

Baptist Hospital of East Tennessee and Office and Professional Employees International Union, Local 2001. Case 10–CA–33684

September 27, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On February 20, 2003, Administrative Law Judge Lawrence W. Cullen issued the attached decision.¹ The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief opposing the exceptions. The Respondent also filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs² and has decided to affirm the judge's rulings, findings, and conclusions, as amplified below, and to adopt the recommended Order.

Relevant Facts

The Respondent operates an acute-care hospital in Knoxville, Tennessee, and has a longstanding collective-bargaining relationship with Office and Professional Employees International Union, Local 2001 (the Union). In January 2002, the Union represented 178 employees who worked in several areas of the hospital. The represented employees were covered by a collective-bargaining agreement effective November 1, 1999, through October 31, 2002.

Some represented employees worked in the in-patient radiology unit of the imaging department, a section of the hospital that operates 24 hours a day, 7 days a week. Prior to January 2002, employees in this department were scheduled for holiday work shifts based on employee seniority and preference. This procedure followed the Respondent's earned time policy (ETP), which applied to both unit and nonunit employees of the hospital.³ As of January 1, 2002, the Respondent changed the

procedure for scheduling holiday shift work for the in-patient radiology unit employees; thereafter, supervisors would assign employees to holiday shifts on a rotational basis, without regard to employees' preference or seniority. The reasons for the change were to ensure adequate coverage, provide fairness in employee scheduling, and to aid employee recruitment/retention efforts. The Respondent did not notify or bargain with the Union over the January 2002 change.

Article I of the parties' collective-bargaining agreement, a management-rights provision, states, in relevant part:

Subject only to provisions expressly specified in the Agreement, the Employer will retain and have exclusive right to . . . assign . . . employees; to determine and change starting times, quitting times and shifts . . . to determine or change methods and means by which its operations are to be carried on. . . .

Article XIX of the agreement, entitled "preservation of benefits" states, in relevant part:

This Article is not intended to interfere or conflict with Management rights as set forth in Article I of this Agreement.

. . . The following benefits will be made available to bargaining unit employees on the same basis they are made available to all other employees and will not be reduced during the term of this contract:

Earned Time ⁴	Funeral Leave
Sick Time	Jury Duty
Life Insurance	Retirement Plan
Tuition Reimbursement	

Analysis

The issue in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a change in scheduling holiday shift work for unit employees assigned to the in-patient radiology unit. In dismissing the complaint, the judge found that the collective-bargaining agreement clearly vested the Respondent with the right to make this kind of schedul-

¹ In the second par., L. 6, of the judge's decision, "Joint Exhibits 1 and 2" should read "Joint Exhibits 1 through 7 and Respondent's Exhibits 1 and 2."

² In light of our dismissal of the complaint, we find it unnecessary to consider the Respondent's cross-exceptions to the judge's decision.

The General Counsel moved to strike portions of the Respondent's brief in opposition to the General Counsel's exceptions, contending that they constitute exceptions to the judge's decision not presented in the Respondent's separate cross-exceptions, and that they exceed the scope of the General Counsel's exceptions. See Sec. 102.46(d)(2) and (e) of the Board's Rules and Regulations. We agree and grant the motion. Those portions of the Respondent's brief that are identified in par. 2 of the General Counsel's motion are stricken from the record.

³ "Earned time" under the ETP consists of both holiday time off and accrued vacation time. Sec. 4.3 and 4.4 of that policy state:

4.3 Department Director or Manager/Supervisor posts Earned Time schedule based on employee's choice and hire date seniority by February 15.

4.4 After February 15, Department Director or Manager/Supervisor schedules Earned Time on a first come, first serve basis.

NOTE: In some instances it may be necessary to disregard seniority and rotate earned time days off, to more fairly distribute popular holiday time.

⁴ In the General Counsel's view, the ETP was incorporated into the collective-bargaining agreement through art. XIX's reference to "earned time."

ing change. We adopt the judge's dismissal of these complaint allegations.⁵

The judge found that the unilateral imposition of the scheduling procedure for the in-patient radiology unit in January 2002 constituted a substantial and material change to a mandatory subject of bargaining affecting employees' working conditions. He also found that article I of the parties' contract clearly specified management's right to make schedule changes, and that this clause "clearly afforded the Respondent the right to make the schedule change as it did in this case." Therefore, the judge dismissed the complaint.

