STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

International Brotherhood of Teamsters Local 700,	)	
Charging Party	)	
	)	Case Nos. S-CA-09-115
and	)	S-CA-10-057
	)	S-CA-10-105
Lake County Circuit Clerk,	)	S-CA-10-107
Respondent	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD STATE PANEL

On November 5, 2012, Administrative Law Judge (ALJ) Elaine L. Tarver issued a Corrected Recommended Decision and Order (RDO), finding that the Lake County Circuit Clerk (Respondent) had violated Section 10(a)(4) and (1) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010), by failing to bargain in good faith with the International Brotherhood of Teamsters, Local 700 (Charging Party). She recommended finding that it had failed to bargain over a fair share clause in the parties' collective bargaining agreement.[1]

Pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240, Respondent filed timely exceptions. Charging Party has not filed a response. For the reasons which follow, we reject the ALJ's recommendation and dismiss the complaint.

[1] This finding was made in Case No. S-CA-10-057. The charges in Case Nos. S-CA-09-115, S-CA-10-105 and S-CA-10-107 have been withdrawn.

Issue Presented

The relevant portion of the complaint alleged that the Respondent failed and refused to bargain in good faith with the Charging Party in the negotiation of an initial collective bargaining agreement by engaging in surface bargaining in violation of Sections 10(a)(4) and (1) of the Act. At hearing, the Charging Party premised its surface bargaining claim on the Respondent's refusal to agree to the Charging Party's proposals to include a "fair share" clause in the agreement. Therefore, the issue to be decided is whether Respondent's conduct with respect to the Union's fair share proposals constitutes surface bargaining, and therefore a failure to bargain in good faith within the meaning of Sections 10(a)(4) and (1) of the Act.

Parties' Course of Bargaining

The essential facts are as follows. In Case No. S-RC-08-115, the Board certified Charging Party as the exclusive representative of about 127 of the 150 positions within the office of the Circuit Court Clerk of Lake County. The only employees of that office not in the bargaining unit were managers and supervisors. Certification issued on September 26, 2008, and the parties held their initial negotiating session on November 12, 2008.

On the initial date of bargaining, Charging Party submitted its first proposal for a collective bargaining agreement. This proposal included a dues check-off provision, requiring the Respondent to make a payroll deduction and transmit to the Charging Party union dues for any unit employees submitting written authorization for such deductions. Charging Party's initial proposal also included a "fair share" clause, requiring unit employees who do not submit union dues deduction authorization cards to the Respondent to pay the Charging Party a "service fee," in the amount of 85% of full union dues, for the purpose of "administering the provisions

of" the proposed collective bargaining agreement. Under the Charging Party's proposal, such fee payments would also be subject to payroll deduction and transmission to the Charging Party under the terms of the dues check-off provision. The parties reached tentative agreements on a number of items on that date. On December 7, Respondent submitted its proposal, which omitted a fair share clause. It explained management's feelings that employees not in the union should not have to pay fair share fees as it would be a financial hardship. In response, Charging Party offered to provide its showing of majority support, and proposed to negotiate a fair wage. At one point during the meeting the Clerk of the Court, Sally Coffelt, appeared angry and left the session. She testified she felt Charging Party's lead negotiator, Barbara Cornett, was being antagonistic, mean and abusive toward her.

When the parties again met on January 9, 2009, Charging Party presented a counterproposal, the parties reached an agreement on another issue, and they again discussed the fair share clause. Charging Party submitted another counterproposal on February 11, and the parties reached agreement on two more issues. At the next meeting on April 15, the Respondent submitted a counterproposal which again omitted a fair share clause. Respondent's proposal did, however, reflect the Respondent's tentative agreement to the Charging Party's dues check-off proposal, except for that portion of the check-off proposal that would require the deduction of fair share fees.

Charging Party submitted another proposal on July 16, 2009, and the parties reached more tentative agreements. Charging Party also presented signed authorization cards showing that it represented a "vast majority" of the membership, and offered to give the Clerk the ability to determine the amount of fees fair share employees would pay. Respondent did not change its

position on the fair share clause. The parties met to discuss open items on July 22 and August 11 and Respondent made some concessions, but none on the fair share clause.

On August 24, 2009, Charging Party filed an unfair labor practice charge in Case No. S-CA-10-057, the only charge that remains in issue. This charge, along with charges filed in Case Nos. S-CA-09-115, S-CA-10-105 and S-CA-10-107, were investigated, and the Board's Executive Director issued a complaint for hearing and an order consolidating the cases.[2] The charges in the latter three cases have since been withdrawn by the Charging Party.

