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I. INTRODUCTION

In early 2015, the Academy of Magical Arts, Inc. (the “AMA”) engaged in collective bargaining for a unit of musicians represented by the American Federation of Musicians, Local 47 (“the Union”). The musicians formerly performed contract work for the AMA through the Union’s Area Standard Agreement, which set general work requirements, including a per-shift pay compensation plan for the musicians.

The parties intended to replace the Area Standard Agreement and formalize the musicians’ employment relationship with the AMA. In June 2015, following negotiations, the parties executed the Master Agreement (the “Agreement”). Among other things, the Agreement replaced the Area Standard Agreement’s shift-pay policy with a new hourly rate of pay compensation plan. The parties also agreed upon the following language in the Agreement: “The Employer retains the sole and exclusive right to assign shifts or work schedules for Musicians. Changes to work schedules may be made by the Employer at any time, so long as it has notified the Musicians at least 24 hours prior to the change.” Similarly, the Employer’s Rights provision states that, “The Employer retains, solely and exclusively, all the rights, powers, and authority. . . to schedule and change working hours, shifts and days off..”

Pursuant to the terms of the Agreement, the AMA changed certain shift schedules and provided the requisite notice. On May 27, 2016, the Union filed an unfair labor practice charge alleging that the AMA violated sections 8(a)(1) and (5) of the Act by making unilateral changes to the unit employees, shifts.¹

¹ The Union’s charge relating to premium pay for shifts worked on New Year’s Eve is no longer at issue since neither party has filed exceptions to ALJ’s Decision and the AMA has complied with the ALJ’s Order as to that portion of the charge.

On January 10, 2017, Administrative Law Judge Hon. Joel B. Biblowitz (“ALJ”) issued his decision and order, which, among other things, dismissed the Union’s charge that the AMA made a unilateral change in unit employees’ shifts. The ALJ reasoned that the parties discussed the desire to change the unit employees’ shifts. The parties’ negotiations resulted in specific language in the Agreement providing the AMA with the sole and exclusive right to change schedules at any time with sufficient notice, and the AMA made the shift changes at issue pursuant to these agreed-upon terms.

The Union filed two exceptions to the ALJ’s decision: (1) that ALJ Biblowitz erred in failing to find that the AMA unilaterally changed the musicians’ shifts and (2) that the ALJ erred in finding that the AMA made changes to the shift schedule consistent with the terms of the Agreement. There is simply no basis for these exceptions. By agreeing to specific language providing the AMA with the sole authority to change shift schedules upon 24 hours’ notice, the Union knowingly waived its right to bargain further over this subject. In order to make changes to the shift schedules, the AMA is only required to give 24 hours’ notice, nothing more, but the AMA, in fact, provided several weeks’ notice of any shift changes. Accordingly, the ALJ’s decision must be upheld.

II. RELEVANT FACTS

A. The Parties

The AMA is a private club that provides food, beverage, and entertainment to its members and guests from its clubhouse in the Magic Castle, located in Hollywood, California. (*See* ALJD 1). Among its variety of performers are musicians who perform live music through the “Irma,” a grand piano that plays over 10,000 songs. These musicians are members of the Union, which the AMA recognizes as the exclusive bargaining representative. (ALJD 1:1-5).

B. Bargaining for the Master Agreement

During bargaining, the parties were represented by counsel who negotiated the musicians' wages. (ALJD 3:45-50). The Union initially referenced the musicians' "shift rate" and noted that shifts averaged four to six hours. (See ALJD 3:45-4:5; see also Jt. Exh. 4, p. 8). The AMA specified that musicians should be paid on an hourly basis, replacing any former reference to any "shift rate," and the resulting Addendum A which reflected the hourly rates per shift, rather than any "shift rate." (*Id.*; see also Jt., Exh. 1, p. 6). The hourly rates ranged from \$30 to \$75. *Id.*

On March 11, 2015, the Union circulated an initial draft of the Agreement, and the AMA countered. (See ALJD 3:45-4:5; see also Jt. Exh. 4, p. 15.) The proposed AMA revisions included a "Changes to Shift" provision as well as the Employer's Rights provision. (See ALJD 3:45-4:5; see also Jt. Exh. 4, p. 18-19). The proposal removed the Union's language that "[a]ll Rules and Regulations of the Local [(“Local Rules”)] covering live engagements in effect as of this date and not in conflict with the specific terms of this Agreement shall be considered a part of this Agreement." (See ALJD 3:45-4:5; see also Jt. Exh. 4, p. 18). In its counter, the AMA removed all reference to the Local Rules and proposed that the musicians' employment be dictated by the AMA Employee Handbook, except where specifically dictated by the Agreement. (See ALJD 3:45-4:5; see also Jt. Exh. 4, p. 21).

