

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL**

International Brotherhood of Teamsters,)	
Local 700,)	
)	
Charging Party)	
)	Case No. L-CA-10-045
and)	
)	
City of Chicago,)	
)	
Respondent)	

ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER

On January 28, 2010, the International Brotherhood of Teamsters, Local 700 (Charging Party or Union) filed charges with the Local Panel of the Illinois Labor Relations Board (Board) in Case No. L-CA-10-045, alleging that the City of Chicago (Respondent or City) engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012), as amended (Act). Subsequently, the charges were investigated in accordance with Section 11 of the Act and the Rules and Regulations of the Board, 80 Ill. Admin. Code, Parts 1200 through 1240 (Rules). On May 5, 2011, the Board’s Executive Director issued a Complaint for Hearing for three of the charges. The parties proceeded to hearing only on Counts I and III of the Complaint.

The case was heard on January 8-9, 2013 in Chicago, Illinois before Administrative Law Judge (ALJ) Elaine Tarver.¹ At that time, all parties appeared and were given a full opportunity to participate, adduce relevant evidence, examine witnesses, and argue orally. Both parties timely filed briefs.

¹ ALJ Tarver subsequently left employ with the Board and this case was assigned to me for Recommended Decision and Order.

After full consideration of the parties' stipulations, evidence, arguments, and briefs, and upon the entire record of this case, I recommend the following:

I. PRELIMINARY FINDINGS

The parties stipulate, and I find as follows:

- A. At all times material, the Respondent has been a public employer within the meaning of Section 3(o) of the Act and a unit of local government pursuant to Section 20(b) of the Act under the jurisdiction of the Board pursuant to Section 5(b) of the Act.
- B. At all times material, the Charging Party has been a labor organization within the meaning of Section 3(i) of the Act.
- C. At all times material, the Charging Party or its predecessor has been the exclusive representative of a bargaining unit composed of certain of the Respondent's employees (Unit).
- D. At all times material, the Charging Party or its predecessor has been a party to a collective bargaining agreement with the Respondent setting out the terms and conditions of employment for Unit employees.
- E. The Unit includes employees of the Respondent's Departments of Aviation and Water Management in the classification of Motor Truck Driver and Pool Motor Truck Driver.
- F. Policies affecting the duration of a shift for bargaining unit employees involve wages, hours, or working conditions within the meaning of Section 7 of the Act and are thereby mandatory subjects of bargaining.
- G. In 2009, the City sought concessions from its unions to avoid layoff. Ultimately, the City and most of the City's Trade Unions, including Pipefitters, Local 597; Plumbers, Local 130; Bricklayers, Local 21; and Laborers, Local 1092 entered into what is commonly known as the COUPE Agreement around June 2009.
- H. The COUPE Agreement was in effect during the period of July 16, 2009 through June 30, 2011.
- I. The Charging Party or its predecessor was given the opportunity to become a signatory to the COUPE Agreement but it declined this opportunity and opted instead for a layoff of its members.
- J. The Department of Water Management directed "all Teamsters Bargaining Unit Members on M-F shift" not to report to work on February 15, 2010, March 19,

2010, June 11, 2010, August 20, 2010, November 11, 2010, December 10, 2010, February 11, 2011, March 18, 2011, and June 10, 2011.

II. ISSUES AND CONTENTIONS

The Charging Party requests that Count I be deferred to the arbitration award regarding the same set of circumstances. It argues that deferral is appropriate because all four factors required for an unfair labor practice charge to be deferred under Spielberg Manufacturing Co., 112 NLRB 1080 (1955), are present. The Charging Party does not argue the merits of Count I in its post-hearing brief. The Respondent, which initially requested deferral at the hearing, makes no argument for or against deferral in its post-hearing brief. Instead, it argues that the 10(a)(4) and (1) charges in the Complaint for Hearing are without merit.

In Count III, the Charging Party alleges that the Respondent violated Sections 10(a)(4) and (1) when it failed and refused to bargain in good faith with the Charging Party before making the decision to shut down operations in the Department of Water Management (DWM) on certain days. It also alleges that the Respondent failed and refused to bargain over the effects the shutdown days would have on the Charging Party's members. The Respondent disputes these allegations. It argues that it was within its right to implement the shutdown days because the Charging Party had waived bargaining over the shutdown days by the express terms of the parties' collective bargaining agreement (CBA). The Respondent also argues that it did in fact bargain over the effects of the shutdown days on the Charging Party's members.²

III. FINDINGS OF FACT

A. THE CHARGING PARTY AND ITS PREDECESSOR

At all times material to this case, the parties were operating under a CBA with a stated term of July 1, 2007 through June 30, 2017. The parties' CBA was negotiated between the

² At the Board hearing, the Charging Party withdrew Count II of the Complaint.

Respondent and the Charging Party's predecessor, Teamsters Local 726. Sometime after these negotiations, Local 726 was disbanded and the membership put into a trusteeship. That trusteeship eventually became part of the Charging Party.

B. COUNT I

1. BACKGROUND

At both O'Hare and Midway International Airports (O'Hare and Midway), the Charging Party's members are hired by the Chicago Department of Aviation (Aviation) to perform various driving-related tasks. Drivers who are assigned permanently to either O'Hare or Midway have the job title of Motor Truck Driver (MTD). In Aviation, the job title of Pool Motor Truck Driver (PMTD) generally refers to seasonal drivers who work for Aviation. The PMTDs are pulled from a city-wide "pool." This pool was created in 2006 to allow the Respondent to move drivers in and out of departments as the departments' needs change.

Aviation requires more drivers during the snow season, which generally runs from September or October of one year through March or April of the next. Prior to the start of the snow season, Aviation will hire around 250 additional drivers from the pool whose main job is snow removal. About 60 are assigned to Midway and the rest to O'Hare. There are about 500 total MTDs and PMTDs employed by Aviation during the snow season: approximately 400 at O'Hare and 100 at Midway. Once the snow season ends, the majority of the PMTDs are released back into the pool. Some may be retained year-round if Aviation determines they are needed.

Prior to 2010, the PMTDs worked eight-hour shifts regardless of whether there was snow to remove. However, after Aviation underwent a reorganization, concerns developed within the department about the PMTDs working full shifts even when there was no forecast for snow. In or about April 2009, a group of officials at Aviation reviewed the CBA between the Charging Party

and the Respondent. They determined that Section 4.9 (Reporting Pay) entitled the Respondent to send the PMTDs home early if there was no snow forecasted and therefore no work for these drivers. After informing the Charging Party of its intentions, the Respondent sent PMTDs home early on non-snow days from January 2010 through March 2011.