The parties agreed to use a mediator at the next meeting scheduled for September 1, 2009, but Respondent did not want a face-to-face meeting, just handwritten proposals, and the parties did not negotiate that day. They met with the mediator present on September 28, and reached agreement on more open items. Charging Party maintains that fair share was discussed at this meeting, but no progress was made. At the next negotiation meeting, on October 19, Charging Party submitted a proposal modifying language to the layoff clause, and also, for the first time, submitted a written modification to its initial fair share proposal. Under its modified proposal, fair share fees would be waived for employees "who demonstrate that payment of the service fee constitutes an economic hardship," and "for such period of time that the hardship persists." Respondent rejected both proposals.[3] The record reflects that the parties engaged in

[2] The charge in Case No. S-CA-09-115 was filed on November 17, 2008; the charge in Case No. S-CA-10-105 was filed on October 8, 2009; and the charge in Case No. S-CA-10-107 was filed on October 15, 2009.

[3] The next day, September 29, 2009, an employee, Rebecca Cook, filed a decertification petition with the Board in Case No. S-RD-10-005. On January 20, 2010, the Executive Director issued an order holding that petition in abeyance pending resolution of the charges in Case Nos. S-CA-10-057, S-CA-10-105 and S-CA-10-107. Between the date of the Board's meeting at which it reached its decision in this case and the date this written decision issued, we were advised by a person seeking to replace Cook as the

subsequent negotiation sessions on December 7, 2009 and February 2, 2010. Sometime in December 2009, the Respondent implemented wage increases based on merit, but this was done without objection by Charging Party.

Relevant Law

Section 10(a)(4) makes it an unfair labor practice for an employer

> to refuse to bargain collectively in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit, including, but not limited to, the discussing of grievances with the exclusive representative[.]

Violation of Section 10(a)(4) is often a derivative violation of Section 10(a)(1), which makes it an unfair labor practice for an employer

> to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act or to dominate or interfere with the formation, existence or administration of any labor organization or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay[.]

Section 7 establishes the duty to bargain, and in relevant portion provides:

> A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section.
>
> For the purposes of this Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours, and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

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petitioner that Cook had been moved into "a job title/classification that is not included in the employees of the Lake County Circuit Clerk bargaining unit." That information played no role in our decision.

> The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law. If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

ALJ's Analysis

The Charging Party accuses the Respondent of surface bargaining by its failure to negotiate with respect to the Charging Party's fair share proposal. Respondent argues it was merely engaged in hard bargaining, and points to its active participation in negotiations and to the numerous issues for which the parties had reached agreement. In finding Respondent had violated the Act, the ALJ cited authority that requires the Board to consider the totality of the circumstances, and primarily relied upon the numerous court, board and NLRB decisions that hold that a party has to intend to reach an agreement. She found Respondent had no such intent. She references the Charging Party's attempt to address Respondent's asserted concerns about the fair share proposal, and concludes that Respondent refused to consider any course of action other than to have no fair share clause at all. This was evident from Clerk Coffelt's testimony at hearing where she repeated her earlier stated concern over individuals' ability to pay fair share fees when they have opted out of the union. The ALJ found that this was not a matter of hard bargaining, but of no bargaining at all.

Respondent's Exceptions

Respondent primarily relies on Section 7's provision that a party is under no obligation to agree to a proposal or make a concession, and on the fact that the parties engaged in a number of bargaining sessions and reached agreement on many issues. With respect to the ALJ's finding that the Clerk's refusal to consider any option other than having no fair share clause at all indicated that Respondent had never intended to bargain over fair share fees, Respondent simply asserts that it *had* considered the proposals and then explained the Clerk's position that "she had not seen a reason to agree to fair share and, more importantly, that she viewed fair share as imposing a financial hardship on her employees." Respondent also states that the degree of employee support demonstrated for the employees' certified exclusive representative was of no relevance to the merits of the Charging Party's fair share proposal. Finally, Respondent contends that "[t]he Circuit Clerk is tasked with doing what she believes is in the best interest of all her employees, not just those who filled out dues authorization cards."

Analysis and Decision

As the ALJ correctly noted in her decision, the duty to collectively bargain in good faith fundamentally requires both parties to engage in negotiations with "an open mind and a sincere desire to reach an ultimate agreement." Service Employees Int'l Local Union No. 316 v. Ill. Educ. Labor Relations Bd., 153 Ill. App. 3d 744, 751 (4th Dist., 1987); City of Mattoon, 11 PERI ¶2016 (IL SLRB 1995); City of Springfield, 6 PERI ¶2051 (IL SLRB 1990). Where a party undertakes a calculated strategy of avoiding reaching an agreement, and does nothing more than "go through the motions of bargaining," the Board will find that the party has engaged in "surface bargaining" in violation of Section 10(a)(4) of the Act. Service Employees Int'l Local

Union No. 316, 153 Ill. App. 3d at 751; Chicago Typographical Union, 15 PERI 3008 (IL LLRB 1999).

