

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Washington, D.C.**

THE ACADEMY OF MAGICAL ARTS, INC.

and

Case 31-CA-166705

AMERICAN FEDERATION OF MUSICIANS,  
LOCAL 47

**REPLY BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO THE  
ANSWERING BRIEF OF *ACADEMY OF MAGICAL ARTS, INC.* TO THE  
GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

Submitted by:  
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Pursuant to Section 102.46 of the Board’s Rules and Regulations, Counsel for the General Counsel respectfully files the following reply brief in response to Respondent’s Answering Brief to Counsel for the General Counsel’s Exceptions and Brief in support thereof.

## **I. PROCEDURAL HISTORY**

On February 28, 2017, Counsel for the General Counsel filed Exceptions and its Brief in support of its Exceptions. On March 14, 2017, Respondent filed its Answering Brief to Counsel for the General Counsel’s Exceptions (“Answering Brief”).<sup>1</sup>

## **II. DISCUSSION**

### **A. THE AMA HAS A DUTY TO BARGAIN OVER SHIFT CHANGES**

Respondent argues in its Answering Brief that the Academy of Magical Arts (“AMA”) has no duty to bargain over shift changes because Article III, Section B addresses changes to shifts. (AB 10). However, the Board has held that hours of work and duration of shifts are often distinct from the right to assign and schedule certain employees to work certain shifts. (GC Br 8). Respondent’s reliance on Article III, Section B to absolve its responsibility to bargain over a reduction to employees’ hours is improper. The Board has clearly and unequivocally held that an employer is obligated to bargain over mandatory subjects prior to the unilateral implementation of changes to terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). Unit

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<sup>1</sup> References to the decision of the ALJ will be cited as “ALJD” followed by the appropriate page number from his decision. References to the transcript will be cited as “Tr.” followed by the appropriate page. References to Respondent’s Answering Brief will be cited as “AB,” followed by the appropriate page number. References to Counsel for the General Counsel’s post-hearing brief will be cited as “GC Br,” followed by the appropriate page number.

employee shift hours are certainly a term and condition of employment and a mandatory subject of bargaining. (GC Br 6).

**B. THE UNION DID NOT “CLEARLY AND UNMISTAKABLY” WAIVE ITS RIGHT TO BARGAIN OVER SHIFT CHANGES**

Respondent, in its Answering Brief, asserts that when the Union reviewed the language covering Shift Changes, it agreed that the language “seems pretty standard” and that the Union only requested that the Respondent provide 24-hour notice prior to any such changes were to take effect. (AB 3). However, a closer look at this correspondence reveals that the Union had not clearly and unmistakably waived its right to bargain over changes to the *length* of shifts. The “Shift Changes” language provided the Respondent the right to “assign shifts or work schedules for Musicians” and required that the Respondent provide the Musicians with at least 24-hour notice of the change. The Union, in its April 16, 2015 email to the Respondent writes “there should at least be a 24 hour notice in the event of change/cancellation of shift.” (Jt. Exh. 4 at 27). This communication falls far short of the Union agreeing to empower Respondent to reduce the lengths of employees’ shifts as the Respondent ultimately did. Further, when the Union made these comments, it was under the impression that it and Respondent had also agreed to set hours and rates of pay for employees. Here, the Union agreed to provisions of the Master Agreement knowing that those provisions were abridged later, in Addendum A, and with an understanding that the employees would not suffer a pay cut based on the Master Agreement. (GC Br 3).

A union may waive its right to bargain over a mandatory subject of bargaining, but does so only by a “clear and unmistakable waiver.” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 710 (1983). A general ‘Management Rights’ clause in a collective bargaining agreement, by itself, is not sufficient to establish such a waiver. *Id.* at 710. The Respondent attempts to use the general management rights clause to support its contention that it may unilaterally make changes to employee work schedules, contrary to Board law. (AB 7). Respondent’s reliance on *Quality Health Servs. Of P.R., Inc. d/b/a Hosp. San Cristobal & Unidad Laboral De Enfermeras Y Empleados De La Salud*, 356 NLRB 699 (2011) is misplaced. (AB 8). In that case, the ALJ found that the management-rights clause in the contract allowed the employer to assign employees to different shifts. *Id.* at 702. The case here differs in that Respondent changed the shifts completely and that change resulted in a reduction of pay to employees. (GC Br 9). In *Quality Health Servs.*, the nurses were reassigned to already existing shifts. *Quality Health Servs.* 356 NLRB at 702. Here, however, the Respondent changed the shifts in a way that specifically violated other terms of the agreed-upon contract.