In agreement with the judge, we find that the Union clearly and unmistakably waived bargaining over the January 2002 holiday scheduling change under the collective-bargaining agreement. See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989).⁶

Article I of the contract vests the Respondent with various management rights. Among them are the right "to determine and change starting times, quitting times and shifts," and the rights to "assign" employees and to "change methods and means by which its operations are to be carried on." We agree that this plain language of the contract privileged the Respondent's change in the holiday-shift scheduling procedure, which change is simply an incident of the fundamental right to schedule employees and to establish the means by which the Hospital's operations are carried out. Indeed, the contract language could hardly be clearer.

⁵ Unlike our dissenting colleague, we find that the General Counsel did not clearly pursue an 8(d) contract modification theory in this case. At various times during the litigation of this case, the General Counsel appeared to make the argument that the Respondent's actions "modified" the contract, in violation of Sec. 8(a)(5)—Sec. 8(d). However, it is incumbent upon the General Counsel, as prosecutor and master of the complaint, to specify with adequate clarity the nature of his accusations. It is not the Board's role to attempt to piece together theories from ambiguous complaint references and random statements during the hearing. In our view, the clearest statement of the General Counsel's theory in this case appears in the "conclusion" section of his brief to the Board. That conclusion states: "Based on the foregoing, Counsel for the General Counsel respectfully requests that the Board determine that the Respondent Employer violated Section 8(a)(5) and (1) of the Act by unilaterally abolishing employee preference and seniority as elements of the procedure for holiday scheduling, thereby implementing a unilateral change in a mandatory subject of bargaining without first affording the Union notice and an opportunity to bargain over the change." Thus, we rely on this formal statement and treat this case as one alleging an 8(a)(5) unilateral change violation.

⁶ The Respondent alternatively argues that its unilateral scheduling change was privileged under art. I of the parties' contract pursuant to a "contract coverage" analysis. See, e.g., *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993). We find that if a contract coverage theory were applied here, we would reach the same result: dismissal of the complaint. See *Cincinnati Paperboard*, 339 NLRB 1079 fn. 2 (2003).

The issue before us does not significantly differ from that presented in *Cincinnati Paperboard*, supra. There, the employer unilaterally changed a policy that permitted employees to trade work shifts with each other. The Board found that the explicit management right in the collective-bargaining agreement to "schedule and assign work" authorized this unilateral change, and ultimately the Board concluded that the union had clearly and unmistakably waived its right to bargain about the change. Similarly, the relevant language in article I of the contract here plainly covers the Respondent's change in the scheduling of holiday work shifts. Accordingly, by agreeing to article I, the Union clearly and unmistakably waived its right to bargain about the January 2002 change.⁷

The General Counsel, joined now by our dissenting colleague, argues that article XIX of the contract incorporated the ETP by reference, making the ETP—and the holiday scheduling procedure of earned time credits—part of the collective-bargaining agreement. Both the General Counsel and our colleague further contend that the first clause in article I ("Subject only to provisions expressly specified in the Agreement") insulates the ETP, as set forth in article XIX, from the reach of the management rights provisions of article I. Under this interpretation, the General Counsel and our dissenting colleague assert that the Respondent's managerial authority in article I is limited by article XIX, and accordingly does not authorize the unilateral change in the scheduling of holiday work shifts. We disagree.

⁷ Our conclusion is further consistent with earlier Board decisions involving comparable contract language. See *United Technologies Corp.*, 300 NLRB 902, 903 (1990) (clear and unmistakable waiver of union's right to bargain concerning increase in Saturday overtime hours, given authority in management rights clause to determine "shift schedules and hours of work"); *Johnson-Bateman*, supra at 188–190 (contract language permitting employer to pay additional wages clearly and unmistakably waived union's right to bargain about attendance-bonus plan); *S-B Mfg. Co.*, 270 NLRB 485, 489–491 (1984) (authority under management rights clause to determine number of employees, number of hours, and schedules established a clear and unmistakable waiver of union's right to bargain over reduction in employees' hours of work).

In *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), Chairman Battista endorsed the "contract coverage" test accepted by the U.S. Courts of Appeals for the D.C. and Seventh Circuits. Under this test, where there is a contract clause that is relevant to the dispute, it can reasonably be said that the parties have bargained about the subject and have reached some accord. Chairman Battista notes that, in this case, the "contract coverage" test yields the same result as application of the clear and unmistakable waiver standard: dismissal of the 8(a)(5) complaint.

Member Schaumber has also endorsed the "contract coverage" analysis. See *California Offset Printers*, 349 NLRB 732 (2007) (dissenting opinion). He agrees that application of that test here would result in the same outcome.