An equally well-recognized and fundamental principle of collective bargaining is that, while the obligation to bargain in good faith requires both parties to negotiate with "a sincere purpose to find a basis of agreement," the Board "cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position." Laborers Local 996 and County of Woodford, 8 PERI ¶2019 (IL SLRB 1992) (quoting Atlanta Hilton & Tower, 271 NLRB 1600 (1984)); also see H.K. Porter Co. v. NLRB, 397 US 99 (1970). This principle is expressly incorporated in Section 7 of the Act, which provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." Therefore, as the Board noted in Chicago Typographical Union, "[a]n adamant insistence upon a bargaining position is not of itself a refusal to bargain in good faith" (quoting Neon Sign Corp. v. NLRB, 602 F.2d 1203 (5th Cir. 1979)).

As the ALJ also correctly noted, in a surface bargaining case, the Board will examine "the totality of the circumstances" in order to determine whether a respondent engaged in permissible "hard bargaining," or whether the respondent was instead motivated by a bad faith desire to avoid reaching agreement altogether. Chicago Typographical Union, and City of Mattoon. The types of conduct indicative of bad faith intent include delaying tactics; unreasonable bargaining demands (such as a proposal for a contract with a term of seven weeks - see NLRB v. Holmes Tuttle Broadway Ford, Inc., 465 F.2d 717 (9th Cir. 1972)); an employer's implementation of unilateral changes involving mandatory subjects of bargaining; failure to designate a representative with sufficient bargaining authority; withdrawal of previously

accepted proposals; and arbitrary scheduling of bargaining meetings. Laborers Local 996 and County of Woodford.

In the case at hand, the ALJ found a violation of Section 10(a)(4) based solely on the Respondent's bargaining posture with respect to the Charging Party's fair share proposal. The ALJ concluded that the Respondent's unwillingness to make a concession on fair share, despite the Charging Party's demonstration of majority support in the bargaining unit, as well as the Charging Party's modification of its initial proposal to allow for a temporary waiver of fair share fees, for employees who are able to demonstrate to the Charging Party that the payment of the fees would "constitute an economic hardship," amounted to "no bargaining at all" on the fair share issue, and therefore a violation of Section 10(a)(4).

We disagree with the ALJ's conclusion that this evidence, standing alone, is sufficient to warrant a ruling that the Charging Party has met its burden of proving that the Respondent engaged in surface bargaining in violation of Section 10(a)(4). The totality of the circumstances, as reflected in the record before us, demonstrates that the parties engaged in meaningful negotiations over numerous issues in the course of bargaining for a first collective bargaining agreement, including the achievement of several tentative agreements. There is no indication in the record that the Respondent has engaged in arbitrary scheduling of meetings or other dilatory tactics, that it submitted regressive bargaining proposals or withdrew tentative agreements, that it made any statements suggestive of a deliberate strategy of avoiding agreement with the Charging Party, or that it committed any other unfair labor practices. In short, other than its alleged unreasonableness with respect to the subject of fair share, there is no evidence of bad faith by the Respondent anywhere in the record.

We are unable to find any precedent for the proposition that an employer's refusal to make a concession on a fair share or similar proposal is a sufficient basis, without more, for a finding that the employer has engaged in illegal surface bargaining. Instead, the decisions we have found consistently require considerably more evidence of bad faith than can be gleaned from the record before us.[4]

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[4] See, e.g., Illinois-American Water Co., 301 NLRB No. 23 (1991), and Challenge-Cook Bros., 288 NLRB No. 46 (1988) (proposal to eliminate existing union security clause permissible hard bargaining in negotiations for successor CBA, and not a basis for finding illegal surface bargaining; a party is entitled to stand firm on a position if it reasonably believes its position is fair and proper, or that it has sufficient bargaining strength to force the hand of the other party); Reed and Prince Mfg. Co., 96 NLRB 850 (1950), enforced, 205 F.2d 131 (1st Cir. 1953) (bad faith bargaining found where employer with "unsavory labor relations history" took the position that it was not legally obligated to bargain over dues check-off despite established NLRB authority to the contrary, delayed scheduling negotiation meetings and providing requested bargaining data, insisted on the presence of a stenographer at bargaining sessions, unreasonably withheld agreement on admittedly trivial matters such as a union recognition clause, and implemented a wage increase without notice to the union); United States Gypsum Co., 94 NLRB 112, amended 97 NLRB 889 (1951), enforced, 206 F.2d 410 (1st Cir. 1953) (surface bargaining found where employer's spokesman stated that it would be a waste of time to discuss union security, dues check-off, seniority and arbitration, and employees were told that plant would be shut down before the employer would agree to those four items; the employer frequently expressed its intense dislike for the union and its intention to bargain to impasse and move the plant; and the employer illegally implemented unilateral changes, including layoffs); Universal Fuel, Inc., 358 NLRB No. 150 (September 27, 2012) (surface bargaining found in negotiation of first CBA where totality of employer's conduct included opposition to union security proposal for purely philosophical reasons and without advancing any legitimate business justification, reneging on several tentative agreements late in negotiations and making regressive proposals without good cause, introducing new and unpalatable proposals on subcontracting and picketing late in negotiations without any legitimate business justification, falsely informing employees that union security was the only remaining issue, and blaming the union for failure to reach agreement).

