



Testimony of Patrick Forrey

President, National Air Traffic Controllers Association

Before the House Committee on Transportation and Infrastructure

Subcommittee on Aviation

March 22, 2007

A Review of FAA Operational and Safety Programs

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Executive Summary

Introduction

The current prevailing attitude at the Federal Aviation Administration (FAA) defies the recommendations of the Government Accountability Office (GAO) and the Department of Transportation Inspector General (IG). Despite numerous revelations that failure to work in cooperative collaboration with employees and stakeholders has cost taxpayers billions of dollars, delayed by decades the deployment of new safety/modernization technology, and exacerbated foreseeable and addressable safety issues, the FAA continues to "go-it-alone," ignoring sound expert advice and imposing its will to the detriment of the modernization of the air traffic control system, the aviation industry, and the American flying public.

It is in the best interest of all stakeholders that the FAA work more collaboratively with stakeholders in the development and deployment of new air traffic control technology. The failure of the Agency to consult its controller and technician workforce in its attempts to modernize the ATC system, according to the IG, cost the American taxpayer \$35 billion dollars since 1981.

With no new technologies on the horizon, and only vague concepts like NGATS and NextGen being tossed around by the FAA, it is imperative that air traffic control facilities be adequately staffed to maintain the current level of safety. Unfortunately, the Agency is on its way to underestimating the number of controller retirements for the fourth consecutive year and was recently forced to admit that its imposed work rules are actually exacerbating the controller staffing crisis. In response, the Agency has unwisely decided to instead unilaterally impose vague new controller staffing ranges which do little to staff to traffic, but instead focus on staffing to budget.

This ill-advised approach is leaving towers, TRACONS, and en route centers around the country understaffed and equipped with out-of-date technology, compromising safety throughout the system. Without Congressional mandate to refocus the Agency on safety through collaboration and cooperation, safety will continue to be compromised and our economy will suffer.

Contract

There are tens of thousands of Federal Aviation Administration (FAA) employees working without a contract – most of whom are represented by the National Air Traffic Controllers Association (NATCA), Professional Airways Systems Specialists (PASS), and American Federation of State, County and Municipal Employees (AFSCME). In July 2005, the FAA unilaterally imposed work rules on 11 NATCA bargaining units consisting of many aviation safety professionals, including Operations Engineers, Aviation Safety Engineers, Aircraft Certification Engineers, Test Pilots, Nurses, Lawyers, Drug Abatement Inspectors, and others. On September 3, 2006, the FAA employed that same tactic and imposed work rules and a two-tier pay scale on air traffic controllers. Although the FAA continually refers to a contract, the truth is that thousands of FAA employees – air traffic controllers, test pilots, nurses, lawyers and others represented by NATCA – are working under imposed work and pay rules, not a contract.

Let us be clear: no labor law considers imposed work rules to be a contract. The Agency's actions are antithetical to the definition of collective bargaining.

Morale among FAA employees is extremely low. Retirements are far exceeding FAA's planning. Fatigue among those employees remaining is a major concern. And these are all effects of the unilaterally imposed work rules. We have seen a reduction in air traffic controllers nationwide and an unnecessary compromise of safety to the flying public.

Without a concerted effort to attract experienced controllers and retain our current workforce, the ATC system will continue to lose controllers and that will mean flight delays, runway incursions and increased chance of aviation disasters.

Controllers are leaving the workforce at a rate of exactly three per day since the start of the current fiscal year. At the current pace, the number of controller losses would be 1,095 – nearly 400 more than the FAA’s projected retirements for FY2007 released earlier this month. This FAA miscalculation would not represent an unusual occurrence, as the Agency has missed its retirement projections for three straight years, by an increasing margin each year. But it does represent a paradigm shift away from “safety first,” as the FAA has always previously maintained.

It is important to note that the FAA is not currently hiring air traffic controllers, it is hiring trainees. It takes an average of three years for a trainee to become fully-certified. Exacerbating the training process is the fact that when we lose veteran controllers, we are removing the on-the-job instructors that assist with the development of new hires. With the pool of instructors continually shrinking, the length of time it takes trainees to become fully-certified and able to work traffic will continue to increase.

That gap, from the day a veteran controller retires to the day their replacement reaches full certification level, is where we have the most reason to worry about the agency’s continued ability to maintain the margin of safety in the system by ensuring there is redundancy. Our greatest challenge today is maintaining the margin of safety knowing the level of redundancy has been whittled away to its bare minimum. We need more eyes watching the skies.

It is likely that those controllers that are retirement-eligible will choose to leave the system unless something can be done to keep them, like returning to the negotiating table under fair conditions with the intentions of reaching a mutually-agreeable contract.

Staffing Authorization Plan

What the FAA has instead done is to intentionally blur the lines of safety in every air traffic control facility in the country. Unwilling to plan for the controller retirement crunch that could be seen decades in advance, underestimating the number of controller retirements three years in a row, and failing to recognize the accelerating effect the work rules they imposed upon the controller workforce would have on controller retirements, the FAA this month replaced the controller staffing authorization numbers developed in tandem with NATCA in 1998 with vague staffing ranges that fail to staff to traffic.

As traffic continues to rise while the number of controllers continues to decrease, inefficiencies will become more rampant and delays will become the norm rather than the exception. Fearfully, the likelihood of runway incursions or in-air accidents is also increased.

Modernization

The FAA is hanging its hat on modernization of the system to help offset the loss of retiring controllers and to make the system more efficient to meet expected growth in air traffic. But according to the IG, the FAA has spent \$35 billion on modernization projects since the 1980s without the significant deployment of new technology. To the GA community, aviation industry, pilots, distinguished members of this panel, and other stakeholders, including the American flying public who are counting on NextGen to revolutionize the system, I say: don’t count on it.

In a time when capacity has rebounded and is expected to perhaps triple by 2015, we have not witnessed a single new modernization program of any significance started under the current administration.

Meanwhile, the GAO has specifically blamed the cost overruns and limited deployments on a lack of input from controllers. Because the FAA has taken no steps to seek input from controllers on the development of NextGen or other technologies, we are holding out little hope that any significant strides will be made in the near future.

The aviation community, including the 14,000 air traffic controllers that I represent, has been awaiting modernization in many different forms for literally decades. Controllers were supposed to be using GPS-based navigation systems by 1997; in 2007 we are still using ground-based radar throughout the system.

In 2004, FAA Administrator Marion Blakey spoke to the advice of the GAO when she said that “One of the great lessons we’ve learned is that controller involvement – early and continuous controller involvement –

makes a big difference when it comes to deployment. We've stressed the need for controllers to be there each step of the way." But only a few short months later the FAA instead eliminated a very important partnership, the liaison program, and with it made it more likely that new equipment implementation will be over-budget and behind schedule.

The GAO has specifically cited the lack of input from stakeholders, including air traffic controllers, as reasons why modernization tools such as LAAS, WASS, STARS, CPDLC, ACDs, ASR-11, ATCBI-6, and ASDE-X had cost overruns, schedule extensions and/or performance problems. It should be noted that STARS cost more than \$520 million above its original 1994 estimate of \$940 million, according to GAO. For this extra half-billion dollars, the American taxpayer saw STARS deployed 5 years late in only 29 facilities, rather than the 172 as originally slated. In addition, WAAS costs have grown by 227 percent from its original price tag of \$509 million while complete implementation has extended by 13 years.

The truth is that the promises of all of these technologies were never fulfilled. In the real world, the FAA would have a tough time finding capital investment with a pitch that includes going 0-8 on modernization and over \$35 billion in misplaced taxpayer investment. But while most corporate board rooms would laugh their NextGen proposal out of the room, I fear that Congress is going to fail to hold them accountable and write them another blank check, leaving controllers to handle an increased workload and users to bear the consequences.

Collaboration Quickens Modernization

When the FAA works in partnership with air traffic controllers, great things can be accomplished. The Domestic Reduced Vertical Separation Minimum (DVRSM), for example, was made possible by the partnership the FAA had with the air traffic controllers. ASDE-X (Airport Surface Detection Equipment – Model X) was a modernization project the air traffic controllers brought to the FAA and is a key instrument in mitigating runway incursions according to the NTSB. Former FAA COO Russ Chew praised the collaborative efforts of the air traffic controllers, technicians, union and management that worked together successfully implementing ATOP (Advanced Technologies and Oceanic Procedures) at New York Center.

These three systems are just a few of the many examples of how important it is to have collaboration between the FAA and the air traffic controllers. Since the FAA chose to eliminate a very important partnership (liaisons) the chance of successfully implementing new equipment within cost and time schedules will most assuredly be impaired.

No one would like to see more efficient air traffic control technology put into place than those who will be using the equipment. The proper tools in place will allow air traffic controllers to make faster and better decisions, making the entire system safer and more efficient. Air traffic controllers want it and we demand it, but we have learned from countless FAA disappointments to not expect it.

I think the FAA, the aviation industry, and the American flying public would be better served if the Agency invested some good faith in their employees and took the advice of the GAO to work in collaboration, not alienation, with their air traffic controllers in the development of new ATC technologies.

Administration's FAA Reauthorization Proposal

The battle over FAA Reauthorization and the Administration's agenda concerning policy and budget has begun in earnest. And NATCA is both watching and participating in this pivotal battle over how the National Airspace System and the FAA will be funded over the next five years.

NATCA's position concerning user fees has not changed. We are opposed to a user fee-based system for three main reasons:

First, it has clearly been documented that in order to commercialize – or to state more accurately – PRIVATIZE the air traffic control system, a separate funding stream must be enacted to allow the provider the ability to manage system resources. NATCA considers air traffic control and its associated occupations inherently governmental functions and we will meet any move to allow a contracted service provider to

manage our ATC system with vigorous opposition. We view the Administration's proposal as the first step to privatizing air traffic control in the United States.

Second, the current method of funding the system, through ticket taxes, PFCs and fuel taxes, provides more revenue than the president's proposed user fees, and provides a simple user-based structure that is projected to provide robust funds well into the future. It seems ironic that the same FAA that is boasting of "NextGen" systems that aren't even fully conceptualized advocates a funding mechanism that provides less revenue needed to pay for modernization.

