

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION SEVEN**

VHS OF MICHIGAN, INC. d/b/a  
DETROIT MEDICAL CENTER (DMC),

Respondent,

Case: 07-CA-205394

-and-

LOCAL 283, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS  
(IBT),

Charging Party.

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**VHS OF MICHIGAN, INC.'S  
POST-HEARING BRIEF**

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## INTRODUCTION

The VHS of Michigan, Inc, d/b/a Detroit Medical Center (“DMC”) and Local 283 International Brotherhood of Teamsters (“IBT” or “Union”) have a long-standing collective bargaining relationship spanning over 13 years. In June of 2017, the DMC moved the Union’s members to a traditional 40-hour per workweek overtime computation structure. This authority derived directly from the Parties’ Collective Bargaining Agreement. The Union, however, argues that the 40 hour work week contemplated by the Parties requires payment of overtime for hours worked in excess of 8 hours in a day.

## STATEMENT OF FACTS

During its long-standing bargaining relationship, the DMC and Union have successfully negotiated three collective bargaining agreements. GC Exhibit 4, 2006-2008 Collective Bargaining Agreement; GC Exhibit 3, 2009-2011 Collective Bargaining Agreement; GC Exhibit 2, 2012-2014 Collective Bargaining Agreement. The Parties have also reached numerous agreements to extend its 2011-2014 contract (“Contract” or “Agreement), which is the currently effective contract. Hr’ing Transcript 7:24-8:4; 44:25-45:2 (Hicks).

Article VII of the Parties’ Collective Bargaining Agreement addresses the Parties’ agreement concerning work schedules and overtime computation structures. Under the terms of Article VII, the DMC retains the right to alter its work schedules between two different work structures: a traditional 40-hour workweek structure (“40-Hour Structure) or an 8-and-80 workweek structure—the latter being a unique overtime calculation system available to the healthcare industry through by the Fair Labor Standards Act (“FLSA”) § 7(j) (hereinafter “8-and-80 Schedule). Under the FLSA’s 8-and-80 Structure, overtime pay is required for hours worked in

excess of 8 hours a day and 80 hours in a two-week period. In regard to these two available overtime computation structures, the Union and the DMC negotiated the following language:

Recognizing that the provisions of health care services may require regular work on seven days per week the *regular work schedule* for a full-time employee shall consist of eighty (80) hours per 2-week period *and* eight (8) hours per workday. The Employer reserves the right to change the *regular work schedule* to forty (40) hours, per week.

(emphasis added) GC Exhibit 1, *Current Collective Bargaining Agreement*. Article VII further addresses overtime in Section 4, stating that “[s]chedules will be made based on management determination of the most expeditious and cost-effective way to schedule overtime[.]” *Id.*

The Contract does not further define these two overtime computation structures. Rather, the Parties’ have relied on the common definitions based on the FLSA and DMC policy. Hr’ing Transcript 73:7-9 (Reed). During the negotiation of the collective bargaining agreement, the DMC’s long-standing Pay Administration Policy HR 202 further explained these two overtime computation structures:

For hourly-paid classifications, each Operating Unit will determine which of the following methods is used to pay overtime:

- 1) Time and one half (1 – ½) will be paid for all hours worked in excess of the standard work period (40 hours).

OR

- 2) Time and one half (1 – ½) will be paid for all hours worked in excess of the standard work period (80 hours) or in excess of eight (8) hours in a work day.

Resp. Exhibit 1, *Pay Administration Policies*. At all times relevant to this case, the DMC’s Pay Administration Policies have provided extensive and detailed instruction regarding overtime pay practices. Numerous references to the operation of these two overtime schedules and pay systems

are present throughout the HR 202 Policy clarifying the difference between the 40-Hour Structure and the 8-and-80 Structure:

*Example-* If overtime option 2 is applicable and an employee works 84 hours in fourteen day standard work period and 12 hours in an individual work day, the employee will receive overtime once, for the hours worked in excess of a 8 hour workday. The employee is not also eligible for overtime for the hours in excess of 80 in the work period.