Also see, more generally, Atlanta Hilton & Tower, 271 NLRB 1600 (categorical rejection of all of the union's proposals for a new CBA, and unwavering insistence on a one-year extension of current CBA, not surface bargaining, where there was no other indication of intent not to reach agreement); and NLRB v. Hardest Co., Inc., 308 F.3d 859 (8th Cir. 2002) (surface bargaining found where employer engaged in regressive bargaining on a number of proposals, illegally refused to provide requested information, illegally implemented unilateral changes, and also made illegal statements to unit employees away from the table which suggested a specific employer strategy of undermining the union and avoiding agreement on a CBA).

We recognize that the fair share proposal is a significant one for the Charging Party, and also exactly the type of issue that an employer motivated by bad faith might try to exploit in an effort to undermine a union, and to avoid agreement on an entire CBA, under the guise of "hard bargaining." For this reason, we believe that an employer's intransigence on an issue such as fair share should draw particular scrutiny in weighing the totality of the circumstances with regard to an allegation of surface bargaining. However, we cannot infer bad faith by the Respondent solely on the basis of its refusal to make a concession on this one issue, in the absence of any other evidence suggesting that the Respondent's position on this issue was motivated by a desire to avoid agreement on a CBA. While it is indeed possible that the Respondent's posture on fair share was part of a calculated effort by the Respondent to avoid agreement on a CBA altogether, based on the record before us, it is equally possible to infer a genuinely-held conviction by the Respondent that a CBA mandating payment of fees to Charging Party is unfair to the covered employees, and that financial support for a union should be a matter of "personal choice," as the Clerk testified at hearing. Although the substantive merit of the Respondent's stated position on fair share is certainly open to debate, we cannot say that the Respondent's insistence on its position is *per se* unreasonable, or that, in the absence of any other indicia of bad faith, it is sufficient, in and of itself, to constitute an unfair labor practice.

To find that the Respondent has engaged in surface bargaining in this case, solely on the basis of the Respondent's unwillingness to waver from its opposition to the inclusion of a fair share clause, and in the absence of any other evidence of bad faith, would be tantamount to creating a *per se* rule requiring employers to make concessions on union fair share proposals, even though, as reflected in the language of Sections 6(a) and 6(e) of the Act, the legislature

clearly did not intend to impose a requirement that every CBA include a fair share clause.[5] To create such a *per se* rule would also be contrary to Section 7 of the Act, and firmly entrenched NLRB precedent cited herein, which reserves to both parties to a negotiation the right to reject proposals and refrain from making concessions, and which expressly precludes the Board from compelling agreement to any proposal.

Unlike the circumstances present in Farmers Cooperative Gin Ass'n, 161 NLRB 887 (1966) and H.K. Porter Co., 153 NLRB 1370 (1965), there is no suggestion in this case that Respondent's position on fair share is inconsistent with the position it has taken in other negotiations (it appears that this is Respondent's first collective bargaining experience), that it is arbitrarily refusing to agree to deduct union dues despite its willingness to process paycheck deductions for a variety of other purposes, or that its objective was to avoid providing the union with any form of assistance in managing its affairs. In fact, it is worth noting that, consistent

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[5] Section 6(a) of the Act provides in relevant part as follows:

> Employees *may* be required, pursuant to the terms of a lawful fair share agreement, to pay a fee which shall be their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and other conditions of employment as defined in Section 3(g).

(Emphasis added.) Similarly, Section 6(e) provides that

> When a collective bargaining agreement is entered into with an exclusive representative, it *may* include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment, as defined in Section 3(g), but not to exceed the amount of dues uniformly required of members.

(Emphasis added.)

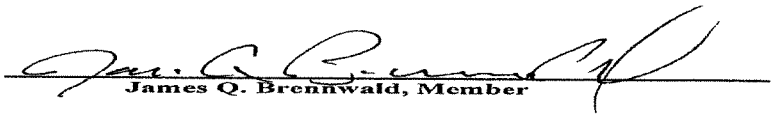
with its stated position that financial support for a union should be a matter of employee choice, and unlike the employers in the cases cited, the Respondent did agree to the Charging Party's dues check-off proposal for employees who voluntarily elect to submit dues deduction authorization cards.

In conclusion, and limiting our holding to the very specific facts of this case, and based on our finding that, other than its rejection of the Charging Party's fair share proposals, there is no evidence of bad faith by the Respondent, we find that the Charging Party has failed to meet its burden of proving that the Respondent engaged in "surface bargaining" in violation of Sections 10(a)(4) and (1) of the Act. Accordingly, we reverse the RDO, and dismiss the complaint.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

John Hartnett, Chairman

Paul S. Besson, Member



James Q. Brennwald, Member

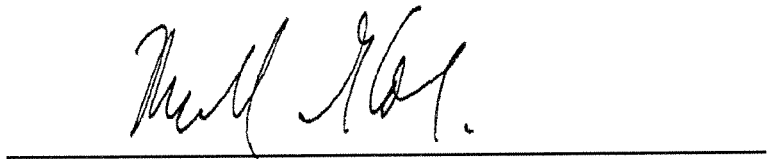
Members Coli and Washington, dissenting:

We respectfully dissent from the decision reached by our colleagues, and would have found a violation of Section 10(a)(4) and (1) under the facts of this case.

