

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

U.S. DEPARTMENT OF TRANSPORTATION,
SAINT LAWRENCE SEAWAY DEVELOPMENT
CORPORATION

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1968, AFL-CIO

Case No. 20 FSIP 027

DECISION AND ORDER

The U.S. Department of Transportation, Saint Lawrence Seaway Development Corporation (Agency or SLSDC) filed a request for assistance with the Federal Service Impasses Panel (Panel) to consider a negotiation impasse under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. § 7119, between it and the American Federation of Government Employees, Local 1968, AFL-CIO (Union) over a dispute related to the parties' successor collective bargaining agreement (CBA). The Agency, which is located in Massena, New York began operations in 1959, to maintain the U.S. infrastructure and waters of the Saint Lawrence Seaway between the Port of Montreal and Lake Erie. Its mission is to serve the marine transportation industries by providing a safe, secure, reliable, efficient, and competitive deep draft international waterway in cooperation with the Canadian Saint Lawrence Seaway Development Cooperation.

During navigation season, which runs from March to December, vessels pass through the Saint Lawrence Seaway 24 hours a day, 7 days a week. In a typical navigation season, approximately 2,400 commercial vessels and 1,500 pleasure craft transit cargo, such as iron ore, coal, limestone, grain, and cement through the Seaway. Currently, there are 93 bargaining-unit employees, 68 are classified as Wage Grade (WG) employees and 20 are under the General Schedule. The parties dispute centers around the WG employees, specifically 32 WG employees who work as Lock Operations employees on the Saint Lawrence Seaway. The employees that work in Lock Operations are Lock Dam Operators who primarily work from a computer console to actuate lock machinery, such as gates and valves that control the water flow in and out of the locks,¹ which allow vessels to traverse through the Seaway. There are Line-handlers who

¹ A lock is a device used for raising and lowering boats between different bodies of water that are varying levels to allow the boats to more easily traverse through a waterway. The boats will travel into a chamber with gates at both ends of it, which will lock once the boat is inside and the water will be raised and lowered to permit the boat to access the waterway.

help to position the ship inside the locks, as well as perform maintenance duties. There are Electricians and Millwrights that primarily adjust machinery, respond to lock failures, and work with maintenance employees to perform large scale repairs. Finally, there are also Vessel Traffic Controllers who communicate with the ships to ensure safe passage through the waterway.

The parties' current CBA, which became effective on June 20, 2016, expired on September 30, 2018, but remains in effect until the parties reach agreement over a successor CBA.

BACKGROUND AND PROCEDURAL HISTORY

On June 28, 2018, the Agency provided the Union notice that it was reopening the parties' CBA. The parties initiated successor CBA negotiations by bargaining over ground rules in July and August 2018. After finalizing the ground rules agreement, the parties bargained over the successor CBA on November 6 and 7; from November 27 to 29; from December 11 to 13; and on January 29 and 30, 2018. As a result of those negotiations, the parties agreed on 40 of 42 articles in their successor CBA.

In late January 2019, the parties enlisted the services of the Federal Mediation and Conciliation Service (FMCS) Mediator Edward C. Garrow to assist them in reaching an agreement over the remaining two articles in dispute: Article 11 Wage Board Compensation; and Article 16, Absence and Leave. The parties were unable to resolve those two articles in mediation, so Mediator Garrow released the parties from mediation on February 13. On April 26, 2019, the Agency filed a request for Panel assistance in Case No. 19 FSIP 037.

During the investigation of that case, the parties resolved Article 16. On August 6, 2019, the Panel asserted jurisdiction over Article 11. The Panel directed the parties to an Informal Conference proceeding at the Panel's Office in Washington, D.C. on October 3, 2019. The Panel's Staff conducted the Informal Conference, assisting the parties by arriving at a resolution over Article 11.

On October 21, 2019, the Union submitted the parties' agreement in principle to its membership for a vote. On October 22, the Union informed management that Article 11 and Article 16 failed ratification. On January 21 and 22, 2020, the parties met with Mediator Garrow in an attempt to resolve the issues in the two articles that failed ratification. The Agency and Union each exchanged a proposal over the articles; however, they were unable to reach an agreement. Therefore, on January 22, Mediator Garrow released the parties from mediation.² On January 27, the Agency filed its second request for Panel assistance in the instant case.