Third, a user fee-based system is vulnerable to problems that disrupt aviation and commerce, much like 9/11 and SARS did a few years ago. Disruption to system funding will not only impact the maintenance and modernization of the airspace system, it will also affect staffing and workforce issues. A government-based system, such as the Aviation Trust Fund, provides stable and predictable funding for maintenance and modernization and general fund resources to account for the services and benefits all Americans receive from the NAS. It also guarantees that the provider won't be coming back to the government looking for a bailout that other privatized systems have already had to do and will do with the next world disruption.

The Administration's FAA Reauthorization plan also contains a BRAC-like system for closing and consolidating air traffic control facilities. NATCA's position has always been that we can support consolidation where it makes sense from both a fiscal and safety standpoint. However, without collaboration with all of the FAA stakeholders, including controllers and Members of Congress, I have significant doubts that the BRAC-like system proposed would maintain the system with the current level of redundancy necessary to maintain the current level of safety.

NATCA is also concerned about the changes to the contract tower program contained in the reauthorization proposal. The local-federal cost-sharing effectively provides air traffic control services to communities that would otherwise go without. Predominantly smaller, rural airports benefit from the contract tower program. Redefining what a contract tower is, however, simply to contract out more inherently governmental air traffic control positions opens up a Pandora's Box to the compromise of safety of the entire national airspace.

Executive Summary Conclusion

NATCA would like to aid in the modernization of the air traffic control system. Rather than seeing another 25 years and \$35 billion wasted, we'd like to see the FAA heed the advice of the GAO and the Inspector General and work in collaboration with air traffic controllers in the development and deployment of NextGen. Congress should insist that the FAA reinstate the liaison program and mandate that the Agency utilize controller input in order to prevent the waste, fraud, and abuse of the money and confidence of the American taxpayer.

Symptomatic of the FAA's repeated inability to work with its employees collectively and in collaboration is its complete failure to negotiate fairly with its employees and failure to make a good-faith effort to reach a mutual-agreement with the unions that represent its employees. NATCA believes that the quickest solution to this safety-related staffing crisis is to require the FAA to return to the bargaining table with its employees, provide a clear impasse procedure, similar to the process that has been consistently successful for the US Postal Service for over 30 years, preserve the rights to ratification and agency head review, and provide jurisdiction for the federal courts to hear disputes and enforce the law.

We would like to return to the contract negotiating table with the FAA and fix this critical problem immediately before the margin of safety in our beloved National Airspace System is further compromised. I believe this will decelerate the attrition levels we are currently seeing.

The Impact of FAA's Unilaterally Imposed Work Rules on Air Traffic Control

There are tens of thousands of Federal Aviation Administration employees working without a contract including many employees represented by National Air Traffic Controllers Association (NATCA), Professional Airways Systems Specialists (PASS), and American Federation of State, County and Municipal Employees (AFSCME), who are working without contracts for their respective bargaining units.¹ In July 2005, the FAA unilaterally imposed work rules on 11 NATCA bargaining units consisting of many aviation safety professionals, including Operations Engineers, Aviation Safety Engineers, Aircraft Certification Engineers, Test Pilots, Nurses, Lawyers, Drug Abatement Inspectors, and others. On September 3, 2006, the FAA used that same tactic and imposed work rules and a two-tier pay scale on air traffic controllers. Currently the NATCA-represented aviation safety professionals do not have a contract with the FAA and air traffic controllers are working under imposed work and pay rules without a contract. Although the FAA continues to tell the big lie that there is a contract, that doesn't make it true.

It is axiomatic that in order to form a contract the parties must have a meeting of the minds. NATCA and FAA did not and do not have a meeting of the minds over the terms and conditions of employment for the three Air Traffic Controller bargaining units. Instead FAA unilaterally implemented its last proposal, so employees are working under imposed work and pay rules rather than a contract. No labor law considers imposed work rules to be a contract. In fact, unilateral implementation is a form of economic warfare not unlike a strike or lockout in the private sector.²

¹ In fact, over the past five years, only one union, the National Association of Air Traffic Specialists (NAATS), has reached a collective bargaining agreement with the FAA and shortly thereafter nearly all of the employees in its Flight Service Station (FSS) bargaining unit were separated from service or transferred to other parts of the Agency when their work was contracted out. FAA subsequently moved unsuccessfully to void the agreement for the remaining employees in Alaska when it petitioned the Federal Labor Relations Authority to decertify the NAATS FSS Alaska bargaining unit.

² When an impasse in bargaining is reached, the duty to bargain is not terminated but only suspended. *NLRB v. Tex-Tan*, 318 F.2d 472 (5th Cir. 1963) However, the fact of impasse enables the employer to make unilateral changes in working conditions that are "not substantially different or greater than any which the employer... proposed during negotiations." *Atlas Tack Corp.*, 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977).

Impasse, in effect, temporarily suspends the usual rules of collective bargaining, by enabling the interjection of new terms and conditions into the employment relationship even though no agreement was reached through the proscribed collective bargaining process. As the Supreme Court in *Charles D. Bonanno Linen Service v. NLRB*, observed:

As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." Furthermore, an impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process." 454 U.S. 404, 412 (1981).

In short, the impasse doctrine is designed, in part, to allow an employer to exert unilateral economic force by establishing new terms and conditions of employment as set out in the employer's bargaining proposals. However, the impasse is always viewed as a temporary circumstance, and the impasse doctrine allowing implementation of employer proposals is legitimated only as a method for breaking the impasse. The parties, thus, remain obligated to continue their bargaining relationship and attempt to negotiate an agreement in good faith. The impasse doctrine, therefore, is not a device to allow any party to continue to act unilaterally or to engage in the disparagement of the collective bargaining process. *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 224 (1949). In the instant dispute, even *assuming arguendo* that the Parties reached impasse, FAA has interpreted its unilateral implementation as a contract, rather than a means of pressuring NATCA into reaching a contract. It has, in the Supreme Court's language, disparaged the entire process of collective bargaining.

Morale among FAA employees is extremely low. Retirements are far exceeding FAA's planning. Fatigue among those employees remaining is a major concern. A lack of trust between employees and their supervisors creates additional tension. Decisions based upon the desire to display authority rather than based upon safety needs or common sense have become pervasive. Thousands of grievances are awaiting disposition. The failure of FAA to reach agreement with the unions that represent its employees has caused urgent safety concerns. Congress must act now to alleviate these problems by requiring the FAA to return to the bargaining table with NATCA. The current law is unclear. Unless the process is changed and clarified, FAA will have no motivation to reach agreement, and it will, unfortunately, once again fail to reach agreement. Congress must act to send the FAA back to the table, provide a clear impasse procedure similar to the process that has been consistently successful for the U.S. Postal Service for over 30 years, preserve the rights to ratification and agency head review, and provide jurisdiction for the Federal Courts to hear disputes and enforce the law.³

AIR TRAFFIC CONTROLLER STAFFING

The National Air Traffic Controllers Association has been warning of a retirement wave and subsequent staffing crisis since 1999, when it began looking ahead to the day when air traffic controllers hired after the PATCO strike in 1981 would reach retirement eligibility and decide to leave the workforce. Controllers can retire at age 50 with 20 years of service and at any age with 25 years of service. Because of the increasing stresses of the job, the rise in traffic volume, the worsening staffing crisis and the Federal Aviation Administration's imposed work rules and pay bands, more controllers are leaving the workforce sooner than the FAA anticipated and well short of when they would be forced to retire.

In 2004, just after reaching a high point in controller staffing levels nationwide, the FAA hired only 13 controllers and to this day has not been able to keep up with the rate of attrition, losing more than 1,100 controllers than it has hired in the past three and a half years.

NATCA believes the FAA's updated staffing plan, released on March 7, is three years too late in arriving to address this critical safety issue. Because it takes an average of three years to train a new hire to full certification level, and because retirements have exceeded FAA projections for three straight fiscal years and are on track for a fourth (FY07), the FAA will continue to have a serious problem adequately staffing its facilities for the next several years. Controllers are deeply concerned about the effect on the margin of safety this staffing crisis is already having, and how bad the situation could get.

³ Currently the Federal Courts do not have jurisdiction over these disputes. This is distinguished from the attempt to change the personnel regulations in the Department of Homeland Security. Under its statute (5 U.S.C. §9701(a) (Supp. II 2002), DHS was to create a new system through the issuance of regulation (70 Fed. Reg. 5272, Feb. 1, 2005 codified at 5 C.F.R. Part 9701), making it subject to Federal Court jurisdiction under the Administrative Procedures Act. When the courts reviewed DHS' proposed regulations it found that the Department had exceeded its scope by effectively eliminating collective bargaining, among other things. *Nat'l Treasury Employees Union v. Chertoff (Chertoff I)*, 385 F.Supp. 2d 1 (D.D.C. 2005), and *Nat'l Treasury Employees Union v. Chertoff (Chertoff II)*, 394 F.Supp.2d 137 (D.D.C. 2005), enf'd 452 F.3d 839 (D.C. Cir. 2006).

However, not unlike what has occurred in the negotiations between FAA and the unions that represent its employees, the United States Court of Appeals for the District of Columbia Circuit wrote in enforcing the *NTEU v. Chertoff* cases, "the regulations effectively eliminate all meaningful bargaining over fundamental working conditions (including even negotiations over procedural protections), thereby committing the bulk of decisions concerning conditions of employment to the Department's exclusive discretion. In no sense can such a limited scope of bargaining be viewed as consistent with the Act's mandate that DHS 'ensure' collective bargaining rights for its employees." *Id.* at 844. Similar to DHS, the FAA reserved to its own discretion all of the newly negotiable subjects under 49 U.S.C. 40122(a) in its last, best offer to NATCA, effectively nullifying the first section of the law, where negotiations are provided for, even though it relied upon the next section to unilaterally implement such discretion.

This new FAA report reflects what the FAA wants to spend to staff its control facilities, not what is needed to safely staff them. In fact, two of the FAA's chief architects of this plan are financial officials at the Agency. The FAA has replaced longstanding agreements on safe staffing levels at each facility by offering up a range of staffing for each facility. But controllers believe calling that safe or acceptable is wrong. The FAA has not acknowledged the depth of the staffing crisis and has brought down its numbers to try and hide the fact that it has lost over 1,000 controllers in three years and does not have enough controllers to fully staff its facilities. These ranges were designed to meet what the current staffing levels are, not what they should be.

