UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH & WELFARE AND PENSION FUNDS,

Respondent,

and

HEALTH CARE, PROFESSIONAL, TECHNICAL, OFFICE, WAREHOUSE AND MAIL ORDER EMPLOYEES' UNION, LOCAL 743, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Charging Party.

Case 13-CA-277915

RESPONDENT’S POST-HEARING BRIEF

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ATTORNEYS FOR CENTRAL STATES
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I. SUMMARY OF ARGUMENT

Respondent Central States, Southeast and Southwest Areas Health & Welfare and Pension Funds (the “Fund”) did not violate Section 8(a)(5) of the National Labor Relations Act (the “Act”) by refusing to bargain with Charging Party Health Care, Professional, Technical, Office, Warehouse and Mail Order Employees’ Union, Local 743, affiliated with the International Brotherhood of Teamsters (“Local 743”) regarding changes to the flexible start times of the salaried bargaining unit (the “Salaried Unit”). After the Fund announced the changes in December 2020, Local 743 never clearly demanded bargaining. Rather, it sent a letter which indicated that it was sent as a placeholder only to preserve its right to request bargaining while it investigated whether it could demand bargaining under the Salaried Unit’s collective bargaining agreement (the “Salaried Unit CBA”) and the parties’ bargaining history. Since Local 743 did not send any communication as a follow-up to the letter clearly stating that it was demanding bargaining, the Fund did not commit an unfair labor practice.

Even assuming arguendo that Local 743 demanded bargaining, the Management Rights provision in the Salaried Unit CBA broadly confers management with the unilateral right to direct and control operations, schedule and assign work, determine employees’ work schedules, and to maintain and improve efficiency. Local 743 admitted that “the [Fund] has the right to set employee work schedules based on the language in the management rights clause.” Thus, the plain text of the provision, and the parties’ interpretation of that provision, clearly show that the Fund did not have an obligation to bargain over the decision to change the Salaried Unit’s flexible start times.
Where, as here, there is a provision in the collective bargaining agreement which confers management with authority to make certain decisions, the Board applies the “contract coverage” standard which looks to the plain language of the agreement to determine whether action taken by an employer was “within the compass or scope of contract language” that grants the employer the right to act unilaterally. Under that standard, since the Fund was allowed to unilaterally change the flexible start times, there was no duty to bargain over the effects of that decision unless the agreement or the parties’ bargaining history indicates an intent to treat effects bargaining separately from bargaining over the decision itself. Here, the evidence shows that nothing in the Salaried Unit CBA or the parties’ bargaining history indicates an intent to create a decisions-effects bargaining dichotomy. Indeed, when the Fund initially (and unilaterally) set the flexible start times in 2000, the Fund and Local 743 did not bargain over the effects of that decision. Accordingly, the Fund was not obligated to bargain with Local 743 regarding the effects of establishing new flexible start times for the Salaried Unit.

Local 743 never clearly demanded bargaining regarding the changes to the flexible start times. Even if it did, the Fund had the unilateral right to establish new flexible start times for the Salaried Unit and it had no obligation to engage in effects bargaining over that decision. Accordingly, the Judge should dismiss the General Counsel’s First Amended Complaint.
II. ISSUES PRESENTED

1. Whether the Fund committed an unfair labor practice by refusing to bargain regarding changes to the flexible start times for the Salaried Unit when Local 743 never clearly demanded bargaining and instead stated that it was still investigating whether it could demand decision or effects bargaining?

2. Even if Local 743 had demanded bargaining regarding changes to the flexible start times, was the Fund required to bargain where the Management Rights provision contained in the Salaried Unit CBA broadly confers management with the right to, amongst other things, direct and control operations, schedule and assign work, determine employees’ work schedules, and to maintain and improve efficiency?
III. RELEVANT CONTRACT PROVISIONS

The relevant provision from the Salaried Unit CBA is as follows:

Section 6. Management Rights

6.1 The management of the Employer's operations and the direction of the work force, including, but not limited to: the right to plan, direct and control office operations; to hire, schedule and assign work to the employees; to determine what employee qualifications are necessary for the job; to determine the means, methods, process and schedules of work; to introduce new or improved equipment, facilities or methods; to add or discontinue services or processes; to determine the location of operations, the establishment of new operations or locations, and the continuance of the operations and the various operating departments; to discontinue jobs; to establish reasonable production standards and to maintain and improve efficiency, to transfer employees or to relieve employees from duties for justifiable reasons; to maintain order and to suspend, demote, discipline and discharge for proper cause, are the sole rights of the Employer, provided, however, that said powers shall be exercised in accordance with this Agreement.

