

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

Amalgamated Transit Union,	)	
Local 241,	)	
	)	
Charging Party	)	
	)	Case No. L-CA-15-008
and	)	
	)	
Chicago Transit Authority,	)	
	)	
Respondent	)	

**ADMINISTRATIVE LAW JUDGE’S RECOMMENDED DECISION AND ORDER**

On August 26, 2014, Amalgamated Transit Union, Local 241 (Union or Charging Party) filed a charge with the Illinois Labor Relations Board’s Local Panel (Board), alleging that the Chicago Transit Authority (CTA or Respondent) engaged in unfair labor practices within the meaning of Sections 10(a)(4) and (1) of the Illinois Public Labor Relations Act (Act) 5 ILCS 315 (2014), as amended. The charge was investigated in accordance with Section 11 of the Act and on November 25, 2014, the Board’s Executive Director issued a Complaint for Hearing. A hearing was conducted on February 24, 2015, in Chicago, Illinois, before ALJ Thomas Allen, at which time the Union presented evidence in support of the allegations and all parties were given an opportunity to participate, to adduce relevant evidence, to examine witnesses, to argue orally, and to file written briefs. The Board administratively transferred the case to me, and the parties stated they had no objection to the issuance of a Recommended Decision and Order based on the existing closed record. After full consideration of the parties’ stipulations, evidence, arguments and briefs, and upon the entire record of the case, I recommend the following:

**I. PRELIMINARY FINDINGS**

The parties stipulate and I find that:

1. At all times material, the 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 Act, pursuant to Section 20(b) of the Act.

3. At all times material, the Union has been a labor organization within the meaning of Section 3(i) of the Act.
4. At all times material, the Union has been the exclusive representative of a bargaining unit (Unit) comprised of certain employees employed by the Respondent, including those in the position of Bus Service Management (BSM) Supervisors.
5. At all times material, the Respondent and the Union were parties to a collective bargaining agreement (CBA) that includes a grievance procedure culminating in final and binding arbitration, with an effective date of January 1, 2012 through December 31, 2015.

## **II. ISSUES AND CONTENTIONS**

The issue is whether the Respondent violated Sections 10(a)(4) and (1) of the Act when it allegedly changed the available options for work assignments/hours of Bus Service Supervisors in the work assignment selection (“pick”) process.<sup>1</sup>

The Union argues that the Respondent unlawfully effected a unilateral change in employees’ terms and conditions of employment when it modified the available assignments because it did not first bargain to impasse or agreement on the proposed changes. First, the Union asserts that the changes to available work assignments are a mandatory subject of bargaining that do not fall within matters of inherent managerial policy listed in Section 4 of the Act. In the alternative, the Union argues that the benefits of bargaining over the changes outweigh the burdens of bargaining on the Respondent’s inherent managerial authority because the Union could offer creative solutions to the Respondent’s problems of maintaining timely bus service.

Next, the Union asserts that the Respondent failed to bargain to impasse before implementing the changes to the assignments available for selection because further bargaining would have been fruitful in light of the parties’ bargaining history. The Union also argues that a finding of impasse is precluded where the Respondent demonstrated bad faith by expressing its determination to implement its proposal regardless of the Union’s offers.

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<sup>1</sup> The Complaint alleges that the Respondent “eliminated the process in which Bus Service Supervisors picked their work region and work hours.” However, both parties agree that the Respondent still conducts the contractually-mandated process in which Bus Service Supervisors select their work hours and assignments.

Finally, the Union claims that even if the Respondent had bargained the proposed change to impasse it would not be entitled to implement its final offer because the parties' contract already addresses the matters at issue and any change to its terms would require the Union's consent. On these grounds, the Union also argues that the Respondent repudiated the parties' collective bargaining agreement by implementing the changes because the contract squarely addresses the matters that the Respondent changed.

The Respondent argues its changes to the available work assignments and work hours for selection by BSM Supervisors did not change the status quo because the status quo under the parties' contract and past practice includes the Respondent's discretion to make those changes.

The Respondent also contends that its changes address permissive subjects of bargaining. The Respondent denies that the changes impact employees' terms and conditions of employment. Instead, it asserts that the changes address purely matters of inherent managerial authority such as the improvement of its operations and equalization of workload. The Respondent alternatively argues that the burdens of bargaining outweigh the benefits of bargaining where Union had nothing to offer and bargaining would delay the changes that were necessary to achieve the Respondent's statutory mission.

In addition, the Respondent argues that it was entitled to make the changes to available work assignments because the parties bargained to impasse. The parties had bargained for four months, the Union's counterproposal did not address the Respondent's business needs, and the Union made statements to suggest that further bargaining would be futile.

Finally, the Respondent rejects the Union's claim that the parties' contract barred the changes in question. It also rejects the assertion that the Union was entitled to decline bargaining over such changes during the term of the parties' 2012-2015 contract where the Union presented no evidence that parties had bargained over the matters in negotiations for that contract.

### **III. MATERIAL FACTS**

The Respondent divides its bus operations into three regions, North, Central, and South. The Respondent further divides each region by assignment area. Prior to January 1, 2014, the Respondent's bus operation management structure included a Bus Operations Vice President and general managers, who each oversaw a garage.

Bus Service Management (BSM) Supervisors oversee bus operators. They ensure that bus service is maintained according to schedule, detect and correct service problems, implement service restoration techniques to mitigate the delay that results from an incident on the street, restore service interruption, inspect service areas, and report unsafe conditions. The BSM Supervisor job description provides that the BSM Supervisor may be dispatched to the scene of trouble or to a location where emergency procedures may be directed. It further provides that the position holder must “work various hours.” The work is not limited to the morning, the evening, or any particular shift.

In 2006, most BSM Supervisors worked from fixed posts located at key locations throughout the Chicago area. The Respondent assigned a small group of BSM Supervisors to flexible or mobile posts, and these supervisors were responsible for responding to events in the general area. BSM Supervisor Christine Hawkins described the difference between a fixed post and a flexible post. She stated that BSM Supervisors assigned to flexible posts are assigned to a district, and the Respondent provides them with cars they use to meet the buses on the street. By contrast, BSM Supervisors assigned to fixed posts are assigned to a particular fixed location, and the buses with problems come to the BSM Supervisor, rather than the other way around. The Respondent’s offer of assignments (“pick”) from June 24, 2007 indicates that the Respondent offered both fixed and flexible post locations for BSM Supervisors.

Around 2008, the Respondent adopted bus tracker GPS technology, which provided the Respondent and customers with more information about bus location and estimated time of arrival. The Respondent sought to use the GPS technology to respond more proactively to delays. To that end, the Respondent established two separate assignments for BSM Supervisors. In one assignment, the BSM Supervisor used the bus tracking technology to monitor service on the street and responded to specific delay using their assigned cars. In the other assignment, the BSM Supervisor responded to notifications received from the Control Center. It is unclear from the record whether the BSM Supervisors who responded to Control Center notifications were assigned to fixed posts, flexible posts, or a combination thereof.

Since 2008, the Respondent reduced the number of BSM Supervisors assigned to a fixed location by attrition. BSM Supervisor Christine Hawkins testified that when she worked at a fixed post the Respondent sometimes called her away from her assigned district to address bus problems in a neighboring district when the supervisor assigned to that district was absent.

Director Mike Stubbe likewise testified the Respondent's assignment of an employee to pick assignment area did not restrict the Respondent from sending that employee to a variety of locations outside their assignment area.

On or about January 7, 2012, the Respondent and the Union entered into a tentative agreement for a successor contract. The agreement provided that the terms of the parties' prior agreement (effective January 1, 2007 through December 31, 2011) would remain in effect in the parties' new agreement except as modified in the parties' tentative agreement. The parties stipulate that they entered into a collective bargaining agreement effective January 1, 2012 through December 31, 2015. The new agreement incorporated, as unchanged, Sections 13.5, 13.15, and 12.15 of the prior agreement.

Section 13.5 of the parties' collective bargaining agreement addresses the "pick," the procedure by which BSM Supervisors, by seniority, choose their work region, assignment area, work time, and days off. In relevant part, it provides the following:

Bus service supervisors will be allowed to pick their districts every two (2) years, and their work twice a year, to be effective in June and in December. In the scheduling of such picks and work assignments, the Authority will retain the right to maintain sufficient flexibility in order to provide for continuous and efficient service to the public. In order to provide such service, certain jobs will be required to work as assigned. It is understood that this picking of jobs would in no way change the present practice of all jobs working as assigned under certain circumstances, such as emergencies, special events, etc..