The Union reviewed the proposed master agreement, accepted many provisions at issue, and countered others. With regard to the Shift Changes language, the Union agreed that the language "seems pretty standard." The Union made only one request regarding the Shift Changes provision, that the AMA provide 24 hour notice before any such changes were to take effect. (See ALJD 3:45-4:5; see also Jt. Exh. 4, p. 27). The AMA agreed.

The Union also accepted the inclusion of the Employer's Rights provision which further allowed the AMA, "to schedule and change working hours, shifts, and days off." (See ALJD 3:45-4:5; *see also* Jt. Exh. 4, p. 27). After these revisions, no further changes were made to the relevant provisions and the agreed-upon language was adopted into the final Agreement, which the parties signed on June 22, 2015. (ALJD 2:15-20).

C. Relevant Provisions of the Agreement

The final Agreement included two critical provisions regarding the challenged changes to shift schedules: Article III, Section B, relating to shift changes; and Article IX, Section A, relating to management rights; it did not include the Union's proposed language incorporating the Local Rules and Regulations .

1) Shift Changes (Article III, Section B):

Changes to Shifts: The Employer retains the *sole and exclusive right* to assign shifts or work schedules for Musicians. *Changes to work schedules may be made by the Employer at any time, so long as it has notified the Musicians at least 24 hours prior to the change.* (Emphasis added.)

(ALJD 2:20-25).

2) Management Rights (Article IX, Section A):

The parties also agreed that any term or condition of employment not specifically directed by the Agreement would be subject to AMA control:

Employer's Rights: The Employer retains, solely and exclusively, all the rights, powers, and authority which it exercised or possessed prior to the execution of this Agreement, except as specifically abridged by this Agreement. Without limiting the generality of the foregoing, the rights, powers, and authority retained solely and exclusively by the Employer include, but are not limited to the following: To manage, direct and maintain the efficiency of its operations and personnel; to manage and control its departments and facilities; to create, change, combine or abolish positions and jobs, departments and facilities in the whole or in part, to subcontract or discontinue functions and activities, to direct its staff; to increase or decrease its staff and determine the number of employees; to

hire, transfer, promote, demote, suspend, discharge, maintain the discipline and efficiency of its employee; to lay off employees; to establish work standards and rules, schedules of operation and workloads; to specify and assign work requirements and require overtime; to assign work and decide which employees are qualified to perform work; ***to schedule and change working hours, shifts and days off***; to adopt rules of conduct and safety rules, and penalties for violations thereof; to determine the methods, processes, means and places of providing services; to determine the location and relocation of facilities; and to effect technological changes. The Musicians shall at all times conduct themselves in accordance with all applicable laws and shall observe professional decorum in the performance of their duties. The Musicians shall also adhere to such reasonable rules and code of conduct as the Employer may promulgate. (Emphasis added.)

(ALJD 2:40-55).

D. The AMA Changed Shift I and Shift VIII Pursuant To the Agreement, But Did Not Change The Hourly Pay Rates

As authorized by Article III, Section B of the Agreement (shift changes), in November 2015, the AMA changed a musician shift on Thursdays from 6:00 p.m. - 12:00 a.m. to 5:00 p.m.- 9:30 p.m. The AMA also created a new Thursday shift, from 9:30 p.m.-1:30 a.m. In February 2016, the AMA changed a musician shift on Wednesdays from 6:00 p.m. – 12:00 a.m. to 5:00 p.m. to 9:00 p.m. It also created a new Wednesday shift from 9:00 p.m. to 1:00 a.m.

(ALJD 3:15-40).

In November 2015, the AMA changed a musician shift on Sundays from 5:30 p.m.- 11:30 p.m. to 5:00 p.m.- 9:30 p.m. It also created a new Sunday shift, from 9:30 p.m. -1:30 a.m. Starting February 2016, those hours were changed to 5:00 p.m. – 9:00 p.m. and 9:00 p.m.- 1:00 a.m., respectively. *Id.* The changes resulted in more available working hours for the musicians as a whole.

Unit employees' hourly wages remained the same as set forth in Addendum A to the Agreement. (ALJD 3:35-40). In accordance with the Agreement, prior to all shift changes, the AMA provided at least 24 hours' notice to the Unit employees. (ALJD 3:30-40). In fact, it

was the AMA's practice to notify the musicians several weeks in advance. No changes were made to the hourly rate for any shift. (ALJD 3:35-40).