The proposed interpretation advocated by the General Counsel and dissent conflicts with the express language of the contract. Article XIX, by its own terms, “is not intended to interfere or conflict with Management rights as set forth in Article I of this Agreement.” Accordingly, even if the provisions of article XIX could be read as incorporating by reference the ETP, those provisions are qualified by and subordinate to the exercise of management rights identified in article I. And, as we have explained, the Respondent possessed the right under article I to change schedules and scheduling procedures, including holiday-shift scheduling in the in-patient radiology unit.⁸

Our dissenting colleague disagrees with our finding of a clear and unmistakable waiver. However, the cases on which she relies do not contradict our holding. Essentially, the Board found in those cases⁹ that the relevant contract language lacked a sufficient degree of specificity to establish the union’s waiver of its bargaining right. As we discussed above, the contract language at issue in this case is sufficiently specific, and clearly encompasses the Respondent’s change in holiday work shift scheduling.

Our primary disagreement with the dissent involves its strained and constricted interpretation of the language in article I. Contrary to our colleague, it is not reasonable to suppose that, in agreeing to a management right to “determine and change starting times, quitting times and shifts,” the parties intended to address only the precise time of day for starting and quitting work, and the number of shifts to be worked in a day. Rather, the language must be read, in conjunction with the other management rights to “assign” employees and “determine or change methods and means” of conducting operations, to also encompass the scheduling of employees and work shifts. This lesser right is necessarily included in the more general right granted by article I.

Accordingly, we conclude, in agreement with the judge, that the General Counsel failed to prove an unlawful unilateral change made by the Respondent.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

⁸ We also note that even if the ETP had been incorporated into the parties’ collective-bargaining agreement, the last sentence of sec. 4.4 of that policy permits disregard of seniority in favor of a rotational scheduling procedure “in some instances,” which could encompass the situation with the in-patient radiology unit employees.

⁹ *KIRO, Inc.*, 317 NLRB 1325 (1995), *Postal Service*, 302 NLRB 767 (1991), and *Dearborn Country Club*, 298 NLRB 915 (1990).

MEMBER LIEBMAN, dissenting.

The issue here is whether the Respondent had a unilateral right to change the holiday scheduling procedure in the in-patient radiology department.¹ The existence of such a right turns on whether the Union clearly and unmistakably waived its statutory right to bargain over the change. See, e.g., *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007) (reaffirming “clear and unmistakable waiver” standard and rejecting “contract coverage” doctrine); *Johnson-Bateman Co.*, 295 NLRB 180, 184 fn. 22 (1989), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The Respondent argues, and the majority holds, that the management-rights clause in the parties’ collective-bargaining agreement establishes this waiver. In fact, however, the agreement seems specifically to *prohibit* the change made by the Employer—just the opposite of what is required to find a waiver.

The General Counsel correctly argues that the Respondent’s earned time policy (ETP), which provided for holiday work scheduling based on employee seniority and preference, is incorporated by reference in the collective-bargaining agreement. Article XIX of the agreement explicitly refers to the ETP as a benefit that “will not be reduced during the term of this contract.” The Respondent’s vice president for human resources (J. Scott Schaffer), in an affidavit included in the parties’ stipulation of facts, stated that the ETP “applies to employees in the bargaining unit . . . by reason of Article XIX of the [collective-bargaining agreement].”

The majority, however, finds a waiver based on article I of the agreement, which provides that:

Subject only to provisions expressly specified in the Agreement, the Employer will retain and have exclusive right to . . . assign . . . employees; to determine and change starting times, quitting times and shifts . . . to

¹ The scheduling of holiday work for the employees in the in-patient radiology department is a mandatory subject of bargaining. See, e.g., *Morgan Services*, 336 NLRB 290, 294 (2001).

The Respondent does not dispute that it unilaterally changed the holiday scheduling procedure to follow a strict rotational plan, without regard to preference or seniority. The Respondent also does not dispute that it made the change while the parties’ collective-bargaining agreement was in effect and without the Union’s consent. Thus, the General Counsel made a prima facie showing that the unilateral change violated Sec. 8(a)(5) of the Act. See generally Sec. 8(d) of the Act; *Bonnell/Tredegar Industries*, 313 NLRB 789, 790 (1994), *enfd.* 46 F.3d 339 (4th Cir. 1995). Unlike my colleagues, I do not find it significant whether the General Counsel relied on a “contract modification” theory under Sec. 8(d) in addition to a “unilateral change” theory under Sec. 8(a)(5). Under my view of the “clear and unmistakable waiver” doctrine, these refusal-to-bargain theories do not require separate analyses. See my dissenting position in *Bath Iron Works Corp.*, 345 NLRB 499 (2005), *affd.* *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

determine or change methods and means by which its operations are to be carried on. . . . [Emphasis added.]