2. PROCEDURAL HISTORY

In the Complaint, the Charging Party alleges that in or about January 2010, the Respondent implemented a new schedule policy for the PMTDs, whereby the Respondent would end the PTMDs' work shifts at some point after two hours from the commencement of the shift, but prior to the end of their regularly scheduled shift (the send-home policy). According to the Charging Party, this change was effectuated without giving the Charging Party notice or the opportunity to bargain, and therefore the Respondent violated Section 10(a)(4) and (1) of the Act.

Prior to the Board hearing, the Charging Party grieved the send-home policy twice. The initial grievance was filed January 13, 2010, the day after Aviation sent the PMTDs home early for the first time during the 2009-2010 snow season. The second grievance was filed January 5, 2011, two days after the first time Aviation sent the PMTDs home early during the 2010-2011 snow season. In each grievance, the Charging Party alleged that this schedule change violated Section 5.1 of the CBA, the section regarding hours of work.

The first grievance proceeded to arbitration on February 14, 2011. The arbitrator, Arbitrator Clauss, issued his award on September 26, 2011. The award sustained the Charging Party's grievance, finding that the Respondent violated the CBA when it instituted the send-home policy. The remedy for that award, issued December 8, 2012, only covered the 2009-2010 snow season. On December 29, 2012, the Charging Party requested an amended remedy to cover

the 2010-2011 snow season as well, thereby presenting the issues from the second grievance to the arbitrator.

At the time of the Board hearing, the parties were awaiting the arbitrator's amended remedy. At hearing, the Respondent asked to defer to the existing arbitrator's award. The Charging Party requested that the parties proceed with the hearing under the theory that the amended remedy might not award the Charging Party the full relief it sought. ALJ Tarver ruled that she would hold in abeyance her determination of whether to defer Count I until after she had reviewed the arbitration award and the arbitrator had issued his amended remedy. Arbitrator Clauss did issue a "Corrected Remedy Award" on March 29, 2013, which the parties forwarded to ALJ Tarver on April 18, 2013.

3. THE ARBITRATION AWARD AND AMENDED REMEDY

In his award, Arbitrator Clauss framed the issue as "[w]hether the Department [of Aviation] violated the Collective Bargaining Agreement when it sent pool MTDs home early on January 12, 2010 and did not pay them for 8 hours." He stated that the relevant portions of the CBA were the management rights clause (Article 2), the "Reporting Pay" section (Section 4.9),³ and the section involving hours of work (Section 5.1).

The arbitrator noted that the Charging Party argued that Section 5.1 defines the normal work week as five consecutive eight-hour days and two days off. While Section 5.1 is not a guarantee of work, it does provide a definition of the work week. By enacting a policy whereby it sent home PMTDs after two hours of work, the Respondent had unilaterally changed that definition. However, the Respondent argued that Section 5.1 does not guarantee work hours.

In his factual findings, Arbitrator Clauss stated,

³ In the award, Section 4.9 is mistakenly cited as Section 4.4.

Mr. Williams [the business agent who handles Aviation and other departments] testified that the Union received a letter from the City in November 2009. The letter stated that the City was going to implement a 2 hour plan for pool drivers that would send them home after two hours if no work was available. Mr. Williams replied with a letter to the Commissioner objecting to the 2 hour plan and stating that the pool job had historically been an 8 hour job.

The arbitrator also found that the decision to implement the send-home policy was announced to the Charging Party in November 2009 and the decision would be effective on December 15, 2009.

In his analysis, Arbitrator Clauss mainly sustained the Charging Party's grievance based on long-standing past practice. He also noted that although Section 5.1 does not guarantee work, it does contain the definition of full-time employment which Aviation and the Charging Party had utilized in past and current CBAs. On these bases, the arbitrator found a violation of the parties' CBA.

In the first separate remedy award, Arbitrator Clauss ordered make-whole relief to any PMTD who was sent home early without a full day's pay during the 2009-2010 snow season. The Corrected Remedy Award, issued after the Board hearing, did not limit the make-whole relief to the 2009-2010 snow season. Instead, PMTDs were entitled to relief for any day they were sent home early under the Respondent's send-home policy.

B. COUNT III

1. JOB DUTIES OF THE CHARGING PARTY'S MEMBERS EMPLOYED BY THE DWM

The DWM is responsible for repairing, replacing, and maintaining 4,400 miles of water mains and 4,400 miles of sewer mains throughout the City of Chicago. Multiple types of work crews⁴ are required to complete the department's daily operations. Each crew is comprised of

⁴ The DWM has crews for leak repair, sewer repair, new construction, and investigation, as well as "specialized" and "advanced complaint" crews.

members of various unions, including drivers represented by the Charging Party. Every type of crew requires specific combinations of workers from the various trades. It is the Charging Party's members who drive the different vehicles that are used throughout the DWM. These drivers' job titles are also MTD or PMTD.

2. THE COUPE AGREEMENT AND ITS IMPLEMENTATION AT THE DWM

At the time of the hearing, the Charging Party was a member of a coalition of unions known as "COUPE"- the Coalition of Union Public Employees. This group consisted of the various trade unions in the City of Chicago and Cook County. In 2009, the Respondent had been facing a "dramatic decline in revenues" for the preceding two fiscal years. The Respondent sought concessions from the COUPE members to help combat its budgetary crisis. In June 2009, it asked the unions to execute an amendment to their CBAs (the COUPE Agreement) whereby the unions' members would voluntarily take furlough days in lieu of layoffs. There would be seven furlough days in what remained of 2009, 13 furlough days in 2010, and six furlough days in the first half of 2011. Most of the members of COUPE signed the COUPE Agreement (the Agreement signatories). The Charging Party was one of two unions which did not become a signatory to the COUPE Agreement and faced layoffs of its members.

Each department within the City was responsible for its own implementation of the COUPE Agreement. The DWM implemented the COUPE Agreement for the second half of 2009 by allowing its employees to select their own furlough days. This created a scheduling and availability issue for the department. Barrett Murphy, then the managing deputy commissioner over the Bureau of Operations and Distribution for the DWM, testified that it was very hard to organize full crews to perform the department's work. Because DWM crews are comprised of various members of different trades, it became increasingly difficult to determine whether

enough members of a trade would be available to make up a minimal complement of crews on any given day. This meant that the DWM was not able to meet minimal standards of service, both in scheduled repair and installation work, as well as in responding to public complaints.

Neither the DWM nor the Agreement signatories were satisfied with the department's implementation of the COUPE Agreement. In December 2009, the department and the larger unions who had signed the COUPE Agreement met to discuss a different way to implement the Agreement. At that meeting, the Agreement signatories and the DWM agreed to set six of 2010's 13 furlough days as department-wide shutdown days. These days would be operated with the same workforce as if it were a holiday: skeletal crews would be available for emergencies, but all other employees would be directed to stay home. Murphy testified that while "minor tweaks" to the specific days set aside as shutdown days were subsequently made, the Agreement signatories agreed to the general principle of the shutdown days at that meeting. The results of this meeting were confirmed by a letter sent to the COUPE signatories by Assistant Commissioner Maureen Egan, dated December 28, 2009.

