

**IN THE MATTER OF AN ARBITRATION
BETWEEN**

The National Treasury Employees Union,
Chapter 164, Oroville, Washington

The Union

and

U.S. Customs and Border Protection,
Department of Homeland Security

The Agency

Arbitrator: Jerry B. Sellman
Decision Dated: June 18, 2010
Bid, Rotation and Placement
Expedited Hearing

APPEARANCES

FOR THE UNION:

Diana L. Anderson, Esq. – Assistant Counsel, National Treasury Employees Union, representing
NTEU Chapter 164
Jonathan S. Levine, Esq. – Assistant Counsel for negotiations with the National Treasury
Employees Union, Witness
Dwayne R. Dickey - Former U.S. Customs and Border Patrol Officer, Witness
Gregory M. Johnson – President of Chapter 164 of National Treasury Employees Union,
Witness

FOR THE AGENCY:

Jennifer W. Stilwell, Esq. – Office of the Assistant Chief Counsel for the Department of
Homeland Security, representing the U.S. Customs and Border Protection
Michael J. Wenzler, Esq. – Director of Labor Relations, U.S. Customs and Border Protection,
Witness
Joseph J. Wilson – Port Director for the Port of Buffalo, New York, Witness
Ron Arrigoni – U.S. Customs and Border Protection Port Director, Witness
Lynn Beltz – U.S. Customs and Border Protection Port Director, Witness
Michael Bol – Chief Passenger Officer, U.S. Customs and Border Protection at Port of Oroville,
Witness

I. NATURE OF THE CASE

Bid, Rotation and Placement Procedure; Management Rights: This matter came for hearing before Arbitrator Jerry B. Sellman on April 6, 2010. The hearing was held at the offices of the U.S. Customs and Border Protection at the Port of Oroville, Washington. The proceeding arises pursuant to the provisions of the Bid, Rotation and Placement Article of the National Bargaining Agreement (hereafter "Agreement") between U.S. Customs and Border Protection, Department of Homeland Security (hereafter "Agency" or "CBP") and Chapter 164 of the National Treasury Employees Union (hereafter "Union" or "NTEU"). This proceeding concerns a Grievance filed by members of the Union on or about August 25, 2009 wherein the Union alleges that the Agency violated the Bid, Rotation and Placement Article (BR&P) of the Agreement during the annual bid process for fiscal year 2010. The Union claims that its members were not permitted to bid on the smallest organizational component, or work unit, to which groups of employees are normally assigned as required by the BR&P. Instead, NTEU members were only permitted to bid on larger defined work units that included the duties of the smaller work units. Additionally, the Union claims that its members were not permitted to express a preference for available shifts or schedules within each work unit as permitted under the BR&P. Despite the existence of established shifts, the Agency continued to rotate its members through all the shifts. The Agency maintains that it did not violate any provisions of the BR&P Article for it did permit the Union members to bid on what it determined, under its managerial rights, to be the appropriate work units in the Port Area. It also avers that currently, as well as prior to the establishment of the BR&P, it achieves its operational and mission requirements by maintaining rotating shifts, which are the only available shifts to which Union members can express a preference. By permitting the Union members the right to express a

preference on the rotation wheel of the rotating shift it is complying with the requirements of the BR&P. It is not required to establish fixed shifts under the BR&P.

At the beginning of the hearing, the Parties stipulated that the matter was properly before the Arbitrator for resolution. At the conclusion of the hearing, the Parties requested permission to file post hearing briefs. The briefs were filed on June 6, 2010.

The Union stated the issue in this proceeding as follows:

Whether the Agency violated the intent of the 2008 Bid, Rotation and Placement MOU and specifically Section 1.J. of the MOU when it failed to permit officers within the Port of Oroville to bid on three separate work units of cargo processing, passenger processing and the Port of Nighthawk for the 2010 fiscal year bidding process? If so, what should be the appropriate remedy?

Whether the Agency violated the intent of the 2008 Bid, Rotation and Placement MOU and specifically Section 1.J. of the MOU when it failed to permit officers within the Ports of Frontier and Danville to bid on the ports of Boundary and Ferry respectively as work units for the 2010 fiscal year bidding process? If so, what should be the appropriate remedy?

Whether the Agency violated the intent of the 2008 Bid, Rotation and Placement MOU and specifically Section 4, when officers within the ports of Oroville, Danville, and Frontier were not allowed to preference available shifts within work units at each port? If so, what should be the appropriate remedy?

The Agency stated the issue in this proceeding as follows:

Whether the National Treasury Employees Union (“NTEU”) has proven, by a preponderance of the evidence, that under the terms of the Bid, Rotation and Placement Agreement (“BR&P”), U.S. Customs and Border Protection (“CBP”) management must create additional work units within the Area Port of Oroville, Washington?

Whether NTEU has proven, by a preponderance of the evidence, that under the terms of the BR&P, CBP management is required to establish fixed (non-rotating) shifts for each work unit, and to allow bargaining unit employees to bid to these shifts?

If NTEU meets this burden of proof, what is the appropriate remedy?

The Arbitrator adopts the issues as proposed by the Union, but in addressing those issues will address the issues proposed by the Agency.

The applicable provisions of the Agreement in this proceeding are as follows:

RELEVANT CONTRACT PROVISIONS

MEMORANDUM OF UNDERSTANDING

* * *

(2) CBP will immediately commence efforts to move forward with the terms of the BR&P policy so that employee rotations will be effective no later than January 31, 2009. The annual process will resume in August of 2009 as written in the attached policy.

