

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.**

**HEARTLAND-PLYMOUTH COURT MI,)
LLC, d/b/a HEARTLAND HEALTH CARE)
CENTER-PLYMOUTH COURT,)
)
Respondent,)
)
and)
)
)
**SEIU HEALTHCARE MICHIGAN,)
)
)
Charging Union.)****

Case No. 07-CA-070626

**RESPONDENT’S BRIEF IN SUPPORT OF EXCEPTIONS
TO ADMINISTRATIVE LAW JUDGE’S DECISION**

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COMES NOW, Heartland-Plymouth Court MI, LLC, d/b/a Heartland Health Care Center-Plymouth Court (hereafter referred to as “Respondent” or “Plymouth Court”) and files its Brief In Support of Exceptions to Administrative Law Judge’s Decision, as follows:

STATEMENT OF CASE

In September 2011, Respondent, reacting to a sudden decline in its patent census, implemented a reduction of hours within the dietary department. SEIU Healthcare Michigan (“the Union”) responded by filing a class action grievance on November 9, 2011. On December 13, 2011, the Union filed an unfair labor practice charge alleging Respondent had “made unilateral changes to the working terms and conditions of the employees, in violation of section 8(a)(5) of the Act.”

Following the exhaustion of the grievance procedure, the dispute proceeded to arbitration, and the charge was held in abeyance pending the outcome of the arbitration hearing, which was held on June 6, 2012, in Detroit, Michigan, before Arbitrator Paul E. Glendon.

Arbitrator Glendon issued his decision on August 1, 2012, in which he denied the grievance in its entirety. The Regional Director, however, refused to defer to the arbitral award, and on November 27, 2012, the Regional Director issued a Complaint alleging that Respondent had violated the Act by reducing the work hours of several unit employee “without affording the Charging Union a meaningful opportunity to bargain with Respondent with respect to the effects of this conduct.” Respondent filed a timely Answer to the Complaint, denying the material allegations.

A hearing on the unfair labor practice charge was held before Administrative Law Judge Ira Sandron (“ALJ” or “judge”) on January 14, 2013 in Detroit, Michigan. On March 12, 2013, ALJ Sandron issued his Decision, finding that Respondent violated the Act by failing to bargain with the Union over the effects of the reduction in hours. Respondent now files Exceptions to the ALJ’s Decision and this Brief In Support Of Exceptions.

STATEMENT OF FACTS

A. The Reduction In Hours

Plymouth Court is a 109-bed facility providing long-term care, as well as skilled nursing rehabilitation, for patients in Plymouth, Michigan. (Jt. Exh. 2 --Arb. Tr. 72). The Union represents a unit of “all full-time and regular part-time nurses’ aides, housekeeping employees, laundry employees, maintenance employees and cooks employed by the employer at its facility at 105 Haggerty Road, Plymouth, Michigan.” (Jt. Exh. 2 -- Arb. Tr. 6-7). The terms and conditions of employment for the unit employees are set forth in a written collective bargaining agreement, effective by its terms from July 8, 2011 through July 8, 2014. (Jt. Exh. 2). This agreement contains a management rights clause, (Article 3), which grants management a wide array of rights, including the right to determine the extent to which departments would be operated and work would be performed, as wells the right “to determine and change starting

times, quitting times, and shifts.” Article 4 of the agreement addresses the subject of “hours of work and overtime,” and provides that although a normal work day is 8 hours, “[n]othing contained herein shall guarantee to any employee any number of hours of work per day or week.”

In September 2011, Respondent experienced a serious decline in patient census as a result of federal regulations that significantly curtailed Medicare funding, as well as a state inspection that temporarily halted new admissions. (Tr. 71-72; Jt. Exh. 2 – Empl. Exh. 8). Employee staffing levels are entirely dependent on the patient census (typically, the census is predicted at 90; during September, the census dropped to 60); accordingly, in order to remain within budget, it became necessary to implement a reduction of hours for many of the dietary department employees. In response to this drop in census, Cari Mitter, Director of Food and Nutrition at Plymouth Court, cut employee hours according to seniority. Mitter, however, provided employees the opportunity make up their lost hours by posting open shifts. (Tr. 70-73; Jt. Exh. 2 -- Arb. Tr. 72-77, 82-83).

B. Meetings And Discussions Between Union And Respondent

The only witness for the Acting General Counsel (AGC) was the Director of Representation for the Union’s nursing home division, Kim Fowlkes. According to Fowlkes, she only became aware of the reduction in hours for dietary employees when she was conducting a routine site visit at the facility in November 2011:

I was at the facility on a routine site visit, and as I recall an employee, Felicia Slater, approached me. Actually she ran up to me, and she said that there were full-time workers in her department whose hours were being cut, and she said that it had been happening for a while. I know she mentioned that it started happening like back in September, and we were like early in November sometime or whatever when she told me, and I told her that what I would do was investigate the situation, which I did.

(Tr. 21.).