(JX 1 – Salaried Unit CBA, § 6.1.)

1 Citations to the hearing transcript are indicated by “Tr.” followed by the page and line numbers of the transcript. Citations to the Joint, Respondent, and General Counsel exhibits are indicated by “JX,” “RX,” and “GCX,” respectively, followed by the exhibit number.
IV. FACTUAL BACKGROUND

A. The Fund and Local 743

The Fund is a Taft-Hartley Act multiemployer fund which provides pension and health benefits to participants and beneficiaries throughout the United States. (GCX 1(h) – Answer to First Amended Complaint, ¶ II(a).) As a Taft-Hartley fund, the Fund is managed by a board of trustees that is composed of management and union-appointed trustees. The Fund has approximately 680 employees which includes non-bargaining and bargaining unit employees. (Tr. 85:8-9.)

The Fund’s bargaining unit employees are divided into two bargaining units that are covered by separate collective bargaining agreements. (Tr. 85:13-15; 87:14-16.) The first unit, which has approximately 360 employees, is referred to as the “Hourly Unit” because the employees in that unit are paid on an hourly basis. (Tr. 43:15-23; 85:13-86:3.) The second unit, which has approximately 100 employees, is referred to as the “Salaried Unit” because the employees in that unit are paid a salary. (Tr. 43:15-23; 85:13-25.) All of the bargaining unit employees are represented by Local 743. (Tr. 85:13-17.) The alleged unfair labor practice in this matter pertains to the employees in the Salaried Unit.

B. The Salaried Unit

The Hourly Unit was established in the 1970s and the Salaried Unit was established in 1997. (Tr. 86:24-87:3; 105:11-14.) When it was first formed, the Salaried Unit only consisted of employees in the Fund’s Field Services Department. (Tr. 87:7-11.) In 2000, employees in the Central Technology Services (“CTS”) Department joined the Salaried Unit. (Tr. 87:12-13.)
Currently, all of the employees in the Salaried Unit work either in the Field Services or CTS departments. (Tr. 86:4-6.) There are approximately 10 Salaried Unit employees in the Field Services group whose main job duties are to service and support the local unions who have members that participate in the Fund. (Tr. 86:9-18.) There are approximately 90 Salaried Unit employees in the CTS group which is the Fund’s information technology area. (Tr. 86:4-5; 86:19-23.)

C. Changes to the Hourly Unit’s Flexible Start Times

Since approximately 1991, the Hourly Unit CBA had a specific provision which provided the covered employees with flexible start times between the hours of 6:00 a.m. to 10:00 a.m. (Tr. 91:11-18.) Since the Fund has a seven-hour workday, allowing employees to start at 6:00 a.m. presented operational problems for management because so many employees were leaving as early as 1:30 p.m. after their normal workday.² (Tr. 73:7-74:11; 100:8-14.) So, when negotiating a new collective bargaining agreement for the Hourly Unit in 2018, management made it a priority to restrict the flexible start times provision so that more employees would be in the office during core business hours. (Tr. 73:7-74:11.) The Hourly Unit CBA negotiations were difficult and the proposed change to restrict the flexible start times was one of the major reasons which led to a strike. (Tr. 74:2-15; 75:25-76:4.) However, after lengthy negotiations, the Hourly Unit CBA was ratified and the flexible start times were restricted to the hours of 6:30 a.m. to 9:30 a.m. effective January

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² Even though it is a seven-hour workday, employees who started at 6:00 a.m. would not end their workday until 1:30 p.m. because of their 30-minute lunch break.
1, 2021. (Tr. 91:11-18.) As a result, no employee in the Hourly Unit is currently allowed to start prior to 6:30 a.m. (Tr. 93:21-23.)