Resp. Exhibit 1, Pay Administration Policies. Subsection C of the Policy provides further explanation, stating: “all hours in excess of the defined work shift, provided a minimum 8 hours has been worked (if overtime option 2 is applicable) OR for all hours worked in excess of forty (40) hours per week (if overtime option 1 is applicable).” *Id.* Notably, these references all directly address overtime computation.

Prior to July 9, 2017 and per the Parties’ Agreement, the Union’s bargaining unit members were paid under the 8-and-80 Structure. Hr’ing Transcript 21:1-5 (Perry); Hr’ing Transcript 32:22 (Melissa Burger); Hr’ing Transcript 43:12 (Steve Hicks). On or about July 9, 2017, the DMC exercised its authority under the collective bargaining agreement to move to a 40-Hour Structure, thereby ceasing payment of overtime for hours worked in excess of an 8 hours in a day and providing overtime compensation for hours worked exceeding 40 hours in a work week. The Union now argues that the Parties’ Contract did not encompass a shift in overtime computation.

## LEGAL ANALYSIS

At the heart of this case, there is one issue: the definition of a “40-hour Workweek” Schedule as provided for in Parties’ Collective Bargaining Agreement. It is undisputed that the DMC retains the exclusive right to switch to the 40-Hour Structure. However, the Union rather confusingly argues that the 40-Hour Structure and 8-and-80 Structure only concern whether workweeks occur at 40 hours per a one-week interval or 80 hours in per a two-week interval and

that overtime calculations are not encompassed within the definition of these terms. However, such an interpretation is incorrect and unreasonable. These terms are, *themselves*, defined as referring to two different overtime calculation structures—pursuant to the Parties’ negotiated language, the FLSA, and the pre-existing, long-standing policies and past practices of the DMC.

**I. THE COLLECTIVE BARGAINING AGREEMENT AUTHORIZES THE DMC TO SHIFT ITS OVERTIME CALCULATION STRUCTURE FROM AN 8-AND-80 STRUCTURE TO A TRADITIONAL 40-HOUR STRUCTURE.**

Under each of the three collective bargaining agreements between the Parties, the Union and DMC have purposefully and carefully negotiated language pertaining to the overtime calculation structure. Namely, the DMC has negotiated for the right to change its overtime structure between two options: the traditional 40-Hour Structure and the 8-and-80 Structure. This authority is clearly reflected in the language of the Contract as well as the extrinsic evidence—authority that has no other purpose than to address overtime computation.

a. Applicable Law

In interpreting collective bargaining agreements, the Sixth Circuit has held that “the court should first look to the explicit language of the collective bargaining agreement for clear manifestation of intent. **“The intended meaning of the most explicit language can, of course, only be understood in light of the context which gave rise to its inclusion.”** *Int’l Union v. Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983); *see also United Steelworkers of America v. American Manu. Co.*, 363 U.S. 564, 570 (1960); *Kellogg Co. v. NLRB*, 457 F.2d 519, 524 (1972). Further, **“collective bargaining agreement’s terms must be construed so as to render none nugatory[.]”** *Int’l Union*, 716 F.2d at 1479 (emphasis added); *see Cordovan Associates, Inc. v. Dayton Rubber Co.*, 290 F.2d 858, 861 (6th Cir. 1961).

"If, after applying these rules of interpretation, the contract remains ambiguous," then the parties' original understanding of the contract's terms may be ascertained through extrinsic evidence. *Sansla, Inc.*, 323 NLRB 107, 109 (1997); *Electrical Workers IBEW Local 1977 (A.O. Smith Corp.)*, 307 NLRB 138, 139 (1992). A contractual provision is ambiguous if it "is subject to two reasonable interpretations." *In re AmTrust Fin. Corp.*, 694 F.3d at 750. Where ambiguities exist, other words and phrases in the agreement should be reviewed for guidance. *Int'l Union*, 716 F.2d at 1479. Finally, "the court should review the interpretation ultimately derived from its examination of the language, context, and other indicia of intent for consistency with federal labor policy." *Int'l Union*, 716 F.2d at 1480.

b. The Explicit and Plain Meaning of the Contract Language Comprises of Overtime Computation Structures.