ARTICLE XX (Final Numbering Reserved)
BID, ROTATION AND PLACEMENT

PART A: BID ROTATION AND PLACEMENT FOR CBP OFFICERS AND CBP AGRICULTURE SPECIALISTS.

In the interest of providing opportunities for employees to receive work assignments in accordance with their preferences, this Part affords CBP Officers and CBP Agriculture Specialist within the Office of Field Operations an annual opportunity to bid on specific assignments or work units within the area of responsibility of their Port Director.

Section 1. Definitions

A. **Bid** is the term used to refer to an individual's request to be assigned to a specific work unit. Similarly, **bidding** refers to the process of submitting a request for assignment to a work unit or higher level unit in accordance with this procedure. Such a bid constitutes an employee commitment to be assigned to those requested work units in the event (s)he is selected in accordance with these policies and procedures.

* * *

J. **Work unit** means the smallest organizational component, operational or equivalent level to which groups of employees are normally assigned and for which qualifications for positions are defined and applied. Such units are specific to the configuration of each Port. Examples of work units are: airport, seaport, cargo, and passenger, and to the extent they exist, A-TCET, PAU, PERT, NII, ICAT and Outbound.

Section 2. Policies

* * *

E. In processing employee bids under these procedures, management is responsible for ensuring employees are assigned to a particular work unit so as to ensure continuity of, and to prevent unnecessary disruption to, Agency operations. This responsibility includes determining the appropriate numbers, types (e.g. CBP Officers and Agriculture Specialists) and grades of employees with specific skill sets needing to be assigned or retained within a particular work unit or assignment. Nothing in this subsection is intended to permit the creation of a work unit based solely on grade.

* * *

Section 4. Work Schedule Preference

A. Concurrent with the bid procedure, employees will be permitted to express a preference for available shifts or schedules within each work unit or assignment.

B. Selections for available shifts and/or work schedules will be made in a manner consistent with the policies and procedures delineated above. Such work schedule preferences, however, will not be limited to 25%.

II. SUMMARY OF THE TESTIMONY AND POSITION OF THE PARTIES

U.S. Customs and Border Protection was created in March 2003 in response to the terrorist attacks of September 11, 2001. The mission of CBP is to protect the homeland, to prevent the entry of terrorists and their weapons, and to facilitate legitimate trade into and out of

the United States.

In 2008, CBP and NTEU negotiated a “Bid, Rotation, and Placement” contract article to be implemented in advance of the completion of the full national collective bargaining agreement. The purpose of the Agreement is stated in its opening paragraph:

In the interest of providing opportunities for employees to receive work assignments in accordance with their preferences, this Part affords CBP Officers and CBP Agriculture Specialists within the Office of Field Operations an annual opportunity to bid on specific assignments or work units within the area of responsibility of their Port Director.

CBP and NTEU also negotiated a Memorandum of Understanding (“MOU”) regarding the implementation of the Agreement which was signed¹ by representatives from CBP and NTEU on October 29, 2008. The Agreement is to remain in effect while CBP and NTEU negotiate the national collective bargaining agreement, and will be included in that agreement, once it is finalized.

CBP officers within the Area Port of Oroville¹ typically conduct inspections at land ports of entry, as opposed to the air or sea ports. Specifically, officers assigned to the Area Port of Oroville conduct inspections of people and merchandise at the border. Since the terrorist attacks of September 11th (hereinafter “9/11”), the Agency has substantially increased its inspections. For example, at the Port of Oroville, officers now perform 100% checks on people and vehicles that enter the country - a percentage that is much higher than was performed prior to 9/11. In addition, while prior to 9/11, it was not uncommon for smaller ports (including those within the Area Port of Oroville) to have only one officer assigned to work there, today, there are a minimum of two (2) officers assigned to work at every location on every shift.

¹ When referring to the Port of Oroville, it is intended to include the facilities in the city of Oroville, Washington where CBP conducts inspections. The Area Port of Oroville’s geographic reach is somewhat broader and includes the Ports of Oroville, Nighthawk, Frontier, Boundary, Danville, Ferry, Metaline Falls, and Laurier.

In the instant case, pursuant to the BR&P Agreement, the Agency notified the Union that it determined that, in the 2010 BR&P bid cycle, it would not make any changes to the available work units. It considered the “work units” that were currently, and had been, in place within the Area Port of Oroville to be as follows:

- 1) Oroville (including Nighthawk)
- 2) Frontier (including Boundary)
- 3) Danville (including Ferry)
- 4) Metaline Falls
- 5) Laurier

The Union did not agree with the Agency’s interpretation of a “work unit” as it is identified in the BR&P. Union representatives testified that , in the Port of Oroville, officers are assigned and report to work on a regular basis to one of three work units; cargo, passenger processing, or the Port of Nighthawk. Although unusual traffic flow may cause a need for increased staffing in cargo or passenger processing on a given day, the Agency knows and staffs each operation, including Nighthawk, with a consistent number of officers on a daily basis.

After the Port of Oroville’s new port facilities became operational, during the day shift the cargo and passenger operations have been worked from opposite sides of the ports due to the port’s configuration and due to the amount of cargo traffic passing through the port throughout the day. At the beginning of the swing shift, the separate cargo operations are closed down and all officers are assigned to work out of the passenger processing side of the port until the next day shift comes on duty. Officers routinely work cargo and passenger processing and routinely rotate to Nighthawk.

