

**UNITED STATES OF AMERICA  
FEDERAL LABOR RELATIONS AUTHORITY**

**In re the Matter of:**

Federal Aviation Administration,

Charging Party,

and

Professional Airways System Specialists, AFL-CIO,

Respondent.

Case No. WA-06-0356

**FEDERAL AVIATION ADMINISTRATION'S  
EXCEPTIONS TO THE ALJ'S DECISION  
AND  
BRIEF IN SUPPORT OF EXCEPTIONS**

Dated this 14<sup>th</sup> day of September, 2007

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- a. The ALJ's reliance on, and interpretation and application of, private sector cases is misplaced. None of the private sector decisions relied upon by the ALJ hold that a union's conduct during a ratification vote is not subject to the good faith requirement where, as here, the vote is required by a ground rules agreement. 15
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I.

EXCEPTIONS

The Administrative Law Judge's decision in this matter, issued on July 31, 2007<sup>1</sup>, is riddled with error, the most egregious error being his failure to grasp the essence of the allegations that constitute the unfair labor practice charge in this case.

At the center of the allegations is the statutory duty to bargain in good faith with a sincere resolve to reach agreement. Conduct that is antithetical to that resolve constitutes bad faith bargaining, and bad faith bargaining is an unfair labor practice under the Federal Service Labor-Management Relations Statute. Whether particular conduct is antithetical to a sincere resolve to reach agreement is determined based on the totality of circumstances in a given case.

The question here is whether the agreement that resulted from PASS'S action in withdrawing its bargaining proposals and accepting FAA's initial proposals reflected a sincere resolve to reach agreement under the circumstances of this case. Those circumstances include (i) an "evergreen" provision in the 2000-2005 collective bargaining agreement extending its duration until a successor agreement takes effect; (ii) provisions in the negotiated ground rules requiring ratification of a successor agreement; (iii) a provision in the successor agreement providing for the agreement to take effect upon ratification; (iv) an FSIP-imposed end date for substantive negotiations of July 21; (v) a PASS-imposed return date of July 31 for the ratification ballots; and (vi) a four-month "vote no" campaign carried out by PASS to ensure defeat of the agreement it created when it withdrew its proposals and accepted FAA's initial proposals. Because the ALJ did not grasp the essence of FAA's allegations against PASS, the ALJ evaluated PASS'S actions independently rather than as part of a course of conduct.

Thus, pursuant to §2423.40(a) of the Authority's Regulations, the Federal Administration respectfully takes the following exceptions to the Decision and Recommended Order of Administrative Law Judge Richard A. Pearson dated July 31, 2007, OALJ 07-020:

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<sup>1</sup> An unsigned copy of that decision was immediately released via facsimile to NATCA, a union representing several bargaining units at FAA but not the bargaining unit involved in the case at hand. NATCA, in turn, immediately forwarded a copy of the unsigned decision to Michael Derby, legal counsel to and chief negotiator for PASS. A signed copy of the decision was served via certified mail on FAA, and FAA received the signed copy on August 6. Security protocols for screening incoming mail delayed delivery of the signed copy to FAA labor relations personnel for several additional days.

- 1 1. The determination that “it was the campaign speech itself that constitutes the unlawful act being  
2 alleged.” ALJD at 32, lines 30-33. *Grounds:* The unlawful act alleged was not the speech itself but  
3 the course of conduct, namely the “vote no” campaign in the context of this case. The speech was  
4 simply the means by which the Union breached its duty to bargain in good faith by avoiding  
5 agreement. FAA Brief at 19-21.
- 6 2. The determination that “the Union’s speech and literature were the essence of the unlawful acts  
7 being alleged, and that the only unlawful purposes attributed to PASS’S conduct are delay and  
8 avoidance of reaching agreement” neither of which was proven. ALJD at 33, lines 1-5. *Grounds:*  
9 The unlawful act alleged was neither the speech nor the literature in and of themselves. Rather, both  
10 were simply the means by which the Union avoided reaching agreement with FAA.
- 11 3. The determination that General Counsel and FAA “urge that a union negotiating in good faith must  
12 not only conduct a ratification vote, but also affirmatively support ratification (or at least that it must  
13 not discourage ratification).” ALJD at 24, lines 3-7. *Grounds:* Neither GC nor FAA has argued in  
14 this case that the Union was legally obligated to “affirmatively support” ratification. To the contrary,  
15 FAA specifically noted that “[t]he Authority need not decide the full reach of the duty of good faith  
16 that attaches when ratification is a condition precedent to a collective bargaining agreement in order  
17 to find that PASS breached that duty in this case.” FAA argued that whatever the reach of the duty of  
18 good faith, the duty under the facts of this cases “encompasses at the very least an obligation to  
19 refrain from taking action to impede, hamper or otherwise prevent ratification.” See FAA’s Post-  
20 Hearing Brief at 29, lines 6-15.
- 21 4. The finding that the Union “demonstrated at all times a ‘sincere resolve to reach a collective  
22 bargaining agreement with the FAA as it is required under [S]ection 7114(b)(1). ALJD at 29, lines  
23 22-25. *Grounds:* Where, as here, actions are inherently destructive of collective bargaining rights,  
24 the party engaged in those actions has the burden of explaining, justifying or otherwise  
25 characterizing the actions as something different from what they appear on their face. *NLRB v. Erie  
26 Resistor Corp.*, 373 U.S. 221, 228 (1963). If, as here, the counter explanation, justification or  
27 characterization fails, the actions were taken in bad faith. *Id.* at 28. FAA Post-hearing Brief at 22-  
28 29.
- 29 5. The finding that ratification of a collective bargaining agreement under the totality of circumstances  
30 present in this case was not inextricably intertwined with the collective bargaining process and  
therefore not subject to the duty of good faith that attaches to the bargaining process. ALJD at 23.  
*Grounds:* The ALJ’s finding is inconsistent with the facts and reflects a misapplication of precedent.
6. The legal conclusion that the Union’s duty *vis-à-vis* ratification of an agreement is limited to the  
ministerial act of submitting the agreement for ratification within a reasonable period of time.  
ALJD at 23. *Grounds:* The ALJ’s legal conclusion is inconsistent with well-know precepts of  
contract law regarding a party’s duty *vis-à-vis* conditions that are within the party’s exclusive  
control.
7. The legal conclusion that the NLRB, if presented with the facts in this case, would “definitely reject”  
the contention that the Union, in order to discharge its duty to bargain in good faith, must not  
discourage ratification. ALJD at 24. *Grounds:* The legal conclusion is inconsistent with a well-  
known precept of contract law regarding a party’s duty *vis-à-vis* conditions that are within the  
party’s exclusive control, and the Board traditionally adopts contract law principles with respect to  
the formation of a collective bargaining agreement and defining the rights and obligations of the  
parties. *Sierra Publishing Co.*, 296 NLRB 477 n.12 (1989)(concurring opinion).