The FAA did not include controllers in coming up with this plan and has not offered an explanation for why it now needs between nine and 26 percent fewer air traffic controllers than ever before (the difference between the new ranges of staffing and the established authorized levels).

Rather than 'staffing to traffic' as the FAA states publicly is its new mission, the agency appears to be following a new policy; 'staffing to budget.' And the FAA is currently hiring trainees; it is not hiring controllers. No amount of new hires the agency has made over the past two years or will make over the next few years is going to fix the current staffing problem.

By the FAA's own admission, and verified by the DOT Inspector General, the FAA miscalculated the detrimental effect the work and pay rules would have on retirements and recruitment. Thirty percent more controllers left than the FAA expected after having work and pay rules forced down their throats. NATCA would like to return to the contract negotiating table with the FAA and fix this critical problem immediately before the margin of safety in our beloved National Airspace System is further compromised. The FAA must hold onto its veteran controllers instead of giving them incentives to leave. These controllers are the on-the-job trainers for the new hires and are the glue that is currently holding the system together.

The Relationship between Understaffing and Safety, Fatigue and Productivity

NATCA has found a direct relationship between staffing and safety, one that becomes even clearer over time as the cumulative effect of long shifts, forced overtime, increased time on position and decreased personal time for family, rest and relaxation take a brutal toll on the mind and the body. This in turn affects reaction times, judgment, focus and alertness. Fewer controllers in a facility means a rise in operational errors and runway incursions and a higher risk of safety problems due to the decreased margin of safety and lack of any room for error.

Facilities that are understaffed often are easy to spot due to several factors: The use of forced overtime by FAA managers, the combining of positions due to the inability to staff every position needed to run the operation, an increase in operational errors, the prevalence of scheduled six-day weeks for controllers whose normal workweek is five days/40 hours, and a rapid decline in morale in the workforce and loss of passion for the job.

At the Southern California TRACON (SCT), traffic is up beyond pre-9/11 levels, to a point where they are handling 2.2 million operations per year. Meanwhile, the facility is operating with only 188 of its authorized 261 controllers, and they are being told that the Palm Springs facility, along with its 220,000 annual operations, will be consolidated into SCT. Meanwhile, and not coincidentally, the number of operational errors at the Southern California TRACON was eight in 2004, and it has grown to 22 in 2006. That represents a near 300 percent increase in operational errors over a two year period as the staffing levels have dropped.

Air traffic controllers' concern is that we are pushing the controller workforce to the breaking point and we can't afford for it to break. We have so few controllers at some of these facilities, like the Southern California TRACON where we are short 73 controllers, that there is no margin for error. Controllers are people, and things happen to people – they get sick, or there is a family emergency and they have to take a sudden and unexpected leave of absence. With staffing so critically low, and with retirements at their current rate, we don't see how we can keep this up before real tragedy strikes.

The situation is so dire at Southern California TRACON that the FAA has had no choice but to place new trainees – straight out of CTI programs or off the street – into the facility to rush them into the training process and desperately work to try and get them to full performance level within three years. This is an extremely reckless and dangerous course. Until now, Southern California TRACON was a destination for experienced controllers, not a starting point for new controllers, because of the incredible complexity of the operation. SCT is the busiest TRACON in the United States. Veteran controllers there didn't start at that facility, they moved through the system, graduating from less busy facilities and gaining valuable experience before earning a well-deserved promotion to SCT. But because of the staffing crisis, controllers do not move up through the system anymore because their current facilities couldn't afford to lose that person. So the FAA is putting brand-new trainees – with no prior experience at an FAA facility – at Southern California TRACON. This is like taking a high school baseball player and putting them in the starting lineup for the New York Yankees and expecting them to play error-free baseball and hit a home run every day.

At the world's busiest airport control tower – Atlanta Hartsfield – the situation is bleak. The tower is authorized by the FAA to be staffed with 55 controllers. Yet currently, there are only 34 veteran, fully-trained controllers on staff. Twelve of them (35 percent) are eligible to retire this year and nine of those have declared that they will indeed leave the workforce this year. There are only five trainees on board. So far in FY07, the facility has lost four veteran controllers to retirement. To put the situation in perspective, the tower has 11 fewer fully certified controllers than O'Hare Tower in Chicago, yet works slightly more traffic than ORD. And ORD is also understaffed by 12 controllers, by the way.

The understaffing at Atlanta is causing the workforce to suffer a tremendous burden of fatigue and burnout. This has potentially dire consequences for safety. "If a controller is working 15 planes at the same time, and you're on #15, you don't want the controller to forget you," said Atlanta controller Gary Brittain. "But when I talk to my colleagues, I hear the exhaustion in their voices and see the fatigue in their eyes and in their faces."

On Jan. 10, a controller cleared Delta Flight 1606 for takeoff, without realizing that the runway was not in the proper configuration for departing flights. It was an erroneous clearance. The Delta jet began its takeoff roll and got up to nearly full speed, 140 knots. At the last moment before takeoff, the controller, having caught his own error, instructed the pilots to abort the takeoff. The plane did stop, but in applying the brakes in a very hard fashion, it blew out multiple tires on the aircraft and resulted in very hot brakes. The plane exited the runway but could not get back to the gate. Passengers were taken off the aircraft out on the airport field and taken back to the gate in buses. There were no injuries and no fire, thankfully.

The FAA took disciplinary action against two controllers in the tower, decertifying them. An FAA supervisor researching the event verbally disciplined the two controllers involved, and told them that if the aircraft had gotten airborne that it would have been 'catastrophic.' Controllers regularly work more than six hours per day on position, well above safe levels that had been in place since World War II but scrapped by the FAA in its imposed work rules last September. Atlanta controllers routinely are forced to work almost three straight hours at a time without a break, 50 percent longer than what is widely regarded as a safe period of work on position.

As for the Jan. 10 incident, it was ironic that the decertification of the controllers involved was only to occur if the performance was deemed seriously deficient, yet the certification process was only a few hours long. The FAA told a local Atlanta TV station that the incident was not serious and did not jeopardize safety. However, the NTSB investigation team was on site almost immediately to look into the incident, a first in Brittain's 28-year career. The fire and crash crews were called out to investigate all the smoke. The aircraft had to be repaired on the taxiway before it could even move.

At New York's John F. Kennedy International Airport Control Tower, flights are at record high levels:

1999: 355,677 operations
2000: 358,951
2001: 317,746

2002: 301,160
2003: 291,299
2004: 332,816
2005: 362,680
2006: 396,734
2007: 37,108 through January, meaning a projected yearly total of 450,000-475,000

As shown, the JFK Tower traffic count is up considerably since 9/11. Conversely the controller staffing level is down 30 percent during that same period. Common sense suggests safety and efficiency should dictate a 30 percent increase of the tower's pre-9/11 authorized staffing numbers considering the FAA's motto is, "the safe, efficient, expeditious movement of air traffic." Yet, the FAA's "new" plan has ceased the practice of staffing to traffic but instead, staffing to its budget.

In 2006, JFK Tower lost four veteran controllers. This year, another three will leave; and as many as eight have expressed their desire to retire. Five of these retirements are mandatory (age 56) by 2008. That equates to more than a 40% reduction in staffing. While we are encouraged by management's intent to hire three controllers this year, they will not be fully certified until 2009 or later. During that two-plus year period, even more controllers will be retiring, thus putting JFK even further behind the eight ball.

BY THE NUMBERS: Staffing Levels and Retirements the Past Several Years

According to the FAA's most recent "Administrator's Fact Book," published in December 2006, there are 14,206 air traffic controllers working in the United States.

That represents a drop in controller staffing levels for the third straight year and provides a strong indication that despite the FAA's attempts to hire the next generation workforce to offset the long-expected retirement wave that has now arrived, the agency is losing more controllers than it is hiring. This is mostly due to the FAA's imposed work rules and pay bands that have removed any incentive for veteran controllers to either transfer to busier facilities in need of more controllers or even to stay in the workforce altogether.

A 30 percent pay cut for new controllers and reduced pay bands are also forcing many of the agency's new hires to reconsider their career plans. Over 60 new hires have resigned since June 2006. One new controller in Memphis just recently left to start a lawn mowing business because it provided a higher salary. Two Department of Defense controllers turned down job offers at the FAA control facility in Louisville, Ky., because it would have meant a \$20,000 pay cut.

Even FAA management officials at the facility level are acknowledging that veteran controllers are leaving sooner than ever upon reaching retirement eligibility, thereby depleting available ranks of fully certified controllers and also removing the on-the-job trainers to assist with the development of new hires. Below is a report on the situation at Washington Air Route Traffic Control Center, from FAA supervisor Ed Macknight, who wrote the following on a supervisor's web site known as SUPCOM:

"At ZDC, they are bailing at first opportunity which is a marked change from 2 years ago. Even with a mass arrival of CTI (Controller Training Initiative) students, we are way behind the curve. We also have had new students resign, transfer out of the FAA, or just not accept the job at all. Never, ever saw that prior to this past year.

"Overtime is available almost every week to those who wish to work it. Holdover is a daily occurrence. It all reminds me greatly of FAA circa 1983-1987, when I recall that constant 6 day weeks were very fatiguing and led to other issues at home and at work."

As for the FAA's imposed work rules and pay bands removing incentives for controllers to want to seek a transfer to a larger, busier air traffic facility, where their services are desperately needed, such as Atlanta

Hartsfield Tower (ATL), an FAA manager at Providence Tower (PVD) named Ed Angel wrote the following on SUPCOM:

"We have a controller at PVD (ATC 8) who was offered a job at ATL. It was not a paid move, and he was offered a 1% pay raise. That raise came before locality. So after locality is figured in, he will take a \$4,000 pay cut, and lose the rest of his CIP on the go (another 4%). His new pay would be in the lower half on the ATL pay band, so there was room to actually offer him a pay raise, and still be within the new band. Of course this employee had to decline the offer. Can anyone blame him??"

"ATL missed out on a controller who I think would be successful at any ATC facility."

The FAA "Administrator's Fact Book" reports that the total number of controllers at the FAA's 314 air traffic control facilities dropped from a high of 15,386 in September 2003 to 14,736 by October 2004 as the long-expected controller retirement wave began to increase in size. The total fell again, to 14,227, at the end of fiscal year 2005. The 14,206 total is listed as being current as of Oct. 31, 2006, taking into account hiring and attrition statistics a full month into the current, 2007 fiscal year.