Fowlkes testified that she then contacted both Karen Szkutnik and the facility administrator, Bret Lucka, to inquire about the reduced hours and that both claimed to be unaware of the reductions in the dietary department. (Tr. 25). Fowlkes then contacted Brandi Malone, whom Fowlkes identified as the Acting Union Steward, and Malone confirmed that Slater had also complained to her about the reduction in hours. (Tr. 27-28). Following the conversation with Malone, Fowlkes testified that she instructed Malone to file the class action grievance about the reduction. (Tr. 30; Jt. Exh. 2 -- p. 48). The grievance was actually filed on November 9, 2011.

Malone, however, testified at the arbitration hearing that she was a Union Steward and that following the reduction in hours, she had multiple meetings with management in which an agreement was reached to restore the hours of all dietary employees except for Clondia Finley. (Jt. Exh. 2 – Arb. Tr. 17-19). Malone testified that she actually drafted the Union’s grievance, but that Felicia Slater signed it because Malone and the other Union Steward were going out on a medical leave. (Jt. Exh. 2 – Arb. Tr. 16).

Throughout the unfair labor practice hearing, several witnesses referred to the fact that while many employees’ hours had been cut, the majority of the dietary workers subsequently had their hours restored. Fowlkes testified that she knew of an employee named “Belle” having her hours reduced; later, according to Fowlkes, “they took care of Belle’s problem.” (Tr. 40). Fowlkes further noted that, “I know that Felicia Slater had a problems [sic] but she fixed hers.” (Tr. 40). By November 2011, the majority of employees had returned to their normal working hours as a result. Karen Szkutnik, Respondent’s Regional Human Resources Manager, testified at the unfair labor practice hearing that Cari Mitter “added hours back when they could.” (Tr.

73). At the arbitration, Mitter explained that initially, an even larger number of employees had seen their hours reduced; in addition to Clondia Finley, Mitter named “Khadijah Anderson, Eartha Finley, Dion Luckett, Stacey Miller, Felicia Slater, Laura Gonzales, Joann Wood, John Ross, [and] Angela Vasquez” as other employees who were affected by the reduction. (Jt. Exh. 2 -- Arb. Tr. 85). During the arbitration hearing, the Union repeatedly emphasized the number of meetings that were held between Malone and management *prior* to the filing of the grievance. In the Union’s post-arbitration brief, it notes that, “Per the testimony of Steward Brandi Malone, the Union complained to Management, and meetings were held with Management, to discuss the issue. Some areas of concern were worked out and in some cases, hours were restored, however, Ms. Clondia Finley testified that she remained at the reduced level of hours. (p. 17-18 transcript).” (R. Exh. 2; p. 4). The Union’s opening statement, which appears in the arbitration transcript, is equally on point:

On or around September of last year, 2011, the employer reduced the working hours of several full-time employees, including Clondia Finley and others, from 80 hours to approximately 60 to 64 hours per pay period. The union complained to management, and in fact, they had a number of meetings to discuss what the union believed to be a contract violation as it was related to the reduction of the work hours. Many of – the employer restored many of the hours of the workers, but not all, and in the case of some of the cooks [...] their hours were not restored. And it’s the position of the Union that this reduction of hours is a violation of the contract, and as a result, Steward Felicia Slater, along with Brandi Malone, filed a class action grievance to protest the violation.

(Jt. Exh. 2 -- Arb. Tr. 7).

The testimony of Malone further demonstrates that meetings between herself (in her official role as Union steward) and members of management occurred at the time the reductions were made, and prior to the filing of the grievance:

Q: During the time you had reductions, did you have meetings with management?

A: Yes, because we couldn't understand why Ms. Finley was still going home and Rickie Barkoff was coming in and getting 80 hours.

Q: As a result of some of your meetings, were there some employees who had been reduced that were returned to full-time hours?

A: Yes, they asked Ms. Finley – they worked out an agreement with Ms. Eartha Finley to keep her hours, but Clondia was the only one in the kitchen that didn't return to her normal hours.

Q: You said Clondia. Is that Clondia Finley?

A: Yes.

Q: And it was Ms. Finley's continued reduction in hours that prompted the grievance before us today?

A: Yes.

(Jt. Exh. 2; Arb. Tr. p. 17-18).

In short, it appears that either before, or at the outset of the reduction, Mitter and Malone began meeting to discuss ways to alleviate the effects of the cuts. As a result of their discussions, the Union's concerns were fully addressed, except with respect to Clondia Finley, whose circumstances were discussed during the grievance procedure. On December 5, 2011, a grievance meeting was attended by Fowlkes, Slater, Finley, Lucka, Szkutnik, and another management representative. During this meeting, Fowlkes argued that Respondent did not have the right to reduce hours; Szkutnik disagreed. (Tr. 58). Szkutnik again offered Finley an opportunity to make up lost hours by working different shifts, and Finley again refused this offer. (Tr. 54; 44). Fowlkes did not propose any solution to the problem other than reinstating all employees' hours. (Tr. 55-56; 37). Subsequently, on December 19, 2011, Fowlkes and Szkutnik spoke by telephone, and Szkutnik again proposed a solution by which Finley could make up any lost hours if she worked a double shift; Fowlkes refused this option. (Tr. 44). On December 20,