- 1 8. The failure to find that the negotiated ground rules in this case expressly provided for ratification of  
2 any agreement reached at the bargaining table. GC Exh 3, Sections 5 and 17 (Ground Rules  
3 Agreement). *Grounds*: There is a distinction to be drawn between the legal obligations that flow  
4 from a self-imposed ratification process and those that flow from a negotiated one (see ALJD at 20,  
5 lines 3-41). Because the ALJ omitted this critical fact from his analysis, he reached an incorrect  
6 legal conclusion, namely, that ratification of the agreement in this case was a self-imposed  
7 requirement, not a “true condition precedent” negotiated by the parties.
- 8 9. The failure to find that the agreement reached at the table, like the predecessor agreement, expressly  
9 provided for the agreement to “become effective on the date it is approved by the FAA  
10 Administrator or designee and ratified by the membership of PASS.” Exhs. 26(a) (2000-2005  
11 Agreement, Article xx) and 24 (2006 Tentative Agreement, Article 58). *Grounds*: See 8 above.
- 12 10. The failure to find that Union’s Chief Negotiator had “full, complete and unconditional authority to  
13 bind [the Union] regarding any aspect of the negotiations.” GC Exh. 3 (Ground Rules, Section 2)  
14 *Grounds*: This fact is critical to the determination of the status of the agreement reached when PASS  
15 withdrew its proposals and accepting in full FAA’s bargaining proposals. As noted in both 8 and 9,  
16 because the ALJ omitted this fact from his analysis, he reached an incorrect legal conclusion, namely  
17 that ratification of the agreement in this case was a self-imposed requirement, not a “true condition  
18 precedent” negotiated by the parties.
- 19 11. The failure to find that the Union’s Chief Negotiator, by his actions in initialing each article in the  
20 agreement, entered into a binding agreement, the effective date of which was subject to ratification.  
21 GC Exhs. 3 (Ground Rules, Sections 10, 17), 26(a) (2000-2005 Agreement), and 24 (2006  
22 Agreement). *Grounds*: See 8-10, above.
- 23 12. The finding that ratification was a not a “true condition precedent” to the agreement (specifically, its  
24 effective date). *Grounds*: See 8-12 above.
- 25 13. The finding that the Union’s actions in this case were “the functional equivalent of a private sector  
26 union rejecting a company’s offer but agreeing to submit the offer to its [sic] membership for  
27 approval or rejection.” ALJD at 29, lines 40-43. *Grounds*: An offer is not an agreement, and an  
28 agreement is not an offer. Rather, “[a]n offer, as an element of a contract, is a proposal to make a  
29 contract.” BLACK’S LAW DICTIONARY 1233 (4<sup>th</sup> ed. 1968). An offer “creates a power of acceptance  
30 permitting the offeree by accepting the offer to transform the offeror’s promise into a contractual  
obligation.” JOHN D. CALAMARI AND JOSEPH M. PERILLO, CONTRACTS §15 (1970).
14. The conclusion that the Union’s actions in this case were “an attempt to find some way of  
convincing the Agency to soften its bargaining demands.” ALJD at 26 (bottom) and 27 (top).  
*Grounds*: For the Union’s actions to have been such an attempt, the Union had to have a reasonable  
expectation of returning to the bargaining table. The Union had no such expectation here. As the  
ALJ noted,

while the Union may have hoped that a resounding vote against ratification would  
motivate the FAA to return to the bargaining table in a more conciliatory mood, *by  
allowing the ratification process to continue until August 3*, PASS was running the  
distinct risk of losing its window for further bargaining and of having the contract  
imposed on it.

ALJD at 28, lines 24-30 (emphasis added).

