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Background and Current Legislative
Issues

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CRS Report for Congress

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Summary

This report discusses labor-management relations at the Federal Aviation Administration (FAA) and the 2006 implementation of a new labor contract on air traffic controllers. The FAA's ability to implement the new contract with its controllers was arguably supported by a mediation procedure prescribed by federal law. Concern over the fairness of this procedure has prompted Congress to consider legislation that would allow for the use of binding arbitration to resolve negotiation impasses between the agency and the exclusive bargaining representatives of its employees. This report provides background information on the mediation procedure, discusses litigation involving the FAA and two labor organizations, and examines legislative attempts to amend the existing system.

In June 2006, the Federal Aviation Administration (FAA) implemented a new labor contract with its air traffic controllers after years of negotiation and litigation. While the contract is expected to save the agency approximately \$1.9 billion, many air traffic controllers remain dissatisfied because of the contract's new terms.¹ For example, the contract reportedly slows the rate of pay increases for existing controllers and reduces starting salaries for new controllers by 30%.²

The FAA's ability to implement the new contract with its air traffic controllers was arguably supported by a mediation procedure prescribed by federal law. The procedure has been understood to allow for the imposition of new contract terms if the agency and an exclusive bargaining representative fail to reach agreement. In response to the FAA's

¹ See Stephen Barr, *Controllers Have a New Contract, But Fight Isn't Over*, Wash. Post, June 6, 2006, at D04; Stephen Barr, *FAA Has Some Unhappy Controllers*, Wash. Post, Apr. 23, 2007, at D01.

² See *FAA Imposes Labor Contract on NATCA Following 60-Day Congressional Review*, Daily Lab. Rep. (BNA) No. 111, at A-10 (June 9, 2006).

actions with the new contract, legislation that would alter the mediation procedure has been introduced in the 110th Congress. This report provides background information on the procedure and discusses the litigation involving the FAA and two labor organizations, the National Air Traffic Controllers Association (NATCA) and the Professional Airways Systems Specialists (PASS). The report also examines legislative attempts to alter the existing FAA mediation procedure.

Background

In 1995, Congress authorized the FAA Administrator to develop a new personnel management system for the agency's workforce. Section 347(a) of the Department of Transportation and Related Agencies Appropriations Act, 1996, provided for the development and implementation of a new personnel management system following consultation with FAA employees and any non-governmental experts in personnel management systems employed by the Administrator.³ The new system was to provide for "greater flexibility in the hiring, training, compensation, and location of personnel."⁴ As enacted originally, chapter 71 of the U.S. Code, which governs labor-management relations for most federal agencies, did not apply to the new personnel management system.⁵ However, in March 1996, Congress amended section 347 to make chapter 71 applicable to the new system.⁶

In October 1996, Congress considered additional requirements for the FAA personnel management system. Section 253 of the Federal Aviation Reauthorization Act of 1996 amended title 49 of the U.S. Code to add a new section involving consultation, negotiation, and mediation with respect to the new system.⁷ 49 U.S.C. § 40122(a) provides, in relevant part:

(1) Consultation and Negotiation. — In developing and making changes to the personnel management system initially implemented by the Administrator of the Federal Aviation Administration on April 1, 1996, the Administrator shall negotiate with the exclusive bargaining representatives of employees of the Administration certified under section 7111 of title 5 and consult with other employees of the Administration.

(2) Mediation. — If the Administrator does not reach an agreement under paragraph (1) with the exclusive bargaining representatives, the services of the Federal Mediation and Conciliation Service shall be used to attempt to reach such agreement. If the services of the Federal Mediation and Conciliation Service do not lead to an agreement, the Administrator's proposed change to the personnel management system shall not take effect until 60 days have elapsed after the Administrator has transmitted the proposed change, along with the objections of the exclusive bargaining representatives to the change, and the reasons for such objections, to Congress.

³ P.L. 104-50, § 347(a), 109 Stat. 436, 460 (1995).

⁴ *Id.*

⁵ See P.L. 104-50, § 347(b), 109 Stat. 436, 460 (1995) (identifying provisions of title 5, U.S. Code, that would be applicable to the new personnel management system).