Controllers are currently leaving the workforce through retirements, resignations and promotions to FAA supervisor positions (where there exists the only possibility of a pay increase due to the imposed pay bands) at a rate of three per day since the start of the current fiscal year; a total of 467 through March 1, 2007, according to NATCA's facility-by-facility research. This is ahead of the FAA's projected pace of attrition for FY07.

Overall, the FAA has missed its retirement projections for three straight fiscal years, by an increasing margin each year, as the information below shows:

FISCAL YEAR 2004

FAA-projected retirements: 329

(SOURCE: Page 9 of a PowerPoint presentation by FAA Administrator Marion Blakey in December 2004, produced after the original FAA Workforce Plan was released publicly.)

Actual retirements: 362

(SOURCE: Page 9 of the same PowerPoint presentation; also found in the graph at the top of page 32 in the updated workforce plan (released in August 2006).)

FISCAL YEAR 2005

FAA-projected retirements: 341

(SOURCE: Page 32 of the updated FAA workforce plan (dated June 06 but released in August 06)

Actual retirements: 465

(SOURCE: Page 32 of the updated FAA workforce plan)

FISCAL YEAR 2006 (Oct. 1, 2005 – Sept. 30, 2006)

FAA-projected retirements: 467

(SOURCE: Page 32 of the updated FAA workforce plan)

Actual retirements, according to FAA: 583

(SOURCE: FAA internal documents and attributed comments in media accounts)

FISCAL YEAR 2007 (Oct. 1, 2006 – Sept. 30, 2007)

FAA-projected retirements: 643

(SOURCE: Page 32 of the updated FAA workforce plan)

Actual retirements as of March 1, 2007, according to NATCA research: 351

The reason for the high number of retirements thus far in FY07 is clearly the FAA's imposed work rules and pay bands on the controller workforce; something that NATCA never agreed to and which cannot under any definition be accurately referred to as a "contract."

Even the FAA has admitted that the imposed work rules and pay bands are exacerbating the retirement crisis. Furthermore, the Department of Transportation Inspector General reaffirmed this in its Feb. 9, 2007 report on controller staffing, stating on page 7 that, "Beginning in April 2006, actual retirements began exceeding FAA's projections when negotiations between the Agency and NATCA over a new collective bargaining agreement reached an impasse. ... By September, when FAA began unilaterally implementing its own proposals for open Articles, actual retirements were nearly three times higher than FAA had projected (97 actual retirements compared to 39 projected). According to FAA officials, the large jump in actual retirements was a result of the breakdown in contract talks. In our opinion, those events underscore the need for FAA to refine its methodology to consider future events that could trigger a similar reaction. For example, there may be a significant jump in controller retirements during January 2007 when many controllers will see a reduction in their pay checks as FAA begins phasing out Controller Incentive Pay. This one-time event could adversely impact the retirement estimates for 2007 and beyond."

The FAA's about-face on the impact of the imposed work rules and pay bands on the retirement crisis is remarkable, given the Agency's vehement public denials in early 2006 that such an outcome would occur. Both the FAA Administrator and her chief public spokesperson used strong language in flatly denying that controllers would ever feel as though they had no incentive to leave. Yet under the FAA's imposed work rules and pay bands, over 90 percent of veteran controllers will never see another raise. If they retired today, they would get the annual cost of living raise afforded federal employees. But if they stay in the FAA, they do not receive that raise under the imposed pay rules. Combine that with the fact that controllers cannot take leave in the summertime – when their kids are out of school – because of understaffing, cannot take a guaranteed break after two strenuous hours on position at a time and cannot leave the facility to get a cup of coffee and relax in fresh air without taking vacation time to do so, and the FAA has now given controllers EVERY reason to leave the profession. And these veterans are indeed leaving in record numbers, at levels far exceeding Agency projections.

Rather than 'staffing to traffic' as the FAA states publicly is its new mission, the agency appears to be following a new policy; 'staffing to budget.' And what concerns NATCA the most is that no amount of new hires the agency has made over the past two years or will make over the next few years is going to fix the current staffing problem. That's because it takes an average of three years to train a new controller before that professional is fully certified. The FAA is currently hiring trainees; it is not hiring controllers.

That gap, from the day a veteran controller retires to the day their replacement reaches full certification level, is where we have the most reason to worry about the agency's continued ability to maintain the margin of safety in the system by ensuring there is redundancy. Our greatest challenge today, besides the distraction of the imposed work rules, is maintaining the margin of safety knowing the level of redundancy has been whittled away to its bare minimum. We need more eyes watching the skies.

While there is less margin for error than ever before, efficiency is suffering too. Controllers working in en route centers are having to put more space between planes to keep them safe because of low staffing. Controllers have flight strips and other documentation that clearly indicates that staffing is the cause of some flow control restrictions.

We acknowledge that the FAA is hiring more controllers than in years past. However, to repeat, it will take three years for these new hires to be fully trained and able to sit down and work traffic by themselves. That's a big problem. We needed those hires to be made at least three years ago so they could step in today for the retiring controllers. Second, we are currently working to find out how many of the new hires have turned down the job because we have substantial anecdotal evidence to suggest the 30 percent pay cut the FAA forced through, combined with the imposed work rules have led many to choose another line of work.

NATCA officials have personally visited with new hires at the FAA's training academy in Oklahoma City and report that they are not happy about the current state of the FAA. Many military controllers are staying

in the Department of Defense as well, rather than pursue FAA employment that in many cases means as much as a \$20,000 annual pay cut. The current crop of trainees is also coming to the FAA without any military or CTI experience. NATCA Executive Vice President Paul Rinaldi visited with Academy recruits on Feb. 26-27 and reports that approximately 80 percent of them are "off the street," meaning no formal education at a CTI school or military training or service.

First-Hand Accounts from Controllers Choosing To Leave the FAA

Many air traffic controllers who have either retired early (before the mandatory age of 56) or resigned, all because of the FAA's imposed work rules and pay bands, have chosen to express their thoughts on paper. Below are excerpts from five of these letters that NATCA has obtained:

Albuquerque Air Route Traffic Control Center

Resigned October 16, 2006

"I am hereby resigning from the FAA effective the 16th of October 2006. I am returning to my previous position with Midwest ATC Services. After comparing my experiences with both employers, the choice was simple. Under the FAA's new imposed work rules I can not justify staying with the agency. I do not feel I can continue to work in an environment that is so vindictive or for an employer who is more worried about the bottom line rather than safety.

"My take home pay will go up, my quality of life will improve, and my workload will decrease. My only regret is the time I have wasted making this move to Albuquerque, coupled with expense, only to find out I will not be making the money that the FAA told me I would be making. This was the number one factor that prompted my decision to take what I thought would be a career with the FAA. Therefore, this new pay scale is the number one reason for my leaving the FAA."

New York Terminal Radar Approach Control

From a former Navy air traffic controller

Resigned February 28, 2007

"I am writing to regretfully inform you that I'm resigning my position as an air traffic control specialist at the New York TRACON effective close of business February 28, 2007.

"The pay and compensation changed dramatically from the time I submitted my application until I was hired in November 2006. While much of what transpired between the FAA and NATCA in the intervening time does not concern me, the reduction in pay has had a dramatic negative effect on my ability to remain in this profession.

"The cost of living in New York is too great to survive adequately on the new pay scale. I have explored every alternative, including forgoing health coverage to save the additional money. I therefore find myself facing one of the most difficult decisions of my life; to leave the career that I love to regain financial stability."

Minneapolis Air Route Traffic Control Center

Retired October 2, 2006

"Solely as a result of what I perceive to be hostile and intolerable working conditions, I have elected to retire from my position as an air traffic controller effective Monday, October 2, 2006. Although it would be financially beneficial to continue working until the mandatory retirement age (56), recent well-documented changes in the national and local work environment have compelled me to accelerate my retirement plans.

"After learning of some of the details of the FAA's "best and final offer" back in late July, I elected to begin the process of preparing my retirement forms. Even as I did so I continued to hold out hope that a more fair and rational agreement could be reached. Unfortunately for all parties on September 3, 2006 the FAA elected to impose the terms of what is becoming known among controllers as the 'Non-Tract'."

**Boston Air Route Traffic Control Center
Resigned after less than a year on the job**

"I was hired well over a year ago by the FAA. My initial hire letter stated that I would have a salary of almost \$46,000, which included locality. Upon completion of my A sides, I was told I would receive a raise of approximately \$20,000, which would be given to me within about two months. Throughout the course of my first year and completion of my D sides, I was told I was going to get additional raises, which by the end of my first year would put me at over \$90,000.

"Before I left for Oklahoma, I purchased a townhouse in New Hampshire close to the center, basing my budget on all the figures I had previously been told. I left a job in Florida, where I was making a considerable amount of money, but based on all the benefits of the FAA and the salary I was promised, not to mention how much I loved the opportunity of starting such an amazing profession, how could I be anything but ecstatic about what was about to happen.

"Shortly after arriving to the center I sat in on a briefing where I learned that there were many changes being forced on all the controllers, taking away and changing their benefits. When the topic of pay came up no concrete answers were given. It was a series of "I don't know's" or "They'll be a pay briefing in a few weeks.

"During my initial group meeting with Fran Bujak, the Director of Training, he asked if we had any questions or concerns. Half-joking I said, "Yea, how am I going to pay my mortgage?" He said that I wasn't looking at the big picture. I was told that in 3-5 years when I am fully checked out and after nights, Sunday pay, holidays and locality, I would be making around \$82,000. With no warning I went from making \$90,000 in the first year to \$82,000 after three to five years. Then he basically said if anyone doesn't like it they could leave. The comment wasn't directed at me, and it was said rather nonchalantly, but it got me thinking.

"No one could justify to me the fact that trainees who had been there a year were making over \$90,000 and frozen there, but it would take me three to five years to get even close to that number and after being fully checked out I wouldn't even reach that. I chose this career because it is highly rewarding and there is so much responsibility, but I also wanted to be financially secure. In order to make ends meet I would have to get a second job, which would be nearly impossible, due to the fact that my schedule would constantly fluctuate and there is so much to learn the first few months I felt I would get behind. Mainly I took this job and moved up North to have a better way of life and to be able to see my family. Working seven days a week and struggling to pay my bills is not a way I feel comfortable living. If there was a light at the end of the tunnel I would suck it up, but there seems to be no one who can give me a definite answer about the future, and after being misled from the beginning I wouldn't know what to believe anymore."