III. LEGAL ARGUMENT

A plain language reading of the Agreement shows that the Union bargained over and waived its option to bargain further over these issues. The ALJ properly concluded that the AMA did not violate the Act, and that the shift changes were made in accordance with the Agreement.

A. The Board Must Adopt ALJ Biblowitz's Conclusion That The AMA Did Not Violate The Act By Making Shift Changes Pursuant To The Agreement

1. Under the "Contract Coverage Standard," The AMA Has No Duty To Bargain Over Shift Changes

If the parties address a subject in their collective bargaining agreement, "the employer generally has no ongoing obligation to bargain with its employees about that subject during the life of the agreement." *Heartland Plymouth Court MI, LLC v. National Labor Relations Board*, 650 Fed. Appx. 11, 12-13 (D.C. Cir. 2016), citing *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836-37 (D.C. Cir. 1993). See also, *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1358 (D.C. Cir. 2008); *Enloe Med. Ctr. v. NLRB*, 433 F.3d 834, 835 (2005); *U.S. Postal Serv.*, 8 F.3d at 836-37. That is precisely the case here. Article III, Section B clearly addresses changes to shifts - the issue is "covered by" the Agreement. The AMA therefore has no duty to bargain further on this issue.

2. **Under the “Clear and Unmistakable” Waiver Standard, The Union Expressly Waived its Right to Bargain Over Shift Changes**

The parties negotiated over shift changes and the Union accepted clear language in which the AMA reserved the sole authority to make shift schedule changes. A party waives its right to bargain over a condition of employment when the waiver is “clear and unmistakable.” *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708 (1983) The waiver includes the express intention to permit unilateral employer action notwithstanding the statutory duty to bargain that would otherwise apply. *Omaha World-Herald & Teamsters Dist. Council 2, Local 543m, Affiliated with Int’l Bhd. of Teamsters*, 357 NLRB No. 156, *6 (2011).

“The Employer retains the *sole and exclusive right* to assign shifts or work schedules for Musicians. *Changes to work schedules may be made by the Employer at any time*, so long as it has notified the Musicians at least 24 hours prior to the change.” Since the ability to change and assign work schedules lies solely with the AMA, and the parties specifically negotiated over this term, the Union cannot lay claim to any right to bargain over this issue. The Union reviewed the proposed language and commented that the language was fairly standard. The Union requested only 24 hours’ notice prior to making any shift changes, and the AMA agreed to this request. The Union cannot now claim that it did not waive the right to bargain over the shift changes at issue.

The Employer’s Rights clause of the Agreement reinforces the intent of the parties to permit unilateral employer action with regard to shift changes: “[T]he rights, powers, and authority retained solely and exclusively by the Employer include, but are not limited to the following: . . . to schedule and change working hours, shifts and days off...” In assessing whether a contract expresses such intention, rights reserved for the employer in the contract’s management rights provisions must be read in conjunction with one another. *Baptist*

Hospital of E. Tenn., 351 NLRB 71, *73 (September 27, 2007). In *Quality Health Servs. of P.R., Inc. d/b/a Hosp. San Cristobal & Unidad Laboeal De Enfermeras Y Empleados De La Salud*, 356 NLRB No. 95, *6 (Feb. 17, 2011) the Union claimed that the employer “unilaterally and contrary to its past practice, implemented a new policy requiring its registered nurses and licensed practical nurses to work consecutive night shifts.” The management-rights clause in the CBA provided:

Therefore, the Hospital, will have the exclusive right to manage all its business and direct its employees and any other right necessary to the best management of the Hospital like, the right to plan, program, direct and to continue or not operation and or services, to establish over time work, supervise its employees, hire, transfer, ***assign employees to different shifts and/or departments . . .***

(Emphasis added.) The Board found no unlawful change.

In *Baptist Hospital of East Tennessee*, 351 NLRB 71, 72 (2007), the Board held that language in the management-rights clause giving the employer the right to schedule work encompassed shift assignments. ***The language herein is even clearer.*** The management-rights clause enumerates various rights of the hospital including specifically the right to “assign employees to different shifts.” I find that requiring nurses and licensed practical nurses to work twin shifts, i.e., consecutive night shifts, is encompassed by the foregoing language. I shall recommend that this allegation be dismissed.

(*Id.* at 6, emphasis added.)