D. The Salaried Unit CBA and the Management Rights Provision

Unlike the Hourly Unit CBA, the Salaried Unit CBA never had a provision which provides for flexible start times. (Tr. 94:3-6.) However, since 2000, management has allowed the Salaried Unit employees to take advantage of the same flexible start times as the Hourly Unit to keep the start times aligned for operational purposes. (Tr. 93:1-20; 94:7-15; 95:10-13.) When management made that decision in 2000, it did not consult or bargain with Local 743. (Tr. 94:16-95:13.) Rather, it exercised its authority under the Management Rights provision in the Salaried Unit CBA which states:

**Section 6. Management Rights**

6.1 The management of the Employer's operations and the direction of the work force, including, but not limited to: the right to plan, direct and control office operations; to hire, schedule and assign work to the employees; to determine what employee qualifications are necessary for the job; to determine the means, methods, process and schedules of work; to introduce new or improved equipment, facilities or methods; to add or discontinue services or processes; to determine the location of operations, the establishment of new operations or locations, and the continuance of the operations and the various operating departments; to discontinue jobs; to establish reasonable production standards and to maintain and improve efficiency, to transfer employees or to relieve employees from duties for justifiable reasons; to maintain order and to suspend, demote, discipline and discharge for proper cause, are the sole rights of the Employer, provided, however, that said powers shall be exercised in accordance with this Agreement.

(JX 1 – Salaried Unit CBA, § 6.1; Tr. 94:16-95:13; 97:16-98:4) (emphasis added). Notably, after the Hourly Unit CBA was ratified with the more restrictive flexible start times, the Fund and Local 743 negotiated a new collective bargaining agreement for the Salaried Unit
in 2019. (Tr. 95:21-96:7.) During those negotiations, there were no discussions regarding flexible start times nor any proposed changes to the Management Rights provision. (Tr. 32:19-22; 62:14-18; 91:1-7; 98:5-9.)

E. The Salaried Unit’s New Flexible Start Times

As discussed above, management has allowed the Salaried Unit employees to take advantage of the same flexible start times as the Hourly Unit to keep the start times aligned for operational purposes. In preparation for the Hourly Unit’s flexible start times change effective January 1, 2021, management advised the Salaried Unit employees in December 2020 that they too would be subject to the 6:30 a.m. to 9:30 a.m. flexible start times. (Tr. 96:8-17.) As it did in 2000, management believed that it had the authority under the Management Rights provision to make this decision, and did not consult or bargain with Local 743 prior to announcing the change. (Tr. 96:18-97:8.)

F. Communications with Local 743 Regarding the New Flexible Start Times

Brendan Crowley is a staff attorney for Local 743, and he was the business representative for both of the Fund’s bargaining units and the chief negotiator for both units’ current collective bargaining agreements. (Tr. 42:18-43:14.) On December 8, 2020, Crowley sent a letter to the Fund’s Director of Human Resources, Scott Robbins, which stated, in pertinent part, as follows:

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3 For example, the CTS group is responsible for supporting all of the Fund employees’ technological needs. (Tr. 93:6-10.) As such, it is imperative that their work schedules are aligned with the work schedules of the employees they support. (Tr. 93:4-20.) Allowing them to start at 6:00 a.m. when all of the other employees start at 6:30 a.m. means that their services would not be needed for 30 minutes in the beginning of the workday. (Tr. 93:11-17.) It would also mean that they would not be available to provide support after 1:30 p.m. even though all of the other Fund employees are still working and may need technological support. (Tr. 93:17-23.)
The Union has become aware of proposed changes to employee schedules within the Salaried Bargaining Unit. We are dismayed to have heard of such changes through our membership and hope that in the future the employer will give the exclusive representative notice prior to changing wages, terms and conditions of employment.

The Union is still reviewing the Parties’ Collective Bargaining Agreement and bargaining history to determine if such change is even allowed by the Parties’ Agreement. However, in an abundance of caution and to assure the union does not lose its right to bargain over the decision or effects of these changes, and without surrendering any arguments as a result of this letter, please accept this letter as our Union’s demand to bargain over the employer’s recently announced schedule changes for Salaried Bargaining Unit employees.