Albuquerque Air Route Traffic Control Center

"In November 2005, I accepted an offer to work for the Federal Aviation Administration. I voluntarily left the Department of Defense, resulting in a reduction in pay and benefits. However, I was expecting that as outlined in my initial offer I could anticipate seeing this as temporary and I would be able to progress through training and receive compensation accordingly.

"Having completed my training in Oklahoma, I arrived at Albuquerque ARTCC to begin training as an En Route Controller. As I was training, I was watching what was developing between the Agency and the Union regarding contract negotiations. The entire time, I and other developmentals were informed that we would be "grandfathered" in and would not be negatively impacted with our pay, regardless of the outcome of the negotiations.

"I began to understand that the Agency had no intention of protecting developmental pay. We were informed in April that the negotiations had reached an impasse and the final offers were sent to Congress. I was able to locate and interpret the information and began to worry that I might not be compensated in accordance with what I had expected when I transferred to the FAA. As the developmentals began to ask about our pay, management at the facility level became resentful for our inquiries. It appears to me that we were not "allowed" to ask what we would make and that there might be reprisal. I have never been treated so badly by an employer. It should be appropriate for an employee to ask what they will be paid or compensated. People have families to feed and decisions to make.

"In June I began to seek a transfer back to my position at the DoD. I was not surprised that the DoD immediately provided me with all pay and benefits information when I requested them."

The Impact of FAA Imposed Pay Cuts on Ability to Attract and Retain Military (DOD) Controllers

The starting salary for an air traffic controller, according to the FAA's imposed pay bands, is \$32,300. For many military air traffic controllers, accepting this offer to enter the FAA would mean a drastic pay cut from their military salary and benefits. This marks a fundamental shift in the pipeline between the DOD and FAA. The Agency, for decades, got many of its very best air traffic controller candidates from the military and it was a common career path to move into an FAA facility and enjoy a long and successful tenure in service to the country.

But now, many military controllers are turning down employment offers with the FAA because of the imposed pay bands and work rules. This is a devastating development because of two reasons: First, these controllers would make excellent replacements for retiring controllers and help build the foundation for the next generation workforce; and second, these controllers, having brought several years of experience in air traffic control, would likely require far less time to successfully train and certify as Full Performance Level controllers than a trainee who was hired either from a college program or off the street.

Below are passages from three letters rejecting FAA offers of employment, written by military controllers:

Stephani Stykowski: *"In November 2005, I accepted an offer to work for the Federal Aviation Administration. I voluntarily left the DoD, resulting in a reduction in pay and benefits. However, I was expecting that as outlined in my initial offer I could anticipate seeing this as temporary and I would be able to progress through training and receive compensation accordingly.*

"Since I have arrived in the FAA, I have been disgusted with the way the Agency treats its employees, particularly developmentals in training. ... I was amazed that a federal agency could treat employees as such.

"Having completed my training in Oklahoma, I then arrived at Albuquerque ARTCC to begin training as an enroute controller. From the moment I walked in the door, I was treated with the utmost disrespect for my experience and abilities. Having worked for the DOD as an air traffic controller for three years, plus four years in the Air Force, I was subjected to a training program which was inferior to any I have seen to date. It amazed me that so much time and resources were devoted to repeating portions of training already received.

"This occupation is stressful and demanding enough without the added anxiety of worrying about pay and unfair treatment."

William Urena: *"I am a 29 year old Army Veteran with seven years air traffic control experience. I am currently a D.O.D. air traffic controller working at Waynesville Regional Airport at Forney Army Airfield. I have recently applied to the F.A.A. and have been selected as a primary candidate for two different positions. One was throughout Tennessee, and the other was a pinpoint location at Augusta, GA. I have turned down these positions due to the starting salaries.*

"I have the experience you are looking for, and was very excited about the opportunity to work for the F.A.A. But I cannot afford the drastic pay cut. I am currently GS-10 step 2, and would not accept a position for any less than what I'm making now. The D.O.D. has given the air traffic controllers locality pay as well as ATC premium pay. I understand the reason air traffic controllers are receiving these incentive pays are to be competitive with the F.A.A. The starting salary I was offered was approx. 32,000. I don't see how the F.A.A. can compete with the D.O.D. with the current pay scale."

Jessica Dickey: *"My name is Jessica Dickey and I have been in the military for 10 years. I am facility rated (FWS) and CTO Certified Air Traffic Controller with a Bachelors Degree in Psychology and 16 credits into my Masters Degree. I recently submitted my paperwork to become a controller in the FAA. I was up for reenlistment in September of 2006 but I did not intend to reenlist because I wanted to be a controller in the FAA. After I submitted my paperwork I received three letters requesting more information in reference to the jobs that I applied for. I resubmitted my paper for the Texas Terminal area and waited for a response back.*

"A few weeks later I received a letter from the FAA with a pay chart informing me of the new salaries being implemented in the system. The starting salary for a Center Controller was \$32,500. When I saw these numbers I was shocked to think that they would expect me to give up my military salary, which

is much higher, to be employed by the FAA. If I would give up my military salary I would also be giving up my medical insurance, living expenses, and food allowance, which adds up to a nice amount. After giving up this money to take a \$32,500 salary job I would also have to consider the additional money that I would have to spend such as medical insurance, housing, gas, and food. Not to mention my non-taxable allowances.

“Do you think that someone would actually give up all the benefits of the military to take a pay cut? I am a perfect example of that answer, which was no. I extended on my contract and received a pay raise with more benefits and after I do get out of the military I will not consider the FAA because of the new salary. Thanks to all the new changes that have occurred in the FAA it has convinced hundreds of qualified controllers to pursue other jobs and just let expert control qualities go to waste.”

FAA Officials Say There Is a Staffing Problem

NATCA is not alone in reporting an understaffing problem in the controller ranks. FAA supervisors and managers and other officials report that as well.

At Fort Myers Tower in Florida, FAA management sent out a memorandum on Feb. 20, 2007 that addressed the issue of forced overtime after a controller's shift has ended, stating, “You are employed in an occupation where holdover OT is becoming quite routine. Your shift work and overtime assignments are included as conditions of employment.” Then, in denying the requests of at two controllers to be excluded from mandatory overtime to attend to child care issues, the FAA memo states, “You must understand that the facility has a need for your services that may conflict with your childcare routine.”

Clearly, staffing is a problem at that facility or else mandatory overtime would not be needed.

On Jan. 10, 2007, FAA Regional Administrator Douglas R. Murphy, in denying a hardship transfer of a New York TRACON controller to another facility via a letter to Congressman Lynn Westmoreland, wrote, “With limited incoming resources, it is imperative for N90 to maintain adequate staffing due to losses resulting from retirements, transfers, training failures, etc. Since only about 50 percent of the persons in training assigned to N90 progress to a fully certified level, it is necessary to retain all individuals that we anticipate will be successful.”

Last December, FAA Deputy Administrator Robert Sturgell told *Gannett News Service* that “Atlanta's tower is understaffed.” That would be Atlanta Hartsfield, the busiest tower in the world. If the FAA cannot even keep its busiest tower properly staffed, we believe that is a symptom of this large, nationwide problem.

How the FAA's Imposed Work Rules Are Destroying Workforce Morale, Diminishing the Margin of Safety and Creating a Divide between Controllers and FAA Management

The FAA is doing significant harm to the once proud and beloved profession of air traffic control with its imposed, jailhouse-like work rules for air traffic controllers. The imposed work rules are causing strife between employees and management, decimating staffing levels by driving out veteran controllers at a record pace and destroying morale in the facilities. Here are some examples of what is occurring:

- At Jacksonville Air Route Traffic Control Center, on March 2, 2007, an air traffic controller called the facility from home to request sick leave. The controller was running a fever and vomiting. An FAA supervisor denied the request – twice. The controller reported for work as directed. But 90 minutes later, the controller vomited on the sector while attempting to work live traffic. The employee was then released on sick leave. On the very same shift on this same day, an FAA supervisor also called in to request sick leave. FAA management approved the request.

- The FAA, upon imposing its work rules last September, banned all radios in control towers – even weather radios – despite the fact that controllers used them to monitor local weather bulletins provided by local stations and the Emergency Broadcast System. Specifically, tornado warnings were crucial for controllers to hear about since no technology was available to them in the tower to spot tornadoes.

But just days after the radio ban took effect, a severe weather system spawned tornadoes near both DuPage Tower in Illinois and Lincoln Tower in Nebraska. With FAA management having removed radios from all towers under the imposed work rules, neither facility's controllers knew of the impending danger nearby. At LNK, two controllers were on duty with no supervisors at a late hour in the day. Tornado sirens sounded, an event that, according to controllers' own orders, mandates the use of weather radios, radios and televisions to monitor the weather. But there was nothing in the tower to use. At DuPage, a tornado came within two miles of the tower. But controllers had no way of seeing it because heavy rains reduced visibility to a quarter of a mile. The controllers eventually evacuated when one controller received a personal call alerting him of the situation. The next day, the controllers notified the supervisor and stated that the radio that was in the tower, which management took away, would have alerted the staff sooner. The supervisor replied, "You should have looked out the window."

Then, on December 25, 2006, a tornado roared within 150 yards of the Daytona Beach, Fla., Tower – with no warning given to the six controllers on duty who had their radio removed by the FAA – before carving a destructive path through Embry-Riddle Aeronautical University. Had the controllers had their radio, they would have received the tornado warnings that were broadcast to the public. At the time, the tower controllers were vectoring a Comair regional jet (Delta Connection) to the airport but, without any knowledge of the tornado embedded in the severe weather, could not warn the pilots. Fortunately, the aircraft landed safely, but, as the *Daytona Beach News-Journal* wrote in a Jan. 25, 2007 editorial:

"Maybe the new (FAA) work rules are the FAA's attempt to pressure its employees. Maybe they're just work rules that may or may not survive the next contract. Either way, the ban on weather radios seems foolish. Controllers obviously should focus on their job. But safety is part of that job. The FAA can police how weather radios are listened to. Banning such radios, especially at airports in Florida, is going too far and defies intuitive safety measures."