Stubbe testified that the term "district" refers to the region, which includes the North, Central, and South regions, not the work area or assignment.

Section 13.15 of the parties' collective bargaining agreement is entitled "Past Practice," and provides the following: "All present working conditions shall remain in effect during the term of this Agreement, unless a desired change is agreed to by the parties." General Manager for Contract Labor Relations Katharine Lunde testified that the nature of the assignments offered in the pick did not rise to the level of past practice.

Section 12.15 of the parties' collective bargaining agreement provides the following with respect to the work location of BSM Supervisors: "The Authority agrees to limit work locations to two (2). However, in cases of special events, charters and emergencies, the supervisors may be sent to the area of the emergency." Stubbe testified that this provision applies to fixed posts and limits the Respondent from moving employees assigned to fixed posts to any more than one

other fixed post location. He stated, “there’s some vagueness to it...but my interpretation has always been that in constructing a specific assignment for somebody on a daily basis, that we would restrict them for [sic] having to work in two different locations...going back to the old supervisory strategy...where we had post location and if you were at a fix location...we would restrict [you] from having to move around from those fixed locations....” Stubbe also testified that he believed the contract granted the Respondent the authority to remove all boundaries between post locations and make assignments “on demand” within each region.

In January 2013, the Respondent issued a new position description for the Bus Service Supervisor I position. It provides that BSM Supervisors may be dispatched to the scene of trouble or to a location where emergency procedures may be directed. It further states that the BSM Supervisors must work outdoors in all types of weather during any hours of the day or night, and that the BSM Supervisor is required to work various hours.

In December of 2013, the Respondent conducted a pick. Stubbe testified that the pick did not include flexible posts. However, the pick posting admitted into the record provides the following: “All Supervisors are assigned mobile units with laptops to monitor service on the Bus Tracker website and are required to document all work performed in SIMS (Supervisor Information Management System). All Mobile Supervisors are subject to reassignment as legitimate operational needs require.”

On or about January 1, 2014, the Respondent reorganized its management structure and established three director positions to oversee each of the three regions. The Respondent placed Jeff Smith, Mike Stubbe, and Jason Kierna into those new director positions. As of 2014, the Bus Operations Vice President was Monica McMillan-Robinson.

The new directors reviewed the effectiveness of the BSM Group and the distribution of work. They reviewed route data from the Control Center on the response assignments dispatched by the Control Center, separated by category. The data showed that the distribution of work was uneven. The midday and evening periods had more call volume and lower staffing than the morning period.

The directors sought to create efficiencies in supervision, to equalize workload, and to improve the Respondent’s standards of service. They wished to more evenly distribute the calls sent from the Control Center so that certain supervisors assigned to geographic locations with heavy volume would not be overburdened. They wished to have more supervisors at work in the

evening, when call volume was higher instead of having an equal distribution of supervisors at all times of the day. Finally, they wished to improve poorly performing routes by reducing gaps in bus service and bus bunching, which occurred most frequently in the afternoons.

The directors developed a plan to address the identified deficiencies. First, they sought to eliminate a number of fixed “swing-post” assignments, including seven assignments located at the garages and four posts in other fixed locations. Swing posts are weekday assignments where the BSM supervisor works in the morning, takes a break, and works in the afternoon. BSM Supervisors assigned to these posts can earn an overtime premium. By eliminating these swing posts, the Respondent sought to increase the number of employees who worked on the streets and aimed to cut costs by eliminating payment of overtime. Second, the Respondent sought to convert all remaining fixed posts to flexible posts by assigning the position holders vehicles so that they could respond to events on the street as they arose. Third, the Respondent sought to shift ten of the morning (“am”) assignments to afternoon (“pm”) assignments, which would make more BSM Supervisors available at times when the Respondent had the most bus route troubles, such as gaps and bus bunching. Fourth, the Respondent sought to eliminate certain assignment boundaries within the picked regions so that BSM Supervisors would receive assignments “on demand.” This proposed change would expand the BSM Supervisors’ assigned work areas and provide the Respondent with flexibility to dispatch vehicles to areas of concern. Fifth, the Respondent sought to create units or “task forces” that could move across regional boundaries so that the Respondent could direct the task force members to specific routes or give them special assignments. Finally, the Respondent sought to establish a pick system “extra board” for assignments throughout the system.

On April 1, 2014, the Respondent requested a meeting with the Union to discuss its proposed changes. The Respondent wished to receive feedback from the Union on its proposals and to address the Union’s concerns.

On April 10, 2014, the Union and the Respondent met. The Union’s representatives at the meeting included Instructor II Woodrow Eiland and Keith Hill.<sup>2</sup> The Respondent’s representatives at the meeting included Lunde and Director Stubbe. Lunde testified that the purpose of the meeting was for the Respondent to describe its objectives and to provide a reason for the proposed changes. The Respondent presented its proposed changes. The Union

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<sup>2</sup> Hill’s title does not appear in the record.

responded that the proposed changes addressed matters covered by the contract and that the proper time for addressing such changes would be at the parties' negotiations for a successor contract. The Respondent informed the Union that it would proceed with the changes unless the Union offered a counter proposal.

After the April 10, 2014 meeting, the Union asked for the data upon which the Respondent based its proposal. Lunde provided the Union with the data on a thumb drive.

On May 15, 2014, the Respondent requested that the parties schedule a follow up meeting to discuss the proposed changes and to receive the Union's input.

On June 16, 2014, Union attorney David Huffman-Gottschling wrote an email to Lunde expressing the Union membership's reaction to the Respondent's proposal. The email also identified current issues that the Union believed would require resolution before the Union could consider whether the proposed changes were appropriate and permitted by the collective bargaining agreement. Specifically, the Union noted the following ongoing problems. First, it asserted that the Respondent was chronically understaffing the BSM Supervisor title. The Respondent also failed to place certain districts on the pick and declined to fill those districts. Second, it noted that understaffing led to other problems, including the performance of bargaining unit work by managers. Third, the Union claimed that the Respondent had already effectively turned fixed posts into flexible posts. The Union noted that there were pending grievances alleging contract violations on the grounds that the Respondent was instructing supervisors to report directly to a certain work location in the field, rather than adhering to the past practice of requiring them to check in at the garage and having them travel to their work location on the clock. The Union expressed a desire to resolve those outstanding issues at the parties' subsequent meeting.

On June 17, 2014, the Union and the Respondent had a second meeting, which took place at the Respondent's headquarters. The Union's representatives at the meeting included attorney David Huffman-Gottschling, Eiland, and approximately 10 BSM Supervisors. Eiland testified that International Union Vice President/Trustee Javier Perez was also present.<sup>3</sup> The Respondent's representatives at the meeting included Lunde, Vice President of Bus Operations McMillan-Robinson, and the three Directors. The parties had some discussion about the Respondent's proposed changes. The parties had extended discussions about the Union's

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<sup>3</sup> At all times material to this case, the local union was in trusteeship.

concern that the Respondent was understaffing the BSM Group and Union's desire that the Respondent hire additional BSM Supervisors.

Eiland testified to specific statements allegedly made by Respondent agents at this meeting.<sup>4</sup> I do not credit these statements because Eiland did not identify the speaker and Eiland's memory of the events was generally poor. Eiland confused two of the meetings held between the Respondent and the Union regarding the proposed changes and could not recall the total number of meetings held on this subject.

On June 24, 2014, the Respondent provided the Union with a draft pick, via email, that it created following the parties July 17, 2014 meeting and in consideration of the Union's concerns. The draft pick included a map of the Respondent's bus operations. It identified a total of eight task force units divided among the three regions. It reduced the total number of assignment areas in each region, reduced the total number of fixed post locations, and increased the total number of flexible post locations. Formerly, the North region included six assignment areas and four fixed post locations; in the new pick, the North region included three assignment areas and five flexible post locations. Formerly, the Central region included nine assignment areas and four fixed post locations; in the new pick, the Central region included three assignment areas and four flexible post locations. Formerly, the South region included eleven assignment areas and two fixed post locations; in the new pick, the South region included four assignment areas and four flexible post locations.

On June 27, 2014, Perez informed Lunde that the Union was in the process of formulating a response to the Respondent's proposal. He stated that the Union would waive the June 2014 contractual deadline for implementation of the pick to allow the Union the time to prepare a counterproposal and to allow the Respondent time to review it.