⁶ P.L. 104-122, § 1, 110 Stat. 876 (1996).

⁷ P.L. 104-264, § 253, 110 Stat. 3213, 3237 (1996).

In the report that accompanied the Senate version of the 1996 act, the Senate Committee on Commerce, Science, and Transportation indicated that “[i]n negotiating changes to the personnel system, the Administrator and the exclusive bargaining representatives would be required to use every reasonable effort to find cost savings and to increase productivity within each of the affected bargaining units, as well as within the FAA as a whole.”⁸ The House version of the act did not include a provision on consultation, negotiation, and mediation. Ultimately, however, the Senate provisions were incorporated into the final version of the legislation during conference.⁹

Legal Challenges

In 2005, a federal district court considered the impact of 49 U.S.C. § 40122 on labor-management relations at the FAA.¹⁰ After reaching bargaining impasses with the FAA, NATCA and PASS sought the assistance of the Federal Service Impasses Panel (FSIP or the Panel), an entity within the Federal Labor Relations Authority (FLRA or the Authority) that provides assistance with resolving negotiation impasses between federal agencies and unions.¹¹ In 2004, FSIP declined to provide assistance, maintaining that its authority to resolve impasses involving the FAA was unclear in light of 49 U.S.C. § 40122.¹²

After reviewing the development of the FAA personnel management system and the enactment of 49 U.S.C. § 40122, the district court concluded that complaints related to an agency’s participation in FSIP’s impasse resolution procedures could be deemed an unfair labor practice.¹³ Consequently, the court declared that “[w]hen agency action constitutes an arguable unfair labor practice, jurisdiction rests exclusively with the Authority and the Courts of Appeals.... For these reasons, the [court] concludes that it is without jurisdiction and should defer to the FLRA.”¹⁴

Although the FLRA did not address the matter, the U.S. Court of Appeals for the District of Columbia Circuit did review the district court opinion in February 2006. In *National Air Traffic Controllers Association v. Federal Services Impasses Panel*, the D.C. Circuit affirmed the district court decision, concluding that FSIP did not have a clear and specific statutory mandate to assert jurisdiction over the parties’ bargaining impasses.¹⁵

⁸ S.Rept. 104-333, at 36 (1996).

⁹ See H.Rept. 104-848, at 109 (1996).

¹⁰ *National Air Traffic Controllers Association v. Federal Service Impasses Panel*, 2005 WL 418016 (D.D.C. 2005).

¹¹ A formal request for assistance from FSIP was filed on July 8, 2003, after attempts to reach resolution with the assistance of the Federal Mediation and Conciliation Service failed.

¹² *National Air Traffic Controllers Association*, 2005 WL at 1-2.

¹³ *Id.* at 4.

¹⁴ *Id.*

¹⁵ 437 F.3d 1256 (D.C. Cir. 2006).

The court did observe, however, that the FAA's refusal to participate in proceedings before FSIP could form the basis of an unfair labor practice charge before the FLRA.¹⁶

On April 5, 2006, the FAA formally announced that it had reached an impasse in its negotiations with NATCA regarding its agency-wide contract covering the air traffic controller workforce.¹⁷ In accordance with 49 U.S.C. § 40122(a)(2), the FAA Administrator indicated that the agency would send its last, best offer to Congress.¹⁸ On June 5, 2006, the FAA implemented a new labor contract with its air traffic controllers after Congress failed to enact legislation that would have repealed 49 U.S.C. § 40122(a)(2) and nullified the changes proposed by the FAA.¹⁹

Proposed Legislation

Concern over the fairness of the FAA mediation procedure has prompted Congress to consider legislation that would allow for the use of binding arbitration to resolve negotiation impasses between the agency and the exclusive bargaining representatives of its employees. Senator Barack Obama, the sponsor of such legislation in 2006, contended, “[I]t is in the best interest of the agency and public safety to have management and labor cooperate in contract negotiations and if that is impossible, then no one side should be able to impose its views on the other.”²⁰

