The Collective Bargaining Process In-Depth Part 8

Bargaining Disputes And Impasses

Hello NWP Members and Reps;

Welcome to LR Chronicles number 38. This edition represents the last in the series of the in-depth explanation of the collective bargaining process. By now, you have all of the information needed to actually conduct your local level negotiations for any change in conditions of employment, and specifically for the negotiations regarding the basic watch schedule and annual leave MOUs. This final edition in the series will explain what needs to be done should your negotiations result in impasse and/or should the FAA declare that one or more of your bargaining proposals are non-negotiable.

More likely than not, any impasse or negotiability appeal that emanates from the local level will be handled and resolved at a higher level. The reason being is that should either of these issues arise, a third party entity may become involved in the resolution. While third party involvement will not preclude NATCA and the FAA from resolving the issue(s) ourselves, any resolution at that point will be handled at the regional and/or national level.

That being said, any resolution regarding impasse or negotiability will absolutely require your involvement. As the local level chief negotiator, you may be called upon in order to assist us at the regional and/or national level in resolving the dispute. Additionally, should a third party become involved, you may be called upon to provide evidence and/or testimony in an official proceeding. This may even be done via a subpoena.

In this edition of the LR Chronicles, I will again explain the importance of documentation regarding your local level negotiations, as well as explain what possibilities exist should any portion of your negotiations be elevated to the next higher level. I will also cover the various laws that cover bargaining impasses and negotiability issues. Additionally, I will cover and explain the various options that are available to NATCA and the FAA in the resolution of disputes of this nature. Finally, I will cover the relevant case law that has emanated from these types of disputes.

Impasse and/or negotiability issues at the local level:

Local level bargaining, otherwise known as "mid-term" bargaining is contained in Article 7 of both the CBA and the white book. Notwithstanding the differences in protocol to get there, for all intents and purposes, the language in both is the same concerning the resolution of a bargaining dispute. Basically, what they both state is that after NATCA and the FAA believe they are at impasse, the exclusive avenue for resolution of either type of issue is through Title 5,

Chapter 71, otherwise known as the Federal Service Labor-Management Relations Statute. Regardless of what other laws, rules, regulations or procedures exist, both NATCA and the FAA have agreed that Title 5, Chapter 71 is the appropriate avenue in the resolution of these issues and governs any issue related to mid-term bargaining.

Should you ever hear anything different or should you have any questions or concerns regarding what law, rule, or regulation governs mid-term bargaining, it is best to contact your RVP or regional LR Lead.

<u>Documentation:</u>

As you will recall, over the course of the last nine editions of the LR Chronicles, the importance of documentation has been stressed to you with respect to your local level negotiations. Documentation is extremely important in everything that you do as a NATCA representative and particularly when there is the possibility of third party involvement on an issue. (See LR Chronicles numbers 8 and 9) Considering the fact that these are YOUR local level negotiations and the fact that your local negotiations may result in a resolution above the local level and/or that may involve a third party proceeding, it is incumbent upon you to create and maintain a full and complete written record of what transpired in the negotiations so that once an issue is elevated above the local level, it may be easier to resolve that issue to our benefit, based on the documentation that you have created. Without the appropriate and requisite documentation, these types of issues will be much more difficult to resolve regardless of the forum that will be used for resolution.

As stated in the previous editions, it is a distinct possibility that your documentation and/or testimony may make or break an appeal or an impasse proceeding. Without a good and solid record of your negotiations, any issue which may be elevated could end up in a "he said/she said" scenario. The best way for NATCA to prevail on any issue that is elevated above the local level, is to have and present good, solid documentation. That begins and ends with you! Once again, the importance of written documentation cannot be overemphasized.

<u>Relevant and applicable laws that cover bargaining disputes and impasses:</u>

There are several laws under Title 5, Chapter 71, that cover bargaining disputes and impasses. I will give a very brief explanation of each law below. However, you need to keep in mind that the FLRA and the various courts of law issue case law on disputes that appear before them. Therefore, just like with any other law, the various third parties further explain and interpret the words that appear in the law. The following laws address bargaining disputes and impasses:

5 USC 7116(a)(6) and (b)(6):

Both federal Unions and federal agencies are required to cooperate in impasse procedures and decisions. Failure to do so may result in an unfair labor practice (ULP) charge. 5 USC 7116(a)(6) makes it a ULP against an agency to refuse to cooperate in impasse procedures and decisions and 5 USC 7116(b)(6) makes it a ULP against a Union to do so.

5 USC 7117(c):

This law covers bargaining obligation disputes and negotiability disputes as explained below.

5 USC 7118(a)(4)(A):

This law provides the timelines in which to file a ULP.