On July 22, 2014, the Union provided the Respondent with a counterproposal to the Respondent's proposed changes. In that proposal, the Union set forth three broad objections to the Respondent's proposal and explained them in a narrative. First, it objected to the elimination of assignment area boundaries and the elimination of assignments. It noted that the new pick consolidated most of the previously-picked work areas into larger districts covered by multiple supervisors and eliminated several picked positions. The Union noted that change would give

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<sup>4</sup> According to Eiland, an agent from the Respondent stated, "regardless of what you all are saying, we are going to move forward with the pick." Eiland further testified that an agent for the Respondent also "basically told" the Union that, "it is what it is, we are implementing this."

employees increased responsibly, including responsibility for a greater geographical area and a greater number of routes. The Union stated that the change raised concerns about the quality of the employees' work life and also increased the potential for performance-related discipline. The Union additionally observed that it would adversely affect supervisors' ability to respond quickly to situations on the street as they arose, which would have potentially serious consequences for public safety, traffic, operator safety, and the needs of the ridership. Second, the Union objected the creation of task force units. It asserted that such units diluted the benefit of seniority-based picking rights, which were intended to protect against managerial favoritism in assigning work. Because the proposal transferred the eliminated positions into a task force that worked as assigned by management each day, employees would no longer be entitled to choose their work locations and would be subject to the exercise of favoritism that the seniority provisions were intended to prevent. Third, the Union objected to conversion of fixed posts into flexible posts. The Union asserted that these three changes also violated the contract, which required the Respondent to maintain the status quo of employees' terms and conditions of employment during the term of the contract, allowed employees to pick their work location, and prohibited the Respondent from assigning employees to more than two work locations.<sup>5</sup>

The Union's counter proposal also offered specific changes to the draft pick presented by the Respondent, but left some aspects of the Respondent's proposed pick unchanged. The Union separated its counter proposal by region and offered specific changes to the pick related to each of the three regions. With respect to the South Region, the Union sought to restore assignments K12 AM and K34. It agreed to the combinations of certain areas, but indicated that the makeup of the combinations should be different. The Respondent had proposed the following combination of assignment areas: 16/32 and 15/21/35. The Union proposed the following different combination of assignment areas: 32/34, 15/16, and 31/35. Similarly, the Respondent had provided the following combination of assignment areas: 11/13/18. The Union provided the combination of 13/18, but sought to leave 11 separate. The Union proposed to retain task force units S25 and S27, where one would be assigned south of 79th and the other north of 79th. With respect to the Central region, the Union proposed to restore K52 as a mid-day assignment. It sought to restore boundaries between regions 51, 53, and 55. It also sought to retain task force

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<sup>5</sup> At hearing, Eiland testified that the Union also objected to the proposed changes because they would eliminate 10 to 20 jobs. However, there is insufficient evidence in the record to suggest that any employee lost his job.

units C24 and C25. With respect to the North Region, the Union sought to restore the K77 AM assignment. It sought to restore the K179 assignment's hours to 0500-1330 and 1330-2200. It also sought to change the Task Force unit M177's hours to 0500-1330. Finally, it set forth a proposal in paragraph four that would impact all regions. Paragraph four of the Union's proposal includes the four following subsections:

- a) CTA agrees that not only may CTA not back-fill temporarily reassigned supervisors' positions, but it also may not assign managers to perform duties of temporarily reassigned supervisors.
- b) Flexible post assignments are subject to reassignment within the district in which they are located in the event of an emergency.
- c) Sign-out positions to be made fix posts, not flexible.
- d) No mixing of AM and PM reliefs in the same week.

Stubbe testified that the Union's proposal represented significant movement from the Union's initial position on the Respondent's proposed change. However, he also asserted that the Union's proposal did not consider the data upon which the Respondent based its proposed combination of regions. According to Stubbe, these were proposed based "more or less" on the desires of the membership.

On July 30, 2014, the Union and the Respondent had a third meeting. The Union brought a group of approximately 24 BSM Supervisors to the meeting. The Respondent spent approximately 45 minutes to an hour looking for a meeting room large enough to accommodate the group. Stubbe stated that the parties' final July 30, 2014 meeting "wasn't what [he] would classify as a productive meeting." The Respondent accepted paragraph 4(a) of the Union's proposal. It also accepted paragraphs 4(b) and (c) with some small edits.<sup>6</sup> The record does not set forth the content of these small edits. The Union expressed displeasure at the fact that the Respondent accepted only three points of the Union's proposal. One of the Union agents asked, "that's it, that's all you are going to take from our counter proposal?" Lunde testified that she responded, "well, yea, because your counterproposal is just a different flavor of what we already proposed and you are saying all right, you can do it this way but you have to do it our way."

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<sup>6</sup> Stubbe conceded that the Respondent's implementation of parts 4(b) and 4(c) of its proposal was not a concession because the Respondent was already operating as requested under those provisions when the Union made its counterproposal. However, the Respondent had never included the language of 4(c) on any of its pick-related documents.

Lunde further stated, “if you are saying it’s ok to do it this way, then we are going to do it our way and thank you for your time.”

Lunde noted that the Respondent would edit the pick documents to include the addition of those Union’s proposals that the Respondent accepted. One BSM Supervisor pointed out other aspects of the Union’s proposal to the Respondent and asked the Respondent to incorporate them. Lunde then concluded by stating that “management has the right to allocate its resources as it sees necessary.” The Union never informed the Respondent that its proposal of July 22, 2014 constituted its final offer and it never told the Respondent it was unwilling to consider other changes.

Lunde then ended the meeting because she was not prepared to have a meeting with such a large group and was instead prepared to speak only to a couple of people about the Respondent’s proposal. Lunde testified that she concluded the parties were at impasse based on the Union’s response to her statement that the Respondent would not offer more to the Union than its acceptance of paragraphs 4(a), (b), and (c).

On August 6, 2014, the Respondent posted the final pick. At the request of the Union, the Respondent halted the pick and provided requested clarification on assignments. The Respondent reposted the final pick a week later. The Respondent’s final pick included changes that it made to its original proposal, in consideration of discussions with the Union. It included assignment M81 and an assignment that would monitor the storage area,<sup>7</sup> which were both swing posts that included weekends off and allowed the assignment holders to earn overtime. Lunde stated that the Respondent’s final pick included a “huge amount of changes,” made upon the Union’s request and further stated the changes were not limited to the Respondent’s acceptance of paragraphs 4(a), (b), and (c) of the Union’s counterproposal. Lunde did not identify those changes.

Since the Respondent’s change, the Respondent operates only four fixed posts. The BSM Supervisors’ areas of responsibility became larger and they became responsible for a greater number of bus routes.

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<sup>7</sup> The Respondent had formerly filled this position with pool supervisors. A pool supervisor is an employee who passed the supervisor test, but who still holds the bus operator/supervisor title and performs supervisory duties on an as-needed basis.

#### IV. DISCUSSION AND ANALYSIS

##### 1. Sections 10(a)(4) and (1) – Repudiation<sup>8</sup>

The Respondent did not repudiate the parties' collective bargaining agreement when it implemented changes to the available assignments in the BSM Supervisor pick because the parties' contract does not unambiguously prohibit the Respondent's changes. Even if the Board determines that the contract does prohibit the changes, the record in this case provides an insufficient basis from which to infer bad faith.

During the term of a collective bargaining agreement, neither party is required to bargain anew concerning matters settled by the contract, and neither party is free to modify the contractual terms over the other's objections. Chicago Transit Auth., 16 PERI ¶ 3021 (IL LRB-LP 2000); Chicago Transit Auth., 15 PERI ¶3018 (IL LLRB 1999); Chicago Transit Auth., 14 PERI ¶ 3002 (IL LLRB 1997); City Colleges of Chicago, 10 PERI ¶ 1010 (IL ELRB 1993); Illinois State Board of Education, 9 PERI ¶ 1059 (IL ELRB 1993); Waverly School District, 5 PERI ¶ 1002 (IL ELRB 1988); American Thoro-Clean, Ltd., 283 NLRB 1107 (1987); Herman Brothers Inc., 273 NLRB 124 (1984).