2011, Szkutnik sent Fowlkes an email, constituting the Respondent's third step response to the Union's grievance, which stated: "Per our phone conversation yesterday you have notified me that despite our proposed solutions to this issue you will proceed with the arbitration. Please consider this our response to the grievance." (Tr. 44-45; GC Exh. 2). Fowlkes responded with her own email, which reads as follows:

Karen, I don't know how you figure that you are right, as I stated before. The issue has not been resolved. If it were resolved, a grievance would not have been filed, along with a charge. Your resolution makes no sense at all. I'm not going through this anymore with yourself or Bret. Stop cutting the hours of full time employees, and this issue will be resolved. I was lied to for two months concerning this issue, by [B]ret. If you were right, a charge would not have been filed. The union would be more than willing to drop all charges, and settle this issue, if you give the employees their full time hours back. I have nothing else to say concerning this matter. I'm on vacation, have a great Christmas, and a happy new years.

G.C. Exh. 3.

At this point, the parties proceeded to arbitration; meanwhile, the Region deferred investigation of the unfair labor practice charge, pending that outcome.

C. The Arbitration

On June 6, 2012, an arbitration hearing was held in Livonia, Michigan, before Arbitrator Paul E. Glendon. The record of that proceeding was introduced at the unfair labor practice hearing as Joint Exhibit 2. On August 1, 2012, Arbitrator Glendon issued his decision. (R. Exh. 1). After summarizing the facts, as well as the positions of both the Employer and the Union, the Arbitrator concluded that "[t]he Employer is correct on all counts." Specifically, Arbitrator Glendon found that Respondent's interpretation of the disputed contract language was proper, and that the word "normal" did not create a guarantee of 80 hours of work per pay period for unit employees. After further finding that nothing in Respondent's actions violated the seniority provisions in the collective bargaining agreement, Arbitrator Glendon ultimately concluded that

the Respondent’s “reduction of Finley’s regularly scheduled work hours below eight per day and/or eighty per pay period did not violate any provision in the agreement, and the grievance must be denied.” (R. Exh. 1, p. 5).

ISSUES PRESENTED

1. Whether the Union waived any right it may otherwise have had to bargain over the effects of Respondent’s decision to temporarily reduce employee hours? [Exceptions 6, 7, 8, 9, 11, 15, 16, 18, 22, 23]

2. Whether under a “contract coverage” analysis, the Respondent had any further obligation to bargain over the effects of Respondent’s decision to temporarily reduce employee hours? [Exceptions 5, 11, 15, 16, 18, 20, 22, 23]

3. Whether the arbitrator’s decision is determinative and should be deferred to by the Board? [Exceptions 11, 12, 13, 14, 16, 18, 22, 23]

4. Whether the Union made any request to bargain over effects, or alternatively, whether Respondent satisfied any effects bargaining obligation it may have had? [Exceptions 1, 2, 3, 8, 10, 11, 18, 22, 23]

5. Whether there was any “effects bargaining” obligation with respect to Respondent’s decision to temporarily reduce employee hours? [Exceptions 11, 15, 18, 22, 23]

6. Whether, if an effects bargaining violation is found, a *Transmarine Navigation* remedy is appropriate? [Exceptions 17, 18, 19]

ARGUMENT

A. The Union Waived Any Right To Bargain Over The “Effects” Of Respondent’s Decision To Temporarily Reduce Employee Hours.

Although Respondent contends that a “contract coverage” rather than a “waiver” analysis is appropriate when the issue involves the proper interpretation of contractual language, it is

clear that the collective bargaining agreement did “waive” any right the Union may have had to bargain over the “effects” (if any) of Respondent’s decision to reduce employee hours. This waiver flows ineluctably from Articles 3, 4, and 25 of the collective bargaining agreement, which must be read in harmony:

ARTICLE 3
Management Rights

Section 1. The Employer shall retain all rights and authority it had prior to entering into this Agreement, including, but not limited to, the unrestricted right to: manage the Center and to direct the work force; to determine and change the methods and manner of patient care; to determine and change the size and composition of the work force; to determine the extent to which and the manner and means the Center and its various departments shall be operated or shut down; to determine whether and to what extent any work shall be performed by employees; to maintain order and efficiency in the convalescent center and its operations, including the right to select, hire, promote, lay off, assign and train employees; to select and determine supervisory employees, to determine and change starting times, quitting times and shifts; to determine and change methods and means by which Center operations are to be carried on; to establish, change and abolish its policies, rules, regulations, practices and standard of conduct and to adopt new policies, rules, regulations, practices and standard of conduct; and to assign duties to employees in accordance with the needs and requirements as determined by the Employer. The exercise of the foregoing powers and rights, together with the adoption of policies, rules, and regulations in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific terms and conditions of this Agreement.