In *United Technologies Corp., Hamilton Standard Division*, 300 NLRB 902, *902 (December 14, 1990), the Board held that the union’s agreement to certain language in a management functions clause waived its right to bargain over the employer’s decision to increase a Saturday overtime shift from 5 to 8 hours. The clause stated, in part, that “[T]he company has and will retain the sole right and responsibility to direct the operations of the company and in this connection to determine . . . shift schedules and hours of work.” The Board stated:

Unlike our dissenting colleague, we find no ambiguity in the language of the management functions clause pertaining to “shift schedules and hours of work.” Because it is without qualifying language, it plainly authorizes the Respondent to determine the hours of scheduled shifts whether they occur on Saturday, when employees are paid at a premium rate, or on a weekday.

300 NLRB at 902.

In *S-B Mfg. Co.*, 270 NLRB 485, *489-491 (May 8, 1984), the Union claimed that the employer unilaterally reduced the hours of the bargaining unit employees from 32 to 24 hours per week. The employer’s management rights clause provided the employer with the right to determine the “number of hours and schedules of employment,” which established a clear and unmistakable waiver of the union’s right to bargain over the reduction in employees’ hours of work.

Here, the Union’s waiver bargain over shift changes is *even clearer* than the language in *Baptist Hospital of East Tennessee* and *Quality Health Servs.* and more closely tracks the language in *United Technologies* and *S-B Mfg. Co.* As in those cases, the Agreement’s Employer’s Rights provision expressly allows the AMA to make changes to the employee’s “schedule[s] and change working hours, shifts and days off.”

That language establishes the Union’s waiver of any right to bargain over the musicians’ shifts. Moreover, the AMA provided ample notice of the various shift changes and never changed the agreed-upon hourly rate. It also complied with the wage scales contained in the Agreement; the AMA paid the musicians at the rate in Addendum A for all hours worked. The ALJ correctly concluded that the AMA did not make a unilateral change in the musicians’ shifts.

3. **The Union's Interpretation of Addendum A to the Agreement Would Improperly Negate Other Provisions of the Agreement**

Courts must read a collective-bargaining agreement in its entirety, meaning that its provisions are not read in isolation, but with reference to the rest of agreement, so that the parts form a harmonious whole. *See Textron Puerto Rico* (1953) 107 NLRB 583, 589 at footnote 5. A court must construe the language of a collective bargaining agreement so as to render none of its provisions nugatory and to avoid illusory promises. *See Martinsville Nylon Employees Council v. NLRB*, 969 F.2d 1263, 1267 (D.C. Cir. 1992) (“The parties to a [collective bargaining agreement]...ought not be presumed to have included in their agreement a meaningless provision....”); *Retail Clerks Int’l Ass’n Local No. 455 v. NLRB*, 510 F.2d 802, 806 n. 15 (D.C. Cir. 1975) (“It is a settled rule of contract interpretation that contract language should not be interpreted to render the contract promise illusory or meaningless”). Here, the Union argues that Addendum A, which outlines the musicians’ shift schedules and hourly rates somehow prohibits the AMA from making any changes to the hours of the shifts. *See* Brief at p. 7. This result is absurd when read in light of the Shift Changes and Employer’s Rights provisions, which, again, expressly give the AMA the right to change the shifts with proper notice. If the Board is to adopt the Union’s position that all shifts must be scheduled according to Addendum A at all times, then the AMA would not be able to make any changes to the shift schedules whatsoever, rendering the Shift Changes and Employer’s Rights provisions with regard to shift schedules meaningless.

Moreover, Counsel for General Counsel’s reliance on *Control Services, Inc.*, 303 NLRB 481 (1991) is inapposite. In *Control Services*, the collective bargaining agreement stated that “the Company has the unqualified right to schedule hours of employment...” The Board found that the Union had not expressly waived its right to bargain over **changes** in the working hours. *Id.* at 484. Here, the Employer’s Rights provision specifically gives the AMA the sole

and exclusive right to both “schedule *and change* working hours, shifts, and days.” (Emphasis added.) *KIRO, Inc.*, 317 NLRB 1325, 1328 (1995), also cited by the Counsel, similarly included a management rights clause which reserved the right to “schedule and assign” shifts.

The Union’s position that the shift change unlawfully resulted in a pay cut for the musicians is simply untrue. The Union argues that a reduction in the hours of a shift results in a corresponding reduction in the musicians’ per shift pay, as consequence the Union contends it did not intend. Any reduction in the pay per shift is a logical result of the parties’ negotiations. Regardless, even if the Union intended the shift schedules to remain the same, the unambiguous language of the Agreement permits the AMA to make the shift changes. The expression “meeting of the minds” does not require that both parties have identical subjective understandings on the meaning of material terms of the contract. *Vallejo Retail Trade Bureau and its Employer-Members* (1979) 243 NLRB 762. Rather, subjective understandings or misunderstandings as to the meaning of terms which have been assented to are irrelevant, provided that the terms themselves are unambiguous judged by a reasonable standard. *Diplomat Envelope Corp.* (1982) 263 NLRB 525, 535–36. Here, the plain meaning of the terms allowing the AMA to make changes to shift schedules renders the Union’s intent regarding its interpretation of the clause irrelevant. Regardless, and as discussed above, the parties’ intent, as reflected in their negotiations, supports the AMA’s position that the Union knowingly waived its right to bargain over any shift changes.