The Charging Party was mistakenly invited to this meeting. Ramon Williams, the Charging Party's business agent who handled both Aviation and the DWM, showed up at the meeting only to be turned away. The Respondent was only interested in speaking with the larger COUPE signatories to schedule their furlough days. Williams was later informed that the Respondent and the signatories to the COUPE Agreement had agreed that the signatories would take half of their furlough days when the DWM held department-wide shutdown days. Williams sent a letter to Commissioner John Spatz, dated January 15, 2010, which stated in pertinent part,

It has come to the attention of the Teamsters Union that an agreement, initiated by the Department of Water Management, has been reached with certain COUPE unions regarding 6 of their 13 agreed furlough days for 2010. In light of such an agreement, the obvious question remains: What operational provisions are being extended to the DWM's

drivers to ensure that they are not adversely impacted by this decision? Once again, I request the opportunity to meet with you to discuss this matter...

Williams did meet with the DWM on January 26, 2010. Also present from the Charging Party were then-Assistant Trustee William (Bill) Logan and General Counsel Kevin Camden. The Respondent was represented by Commissioner Spatz, First Deputy Bill Bresnahan, Maureen Egan, and Barrett Murphy.⁵

3. THE JANUARY 26, 2010 MEETING

The Charging Party asserts that at this meeting, it proposed that its members continue to come into work. According to the Charging Party, the Respondent should have found some work for its members to perform. The Respondent responded, and its position remained, that there was no work for the Charging Party's members to do when the DWM was shut down.⁶

Williams testified that the Charging Party representatives "voiced our concern or our displeasure with the department's decision to have furlough days, and we told them that it would absolutely have an adverse effect on our members." According to Williams, the DWM did not "have a response" to his concerns at the meeting.

Both Egan and Murphy testified that the Charging Party's main concern at that meeting was regarding the impact the shutdown days would have on its members. They also both testified that the Charging Party sought assurances that its members would be allowed to use accrued benefit time to cover the shutdown days and ensure a regular weekly paycheck.

⁵ There may have been additional representatives at this meeting, but these are the people who the record clearly establishes were present.

⁶ The Respondent sometimes refers to these days as "lack of work" days for the Charging Party's members. The only reason a lack of work existed for the Charging Party's members in the DWM was because there were no crews to drive on the shutdown days. The Respondent created the lack of work when it implemented the shutdown days as a way to have the Agreement signatories all take a portion of their furlough days simultaneously. I will continue to refer to these days as "shutdown days," since that is what I find they truly are.

The Respondent did agree to allow the Charging Party's members to use benefit time to cover the shutdown days. On cross examination, Williams testified that he was "not sure if [the decision to allow members to use benefit time]... came out in that meeting," but "ultimately, yes, they were allowed to use vacation time." Murphy testified that the department's response to the Charging Party's concerns at that meeting were that "they could, in fact, use... their vacation days and five call-in days." However, the DWM would continue with its unified shutdown days. On rebuttal, Williams testified that the Charging Party never agreed to accept the shutdown days in exchange for being able to use benefit time.

Commissioner Spatz sent a follow-up letter dated February 1, 2010 to representatives of the Charging Party. In this letter, he says that the DWM "appreciated having the opportunity to meet with you this past week to explain the operation of the set furlough days." He went on to inform the Charging Party that the first department shutdown day was set for Monday, February 15, 2010, and that only the Charging Party's members listed on an attached sheet should report to work that day. Finally he stated, "As we told you after our meeting, those who have been directed to not report to work can use vacation time or accrued comp time to cover this day if they wish to be paid."

4. THE SHUTDOWN DAYS

Egan sent a letter to the Charging Party dated February 4, 2010, again informing it that the first DWM shutdown day was scheduled for February 15, 2010. Williams responded with a letter dated February 11, 2010, stating, "It has come to the attention of the Teamsters Union Local No. 700 that our members in the Department of Water Management have been asked to sign a notice indicating that they are not to report to work on Monday, February 15, 2010." The letter went on to state that the Charging Party

takes the firm position that if our members are sent away on Monday or denied the opportunity to work, this shall be considered a shut down by the Employer. Any attempt to force our membership to use their benefit time in order to be paid for the day will result in the filing of a grievance...

The shutdown days went ahead as planned by the DWM, and the Charging Party subsequently filed a grievance for each day the DWM shut down in 2010. In total, six grievances were filed over shutdown days in 2010.

The DWM found that the shutdown day solution to the furlough day scheduling problem worked well in 2010. The DWM continued its plan in 2011 and scheduled three of the six required furlough days as shutdown days.⁷ The Charging Party grieved each of these shutdown days as well.

5. CONTRACT LANGUAGE

In its brief, the Respondent cites to three CBA provisions that allegedly gave it the right to institute shutdown days. The first, Article 2, is the management rights clause, which states in pertinent part,

The Union recognizes that certain rights, powers, and responsibilities belong solely to and are exclusively vested in the Employer... Among these rights, powers, and responsibilities, but not wholly inclusive, are all matters concerning or related to the management of the Employer's operations and the administration thereof, and the direction of the working forces, including (but not limited to) the right to suspend, discipline, or discharge for just cause; to layoff by reason of lack of work, by reason of lack of funds or work... to hire, classify, transfer and assign work, promote, demote, or recall... to schedule the hours of work, to determine the services, processes, and extent of the Employer's operation...

Section 5.1, the introductory section in Article 5, "Hours of Work and Overtime," states the following:

⁷ It is unclear from the record whether the decision to have shutdown days in 2011 occurred at the same time as the agreement regarding the 2010 shutdown days. However, I find that since the plan did not vary from 2010 to 2011, (half the furlough days were taken as shutdown days in 2010 and half the furlough days were also taken as shutdown days in 2011), it is irrelevant whether the DWM decided on both years in December 2009 or waited until a later date to implement the same program in 2011.

This Article shall be to calculate overtime and shall not be a guarantee of work or hours for any day or week.

The normal work week shall consist of five (5) consecutive 8-hour days and two (2) consecutive days off, except where the Employer's operations require different scheduling needs...

Section 4.9, "Reporting Pay," contains the following language:

When an employee reports for his or her regularly scheduled shift, the employee shall receive a minimum of two (2) hours work or pay at the employee's regular straight time hourly rate, unless the employee was told at least three hours prior to his or her normal starting time not to report for work, except for reasons beyond the Employer's control...