ARTICLE 4
Hours of Work and Overtime

Section 1. For purposes of this Article, eight (8) consecutive hours of service, excluding an unpaid thirty (30) minute lunch period, shall constitute a normal working day for all departments, except Nursing. For employees in Nursing, the normal workday shall consist of seven and one-half (7 ½) hours of service, excluding an unpaid lunch period. The normal work/pay period for a full-time employee shall be ten (10) workdays within a consecutive fourteen (14) day period. The normal work week for all shifts shall be those hours which commence at

12:01 am Wednesday and ends two weeks later at 12:00:59 am on Wednesday. Nothing herein shall guarantee to any employee any number of hours of work per day or week.

ARTICLE 25
Waiver

The parties acknowledge that during the negotiation which resulted in this Agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all of the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement and attached Memorandum of Understanding. Therefore, the Employer and the Union for the life of this Agreement each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to, bargain collectively with respect to any subjects or matters referred to in this Agreement, even though such subjects or matters may not have been within the knowledge of [sic] contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

Under a waiver analysis, the waiver must be “clear and unmistakable” and will not be “infer[red] from a general contractual provision . . . unless the undertaking is ‘explicitly stated.’” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983). Here, there is nothing “general” about these articles and the waiver is explicitly stated. We start with what the AGC concedes in his complaint: Respondent acted “pursuant to Articles 3 and 4 of the collective-bargaining agreement” in reducing the work hours of certain employees. Thus, the subject of “hours of work” and Respondent’s rights and obligations regarding this subject are explicitly addressed in Articles 3 and 4. This is important because Article 25, the “Waiver” article, “voluntarily and unqualifiedly waives the right, and each [party] agrees that the other shall not be obligated to, bargain collectively *with respect to any subjects or matters referred to in this Agreement*, even though such subjects or matters may not have been within the knowledge of [sic] contemplation of either or both of the parties at the time they negotiated or signed this Agreement.” [Emphasis

supplied]. Inasmuch as the subject of work hours is addressed in Articles 3 and 4, the undeniable effect of Article 25 is to waive the right to bargain further on this subject during the term of the agreement. This waiver unambiguously encompasses not only the decision to reduce work hours, but the effects of such decision. There is no requirement that the agreement specifically mention “effects bargaining.”

Explicit waiver or “zipper” clauses are binding, are not repugnant to the Act, and “will be given meaning and effect.” *Radioear Corp.*, 214 NLRB 362, 364 (1974). The Board has long distinguished between using a zipper/waiver clause as a “sword” and using it as a “shield.” *CBS Corp.*, 326 NLRB 861, 861-862 (1998); *GTE Automatic Electric, Inc.*, 261 NLRB 1491, 1491-92 (1982). Such a clause may not be used by either party to justify a unilateral change or to force the other party to engage in mid-term bargaining, but it may be used as a shield to refuse to engage in mid-term bargaining.

The zipper clause in *CBS* was identical to the zipper clause here insofar as the parties “voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement,” but was broader in that it also waived bargaining with regard to non-included subjects or matters “which were discussed during the negotiation of this Agreement.” The Board agreed that the union could use the zipper clause as a shield to refuse to bargain over mid-term subcontracting decisions inasmuch as subcontracting had been discussed during the negotiations. The zipper clause in *GTE* waived the right to bargain mid-term on all subjects and matters, included or non-included, known or unknown. The Board held that the employer could use the clause as a shield to refuse to bargain over a new benefit not provided for in the collective

bargaining agreement and “to maintain the status quo regarding the terms and conditions of employment of unit employees:”

We are of the opinion that, by permitting Respondent to invoke the zipper clause as a shield against the Union’s midterm demand for bargaining over a new benefit, and by giving literal effect to the parties’ waiver of their bargaining rights, industrial peace and collective-bargaining stability will be promoted.

261 NLRB at 1491-92.

The ALJ’s heavy reliance on the Board’s decision in *Good Samaritan Hospital*, 335 NLRB 901 (2001), is misplaced. The Board did not in that case determine that language waiving a right to bargain over a particular management decision would never be sufficient to also waive the right to bargain over the effects of that same decision. Rather, it found that while the agreement language in that case waived the right to bargain over a new staffing matrix, the language was not sufficiently explicit to find a waiver of the right to bargain over the effects of the decision. Notably, in *Good Samaritan*, the only pertinent contractual language was the management rights provision. There was nothing in the collective bargaining agreement that spoke to the effects of changes in the staffing matrix and no zipper clause from which the Board could conclude that there had been an explicit waiver of the right to bargain over the effects of the new staffing matrix. Thus, *Good Samaritan* is clearly distinguishable and does not control the specific waiver issue presented in this case.

Here, none of the three cited articles is determinative by itself; rather, it is the combined effect of the substantive provision regarding “hours of work,” the management rights article, and the waiver/zipper article that demonstrates the clear and unmistakable waiver. A contrary conclusion would effectively nullify the agreement made between the parties. Because the Union

clearly and unmistakably waived the right to bargain over the effects of the decision to reduce employee hours, the Board should dismiss the complaint.