Unlike Oroville, the Ports of Frontier and Danville are smaller by comparison and the type of cargo flowing through these ports is restricted to pre-permitted vehicles only. Staffing at these ports is also less, due to the size of each port’s traffic flow and configuration. By

operational necessity, due to the port's configuration, small size, and staffing, officers in Frontier and Danville work both cargo and passenger processing simultaneously throughout all shifts.

The Ports of Frontier and Danville are responsible for staffing two smaller stand-alone ports of Boundary and Ferry, respectively. Both of these ports are smaller still and only operate during the day shift. Assignments to Boundary and Ferry are for a one week period at a time.

In addition to its decision regarding assignments to work units, the Agency decided that it would not make any changes to the available shifts to which employees could express a preference. Officers were assigned to rotating shifts and not fixed shifts.

Union witnesses stated that there were identifiable shifts at each of the port locations to which officers were assigned. The Port of Oroville had three established shifts that officers work and the Port of Nighthawk had only a day shift. Frontier and Danville each has three established shifts that officers work. The Ports of Boundary and Ferry only had one shift (day) per day. Despite the existence of these established shifts in all the afore-referenced ports, the Agency continued to rotate officers through all the shifts after the BR&P was negotiated.

In an email dated August 6, 2009, the Union voiced its objections to numerous parts of the Agency's proposed implementation of the BR&P. The parties met on or about August 21, 2009, to discuss NTEU's concerns. Chief CBP Officer Mike Bol testified that, as a result of the meeting with NTEU, the Agency did adopt some of the Union's recommendations. However, the Agency did not agree to the Union's interpretation or identification of existing work units, nor did the Agency agree to allow officers to express preferences to fixed shifts identified by the Union.

On August 25, 2009, the NTEU filed a grievance claiming that the Agency violated the parties BR&P Agreement when it: (1) failed to identify work units at the Oroville Port of Entry

into Passenger Processing, Cargo Processing, and Nighthawk; (2) failed to identify work units at the Frontier Port of Entry into Frontier and Boundary; (3) failed to identify work units at the Danville Port of Entry into Danville and Ferry; and (4) did not allow employees to express a preference to fixed shifts. The Agency denied the grievance and appeals.

The NTEU invoked arbitration on this matter on November 9, 2009. A hearing was held on April 6, 2010 in Oroville, Washington.

Position of the Union

The Agency's failure to permit bargaining unit employees the right to bid on separate work units, in the absence of an operational need to do otherwise, violated the intent of the parties' BR&P. Even though the Agency decided to rotate officers through all the different operations and shifts in the past, this action is in contravention of the intent to allow the members to bid on traditionally defined work units. The parties agreed to define a "work unit" to which employees could bid as the smallest organizational component, operation or equivalent level to which groups of employees are normally assigned and for which qualifications for positions are defined and applied. At the Port of Oroville, the three work units are cargo processing, passenger processing and the Port of Nighthawk. The Ports of Frontier, Danville, Boundary and Ferry should each be considered a work unit, based upon the size of operation and duties assigned.

Regardless of management's rotation of officers between cargo and passenger processing on a daily or hourly basis, or to Nighthawk on a weekly basis, all three are worked as separate operations and in different locations by specified employees in the port at all times during the day shift.

The Agency introduced no credible evidence that demonstrated an operational reason for prohibiting employees to bid on the Ports of Boundary or Ferry as work units within the Ports of

Frontier, and Danville respectively, despite the fact that each of these smaller ports meets the definition of a work unit. Employees are regularly assigned to and report to work at each of these ports. And each port is the smallest organizational component, operation or equivalent level to which groups of employees are normally assigned within the Ports of Frontier and Danville.

The Agency failed to prove that internal security concerns, loss of skill level or inability to staff vacancies justified the Agency's decision not to treat the smaller ports of Nighthawk, Boundary, and Ferry as work units. Even though the Agency indicated that integrity issues could result if these small ports did not have rotating staffs, the integrity issues cited all occurred when rotating staffs were in place. There was no evidence to suggest that this issue is more likely to happen if officers are permitted to bid on each of these small ports as a work unit. In regard to an officer's skill level diminishing when working in a smaller port, that did not happen when one of the officers acknowledged that her own experience of working alone in the port of Ferry for over 15 years had not resulted in any loss of skills on her part.

The record of evidence demonstrated that the Agency's assertions regarding staffing were equally without merit. Two Agency witnesses testified that if officers were permitted to bid to work in only Nighthawk, it could result in staffing issues if an assigned officer was unable to report due to illness or was on leave. One former union member and BCP officer testified that when officers are unable to report to their assignment at Nighthawk or Boundary, management did and does have the ability to detail another officer to fill in the vacancy. Further, one of the Union negotiators of the Agreement and the BR&P, Mr. Levine, testified that ports such as Nighthawk could certainly be work units within larger ports under the terms of the BR&P. In response to Agency witnesses' assertions that officers needed to rotate through all operations in order to remain proficient, Mr. Levine testified that management at no time mentioned this

concern during bargaining and in fact, if this were the case, it would defeat the purpose of the BR&P.

The Agency's failure to permit employees to preference and work a non-rotational, specific shift for the entire bid cycle is contrary to the intent of the BR&P procedures. Permitting officers to preference and be awarded a starting position on a rotating scheduling wheel is not the same as a preference and award to a set shift. Such a position misconstrues the entire concept of being able to preference a schedule and is contrary to the standard definition of a shift. Webster defines "shift" as "a scheduled period of work or duty." Thus, a shift is a fixed period of time, not a rotation from one period of time to another. This definition is consistent with Mr. Levine's testimony. He testified that it was his understanding during negotiations that the term "shift" meant hours an officer worked on a regular basis

Indicating a preference for placement on a scheduling wheel is also inconsistent with the National Standardized Bid and Rotation Preference Sheets established by the Parties. The National form clearly indicates that officers were to be able to preference for a specific shift, e.g., 1100, 1600, 0600, or 0800, as an example.