But article I is “subject” to “provisions expressly specified in the Agreement,” and article XIX, which incorporates the ETP by reference, is just such a provision. Thus, even if the general language of article I could be read to encompass holiday scheduling—a reasonably debatable proposition itself, as I will explain—it would still not clearly authorize unilateral action, in the face of article XIX.²

The majority points to language in article XIX which recites that it “is not intended to interfere with or conflict with Management rights as set forth in Article I.” This language, the majority argues, makes the “provisions of Article XIX, including the ETP, . . . subordinate to the exercise of management rights identified in Article I.” On that view, of course, article I makes the promises of article XIX illusory. To the extent that articles I and XIX are in tension—and any reasonable reading of the agreement must seek to give effect to both provisions—it would seem impossible to find a clear and unmistakable waiver.

This is especially true because there is no specific reference to the ETP or holiday scheduling in article I. The majority relies primarily on the stated management right “to determine and change starting times, quitting times and shifts” to establish a clear and unmistakable waiver. However, this contract language does not plainly authorize changes to the employees’ holiday scheduling procedure. There is no specific reference to “schedule” or “scheduling” here or elsewhere in article I. Nor is there any reference to holidays. Certainly, the contract terms in question may be interpreted simply as the right to set the starting and quitting times for employees (e.g., 9 a.m. to 5 p.m.) and to designate the number of shifts to be worked in a day.³ In this interpretation, the language does not address at all the procedure for scheduling holiday work, and, more specifically, for determining who works on holidays and who does not. This reasonable

² The majority erroneously relies, in part, on the “note” portion of sec. 4.4 of the ETP to justify the Respondent’s unilateral change. The language in question permits the Respondent to disregard seniority in favor of rotation of days off “in some instances” when “it may be necessary.” This provision clearly envisions an exceptional, temporary alteration of the ETP, not the permanent unilateral change that the Respondent effected in this case.

³ The majority finds this interpretation unreasonable, and then engages in inappropriate speculation concerning the contracting parties’ intent. The fact is that there is an absence of evidence of contractual intent in this record. Judging on the face of the contractual language alone, it is not unreasonable to find that the parties may have agreed to limit managerial discretion to the designation of starting and quitting times and the number of shifts per workday—regardless of the significance my colleagues assign to it.

interpretation is at odds with a clear and unmistakable waiver.

Considered in light of our cases, this language simply lacks the degree of specificity and certainty required to find a clear and unmistakable waiver.⁴ In turn, the decisions my colleagues rely on—which naturally turn on the particular contractual language and circumstances involved—are distinguishable. For example, the record in *Cincinnati Paperboard*, 339 NLRB 1079 (2003), where I joined the majority, showed that the employees’ trading of work shifts constituted a formal schedule change in the employer’s administration of its workplace; therefore it was inarguably covered by the employer’s managerial right to schedule and assign work. In addition, the employer’s alteration of the shift-trading policy was the kind of change that the union had agreed in the collective-bargaining agreement was exempt from the parties’ obligation to bargain. *Id.*⁵

Accordingly, I would find this violation, and I dissent from the majority’s dismissal of the complaint.

Eileen Conway, Esq., for the General Counsel.

Penny A. Arning, Esq., for the Respondent.

Phillip R. Pope, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard by me by telephone on January 10, 2003, pursuant to agreement of the parties and their waiver of their right to present testimony and other evidence in person at a designated hearing site. The charge in this case was filed by the Office and Professional Employees International Union Local 2001 (the Charging Party or the Union). The complaint was issued

⁴ See, e.g., *Dearborn Country Club*, 298 NLRB 915 (1990) (contractual right to designate hours of shifts, determine days off, and schedule employees did not privilege employer to discontinue practice of offering overtime first to employees who worked full time); *KIRO, Inc.*, 317 NLRB 1325 (1995) (right to schedule, assign work and establish production standards did not privilege employer to increase work hours and work load). See also *Postal Service*, 302 NLRB 767, 774 (1991) (“generalized language” in management-rights clause was insufficient to establish clear and unmistakable waiver of the union’s right to bargain over rescheduling of employees’ work hours).