On May 20, 2020, the Panel asserted jurisdiction over Article 16, but declined to assert jurisdiction over Article 11 due to a colorable duty to bargain argument.³ The Panel ordered the

² FMCS Case No. 202010160032.

³ The parties' dispute over Article 11 pertained to whether their proposals were in accordance with the prevailing rates and pay practices of the industry. The Panel found that because the parties disagreed on whether the matter was consistent with the prevailing rates and pay practices, the parties should resolve the duty to bargain question in another forum. Therefore, the Panel declined jurisdiction over Article 11.

parties to a Written Submissions procedure, with an opportunity to submit rebuttal statements. The parties timely provided those submissions.

POSITIONS OF THE PARTIES

There is one article in dispute in the parties' successor CBA: Article 16, Absence and Leave, section 16.4(f). The parties' dispute pertains to the amount of annual leave that Lock Operations Employees may receive during the navigation season. The parties' proposals are attached to this Order.

I. Agency's Position

The Agency proposes that during each navigation season, from March through December, employees will be permitted to use up to 96 hours of annual leave. The Agency proposes that employees should submit their annual leave requests by April 1, to be given priority consideration. The Agency also proposes that employees who did not submit their leave requests by April 1, must then submit the requests at least five calendar days in advance of taking the requested annual leave.

The Agency states that its proposal mirrors the language that the parties agreed to at the bargaining table, but was rejected by the Union during its ratification vote of the CBA in October 2019. In this respect, the Agency's proposal maintains the status quo language in the parties' current CBA with minor grammatical changes and an acknowledgement that the parties use the electronic rather than a paper time keeping system. The Agency asserts that the parties have operated with a navigation season leave restriction of some sort for more than 50 years, which the Agency proposes to maintain. The Agency argues that it is important to maintain the annual leave restriction during the navigation season because it is the busiest time of the year for the Lock Operations and it needs all employees available to safely and sufficiently operate the locks so that vessels can travel through the Saint Lawrence Seaway. The Agency asserts that the Union's proposal does not maintain the leave restriction and could have unintended organizational and operational consequences on the Agency.

During each navigation season, employees work 12-hour shifts of 3 days on, 2 days off, 2 days on, 3 days off, and 2 days on during a 14-day pay period. In total, these employees work 7 days on and 7 days off each pay period. Each 12-hour shift is staffed by 1 of 4 crews, consisting of 9 bargaining unit employees on each crew. The Agency states that employees maximize their time away from work by combining annual leave with their regularly scheduled days off, which can result in employees having several days off from work each pay period. As a result, the Agency argues that it can be challenging to ensure that the Lock Operations is fully staffed. The Agency argues that it would be even more difficult to staff the Lock Operations and safely secure vessels into the locks if there was no leave restriction in place.

During the non-navigation season, which runs from January to March and is not in dispute, the Agency states that no ships traverse the Saint Lawrence River and the locks are drained for maintenance. The Agency states that some of the 32 bargaining unit employee continue to work the 12-hour shifts performing security and facility watch duties, while the rest

of the crew assist with maintenance and work a compressed work schedule. During this time, employees are generally permitted to take leave unless there are critical projects with strict deadlines that are imposed.

The Agency argues that if the Union's proposal were adopted, a senior employee could have up to 448 hours of annual leave available to use during the navigation season.⁴ For example, the Agency asserts that an employee could be off work from Memorial Day through September, during peak navigation season, which would seriously hamper the ability of the Lock Operations to meet its mission. The Agency further asserts that if this were to occur, it thinks that it would have to consistently deny less senior employees' leave requests in order to maintain minimum staffing and safety requirements, which could impact the morale of the bargaining unit.

The Agency states that the Union's proposal in section (a) actually harms the bargaining unit employees because it does not permit employees to take leave of one week or more if the leave request is not submitted by April 1. Currently, the Agency asserts that employees may request leave for any amount of time subject only to the 96-hour restriction during the navigation season and other mission-related work during non-navigation season. Under section (b) of the Union's proposal, the Agency states that employees may request leave at any point in time without providing notice to management if the request is less than one week. The Agency contends that this practice would hamper management's ability to find another employee to cover the shifts of the employee requesting leave. As a result, the Agency states that the efficiency and safety of its operations could be jeopardized. Conversely, the Agency asserts that its proposal will permit the Agency to make the necessary arrangements for employees requesting leave, since all leave requests will be needed by April 1 in order to be given priority consideration, or employees must provide the request at least five days prior to the date that the leave will be taken if submitted after April 1.