Finally, Section 20, which contains the parties' "zipper clause" states, in pertinent part,

This Agreement constitutes the entire contract between the Employer and the Union and settles all demands and issues with respect to all matters subject to collective bargaining. The Employer and Union, therefore, voluntarily waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any matter which is subjected to collective bargaining whether or not such matter is specifically referred to herein, and even though such matter may not have [sic] within the knowledge or contemplation of the parties at the time this Agreement was negotiated or signed...

In addition to the citations in its brief, the Respondent also referenced Sections 5.1 and 4.9 in its responses to the Charging Party's grievances. Egan wrote in the responses that these sections authorized the shutdown days, and she denied the grievances on that basis.

6. ARBITRATION

The parties initially advanced five of the nine grievances to final and binding arbitration. Three went to hearing on July 20, 2011. The Respondent contested the arbitrability of the other two grievances, and those went to hearing on June 28, 2012. The arbitrator, Arbitrator Feuille, found that one of the grievances was not arbitrable. In regards to the other four, he found that the Respondent had violated the CBA when it directed the Charging Party's members to not report to work on those four days. Arbitrator Feuille held that the DWM "abused its Article 2 scheduling discretion and therefore acted in an unreasonable manner" when it imposed the shutdown days on the Charging Party's members.

At the time of the Board hearing, Egan testified that arbitration had been invoked on two more of the grievances. Arbitration had never been invoked on the remaining two grievances.⁸

7. DEFERRAL

At the hearing, ALJ Tarver determined that four of the nine days in question and already been ruled upon and remedied by the arbitrator. She therefore deferred to the arbitration award in regards to those four days. The other five days remained at issue before her. The Respondent moved to defer the remaining five days to arbitration for the first time at the hearing. However, ALJ Tarver correctly noted that the Respondent had waived deferral because the motion was not timely brought. She therefore denied the Respondent's motion to defer. ALJ Tarver also ruled that if the Respondent was found to have violated the Act, any remedy awarded to the Charging Party would cover only the five days not remedied by the arbitration award.

IV. DISCUSSION AND ANALYSIS

A. COUNT I

The issue regarding Count I is whether the Board should defer that Count to arbitration. Deferral is authorized by Section 11(i) of the Act, which allows the Board to defer an unfair labor practice charge to arbitration when the charge involves the interpretation or application of a CBA. Chief Judge of the 16th Judicial Circuit, 29 PERI ¶50 (IL LRB-SP 2012), *aff'd*, Moehring v. Ill. Labor Rel. Bd., 2013 IL App. (2nd) 120342, 989 N.E.2d 1131. At the hearing, ALJ Tarver reserved her ruling on deferral until she was able to review both the arbitration award and the amended remedy. She stated,

I will allow the Respondent to argue that the Board should defer to the arbitrator's award... not that the Board doesn't have jurisdiction over this case because it should be

⁸ The Respondent's brief states that the Charging Party demanded arbitration on three of the remaining grievances. I am unable to determine conclusively from the record what is the actual number of grievances which were forwarded to arbitration.

deferred to arbitration; but instead that whatever the arbitrator's award addresses as it relates to the issues and merits of this case, the Board should defer to those rulings.

I have now reviewed the award, the Corrected Remedy Award, and the record, and I find deferral is warranted.

In its brief, the Charging Party argues only that deferral is appropriate and does not address the merits of Count I. Conversely, the Respondent does not argue deferral in its brief. Instead, in support of its contention that no Section 10(a) violations exist, the Respondent makes what appear to be very similar arguments to those made before the arbitrator. In addition to these arguments, the Respondent alleges that this case is not properly before the Board because it deals solely with a matter of contract interpretation. I find that the Charging Party has sufficiently alleged a violation of Section 10(a)(4) and (1). However, as will be shown through the Spielberg analysis, this allegation was sufficiently presented to and considered by the arbitrator and can be appropriately deferred to the arbitrator's award.

As the arbitrator's award is now final and the Respondent has not challenged the appropriateness of deferral to that award, I will analyze whether the charges in Count I should be deferred to the arbitration award under the NLRB's post-arbitral deferral doctrine announced in Spielberg Manufacturing Co., 112 NLRB 1080. Under the Spielberg deferral doctrine, which this Board has adopted, City of Alton, 22 PERI ¶102 (IL LRB-SP 2006); Chicago Transit Authority, 1 PERI ¶3004 (IL LLRB 1985), an unfair labor practice case before the Board may properly be deferred to an arbitration award where (1) the unfair labor practice issues have been presented to and considered by the arbitrator; (2) the arbitration proceedings appear to have been fair and regular; (3) all parties to the arbitration agreed to be bound by the award; and (4) the arbitration is not clearly repugnant to the purposes and policies of the Act. Moehring v. Ill. Labor Rel. Bd., 2013 IL App. (2nd) 120342 ¶11, 989 N.E.2d at 1136; City of Alton, 22 PERI ¶102. Only the

analysis of the first factor in the Spielberg deferral standard is not immediately clear in this case. Therefore, whether Arbitrator Clauss was presented with and considered the failure to bargain issues in fashioning his award is determinative of whether this unfair labor practice charge should be deferred.

First, I note that the January 13, 2010 grievance states that Aviation violated the CBA when “it unilaterally changed the past practice of eight-hour work days for the DOA drivers.” Additionally, the arbitration award states that

the Union received a letter from the City in November 2009. The letter stated that the City was going to implement a 2 hour plan for pool drivers that would send them home after two hours if no work was available. Mr. Williams replied with a letter to the Commissioner objecting to the 2 hour plan and stating that the pool job had historically been an 8 hour job.

This indicates that the arbitrator heard testimony about the Respondent’s alleged failure to bargain over changing the PMTD’s schedules, the “crucial allegation” in the Charging Party’s unfair labor practice charge. See North Shore Sanitary District v. Ill. State Labor Rel. Bd., 262 Ill. App. 3d 279, 296, 634 N.E.2d 1243, 1256 (2nd Dist. 1994) (noting that deferral is improper where an arbitrator’s decision has not made a factual finding with regard to a crucial allegation of an unfair labor practice.) The arbitrator also noted the Charging Party’s position that in changing the work week as defined in Section 5.1 of the CBA, the Respondent “is effecting a unilateral change to that definition.” Finally, it is instructive that the Respondent’s arguments regarding Section 4.9 and Section 5.1 were very similar, if not the same, in both the arbitration award and this case.

While Arbitrator Clauss could not have explicitly resolved the issues in the unfair labor practice complaint, so long as the issues were presented to and considered by him, deferral is appropriate. City of Alton, 22 PERI ¶102; Chicago Transit Authority, 16 PERI ¶3010 (IL LLRB

1999). Based on the factual determinations in Arbitrator Clauss' award and his summaries of the parties' positions, I find that the arbitrator was informed of the failure to bargain allegation when he was hearing and deciding the case. Additionally, the arbitration proceedings appear to have been fair and regular, both the Respondent and the Charging Party agreed in their CBA to be bound by any arbitration award, and the arbitration is not clearly repugnant to the purposes and polices of the Act. The factors allowing for deferral to an arbitration award under Spielberg have been met, and deferral to Arbitrator Clauss' award is appropriate.