⁵ In other precedent cited in the majority opinion, the Board found a clear and unmistakable waiver with respect to:

(1) a unilateral increase in overtime hours authorized by contract right to determine shift schedules and hours of work, *United Technologies Corp.*, 300 NLRB 902, 903 (1980);

(2) a unilaterally implemented attendance-bonus program authorized by contract right to pay extra wages, *Johnson-Bateman*, supra at 188–190; and

(3) a unilateral reduction in work hours authorized by contract right to determine the number of employees, the number of hours, and employee schedules, *S-B Mfg. Co.*, 270 NLRB 485, 489–491 (1984).

This clear connection between contract right and unilateral action is absent in this case.

by the Regional Director for Region 10 of the National Labor Relations Board (the Board) and alleges that Baptist Hospital of East Tennessee (Respondent or Hospital) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by changing its earned time policy as applied to the in-patient radiology unit by assigning employees to holiday work schedules without regard to employee preference or seniority which subject matters are a mandatory subject of bargaining and that Respondent implemented this change without affording the Union prior notice and an opportunity to bargain as the exclusive representative of Respondent's employees. The Respondent has by its answer denied the commission of any violations of the Act.

A joint motion at the hearing to submit this case to me upon a stipulated record was filed by all three parties to this case. Accordingly, in order to effectuate the purposes of the Act and under the authority of Section 102.35(a)(9) of the Board's Rules and Regulations, I granted the motion to hear this case on the basis of a stipulated record. The parties agreed that the charge, complaint and notice of hearing, answer, stipulation of facts, Joint Exhibits 1 and 2 constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties. The parties further stipulated that they waived a hearing before an administrative law judge and the right to file with the Board exceptions to the findings of fact but not to conclusions of law or recommended orders which the administrative law judge shall make in his decision. The stipulation of facts is as follows:

Without waiving objections as to relevance or weight, the parties stipulate to the following facts:

1. Respondent is a not-for-profit acute-care hospital located in Knoxville, Tennessee. The hospital employs approximately 2400 employees and has a longstanding collective-bargaining relationship with the Union which represents a unit of approximately 178 employees who work in several areas of the hospital, including the in-patient radiology unit of the imaging department. Respondent and the Union are signatory to a series of collective-bargaining agreements; the agreement relevant to resolution of this dispute covered the period November 1, 1999, through October 31, 2002, and is referred to herein as the "contract." (Jt. Exh. 1.)

2. Respondent classifies all paid time off as "earned time" described in and administered pursuant to Respondent's earned time policy. (Jt. Exh. 2.) The earned time policy applies to all hospital employees. The earned time policy is referred to at article XIX of the contract.

3. Because not all departments of the Hospital are open 24 hours per day, 7 days per week, various departments handle holiday scheduling in different ways.

4. The in-patient unit of the imaging department has had a longstanding practice of preparing holiday schedules under a procedure called "holiday guidelines." (Jt. Exh. 3.) Radiology technologist Richard Keller, a 20-year employee of the in-patient unit of the imaging department, would testify that the holiday guidelines have been in effect throughout the term of his employment. Joint Exhibits 4, 5, and 6 shows the holiday schedules for the in-patient unit of the imaging department for

the years 1999, 2000, and 2001 which were prepared consistently with the holiday guidelines provisions.

5. On or about January 1, 2002, Roger Rhodes, director of the imaging department announced a change in holiday scheduling for the in-patient department applicable to dates in 2002. Joint Exhibit 7 is the 2002 schedule. Under the new procedure employees were scheduled to cover holiday work shifts by the team leader, a statutory supervisor, without regard to employee preference or seniority, and those assignments rotate annually. The change was made without prior notice to the Union. The change did not affect any employee's accrued earned time balance or the manner in which employees continued to accrue earned time. If called to testify, Rhodes would testify consistently with his affidavit and it is incorporated herein by reference. (R. Exh. 1.) J. Scott Shaffer is Respondent's vice president of human resources. If called to testify, Shaffer would testify consistently with his affidavit and it is incorporated herein by reference. (R. Exh. 2.)

6. As set forth more fully in Shaffer's affidavit, holiday scheduling practices and unilateral changes in other departments may be summarized as follows.

(a) In the respiratory care department the practice for many years was to have a rotating holiday schedule for Christmas Eve and Christmas Day so that employees who worked on those holidays in one year would not have to work on those holidays in the following year. Until 2001, the department treated Thanksgiving as any other work day. In 2001, management changed the practice, rotating Thanksgiving coverage along with Christmas Eve and Christmas Day.