The Agency provided an affidavit from the Director of the Lock Operations and Marine Services. He states that in 2019, the Lock Operations employees used 2,848 hours of annual leave during the navigation season, which is equivalent to 237 12-hour shifts out of a possible 500 shifts during the navigation season. Additionally, he states that these employees used 1,122 hours of sick leave, which is equivalent to 93 12-hour shifts. As a result of employees taking annual and sick leave in 2019, that amounted to at least one employee absent from work for 330 shifts. To cover the shifts, the affiant states that the Agency needed to assign overtime to employees, or the Lock Operations operated shorthanded if an employee was on annual or sick leave.

Regarding the Union's proposal that permits employees to take last-minute leave for emergency situations, the Agency states that its proposal already provides options for these types

⁴ The Office of Personnel Management authorizes employees to maintain up to 240 hours of annual leave each year. Any accrued annual leave in excess of that ceiling is forfeited if not used by the final day of the leave year. The Agency contends that the possible 240 hours of accrued annual leave coupled with 208 hours of annual leave that a senior employee may be able to save (a senior employee with more than 15 years of service accrues 8 hours of annual leave each pay period, which amounts to 208 hours based on 26 pay periods in a calendar year), could permit the employees to take off 448 hours of annual leave in a calendar year.

of circumstances. In section (d)(7), it states that employees may request to leave work early, which will be considered and may be approved based on available relief and workload. Also, the Agency states under Article 40-1 of the CBA, employees may swap shifts, which would also allow the employees to take leave for emergency situations.

II. Union's Position

The Union states that its proposal conforms with the tentatively agreed upon language that the parties reached agreement over during their negotiations. In this respect, the Union states its proposal is designed to maximize the employee's right to take annual leave, while ensuring that the Agency's mission is met. The Union proposes in section (a) that employee's will not be limited to a specified amount of leave during the navigation season. Instead, it proposes that requests for leave for one week or more must be submitted by April 1 of each year, so that both management and employees can make the necessary arrangements to plan for the employees' absences. For leave requests that are less than one week, the Union proposes in section (b) that employees may submit those requests at any time. The Union further proposes in section (c) that employees are encouraged to take leave during the non-navigation season.

Finally, the Union proposes in section (d) that employees intending to use leave during the last three months of the calendar year must submit their request by October 1. The Union states that a leave system such as the one it proposes will allow employees to fully utilize leave available to them in a calendar year. The Union acknowledges, however, that ultimately it is within management's discretion to approve or deny the employee's leave requests based on the workload and needs of the Lock Operations.

The Union states that during the negotiations over this Article, the Agency advised the Union that it had denied four leave requests that were made during the navigation season because the employees had reached their 96-hour leave cap. The Union states that the denials were strictly based on management adhering to the parties' contractual agreement and not based on the actual work or mission of the Agency. The Union states that all decisions concerning annual leave for employees should be based on leave availability and the workload requirements of the Lock Operations to ensure that the mission of the Agency is met. The Union argues that the Agency's denials and the leave restriction it is proposing to maintain are contrary to the Office of Personnel Management's (OPM) "standards" because it limits the employees' rights to use annual leave.

The Union states that Lock Operations employees are the only employees in the bargaining unit that have a requirement to submit a leave request by a specified amount of time prior to taking the leave. The Union asserts that the requirement proposed by the Agency for Lock Operations employees to submit leave requests 5 days in advance of the date the employee wants to take the leave is contrary to OPM standards. The Union also asserts that its proposal, unlike the Agency's, allows employees the opportunity to request leave in the event of an emergency.

The Union argues that there is no evidence that there is a 50-year history of restricting Lock Operations employees' leave during the navigation season. The Union further states that

there is no proof that an individual requesting more than 96 hours of leave during the navigation season creates an undue hardship on the Agency. To support its point, the Union asserts that the parties agreed in a Memorandum of Understanding (MOU) that it is not necessary to cover employee shifts where the absence extends up to three workdays. Therefore, the Union contends that not every shift needs to be filled and the employees should be permitted to utilize their annual leave without limitation.