A Respondent's breach of a collective bargaining agreement rises to an unlawful repudiation of the collective bargaining process where the breach is both (1) substantial and (2) made without rational justification or reasonable interpretation such that it demonstrates bad faith. City of Loves Park v. Ill. Labor Rel. Bd. State Panel, 343 Ill. App. 3d 389, 395 (2nd Dist. 2003); Byron Fire Protection District, 31 PERI ¶ 134 (IL LRB-SP 2015); City of Chicago, 30 PERI ¶ 194 (IL LRB-LP 2014) (setting forth two-step repudiation analysis); City of Elgin, 30 PERI ¶ 8 (IL LRB-SP 2013); City of Kewanee, 23 PERI ¶ 110 (IL SLRB 2007). The Board has found breaches to be substantial where respondents, in violation of the contract, implemented multiple shift schedules and eliminated daily overtime,<sup>9</sup> changed insurance coverages and performed a layoff in violation of the contract,<sup>10</sup> and changed the manner of overtime

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<sup>8</sup> The Complaint does not allege a violation of the Act based on the Respondent's alleged repudiation of the parties' agreement. However, the record supports consideration of such a claim and I exercise discretion under Section 1220.50(f) of the Rules to amend the complaint to conform to the evidence presented. As discussed below, this allegation is nevertheless properly dismissed. State of Ill., Secretary of State, 31 PERI ¶ 7 n. 1 (amending the complaint to add new allegation, but nevertheless dismissing the complaint in its entirety); cf. Vill. of North Riverside, \_\_ PERI ¶ \_\_ (IL LRB-SP July 12, 2016) (declining to amend where proposed claim lacked merit).

<sup>9</sup> Chicago Transit Authority, 15 PERI ¶ 3018 (IL LLRB 1999).

<sup>10</sup> City of Kewanee, 23 PERI ¶ 110.

calculation.<sup>11</sup> The Board has found bad faith where the respondent's conduct evidenced an outright refusal to abide by a contractual term. City of Loves Park v. Ill. Labor Rel. Bd. State Panel, 343 Ill. App. 3d at 395. However, a finding of repudiation is precluded where the contract's language is open to more than one reasonable interpretation. City of Kewanee, 23 PERI ¶ 110. Indeed, where the contract language is ambiguous, the Board does not even have jurisdiction to remedy the alleged breach. Byron Fire Protection District, 31 PERI ¶ 134; Vill. of Creve Coeur, 3 PERI ¶ 2063 (IL SLRB 1988).

Notably, in repudiation cases, the Central City test is inapplicable because the Board's focus is on the respondent's conduct with respect to a matter that the parties have already allegedly bargained fully and/or incorporated into an agreement, rather than a novel issue. Chicago Transit Authority, 15 PERI ¶3018 n. 11.

Here, two of the three contract provisions referenced by the Union in support of its repudiation claim do not expressly bar the Respondent's actions. In addition, they are ambiguous in light of the parties' conduct and the contract as a whole, and therefore cannot support a finding of repudiation. The third contract provision is clearer, but the Respondent's alleged violation of it does not evidence bad faith in the absence of additional evidence.

First, Section 12.15 of the parties' agreement does not prohibit the Respondent from eliminating fixed post assignments (include swing posts), converting fixed posts to flexible ones, eliminating assignment boundaries, or creating task force assignments. It does not even reference posts, assignments, assignment boundaries, or the nature or work performed. It simply provides that the "Authority agrees to limit work locations to (2)." City of Aurora, 26 PERI ¶ 28 (IL LRB-SP ALJ 2010) (finding no repudiation where contract was silent on the matter at issue and where ALJ would have had to interpret contract in union's favor to find a violation of the Act).

The Union's assertion, that Section 12.15 bars the Respondent's changes, underscores the provision's ambiguity because the Union's interpretation of that provision conflicts with the parties' long-standing practices. The Union reasons that Section 12.15 prohibits the Respondent from using flexible posts, and making related changes that would require employees to repeatedly leave a fixed location, because such changes would contravene the Respondent's

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<sup>11</sup> Chicago Transit Auth., 16 PERI ¶ 3021.

agreement to “limit work locations to (2).” However, there is no dispute that the Respondent used flexible posts on and off since at least 2007, and that each contract in effect during that time contained the language relied upon by the Union in support of its claim that the contract prohibits their use. Stubbe’s testimony further highlights the existence of this ambiguity because he stated that the parties understood the “(2) locations” limitation to apply solely to fixed posts, and not flexible ones, which necessarily had no discretely calculable work locations and instead required employees to move from incident to incident. The Respondent’s failure to offer flexible posts in the 2013 pick does not eliminate this ambiguity where the Respondent offered flexible posts in the past, while the parties operated under the very contract language that the Union now claims bars those types of assignments. Chicago Transit Auth., 16 PERI ¶ 3021 (declining to find repudiation where case raised “questions relating to the applicability of the parties’ longstanding past practices in the face of arguably contradictory language”).

The Union’s claim that Section 12.15 also bars the creation of task force assignments<sup>12</sup> must likewise fail where the Union premises it on the unpersuasive argument that the provision unambiguously limits the Respondent’s assignment of employees to fixed locations. The Union’s related claim, that this provision bars elimination of assignment boundaries, fails for the same reason.

The ambiguity of Section 12.15 is even more apparent when that provision is viewed in the context of other contract sections. For example, Section 13.5 of the contract may arguably stand as an exception to Section 12.15’s requirement that the Respondent must limit work locations to two. Specifically, Section 13.5 in part provides that, “the authority will retain the right to maintain sufficient flexibility in order to provide for continuous and efficient service to the public [and that] [i]n order to provide such service, certain jobs will be required to work as assigned.” Accordingly, even if the Union is correct in its interpretation that Section 12.15 prohibits the use of flexible posts by limiting work locations to two, the contract contains ambiguity where Section 13.5 could be viewed as an exception that permits their use. Chicago Transit Auth., 16 PERI ¶ 3021 (no repudiation found where Board would have been required to interpret several contract provisions, which affected each other.)

Second, Section 13.5 of the contract likewise does not expressly prohibit the Respondent from eliminating fixed post assignments (including swing posts), converting fixed posts to

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<sup>12</sup> In task force assignments, BSM Supervisors move across regional boundaries to address bus problems.

flexible ones, eliminating assignment boundaries, or creating task force assignments. It simply provides that BSM Supervisors “will be allowed to pick their districts [region]<sup>13</sup> every two (2) years, and their work twice a year.” The Union contends that the Respondent’s transition to flexible posts and the broadening of assignment areas (i.e. creation of task forces and elimination of boundaries) nullifies the BSM Supervisor’s contractual benefit to pick their “districts” and their “work.” However, the Union misstates the effect of the change. The Respondent did not eliminate all assignment boundaries; it simply reduced the total number of assignment areas from a total of 26 to 10. Likewise, it did not eliminate fixed posts, it simply reduced them from a total of ten (10) to four (4). Although the creation of task forces eliminates boundaries for those who pick that assignment, unit members as a group still have a choice of districts and work location.

Further contrary to the Union’s contention, Section 13.15 of the parties’ contract addressing “past practices” is likewise ambiguous, because the parties offer differing, yet reasonable interpretations of that clause. Section 13.15 provides that “all present working conditions shall remain in effect during the term of this Agreement, unless a desired change is agreed to by the parties.” The Union claims that the clause prohibits any changes to employees’ working conditions. The Respondent claims that clause prohibits changes to present working conditions only if those working conditions constitute a “past practice.”

The Board in one case found a repudiation based on a breach of this provision, set forth in a prior CTA/ATU contract and, implicitly found it unambiguous. Chicago Transit Auth., 16 PERI ¶ 3021. However, that case is distinguishable because both the respondent’s breach and the respondent’s bad faith were readily apparent, whereas here they are not. In Chicago Transit Authority, the record contained extensive evidence that the “present working condition” at issue—treatment of minimum work and overtime—constituted a “past practice” of the parties, such that the past practice clause applied. Id. The record contained evidence concerning the length of time that the Respondent had interpreted its other provisions addressing minimum work and overtime provisions to include daily minimum guarantees for regular operators. Id. The record also demonstrated that the Respondent during bargaining sought to remove contractual obstacles that would prevent the Respondent from unilaterally changing those practices. Id. The Board concluded that the Respondent repudiated its collective bargaining obligation. Id.

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<sup>13</sup> Stubbe testified that the term district in the contract means region, North, South or Central. The Union does not dispute this interpretation.

By contrast, in this case, the record contains no evidence concerning the parties' bargaining history as it relates to any past practices relevant to the changes at issue here. There is no evidence that the Respondent, during bargaining, understood that Section 13.5 of the contract (addressing pick procedure) or Section 12.15 (addressing work location) prohibited the reduction/elimination of fixed and swing posts, the elimination of some assignment boundaries, the shifting of assignments from a.m. to p.m., or the creation of task force assignments. Nor is there evidence that the Respondent's present conduct served to implement changes that it could not secure during collective bargaining. Accordingly, there is insufficient evidence from which to conclude that the Respondent's changes constitute a breach of Section 13.5 of the parties' contract that rises to a repudiation of the Respondent's bargaining obligation. Cf. Chicago Transit Auth., 16 PERI ¶ 3021 (finding repudiation where "clearly, the parties had historically interpreted the contractual overtime and minimum guarantee provisions as including daily minimum guarantees in calculating overtime for regular operators").