Assuming then, *arguendo*, that the Union’s intent is relevant to the interpretation of the Shift Change and Employer’s Rights provisions, the parties’ negotiations support the AMA’s position that the Union knowingly waived its right to bargain over any shift changes. If the wording of the provision is ambiguous—that is, unclear or susceptible to more than one

interpretation—the Court may turn to extrinsic evidence, including the parties’ bargaining history. *In Re Des Moines Register & Tribune Co.* (2003) 339 NLRB 1035, 1037(citations omitted.) The parties’ negotiations evidence a clear and express intent to transition from a shift pay compensation plan to an hourly rate compensation plan. (ALJD 3:45-4:5; *see also* Jt. Exh. 4, p. 8). Moreover, the Union explicitly agreed to language giving the AMA the right to not only schedule, but change, the musicians’ working hours and shifts. Clearly, any reduction in the number of hours per shift would result in a corresponding reduction in the amount a musician earned in a particular shift, just as any increase in shift length would result in an increase in the amount earned in a particular shift. Thus, in light of the parties’ negotiations, and the entire Agreement read as a whole, it cannot be the case that the parties intended for the shift schedules to remain the same length of time or for the shifts to start and stop at the same times only as listed in the Addendum; rather, the AMA must have the authority to make shift schedule changes, as the parties agreed.

In addition, the Union itself recognized and considered during the negotiations that most shifts averaged four to six hours and made no representation that it intended for the shifts to remain the same length when it transitioned to the hourly rate compensation plan. (*See* ALJD 3:45-4:5; *see also* Jt. Exh. 4, p. 8). The changes made to the shifts fall within the average range specifically contemplated by the Union. Since the Union’s interpretation of Addendum A would strip the AMA of authority and power the parties expressly negotiated, the Board must uphold the ALJ’s conclusion that the AMA did not violate the Act when it made changes to the shift schedules.

B. The Board Must Adopt ALJ Biblowitz's Finding That The AMA Acted In Accord With The Agreement When It Made The Shift Changes

The parties expressly agreed that the AMA retained the right to make changes to shift schedules, so long as it provided the musicians with at least 24-hours' notice. It is undisputed that the AMA gave the musicians sufficient notice of any changes to shifts (in fact, the AMA regularly gave the musicians several weeks' notice of the changes). The Union again takes the position that Addendum A limits the AMA's right to make these changes. Such an interpretation would improperly elevate the terms of the Addendum over two substantive provisions in the main portion of the Agreement. Moreover, as discussed above, this interpretation would improperly render those provisions meaningless. As a result, the only reasonable finding the ALJ could make, and that which would reflect the parties' intent, was for the Agreement to allow the AMA to make the challenged changes to the shifts.

IV. CONCLUSION

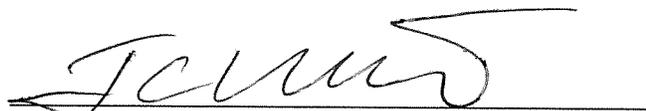
The Union clearly and unmistakably waived its right to bargain over shift and schedule changes by agreeing to unequivocal language granting the AMA the ability to revise musician schedules as it sees fit. The AMA requests that the Board adopt the ALJ's findings and conclusion.

DATED: March 14, 2017

Respectfully submitted,

MUSICK, PEELER & GARRETT LLP

By:



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ACADEMY OF MAGICAL ARTS, INC.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is One Wilshire Boulevard, Suite 2000, Los Angeles, California 90017-3383.

On **March 14, 2017**, I served true copies of the following document(s) described as **BRIEF OF EMPLOYER, THE ACADEMY OF MAGICAL ARTS, INC.** on the interested parties in this action as follows:

For Charging Party:

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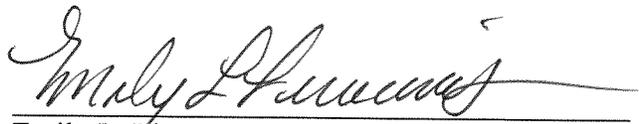
Designated Agent of NLRB Region 31:

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- BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address e.livermont@mpglaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **March 14, 2017** at Los Angeles, California.



Emily L. Livermont