Article VII(1)(A) of the Parties' Contract states:

Recognizing that the provisions of health care services may require regular work on seven days per week, the regular work schedule for a full-time employee shall consist of eighty (80) hours per 2-week period *and* eight (8) hours per workday. The Employer reserves the right to change the regular work schedule to forty (40) hours, per week.

GC Exhibit 2. The language of the Contract plainly reflects the Parties' intent to address the traditional system and "[s]pecial overtime provisions available for hospitals" under the FLSA terms "for purposes of overtime computation". *See* 29 CFR § 778.601. However, the Union argues that Section 1(A) of the Contract does not address overtime calculation structures—as the Parties intended and as the plain language and context establishes.

First, the plain meaning of the Contract gives the DMC the authority to change between the 40-Hour Structure and 8-and-80 Structure, which are for purposes of overtime computation. The Union ignores the plain meaning of the Contract language, and effectively urges the Board to

read the second sentence as “The Employer reserves the right to change to forty (40) hours, per week and must pay overtime for work exceeding eight (8) hours per workday.” The Union disregards the explicit contract language and attempts to bifurcate the 8-and-80 Structure by effectively claiming that the “8” and “80” language is severable, and therefore, the DMC may only switch to a “forty (40) hours, per week” but it must continue to pay the overtime for the “*and* eight (8) hours per workday.” However, the Contract does not say this. Nor is it implied. This interpretation ignores “regular work schedule” and the carefully placed conjunction of “and”. The 8-and-80 language and 40-hour workweek language modifies “regular work schedule”—indicating there are two separate “regular work schedules”. Further, “and” is used to connect words of the same part of speech or clause and is meant to be taken jointly. Here, it is only used in reference to the 8-and-80 Structure. Such an interpretation would render the carefully negotiated terms of the Contract meaningless and nugatory.

Second, the intended meaning of even the most explicit language can only be understood in light of the context which gave rise to its inclusion. *Int’l Union*, 716 F.2d at 1479; *United Steelworkers of America*, 363 U.S. at 570. It was the Parties’ intent that this language regarded overtime. See Hr’ing Transcript, 75:4-10 (Reed) (“Given our policies, the FLSA, and this language, the only thing that that [sic] 8/80 and 40 can be referencing is overtime.”) The requirements of the FLSA and the nature of the DMC’s exempted status as a healthcare establishment under the Act is paramount to the context of this language—since without it the 8-and-80 Structure contained in the Contract would be violation of federal labor law. *Int’l Union*, 716 F.2d at 1480 (stating contract language should be interpreted consistent with federal labor policy). Notably, to implement the FLSA 8-and-80 Structure, the Act requires an agreement directly with the employee “or through his representative” and some form of recording must be

kept. 29 CFR § 778.601(c). This agreement is clearly encompassed in Article VII(1)(A) of the Parties' Contract, and accordingly, bargaining unit members were permitted to be paid overtime under the 8-and-80 Schedule. Hr'ing Transcript 21:1-5 (Perry); Hr'ing Transcript 32:22 (Melissa Burger); Hr'ing Transcript 43:12 (Steve Hicks). Per the FLSA, the Section 7(a)'s 40-Hour Structure and Section 7(j)'s 8-and-80 Structure are clearly and explicitly encompass overtime as they are "for purposes of computing overtime compensation."

Further, the DMC's internal policies, namely the Pay Administration Policies, also impact the context that gave rise to the inclusion of this language. The DMC's HR 202 Policy—also defining the 40-Hour Structure and 8-and-80 Structure as overtime computation structure—was applicable at all times during the Parties' negotiation relationship. And, the common-sense meaning of words must be assigned to the language unless expressly altered by the Parties—no such alternate definition exists here. The plain language of the Contract refers to the two overtime calculations systems.