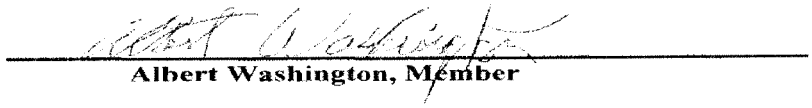
As the majority recognizes, refusing to bargain over a fair share proposal is precisely the type of tactic an employer might use to undermine a union and avoid reaching a collective bargaining agreement. The potential effectiveness of that tactic is particularly keen where, as here, the bargaining relationship is in its infancy and the parties are negotiating an initial collective bargaining agreement.[6] While a finding of surface bargaining requires more evidence of bad faith than a mere refusal to bargain over a single issue, we believe the amount of such additional evidence needed decreases in proportion to the importance to the union of the refused subject of bargaining. That fair share fees are important to the union cannot be questioned. Nor should it be questioned that Respondent's asserted reason for refusing to bargain on that issue—that it would pose a financial hardship for her employees—is wholly inconsistent with her position that they were already receiving fair wages and also inconsistent with her rejection of Charging Party's invitation to participate in the process of setting fair share fee amounts. We find some evidence of bad faith in these inconsistencies. We also note that Respondent's explanation for walking out of a negotiation session (an explanation given long after the heat of the moment) was that she took personal offense at what was being said by Charging Party's lead negotiator, and note that she has consistently insisted that it was her role to represent the interests

[6] That a decertification petition was filed the day after the unfair labor practice charge was filed in this case tends to underscore the potential vulnerability of unions during their negotiations of initial collective bargaining agreements.

of her employees. Taken together, these statements show that at both an emotional and an intellectual level, Respondent refuses to acknowledge the role of the entity we have certified as her employees' exclusive bargaining representative. Under this set of facts, we would have found surface bargaining, and a violation Sections 10(a)(4) and (1) of the Act, by refusing to bargain over the topic of fair share fees.



Michael G. Coli,



Albert Washington, Member

Decision made at the State Panel's public meeting in Springfield, Illinois on February 5, 2013, written decision issued in Chicago, Illinois on May 13, 2013.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

International Brotherhood of Teamsters Local 700,	)	
Charging Party	)	
and	)	Case No. S-CA-09-115 S-CA-10-057 S-CA-10-105 S-CA-10-107
Lake County Circuit Clerk,	)	
Respondent	)	

CORRECTED ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER[1]

On November 17, 2008, International Brotherhood of Teamsters Local 700 (formerly Local 714) (Charging Party or Union) filed a charge with the State Panel of the Illinois Labor Relations Board (Board) in Case No. S-CA-09-115, alleging that the Lake County Circuit Clerk (Respondent) engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2010) as amended (Act), and the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). On August 4, 2009 the Charging Party filed a charge in Case No. S-CA-10-057 with the Board alleging that Respondent engaged in further unfair labor practices within the meaning of the Act , and filed similar charges of unfair labor practices on October 8, 2009 in Case No. S-CA-10-105 and October 15, 2009 in Case No. S-CA-10-107. These charges were investigated pursuant to Section 11 of the Act and on January 25, 2010, the Executive Director of the Illinois Labor Relations Board issued a Complaint for Hearing and Order Consolidating Cases.

[1] Recommended Decision and Order corrected to include remedy of extension of one year certification period by 11 months.

On September 29, 2009, Rebecca Cook filed a Decertification Petition (Petition) in Case No. S-RD-10-005 with the Board seeking an election to determine whether the employees in the bargaining unit desired to continue representation by the Charging Party. On October 21, 2009, the Charging Party requested the Board dismiss the petition because of the pending unfair labor practice charges against the Respondent. On January 10, 2010 the Executive Director issued an Order Blocking Decertification Election effectively holding the petition in abeyance until the pending charges were resolved.

On July 2, 1010, the Charging Party withdrew its charges in Case Nos. S-CA- 09-115 and S-CA-10-105. A hearing in this case was held on March 14, 2012, in the Chicago offices of the Illinois Labor Relations Board at which time the Charging Party also withdrew its charges in Case No. S-CA-10-107 leaving only the charges in Case. No. S-CA-10-057 for resolution. The Charging Party presented evidence in support of the allegations, and all parties were given an opportunity to participate, adduce relevant evidence, examine witnesses, argue orally and file written briefs. After full consideration of the parties' stipulations, evidence, and arguments, and upon the entire record of the case, I recommend the following.

I. PRELIMINARY FINDINGS

The Parties stipulate and I find as follows:

1. At all times material, the Lake County Circuit Clerk (Respondent) has been a public employer within the meaning of Section 3(o) of the Act.