The Agency's forced rotation process dilutes employees' ability to meaningfully exercise their seniority, which is also contrary to the intent of the MOU. Even though the Agency retains the right to assign a more junior employee to a work unit if operational needs demand additional skills and knowledge, between equally qualified employees the only advantage an employee's seniority grants that employee is the employee's initial starting shift on the rotation wheel. Thereafter, the employee's seniority placement is totally negated because (s)he is forced to rotate through shifts that (s)he did not preference. Basically, the Agency's method negates seniority where it counts the most in giving an employee some measure of control over when they will

work. The importance of seniority to the process is evident in Section 1(I), which goes to great lengths to define the basis for seniority determinations. Because the entire bid process is seniority driven in the absence of the need to select someone with additional qualifications, forced rotation through shifts undermines the intended result that more senior employees will be able to work in units and shifts their seniority permits.

The Agency's arguments that it is necessary to rotate officers through shifts to ensure officer integrity and to maintain proficiency levels with all assigned duties are equally without merit, as discussed previously. Mr. Levine testified that management never raised any concerns during bargaining that employees could not work straight shifts for any reason. He also testified that there were no discussions that employees needed to rotate through multiple shifts to retain their qualifications. As he explained, this would have defeated the concept of being assigned to a specific shift

Mr. Johnson, with the Port of Blaine, Washington indicated that officers bid straight or set shifts as well as rotating type schedules and have had these types of schedules for years. While both types of schedules were available for bidding, most of the schedules were for set shifts because of the stability it provided officers. Those officers preferring rotating shifts, based upon Mr. Johnson's experience, desired to pick up the additional premium pay they could receive when they rotated through the midnight and swing shifts.

Finally, management's guidance documents specifically stated that the BR&P was intended to provide officers with an opportunity to receive work assignments and schedules within the various ports of entry in accordance with their preference. As Mr. Levine testified, the BR&P process was an effort by the parties to give employees more control over their

working lives. In agreeing to these procedures, management did not lose its ability to meet its operational needs.

The Union's interpretation of "work units" and "shift preference" mirrors the intent and purpose of the BR&P. Under the terms of the BR&P employees are directed to bid on a work unit and concurrently express a preference for available shifts or schedules within each work unit. It is well established that great weight should be given to interpreting the words of a provision when the intended purpose of the parties can be ascertained. An interpretation that conflicts with the provision's purpose should not be favored.

The Agency's assertion that the enforcement of the BR&P in this case interferes with management's rights is without merit. Under 5 U.S.C. § 7106(a), matters relating to "numbers, types, and grades of employees or positions assigned to any organizational subdivision" including allocations of staff, for the purposes of an agency's organization and accomplishment of work are negotiable at the election of the Agency. Under the BR&P, management retains its right to select qualified employees in seniority order except when an obvious difference in qualifications exists among employees that would impact the performance of the unit. After all qualified employees have been placed into a work unit from their bid, management has the right to assign the remaining employees through any appropriate method. None of these procedures prevent the agency from acting at all or excessively interfere with any management rights under the Statute.

The NTEU requests that the Arbitrator order that the Agency re-run the bid and rotation process in the Ports of Oroville, Frontier, and Danville. Further, the NTEU request that the Arbitrator order the Agency to permit the bargaining unit employees assigned to the Port of Oroville to bid and be awarded assignments in one of the following work units: cargo processing,

passenger processing, the combined operation of cargo/passenger processing (swing & midnight shifts) and Port of Nighthawk, under the terms and procedures of the BR&P. Further, the NTEU request that the Arbitrator order the Agency to permit bargaining unit employees assigned to the Port of Frontier to bid and be awarded to either the work unit of the Port of Frontier or the Port of Boundary and employees assigned to the Port of Danville to bid and be awarded to either the work unit of the Port of Danville or the Port of Ferry. In addition, during the re-bid process NTEU request that the Arbitrator order the Agency to permit all bargaining unit employees participating in the rebid the ability to preference the currently established shifts connected with each work unit as provided for under the terms of the BR&P.

Position of the Employer

Under the Agency's statutory right to assign work, to make determinations with respect to contracting out, and to determine the personnel by which Agency operations shall be conducted, it identified appropriate work units within the Port Area of Oroville. These determinations were based on the existing local work unit structures necessary to carry out the operation and mission requirements of the CBP in this specific region. Those work units have been identified as (1) the Port of Oroville, which includes the Port of Nighthawk; (2) the Port of Frontier, which includes the Port of Boundary; (3) the Port of Danville, which includes the Port of Ferry; (4) the Port of Metaline Falls; and (5) the Port of Laurier. The Union's position that the Port Director is required to describe work units by separating out duties performed within those work units is unfounded. Nothing in the Agreement or the BR&P requires management to change or redefine existing work units for the purpose of bid and rotation placement. Nothing in the Agreement or the BR&P requires the Agency to create additional work units under the BR&P.