B. COUNT III

1. DEFERRAL

Since the issue was fully briefed by the Charging Party, I will quickly address deferral of Count III before moving onto the merits of the Count. ALJ Tarver already ruled at the hearing that the Respondent's motion to defer was procedurally inadequate. The Respondent waived deferral on Count III because it did not move for deferral within 25 days after the issuance of the Complaint for Hearing, as required in the Board's Rules.⁹ The Respondent also made no argument for deferral in its brief, instead arguing that the Count should be dismissed because it deals with a matter of contract interpretation and is not within the Board's jurisdiction. As discussed more fully below, I find that the Charging Party has sufficiently alleged a violation of Section 10(a)(4) and (1). I further find that even though the CBA violations and the Act violations share the same set of facts, this case does not solely involve contract interpretation. The Respondent's abandonment of its deferral argument and the procedural inadequacy of the motion therefore make deferral of Count III inappropriate.

⁹ 80 Ill. Admin Code 1220.65(b).

2. REFUSAL TO BARGAIN

It is well-established that a public employer violates its obligation to bargain in good faith, and therefore violates Section 10(a)(4) of the Act, when it makes a unilateral change to a mandatory subject of bargaining without giving notice and opportunity to bargain with its employees' exclusive bargaining representative. County of Cook v. Licensed Practical Nurses Ass'n of Ill., Div. 1, 284 Ill. App. 3d 145, 153, 671 N.E.2d 787, 792 (1st Dist. 1996); Village of Schaumburg (Police Dep't), 29 PERI ¶75 (IL LRB-SP 2012). A 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 the Act, or to interfere with the formation, existence, or administration of a labor organization or contribute financial or other support to it.

Once an employer gives a union notice of a proposed change to employees' wages, hours, or terms and conditions of employment, the union must actually demand to bargain over the proposed change. A request to bargain need not be comprised of any particular phrase, nor invoke "any special formula or form of words." City of Collinsville v. Ill. Labor Rel. Bd., 329 Ill. App. 3d 409, 421, 767 N.E.2d 886, 896 (5th Dist. 2002). "[S]o long as there is a clear communication of meaning," the request to bargain may be made by clear implication. City of Chicago, 9 PERI ¶3001 (IL LLRB 1992).

Section 7 of the Act establishes the parties' duty to bargain. It provides, in relevant part, "A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section." Under the Act, "to bargain collectively" means the performance of the mutual obligation of the employer or its designated representative and the representative of the employees to meet at reasonable times, including meetings in advance of

the budget-making process; to negotiate in good faith with respect to wages, hours, and other terms and conditions of employment not excluded by Section 4 of the Act; to negotiate an agreement, or any question arising thereunder; and to execute a written contract incorporating any agreement reached if requested by either party. Lake County Circuit Clerk, 29 PERI ¶179 (IL LRB-SP 2013).

The duty to bargain in good faith requires parties to actively participate in negotiations, with an open mind and a sincere effort and intention to reach an agreement. County of Cook (Dep't of Central Services), 15 PERI ¶3008 (IL LLRB 1999). The Board uses a “totality of the circumstances” test to determine whether a party bargained in good faith or was instead motivated by a bad faith desire to avoid reaching an agreement altogether. Id. Types of conduct that are indicative of a bad faith intent include delaying tactics, unreasonable bargaining demands, 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. County of Woodford and the Woodford County Sheriff, 8 PERI ¶2019 (IL SLRB 1992).

This case is about whether the Respondent had a duty to bargain with the Charging Party over the nine shutdown days which coincided with the Agreement signatories’ furlough days, as well as the effects those days would have on the Charging Party’s members. The furlough days themselves are not at issue, as the evidence shows that the Charging Party and the Respondent did bargain over furlough days. The result of those negotiations was that the Charging Party did not sign the COUPE Agreement and therefore did not accept furlough days in lieu of layoffs. The Respondent was well within its right to refuse to discuss the furlough days with Williams

when it was meeting with the Agreement signatories in deciding how to schedule the days. These were meetings only for parties who had signed the COUPE Agreement.

a. BARGAINING OVER THE SHUTDOWN DAYS

The issue of bargaining over furlough days is not before the Board in this case. Instead, the Charging Party contends that the Respondent failed to negotiate over the decision to implement department-wide shutdown days. Before turning to that issue, I will quickly note that whether the Charging Party timely requested to bargain is not at issue. The Charging Party is correct in its assertion that the request to bargain over the shutdown days was timely and effective. Williams' attempt to attend the meeting about the furlough days, coupled with his multiple letters to the Respondent, clearly communicate the Charging Party's desire to bargain over the shutdown days.

As for the question of whether the Respondent bargained over the decision to implement the shutdown days, Egan testified that the Respondent met with the Charging Party after it met with the Agreement signatories but "before any set furlough days were taken" (emphasis added). Murphy testified that the decision to implement shutdown days resulted from the meetings with the Agreement signatories. The record indicates that the decision to close the department was made before the Respondent would even sit down with the Charging Party. Indeed, the scheduled shutdown dates were announced via letter to the Agreement signatories on December 28, 2009. The Charging Party did not meet with the Respondent until January 26, 2010, nearly a month later.

Once the Charging Party did meet with the Respondent, the Charging Party again stated to the Respondent that it would not accept the shutdown days. Williams testified that the Charging Party never agreed to accept shutdown days even in exchange for the ability to use

benefit time. Similarly, Murphy testified that the Respondent only agreed to allow the Charging Party's members to use their benefit time on the shutdown days. The Respondent was going to continue "with the unified shutdown days as [it] had agreed to with the signatories to the COUPE Agreement." There was no resolution of this issue at that meeting. Nor is there any indication that the Respondent even discussed alternatives to requiring the Charging Party's members to not report to work those days. Even though the Charging Party remained firm on its position that the Respondent should find some type of work for the Charging Party's members to perform on the shutdown days, it does not appear that the Respondent was willing to discuss this or any other alternatives to the shutdown days that the Charging Party suggested or could have proposed.