Finally, other such DMC policies were contemplated, and have adhered to by the Parties, although they are not explicitly stated in the collective bargaining agreement. Bargaining unit members receive holidays that "are not specifically listed in the collective bargaining agreement". Hr'ing Transcript 33:21-35:13 (Burger); Hr'ing Transcript 69:16-70:1 (Reed). Bargaining unit members are eligible for benefits per the DMC's 1 HR 207 Policy, paid time off per DMC policies, and 401k benefits per DMC policies. *Id.* at 39:14-17; GC Exhibit 1, *Collective Bargaining Agreement* Art. XIII-XV. Such context clearly indicates that the Parties' intended the FLSA and DMC policies to determine common-sense use of the language used in the Contract. Therefore, the DMC was within its authority to cease payment of overtime for work exceeding 8 hours in a day as provided for by the terms of the Parties' Agreement.

c. Extrinsic Evidence Strongly Supports the DMC's Authority to Shift Its Overtime Computation Structure.

Even if the Contract language contains an ambiguity, the DMC's Pay Administration Policies are indicative of the Parties' intent that Section 1(A) addresses the 40-Hour Structure and 8-and-80 Structure as systems for computing overtime compensation. The policy states:

For hourly-paid classifications, each Operating Unit will determine which of the following methods is used to pay overtime:

- 1) Time and one half (1 – ½) will be paid for all hours worked in excess of the standard work period (40 hours).

OR

- 2) Time and one half (1 – ½) will be paid for all hours worked in excess of the standard work period (80 hours) or in excess of eight (8) hours in a work day.

Resp Exhibit 1, Pay Administration Policies. Subsection C also provides explanation, stating: “all hours in excess of the defined work shift, provided a minimum 8 hours has been worked (if overtime option 2 is applicable) OR for all hours worked in excess of forty (40) hours per week (if overtime option 1 is applicable).” The HR 202 Policy provides other clear examples of the two overtime options, such as:

If overtime option 2 is applicable and an employee works 84 hours in fourteen day standard work period and 12 hours in an individual work day, the employee will receive overtime once, for the hours worked in excess of a 8 hour workday. The employee is not also eligible for overtime for the hours in excess of 80 in the work period.

*Id.* Later, the Policy states: “[t]he organization has a 40 hour standard work period where overtime is paid over 40 hours.” And, “[f]or a 40 hour standard work period, the supervisor may permit an employee to work one 9 or 10 hour day and one 7 or 6 hour day in the same work period without the payment of overtime.” *Id.* at Midnight Bonus (c-e). This policy has been consistently applied since April 1, 1999 and has been applicable at all times the Parties' have negotiated the contract

language at issue. *See* Resp. Exhibit 1, Pay Administration Policy (including HR Policy 202 from 1999, 2002, 2008, 2015, 2017). This policy has been consistently applied throughout the DMC, and it is undisputed that the DMC has regularly and continuously applied this overtime computation policy.

Therefore, the Parties' Collective Bargaining Agreement authorized the DMC's change to a 40-Hour Structure as contemplated by the Parties' language, the FLSA, and Pay Administration Policies. Accordingly, there has been no unfair labor practice.

## **II. THE DMC HAS NOT CHANGED ITS PAST PRACTICE OF DETERMINING OVERTIME COMPUTATION BASED ON A 40 OR 8/80 STRUCTURE.**

The DMC has not unilaterally changed its policies. It has applied the long-standing HR 202 Policy. Furthermore, the Parties have engaged in thorough negotiations of multiple contracts containing the DMC's explicit reservation of rights to move to a 40-Hour Structure. The DMC had no duty to re-negotiate previously negotiated provisions of its current Agreement. Accordingly, the Union waived its right to further bargaining.

### **a. The DMC's Application of its HR 202 Policy was not a Unilateral Change.**

The DMC and Union have operated under the HR 202 Policy for over 13 years. The DMC has had a long-standing past practice of computing overtime pay based on whether the operating unit was paid under a 40-Hour Structure or an 8-and-80 Structure.

