive proposal should no ground rules be negotiated:

*“Should the agency head determine that any provision of this agreement be deemed contrary to law or otherwise contrary to government-wide rule or regulation, the remaining provisions shall be in full force and effect and binding on both parties.”*

The agency head review process does NOT pertain to “permissive” subjects of bargaining. The agency head is NOT allowed to disapprove a permissive subject of bargaining upon agency head review. In other words, agency head review is NOT an opportunity for the FAA to feel “buyer’s remorse” and renege on an otherwise legal and appropriate agreement. The review is meant to review the legality of the agreement and NOT the wisdom of the local negotiator. If no action is taken within the thirty (30) day time frame, then the agreement becomes final and binding on both parties. Should however, the agency head review result in an alleged defect (violation of law or inconsistency with government-wide rule or regulation), the parties can either “remedy” the defect or view the agency head’s assertion as a declaration of non-negotiability. Should this occur, you need to immediately contact your RVP or Regional LR Lead for proper guidance as there are strict timelines to follow regarding such assertions.

Below is some FLRA case law regarding agency head review in accordance with 5 USC 7114(c):

- An agency head is entitled to review and disapprove provisions ordered by the FSIP if they are deemed contrary to applicable law or regulation. (789 F. 2d 944; DC Circuit, 1986)
- If an agency head disapproval of a FSIP ordered provision is later determined to be incorrect based upon precedent in existence at the time of the disapproval, the agency is liable to a ULP finding. (17 FLRA 84)

- An agency head is entitled to review and disapprove provisions ordered by an interest arbitrator appointed at the direction of the FSIP if they are deemed contrary to applicable law or regulation. (*28 FLRA 137*) and (*37 FLRA 1346*)
- An agency head may lack authority to review and disapprove provisions ordered by an interest arbitrator who was voluntarily appointed by the parties, rather than at the discretion of the FSIP. (*883 F. 2d 104; 4<sup>th</sup> Circuit, 1989*)
- Provisions are not subject to disapproval upon agency head review merely because they implicate permissive topics of bargaining. (*24 FLRA 56*)
- When an agreement becomes effective following the agency head's failure to address it in a timely manner, any provision conflicting with law or government-wide rule or regulation is unenforceable. If it is found to be unlawful, it will be deemed void. (*56 FLRA 119*)
- An agency head is empowered to disapprove agreement provisions for failure to comply with applicable law or regulations, but not disapprove them on the basis that they involve permissive topics of negotiation under 5 USC 7106(b)(1). (*22 F. 3d 1150; DC Circuit, 1994*)
- The date of execution of a labor agreement is the day on which no further action is necessary to finalize the agreement. In most cases, this is the day on which the representatives of the parties sign it. (*41 FLRA 795*)
- Absent notice of disapproval of one or more provisions of an agreement, it goes into effect on the 31<sup>st</sup> day after execution, subject to the requirements of applicable law and regulations. (*17 FLRA 19*)
- A notice of disapproval must be in writing and must be served upon the Union within the 30-day review period. (*5 FLRA 599*)
- Upon disapproval of any portion of an agreement, the entire agreement is disapproved unless the parties have agreed otherwise. (*20 FLRA 537*)
- A Union negotiability appeal on a provision asserted by the agency to be non-negotiable upon agency head review must be filed within 15 days of notice of disapproval. (*15 FLRA 98*)

### **Final thoughts on the bargaining process as outlined herein:**

There is one last item that needs to be discussed and arguably the MOST important part of the bargaining process; your bargaining history. As has been stated many times in the LR Chronicles, documentation is essential to ANY meeting with management, especially that of negotiations. Should there ever come a time where the agency makes an allegation of non-negotiability, or either party declares impasse, or you end up in mediation, there is more than a 99% chance that all documentation will appear before a third party. You want YOUR version of the events to be the documented version as well as the correct version. You NEVER want to appear before a third party in a "he said/she said" scenario.

To this end, it is extremely important to accurately document EVERYTHING in your negotiation process. This includes, but is not limited to:

- Accurately labeling your proposals (U-1, U-2, U-3r) etc;
- Accurately labeling the proposals within the MOU (Section 1, Section 2) etc;

- Taking good notes in all of your bargaining sessions;
- Keeping all of your research documents;

All of the above will become your bargaining history. Bargaining history is extremely important to a third party. With good bargaining history and documentation, especially your notes, you will absolutely have a very good chance of prevailing in any third party proceeding.

Finally, anytime you meet with management to conduct negotiations, whether or not they are contractually or statutorily required, the Union has a right to “equal numbers” on official time. Therefore, if management has three (3) representatives in a negotiating session, then you are entitled to three (3) representatives present and on official time.

Bargaining can be very tedious and time consuming. It can also be very rewarding if done correctly. It is very important for you to know that assistance for you is only a phone call or email away. Should you have any questions or need any assistance along the way during your negotiations, you should contact your RVP or Regional LR Lead. If necessary, they can utilize the services of our national office. Please do not hesitate to make that phone call or send that email.

Mike Hull  
NWP LR Lead