The definition of “work unit” was intentionally broad, according to Mr. Wenzler, the Director of Labor Relations for CBP and one of the negotiators of the Agreement, in order to allow the Agency to make necessary determinations on a port-by-port basis. In other words, he explained, because of the vastly different types of ports within the Agency, and recognizing that not every port performs the same functions or is set up in the same manner as any other port of entry, what one port might consider a “work unit,” another port might not consider it to be a “work unit.” Mr. Wenzler testified that there was no expectation that port directors would be required to deviate or adjust their operations based on the implementation of the BR&P. Much deference is to be afforded to the port directors who are, ultimately, responsible for identifying available work units.

The Agency did not arbitrarily decide against separating existing work units into core functions, such as cargo screening, passenger screening. After thoughtful consideration, it was determined that separating the units would not be in the best interests of the Agency and its operations. It decided not to separate the Port of Oroville into cargo screening, passenger screening and the Nighthawk operation, as requested by the Union, because CBP officers are not “assigned” to Passenger Processing or Cargo Processing. Rather, CBP officers are “assigned” to the Port of Oroville and will go back and forth between the passenger processing area and the cargo processing area—and will work in both areas—during any given shift. A CBP officer is not required to meet any particular qualifications before working in “Passenger” versus “Cargo.”² For purposes of the BR&P, making the requested change to separate out the work units would not comply with the BR&P for the proposed work units are not components to which “groups of employees are normally assigned and for which qualifications for positions are defined and applied.”

² There are some officers that are trained on specialized equipment and only they can operate the equipment.

In addition, work load and traffic played a part in the Agency's decision not to separate Passenger and Cargo into separate work units. According to APD Arrigoni, the Port of Oroville simply did not have consistent traffic in both Passenger and Cargo to warrant separating the two components.

It is not operationally in the Agency's best interests to separate the operations of the Port of Nighthawk and provide permanent staffing and a port director to it. First, the Union has no authority to dictate to the Agency where it must assign permanent staff or where it must assign a permanent port director. But from an operational perspective, prior to the BR&P and continuing since the implementation of the BR&P, CBP Officers assigned to the Port of Oroville routinely rotated through the Port of Nighthawk. Employees are not "assigned" to the Port of Nighthawk, but rather they rotated through the port every few weeks. These CBP Officers receive no additional training, and need no additional qualifications, in order to work at Nighthawk. Other reasons, given by Chief Bol in his testimony, that the Agency ultimately determined not to separate out the Port of Nighthawk, included traffic, staffing, integrity, and expertise. Because of the low volume of traffic at Nighthawk, the Agency generally sends two (2) CBP officers to work there. Under the Union's proposal, staffing could become an issue if one of the two "assigned" officers was sick, on leave, or otherwise unavailable for his/her shift. Further, potential issues involving integrity may become a concern, especially at two-person ports. For example, if a traveler always knew which CBP Officer would be on duty at a small port, like Nighthawk, then it could present that individual with an opportunity to bribe or otherwise attempt to corrupt the officer. Finally, with respect to expertise, because Nighthawk is such a small port and only sees a fraction of the traffic and issues that Oroville sees, an officer could become complacent and lose the ability to perform the full range of his/her duties.

The Union's request to separate the Port of Ferry from the Port of Danville and to separate the Port of Boundary from the Port of Frontier, and identify each port as a separate work unit is not only an infringement upon the Agency's right to manage, it is not consistent with previously defined work units and is not operationally in the best interests of the Agency. The Agency's reasons for not separating the Port of Ferry from the Port of Danville are similar to the reasons set forth with respect to the Port of Nighthawk. Officers require no special skills or qualifications to work in Ferry; officers in both Danville and Ferry are required to perform all duties of the CBP Officer position—in other words, they are not specialized; officers are routinely assigned to work, through a previously-established rotation, at the Port of Ferry; and Ferry is not a self-sustaining port and cannot function without the assistance of officers, expertise, and supervision out of Danville. Potential integrity issues were also identified as a reason not to assign permanent staff to the Port of Ferry. While the NTEU scoffs at the Agency's position on the integrity issue, because no officers have been accused of any integrity violations in the recent past, it in no way lessens the Agency's concern over possible integrity violations.

The Union's arguments that similar ports separate out the core work units and thus the Port of Oroville is also required to do so is wholly without merit. The ports offered for comparison by the NTEU were larger, had more traffic and, prior to the BR&P, assigned work to CBP Officers within those existing work units. The Port of Oroville is assigning work according to its existing work units. Decisions regarding work units need to be made on a port-specific basis, and take into account the specific requirements and needs of each port. Thus, simply because the Port of Sumas, as an example, felt it was operationally feasible to identify Passenger

Processing and Cargo Processing as distinct work units, does not necessitate the Port of Oroville reaching the same conclusion.

The NTEU has provided no testimony or evidence to contradict the Agency's proffered justifications for the identification of work units at the Port of Oroville. Thus, the NTEU has failed to prove, by a preponderance of the evidence, that the Agency violated the Agreement when it did not create additional work units within the Area Port of Oroville.

Contrary to the contention of the Union, the Agency has provided its employees with the opportunity to express a preference for an available shift. The only available shifts at the Area Port of Oroville are rotating shifts. Section 4 of the BR&P clearly states that employees will be permitted to "express a preference" for "available shifts" within a work unit. It does not say that employees may express a preference to a "fixed shift." Negotiators on behalf of the CBP testified that the language chosen meant exactly what the plain meaning of the words say: the preference is in regard to available shifts and it did not say "fixed shifts." There was never an obligation on the part of the Agency to create a shift, or type of shift, where one was not already in place. This is consistent with the Guidance on BR&P issued to managers where it states that new work schedules do not need to be established, as employees may only express a preference for *existing* work schedules.