(b) In the laboratory services department, employees rotate July 4 and Labor Day holidays and employees must work on one of the three major holidays, Thanksgiving, Christmas, and New Year's Day. Under this practice an employee who works Christmas one year would not have to work on Christmas the following year.

(c) In the surgery department the director posts a blank holiday schedule for the entire year and employees select the holidays they wish to work. If there are holidays with insufficient coverage the director assigns coverage without regard to employee seniority.

(d) In the rehabilitation services department management initiated in April 2001, a practice requiring certified occupational therapy assistants and physical therapy assistants work rotating weekend and holiday schedules.

(e) In the heart institute and the cath lab management began requiring holiday work approximately 4 or 5 years ago.

(f) The foregoing holiday scheduling practices were adopted unilaterally without objection from the Union. The issue of holiday scheduling practices has never been addressed by the Union in the form of a request to bargain or a grievance.

7. As noted above, the Hospital applies various holiday scheduling procedures in different departments. From time-to-time the procedures have been changed by management, without notice to or objection from the Union. Union Representative Phillip Pope would testify that the Union was unaware of any such changes until Respondent filed its Motion for Summary Judgment in the instant case and that the Union would have objected to the changes had it been informed.

8. Director Rhodes changed the holiday scheduling practice in the in-patient radiology unit of the imaging department because employees in the department complained that the scheduling system was unfair and in an effort to recruit and/or retain technologists for the department.

9. Union Representative Phillip Pope would testify that the Union learned of the change in the in-patient radiology unit in January 2002, but did not file a grievance because under the terms of the contract's grievance and arbitration clause the matter is not arbitrable before a neutral party. (Jt. Exh. 1; art. V.)

Administrative law judge (ALJ) Exhibit 1a (the charge), 1b (the complaint and notice of hearing), 1c (the answer) and ALJ Exhibit 2a (motion to waive hearing and submit case to the administrative law judge upon a stipulated record) and ALJ Exhibit 2b (stipulation of facts) are included as exhibits as a part of the official record in Case 10-CA-33684.

Issue

The central issue in this case is whether Respondent's unilateral change in procedure for holiday scheduling in the in-patient radiology unit of the imaging department violated the Act.

Positions of the Parties

The General Counsel contends that director of imaging, Roger Rhodes, unilateral implementation of a new procedure for scheduling holiday work for bargaining unit employees in the in-patient radiology department constituted a unilateral change in a mandatory subject of bargaining and thereby violated Section 8(a)(1) and (5) of the Act as Respondent did not provide the unit employees' collective-bargaining representative with notice and a meaningful opportunity to bargain about the changes, citing *NLRB v. Katz*, 369 U.S. 736 (1962); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993). The General Counsel contends the unilateral change imposed in this case was "a substantial, and a significant one" and had a real impact on or was a significant detriment to the employees or their working conditions, citing *Outboard Marine Corp.*, 307 NLRB 1333, 1339 (1992). The General Counsel also contends that the Board has consistently found that schedules and hours are mandatory bargaining subjects. *Morgan Services*, 336 NLRB 290 (2001), citing *Our Lady of Lourdes Health Center*, 306 NLRB 337, 339 (1992). The General Counsel further notes that the Board has held that vacation scheduling is a mandatory subject of bargaining citing *Beverly Health & Rehabilitation Services*, 335 NLRB 635 (2001); *Blue Circle Cement Co.*, 319 NLRB 954, 960 (1995).

The General Counsel further contends that Respondent's contractual defenses are without merit. She states in her brief that to "the extent that Respondent's change involves the application of the Earned Time Policy as opposed to the specific terms of the policy, a practice such as the holidays guidelines at issue here constitutes 'an implied term and condition of employment by mutual consent of the parties' which under well-established precedent, may not be changed without prior notice to the Union and opportunity to bargain," citing *Riverside Cement Co.*, 296 NLRB 840, 841 (1989). She further contends that this "is so even if the practice may have constituted a de-

viation from the letter of the parties' agreement, citing *Sacramento Union*, 258 NLRB 1074, 1075 (1981). Accord: *Keystone Steel & Wire v. NLRB*, 41 F.3d 746 (D.C. Cir. 1994). See also *Pontiac Osteopathic Hospital*, 336 NLRB 101 (2001), unilateral change in procedure for scheduling leave unlawful.