Respondent has failed to show that the Union clearly and unmistakably waived its right to bargain over the reduction in pay to employees based on the changes enacted by Respondent. As set forth above, in determining that a party to a collective bargaining agreement clearly and unmistakably waived its right to bargain over a mandatory subject of bargaining, a general “Management Rights” clause, by itself, is not sufficient. The Board has held that,

[i]n order to find that the contract language meets the ‘clear and unmistakable’ waiver standard, ‘the contract language must be specific, or it must be shown that the matter sought to be waived was fully discussed and consciously explored and that the waiving party thereupon consciously yielded its interest in the matter.’

*Airo Die Casting, Inc.*, 354 NLRB 92, 93 (2009) (citing *Trojan Yacht*, 319, NLRB 741, 742 (1995)). Moreover, in *Provena Hospital*, 350 NLRB 808 (2007), the respondent did not show “that the meaning and potential implications of the management-rights clause in general...were ‘fully discussed and consciously explored’ during negotiations, or that the Union ‘consciously yielded or clearly and unmistakably waived its interest...’” *Id.* at 822.

Respondent cites *United Technologies Corp., Hamilton Standard Division*, 300 NLRB 902 (1990), in support of its contentions that its management rights clause is sufficient to find that the Union clearly and unmistakably waived its right to bargain. (AB 8). However, as stated above, a general management’s rights provision, on its own, is not enough to overcome the requirement that the matter be fully discussed and consciously explored. *See Provena Hospital*, 350 NLRB at 822. Further, the Board in *United Technologies Corp.* expressly noted that the management rights clause therein did not contain qualifying language. *United Technologies Corp.*, 300 NLRB at 902. That is not the case here. The management rights clause in the Master Agreement does contain qualifying language that restricts the Respondent’s authority to make changes to those items not specifically abridged by the agreement. The Master Agreement contains an abridgment restricting Respondent’s right to make changes. (GC Br 8). Analogously, the Board in *United Technologies Corp.* stated,

[f]inally, we note that the agreement, contrary to common industry practice, contains no provision setting out any particular shift or hours-of-work-schedule. This omission is yet one more indication that the parties intended for the Respondent to have broad discretion in this area.

300 NLRB at 902. The Master Agreement in the instant case does contain a provision setting out particular shifts and hours of work for the employees, which evidences that the parties did not intend for the Respondent to have broad discretion in this area.

Respondent also cites *S-B Mfg. Co.*, 270 NLRB 485 (1984), in support of its contention that the management rights clause established a clear and unmistakable waiver of the union's right to bargain over a reduction in employees' hours of work. (AB 9). However *S-B Mfg. Co.* is distinguishable from the instant matter because in *S-B Mfg. Co.* the record showed extensive negotiations over the terms of the management rights clause, and an agreement of the parties thereto. *Id.* at 490. Moreover, the ALJ found that throughout negotiations the Union attempted to modify, eliminate, or reduce management's exclusive control over employee working hours, that it had met with repeated failure, and that it had consistently agreed to the language proposed by management. *Id.* Further, the management rights provision remained the same in each collective-bargaining agreement between the union and employer. *Id.* In the instant case, there is no evidence showing that there was any specific negotiation or discussion regarding the management rights clause and the effects it would have.

**C. ADDENDUM A TO THE AGREEMENT DOES NOT IMPROPERLY  
NEGATE OTHER PROVISIONS OF THE AGREEMENT**

Respondent argues that it would not be able to make any changes to scheduling, whatsoever, if the Board finds that the Union did not clearly and unmistakably waive its right to bargain over shift changes. (AB 10). Respondent's argument misstates the Union's position. The Union only requests that the Respondent comply with Board law, by providing it with notice and opportunity to bargain over mandatory subjects of bargaining.

Interestingly, Respondent argues, on one hand, that the Union's position on a provision of the contract –Addendum A- would negate other provisions of the contract – Shift Changes and Employer's Rights provision. On the other hand, the Respondent argues that a provision of the contract –Shift Changes and Employer's Rights- *should* negate other provisions of the contract –Addendum A. Respondent's argument is inconsistent. (AB 10).

Respondent argues that it never changed the employees' hourly rate, however, as stated in Addendum A to the Master Agreement, the employees were paid based on a specific number of hours per shift. Respondent, by unilaterally reducing the number of hours per shift directly reduced the take-home pay of the employees. This is contrary to the parties' negotiations over the subject of pay, wherein the Union advised the Respondent that it did not want the employees to experience a pay cut as a result of the implementation of a Master Agreement. (GC Br 3). Respondent argues that there was a

clear intention to shift employees to an hourly rate of pay, however, there is no evidence that the Union agreed to grant Respondent the right to unilaterally reduce employees' hours worked and the pay of employees it represents.

### **III. CONCLUSION**

In conclusion, Counsel for the General Counsel submits that the ALJ erred in failing to find that the Respondent violated Section 8(a)(5) by making unilateral changes to unit employees' shift lengths.

Dated at Los Angeles, California, this 28th day of March, 2017.

Respectfully submitted,

**/s/ Joelle A. Mervin**

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