An employer violates Section 8(a)(5) and (1) if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving the Union notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). "The vice involved in [a unilateral change] is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge." *NLRB v. Daily*

*News of Los Angeles*, 315 NLRB 1236, 1237 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997) (emphasis in original). An employer does not affect “change” when applying a preexisting practice. *Raytheon Network Centric Sys.*, 365 NLRB No. 161 (2017). No violation exists where the employer simply followed a well-established past practice. *See, e.g., NLRB v. Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984); *NLRB v. A-V Corp.*, 209 NLRB 451, 452 (1974). The party asserting the existence of a past practice bears the burden of proof. *Id.* To meet this burden, the party must show the prior action was similar in kind and degree and occurred with such regularity and frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis. *Id.*

Here, the HR 202 Policy has governed how overtime compensation is calculated at all times relevant, and the Union does not dispute this fact. The DMC has consistently and regularly applied the HR 202 Policy. *See* Hr’ing Transcript 15:1-4, 18:19-22 (Perry); Hr’ing Transcript 43:9-12 (Hicks); Hr’ing Transcript 60:10-12, 79:10-12 (Reed). The practice policy has been regularly reviewed and republished within the DMC. Resp. Exhibit 1, Pay Administration Policy (including HR Policy 202 from 1999, 2002, 2008, 2015, 2017). During this time, the policy was similar in kind and degree as it did not substantively change at any time since 1999. *Id.* As reflected in the Contract and hearing testimony, the Parties’ regularly incorporated and contemplates DMC policies in their three prior contracts—giving employees reason to anticipate continued application. *See* Hr’ing Transcript 33:21-35:13 (Burger); Hr’ing Transcript 69:16-70:1 (Reed); GC Exhibit 1, Collective Bargaining Agreement Art. XIII-XV. Further indication of a reasonable expectation of continuance is the fact that the Parties’ collective bargaining agreement explicitly provides the DMC with the authority to change between the structures provided in the HR 202

Policy. Accordingly, the DMC's actions do not constitute a "change" and its exercise of its authority under the Contract does not constitute a "change" violating Section 8(a)(5) and (1).

b. The DMC Had No Obligation to Renegotiate its Existing Bargaining; and, the Union Waived its Right to Bargain.

The Parties' Agreement already had memorialized their bargain regarding overtime and work schedules, and in the alternative, the Union waived its right to further bargain over the matter.

"When an employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules that govern their future relations. Unless the parties agree otherwise, there is no continuous duty to bargain with respect to a matter covered by the contract. Thus, we are bound to enforce lawful labor agreements as written." *Automatic Sprinkler Corp. of Am. v. NLRB*, 120 F.3d 612, 617 (1997); *Gratiot Community Hosp.*, 51 F.3d at 1261 (citing *NLRB v. United States Postal Serv.*, 303 U.S. App. D.C. 428, 8 F.3d 832, 836 (D.C. Cir. 1993)). Whether a subject of the dispute is covered by the parties' agreement is a matter of ordinary contract interpretation. *Enloe Med. Ctr. V. NLRB*, 433 F.3d 834, 839 (D.C. Cir. 2005). Further, a waiver of statutory bargaining rights may be made when they are "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)<sup>1</sup>. "Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two." *American Diamond Tool, Inc.*, 306 N.L.R.B. 570, 570 (1992) (citing *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982)). A contractual waiver will not lightly be inferred but must be clearly demonstrated by the terms of the collective-

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<sup>1</sup> Federal circuits have found that the Board is free to apply its waiver analysis, but it may not do so to the exclusion of the contract coverage analysis. See *Enloe Med. Ctr. V. NLRB*, 433 F.3d 834, 837-38 (D.C. Cir. 2005); see also *Heartland Plymouth II*, 838 F.3d 16, 19-20 n1 (D.C. Cir. 2016) (question of contract coverage is antecedent to waiver question).

bargaining agreement and, under certain circumstances, from the history of negotiations, *Southern Florida, Hotel & Motel Association, et al.*, 245 NLRB No. 49 (1979); *Hilton Hotel Corporation*, 191 NLRB 283 (1971); *or from unequivocal extrinsic evidence bearing upon ambiguous contractual language. Int'l Union of Operating Engineers, Local Union 18, AFL-CIO*, 238 NLRB 652 (1978). Furthermore, pursuant to a waiver, an employer can lawfully enact a unilateral change if the employer has a sound basis for ascribing a particular meaning to the contract. *Vickers, Inc.*, 153 NLRB 561, 570 (1965).