2. At all times material, the Respondent has been subject to the jurisdiction of the Board's State Panel pursuant to Section 5(a) of the Act.

3. At all times material, the Respondent has been a unit of local government subject to the Act pursuant to Section 20(b) of the Act.

4. At all times material, International Brotherhood of Teamsters, Local 700 (Charging Party) has been a labor organization within the meaning of Section 3(i) of the Act.

5. At all times material, Charging Party has been the exclusive representative of the bargaining unit composed of Respondent's employees including those employed in the job title of Principal Clerk.

6. The Charging Party was certified by the Board on September 26, 2008, in Case No. S-RC-08-115, as the exclusive representative for the bargaining unit.

7. The parties are negotiating their initial collective bargaining agreement.

8. At all times material, Sally Coffelt has occupied the title of Lake County Circuit Clerk and has been an agent of Respondent authorized to act on its behalf.

9. The initial negotiation session between Respondent and Charging Party occurred on November 12, 2008.

10. The parties have participated in subsequent negotiation sessions on December 4, 2008, January 7, 2009, January 22, 2009, February 11, 2009, April 15, 2009, June 2, 2009, July 15, 2009, July 22, 2009, August 11, 2009, September 1, 2009, September 28, 2009, October 19, 2009, December 7, 2009, and February 2, 2010.

11. The only issues for hearing relate to the charges filed in Case No. S-CA-10-057, as all other charges were withdrawn by the Charging Party.

II. ISSUES AND CONTENTIONS

The Charging Party argues that the Respondent failed to bargain in good faith on a mandatory subject of bargaining by engaging in surface bargaining. More specifically, the Charging Party argues that the Respondent refused to negotiate any form of a fair share clause for non-members, thus violating the Act.

The Respondent denies that it violated the Act, and maintains that it intended on reaching an agreement when negotiating the collective bargaining agreement. The Respondent argues that its position on the fair share clause was merely hard-bargaining and did not reach the level of bad faith or surface bargaining.

III. FINDINGS OF FACT

Lake County Circuit Court Clerk (Respondent) employs approximately 150 employees. Of those, approximately 127 positions are in the in bargaining unit although all positions within

the unit are not filled. Management and supervisors are excluded, but every other position is in the bargaining unit. The Respondent has offices located in Waukegan, Park City, Round Lake, and Mundelein and a Juvenile Center in Vernon Hills. Sally Coffelt has been the Clerk of Lake County for 32 years. It is an elected position. Her office is located in the Waukegan Courthouse. She has never laid-off any personnel.

The Union and Respondent are negotiating its initial collective bargaining contract. The Board certified the Union as the exclusive representative of the bargaining unit on September 26, 2008. The Union and Respondent have been negotiating since November 12, 2008. The Charging Party's witness, Barbara Cornett, gave a detailed account of the negotiations between the parties. Cornett is employed by the Charging Party as a Business Representative and she handles grievances, labor management meetings, meets with the members of the bargaining unit and participates in negotiations for bargaining units. She was present at every meeting between the parties. The Union presented its first proposal on November 12, 2008, which was based on language contained in other contracts the Union currently had in place with other bargaining groups of the Respondent's.

The parties met on December 4, 2008, and the Respondent admitted receiving the Union's correspondence including information regarding raises for employees and cost of insurance. The Union expressed its desire to negotiate over wages instead of the Respondent implementing them as they would have in the past. The parties reached tentative agreements on secondary employment, authorization of contract, a savings clause, an article on indemnification and a preamble.

On December 7, 2008, the Respondent submitted its proposal, omitting a fair share clause. The fair share provision was discussed and management felt that employees not in the

union should not have to pay fair share dues as it would be a financial hardship. The Union offered two ways to ease management's concerns by offering to provide the showing of support by those who signed cards to show that most bargaining unit employees were in favor of joining the Union. The Union also proposed to negotiate a fair wage. The Clerk, Sally Coffelt appeared to be angry and left the session. Coffelt later testified that she was upset because she felt Cornet was being antagonistic, mean and abusive toward her for no reason.

On January 9, 2009, the Union submitted its counterproposal. The parties negotiated to reach a compromise on temporary employees being laid-off before regular employees. They also discussed the fair share clause.

On February 11, 2009, the Union submitted another counterproposal and the parties reached tentative agreements on two more proposals. The next meeting was on April 15, 2009 where the Respondent submitted its counterproposal, and consistent with its first, omitted a fair share clause.

On July 16, 2009, the Union submitted its proposal and the parties reached more tentative agreements. At this meeting the Union provided cards to show that it was representing a vast majority of the membership and offered to give the clerk ability to decide the amount of dues fair share employees would pay. The Respondent did not change its position on the fair share clause.

On July 22, 2009, the parties met again and discussed all open items. These open items included the language regarding the fair share clause. The next meeting was held August 11, 2009. The Respondent made concessions on some tentative agreements and these changes included merit increases, temporary employees and lay-offs. There were no concessions regarding the fair share clause.