- At Boston Consolidated TRACON in Merrimack, N.H., a female controller was taken by ambulance to a hospital after falling down two flights of stairs as a result of being forced to wear dress shoes in direct contradiction to her doctor's orders – delivered to BCT management – that she wear sneakers for medical purposes. BCT managers ignored the orders and imposed their dress code, prohibiting sneakers. As a result, she slipped and fell down the stairs. In a similar incident at New York Center, a female controller tripped, damaged her leg and broke her elbow after ZNY managers didn't accept the validity of her medical certificate specifying her need to wear tennis shoes as a result of serious knee problem.
- At Caldwell, N.J., Tower, a supervisor, after consulting with the air traffic manager, denied a sick leave request for a controller who was scheduled for the 2-10 shift, claiming "operational necessity." The controller, incapacitated and unable to come to work and perform his duties, was charged AWOL by the supervisor. Knowing one person would be left in the tower from 8 p.m. until closing the facility at 11 p.m., the supe decided not to call in overtime. The lone controller was not only responsible for all operational positions for those three hours but all administrative duties and supervisory responsibilities as well.
- At Fairbanks, Alaska, Tower, a controller, after calling in sick, was ordered to report for duty to complete a series of administrative tasks related to his ID card, which

managers had failed to complete months earlier when the controller notified them of the impending expiration date. The controller risked not only his safety but that of the general public by driving while physically impaired by his illness. He then exposed his fellow employees to a highly contagious illness.

- At Indianapolis Air Route Traffic Control Center, the FAA pre-imposed work rules requirement for scheduling was to allow no later than an 11 a.m. shift start time on the third day of a controllers' week, if the fifth day was a 10 p.m. mid shift. But ZID managers are now scheduling noon shifts and even 1 p.m., which results in a controller having shifts on their last three days of: Noon-8 p.m., 6 a.m.-2 p.m., and 10 p.m.-6 a.m. That's 24 hours worked in a span of 42 hours.
- At New York-LaGuardia Tower, not long after starting a 4-12 shift, a controller informed his supervisor that he left his prescription eyeglasses in his car. The supervisor told the controller he was prohibited from leaving the building to go to the parking lot and retrieve his glasses, and instructed him to return to the tower cab – wearing the prescription sunglasses he had on – after his break. He was ordered to work local control and told he could perform CIC duties. He worked local control until the sun went down and then requested to be relieved from position after temporarily losing visual sight of a C206 which dropped off the radar on short final while two MD-80s were crossing the arrival runway. The supervisor then told the controller he was required to take leave to go get his glasses and return to work.
- At Tampa, Fla., Tower, just days after a controller was ordered by a supervisor to drop his pants to make sure they did not contain denim, another controller reported for an evening shift and put his dinner in the refrigerator. A supervisor entered the break room and performed a scheduled clean-out of that same refrigerator, which sat next to another refrigerator that was already full of controllers' food as a result of prohibitions against leaving the facility to purchase meals. The controller's dinner was thrown out. He went to the supervisor to plead his case. The supervisor then called the facility manager with the story and they decided the controller would not be allowed to walk outside the facility to get food. Controllers soon after retreated to a patio on break holding signs that read, "Controllers Need Food."

A Look at Staffing Conditions in Selected States

CALIFORNIA

The 38 FAA air traffic control facilities in the state are authorized by the FAA to have a total of 1,624 controllers on staff. But currently, there are only 1,107 fully certified controllers working, with an additional 351 in training. NATCA has found that 92 controllers retired in FY06 and 33 have retired thus far in FY07, with an additional 303 – 27 percent – of the veteran controllers eligible to retire this year.

An example of a key airport control tower in the state that is suffering through the effects of understaffing is Los Angeles (LAX).

The effects of short staffing on safety are documented quite clearly at LAX. From the fatal accident in 1991, throughout the decade of the 1990s, LAX was at or near the top of the national statistics on airport runway incursions. During this time period, LAX was, by the FAA's own written admission, in a Feb. 5, 2002 letter to NATCA from the facility's FAA Air Traffic Manager, "critically short staffed." In the early 2000s, the FAA made a concerted effort to staff LAX tower to our historic authorized staffing numbers of between 47-50 controllers. The result was a startling reduction in runways incursions and surface incidents, from 24 in 2000 down to only nine in 2004. In fact, LAX went roughly two years and three months without one single controller error. This was an unprecedented period of safety and staffing at LAX. However, in the past few years the FAA has allowed staffing to drop back down to the 2000 level,

around 35, and safety is once again a problem. The weekend of February 24 and 25, 2007 saw two runway incursions and one near-mid-air collision.

After staffing issues and controller fatigue were listed as probable causes of a near fatal runway incursion in the fall of 2004, the FAA put in writing that the safety and the efficiency of the air traffic system required it to add two extra night shifts, bringing the total to 13. Since this time, staffing has dropped to the point that it has become mathematically impossible for the FAA to staff to these numbers. A breakdown of this current year, from Jan. 1, 2007 until Feb 28, 2007, has revealed some alarming statistics: Despite averaging almost two overtime shifts per day, not one night shift began with the 13 controllers the FAA said it needed for safety. Ninety-three percent of these night shifts began at least two controllers short. Four of these shifts started with only nine of the required 13 controllers. These are only the numbers for the night shifts. Similar problems exist on the day shifts.

It is difficult to understand how the FAA allowed LAX to fall into this situation given the letters the agency has written to NATCA officials clearly stating there is a known link between safety and staffing.

As LAX controller numbers continue to dwindle, with seven controllers expected to retire this year, things are fast approaching the "critical" levels of the 1990s. Since all other facilities in the Los Angeles area are also short-staffed and the new imposed pay scale would cost experienced controllers money to transfer here, LAX tower can expect to receive only raw, inexperienced trainees. Without a concerted effort to attract experienced controllers and retain our current workforce, LAX will continue to lose controllers and that will mean flight delays, runway incursions and an increased chance of another fatal crash.

ILLINOIS

The 13 facilities in the state are authorized by the FAA to employ a combined 813 controllers to safely staff the system. Currently, however, there are just 657 fully certified controllers working. There have been 16 retirements thus far in FY07. Another 164 controllers can retire this year, offsetting gains of a possible 101 controllers that are currently in training.

MASSACHUSETTS

The four FAA air traffic control facilities in the state are authorized by the FAA to have 84 controllers on staff. But currently, there are 67 fully certified controllers working. Twenty-seven of these veterans are eligible to retire this year.

At Bedford Tower, an FAA supervisor on Feb. 27 posted the following report on conditions at the facility on a web chat board exclusively for supervisors:

"We have 2 people eligible to retire in the next 6 months. If either of them decides to do so, we will not be able to legally staff the facility during its hours of operation. That's even with me working 10 hours a day 6 days a week like everyone else! This is simply a result of p#ss poor planning on the part of the previous manager and the pathetic compensation package we are offering potential hires.*

"We are severely short staffed and leave is not even a possibility. Overall, the outlook is dim. The controllers here are overworked with the staffing needed to fill the schedule, train the developmentals, and never getting leave. We have made job offers to CTI and military recruits, but the pay has been reduced to a laughable level so we are being turned down right and left.

"Overall very discouraging, especially for those who want to move on in their careers."

MISSISSIPPI

The three FAA facilities in the state are authorized by the Agency to staff 52 controller positions. But there are only 42 fully trained controllers working today. Nearly one in four – nine total – are eligible to retire this year and 14 more could retire in 2008.

WEST VIRGINIA

The three FAA air traffic control facilities in the state are authorized to employ 63 controllers. But currently, there are just 45 on staff. Ten of those are eligible to retire this year and 10 more can retire in 2008.

STAFFING CONCLUSION

The FAA currently is staffing to budget in its 314 air traffic control facilities. It is not staffing to traffic. That is why we are short 1,100 controllers from what we had working the system just over three years ago. In fact, the same FAA Air Traffic Organization official in charge of staffing is the very same official in charge of finance. That is a conflict of interest.

And contrary to Agency claims that an aggressive hiring spree will ensure full staffing and overcome the losses that have resulted from many more controllers retiring and leaving the workforce through other attrition reasons than the Agency ever expected, the simple fact of the controller training process suggests otherwise. It takes three years to fully certify a controller to work traffic alone. Therefore, the FAA is hiring trainees. It is not hiring controllers.

The bulk of the current veteran controller workforce was hired between 1981 and 1984, following the PATCO strike, and they are eligible to retire at age 50. Anyone could have seen this retirement swoon coming down the pike decades in advance.

Yet, when we look at the numbers, we see that the FAA only hired 13 controllers in 2004. But this year, the FAA is going to hire 1,100.

Conveniently, but we're sure not coincidentally, the increased controller hiring is taking place after the FAA unilaterally imposed work rules and pay bands. A skeptic would argue that the FAA had its plan for how it was going to handle the staffing crisis: do nothing until the agency pushes through a new pay structure, and then fill the empty positions with cheaper labor.

By the FAA's own admission, it miscalculated the detrimental effect the work rules would have on retirements and recruitment, and last month DOT Secretary Mary Peters has said that delays in the system could cost the aviation industry and the U.S. economy \$22 billion a year.

We are faced with a similar staffing crisis in the nursing profession, as hospitals around the nation are struggling to get enough nurses trained and plugged into the system. A quick Google search pulls up federal and state efforts to provide incentives to recruit nurses into the profession. Yet we're dismayed that the FAA is actually doing everything it can to dis-incentivize recruits from joining the ranks as controllers while at the same time pushing the veteran controllers out the door towards retirement.

This approach is bad for our economy, bad for the safety of the flying public, and bad for the nation.

We would like to return to the contract negotiating table with the FAA and fix this critical problem immediately before the margin of safety in our beloved National Airspace System is further compromised.

NATCA AND FAA DO NOT HAVE A CONTRACT

Statutory Background

On November 15, 1995, Congress enacted Section 347 of the 1996 Department of Transportation Appropriations Act,⁴ directing the FAA to develop and implement a new personnel management system, to address "the unique demands on the agency's workforce." Section 347(b) specifically stated that Chapter 71 of Title 5 of the U.S. Code would not apply to the new personnel management system, except for the prohibition of the right to strike in §7116(b)(7).⁵

On March 28, 1996, the FAA issued a new Personnel Management System (PMS), organized in chapters addressing Staffing, Compensation, Performance Management, Training, Labor Relations, and Executive Systems. Chapter V, Labor Relations provided:

EMPLOYEE RIGHTS

The FAA, all FAA employees, and all labor organizations representing FAA employees shall have the same rights, and be subject to the same responsibilities and limitations, as are available to all Federal agencies, employees, and labor organizations under 5 U.S.C. Chapter 71.