(JX 2 - B. Crowley Email and Letter to S. Robbins dated December 8, 2020.) Crowley’s letter was unclear as to whether it was requesting bargaining or if it was sent as a placeholder to preserve Local 743’s right to request bargaining pending review of the parties’ agreement and bargaining history. As such, Robbins forwarded the letter to the Fund’s in-house counsel, Charles Lee. (Tr. 102:22-104:13.) On December 14, 2020, Lee sent an e-mail to Crowley stating, in pertinent part, as follows:

Brendan:

I hope you are doing well. I received a copy of your December 8 letter to Scott Robbins. In the letter, you stated that the Union is still reviewing the parties’ CBA and bargaining history to determine if the change to the work hours is allowed. I assume you have had the chance to review the Salaried Unit CBA and are aware that it has the following management rights provision:

Section 6. Management Rights

6.1 The management of the Employer's operations and the direction of the work force, including, but not limited to: the right to plan, direct and control office operations; to hire, schedule and assign work to the employees; to determine what employee qualifications are necessary for the job; to determine
the means, methods, process and schedules of work; to introduce new or improved equipment, facilities or methods; to add or discontinue services or processes; to determine the location of operations, the establishment of new operations or locations, and the continuance of the operations and the various operating departments; to discontinue jobs; to establish reasonable production standards and to maintain and improve efficiency, to transfer employees or to relieve employees from duties for justifiable reasons; to maintain order and to suspend, demote, discipline and discharge for proper cause, are the sole rights of the Employer, provided, however, that said powers shall be exercised in accordance with this Agreement.

We believe that management has the unilateral right to change the work hours under the terms of the Salaried Unit CBA. If you disagree, please let me know why so that I can discuss your explanation with management.

(JX 3 - C. Lee E-mail to B. Crowley dated December 14, 2020.) Lee and Crowley then had a telephone conversation on December 15, 2020. (Tr. 113:2-14.) During that call, Lee and Crowley discussed the Management Rights provision and how the Board’s recent decision in MV Transportation affected the Fund’s obligation to engage in decision and effects bargaining under various hypothetical situations. (Tr. 113:15-116:1; RX 4 – C. Lee Email dated December 15, 2020.) At no time during the conversation did Crowley state that Local 743 was demanding bargaining. (Tr. 116:2-6; RX 4 – C. Lee Email dated December 15, 2020.) After December 15th, there were no further communications between Local 743 and the Fund regarding the Salaried Unit’s flexible start times. (Tr. 99:15-19; 117:12-14.)

G. The Charge and First Amended Complaint

After over five months of silence, Local 743 filed the underlying Charge on June 1, 2021, alleging that the Fund violated Section 8(a)(5) of the Act because it failed to bargain regarding changes to the Salaried Unit’s flexible start times. (GCX 1(a) – Charge dated
June 1, 2021.) Subsequently, on August 25, 2021, the General Counsel filed the Complaint alleging that the Fund violated Section 8(a)(5) of the Act by refusing to bargain regarding the effects of the changes to the flexible start times. (GCX 1(c) – Complaint, ¶¶ VI(a)-(b).)

On February 4, 2022, the General Counsel filed the First Amended Complaint adding the allegation that the Fund had also refused to bargain over the decision to change the Salaried Unit’s flexible start times. (GCX 1(f) – First Amended Complaint, ¶¶ VI(a)-(b).)

On May 2, 2022, there was a hearing in this matter. The General Counsel called two witnesses, George Micholson and Brendan Crowley. The Fund also called two witnesses, Scott Robbins and Charles Lee. All witnesses gave direct testimony and were cross-examined.