Here, the Parties had no obligation bargain for the change in overtime policy as the Union already bargained as memorialized in the Parties' Agreement. Further, the Union waived its right to bargain on the subject matter. The Parties' collective bargaining agreement contains no language providing for *subsequent* bargaining regarding overtime computation as it relates to work schedules. Rather, the DMC bargained for the exclusive authority to shift between a 40-Hour Structure and 8/80 Structure. The Sixth Circuit has found there is no continuous duty to bargain with respect to matters covered in the contract, even when there was no explicit language and the authority was clearly implied. *Gratiot Community Hosp. v. NLRB*, 51 F.3d 1255 (6th Cir. 1995). (finding that language stating "[t]he Director of Nursing will decide the number of assignments and work areas that will be under the Seventy Hour shift" *clearly* authorized the unilateral abolishment of the program altogether). Here, Article VII of the Parties' Contract is not simply boilerplate language and the Parties thoughtfully and carefully negotiated its language pursuant the FLSA and DMC policies. Under the clear language and intent of the Agreement, the Parties agreed the employer, alone, has the right to change to the overtime computation structure to a 40-Hour Structure. GC Exhibit 1.

As discussed herein, the 40-Hour Structure language must be evaluated against the FLSA, the parties' language, and the DMC policies to determine intent. This determines content of the Parties' agreement as well as applicable to waiver analysis. The Board has found that "actual contractual intent" may be properly evaluated against the elucidating background of the parties' bargaining history when assessing waiver. *N.Y. Mirror, Div. of the Hearst Corp.*, 151 N.L.R.B. 834, 840-841 (1965) ("[F]or example, if it were to appear that after full exploration of the subject during prior negotiations the Unions had consciously yielded their interest to be notified . . . a finding of a clear and unmistakable waiver might well be justified."). Here, the DMC would have no benefit or reason to bargain for the authority to shift to a 40-Hour Structure if Article VII Section 1 "Normal Work Schedule" did not permit it to alter overtime computation systems—such an interpretation renders the section nonsensical. The Parties' further agreed in Article VII Section 4 "Overtime" that the "schedules will be made based on management determination of the most expeditions and cost-effective way to schedule overtime[.]" GC Exhibit 1. Beyond the plain language of the contract, the contractual interpretation as further discussed herein is further indicative of the Parties' intent. Such language and context establish a clear and unmistakable waiver.

For these reasons, the DMC had no further obligation to bargain regarding overtime compensation structures. Accordingly, the DMC's exercise of its authority under the Contract does not constitute a violation of Section 8(a)(5) and (1).

### **III. THE UNION PRESENTS A CONTRACT INTPRETATION MATTER THAT THE PARTIES AGREED TO ARBITRATE UNDER THE COLLECTIVE BARGAINING AGREEMENT.**

This matter falls squarely within the Parties' Collective Bargaining Agreement grievance-arbitration clause since at the heart of this case is a contract interpretation issue, and it is the policy

of the Board to hold parties to their own bargaining by not allowing them to avoid substituting the Board's process for their own mutually agreed-upon method for dispute resolution.<sup>2</sup> Accordingly, this issue should be deferred to arbitration under *Collyrer*.

The Board has established the general rule that it refrains from adjudicating issues, including claims of unfair labor practices, that arises from the parties' collective bargaining agreement if the agreement provides for arbitration as the method of resolving disputes over the meaning of its provisions. *Harley Davidson Motor Co.*, 366 NLRB No. 121, slip. Op. at 2 (2018); *Caritas Good Samaritan Med. Ctr.*, 340 NLRB 61, 62 (2003); *San Juan Bautista Medical Center*, 356 NLRB No. 736, 737 (2011). *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971); *Jos. Schlitz Brewing Co.*, 175 NLRB 141 (1969). Further, it is the policy of the Board to not

The Board considers six factors to determine whether a dispute should be deferred to arbitration: "(1) whether the dispute arose within the confines of a long and productive collective-bargaining relationship; (2) whether there is a claim of employer animosity to the employees' exercise of protected rights; (3) whether the agreement provides for arbitration in a very broad

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<sup>2</sup> Because of the underlying principles of the Act, a pre-arbitration order of deferral may be made despite objection from the parties so long as the proponent of deferral is willing to arbitrate the dispute. See *Collyer Insulated Wire*, 192 NLRB at 842.