Under the BR&P, it was perfectly acceptable for the Agency to allow officers to express a preference to rotating shifts, if the officers were working rotating shifts prior to the implementation of the BR&P. Likewise, if the Agency was using fixed shifts prior to the implementation of the BR&P, then it would be perfectly acceptable for the Agency to allow officers to express a preference to fixed shifts. However, the Agency was under no obligation to allow employees to express a preference to a fixed shift if the port used or had a need to use

rotating shifts for any given work unit. Consequently, the BR&P Agreement uses the term “available shift” when referencing the type(s) of shift for which an officer may express a preference. Had the parties intended to entitle officers to work fixed shifts, they would have specifically stated such intent in the BR&P Agreement.

In addition to following the clear intent of the language regarding shift preference, there are a number of reasons fixed shifts are not in the best interest of the Agency. Notably, APD Arrigoni testified that the Area Port of Oroville used rotating shifts for internal security measures to ensure the integrity of CBP operations and to ensure that officers were provided with opportunities to engage in different experiences that occur on different shifts (for example, an officer working on the midnight shift would likely encounter different experiences than an officer working on the 8-4 shift). It is clear from his testimony that he made the decision to continue to have rotating shifts after determining that to do otherwise would conflict with operational requirements.

The Union did not provide any testimony that “fixed” shifts, rather than rotating shifts, were actually in use in all of the work units at the Area Port of Oroville prior to the implementation of the BR&P. Nor did the Union provide any support for its assertion that rotational shifts were not necessary, or that the reasons articulated by the Agency for using rotational shifts were false. The managerial right to determine the type of shift most appropriate for each port has not been diminished by the BR&P. As an example, even at the alleged “comparable” port of Sumas, all of the officers did not work “fixed” shifts. The Union failed to prove that the Agency violated the BR&P Agreement with respect to the expression of preferences to available shifts.

III. DISCUSSION AND OPINION

A resolution of the dispute between the parties in this proceeding is determined by examining the right of the Agency to manage its operations and the rights granted to NTEU employees under their Bid, Rotation and Placement agreement.

The Agency has the statutory right, “to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted. . . .” 5 U.S.C. §7106(a)(2)(B). “The right of an agency to assign work under §7106(a)(2)(B). . . includes the right to determine the particular duties to be assigned, the right to decide when work assignments will occur, and the right to decide to whom or what positions the duties will be assigned.” *AFGE and SSA Baltimore*, 58 FLRA 341, 343 (2003). These rights remain unfettered and are not diminished unless provisions in the parties collective bargaining agreement are intended to have such an effect.

When the Agency and the NTEU entered into negotiations for a national collective bargaining agreement, they agreed to implement a Bid, Rotation and Placement Article in advance of the completion of the full agreement. The purpose of this Article was clear:

In the interest of providing opportunities for employees to receive work assignments in accordance with their preferences, this Part affords CBP Officers and CBP Agriculture Specialists within the Office of Field Operations an annual opportunity **to bid on specific assignments or work units within the area of responsibility of their Port Director.**

Negotiators for the NTEU and CBP both acknowledged that prior to the BP&P Port Directors were using inconsistent standards for job qualifications and CBP officers had no input in work or shift assignments. The BR&P was designed to be a win-win proposition. By negotiating procedures that would give employees the right to determine which employees would

get what assignments, employees would consider the procedure fairer and would be happier; management would, as a result, have more productive employees. Both parties labored over the specific language to be used in the BR&P, with CBP negotiators taking the lead in drafting the final document. With 340 ports of entry and varying operations based upon port size and location, the language in the BR&P was meant to give employees work and shift preferences, while at the same time allowing management flexibility at the port level. As with the implementation of new agreements, differences of opinion invariably arise when one document affects multiple operations, as it has here.

Through this BR&P Article, which was memorialized through a Memorandum of Understanding, the NTEU negotiated certain rights not heretofore available to the CBP Officers and CBP Agriculture Specialists. As is pertinent to this proceeding, **the NTEU members were given rights that diminished the Agency's *unfettered* right to make work assignments and make shift assignments without taking into consideration employee preferences** as specifically set forth in the Article.

Having received certain rights under the BR&P, the issues here are whether the Union proved by a preponderance of the evidence that the Agency violated the terms of the BR&P when (1) it made its determination to narrow the number of work units to which employees could bid and when (2) it made its determination to permit employees to express a preference only to rotating shifts. Based upon a review of the language contained in the BR&P Article, the testimony of record, the documentary evidence provided and the arguments of the parties, it is the opinion of the Arbitrator that the Agency did not violate the terms of the BR&P Article in determining the appropriate work units in the Area of the Port of Oroville, **but it did violate the**

terms of the BR&P Article when it did not permit officers to preference available shifts or schedules as intended by the Article.

In analyzing the disputed language in the BR&P it is incumbent upon the Arbitrator to apply basic standards of contract interpretation. First, it must be determined if the language used by the parties is clear and unambiguous when taken at its ordinary meaning. *See, St. Cloud VA Medical Ctr. and AFGE Local 390*, 106 LRP 24683 (2005 Remington); *AFGE, Local 3627 and SSA, Orlando, FL*, 99 FLRR 2-1063 (Howell 1999). Secondly, the parties' agreement must be construed as a whole, and the arbitrator should err to give effect to all clauses and words. Elkouri and Elkouri, *How Arbitration Works*, 5th Ed., 1997, at 493, citing, *John Deere Tractor Co.*, 5 LA 631, 632 (Updegraff 1946). "The cardinal rule for contract interpretation is to apply the plain meaning of the language used and the parties intentions must prevail." Citation, at p. 9, citing *L & S Products*, 97 LA 282 (McDonald 1991). An arbitrator's interpretation cannot ignore the plain language of the agreement. *Sport Air Traffic Controller's Org. and Dept. of Air Force, Edwards AFB*, 55 FLRA 771, 773 (1999).