Prior to the parties meeting on September 1, 2009, the parties agreed to use a mediator at the next meeting. A mediator was present at this meeting. The Union wanted face to face meeting, but the Respondent preferred a handwritten proposal instead. The parties did not negotiate that day.

On September 28, 2009, the parties met again with the mediator present. The parties went over a list of "open items". More tentative agreements were reached and the Union tried to offer proposals on the fair share clause to no avail. On October 19, 2009, the Union submitted a proposal modifying language in the layoff and fair share clauses. The Union's proposal reduced fair share fees for those experiencing economic hardships. According to the Union, the Respondent rejected both.

On December 7, 2009, the Respondent implemented wage increases based on merit to no objections by the Union. This was also the last day of negotiation sessions. The Union then filed the unfair labor practice charges that resulted in this case.

According to the Respondent, it has always negotiated with the intention of reaching an agreement. The Respondent has never refused to meet and has always actively participated in negotiations. The Respondent characterizes its stand on the fair share agreement as hard bargaining arguing that that is not a violation of the Act. Sally Coffelt testified that the fair share clause was a major stumbling block for negotiations. Coffelt did not agree to a fair share provision because she felt that it was a personal choice and would be a hardship on individuals. She also reasoned that if you want to join the union, you should be allowed to, but if you did not want to join the union you should not be forced to pay.

IV. DISCUSSION

Section 10(a)(4) of the Act provides that it is an unfair labor practice for an employer or its agents "to refuse to bargain in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit, including, but not limited to, the discussing of grievances with the exclusive representative." The duty to bargain is defined in Section 7 of the Act, which provides in relevant part:

> A public employer and the exclusive representative have the authority and duty to bargain collectively set forth in this Section. For the purposes of this Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

In this case, the Charging Party alleges that the Respondent has failed to bargain in good faith with the Charging Party during their negotiations of the initial collective bargaining agreement because the Respondent refused to negotiate a fair share provision. It shall be an unfair labor practice for an employer or its agents to refuse to bargain collectively in good faith with a labor organization under Section 10(a)(4) of the Act. 5 ILCS 315/10(a)(4) (2010). Bargaining does not mean a formal meeting where each side maintains a "take -it -or- leave- it" attitude; good-faith bargaining presupposes an open mind and a sincere intent and effort to find common ground and desire to reach an ultimate agreement. Service Employees International Union, Local 73 v. Illinois Educational Labor Relations Board, 153 Ill. App. 3d 744, 751 (4th Dist. 1987); City of Mattoon, 11 PERI ¶ 2016 (IL SLRB 1995); City of Springfield, 6 PERI ¶

2051 (IL SLRB 1990); City of Burbank, 4 PERI ¶ 2048 (IL SLRB 1988) (citing NLRB v. Montgomery Ward and Co., 133 F.2d 676, 686 (9th Cir. 1943)).

In determining whether a party has fulfilled its duty to bargain in good faith, the Board looks to the totality of circumstances. City of Mattoon, 11 PERI ¶ 2016 (IL SLRB 1995); City of Springfield, 6 PERI ¶ 2051 (IL SLRB 1990); City of Burbank, 4 PERI ¶ 2048 (IL SLRB 1988). Conduct indicative of a failure to bargain in good faith may include delaying tactics, failure to appoint an agent with sufficient authority to engage in meaningful bargaining, withdrawal from tentative agreements and attempting to bypass the union and bargain directly with employees. County of Woodford and Woodford County Sheriff, 8 PERI ¶ 2019 (IL SLRB 1992).

The Union specifically argues that the Respondent's refusal to negotiate its proposal on fair share resulted in "surface bargaining." Surface bargaining occurs when a party's actions appear to be good-faith collective bargaining but where the party is only going through the motions of bargaining. See American Federation of State, County & Municipal Employees, Council 31, AFL-CIO v. Illinois State Labor Relations Board, 187 Ill. App. 3d 585, 590 (4th Dist. 1989).

Here, the Respondent failed and refused to bargain the fair share clause. In its first proposal, the Union included a fair share clause. As early as December 7, 2009, the Respondent refused to agree to a fair share clause because the Clerk felt that contracting employees to pay fair share dues when they opt out of the Union was a financial hardship she was unwilling to impose. In response, the Union agreed to provide evidence that it had a majority support from bargaining unit members and offered to negotiate the amount of fair share dues employees would have to pay. During future negotiation sessions, the Union provided evidence of majority support and also agreed to allow the Respondent to decide how much in fair share dues

nonmembers would have to pay. Lastly, the Union submitted another proposal on October 19, 2009, offering a waiver of fair share dues to nonmembers who demonstrate an economic hardship. To all of these concessions, the Respondent stood firm on its decision not to add a fair share clause to the collective bargaining agreement.