B. Under A “Contract Coverage” Analysis, Respondent Had No Obligation To Bargain Further Over The “Effects” Of The Decision.

Respondent recognizes that the Board has steadfastly refused to follow the “contract coverage” analysis applied by the D.C. Circuit, *Enloe Medical Center v. NLRB*, 433 F.3d 834 (D.C. Cir. 2005), the First Circuit, *Bath Marine Draftsmen’s Assoc. v. NLRB*, 475 F.3d 14 (1st Cir. 2007), and the Seventh Circuit, *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); or the two-step hybrid test applied by the Second Circuit. *Local Union 36, IBEW v. NLRB*, 706 F.3d 73 (2d Cir. 2013). Suffice it to say, however, that the ALJ’s decision is effectively doomed to failure by the D.C. Circuit’s *Enloe Medical Center* decision. In *Enloe*, the court refused to enforce a Board order finding that the employer had unlawfully refused to bargain over the effects of a mandatory on-call policy adopted by the employer pursuant to its rights under a collective-bargaining agreement. The court explained:

Whether the parties contemplated that the collective bargaining agreement would treat the effects of a decision separately from the decision itself is just as much a matter of ordinary contract interpretation as is the initial determination of whether the agreement covers the matter altogether. It would be rather unusual, moreover, to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving a union's right to bargain over the effects of that decision. This is not to say that such an interpretation is inconceivable, but it would seem that there would have to be some language or bargaining history to support the proposition that the parties intended to treat the issues separately.

433 F.3d at 838-839.

Here, it is conceded that the collective bargaining agreement gave management the right to reduce employee hours without bargaining with the Union. Further, neither the AGC nor the Union offered any contract language or bargaining history to show that the parties intended to

treat the effects differently than the decision itself. Indeed, unlike *Enloe*, the collective bargaining agreement here contains a zipper clause, which clearly demonstrates that the parties intended the agreement to be the complete resolution of all “subjects” addressed in the agreement and that neither party would be obligated to bargain further with respect to such subjects. Thus, there is no need here to rely on a presumption; the agreement language is dispositive.

The court in *Enloe* further relied upon the union’s own conduct to support its conclusion:

The fact that the parties to the collective bargaining agreement in this case never contemplated a dichotomy between the management rights granted Enloe and the effects of those rights is amply demonstrated by the Union's behavior when Enloe announced the new mandatory on-call policy. The Union never identified any particular discrete effect about which it was seeking bargaining. Instead, the May 9 e-mail from Union representative Baker asserted that the contract “[did] not give Enloe the right to unilaterally change [a registered nurse's] working conditions.” This suggests that the Union was objecting to the on-call policy change itself, and the concluding sentence of the May 9 e-mail-stating that “Enloe does not have the ‘right’ to change one's working conditions without first bargaining the impacts with the union”-merges the effects with the policy change. (Indeed, the Union had already filed an unfair labor practices charge on May 5.) Even if a contract distinguished a policy decision from its effects, it would unlikely be interpreted to require the employer to delay the decision while it bargained over effects.

Id. at 839.

The *Enloe* court’s observations are equally applicable here. As the ALJ acknowledged, the Union never requested to bargain over the effects of the decision. Indeed, it made no request to bargain at all. Further, neither the Union, the AGC, nor the ALJ has identified any specific “effects” of Respondent’s decision to temporarily reduce employee hours other than those that are inherent in the decision, i.e., reduced work hours. The Union’s position throughout the grievance process was that the collective bargaining agreement precluded Respondent from reducing employee hours. There was no contention that the reduction in work hours triggered

any other adverse consequences such as layoffs, increased work loads, or expanded job duties (and any such effects would also be covered by the contract). It is readily apparent that there are no effects that fall outside the scope of the decision itself. Inasmuch as the collective bargaining agreement covers both the decision and its effects, dismissal of the complaint is required.

C. The Arbitrator's Decision Is Determinative Of This Contractual Dispute. Deferral Is Required.

The Board's deferral policy is defined by its decisions in *Spielberg Manufacturing Corp.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984). In *Spielberg*, the Board stated that in order to facilitate "the desirable objective of encouraging the voluntary settlement of labor disputes," it would defer to arbitral awards when "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." 112 NLRB at 1082. Following some meandering back and forth regarding the necessity for the arbitrator to have explicitly considered the statutory issue and the proper assignment of the burden of proof, the Board announced in *Olin* that:

We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of

affirmatively demonstrating the defects in the arbitral process or award.

268 NLRB at 574.

“The Board strongly favors deferral to arbitration as a means of encouraging parties to voluntarily resolve unfair labor practice issues such as that involved here.” *Kvaerner Philadelphia Shipyard, Inc.*, 347 NLRB No. 36 (2006). Thus, the burden of a party opposing deferral has been characterized as a “heavy” one. *Aramark Services, Inc.*, 344 NLRB 549, 550 (2005).