It is fundamental to the concept of collective bargaining that the parties to a collective-bargaining agreement are bound by the terms of their contract. When an employer and union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principals of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery. For dispute resolution under the grievance-arbitration process is as much a part of collective bargaining as the act of negotiating the contract. In our view, the statutory purpose of encouraging the practice and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief.

*United Tech. Corp.*, 268 NLRB 557 (1984). See also *United Hoisting & Scaffolding, Inc.*, 214 NLRB Lexis 524 (July 1, 2014) (finding deferral proper when interpretation of a particular contract provision, at least in part, would resolve a charge of unilateral change).

range of disputes; (4) whether the arbitration clause clearly encompasses the dispute at issue; (5) whether the employer asserts its willingness to resort to arbitration for the dispute; and (6) whether the dispute is eminently well-suited to resolution by arbitration.” *San Juan Bautista Medical Center*, 356 NLRB No. at 737. Importantly, “[a] dispute is well suited to arbitration when the meaning of a contract provision is at the heart of the dispute.” *Id.*

Here, this case is appropriate for arbitration and full force and effect should be given to the Union and DMC’s own voluntary agreement to submit all such disputes to arbitration proceedings, rather than permitting its agreement to be sidestepped. *See Collyer Insulated Wire*, 192 NLRB 837, 842 (1971). The Union and DMC have had a long and productive collective bargaining relationship that has lasted over thirteen years, through three collective bargaining agreements, and numerous agreements to extent. GC Exhibit 1-3, *Collective Bargaining Agreements*; Hr’ing Transcript 7:24-8:3. There is no claim that the DMC has acted out of animosity, and the DMC has asserted its willingness to arbitrate the dispute. Further, the Parties’ arbitration provision provides for “matters of interpretation and application of this Agreement”. GC Exhibit 1, *Current CBA*. Such language is sufficiently broad to encompass the matters at issue. Furthermore, in *Caritas Good Samaritan Med. Ctr*, the Board found similar language met this standard when it provided for a broad range of disputes when the arbitration provision applied “in the event of a controversy concerning the meaning or application of any provisions of this Agreement.” 340 NLRB at 61-63. The Board in *Caritas* also found that, “most importantly”, the dispute was well suited for arbitration “because the meaning of the contract is at the heart of the dispute.” *Id.* at 63. Here, the dispute is purely a matter of contract interpretation.

Accordingly, the Board should defer this case to arbitration and thereby follow its long-held rule that it is not the proper forum for parties seeking interpretation of their collective

bargaining agreement. *See generally Collyer Insulated Wire*, 192 NLRB 837, 842 (1971); *Jos. Schlitz Brewing Co.*, 175 NLRB 141 (1969); *San Juan Bautista Medical Center*, 356 NLRB No. 736, 737 (2011).

### CONCLUSION

The DMC's decision to move the Union's bargaining unit members to a traditional 40-hour per workweek overtime computation structure was authorized and encompassed under the Parties' Collective Bargaining Agreement. These actions did not constitute a unilateral change since the HR 202 Policy has consistently been applied and contemplated by the Parties. The plain meaning of the Party's contract, context, and extrinsic evidence clearly establish the Parties' intended meaning, and the Union should not be enabled to renege its agreement based on current convenience.

Accordingly, the Respondent respectfully requests that you find no violation of the Act has occurred and dismiss the Union's Charge.

Respectfully submitted this 15<sup>th</sup> day of July, 2019.



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**CERTIFICATION OF SERVICE**

I hereby certify that I filed the foregoing document via the Board's electronic filing system, and served copies on the Regional Director, Counsel for the General Counsel and the Charging Party's Counsel on July 15, 2019 as follows:

**BY ELECTRONIC FILING**

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