Finally, the Union states that the Agency's argument that employees could have up to 448 hours of leave available to use during the navigation season, which would hamper its ability to staff the Lock Operations and meet its mission is misplaced. The Union contends that only one employee, the employee with the most seniority will be granted leave if there is a conflict between two employees. Therefore, the Union argues that the safety of the Lock Operations will not be compromised if the Agency did not have a leave restriction in place during the navigation season.

III. Conclusion

The Panel will adopt the Agency's proposal, with modification. The Agency's proposal is substantively similar to the proposal that the parties agreed to during negotiation, but was ultimately disapproved by the Union during ratification. The Union did not offer any explanation as to why the membership voted against the proposal that the parties agreed to at the bargaining table. Therefore, the Panel will require the parties to follow what they agreed to during their negotiations.

The Agency's proposal balances its obligation to ensure that the Lock Operation's mission is met with the employees' rights to take annual leave. In this respect, the proposal maintains a leave restriction during the Lock Operations busiest time of the year, the navigation season, to guarantee that it can safely operate and maintain the Saint Lawrence Seaway. The Union contends that the 96-hour leave restriction is not supported, yet it offers no evidence to suggest that this leave restriction has inhibited the employees' use of annual leave aside from the denial of four employees' annual leave requests. The denial of leave for 4 employees out of 32 is not sufficient evidence to demonstrate a pervasive practice of leave denials that has significantly restrained the employees' rights to take annual leave. Further, the Union does not indicate whether the Agency made those denials within the last year, or over the course of the parties' current CBA, which has been in place since 2016.

Similarly, the Union argues that denying leave requests based on a contractual limit to annual leave and imposing a date by which employees must submit a leave request interferes with the employees' rights to annual leave and is contrary to OPM "standards". The Union's arguments are without merit. The Union only provides general references to OPM's overview of pay and leave administration and the OPM fact sheet for general information on annual leave to support its position. Those two exhibits indicate that an employee has a right to take annual leave, but that right is subject to managerial approval. Consistent with that, OPM guidance states that "[u]ltimately, supervisors are responsible for the overall planning, coordination, and approving of their employees' annual leave throughout the leave year so that the agency's

mission and the employees' needs are met..."⁵ Finally, the Union points to no authoritative source from OPM which states that an agency cannot require its employees to submit a leave request by a specified period of time. Further, the Union's own proposal requires employees to submit a leave request by a specified date and is arguably more restrictive than the Agency's proposal. The Agency's proposal complies with OPM policy by providing employees a bank of hours to utilize for annual leave during the navigation season, which will ensure that the mission of the Lock Operations is effectively and efficiently met.

The Union asserts that the parties agreed in a MOU that staff coverage for the Lock Operations was not necessary for absences of up to three consecutive workdays; therefore, the Agency's navigation season leave limitation is not necessary. The MOU does indicate in section A that the Agency will not require coverage of the Lock Operations if an employee is absent for up to three consecutive workdays. While the Agency may allow for absences of up to three days without needing additional manpower to staff the Lock Operations, that does not demonstrate the need for an unlimited amount of annual leave during the Division's busiest time of the year.

Next, the Union asserts that the Lock Operations has not had an annual leave restriction in place for the past 50 years, while the Agency produced an affidavit from the Lock Operations Director who attested to there being an annual leave restriction in place since 1965. The Director also stated that the Lock Operations had to expend a significant amount of resources to ensure that it was fully staffed while employees were on annual leave during the navigation season. Specifically, the Agency had to cover shifts with overtime or operate short-staffed for 237 out of the 500 shifts during the 2019 navigation season because employees were out on annual leave. This number does not account for the 93 shifts that had to be covered because employees were on sick leave, which in total amounts to 330 shifts that were covered during the navigation season. That's over half the number of shifts during this time. If the Union's proposal were adopted and there was no limit on the amount of time an employee could be on leave, that could severely jeopardize the operations of the Division.

Lastly, the Union argues the Agency's proposal does not permit employees to utilize annual leave if an unexpected emergency arises and the employee has reached the 96-hour cap during the navigation season. In section (d)(7) of the Agency's proposal, it states that employees may request to leave work early and those requests will be granted based on the ability of the Lock Operations to meet its mission. The Agency's proposal, however, does not account for situations if the employee is not at work and an emergency arises. Therefore, the Panel will impose the following additional language in addition to the Agency's proposal:

"Requests to take annual leave due to an emergency, regardless of the whether the employee has reached the 96-hour leave limitation during the navigation season, will be considered and may be approved based on the relief available and/or workload of the Lock Operations."