Thus, the Respondent's changes do not constitute a repudiation of the Respondent's collective bargaining obligation.

## 2. Sections 10(a)(4) and (1) - Unilateral Changes

The Respondent violated Sections 10(a)(4) and (1) of the Act by unilaterally reducing the total number of swing posts available for the BSM Supervisor pick. However, the Respondent did not violate Sections 10(a)(4) and (1) of the Act when it unilaterally reduced morning shifts and increased evening shifts, eliminated boundaries between pick regions, established a task force assignment, and converted fixed posts to flexible posts.<sup>14</sup>

### i. Bargaining Obligation under Central City Test

The Respondent's decision to reduce the number of swing posts is a mandatory subject of bargaining. However, the Respondent's decisions to reduce morning shifts and increase evening shifts, to eliminate boundaries between pick regions, to establish a task force assignment, and to convert fixed posts to flexible posts are permissive subjects of bargaining.

A unilateral action by an employer may violate Section 10(a)(4) of the Act, even absent a specific contractual breach, if the employer makes a unilateral change in a mandatory subject

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<sup>14</sup> Although swing posts are also fixed posts, the reduction of swing posts is addressed separately.

of bargaining without granting prior notice to, and an opportunity to bargain with, the exclusive bargaining representative of its employees. Board of Educ. of Sesser-Valier Comm. Unit School Dist. No. 196 v. Ill. Educ. Labor Rel. Bd., 878 (4th Dist. 1993); Chicago Transit Auth., 16 PERI ¶ 3021 (IL LRB-LP 2000); Chicago Transit Auth., 14 PERI ¶ 3002; Vill. of Crest Hill, 4 PERI ¶ 2030 (IL SLRB 1988); City of Peoria, 3 PERI ¶ 2025 (IL SLRB 1987); State of Ill., Dep't of Cent. Mgmt. Servs., 1 PERI ¶ 2016 (IL SLRB 1985).

In Central City, the court set forth a three-part test to determine whether a matter is a mandatory subject of bargaining. The first question is whether the matter is one of wages, hours and terms and conditions of employment. Cent. City Educ. Ass'n, IEA-NEA v. Ill. Educ. Labor Rel. Bd. ("Central City"), 149 Ill. 2d 496 (1992). If the answer to that question is no, the inquiry ends and the employer is under no duty to bargain. Central City, 149 Ill. 2d at 522-523. If the answer is yes, then the second question under the Central City test is whether the matter is also one of inherent managerial authority. Id. If the answer is no, then the analysis stops and the matter is a mandatory subject of bargaining. Id. If the answer is yes, the Board will balance the benefits that bargaining will have on the decision-making process with the burdens that bargaining will impose on the employer's authority. Id.

i. Reduction of Swing Posts

The Respondent must bargain over its reduction of swing posts because the benefits of bargaining outweigh the burdens of bargaining on the Respondent's inherent managerial authority.

The Respondent's reduction of swing posts impacts employees' terms and conditions of employment because it reduces opportunities for overtime. The record indicates that the swing posts carried with them the opportunity to earn overtime, whereas the flexible posts and other types of fixed posts did not. The Board has never squarely addressed whether the reduction of overtime opportunities impacts employees' terms and condition of employment. However, both the Illinois Labor Relations Board and the Illinois Educational Labor Relations Board have held that the reduction of opportunities to earn overtime is an adverse employment action. It is reasonable to infer that the reduction of overtime opportunities likewise impacts employees' terms and conditions of employment, even if overtime earnings are not guaranteed. Oswego Community Unit School District 308, 31 PERI ¶ 204 (IL ELRB 2015)(employer's restriction

on opportunity for overtime constituted an adverse employment action); City of Highland Park, 18 PERI ¶ 2012 (IL LRB-SP 2002)(same); see also Comm. College Dist. No. 508 (City Colleges of Chicago), 9 PERI ¶ 1068 (IL ELRB ALJ 1993) (decision that impacted the amount of overtime that teachers could receive affected employees' wages, hours and terms and conditions of employment).

The reduction of swing posts is likewise a matter of inherent managerial authority. Decisions concerning an employer's standards of service, its organizational structure, and the direction of the employer's function are matters of inherent managerial authority. 5 ILCS 315/4 (2012); Cnty. of Perry and Sheriff of Perry Cnty., 19 PERI ¶ 124 (IL LRB-SP 2003). Here, the Respondent sought to eliminate swing posts in part to improve its standards of services. Employees at swing posts work at a fixed location and they split their work time between mornings and afternoons. The Respondent sought to shift assignments from swing posts to flexible posts to increase the total number of employees available to address bus incidents on the streets. It also sought to increase the number of employees available for afternoon shifts to increase the total number of employees assigned exclusively to afternoon/evening hours. According to the Respondent, both these changes served to improve the speed with which the Respondent could resolve bus incidents and restore bus service for its customers because they balanced workload among employees and increased the total number of employees available during periods of increased transit use. Chief Judge of the Circuit Court of Cook County, 31 PERI ¶ 114 (IL LRB-SP 2014) (reorganization that addressed workload equity and staffing parity concerned matter of inherent managerial authority).

However, the benefits of bargaining over the decision to reduce swing posts outweigh the burdens that bargaining would impose on the Respondent's inherent managerial authority. Decisions that are based in part on a desire to reduce labor costs, such as this one, are amenable to bargaining because the union can suggest cost saving measures to benefit the employer or it can offer concessions that could save employees' jobs. Chicago Park Dist. v. Ill. Labor Rel. Bd., 354 Ill. App. 3d 595, 603 (1st Dist. 2004); Vill. of Ford Heights, 26 PERI ¶145 (IL LRB-SP 2010) (considering whether the Union was in a position to offer concessions addressing the Village's financial concerns); see also City of Peoria, 3 PERI ¶2025 (IL SLRB 1987). It is undisputed that the Respondent reduced swing posts in part to reduce labor costs by eliminating overtime hours and, in turn, eliminating the Respondent's payment for that overtime. Although

the decision in this case also related in part to the Respondent's desire to improve its standards of service, the burdens of bargaining the elimination of a mere seven swing-posts is minimal where the Respondent retains the freedom to make many other changes. As discussed below, most of the Respondent's changes address permissive subjects of bargaining and are not mandatorily negotiable. More importantly, they are severable from the Respondent's elimination of swing posts because the Respondent can implement them and take significant steps to improve its standards of service even if it preserves the swing posts at issue here. Accordingly, the Respondent must bargain over the narrow issue of maintaining the seven swing posts where bargaining would not diminish the Respondent's ability to effectively perform the transit services it is statutorily obligated to provide. Cf. Vill. of Franklin Park, 8 PERI ¶2039 (noting that "the scope of bargaining in the public sector must be determined with regard to the employer's statutory mission and the nature of the public service it provides").

Thus, the Respondent must bargain over its reduction of swing posts.

ii. Reduction of Morning Shifts/Increase in Evening Shifts

The Respondent's decision to reduce morning shifts and increase evening shifts is a permissive subject of bargaining over which the Respondent is not required to bargain because the burdens of bargaining outweigh the benefits to the bargaining process.

The Respondent's reduction of morning shifts and corresponding increase in evening shifts impact employees' terms and conditions of employment. A change to a single employee's shift from morning to evening changes that employee's terms and conditions of employment. By extension, a change to the total number of available morning shifts changes some employees' terms and conditions of employment because at least some employees, who formerly had the seniority to select their shift of choice, will be forced to accept a different shift. City of Aurora, 24 PERI ¶ 25 (IL LRB-SP 2008)(reducing number of sergeants allowed to schedule a day off on Sunday impacted employees' "hours" within the meaning of Section 7; ALJ noted that the term "hours" also covers shift times).