5 USC 7119(a):

This law defines and covers under what circumstances mediation is appropriate for a bargaining impasse. It is required that mediation is the first step in any bargaining impasse. Although the law specifically mentions the Federal Mediation and Conciliation Service (FMCS), it is not required that their services be utilized. Any certified mediator may be used as long as there is agreement among both parties to use the services of any particular mediator.

5 USC 7119(b):

This law explains that should mediation not be successful in resolving a bargaining impasse, the next step is to enlist the services of the Federal Service Impasses Panel (FSIP). The FSIP is otherwise known throughout the law as "The Panel" per 5 USC 7103(a)(7).

5 USC 7119(c):

This law explains what the FSIP is as well as their make-up, how they are selected to serve, and for how long each panel member serves in their respective position.

5 USC 7131(a) and (c):

These laws cover the official time authorized for a Union representative to participate in bargaining disputes and impasses. These laws further state, that it is the FLRA that determines the appropriateness of, as well as the amount of official time to be authorized.

5 USC 7132(a) and (b):

These laws authorize the FLRA, the FSIP, and/or a court of law to issue subpoenas that require attendance and/or testimony from any federal employee related to any bargaining impasse or dispute. The subpoena may also include a requirement to produce documentary evidence. These laws also make it a possible contempt of court charge should any employee not comply with an appropriately issued subpoena.

5 USC 7134:

This law authorizes the FLRA, the FSIP and the FMCS to promulgate and maintain the laws by which they are governed. All three of these entities have done so.

<u>Reasons for elevation of local level negotiations:</u>

There are three (3) reasons in which you may need to elevate a local level issue as a result of negotiations or the breakdown thereof. Those reasons are:

- A bargaining obligation dispute;
- A Negotiability dispute; and/or
- A bargaining impasse.

The first two may appear to be similar as they both will end up before the FLRA for resolution. However, among other differences, the main differences between the two are the forum that will be used to resolve each one as well as the Agency's rationale for rejecting the Union's efforts to negotiate.

Bargaining obligation dispute:

This type of dispute occurs when the Union or the agency alleges that it has no obligation to bargain over a specific proposal irrespective of the legality of the proposal. In this situation, the party asserting that there is no bargaining obligation is declaring that there is no legal requirement for them to reach an agreement. . For example, the FAA may tell you that it has no obligation to bargain because you're proposal; is "covered-by" an existing agreement is "de minimis" in nature, or it is not a "condition of employment." (See LR Chronicles number 32) Because the party does not believe it is required to enter into negotiations, it will not bargain. A bargaining obligation dispute is resolved through the negotiated grievance procedure (Article 9) that alleges an unfair labor practice (ULP) charge, or by filing a ULP. Then, the third party must determine whether or not the bargaining obligation has been triggered. If the third party believes that the matter requires negotiations (i.e. that the impact upon bargaining unit employees is more than de minimis, the parties have not negotiated an agreement that covers the subject, and it is clearly a condition of employment), then refusal to bargain will be deemed inappropriate. In no case is a bargaining obligation dispute, by itself, handled through a negotiability proceeding.

Negotiability dispute:

This type of dispute occurs when the Union or the agency alleges that a specific proposal or provision conflicts with a federal law and/or a government-wide rule or regulation. There are two (2) circumstances when this allegation may be made. The first is when the Union or the agency advances a proposal for bargaining and the other party questions the legality of the proposal. This occurs in the midst of bargaining. The second possible time where a negotiability dispute occurs is after the parties at the local level have reached an agreement. After that agreement is made, the agency will conduct the Agency Head Review. At that point, the Agency may assert that a negotiated provision (or the entire agreement) is contrary to law. (See LR Chronicles number 36 for agency head review) This type of dispute is resolved via a "negotiability proceeding." In these situations, there should not be an issue regarding the parties' obligation to negotiate. The subject in dispute concerns whether the proposal advanced or provision agreed to is legal. It must be noted, however, that the FAA may not use the Agency

Head Review process as a means to express 'buyer's remorse' and negate an otherwise legal provision.

The behavior of the parties is extremely relevant when there is the potential for a negotiability appeal. If management makes a passing comment about the negotiability of a proposal, you may ignore it and continue with the bargaining process. The agency's opinion is not a formal statement of non-negotiability. If the negotiations are stalled due to a difference of opinion regarding the negotiability of a proposal, you may then ask for a formal declaration of non-negotiability. This request will begin the timeline for a negotiability appeal. Under these circumstances, you have fifteen (15) days to file a negotiability petition with the FLRA. If the Agency Head Review process results in the rejection of an agreed-upon provision, the clock starts running at the time the Union is served with the Agency Head Review finding. The Union has fifteen (15) days to file the petition with the FLRA. Under either situation, contact your RVP or your Regional LR Lead immediately to discuss the appropriate course of action.