On March 29, 1996, Congress passed the House Joint Resolution 170,⁶ which amended Section 347 of the 1996 DOT Appropriations Act, to require the applicability of Chapter 71 of Title 5, relating to labor-management relations, to the FAA's new PMS.

On October 9, 1996, Congress enacted the Air Traffic Management System Performance Improvement Act of 1996,⁷ (the 1996 FAA Act) to establish a procedure for "developing and making changes to the personnel management system initially implemented by the Administrator... on April 1, 1996...."⁸ The FAA Act requires FAA to negotiate with its employees' exclusive collective bargaining representatives over any changes to the FAA PMS, and to engage in mediation if such negotiations do not produce an agreement. However, if negotiations end in an impasse, the 1996 FAA Act "provide for the Administrator to transmit its proposals, along with the bargaining representative's objections, to Congress. Proposed changes to the PMS will not take effect until sixty days after the Agency's submission to Congress."⁹ At the same time Congress stipulated that all labor-management agreements then in effect were to remain in effect until their expiration dates.¹⁰

In 2000, Congress codified the provisions of House Joint Resolution 170 by adding subsection (g)(2)(C) to 49 U.S.C. Section 40122 to specify that Chapter 71 of Title 5, "relating to labor-management relations"

⁴ Pub. L. No. 104-50, § 347, 109 Stat. 460 (1995).

⁵ *Id.* At §347(b).

⁶ Pub. L. 104-122, 110 Stat. 876 (1996).

⁷ Pub L. 104-264, Title II, 110 Stat. 3227 (1996).

⁸ 49 U.S.C. §40122(a).

⁹ *Id.*

¹⁰ 49 U.S.C. §40122(f).

would apply to the FAA PMS.¹¹ Yet, the statute still remains unclear as to how bargaining impasses are to be resolved.¹²

Air Traffic Controllers Dispute

NATCA and FAA began negotiations for a successor to the 2003 two-year extension to the Collective Bargaining Agreement in July of 2005. During those negotiations and NATCA did not reach agreement with FAA. In fact, FAA from the beginning of the process, until the end, failed to adjust its proposals on pay and several other issues, believing that if it failed to reach agreement, it would submit its final proposal to Congress, Congress would not act, and after 60 days it could unilaterally impose its last best offer on the employees. Rather than engaging in collective bargaining, the result was *a fait accompli*. FAA would engage in what is referred to as surface bargaining¹³ until it found an opportunity to end negotiations, submit its proposal to Congress, and unilaterally implement.

After nine months of meeting, on April 5, 2006, the day FAA unilaterally declared impasse in negotiations, NATCA presented a new proposal for Pay, Article 108. FAA's Rick Duscharme inquired about whether this was NATCA's "best and final offer," presumably meaning last, best offer. NATCA's Barry Krasner responded that he didn't want it to be considered that, that he didn't see a lot of movement, and wanted to see movement from the FAA. FAA's Joe Miniace responded that he would reject or accept the proposal after looking at it during lunch. Previously the shortest time period between a Union pay proposal and an FAA response was approximately six weeks: December 7, 2005 (NATCA's second proposal on pay) to

¹¹ Pub. L. No. 106-181, Title III, §307(a), 114 Stat. 124 (2000).

¹² When FAA and NATCA failed to reach agreements over terms and conditions of employment for 11 bargaining units, NATCA filed a formal Request for Assistance on July 8, 2003 with the FSIP (Case No. 03 FSIP 144). PASS filed similar formal Requests for Assistance on various dates in July 2003 (Case Nos. 03 FSIP 149, 150, 151, and 157). The FAA filed statements of position with the Panel on September 22, 2003, asserting that the Air Traffic Management System Performance Act of 1996 completely divested the Panel of any jurisdiction over the impasses. After soliciting legal positions from all of the parties, on January 9, 2004, the Panel declined to address the impasses "because it is unclear whether the Panel has the authority to resolve the parties' impasse[s].... This determination to decline to assert jurisdiction is made without prejudice to the right of either party to file another request for assistance if the underlying threshold question is resolved in the appropriate forum consistent with the Union's interpretation of the applicable statutory provisions."

NATCA and PASS filed Civil Action No. 04-0138 in the United States District Court for the District of Columbia on January 30, 2004. The District Court ruled that it did not have jurisdiction to hear the underlying claim. *Nat'l Air Traffic Controllers Assn. v. FSIP*, 2005 WL 418016 (D.D.C. 2005). The United States Court of Appeals for the District of Columbia Circuit agreed that it did not have jurisdiction to resolve the complaint on the merits. Instead it deferred to the Unfair Labor Practice processes within the Federal Labor Relations Authority's auspices. *Nat'l Air Traffic Controllers Assn. v. FSIP*, 437 F.3d 1256 (D.C. Cir. 2006). Yet, the FLRA does not have any background in issues involving Title 49. This creates an inherent problem.

¹³ The FLRA has not ruled on surface bargaining, however the National Labor Relations Board has significant case law the subject. In *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990) the U.S. Court of Appeals for the D.C. Circuit reiterated some of the factors that the Board will consider in determining whether bad-faith bargaining had occurred. These include among others: unreasonable bargaining demands that are consistently and predictably unpalatable to the other party, unilateral changes in mandatory subjects of bargaining, and insistence to impasse on nonmandatory subjects of bargaining, all of which are present in the bargaining dispute between NATCA and FAA evidencing the Agency's design to frustrate a bargaining agreement.

January 25, 2006 (FAA's third proposal on pay). On April 5, Miniace's statement that a response could be generated while reviewing the Union's proposal during lunch serves as a further indication that FAA's intention to declare impasse on April 5, regardless of the proposals was *a fait accompli*. The conversation that followed further emphasized the FAA's premeditation:

Miniace: We're taking a very hard look at your proposal. I will take exception with your number, as soon as our folks are finished.

Krasner: You're not finished. You don't know that you'll take exceptions.

Miniace: I think your clarifications make it even lower. I will ensure it gets the due consideration it deserves during our lunch, so we can plug in another number that you clarified today that we had not figured in. We'll be able to do that.

Krasner: That doesn't sound like, it sounds a little, we'll give it due consideration it deserves during lunch . . .

As part of the pay proposal package, NATCA also tendered a new proposal on Article 106, Duration.

On April 5, 2006 NATCA also provided a U-3 proposal on Article 36 Pay Administration. FAA never responded to this proposal, yet declared impasse that same day. NATCA also provided FAA with formal requests for declarations of non-negotiability on several articles. FAA rejected Articles 116 Child Care Subsidy and 143 Student Loan Repayments "on (their) merits." Regarding Article 150, Facility ATC Levels, FAA's Joe Miniace responded, "We will respond to 150. We'll respond to all of them. I'm making no other statement on Article 150 for the record."

NATCA then presented a proposal on Article 38 Overtime and provided FAA with a formal request for a declaration of non-negotiability for that article since FAA had previously made unsolicited statements regarding the negotiability of portions of that proposal. NATCA provided proposals on Article 24 Annual Leave and Article 28 Holidays. FAA then presented a proposal on Article 106 Duration and the Parties broke for lunch.

After lunch FAA presented a proposal on Article 108 Pay. FAA also made new proposals on Article 18 Controller-in-Charge, which NATCA has alleged to constitute bad faith bargaining, and Article 33 Position Rotation and Relief Periods. FAA termed both proposals as their "best and final" offers.

FAA then proposed Article 28 Holidays and gave planned speeches regarding impasse.

Ducharme: Let me address one issue – it's been a hell of a process. Aside from the stuff in pay and upgrades and demotions, I want to thank you and Bob for your efforts and professionalism and I want to acknowledge the rest of the team. Based on what we've exchanged today, I see no value in reentering into mediation. I'm not the FAA Administrator, I don't see it. It's our intention to forward all of our outstanding articles to Congress as an impasse package. If there are any articles that you think we can work, the door is always open. If we can reach agreement on these articles, great. It's not my call. I believe we're at impasse, based on what we've seen today and I see no point in exchanging paper. I wanted a voluntary agreement. I acknowledge your team, but I'm disappointed that it didn't work out. I think we're done.

Miniace: I want to acknowledge this team as well, ours as well as yours. I don't think I've worked with a more professional group ever. We knew this would be hard and difficult. We came to a stall, went to mediation for four weeks. There's some fundamental issues we just can't get over. Because of the philosophical differences between the union and the agency – particularly on the long term goals of the agency – they're going to be issues that remain between us. Rick said our intent is to take this through its process, which would be a congressional process. You said your pay proposal

would be your congressional proposal. I think more mediation at this point is not in the cards. But I, too, extend an offer that we will continue to talk through any process if we can narrow the issues and complete the issues during this period of time, I think we'd be better people for it. The door is absolutely open on that. On behalf of the FAA, I feel that the Agency is declaring impasse.

No Impasse

It is NATCA's position that since Federal Mediation and Conciliation Service Mediator Kurt Saunders did not certify impasse nor release the Parties, and since the Parties provided each other with new proposals on April 5, some within minutes of the FAA's unilateral declaration of impasse, the Parties were not at impasse on April 5, nor have they subsequently reached impasse. Furthermore, since the state of impasse requires that the Parties reach impasse over the entirety of the negotiations, the fact that there were ongoing discussions on April 5 over nearly all of the outstanding subjects precludes the finding of impasse over those subjects where no proposals were exchanged on April 5, and even those subjects where the Parties had not made any movement in some time.¹⁴

Impasse is a bilateral process, not just the cutting off of negotiations by one party.¹⁵ In the instant dispute, the FAA terminated negotiations immediately upon providing NATCA with substantively different proposals than had been provided previously on nearly every subject other than pay, which did not substantially change at any point during negotiations. Further, NATCA had, earlier in that day, provided FAA with substantively different proposals than had been offered previously.