However, the composition of evening and morning shifts is also a matter of inherent managerial authority because it directly bears on the Respondent's standards of service. The Respondent determined that it had too few employees working in the evenings, when there were more bus problems such as gaps and bus bunching. The Respondent sought to increase the

number of employees in the evening and reduce employees assigned in the morning to more efficiently address those issues. Although the Union denies that the uneven distribution of work caused any reduction in standards of service, it cannot reasonably deny that the assignment of additional employees to high traffic times would improve those standards. The Respondent necessarily does not have the statistical information to show that the planned change would produce the desired results, but the Respondent's plan was a reasonable attempt to achieve those ends. Indeed, it is no stretch to infer that Respondent could address a greater number of bus incidents in a shorter amount of time by assigning more employees to the time of day when there are a greater number of bus incidents and by ensuring employees' workloads were balanced. 5 ILCS 315/4 (matters of inherent managerial authority include "standards of service"); Chief Judge of the Circuit Court of Cook County, 31 PERI ¶ 114 (IL LRB-SP 2014)(decision to adjust staffing levels to match intake levels and to address workload equity constituted matter of inherent managerial authority); cf. City of Chicago, 31 PERI ¶ 3 (IL LRB-LP 2014)(installation and use of video cameras did not relate to public library's standards of service where library's primary function was to loan books).

The burdens of bargaining over the number of evening versus morning shifts outweigh the benefits of bargaining to the bargaining process. Other public sector jurisdictions have recognized that the elimination of shifts or the change in shift allocation is a permissive subject of bargaining where the decision is necessary to the efficient delivery of governmental services. New Brunswick Parking Auth., 42 NJPER ¶ 142 (NJ PERC 2016)(employer could unilaterally eliminate maintenance night shift and move employees to the morning shift when customer demand for parking facilities was greatest); see also Starpoint Cent. School Dist., 23 PERB ¶ 3012 (NY PERB 1990)(finding it to be management's prerogative to determine the levels, days and hours of coverage required); cf. Vill. of Oak Lawn, 26 PERI ¶ 118 (IL LRB-SP 2010) aff'd by Vill. of Oak Lawn v. Ill. Labor Relations Bd., 2011 IL App (1st) 103417 (finding that minimum shift manning was a mandatory subject of bargaining upon applying Central City test where employer did not illustrate burdens of bargaining or explain how it related to standards of service). Although public employers are ordinarily required to bargain over the manner in which employees will be assigned to provide coverage of services, the parties in this case have already bargained those matters by negotiating the shift bidding process, to which the Respondent in this case adhered. Starpoint Central School District, 23 PERB ¶ 3012 (noting that employers must

ordinarily bargain the means of accomplishing the changes to work schedules); see also Union-Endicott Cent. Sch. Dist., 25 PERB ¶ 3083 (NY PERB 1992).

Here, the Respondent provided considerable evidence concerning the increased volume of bus incidents in the evening hours and it provided testimony that a corresponding increase in BSM Supervisors on those hours would promote better bus service. The Union by contrast did not separately address the various changes proposed by the Respondent in presenting its arguments. Although the Union asserts that bargaining would give the Union an opportunity to offer creative solutions to the Respondent's problems in maintaining timely bus service, case law from other jurisdictions indicates that such a purported benefit would not outweigh the burdens of bargaining on the Respondent's inherent managerial authority. New Brunswick Parking Auth., 42 NJPER ¶ 142 (NJ PERC 2016) and Starpoint Cent. School Dist., 23 PERB ¶ 3012 (NY PERB 1990).

In sum, the Respondent is not required to bargain over the reduction of morning shifts and the corresponding increase in evening shifts.

### iii. Elimination of Some Assignment Boundaries

There is insufficient evidence that the elimination of some assignment boundaries within pick regions impacts employees' terms and conditions of employment. Changes to work assignments impact employees' terms and conditions of employment when the change (1) involves a transfer of work outside the unit, (2) involves an increase in workload, or (3) expands the scope of employees' existing job functions. City of Chicago, 19 PERI ¶ 69 (IL LRB-LP 2003)(extension of duties within job classification did not impact employees' terms and conditions of employment).

Here, there is no dispute that the elimination of some assignment boundaries does not involve a transfer of work outside the unit. It also does not expand the scope of employees' existing job functions because it adds no duties to those outlined in employees' job descriptions. Village of Bensenville, 14 PERI ¶ 2042 (IL SLRB 1998)(union's proposal to limit employer from assigning officers to dispatch desk addressed permissive subject because dispatch desk duty was not beyond the scope of patrol officers' regular duties).

Finally, contrary to the Union's assertion, there is insufficient evidence to support the claim that the Respondent's elimination of some assignment boundaries increases workload.

Rather, the evidence suggests that the workload of the unit as a whole remains constant and that only the balance of work divided among individual employees has changed. Some employees, formerly assigned to less busy locations are now required to work a larger area, which increases their individual workload because the increased geographical responsibility includes responsibility for a greater number of bus incidents. However, other employees formerly assigned to neighboring, busier locations will experience a concomitant reduction in individual workload. They will share responsibility for the busy areas that they formerly handled alone and also the less busy ones, formerly handled by others. Although there are some cases in which a single employee is newly solely responsible for a larger area at certain times, the Union offered insufficient evidence to demonstrate an overall increase in employees' workload.

Notably, the elimination of boundaries between some assignment areas is also a matter of inherent managerial authority because it relates to the manner in which the Respondent has chosen to improve its standards of service. Section 4 of the Act grants management exclusive decision-making authority over matters including standards of service, organizational structure, and direction of employees. 5 ILCS 315/4; Vill. of Bensenville, 14 PERI ¶2042. Here, the Respondent's decision to eliminate boundaries serves to balance workload and, in turn, improve the speed at which the Respondent can restore normal bus services. Chief Judge of the Circuit Court of Cook County, 31 PERI ¶ 114. As noted above, the Union denies that the uneven distribution of work caused any reduction in standards of service. However, the Union cannot reasonably deny that the expansion of assignment areas to restore balance in employee workload would allow the Respondent to resolve service problems more efficiently, to the benefit of the ridership.

Thus, the Respondent's decision to eliminate some assignment boundaries within pick regions is a permissive subject of bargaining.

iv. Establishment of a Task Force Assignment and Conversion of Fixed Posts to Flexible posts<sup>15</sup>

The Respondent's creation of a task force assignment and its conversion of fixed posts to flexible posts does not impact employees' terms and conditions of employment because there is

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<sup>15</sup> The analysis of this issue does not include the elimination of swing posts, discussed above, even though swing posts are also fixed.

insufficient evidence that those changes increase employees workload or otherwise change the type of work they perform.

Changes to work assignments impact employees' terms and conditions of employment when the changes (1) involve a transfer of work outside the unit, (2) involve an increase in workload, or (3) expand the scope of employees' existing job functions. City of Chicago, 19 PERI ¶ 69 (IL LRB-LP 2003). However, an employer has an inherent managerial right "to determine and assign duties within the ambit of an employee's function...." City of Peoria, 3 PERI ¶ 2025 (IL SLRB 1987).

First, neither the Respondent's creation of a task force assignment nor its conversion of fixed posts to flexible posts involves a transfer of work out of the unit.

Second, there is insufficient evidence in the record to indicate that either the task force assignment or the conversion of fixed posts to flexible posts would increase workload. The Union introduced no evidence to show that a BSM Supervisor assigned to the task force would be responsible for addressing a greater number of bus incidents than those employees assigned to a fixed post or to a non-task-force flexible post. Similarly, the Union introduced insufficient evidence to show that a BSM Supervisor assigned to a flexible post would be responsible for addressing a greater number of bus incidents than employees assigned to a fixed post. There is some evidence that unit employees' work increased overall because the Respondent did not fill positions when they were vacated by attrition; but that increase is unrelated to the change objected to by the Union in this case.

Finally, neither the task force assignment nor the Respondent's conversion of fixed posts to flexible posts changes the scope of employees' existing job functions. Employees assigned to flexible posts have the same responsibilities as those assigned to fixed posts. They address incidents in the field, mitigate delays, and restore service interruptions. Although employees assigned to flexible posts must go into the field with greater frequency, the duties they perform remain the same and the Respondent has added no new responsibilities to the BSM Supervisor job title. Similarly, employees assigned to the task force assignment likewise address incidents in the field, mitigate delays, and restore service interruptions, as do employees at fixed posts.<sup>16</sup> The Union correctly notes that the Respondent had never previously required employees to cross regional boundaries; however, even if this requirement is construed as an additional function, it

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<sup>16</sup> The distinctions between the various assignments were not fleshed out by the parties at hearing.

is one that is within the scope of the employees' job description. It is reasonably related to employees' existing duties, and there is insufficient evidence that the requirement to cross regional boundaries correlates to an increase in workload. Village of Bensenville, 14 PERI ¶2042 (proposal that prevented employer from assigning unit members to perform dispatch desk duties was a permissive subject of bargaining where it was within the scope of their regular duties); City of Oakland, 38 PERC ¶ 170 (CA PERB 2014)(assignment of new job duties is not mandatory subject of bargaining where they are reasonably related to existing duties).