The General Counsel further contends that the Respondent was not privileged to change the holiday scheduling procedure by the language of the contract's management rights clause as the plain language of the management rights clause is "subject only to provisions expressly specified in the Agreement." However the earned time policy is a "provision expressly specified" at article XIX of the collective-bargaining agreement. The General Counsel then argues that the management rights clause is irrelevant to resolution of this dispute.

The General Counsel argues that Respondent's second contractual defense asserts that article XIX of the contract requires the Hospital to notify the Union of proposed changes in personnel policies or benefits only when those changes apply to all employees on a hospitalwide basis. The article states, "in the event the Hospital proposes changes in personnel policies or benefits for all employees, hospital-wide, it will notify the Union in writing of the proposed changes." The General Counsel argues that "while the provision requires written advance notice of changes in policies or benefits which affect nonunit as well as unit employees, it does not vitiate the statutory requirement to provide advance notice to the Union when Respondent intends to change policies which affect only unit employees."

Although Respondent has undeniably made unilateral changes in holiday scheduling policy in other departments affecting unit employees without notice to or objection from the Union, the General Counsel argues that "repeated undermining of the Union does not convert an otherwise unlawful act into a lawful one." *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 430 fn. 15 (1967). The General Counsel also notes that "the change in the in-patient radiology department is inconsistent not only with holiday guidelines but also with the specific requirement of the earned time policy itself which states that earned time is to be scheduled based on employee's choice and hire date seniority."

In her closing statement the General Counsel points out that the earned time policy is a contractual benefit and also notes that the earned time policy permits an occasional disregard of seniority but not a wholesale change in a practice. The General Counsel further submits that Respondent's reasons for changing the holiday policy practice are irrelevant to this Section 8(a)(5) analysis as motive is not an element of an 8(a)(5) violation.

In her brief Respondent's counsel notes that there are varying holiday scheduling practices in various hospital departments which apply to employees covered by the collective-bargaining agreement as well as to other employees and that these varying holiday practices were all adopted unilaterally without objection from the Union.

Respondent's brief notes that in 2001, there was a fairly substantial turnover of technologists in the in-patient radiology unit. Technologists in the unit complained to Respondent's director of imaging "that the holiday scheduling in the unit was inconsistent with other departments, and was unfair because it allowed the same senior employees to always have the same

major holidays off. This meant newly hired employees and employees with less seniority, would always end up having to work on major holidays.” This issue was adversely affecting morale and making it more difficult to hire new radiological technologists. Rhodes therefore implemented a rotational method of scheduling holiday work in the in-patient radiology unit. Under the new schedule posted on January 9, 2002, and discussed in a staff meeting with employees on January 14, 2002, each employee was assigned a particular holiday to work and those assignments rotate annually. Respondent’s counsel contends that nothing in the collective-bargaining agreement prohibited the change in the holiday schedule in reliance on article 1.1 of the contract which grants management the exclusive right “to determine and change starting times, quitting times and shifts”; the right “to establish, change and abolish its policies, practices, rules and regulations and to adopt new policies, practices, rules and regulations”; and the right “to determine or change methods and means by which its operations are to be carried on.” Respondent’s counsel also relies on contract article XIX—preservation of benefits which states, “In the event the Hospital proposes changes in personnel policies or benefits for all employees, hospital wide, it will notify the Union in writing of the proposed changes and if the Union chooses to negotiate over the proposed changes it will notify the Hospital in writing within the above mentioned 30-day period.” Respondent’s counsel notes that the scheduling change at issue applied only to the in-patient radiology unit and was not hospitalwide.

Respondent notes in its brief that the management rights clause in the labor agreement gives it the exclusive right “to determine and change quitting time and shifts,” the exclusive right “to establish, change and abolish its policies, practices, rules and regulations and to adopt new policies, practices, rules and regulations,” and the exclusive right “to determine or change methods and means by which its operations are to be carried on.” Respondent contends that the rights “in this clause plainly include the right to schedule employees,” and that the change in holiday scheduling in the in-patient radiology unit is a schedule change, “No employees’ earned time was affected or altered and each employee continued to accrue earned time as provided for in the earned time policy. The schedule change affected only when employees in the In-patient Radiology group could use their accrued time for holidays, not whether they could use it.”