Moreover, if there are subjects or proposals of questionable negotiability, it is not proper to proceed with impasse resolution procedures until the FLRA can determine the negotiability. In *Commander Carswell AFB and AFGE*,¹⁶ the Authority held that interest arbitrators and the FSIP may apply settled case law determinations of negotiability when a proposal's language is substantially similar to one previously found negotiable or non-negotiable. Further, the Authority held, when it is a matter of first impression, it is inappropriate for any other third party empowered to resolve the impasse to resolve the issue. That responsibility is within the exclusive jurisdiction of the FLRA. The Authority has consistently upheld *Carswell* even as a two member panel.¹⁷ The FLRA is currently only two members since President Bush has not nominated a Democrat to fill the third and final position.

Since the negotiability of the Union's proposals have not yet been determined by the Authority, the Parties never reached a state of impasse. The Authority has ruled that where the Union's proposal has been ruled to be negotiable, it only requires that the Parties' return to the table to negotiate over that proffer. It does not require the third-party impasse adjudicator or other impasse body to accept the Union's proposal, nor

¹⁴ Former NATCA President John Carr announced to the news media that negotiations had broken down several days prior to April 5, however that was due to the FAA wishing to terminate mediation at that time. It was also prior to NATCA developing its April 5 proposals. Moreover, since FAA provided new proposals on April 5, and NATCA had no opportunity to respond to those proposals before FAA unilaterally declared impasse, it is impossible to determine whether or not the Parties could have bridged the gap on those subjects.

¹⁵ *VA, VAMC and AFGE Local 85*, 32 FLRA 855, 874 (1988) (ALJ Decision- Findings of Fact #13).

¹⁶ 31 FLRA 620 (1988).

¹⁷ See: *NTEU and U.S. Dept. of Homeland Security, Customs and Border Protection*, 61 FLRA 729 (2006) and *U.S. Department of the Air Force, Davis-Monthan Air Force Base, Tucson, Arizona and Local 2924, AFGE*, 05 FSIP 104 (2005).

does it establish that the Parties are at impasse. In *POPA v. FLRA*,¹⁸ the Court of Appeals for the D.C. Circuit found that, "The Agency's refusal to bargain cannot be construed as an impasse which the arbitrator could rightfully resolve. The Agency's refusal to bargain was premised not merely on a disagreement with the proposals, but on a threshold claim that the proposals were not negotiable. So long as these negotiability issues remained unresolved, coupled with the parties' resulting failure to negotiate over the merits of the proposals, there could be no impasse on the merits. Thus, there was nothing to be considered by the interest arbitrator, for it is well-established that an interest arbitrator cannot resolve negotiability issues."

The Agency Cannot Grant Itself Discretion Over Mandatory Subjects of Bargaining

NATCA has argued that FAA's proposal to grant itself discretion over wages, facility classification, and other matters, constitutes a waiver of NATCA's right to bargain over working conditions. The Authority has ruled that such waivers are permissive subjects of bargaining and both the Authority and Board are clear that neither the Employer nor the Union may bargain to impasse over permissive subjects or proposals.¹⁹ The U.S. Court of Appeals for the D.C. Circuit ruled on a similar matter for private sector negotiations in *McClatchy Newspapers v. NLRB*²⁰. Summarizing the Board's opinion the Circuit writes, "In the Board's view this case was less about impasse than statutory waiver: an employer who proposes unlimited management discretion over wages is really proposing that the union waive its statutory right to be consulted about wage changes. That is fine, the Board reasoned-if the union agrees. **But impasse, by definition a lack of agreement, could not substitute for consent.**" (emphasis added)²¹. As the Circuit wrote in *McClatchy Newspapers*, in the instant dispute, it seems "somewhat anomalous to refer to the institution of a new wage regime as 'implementation of terms'" since here like in *McClatchy Newspapers*, the Employer's proposal has no terms.

The Circuit even went on to see value in the question of whether or not bargaining to impasse over this wholly discretionary matter (waiver) constitutes true impasse, but did not reach the question since it was not in the Board's holding.²² NATCA, however, does make the argument that the Parties were not at impasse, so it is incumbent upon the Authority to answer this question. In *McClatchy Newspapers* this is even further supported since certain clauses could not be implemented specifically because they are over permissive subjects. While not specifically applicable in the Federal Sector under the 5 U.S.C. 71, the Board's treatment of the no-strike clause is entirely applicable to the overall concept argued by NATCA. "The Board has held that because the right to strike is 'fundamental,' it cannot be relinquished by employees except by consent-which implies a specific contractual waiver."²³

McClatchy Newspapers clearly identifies the problem with the FAA's inappropriate unilateral implementation. The Circuit found circumstances identical to those in the instant dispute. "Rather than merely pressuring the union, implementation might well irreparably undermine its ability to bargain. Since the union could not know what criteria, if any, petitioner was using to award salary increases, it could not

¹⁸ 26 F.3d 1148, (D.C. Cir. 1994).

¹⁹ NATCA is not arguing that wages and the classification of facilities are permissive subjects. They are clearly mandatory subjects under 49 U.S.C. 40122(a). However, the waiver of the right to bargain is a permissive subject. Under the Statute, FAA can neither bargain to impasse over the permissive subject of waiver, nor implement total discretion over mandatory subjects, including wages.

²⁰ 321 NLRB 1386, 1391 (1996), *enfd.* 131 F.3d 1026 (D.C. Cir. 1997), *cert. denied* 524 U.S. 937 (1998).

²¹ *Id.* at 1028.

²² *Id.* at 1030.

²³ *Id.*

bargain against those standards; instead, it faced a discretionary cloud.”²⁴ The Board’s interpretation highlights FAA’s predetermined strategy when it wrote, “**the present case represents a blueprint for how an employer might effectively undermine the bargaining process while at the same time claiming that it was not acting to circumvent its statutory bargaining obligations.**” (emphasis added).²⁵

The Board’s decision in *Mail Contractors of America and Des Moines Area Local, American Postal Workers Union*²⁶, reinforces NATCA’s position. In adopting the ALJ’s decision, the Board agreed that “an employer may not compel a union to grant it unlimited discretion on important mandatory subjects of bargaining even after bargaining to overall impasse. In addition, to allow an employer to do so unjustifiably affects the balance of power between labor and management and thereby undermines an important goal of the Act of encouraging the parties to reach a collective-bargaining agreement. This is so because, as this case shows, there are occasions when an employer may desire unlimited discretion on a mandatory subject of bargaining and may seek in bargaining to persuade a union to relinquish its right to bargain over the matter. In order to do so a union may seek concessions from the employer on other conditions of employment. But if an employer can relegate to itself this discretion a union’s bargaining strength is diminished and the likelihood of reaching an agreement is decreased.... Certainly the Act, which was enacted for the purpose of ‘encouraging the practice and procedure of collective bargaining,’ forbids such a result.”²⁷

As NATCA has argued FAA’s goal was not to reach agreement; it intended to reach impasse and unilaterally implement a vested right of full discretion over pay, facility classification, and other matters to itself with no duty to bargain, something abhorrent to the Statute itself. As in *Mail Contractors of America*, it would not be unreasonable to believe that the Union would have sought other concessions (i.e. retaining the *status quo ante* pay bands and work rules) and agreed to the Agency’s discretion on future annual raises and increases to the bands. However, the Agency instead had no desire to reach agreement. Its intention was to grant itself full discretion through a manipulation in the process, while not conceding on any particular issue. The Agency’s actions are antithetical to the definition of collective bargaining as well as the Statute.

Ratification Required to Form Contract

NATCA’s position has always been that it has a right to ratify the contract once a complete agreement has been reached or the appropriate impasse procedure has been determined by the FLRA and has been concluded by the appropriate body. On May 12, 2005, the date the Parties agreed to the ground rules for negotiations, NATCA provided notice to the FAA regarding its Constitutional requirement to ratify as a precondition to a binding final agreement between the Parties. Specifically, the letter from Barry Krasner, NATCA Chief Negotiator, to Melvin Harris, then FAA Chief Negotiator, stated,

Although not specifically addressed in the Parties’ Memorandum of Agreement Concerning Ground Rules Governing the Conduct of Negotiations of a successor collective bargaining agreement, dated, May 12, 2005, the Union provides the following notice to the Agency. The ratification of a tentatively agreed upon contract by NATCA’s membership is a precondition to a final and binding agreement between the Parties. In the event the membership rejects the tentative contract, NATCA will notify the Agency that the membership has failed to ratify the contract. The Agency is obligated to resume negotiations with NATCA. NATCA will be willing to meet and resume negotiations in

²⁴ *Id.* at 1032.

²⁵ *Id.*

²⁶ 347 NLRB No. 88 (Aug. 31, 2006).

²⁷ *Id.* ALJ decision at 7.

order to complete our contract negotiations should a ratification of a tentative contract fail. The Agency's right to Agency Head Review is only triggered by execution of agreement, a condition not effective until ratification is complete.

Furthermore, the Parties have had a past practice for all other collective bargaining over term contracts that NATCA's Constitution and Standing Rules require ratification by the membership. The Parties have never deviated from that practice.

In the instant dispute FAA provided NATCA with a final offer on April 5, 2006 and immediately and unilaterally declared impasse without NATCA having the opportunity to respond to the proposals. Simultaneous with its declaration of impasse and in evidence of its predetermined posture to not reach agreement, FAA improperly submitted its proposals to Congress. NATCA has filed Unfair Labor Practice Charges over the improper submission to Congress, but the FLRA does not have expertise regarding Title 49 of the United States Code, so it is unclear how it will resolve the issue, if at all. Since NATCA disagrees with the FAA's use of Congress as the appropriate impasse procedure, NATCA cannot submit the FAA's imposed agreement for ratification or risk acquiescence to the FAA's improper impasse procedure. Only after a clear and final impasse procedure is completed would a full and complete collective bargaining agreement be ripe for a ratification vote by NATCA's membership.

In *SSA and AFGE Council 220*,²⁸ the Authority adopted the ALJ's decision that provided that the Union's right to ratification need not be expressed in ground rules as long as, as in the instant dispute, the Union provides the Agency with notice of the ratification as a precondition to a final and complete agreement between the Parties and does not waive its right to ratification. In the instant dispute NATCA's past practice has been to require ratification as a precondition to a complete agreement and NATCA provided FAA with a letter to that effect the same date as the ground rules were agreed to.

²⁸ 46 FLRA 1404, 1415 (1993) (ALJ Decision).