Despite the AGC’s complaint allegations, the dispute between the Respondent and the Union has always been contractual in nature and not a dispute over bargaining rights. The Union filed a grievance alleging a contract violation, followed by an unfair labor practice charge alleging that Respondent made an unlawful unilateral change in terms and conditions of employment. Thereafter, the Regional Director deferred the charge to arbitration, explaining his basis for *Collyer* deferral as follows:

1. The Employer and SEIU Healthcare Michigan have a collective-bargaining agreement currently in effect that provides for final and binding arbitration.
2. The Employer’s alleged unlawful unilateral change in work hours of certain employees as alleged in the charge is encompassed by the terms of the collective-bargaining agreement.
3. The Employer is willing to process a grievance concerning the issues in the charge, and will arbitrate the grievance if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.
4. Since the issues in the charge appear to be covered by provisions of the collective-bargaining agreement, it is likely that the issues may be resolved through the grievance/arbitration procedure.

(Jt. Exh. 2).

At the arbitration hearing, the Respondent argued that the collective-bargaining agreement explicitly authorized it to reduce employee hours. It relied upon articles 2, 3, and 4 of the agreement. The Union argued that the agreement, particularly articles 4 and 8, precluded the Respondent from changing employee hours. Based on his review of the agreement and the evidence presented, Arbitrator Glendon concluded that Respondent was “correct on all counts.” Thus, he denied the grievance.

All of the criteria for deferral have been satisfied. The arbitrator was presented with a contractual dispute that was factually parallel to the alleged unlawful unilateral change. The parties presented the evidence generally relevant to that issue and the arbitrator determined that Respondent had not violated the collective bargaining agreement in any respect. There is no contention that the proceedings were not fair and regular. Finally, the arbitrator’s decision is not repugnant to the Act.

The ALJ declined to defer based on his conclusions that “the issue of effects bargaining was not raised either at the arbitration hearing or in the parties’ posthearing briefs, and nothing whatsoever in the arbitrator’s award purported to address effects bargaining, let alone any kind of bargaining” and “the evidence pertinent to effects bargaining was not meaningfully or fully presented at the arbitration hearing” by either party. (JD 8: 29-31, 43-45). But this analysis is inconsistent with Board law. When section 8(a)(5) unilateral change allegations—which is what the charge alleges without any reference to decision or effects bargaining—are deferred to arbitration, the parties and the arbitrator rarely focus on whether actual bargaining occurred, much less whether a good-faith impasse was reached. Instead, the evidence and the decision almost invariably focus on whether the employer’s actions were in accordance with its contractual rights. The contract interpretation issue is parallel to the statutory issue because “[t]he

presence of contractual authorization for the respondent's action is determinative of the unfair labor practice allegation." *Dennison National Co.*, 296 NLRB 169, 170 (1989). In *Dennison*, the arbitrator declined to address the union's waiver argument because it was "a statutory issue that must be decided by the NLRB." Nevertheless, the Board deferred to the arbitrator's award. The Board rejected the contention (similar to that adopted here by the ALJ) that the arbitrator was not presented with the facts relevant to the statutory issue:

[T]he record shows that the arbitrator received ample evidence, i.e., the parties contract and evidence of past practice. The Board would necessarily consider the same facts in reaching a decision on the Union's unilateral change allegation.

Id. See also, *Bay Shipbuilding Corp.*, 251 NLRB 809 (1980).

Similarly, in *Smurfit-Stone Container Corp.*, 344 NLRB 658 (2005), the Board declined to find an unlawful unilateral change and deferred to an arbitrator's decision finding that the employer acted within its contractual rights by instituting a new attendance policy. The Board concluded that the arbitrator "adequately addressed the statutory issue by determining the contractual issue." *Id.* at 659. Although the arbitrator may have been influenced by the concept of "inherent management rights," that was not the sole basis for the decision, and "a reasonable interpretation of the arbitrator's decision is that the management rights clause authorized the implementation of the absence control policy." *Id.* The Board further concluded that the award was not repugnant to the Act. The Board reaffirmed that the appropriate "standard for determining whether an arbitral decision is clearly repugnant is whether it is 'susceptible' to an interpretation consistent with the Act." *Id.* at 660. The decision need not be the same one that the Board would reach; thus, "mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award." *Id.* It also is not necessary that the award use any magic phrases such as a "clear and unmistakable waiver." *Id.* at

n. 4 (citing *Southern California Edison*, 310 NLRB 1229, 1231 (1993) and *Olin*, 268 NLRB at 576).

Clearly, the ALJ's reliance on the arbitrator's failure to specifically discuss "effects bargaining" (JD 8: 29-34) is misguided. The arbitrator also did not discuss whether any bargaining occurred with respect to the decision itself; yet, the AGC effectively deferred to the arbitrator's decision by choosing not to allege a decision bargaining violation. The effects bargaining issue was encompassed in the grievance every bit as much as the decision bargaining issue.

In these circumstances, the Board's deferral policy requires that the complaint allegations be dismissed.