The February 1, 2010 letter from Commissioner Spatz also indicates that the Respondent never bargained with the Charging Party over the shutdown days. The letter begins, "We appreciated having the opportunity to meet with you this past week to explain the operation of the set furlough days." This is further evidence that there was no bargaining over the implementation of the shutdown days at the January 26, 2010 meeting. At that meeting, the Respondent was merely informing the Charging Party of its predetermined course. The evidence shows that once the Respondent and the Agreement signatories agreed to institute the shutdown days, the Respondent was not interested in negotiating with the purpose of reaching an agreement with the Charging Party regarding the shutdown days or other alternatives to shutting down the department. I must therefore conclude that the Respondent failed and refused to bargain with the Charging Party over the implementation of the shutdown days.

b. BARGAINING OVER EFFECTS

Though I find that the Respondent failed and refused to bargain with the Charging Party over the implementation of the shutdown days, I must also examine whether it bargained with

the Charging Party over the effects those days would have on the Charging Party's members. The evidence in the record supports that in the January 26, 2010 meeting, the Respondent and the Charging Party were bargaining over the effects of the shutdown days on the Charging Party's members.

Williams testified that the Charging Party came into the January 26, 2010 meeting seeking to discuss the implementation of the shutdown days, as well as being concerned about the adverse effect the shutdown days would have on its members. The Respondent's witnesses both testified that it was the Charging Party who suggested that its members employed by the DWM be able to use benefit time to cover the shutdown days. The Charging Party never rebutted this testimony. Additionally, both sides agree that the Charging Party's members were allowed to use their benefit time on the shutdown days. Therefore, not only did the parties bargain over the effects of the shutdown days, they actually came to an agreement, which was implemented by the Respondent.

Commissioner Spatz's February 1, 2010 letter to the Charging Party is also of significance to this analysis. While it is also evidence that no bargaining was had over the actual implementation of the shutdown days, the letter does tend to support the conclusion that there was bargaining and an agreement in regards to effects. It states in pertinent part, "As we told you after our meeting, those who have been directed to not report to work can use vacation time or accrued comp time to cover this day if they wish to be paid." This letter, coupled with the unrefuted testimony of Egan and Murphy that it was the Charging Party which requested the use of benefit time, indicates that the parties bargained and reached an agreement over the effects of the shutdown days. Therefore, I cannot find that the Respondent violated Section 10(a)(4) and

(1) of the Act by failing and refusing to bargain in good faith over the effects the shutdown days would have on the Charging Party's members.

3. SHUTDOWN DAYS AS A MANDATORY SUBJECT OF BARGAINING

Having determined that the Respondent failed and refused to bargain with the Charging Party only over the shutdown days, the inquiry turns to whether the shutdown days were a mandatory subject of bargaining over which the Respondent was required to negotiate in good faith. A topic that affects employees' wages, hours, or terms and conditions of employment is a mandatory subject of bargaining. Central City Educ. Ass'n v. Ill. Educ. Labor Rel. Bd., 149 Ill. 2d 496, 523, 599 N.E.2d 892, 905 (1992). However, if the matter is one that involves inherent managerial authority, the employer is not required to bargain. Id. If the topic involves inherent managerial authority, but also affects the wages, hours, or terms and conditions of employees, then the balancing test set out in Central City must be used. City of Belvidere v. Ill. State Labor Rel. Bd., 181 Ill. 2d 191, 206, 692 N.E.2d 295, 303 (1998). This test balances the burden of bargaining on the employer's authority with the benefit bargaining would bring to the decision-making process. Id. If the benefit outweighs the burden, the matter will be deemed a mandatory subject of bargaining over which the employer is required to bargain with the union before imposing. City of Chicago (Police Dep't), 26 PERI ¶115 (IL LRB-LP 2010).

The threshold question in the Central City analysis is whether the matter involves wages, hours, or terms and conditions of employment. In this case, for six pay periods in 2010 and three pay periods in 2011, the Charging Party's members who were employed by the DWM lost eight hours of work. Additionally, any member of the Charging Party in the DWM who chose not to use his benefit time to cover the shutdown days lost at least eight hours of straight-time pay. The

shutdown days clearly impacted the wages, hours, and terms and conditions of employment of the Charging Party's members.

The next factor to be considered is whether the matter involves inherent managerial authority. Inherent managerial authority consists of those matters residing at the core of entrepreneurial control. Bd. of Trustees of the Univ. of Ill. v. Ill. Educ. Labor Rel. Bd., 224 Ill. 2d 88, 97, 862 N.E.2d 944, 950 (2007); Central City, 149 Ill. 2d at 518, 599 N.E.2d at 902. The Respondent argues that it has the right to schedule its employees. It also alleges that enacting the shutdown days was a manner of determining its standards of service, which the Act recognizes as a matter involving inherent managerial control.

The Respondent is correct in its assertions. The DWM is a public entity charged with maintaining the City of Chicago's water and sewage systems. It knows best how to efficiently carry out its duties. When the Agreement signatories' members chose their own furlough days in 2009, the DWM was unable to operate in a manner expected by both City Hall and the public. In order to remedy this problem, the DWM determined that the best solution was to have the Agreement signatories' members take half of their furlough days simultaneously and shut down the department on those days. The DWM implemented the shutdown days to "best meet its service demands" and therefore the shutdown days also involved a matter of inherent managerial authority.

Because the shutdown days involve both managerial authority and employees' wages, hours, and terms and conditions of employment, I must apply the balancing test from the Central City analysis. The question becomes whether the burden bargaining would create for the Respondent is greater or less than the benefit the Charging Party would receive from bargaining over the shutdown days.

The Respondent alleges that the burden outweighs the benefit because the DWM needed to address its staff shortages immediately. In its brief, the Respondent argues that “[b]argaining with Charging Party would have delayed the Water Department’s efforts to manage the staff shortage problem and made it increasingly difficult for the Water Department to meet service demands and respond to public complaints.” While it is true that the Respondent needed to address its scheduling issues quickly, I do not find that this was an adequate excuse for its failure to bargain with the Charging Party.

The Respondent met with multiple unions who were signatories to the COUPE Agreement when it decided to implement shutdown days and schedule six of the 13 furlough days on those shutdown days. There was clearly time to meet with these unions. Even more telling is the fact that the Respondent bargained over the effects the shutdown days would have on the Charging Party’s members. The existence of concurrent negotiations, even on separate issues, increases the opportunities for discussion and tends to show that bargaining is not overly burdensome. Chicago Park District, 18 PERI ¶3036 (IL LRB-LP 2002), aff’d, Chicago Park District v. Ill. Labor Rel. Bd., 354 Ill. App. 3d 595, 820 N.E.2d 61 (1st Dist. 2004); Georgetown-Ridge Farm Community Unit District 4, 10 PERI ¶1044 (IELRB 1994). I cannot find that bargaining over the shutdown days was overly burdensome for the Respondent when it was simultaneously bargaining over the scheduling of furlough days with other unions and the effects of the shutdown days with the Charging Party.