In June 2007, two bills that directly address the FAA's mediation procedure were introduced. H.R. 2673, the Federal Aviation Administration Fair Labor Management Act of 2007, was introduced by Representative John L. Mica on June 12, 2007. S. 1735, a measure that would amend title 49 of the U.S. Code to “improve dispute resolution provisions related to the Federal Aviation Administration personnel management system,” was introduced by Senator Charles E. Schumer on June 28, 2007. Both bills would amend 49 U.S.C. § 40122(a)(2) and authorize the involvement of FSIP. Binding arbitration would be a possibility under both measures if the parties fail to reach agreement.

H.R. 2673 would permit FSIP to consider the negotiation impasse in a manner consistent with 5 U.S.C. § 7119 and the regulations that have been issued pursuant to that section. In general, 5 U.S.C. § 7119 identifies the composition and duties of FSIP. 5 U.S.C. § 7119(c)(5)(B)(iii) indicates that FSIP may “take whatever action is necessary and not inconsistent with [chapter 71] to resolve the impasse” if the parties fail to reach agreement. In its regulations for FSIP, the FLRA has elaborated on the kind of actions that may be undertaken:

¹⁶ *Id.* at 1265.

¹⁷ See *FAA Declares Impasse in Controller Talks; Next Stop for Two Sides is Congress*, Daily Lab. Rep. (BNA) No. 66, at A-5 (Apr. 6, 2006).

¹⁸ *Id.*

¹⁹ H.R. 5449, introduced by Representative Steven C. LaTourette on May 22, 2006, was considered under suspension of the rules and required a two-thirds vote to pass. The vote was 271-148. For additional information on the congressional consideration of H.R. 5449, see *FAA Imposes Labor Contract on NATCA Following 60-Day Congressional Review*, *supra* note 2.

²⁰ 152 Cong. Rec. S229 (daily ed. Jan. 26, 2006). See also S. 2201, 109th Cong. (2006).

... the Panel may take whatever action is necessary and not inconsistent with 5 U.S.C. chapter 71 to resolve the impasse, including but not limited to, methods and procedures which the Panel considers appropriate, such as directing the parties to accept a factfinder's recommendations, ordering binding arbitration conducted according to whatever procedure the Panel deems suitable, and rendering a binding decision.²¹

S. 1735 also contemplates the use of binding arbitration. However, unlike H.R. 2673, which seems to recognize binding arbitration as one option for resolving an impasse, S. 1735 would require FSIP to order binding arbitration if there was an impasse. Arbitration under S. 1735 would be conducted by a private arbitration board composed of three members. Each party to the arbitration would be permitted to select one arbitrator from a list of 15 arbitrators developed by the director of the Federal Mediation and Conciliation Service. The two arbitrators would then select a third arbitrator from the list. S. 1735 would require the arbitration board to give the parties a full and fair hearing, including an opportunity to present evidence. The arbitration board would have 90 days after its appointment to render a decision. H.R. 2673 does not provide similar requirements with regard to the composition of an arbitration panel or a deadline for issuing a decision.

Provisions to modify the FAA mediation system were also included in two FAA reauthorization measures: S. 1300, the Aviation Investment and Modernization Act of 2007, and H.R. 2881, the FAA Reauthorization Act of 2007. Under both measures, FSIP would be required to order binding arbitration by a private arbitration board if there was an impasse. H.R. 2881 also includes a provision that would invalidate any changes that were implemented by the FAA Administrator on and after July 10, 2005, without the agreement of the exclusive bargaining representative.²² The parties would be governed by their last mutual agreement until a new contract was adopted. This provision would appear to have the effect of undoing the new contract that was implemented on June 5, 2006.²³

²¹ 5 C.F.R. § 2471.11(a).

²² H.R. 2881, 110th Cong. § 601(b) (2007).

²³ For additional information on the FAA reauthorization measures, see CRS Report RL33920, *Federal Aviation Administration Reauthorization: An Overview of Selected Provisions in Proposed Legislation*, by Bart Elias, et al.