Below is some very relevant case law as it applies to bargaining obligation and negotiability disputes:

- There are two types of arguments that may be raised in a negotiability proceeding; negotiability disputes regarding the legality of a proposal, and bargaining obligation disputes regarding whether or not a party must bargain over a proposal that may be negotiable. *(62 FLRA No. 43)*
- A bargaining obligation question, standing alone, is not resolved in a negotiability proceeding. *(62 FLRA No. 43)*
- The FLRA will adopt the Union's interpretation of its proposals if that interpretation is consistent with the wording of the proposals. *(62 FLRA 1)*
- Failure by a party to address any assertion made by the other party will be deemed a concession to that assertion. *(61 FLRA 777)*
- Where a Union offers no argument or authority to counter an agency contention that a proposal affects management rights and does not assert that the proposal is an exception to management rights under section 7106(b), that proposal will be declared outside the duty to bargain. *(61 FLRA 658)*
- Government-wide rules or regulations are those regulations and other official declarations of policy that are binding on agencies and the officials to which they apply. *(3 FLRA 748)*

There are very strict procedures and timelines to which Unions and agencies must adhere to file the appropriate paperwork to have the FLRA resolve either of these types of disputes. As stated above, these appeals will be handled at the regional and/or national level. These procedures and timelines are explained in the FLRA's regulations under 5 CFR Chapter 24, except that regarding bargaining obligation disputes, the timeline to file a ULP is six (6) months as per 5 USC 7118(a)(4)(A). Therefore, it is extremely important for you to notify your RVP or regional LR Lead as soon as it becomes apparent that you may have to elevate one of these issues.

Bargaining Impasses:

A bargaining impasse occurs when there is no further movement or concessions to be made by either the Union or the agency on a specific proposal; the parties simply cannot reach an agreement. As mentioned in a previous edition of the LR Chronicles, federal law does not mandate that either the Union or the agency agree to a specific proposal or to make a concession. In an impasse, neither party has alleged that there is no duty to bargain. Additionally, when considering an impasse, neither party is questioning the legality of the proposals in question. Instead, the parties are faced with two fundamentally sound proposals. The sole issue remaining is how to reach a final understanding. There is a specific procedure outlined in Title 5, Chapter 71 that applies to resolving a bargaining impasse. Additionally, there are very specific procedures and timelines to which must be adhered in order to resolve the impasse.

There are three (3) entities that may become involved and/or assert jurisdiction in a bargaining impasse. Those entities are:

- The Federal Mediation and Conciliation Service (FMCS);
- Any other certified mediator agreed to jointly by the parties;
- The Federal Service Impasses Panel (FSIP) or "The Panel."

The FMCS:

The FMCS, if enlisted by agreement among the parties, is required to provide "services and assistance" to NATCA and the FAA in the resolution of a bargaining impasse. However, the FMCS is given very broad discretion in determining when, for what, and how they will provide services and assistance. The FMCS will provide mediation services in an effort to assist the parties in resolving any bargaining impasse. They will meet with the parties, both together and separately, in order to attempt to assist the parties in finding any common ground for resolution and/or suggest ways to both parties to resolve the dispute. As the name implies, the FMCS mediator only has the ability to bring the parties together; the mediator provided by FMCS does not have the authority to issue a binding award regarding the impasse. Thus, the mediator should be seen, by both parties, as a tool to resolve the impasse. Should the parties find it impossible to resolve the dispute even with the assistance of a mediator; the parties will be released to seek the assistance of the FSIP. In order to avoid problems with timelines, the party declaring an impasse should request the services of both entities at the same time. While the FSIP may not assert jurisdiction until mediation is attempted, it is better to have a timely FSIP filing and wait as opposed to waiting for a resolution through the FMCS to only be told that the FSIP filing was untimely.

Other voluntary arrangements among the parties:

While the statute does not require the services of the FMCS to resolve a bargaining impasse as per 5 USC 7119(b), it DOES require the use of third party mediation PRIOR to moving to the next step in resolution of the impasse. The way the law is written, it allows either party to decline mediation or agree to mediation utilizing a specific third party mediator. Should either party decline mediation, more likely than not, a third party mediator will not substantively engage the parties. However, whether or not a party voluntarily agrees to mediation, the law

requires a mediator to "release" the parties to the next step, that being the FSIP. Barring that release from a mediator, the FSIP will not assert jurisdiction over a bargaining impasse.

The FSIP:

Like the FMCS, the FSIP is given very broad discretion in determining when, how, and in what manner it will assert jurisdiction in a particular bargaining impasse. After investigation, should the FSIP decline to assert jurisdiction, they will notify the parties as such and may recommend procedures, both formal and informal, for resolution of the impasse. Should the Panel decide to assert jurisdiction of your bargaining impasse, they retain their very broad discretion in assisting the parties in any manner that they deem necessary, in resolving the impasse. They have the authority to recommend and/or direct the parties in a variety of formal and informal procedures including:

- Telephone conferences;
- Back to mediation;
- Fact-finding;
- Written submissions from the parties;
- Arbitration by actual Panel members or private arbitrators.