In applying these standards of interpretation to the issues herein, the Arbitrator concludes that the drafters of the BR&P Article did not intend to interfere with the Agency's managerial right to determine appropriate work units within a port area when employees were given the right to request to be assigned to a specific work unit. The definition of a "work unit" in Section 1(J) presupposes that it is the smallest organizational unit (this allows discretion by the Agency), to which groups of employees are assigned (this allows discretion by the Agency), which are specific to the configuration of each Port (this allows discretion by the Agency). Testimony from negotiators on behalf of both parties indicated that the BR&P did not require the Agency to

create new or additional work units, but to allow bidding (as defined in the BR&P) to existing work units.

The terms of the BR&P Article apply to all ports,³ yet it is clear that the Port Directors have discretion in determining the best configuration of work units at their port. Section 1(J) provides that the work units are “specific to the configuration of each port.” Section 2(E) provides that “employees are assigned to a particular work unit so as to ensure continuity of, and to prevent unnecessary disruption to, Agency operations.” Negotiators on behalf of both parties acknowledged that these aforementioned Sections were meant to provide management with flexibility to determine the appropriate work units within their Port area. The Arbitrator agrees that the Agency has retained broad discretion in determining these work units. The Agency’s configuration of work units cannot be subject to challenge unless it is shown that its determination is arbitrary and capricious or clearly made for reasons not consistent with the operation and mission requirements of the CBP in the specific region.

At larger ports it is conceivable that all eleven nationally standardized work units⁴ would be identified and CBP Officers would be assigned to one of the standardized work units. At smaller ports where, as an example, only two or four CBP officers worked and the officers were assigned to switch back and forth between all of the tasks to be performed at the port, the port itself could be a work unit. It would not be operationally feasible to define separate work units for all of the officers at these small ports.

At the Area Port of Oroville, which is a small port (33 fulltime officers), the Port Director must configure the work groups based upon normal assignments and operational requirements.

³ There was some testimony that the BR&P did not apply to smaller ports. Such an exclusion does not exist in the BR&P and the provisions of the BR&P, therefore, applies to all ports.

⁴ Under the BR&P the parties identified eleven “work units” to which CBP Officers could bid. Included with a description of the job duties of each “work unit” were qualifications necessary to bid to the “work unit.”

While officers at the Port of Oroville were assigned each day to work one of three work units - cargo, passenger and Nighthawk - it is clear from the testimony that they went back and forth between the passenger processing area and the cargo processing area—and would work in both areas—during any given shift. A determination of which area they worked was made the day before and could change daily. What was consistent was that they continued to perform all three functions. The CBP officers were not required to meet any particular qualifications before working in “Passenger” versus “Cargo” or at Nighthawk. These groups of employees were normally assigned to the Port, not specifically to cargo processing, passenger processing or Nighthawk.

In regard to the smaller ports of Boundary and Ferry, the Agency’s decision not to separate them for operational purposes cannot be said to be arbitrary or capricious. It appears from the testimony that these ports needed to be a part of Frontier and Danville, respectively, to meet the Area Port of Oroville’s operational requirements. Deciding that it was not in the Agency’s best interests to provide permanent staffing and a port director to the ports of Boundary and Ferry cannot be deemed arbitrary or capricious or in contravention of the terms of the BR&P.

While the intent of the BR&P provisions are to give the CBP officers the opportunity to bid to a work unit (as defined in the Article), the Agency’s determination of a work unit cannot be deemed in violation of the BR&P unless it is determined by a preponderance of the evidence that the Agency’s creation of a specific work unit is designed to subvert the intent of the BR&P provisions; i.e., arbitrary and capricious or clearly made for reasons not consistent with the operation and mission requirements of the CBP in the specific region. Considering the size of the Port of Oroville and the multiple small ports in the Area Port of Oroville, the Arbitrator does not

find that the creation of the work units by the Agency violated the terms and/or intent of the BR&P Article.

The Arbitrator does not draw the same conclusion in regard to the Agency's position on work schedule preferences. The language chosen by the parties regarding Work Schedule Preferences, while undoubtedly crafted to be clear and unambiguous, lends itself to varying interpretations. It is not clear and unambiguous.⁵ For example, does "available shifts" mean only the type of shift that is available (fixed or rotating)? Does it mean the hours employees normally work each day (8-4, 4-12, 12-8)? The negotiator on behalf of the NTEU stated that the parties intended it to mean the hours an employee normally works. The negotiator on behalf of the CBP stated that it was the shifts that were currently available at the time the BR&P became effective. If only a rotating shift was available at a small port, then that would be the only available shift? Does "express a preference for a shift" mean only a preference, which the CBP advocates is the proper interpretation, or does it actually mean the employee can bid on the shift, which is the NTEU's position? The specific language contained in Section 4(A) permits an employee to express a preference, yet language in Section 4(B) provides that selections of available shifts will be made in a manner consistent with the policies and procedures delineated above. The policies and procedures delineated above are specific bidding procedures. Is this a bid or a request? Expressing a preference under the bid procedure is different than requesting a preference. In answering these questions, the Arbitrator determined that the language in these sections must be given a meaning consistent with the Parties' intentions, as presented through testimony at the hearing, and as expressed in the purpose clause of the BR&P Article itself.