In determining whether an employer’s decision is amenable to bargaining, the Board also considers whether the union is capable of offering proposals that are an adequate response to the employer’s concerns. County of St. Clair and Sheriff of St. Clair County, 28 PERI ¶18 (IL LRB-SP 2011). The Respondent states that the Charging Party couldn’t have offered a “better

alternative” that would have addressed the scheduling concerns. However, a union does not have to offer a “better alternative” to be an “adequate response.” In Am. Fed’n of State, County, and Mun. Employees v. State Labor Rel. Bd., 274 Ill. App. 3d 327, 333, 653 N.E.2d 1357, 1361-62 (1st Dist. 1995), the employer argued that bargaining would be pointless because the parties were certain to reach impasse. In rejecting the employer’s argument, the appellate court stated, “It is not necessary for [the union] to show that bargaining will result in a feasible solution.” Id.

In this case, the Charging Party actually lists in its brief different options the parties could have discussed as an alternative to applying the shutdown days to the Charging Party’s members. The Charging Party also notes that it had accepted layoffs in the past, so the possibility of productive bargaining is not illusory. Whether the Respondent would have accepted any of these proposals is not at issue. The Respondent did not give the Charging Party the opportunity to make proposals that could have addressed the Respondent’s concerns. Therefore, the Respondent has not demonstrated that bargaining would have been so burdensome as to outweigh the benefits bargaining might have on the decision-making process.

The Board also determines whether the benefit of bargaining outweighs the burden by analyzing the motivation behind the employer’s decision. A hybrid subject that involves economically-motivated changes is particularly amenable to bargaining. Chicago Park District, 18 PERI ¶¶3036. The Charging Party argues that the shutdown days are amenable to bargaining because the decision to implement them involved a desire to save labor costs.

I disagree. I do not find that the shutdown days were economically motivated. The Respondent’s initial request that the COUPE unions accept furlough days was clearly made out of a desire to save labor costs. However, the decision regarding scheduling the furlough days does not appear to have been driven by cost considerations. Murphy testified that allowing the

DWM employees to choose when to schedule their furlough days caused many problems in meeting service demands. The DWM enacted these shutdown days not in response to monetary concerns, but because shutting down the department made more sense from a scheduling and operational standpoint.

The motivation behind the decision to schedule shutdown days may not have been out of an effort to save on labor costs. However, the Respondent's concurrent bargaining with other unions and the Charging Party, coupled with the Charging Party's ability to offer an adequate response to the Respondent's scheduling problems, demonstrates that the benefit of bargaining outweighs the burden. Therefore, I find that that the decision to implement department-wide shutdown days was indeed a mandatory subject of bargaining.¹⁰

4. WAIVER

The decision to implement shutdown days in the DWM was a mandatory subject of bargaining over which the Respondent failed and refused to negotiate with the Charging Party. It is possible, though, that the Respondent was not required to bargain over the shutdown days if the Charging Party waived its right to midterm bargaining by the terms of the CBA.

Generally, where a subject of bargaining has been fully negotiated and is covered in a CBA, the parties have no obligation to bargain that issue further during the term of the contract. City of Chicago, 18 PERI ¶3025 (IL LRB-LP 2002). For a CBA waiver to exist, the CBA must contain clear and unmistakable language demonstrating the Charging Party's intent to waive its right to bargain over the shutdown days during the life of the contract. Am. Fed'n of State, County, and Mun. Employees v. Ill. State Labor Rel. Bd., 190 Ill. App. 3d 259, 269, 546 N.E.2d 687, 694 (1st Dist. 1989). Waiver is never presumed. Am. Fed'n of State, County, and Mun.

¹⁰ The NLRB has held that a one-day plant closure was a mandatory subject of bargaining where the employer had never before shut down the plant due to lack of work, its proffered reason in that case. Champion Home Builders Co., 350 NLRB 788 (2007).

Employees v. Ill. State Labor Rel. Bd., 274 Ill. App. 3d 327, 334, 653 N.E.2d 1357, 1362 (1st Dist. 1995). It is the burden of the Respondent to establish through express contract language or bargaining history that the parties have considered the situation that has arisen and knowingly and unmistakably waived the right to bargain over the issue. Forest Preserve District of Cook County, 21 PERI ¶43 (IL LRB-LP 2005), aff'd, Forest Preserve District of Cook County v. Ill. Labor Rel. Bd., 369 Ill. App. 3d 733, 861 N.E.2d 231 (1st Dist. 2006).

a. MANAGEMENT RIGHTS CLAUSE

The Respondent first argues that the management rights clause supports its allegation of CBA waiver. This clause, excerpted supra, contains no specific mention of furlough and/or shutdown days. There is also nothing which clearly indicates that, even in the absence of specific language, the parties intended for the Respondent to have the right to institute shutdown days. In AFSCME v. Ill. State Labor Rel. Bd., 274 Ill. App. 3d 327, the union contested the employer's right to unilaterally lay off employees. While the management rights clause did not use the exact word "layoff," it did state that the employer had the right to "relieve employees from duty because of lack of work or other legitimate reasons." The Board and the appellate court agreed that the only possible interpretation of this language was that the employer was authorized to unilaterally lay off employees.

No such language existed in the management rights clause of the parties' CBA in Forest Preserve District of Cook County v. Ill. Labor Rel. Bd., 369 Ill. App. 3d at 755, 861 N.E.2d at 249. In that case, the appellate court looked to AFSCME and noted the critical importance of the specific contract language referencing relieving employees from duty. Id. Without this language, the court held, the employer would not have had the right to unilaterally lay off employees. Id.

Because no such CBA language existed in the case before it, the court could not find a clear and unmistakable waiver of the union's right to bargain over layoffs. Id.

In this case, the CBA's management rights clause does give the Respondent the exclusive right to lay off employees. However, the shutdown days were not "layoffs" as that term is generally understood; furthermore, Egan stated that the shutdown days were not layoffs in the Step One grievance response letter she issued to the Charging Party.

The management rights clause also allows the Respondent to "schedule the hours of work, to determine the services, processes, and extent of the Employer's operation." Shutdown days are not specifically listed as one of the ways to exercise this right. Without such clear and unequivocal language, I cannot find based on the management rights clause that the Charging Party unequivocally waived its right to bargain over the shutdown days. See Secretary of State, 24 PERI ¶22 (IL LRB-SP 2008) ("Waivers by express agreement are construed as applicable only to the specific items mentioned"); Chicago Transit Authority, 14 PERI ¶3002 (IL LLRB 1997) ("[W]here a contract is silent on the subject matter in dispute, a find[ing] of waiver by contract is absolutely precluded.")

**b. SECTIONS REGARDING "HOURS OF WORK" AND
"OVERTIME AND REPORTING PAY"**

The Respondent next argues that Section 5.1 (Hours of Work and Overtime) and Section 4.9 (Reporting Pay) of the CBA, both excerpted supra, authorized the DWM's implementation of the shutdown days. Unlike the management rights clause, these sections have been interpreted by Arbitrator Feuille in the arbitration award regarding the grievances the Charging Party filed over the shutdown days. His interpretation is critical to my analysis of whether the parties clearly intended to waive midterm bargaining over the shutdown days by the language in their CBA.