Respondent contends that the Union waived its right to bargain concerning the holiday scheduling under the management rights clause in the collective-bargaining agreement. Respondent further contends that the holiday scheduling issue is covered by the agreement. Respondent cites *NLRB v. Postal Service*, 8 F.3d 832, 838 (D.C. Cir. 1993), wherein the court reversed the Board’s finding of a violation by a unilateral change in work schedule by the *Postal Service* and the Board had held that there was no waiver because the management rights clause did not specifically refer to work schedules. The court held that the Board’s reading of the clause was far too “crabbed” and that the management rights clause was broad enough to “permit an employer unilaterally to rearrange its employees’ work schedules.” Respondent also cites *Uforma/Shelby Business Forms*

Inc. v. NLRB, 111 F.3d 1284, 1290 (6th Cir. 1997), in which the management rights clause granted the employer the right “to schedule and assign work to employees; to establish and determine job duties and the number of employees required thereof . . . [and the right] to hire, layoff or relieve employees from duties . . .” The Board held this language did not waive the union’s right to bargain over the employer’s decision to abolish a third shift, reschedule 12 employees to different shifts and lay off 5 other employees. In reversing the Board and denying enforcement the court held:

Although the language does not state that petitioner may “eliminate a shift,” it reserves to petitioner the exclusive ability to schedule and assign work, determine the number of employees required for a job, and layoff or relieve employees from duties. These broad powers necessarily encompass the ability to reschedule and lay off the members of a given shift, regardless of whether petitioner is affecting one or one hundred employees.

Respondent argues that these cases support its position that its management rights clause gave it the right to schedule employees for holiday work and the right to change the way in which earned time is accrued. The scheduling change did not alter employees’ accrued earned time benefits or affect the way in which earned time is accrued. It did not change or alter any employees’ hours, wages, accrued benefits or the way in which those benefits are calculated. The rotational schedule did not determine whether employees could use earned time benefits. It simply determined when employees could use earned time benefits. The earned time policy is not “a provision expressly specified in the Agreement” as contended by the General Counsel. Other than the management rights clause, there is nothing in the agreement that relates to the scheduling of holiday work.

The General Counsel’s interpretation of article XIX, preservation of benefits is equally wrong. The General Counsel argues that by virtue of article XIX, the entire earned time policy is incorporated into the collective-bargaining agreement and becomes a provision “expressly specified in the Agreement” within the meaning of the management rights clause and argues from this that the management rights clause does not authorize the Respondent to change the holiday schedule unilaterally. Nothing in the agreement supports the conclusion that the earned time policy is a provision “expressly specified in the Agreement.” The General Counsel’s argument ignores the obvious purpose of article XIX which is to require the Hospital to notify the Union when (and only when) it “proposes changes in personnel policies or benefits for all employees . . .” and to bargain if the Union makes timely request. Article XIX is inapplicable here because the schedule change at issue in this case, did not apply to all employees, but only to those in the in-patient radiology unit and because the change did not affect the level of anyone’s earned time benefit. Moreover article XIX says, “This Article [XIX] is not intended to interfere or conflict with Management rights as set forth in Article I of this Agreement.”

Analysis

I find that the Respondent did not violate the Act by its unilateral change in the holiday schedule in the in-patient imaging group abolishing the old policy based on seniority and employees' preference and replacing it with a rotational policy.

Initially, I find in agreement with the General Counsel's position as set out above that the unilateral imposition of the scheduling procedure in the in-patient imaging department constituted a unilateral change in a mandatory subject of bargaining. I also find that the unilateral change was a substantial and material change and had a real impact on or was a significant deterrent to the employees or their working conditions. I also find that the Respondent's motive for making the change is irrelevant to the issue in this case as motive is not an element of an 8(a)(5) violation. I also find as contended by the General Counsel that unilateral changes in holiday scheduling policy in other departments affecting unit employees without notice to or objection from the Union would not convert an otherwise unlawful act into a lawful one.

I do find however, in agreement with the Respondent's position that the language of the management-rights clause is broad enough to cover the change in the scheduling procedure made in this case. That clause specifically gives management the right to change starting times, quitting times and shifts and to determine or change methods or means by which its operations are to be carried on. I find that the rights granted in this clause clearly include the right to make schedule changes. Therefore its right to make schedule changes is covered by the agreement.

I further find that no employees earned time was affected or altered as each employee continued to accrue earned time as provided for in the earned time policy. The schedule change affected only when the employees could use their accrued time for holidays but did not entail any loss of their accrued time. I further find that article XIX—preservation of benefits and the earned time policy do not specifically address the issue of the schedule change in this case and I find they do not afford any assistance in deciding this case. Rather as noted above I find that the management rights clause clearly afforded the Respondent the right to make the schedule change as it did in this case.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent did not violate the Act in any manner alleged in the complaint.

ORDER¹

The complaint is dismissed in its entirety.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.