Thus, the Respondent's decisions to create a task force assignment and its conversion of fixed posts to flexible ones are permissive subjects of bargaining.

### 3. Waiver

The Union did not contractually waive its right to bargain over the Respondent's decision to eliminate swing posts. It also did not waive its right to bargain over the Respondent's decision to eliminate swing posts through past practice.

A Union's waiver of its right to bargain must be clear, unequivocal and unmistakable. Am. Fed'n of State, Cnty. and Mun. Empl. v. Ill. State Labor Rel. Bd., 274 Ill. App. 3d 327, 334 (1st Dist. 1995) ("AFSCME"); Cnty. of Cook v. Illinois Local Labor Rel. Bd., 214 Ill. App. 3d 979 (1st Dist. 1991); Chicago Park Dist., 18 PERI ¶ 3036 (IL LLRB 2002). When a party claims waiver by contract, the language supporting the claim of waiver must be specific, because a waiver is never presumed. AFSCME, 274 Ill. App. 3d at 334. A party may also waive the right to bargain through past practice. However, the courts have held that the past practice exception to the obligation to bargain must be "narrowly construed." Bd. of Educ. of Sesser-Valier Cmty. Unit Sch. Dist. No. 196 v. Illinois Educ. Labor Relations Bd., 250 Ill. App. 3d 878, 882 (4th Dist. 1993); see also City of Chicago (Chicago Fire Dep't), 12 PERI ¶ 3015 (IL LLRB 1996); Chicago Board of Education and Chicago School Finance Authority, 10 PERI ¶ 1107 (IL ELRB 1994). Similarly, the National Labor Relations Board has held that a right once waived is not lost forever, and a union can request negotiations each time the bargainable event occurs. NLRB v. Miller Brewing Co., 408 F.2d 12, 15 (9th Cir. 1969); see also Bd. of Trustees of Southern Ill. Univ. (Edwardsville), 14 PERI ¶ 1021 (IL ELRB ALJ 1997). It is the respondent's burden to show that a waiver exists. City of Chicago Police Dep't, 21 PERI ¶ 83 (IL LLRB 2005).

Here, the Union did not contractually waive the right to bargain over the Respondent's decision to reduce or eliminate swing posts because the contract does not expressly permit the Respondent to take such action. Indeed, the contract is silent as to the Respondent's authority to reduce or eliminate swing posts and waiver by contract is therefore precluded. Chicago Transit Auth., 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.”)

Similarly, the parties' alleged past practices do not demonstrate that the Union waived the right to bargain over the Respondent's decision to reduce or eliminate swing posts. “Only the clearest evidence of a waiver of any right to bargain about a particular matter on which a contract is otherwise silent will be said to relieve the employer of its duty to bargain.” Vill. of Lisle, 23 PERI ¶ 111 (IL LRB-SP 2007). Here, the Respondent supports its claim of waiver with the observation that it eliminated some fixed posts by attrition in 2007. However, the reduction of fixed posts by attrition is not equivalent to the reduction of swing posts at issue here where not all fixed posts are swing posts and where there is no indication that the 2007 reduction of fixed posts included reduction of swing posts. Chicago Board of Education and Chicago School Finance Authority, 10 PERI ¶ 1107 (even if union had waived the right to bargain previous layoffs through inaction, there was no indication that union waived right to bargain current layoffs, where they were more extensive than the earlier ones).

Moreover, even if the Respondent's earlier elimination of fixed posts included the elimination of some swing posts, the Union's failure to protest that earlier change does not demonstrate a waiver of the right to bargain the instant change. In fact, both public and private sector labor boards have rejected claims that a union failure to protest such earlier unilateral action would act as a waiver of its right to bargain similar changes in the future. Bd. of Educ. of Sesser-Valier Cmty. Unit Sch. Dist. No. 196, 250 Ill. App. at 882 (4th Dist. 1993); see also City of Chicago (Chicago Fire Dep't), 12 PERI ¶ 3015 (rejecting respondent's claim that union waived the right to requested information by past practice where city had never provided the union with that information before); Chicago Board of Education and Chicago School Finance Authority, 10 PERI ¶ 1107; Miller Brewing Co., 408 F.2d at 15; Bd. of Trustees of Southern Ill. Univ. (Edwardsville), 14 PERI ¶ 1021 (employer's past practice of setting parking fees did not demonstrate that union waived the right to bargain those fees).

Thus, the Union did not waive the right to bargain over the Respondent's elimination of swing posts.

#### 4. Impasse

The Respondent implemented its changes without bargaining to impasse.

The Board looks to the totality of the circumstances to determine whether the parties have reached impasse. Specifically, the Board considers the parties' bargaining history, the good faith of the parties during negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties regarding the state of the negotiations. See Ill. Dep't of Cent. Mgmt. Servs. (Corrections), 5 PERI ¶ 2001 (IL SLRB 1988), aff'd 190 Ill. App. 3d 259, 6 PERI ¶ 4004 (1989); Cnty. of Jackson, 9 PERI ¶ 2040 (IL SLRB 1993) aff'd. by unpub. order, No. 5-93-0685 (1994); City of Peoria, 11 PERI ¶ 2007 (IL SLRB 1994).

Here, the short length of the parties' negotiations weighs in favor of finding that the parties did not reach impasse when the Respondent implemented its changes. The parties met only three times to address the proposed changes, bargained at only two of those meetings, and held extensive discussions at only one. The parties' first meeting was not a bargaining session because the meeting consisted of the Respondent's presentation and explanation of its proposed changes. State of Ill. Dep't of Cent. Mgmt. Serv. and Corrections, 5 PERI ¶ 2001 (explanatory meeting did not constitute bargaining). Although the parties bargained at the second meeting, the bulk of the parties' discussions concerned staffing issues that were ancillary to the proposed changes. Indeed, the Union had not yet presented a counterproposal at that time. The parties engaged in in-depth bargaining at only their last meeting, which ended when the Respondent rejected most aspects of the Union's counterproposal and stated it would implement its proposed changes with small modifications. Such limited bargaining does not demonstrate that further bargaining would be futile. Id. (four meetings did not indicate that parties had reached impasse where the parties only bargained at three of those meetings); City of Chicago, 9 PERI ¶ 3001 (IL LLRB 1992)(considering number of minutes spent in discussion of topic at issue); cf. Vill of Steger, 31 PERI ¶157 (IL LRB-SP 2015) (employer was entitled to presume an impasse existed after one meeting where the union made no proposals, did not request additional bargaining

dates, and made no information requests; parties expressed no mutual understanding that bargaining would continue).

Next, the contemporaneous understanding of the parties regarding the state of negotiations further supports a finding that the parties had not reached impasse. For an impasse to exist, “both parties must believe they are at the end of their rope.” Larsdale, Inc., 310 NLRB 1317, 1318 (1993). However, “[i]t is not sufficient for a finding of impasse to simply show that the employer had lost patience with the union.” Barstow Comm. Hospital, 361 NLRB No. 34, slip op. at 9 (2014). In this case, the Respondent never expressed its understanding that the parties were too far apart to ever reach agreement. Rather, the Respondent stated that it had no obligation to bargain at all and that the Union’s counterproposal supported its belief. Lunde explained to the Union, “your counter proposal is just a different flavor of what we already proposed....if you are saying it’s ok to do it this way, then we are going to do it our way” because “management has the right to allocate its resources as it sees necessary.” State of Ill. Dep’t of Cent. Mgmt. Servs. and Corrections, 5 PERI ¶ 2001 (finding no impasse where negotiations were “necessarily constrained” as a result of parties’ polarized positions concerning their bargaining obligations).

Contrary to the Respondent’s contention, the Respondent’s declaration that it would incorporate no more of the Union’s counterproposal into its plan fails to support a finding that the parties had reached impasse. Instead, it shows that the Respondent in fact moved from its original offer and that it accepted a number of the Union’s proposed modifications in the very meeting at which it declared impasse just minutes later.<sup>17</sup> City of Park Ridge, 32 PERI ¶ 151 (IL LRB-SP 2016)(considering movement by the parties throughout negotiations as evidence that the parties were not at impasse).