The Respondent argues that its position was merely hard-bargaining. Because the Respondent actively negotiated most of the terms of the contract, it believes that it has not violated the Act. It is true that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession" and that the National Labor Relations Board (NLRB) and federal courts have construed identical language in the National Labor Relations Act, 29 U.S.C. § 151 et seq., to mean that "[a]n adamant insistence upon a bargaining position is not of itself a refusal to bargain in good faith." Neon Sign Corp. v. NLRB, 602 F.2d 1203, 102 LRRM 2485, 2487 (5th Cir. 1979), citing Chevron Oil Co., Standard Oil Co. of Texas Division v. NLRB, 442 F.2d 1067 (5th Cir. 1971); NLRB v. American National Insurance Company, 343 U.S. 395, 402, 404 (1952); NLRB v. Tomco Communications, Inc., 567 F.2d 871, 97 LRRM 2660, 2663 (9th Cir. 1978); and NLRB v. Herman Sausage Company, 275 F.2d 229 (5th Cir. 1960).

However, the Respondent does have an obligation to "intend" to reach an agreement. Since the time in which the fair share clause was initially introduced, the Respondent's actions indicate that it never intended to negotiate the clause. The Union attempted to address the Respondent's concerns and the Respondent refused to even consider any other option other than no fair share clause at all. The Respondent's intentions were clear when Coffelt stated once again, at the hearing, that she was concerned with individuals ability to pay fair share fees when they have opted out of the Union. This was merely a restatement of the Respondent's position as

early as December 7, 2008, when the Union initially introduced the clause. The Respondent stood firm in its position, never offered a counter offer to the clause or considered other proposals made by the Union that addressed its concerns. These acts are considered a violation of the Act. (Chicago Typographical Union, 15 PERI ¶ 3008, (LLRB 1999) (the board found that the Employer breached its duty to bargain in good faith by maintaining a pre-determined position on wages and job classifications and by refusing to make any reasonable attempt to bargain over those subjects).

The evidence in this case, however, is not one of hard-bargaining over fair share clause but one of no bargaining at all. Through almost a year of negotiations beginning in December 2008, the Respondent held a pre-determined position and merely refused to bargain over the fair share clause. By this conduct, the Respondent has breached its duty to bargain in good faith in violation of Section 10(a)(4) and (1) of the Act.

V. CONCLUSIONS OF LAW

The Respondent violated Section 10(a)(4) and (1) of the Act by failing to bargain in good faith with the Charging Party over a fair share clause in the collective bargaining agreement. In addition to an order that the Respondent cease and desist from such conduct and bargain in good faith with the Charging Party, a remedy must take into account that the Respondent's misconduct occurred during the one year period after the Charging Party was certified as the representative of the petitioned-for employees. That one year certification period is provided by Section 1210.70(a)(2) of the Rules and, in cases such as this, it is appropriate to extend the certification year for that period of time the Respondent has refused to bargain. City of Chicago, 3 PERI ¶ 3017 (IL LLRB 1987); Peoria Housing Authority, 11 PERI ¶ 2033 (IL SLRB 1995); County of Vermillion, 3 PERI ¶ 2004 (IL SLRB 1986).

The Charging Party was certified on September 26, 2008, and the parties first met to bargain on November 12, 2008. Finding that the Respondent failed to bargain from the date of the parties' first meeting, it is recommended that the certification year be extended 11 months beginning from the date the Respondent commences to bargain in good faith with the Charging Party.

VI. RECOMMENDED ORDER

The Board's policy in unfair labor practice cases is to order a make-whole remedy and restore the status quo ante, that is, place the parties in the same position they would have been in had the unfair labor practice not been committed. Village of Dolton, 17 PERI ¶ 2017 (IL LRB-SP 2001). On the basis of the foregoing findings of fact, conclusions of law, and the entire record, issuance of the following Order is recommended:

IT IS HEREBY ORDERED that the Respondent, Lake County Circuit Clerk, its officers and agents shall:

1. Cease and desist from:

   a. Refusing to bargain collectively in good faith by failing to negotiate a fair share clause within the collective bargaining agreement.

   b. In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them in the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

   a. On request, bargain collectively in good faith with the International Brotherhood of Teamsters, Local 700, as the bargaining unit's exclusive representative, with respect to a fair share clause within the collective bargaining agreement.

b. Extend the initial year of certification for a period of eleven months beginning from the date the Respondent commences bargaining in good faith.

c. Post at all places where notices to employees are ordinarily posted, copies of the notice attached hereto and marked "addendum." Copies of this Notice shall be posted, after being duly signed by the Respondent, in conspicuous places and shall be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to ensure that these notices are not altered, defaced or covered by any other material.

d. Notify the Board in writing, within 20 days from the date of this decision, of what steps the Respondent has taken to comply herewith.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of the Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions and cross-responses must be filed with the Board's General Counsel of the Illinois Labor Relations Board at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions and cross-responses will not be accepted at the Board's Springfield office. The

exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Chicago, Illinois this 5th day of November, 2012

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Elaine L. Tarver, Administrative Law Judge