⁵ The Arbitrator is mindful that this provision has been interpreted as "clear and unambiguous" by another Arbitrator, but I must respectfully disagree in light of the analysis set forth herein.

To conclude that the term “available shifts or schedules” refers only to the type of shift available, such as only a rotating shift, is inconsistent with the purpose set forth in the BR&P. The Arbitrator would agree with NTEU representative that permitting officers to preference a shift and be awarded a starting position on a rotating scheduling wheel is not the same as a preference and award to a set shift. Such a position misconstrues the entire concept of being able to preference a schedule and is contrary to the standard definition of a shift. Forced rotation through shifts undermines the intended result that more senior employees will be able to work in those shifts their seniority permits. Webster defines “shift” as “a scheduled period of work or duty.” Thus a shift is a fixed period of time not a rotation from one period of time to another.

There are some port locations where there is only one shift per day. That would be the available shift. Where there are clearly defined shifts that are worked by the CBP Officers, such as three eight hour shifts per day, preventing them from expressing a preference for a clearly defined shift makes the language contained in the BR&P superfluous. As the NTEU Director of Labor Relations stated, “We (the NTEU) are not in the practice of negotiating provisions that are meaningless. The provision was intended to allow senior people a right to preference or bid a fixed shift.”

The Agency argued that at the Area Port of Oroville, which is comprised of small ports, rotating shifts were often necessary to make sure that integrity, qualification and experience issues were adequately addressed. While this was given as the reason for only offering rotating shifts, the NTEU Assistant Counsel for Negotiation stated that management never raised these concerns in the negotiations. If a concern over integrity, qualification or experience issues were relevant to granting shift preferences, they would have been at least discussed. Based upon the language in Section 4, these issues may be relevant to whether certain shifts are available, as

discussed below, but are not relevant when determining the type of shift to which an employee can express a preference. If employees are working eight hour periods in a work unit, then there should be an opportunity to express a preference for what is an identifiable eight hour shift.

Under the BR&P Article, once assigned to a work unit, employees have the right to express a preference to these work shifts, based upon seniority, in order to derive the benefit of working at a particular time. **The primary reason for the preference is to be able to work at the same time each day. Denying this right flies in the face of the intent of the provisions of the BR&P.**

Permitting employees to express a preference on shifts does not interfere with the Agency's right to manage the workforce. Agency witnesses testified that if the right to preference fixed shifts were permitted at smaller ports, senior officers may all bid on the same shift and rookie officers will then be on another. In other cases, employees with needed qualifications may not be available to round out the work unit. Such a situation would not promote the efficiency of the Agency or meet operational requirements. The Arbitrator does not believe that these concerns are valid for several reasons.

While a CBP Officer has a right to express a preference to an available shift, management has retained the right to make schedule adjustments to meet mission and work requirements. The Arbitrator concludes that the language in Section 4(A) anticipated this when it provided that any employee could *express a preference* to a shift, following the procedures set forth in the bid sections. If an adjustment is necessary to balance the experience of officers on a shift, the preference may be denied. However, **if the Agency has no rational basis upon which it denies the employee's preference to work an identifiable shift previously discussed, it is in violation of the BR&P.** If, after the bid, rotation and placement process, it is determined that some officers may

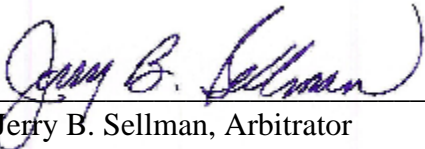
need to be moved temporarily, the Agency has the right under the Parties' Agreement to assign employees to another work unit to meet temporary staffing needs through existing policies, procedures and practices.

The Agency presented several reasons for maintaining a rotating shift at its various ports, but the Arbitrator does not find those reasons sufficient to outweigh the right(s) granted to the NTEU employees to express a shift preference for a fixed shift where more than one shift per day exists for a work unit. To decide otherwise would make the language contained in Section 4 meaningless.

V. AWARD

For all of the foregoing reasons and conclusions, the grievance is denied in part and sustained in part. It is denied to the extent that the Agency did not violate the intent of the 2008 Bid, Rotation and Placement Article when it did not permit officers within the Port of Oroville to bid on three separate work units of cargo processing, passenger processing and the Port of Nighthawk for the 2010 fiscal year bidding process. It is denied to the extent that the Agency did not violate the intent of the 2008 Bid, Rotation and Placement Article when it did not permit officers within the Ports of Frontier and Danville to bid on the ports of Boundary and Ferry, respectively, as work units for the 2010 fiscal year bidding process. It is sustained to the extent that Agency violated the intent of the 2008 Bid, Rotation and Placement Article when officers within the ports of Oroville, Danville, and Frontier were not allowed to preference available shifts within their work units at each port. The Agency is ordered to permit officers within the ports of Oroville, Danville and Frontier to preference the currently established shifts connected with each work unit as provided for under the terms of the BR&P, which shifts are based upon established eight hour shifts and not a rotating shift. The Agency shall not be prohibited from

offering a rotating shift to its employees, but if two or more shifts are being worked at a port location within the Area of Port Oroville for the work units, the employees must be permitted to express their preference for those shifts. The officers' preferences must be granted in conformance with the provisions of the BR&P Article as set forth in this Decision and Award.



Jerry B. Sellman, Arbitrator