The Agency has provided justified rationale for restricting employees' annual leave during the navigation season – to ensure the safety of the Saint Lawrence Seaway and that the mission of

⁵ OPM Pay & Leave, Fact Sheet: Annual Leave (General Information), <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/annual-leave/>.

the Lock Operations is met. Therefore, the Panel will adopt the Agency's proposal with modification.

ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby orders the parties to adopt the provisions as stated above.



Mark A. Carter
FSIP Chairman

July 21, 2020
Washington, D.C.

ATTACHMENTS

- Parties' Proposals

CORPORATION PROPOSAL –
ARTICLE 16-4(f)(2) – LOCK OPERATIONS CONTINUOUS DUTY EMPLOYEES

16-4(f)2

Proposed Change (underlined and in bold)

- (a) During navigation season, continuous duty employees will be entitled up to **ninety-six** (96) hours of annual leave, dependent on relief availability. All other annual leave must be taken in the non-navigation season.
- (b) Continuous duty employees are advised not to enter the navigation season with annual leave balance that includes “use or lose” annual leave in excess of **ninety-six** (96) hours.
- (c) This continuous duty annual leave policy is effective from the beginning of the Navigation Season (as defined by the Seaway Notice) through November 30th of each year. Leave will be restricted for the period of December 1st through the end of the navigation season.
- (d) Navigation Season Annual Leave Requests:
 - (1) – Annual leave requests submitted by April 1st will be given priority over requests submitted later in the season when there is a conflict for coverage.
 - (2) If two (2) or more employees submit requests for annual leave (for the same time period) prior to April 1st deadline, and all leave requests cannot be approved, the employees are encouraged to resolve the conflict, the following priorities will apply:
 - (a) Seniority in the job classification;
 - (b) Corporation Seniority;
 - (c) Total government service
 - (3) Annual leave requests submitted after April 1st must be submitted at least five (5) calendar days in advance.

(4) If **two** (2) or more employees submit requests for annual leave (for the same time period) after the April 1st deadline, and all leave requests cannot be approved, the employees are encouraged to resolve the conflict informally. If the employees are unable to resolve the conflict, the following priorities will apply:

- (a) By date/time submitted;
- (b) Seniority in the job classification;
- (c) Corporation Seniority;
- (d) Total government service.

(5) The **S** supervisor will inform the employee of the approval/disapproval of leave request within one (1) pay period prior to the leave date when possible. **If disapproved, the reason will be noted on the form.**

(6) When coverage has been scheduled for approved annual leave, a minimum notification of ninety-six (96) hours must be made for cancellations and/or changes. Changes can only be made between the employee and the **S** supervisor. Cancellations must be made in **the electronic time and attendance system writing**. If less than **ninety-six** (96) hours notification is provided and accommodation cannot be made, the employee will be required to take the previously approved and scheduled leave.

(7) Requests to leave work early will be considered and may be approved based on relief availability and/or workload. The employee must report to work and request leave. If approved, those hours will not count toward the 96 hour limit.

The only changes proposed from what was worked out at the table during prior negotiations are with Article 16 Section 4 subsection f (2).

16-4 (f)

2. Lock Operations Continuous Duty Employees:

- (a) For planning purposes, scheduled annual leave requests for one week or more (block leave) must be submitted by April 1st each year. Supervisors will approve or disapprove these leave requests by April 30th of each year. Conflicts will be resolved in accordance with 16-4. d.
- (b) Requests for leave of less than one week may be submitted at any time. Employees are encouraged to submit leave requests as early as possible to allow the work to be scheduled. Approval of leave requests will be based on the needs of the work unit. Requests will be approved or disapproved in a timely manner, in accordance with 16-3.
- (c) Lock Operations Continuous Duty Employees are encouraged to take leave during the non-navigation season. Leave during the opening/closing periods, buoy runs, and winter work period may be restricted.
- (d) Lock Operations Continuous Duty Employees leave slips to schedule use-or-lose leave during the last three months of the calendar year must be submitted to the supervisor by October 1st of each calendar year.