When parties include an arbitration clause in their contract, they agree to accept an arbitrator's interpretation of that contract. Am. Fed'N of State, County, and Mun. Employees v. Dep't of Central Mgmt. Services, 173 Ill. 2d 299, 305, 671 N.E.2d 668, 672 (1996); County of Lake, 28 PERI ¶67 (IL LRB-SP 2011). As is true with the courts, the Board is not empowered to overrule an arbitrator's construction if its interpretation of the contract differs from the arbitrator's. AFSCME, 173 Ill. 2d at 306, 671 N.E.2d at 673; Dep't of Central Mgmt. Services v. Am. Fed'N of State, County, and Mun. Employees, 222 Ill. App. 3d 678, 682, 584 N.E.2d 317, 319 (1st Dist. 1991). Additionally, unlike the courts, the Board has no authority to vacate an arbitration award even if it finds the award did not derive its essence from the contract. Dep't of Central Mgmt. Services, 222 Ill. App. 3d at 682, 584 N.E.2d at 319. Therefore, since "an arbitral construction of a contractual provision becomes a binding part of the parties' agreement," County of Lake, 28 PERI ¶67; The Motor Convoy, Inc., 303 NLRB 135 (1991), Arbitrator Feuille's interpretation of the contract language in question must be applied to the issue of waiver.

In his award, Arbitrator Feuille analyzed Section 5.1 both alone and coupled with Section 4.9 in order to determine that the Respondent did not violate Section 5.1 by enacting the shutdown days. Standing alone, Section 5.1 "clearly implies there will sometimes be a not-normal, or abnormal, work week. The weeks during which the shutdown days were held are examples of such abnormal work weeks..." He further found that "the contract drafters explicitly agreed... that this 'normal work week' arrangement could be modified 'where the Employer's operations require different scheduling needs.'" (emphasis added). When Arbitrator Feuille analyzed Sections 5.1 and 4.9 together, he found that "Section 4.9 reinforces the Employer's

ability to change the 'normal work week' when the Employer's operations require different scheduling needs."

Arbitrator Feuille found no Section 5.1 violation by the Respondent because the contract language gave the Respondent the authority to implement shutdown days. Therefore, the arbitration award shows definitively that the parties clearly waived, by the language in their CBA, the right to bargain over the shutdown days.

The award did eventually hold that the Respondent violated the CBA because it

abused its managerial discretion and acted unreasonably when it imposed reduced work hours in the form of lack of work days on Local 700-represented employees in [the DWM] that originated as preselected furlough days in the revised COUPE Agreement in the wake of Local 700's agreement with the City to refuse reduced work hours and instead accept layoffs.

However, the only issue before the Board is whether the Respondent failed and refused to bargain with the Charging Party over these shutdown days. The contract language, as interpreted by the parties' arbitrator, contradicts the Charging Party's allegation of a 10(a)(4) and (1) violation, since that language evinces the parties' agreement that the Respondent had the authority to unilaterally institute the shutdown days. After reviewing Arbitrator Feuille's award, it is clear to me that the parties agreed when negotiating the contract that the Respondent would have the right to shorten the "normal work week" when "the Employer's operations required different scheduling needs." The Respondent exercised that right in the instant case when it instituted six shutdown days in 2010 and three shutdown days in 2011, thereby shortening those nine work weeks. Therefore, I find that the Respondent had no obligation to bargain with the Charging Party over the shutdown days because of the language in Sections 5.1 and 4.9.

c. ZIPPER CLAUSE

The Respondent also argues that the zipper clause, contained in Article 20 of the CBA, prevents the Charging Party from midterm bargaining over any matter subject to collective bargaining. The purpose of a zipper clause is to protect an employer from requests by a union to bargain midterm over terms and conditions of employment which were already negotiated. Village of Bensenville, 19 PERI ¶119 (IL LRB-SP 2003). I disagree with the Respondent's argument that the Charging Party waived its rights to midterm bargaining over any collective bargaining topic because of the presence of the zipper clause. The Board has long held that a zipper clause only precludes bargaining over matters that are contained in the CBA or that were fully discussed or consciously explored during negotiating the contract. See Village of Bensenville, 19 PERI ¶119; City of Chicago, 18 PERI ¶3025. "Stated another way, a zipper clause serves as a 'shield' which a party may use against the other party's request for midterm bargaining, but not as a 'sword' to accomplish unilateral changes in terms and conditions of employment." Village of Bensenville, 19 PERI ¶119, citing CBS Corporation, 326 NLRB 861, 872 (1998).

However, the interpretation of Sections 5.1 and 4.9 of the CBA by Arbitrator Feuille clearly indicate that the Charging Party and the Respondent bargained over the Respondent's right to shorten work weeks, here accomplished by the implementation of the shutdown days. The parties agreed, by including these sections as part of their contract, to give the Respondent the right to make changes to the normal work week when different scheduling needs are required. These sections, read with the zipper clause, constitute a clear and unmistakable waiver of the right to midterm bargaining over the shutdown days.

V. CONCLUSIONS OF LAW

- A. Count I is appropriate for deferral under the Spielberg standard.
- B. The Respondent failed and refused to bargain with the Charging Party over the decision to implement the shutdown days.
- C. The Respondent did bargain with the Charging Party over the effects of the shutdown days upon the Charging Party's members.
- D. The shutdown days are a mandatory subject of bargaining.
- E. The parties' management rights clause does not constitute a "clear and unequivocal" waiver of the Charging Party's right to bargain over the Respondent's decision to implement the shutdown days.
- F. Sections 5.1 and 4.9 of the parties' CBA, as interpreted by Arbitrator Feuille, constitute a "clear and unequivocal" waiver of the Charging Party's right to bargain over the Respondent's decision to implement the shutdown days.
- G. The parties' zipper clause, when read in conjunction with the other terms of the parties' CBA, specifically Sections 5.1 and 4.9, constitutes a "clear and unequivocal" waiver of the Charging Party's right to bargain over the Respondent's decision to implement the shutdown days.
- H. The Respondent did not violate Section 10(a)(4) and (1) when it failed and refused to bargain with the Charging Party over its decision to implement the shutdown days.

VI. RECOMMENDED ORDER

IT IS HEREBY ORDERED that Count I be deferred to the existing arbitration award. It is further ordered that Count III be dismissed.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240, the 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 this Recommendation. Parties may file responses to any 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 recommendation. Within seven 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, if at all, with Jerald Post, General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois, 60601-3103. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted in the Board's Springfield office. 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. 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 20th day of February, 2015.

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
LOCAL PANEL**

Kate Vanek

**Katherine C. Vanek
Administrative Law Judge**