The Union likewise never expressed an understanding that the parties were at impasse. It certainly expressed disappointment and shock that the Respondent did not accept more aspects of its counterproposal,<sup>18</sup> but that initial reaction reveals little about the Union’s willingness to move from its own position. Notably absent from the record is any statement from the Union that its

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<sup>17</sup> The fact that the Respondent’s concessions were not generous, from the Union’s perspective, does not indicate an impasse. State of Ill. Dep’t of Cent. Mgmt. Serv. and Corrections, 5 PERI ¶ 2001 (IL SLRB 1988)(even lack of concessions did not indicate that further bargaining would be futile)(citing Saunders House, 265 NLRB 1632 (1982)).

<sup>18</sup> A Union representative stated, “that’s it, that’s all you are going to take from our counter proposal?”

first counterproposal was its last or that it was unwilling to consider other changes. Towne Plaza Hotel, 258 NLRB 69, 78 (1981)(no impasse, even after union threatened to strike, where Union did not indicate an unwillingness to make concessions or indicate that its most recent offers were its final ones). Although the Union did not request additional bargaining sessions or put forth other proposals during that final session, it had little opportunity to do so where the Respondent issued its modified offer, coupled it with the threat of implementation, and ended bargaining. Southern Ill. Univ. Carbondale, 31 PERI ¶ 98 (IL ELRB 2014)(considering Respondent's threat of implementation in determining whether the parties had reached impasse).

Moreover, the very content of the Union's initial counterproposal demonstrates that more movement was possible because it represents a significant change from the Union's original position. City of Park Ridge, 32 PERI ¶ 151 (considering movement by the parties throughout negotiations as evidence that the parties were not at impasse; noting also that parties believed they had reached agreement). The Union initially rejected the Respondent's proposal in its entirety but then worked off of that very proposal in presenting its own offer. City of East Moline, 33 PERI ¶ 15 (IL LRB-SP 2016)(union's acceptance of much of respondent's proposed language indicated that parties were not at impasse). In light of these concessions, the Respondent's unilateral belief that negotiations were stalled does not indicate impasse, despite the Respondent's assertion that the Union's counterproposal did not adequately address the Respondent's concerns. In Re Jano Graphics, Inc., 339 NLRB 251, 258 (2003)(Union's past concessions weighed against finding an impasse, despite Respondent's belief that the Union would never agree to the Respondent's proposals).

The Respondent's lack of good faith at the bargaining table likewise precludes a finding that the parties had reached impasse. Good faith bargaining requires an open mind and a sincere desire to reach an ultimate agreement. Serv. Employees Int'l Local Union No. 316 v. State Educ. Labor Relations Bd., 153 Ill. App. 3d 744, 751 (4th Dist. 1987). Here, the Respondent's disclaimer of its obligation to bargain and its assertion that "we are going to do it our way" expressed a desire to take unilateral action rather than a sincere desire to reach agreement. Serv. Employees Int'l Local Union No. 316, 153 Ill. App. at 751 (parties cannot fulfill their obligation to bargain in good faith if they adopt a "take-it-or-leave-it" attitude to bargaining). The Respondent did not simply set forth its understanding of its bargaining obligations while continuing good faith negotiations. Rather, it terminated bargaining when the Union did not

accept its counteroffer. Accordingly, the Respondent's bargaining posture was not only inconsistent with its claim that the parties had reached the end of productive give-and-take, but also with its obligation to bargain in good faith, more generally. Ill. Dep't of Cent. Mgmt. Servs. (Corrections), 5 PERI ¶ 2001 (considering good faith in impasse analysis).

Notably, the Respondent has cited to no precedent to suggest that a different test for impasse applies in a case such as this where the parties simultaneously negotiated over mandatory subjects and other subjects later deemed permissive. The parties' mutual understanding of the Respondent's proposal as a single change with different aspects further supports a finding that the Board should consider the traditional factors discussed above. Cnty. of Jackson, 9 PERI ¶ 2040 n. 16 (burden of proof that impasse has occurred when asserted as a defense to a unilateral change rests on the party asserting that impasse exists).

Thus, the parties were not at impasse when the Respondent implemented its changes and the Respondent therefore violated Sections 10(a)(4) and (1) of the Act when it implemented those aspects of its plan that addressed mandatory subjects of bargaining.

## **V. CONCLUSIONS OF LAW**

1. The Respondent violated Sections 10(a)(4) and (1) of the Act when it unilaterally eliminated a number of swing posts.
2. The Respondent did not violate Sections 10(a)(4) and (1) of the Act when it unilaterally eliminated boundaries between picked regions, enlarged the location for which BSM Supervisors were held responsible while assigned to flexible posts, converted non-swing fixed posts to flexible posts, and established a task force assignment.

## **VI. RECOMMENDED ORDER**

IT IS HEREBY ORDERED that the Respondent, its officers and agents, shall:

- 1) Cease and desist from:
  - a. Failing and refusing to bargain collectively in good faith with the Charging Party, Amalgamated Transit Union, Local 241, as the exclusive representative of the bargaining unit including BSM Supervisors concerning its decision to eliminate or reduce swing posts.

- 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 necessary to effectuate the policies of the Act:
- a. On request, bargain collectively in good faith with the Charging Party, Amalgamated Transit Union, Local 241, as the exclusive representative of the bargaining unit including BSM Supervisors concerning its decision to eliminate or reduce swing posts.
  - b. Restore the status quo by restoring the eliminated swing posts and giving unit members the opportunity to select assignments to those posts through the pick process.
  - c. Make unit members whole for any losses they may have suffered as a result of the Respondent's decision to eliminate or reduce swing posts, with interest at seven percent per annum.<sup>19</sup>
  - d. Post, at all places where notices to employees are normally posted, copies of the Notice attached to this document. Copies of this Notice shall be posted, after being duly signed, in conspicuous places, and be maintained for a period of 60 consecutive days. The Respondent will take reasonable efforts to ensure that the notices are not altered, defaced or covered by any other material.
  - e. Notify the Board in writing, within 20 days from the date of this Decision, of the steps the Respondent has taken to comply with this order.

## **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 this 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-

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<sup>19</sup> West Northfield School Dist. No. 31, 10 PERI ¶ 1056 (IL ELRB 1994)(reversing ALJ's decision not to award a make whole remedy for a unilateral change, finding that whether any employee suffered actual loss was a matter for the compliance hearing).

exceptions. Exceptions, responses, cross-exceptions and cross responses must be filed with the General Counsel of the Illinois Labor Relations Board, to either the Board's Chicago office at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, or to Board's designated email address for electronic filings, at [ILRB.Filing@Illinois.gov](mailto:ILRB.Filing@Illinois.gov). All filing must be 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 of listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or 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 9th day of September, 2016**

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

*/s/ Anna Hamburg-Gal*

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**Anna Hamburg-Gal  
Administrative Law Judge**

# NOTICE TO EMPLOYEES

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## FROM THE ILLINOIS LABOR RELATIONS BOARD

### Case No. L-CA-15-008

The Illinois Labor Relations Board, Local Panel, has found that the Chicago Transit Authority has violated the Illinois Public Labor Relations Act and has ordered us to post this Notice. We hereby notify you that the Illinois Public Labor Relations Act (Act) gives you, as employees, these rights:

- To engage in self-organization
- To form, join or assist unions
- To bargain collectively through a representative of your own choosing
- To act together with other employees to bargain collectively or for other mutual aid and protection
- To refrain from these activities

Accordingly, we assure you that:

WE WILL cease and desist from failing and refusing to bargain collectively in good faith with the Charging Party, Amalgamated Transit Union, Local 241, as the exclusive representative of the bargaining unit including BSM Supervisors concerning our decision to eliminate or reduce swing posts.

WE WILL cease and desist from in any like or related manner, interfering with, restraining or coercing our employees in the exercise of the rights guaranteed them in the Act.

WE WILL on request, bargain collectively in good faith with the Charging Party, Amalgamated Transit Union, Local 241, as the exclusive representative of the bargaining unit including BSM Supervisors concerning our decision to eliminate or reduce swing posts.

WE WILL restore the status quo by restoring the eliminated swing posts and giving unit members the opportunity to select assignments to those posts through the pick process.

WE WILL make unit members whole for any losses they may have suffered as a result of the our decision to eliminate or reduce fixed posts, with interest at seven percent per annum.

DATE \_\_\_\_\_

\_\_\_\_\_  
Chicago Transit Authority  
(Employer)

## ILLINOIS LABOR RELATIONS BOARD

One Natural Resources Way, First Floor  
Springfield, Illinois 62702  
(217) 785-3155

160 North LaSalle Street, Suite S-400  
Chicago, Illinois 60601-3103  
(312) 793-6400

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**THIS IS AN OFFICIAL GOVERNMENT NOTICE  
AND MUST NOT BE DEFACED.**

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