Additionally, the FSIP has the legal authority to:

- Hold Hearings;
- Administer Oaths;
- Take testimony or depositions;
- Issue subpoenas.

Once the FSIP has completed their investigation and has assisted the parties, if the impasse is not resolved voluntarily between the parties, the FSIP has four (4) choices in order to resolve the impasse:

- Accept the last best offer from the Union;
- Accept the last best offer from the agency;
- Impose their own contractual language; or
- Take whatever other action is necessary to resolve the impasse as long as that action is consistent with Title 5, Chapter 71.

At any time during this process, whether it is mediation or the FSIP, the parties can agree, between themselves, to resolve the impasse by agreeing to language. Even after imposition of a course of action from the FSIP, the parties can voluntarily resolve the impasse. However, should this not occur, the final and binding merits of the FSIP decision is NOT appealable to any other third party, including a court of law. Even in a situation where the FSIP is asked to resolve an impasse related to a term negotiation, the determination of the FSIP is not subject to the traditional ratification processes. Therefore, both NATCA and the FAA must live with and abide by any FSIP language that will become part of the contract between the parties.

Below is some very relevant case law regarding bargaining impasses:

- Once the parties have bargained to impasse, requesting assistance from the FMCS without follow-up and not invoking FSIP services does not require an agency to maintain the status quo. *(33 FLRA 532)*
- If voluntary efforts, including the assistance of FMCS, fail to resolve a bargaining impasse, either party may request the assistance of the FSIP. *(5 USC 7119(b)(1))*
- The FSIP may accept or decline jurisdiction over an impasse based upon its determination of whether or not the matter is ripe for its services. *(85 FLRR 1-6518)*
- The parties to an impasse may agree to adopt a procedure to resolve the matter through the use of binding arbitration by an independent arbitrator, but only may do so if the procedure is approved by the FSIP. *(5 USC 7119(b)(2))*
- The FSIP is not authorized to independently determine the negotiability of bargaining issues in dispute, but may apply existing precedent to determine whether or not a matter is negotiable. *(26 FLRA 264)*
- Before implementing changes before reaching and announcing an impasse, the agency must allow a reasonable amount of time for the Union to contact the FSIP for assistance. *(16 FLRA 198)*
- If a Union timely requests the assistance of the FSIP to resolve an impasse, an agency is required to maintain the status quo in the conditions of employment to the maximum extent practicable unless the changes are mandated by law or the necessary functioning of the agency. *(18 FLRA 466)*
- If an agency head disapproval of a FSIP ordered provision is later determined to be incorrect based on precedent in existence at the time of the disapproval, the agency is liable to a ULP finding. *(17 FLRA 84)*
- 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. *(89 FLRR 1-8032)*
- The FSIP ordered the parties to negotiate over the Union proposal to allow an installation mechanic to work a 5-4/9 CWS, because the agency failed to show that the proposal would have an adverse agency impact. *(100 FLRR 1-6513)*

Final thoughts on disputes and impasses:

As you can see, in accordance with the federal law and case law as outlined above, there are very strict rules and procedures that must be followed in the case of a bargaining obligation dispute, a negotiability dispute, and/or a bargaining impasse. Additionally, there are very strict timelines to which must be adhered should a local level bargaining issue need to be elevated to a higher level. As such, as soon as you believe there may be a negotiation dispute, you should contact your RVP or your Regional LR Lead. There are many procedures and timelines that must be followed when dealing with these complicated issues.

As stated in the beginning of this edition, any and all bargaining disputes and/or impasses will be handled above the local level. Whether it be at the regional or national level, it is nevertheless required that you make these contacts so that we may begin the processes as required by federal law, case law, and/or contractual requirements.

Finally, it is very important to keep your regional leadership apprised, as soon as possible, at the very first sign that there may be a bargaining dispute or impasse in your local level negotiations. The reason for this is twofold: the main reason is that your regional leadership can intercede with FAA management, above the local level, in order to possibly prevent a dispute or impasse from reaching the formal stage that may involve a third party; secondly, your regional leadership can work with the NATCA national office, if necessary, to begin preparing for the formal stage of the dispute or impasse. In this manner, we can give you the appropriate guidance as the problem progresses should the efforts with regional and/or national level management not resolve the dispute or impasse to our satisfaction. So please make that contact with your RVP or regional LR Lead as soon as you are aware that a dispute or impasse may become a possibility.

If there are any questions and/or concerns regarding this edition of the LR Chronicles, please feel free to contact me.

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