D. The Union Never Made A Request To Bargain Over The Effects Of The Decision. Alternatively, The Respondent Satisfied Its Effects Bargaining Obligation.

The ALJ conceded that "the Union never specifically requested effects bargaining per se," but found that "such a request was implicit in its grievance and its request that the status quo ante be restored." (JD 7: 20-24). This was error. Although the Board found in *Rochester Gas & Electric Corp.*, 355 NLRB 507 (2010) that a grievance was sufficient in that case to constitute a request to engage in effects bargaining, the Board found otherwise in *Noblit Bros.*, 305 NLRB 329 (1992). Thus, each case must be addressed on its own merits.

Here, at the unfair labor practice hearing, the parties stipulated that although Respondent issued a subpoena requesting any such record in existence, no document has been submitted to demonstrate that the Union has requested effects bargaining at any point either before or after the hours were reduced. (Tr. 67-68; R. Exh. 5.) At no time did the Union or the AGC contend that the grievance was an adequate substitute for a specific request to engage in effects bargaining. In

these circumstances, the Union's failure to request effects bargaining requires dismissal of the complaint.

But if we accept that the grievance was a request to engage in effects bargaining, it surely follows that the grievance/arbitration process itself constituted effects bargaining. After all, the "grievance/arbitration process is part and parcel of the collective bargaining process itself." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The inquiry is not whether the grievance process meets the Board's assessment of adequate effects bargaining. Instead, the inquiry is whether the grievance process actually functioned as designed to its agreed-upon conclusion. It clearly did, and the arbitrator's decision represented the final and binding culmination of the bargaining process.

Contrary to the ALJ's conclusions, it is also clear that the parties engaged in substantive effects bargaining prior to the grievance process being invoked. The ALJ discounted this evidence from the arbitration hearing, finding that "the record is totally devoid of any foundational requirements necessary for admissible evidence in a formal proceeding," as Union Steward Malone did not identify the management representatives with whom she met or describe who was present or what was said. (JD 7: 29-48). This conclusion is clearly erroneous. The evidence relied upon by Respondent was solicited by the Union's representative at the arbitration hearing through the Union's Steward, Malone, who testified from personal knowledge. Further, the Union representative relied upon this evidence in his opening statement. "Counsel can make admissions during trial that will bind the client" and "such admissions can be derived from the contents of opening statements or closing arguments." *Butynsky v. Springfield Terminal Railway Co.*, 592 F.3d 272, 277 (1st Cir. 2010); *accord*, *Performance Friction Corp.*, 335 NLRB 1117, 1149 (2001); *Packaging Techniques, Inc.*, 317 NLRB 1252, 1254-55 (1995). Armed with the

admissions of the Union steward and the Union representative at the arbitration hearing that meetings were held between the Union and the Company and that all issues were resolved except for the single employee whose grievance was the subject of the arbitration, Respondent was under no burden to provide any further foundational or explanatory evidence. These facts were established, and it was the burden of the AGC or the Union to attempt to explain them away. They failed to do so, and the complaint should be dismissed.

E. The Board Should Limit The Effects Bargaining Obligation To Significant Management Decisions Involving Loss Of Employment And To Other Management Decisions Where The Union Adequately Identifies Specific Effects Warranting Bargaining.

The whole concept of effects bargaining is premised on the notion that the effects of a management decision are distinct from the decision itself. It was not until 1962 that the Board first adopted the concept of “decision bargaining.” Overruling prior decisions finding no duty to bargain over a subcontracting decision, the Board held that subcontracting *decisions*, as well as their effects, were mandatory subjects of bargaining. *Town & Country Manufacturing Co.*, 136 NLRB 1022 (1962); Thereafter, during the 1960s, the Board reached similar conclusions regarding managerial decisions to sell, close, relocate, and transfer work. Member Leedom frequently concurred, and in his view the bargaining obligation did not extend to management decisions of this nature, but only to the “effects” of the decisions. *E.g.*, *Pepsi-Cola Bottling Co.*, 145 NLRB 785 (1964) (plant shutdown); *Adams Dairy Co.*, 147 NLRB 1410 (1964) (subcontracting); *Royal Plating & Polishing Co.*, 148 NLRB 545 (1965) (plant sale); *Ozark Trailers, Inc.*, 161 NLRB 561 (1966) (plant shutdown)

Although the Supreme Court approved the Board’s position regarding subcontracting decisions, *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964), the majority of the circuit courts took a narrower view with other significant management decisions to sell, close, relocate, and

transfer work, concluding (in agreement with Member Leedom's view) that the bargaining obligation was limited to the effects of such decisions. *E.g.*, *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965); *NLRB v. Transmarine Navigation Co.*, 380 F.2d 933 (9th Cir. 1967); *NLRB v. Thompson Transport Co.*, 406 F.2d 698 (10th Cir. 1969). In *First National Maintenance Corp. v. NLRB*, 452 U.S. 66, the Court concluded that partial closing decisions were not subject to bargaining. But it acknowledged that the effects of such decisions were a mandatory subject of bargaining. *Id.* at 677, n. 15. The Court expressed "no view as to other types of management decisions, such as plant relocations, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts." *Id.* at 686, n. 22.

There is thus an established demarcation line between decision and effects bargaining. This line of demarcation, however, makes sense only when the decision is one that yields visibly identifiable effects that can be distinguished from the underlying decision. The most common decisions of this nature are those that tend to lead to a complete loss of employment; i.e., partial and complete plant closings, relocations and transfers of work, and sale decisions, as well as other decisions affecting the scope of the employer's operations. This is not to say that an effects bargaining obligation can never arise when the decision causes no loss of jobs, but when there is no loss of jobs, the Board should at a minimum be able to identify specific effects of the decision before it will find an effects bargaining obligation.

In many managerial decisions that do not create job losses, the decision and its effects are inextricably intertwined. For example, a decision to change a shift schedule from a 7 to 3 schedule to an 8 to 4 schedule would clearly be a mandatory subject of bargaining, but if the contract authorized management to make the change in hours, there are no readily visible effects that are separate and distinct from the change in hours that would warrant finding an effects

bargaining obligation. If there are specific effects, it is not asking too much for the Union to identify at least one such effect.

Here, neither the Union, the AGC, nor the ALJ has identified any specific “effects” that Respondent’s decision to temporarily reduce employee hours had on employees other than those that are inherent in the decision, i.e., reduced work hours. There is no contention that the reduction in work hours triggered any other adverse consequences such as layoffs, increased work loads, or expanded job duties. In these circumstances, there was no effects bargaining obligation at all, and the complaint should be dismissed.

F. The ALJ Erred In Recommending A Transmarine Navigation Remedy.

Assuming, *arguendo*, that the Board finds an effects bargaining violation, the remedy should not include the limited backpay *Transmarine Navigation* remedy recommended by the ALJ. Indeed, this remedy makes no sense at all in the facts of this case and would be purely punitive. The *Transmarine* remedy is typically granted in situations where the employer’s decision results in a loss of jobs. Indeed, in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), the decision involved a facility closing. *See also, Bridon Cordage, Inc.*, 329 NLRB 258 (1999) (decision to reduce inventory resulted in layoffs). This remedy is not routinely granted in effects bargaining cases where the decision results in no loss of jobs. For example, in *Good Samaritan Hospital*, 335 NLRB 901 (2001), the Board found a violation in the employer’s failure to bargain over the effects of a decision to change staffing matrices, but did not include a *Transmarine* remedy. Here, no employee lost his/her job, and the matter was processed through arbitration. Granting a *Transmarine* remedy would undermine the arbitrator’s decision.

If, however, the Board determines that some type of limited backpay remedy is required, it must be narrowly tailored to the specific decision and effects. Thus, in *Rochester Gas, supra*, the Board limited the remedy to the increased commuting costs incurred by employees as a result

of the employer's decision to discontinue a vehicle benefit. Here, the remedy, if granted, would need to be limited to any reduced work hours of specific affected employees, and the remedy should not begin to run from the date of the Board's decision, but should run from the date of any court of appeals decision enforcing the Board's order.

CONCLUSION

Respondent requests that the complaint be dismissed in its entirety.

Respectfully submitted this 16th day of April, 2013.

/s/ Clifford H. Nelson, Jr.

Clifford H. Nelson, Jr.
Constangy, Brooks & Smith, LLC
Suite 2400, 230 Peachtree St., NW
Atlanta, GA 30303-1557
Telephone: 404-230-6714
Facsimile: 404-525-6955

/s/ Charles P. Roberts III

Charles P. Roberts III
Constangy, Brooks & Smith, LLC
Suite 300, 100 N. Cherry Street
Winston-Salem, NC 27101
Telephone: 336-721-6852
Facsimile: 336 748-9112

/s/ Leigh E. Tyson

Leigh E. Tyson
Constangy, Brooks & Smith, LLC
Suite 2400, 230 Peachtree St., NW
Atlanta, GA 30303-1557
Telephone: 404-230-6762
Facsimile: 404-525-6955

CERTIFICATE OF SERVICE

I, Charles P. Roberts III, do hereby certify that the foregoing Brief in Support of Exceptions has this day been served by electronic filing to the Executive Secretary, National Labor Relations board, and that the following persons have been served via electronic copy:

Dynn Nick
Attorney
National Labor Relations Board
dynn.nick@nlrb.gov

Mark Raleigh
Chief of Staff
SEIU Healthcare Michigan
mark.raleigh@seiuhcmi.org

Brenda D. Robinson, Esq.
SEIU Healthcare Michigan
Brenda.Robinson@seiuhealthcaremi.org

Dated this 16th day of April, 2013

/s/ Charles P. Roberts III

Constangy, Brooks & Smith, LLC
Suite 300, 100 N. Cherry Street
Winston-Salem, NC 27101
Telephone: 336-721-6852
Facsimile: 336 748-9112