V. ARGUMENT

A. The Fund Did Not Commit an Unfair Labor Practice Because Local 743 Never Clearly Communicated a Bargaining Demand.

The General Counsel and Local 743 allege that the Fund refused to bargain regarding changes to the Salaried Unit’s flexible start times. However, it is axiomatic that “[a] union cannot charge an employer with refusal to negotiate when it has made no attempts to bring the employer to the bargaining table.” NLRB v. Alva Allen Indus., Inc., 369 F.2d 310, 321 (8th Cir. 1966); see also NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 297-98 (1939); NLRB v. Rural Electric Co., Inc., 296 F.2d 523, 524 (10th Cir. 1961); Joy Silk Mills v. NLRB, 185 F.2d 732, 741 (D.C. Cir. 1950); NLRB v. W. Ky. Coal Co., 152 F.2d 198, 200 (6th Cir. 1945). Although a request to bargain does not need to follow a specific form or use specific words, there must be a “clear communication
of meaning, and the employer understands that a demand is being made.” *NLRB v. Fosdal*, 367 F.2d 784, 788 (7th Cir. 1966) (quoting *NLRB v. Barney’s Supercenter, Inc.*, 296 F.2d 91, 93 (3d Cir. 1961)). Here, there cannot be an unfair labor practice because Local 743 never clearly demanded bargaining and the Fund did not know a demand was made.

As discussed above, the Fund and Local 743 had limited discussions regarding the Salaried Unit’s new flexible start times. The evidence shows that there are only two communications that the General Counsel and Local 743 can possibly rely upon to show that a bargaining demand was made: (1) Crowley’s December 8, 2020 letter; and (2) the December 15, 2020 telephone conversation between Crowley and Lee. However, Local 743 never clearly demanded bargaining in either communication. The December 8th letter stated:

> The Union is still reviewing the Parties’ Collective Bargaining Agreement and bargaining history to determine if such change is even allowed by the Parties’ Agreement. However, in an abundance of caution and to assure the union does not lose its right to bargain over the decision or effects of these changes, and without surrendering any arguments as a result of this letter, please accept this letter as our Union's demand to bargain over the employer's recently announced schedule changes for Salaried Bargaining Unit employees.

(JX 2 - B. Crowley Email and Letter to S. Robbins dated December 8, 2020.) Robbins and Lee testified that they did not believe the letter demanded bargaining. (Tr. 98:18-99:10; 102:22-104:13; 112:10-113:1.) This is because the letter stated that it was sent as a placeholder only to preserve Local 743’s right to request decision and/or effects bargaining while it investigated whether it could even demand bargaining under the Salaried Unit CBA.
and the bargaining history. Notably, neither Crowley nor Local 743 sent any communication as a follow-up to the December 8th letter. (Tr. 64:2-22; 98:18-99:19.)

The evidence also shows that Local 743 did not demand to bargain during the December 15th telephone conversation. After that call, Lee immediately sent an email to Robbins summarizing the exact details of the conversation with Crowley. (RX 4 – C. Lee Email dated December 15, 2020.) The email shows that Crowley made contradictory statements involving hypotheticals and never specifically stated that Local 743 was demanding decision or effects bargaining. (RX 4 – C. Lee Email dated December 15, 2020.) Lee’s email to Robbins is reliable evidence regarding the specific details of the December 15th call since it was drafted and sent immediately after the call and there would be no reason for Lee to provide Robbins with inaccurate information. (Tr. 116:7-23.) Neither the General Counsel nor Local 743 provided any evidence showing that Lee’s email inaccurately summarized the December 15th conversation. Crowley testified that some of the characterizations in the email were inaccurate. (Tr. 59:11-61:14.) However, Crowley’s recollection of a conversation that occurred almost 1½ years ago is unreliable since he did not take any notes during the December 15th conversation and had no documentation which summarized the call. (Tr. 58:15-59:1; 61:15-20.) Indeed, Crowley’s recollection is further undermined by the June 11, 2021 affidavit he gave to the NLRB Field Examiner. (Tr. 65:17-66:3.) In that affidavit, which was provided six months after the December 15th conversation, Crowley incorrectly stated that he had two conversations with Lee in December 2020 regarding the flexible start times. (Tr. 72:9-73:6.) However, during cross-examination, Crowley admitted that his memory could be incorrect and that
only one conversation occurred. (Tr. 72:9-73:6.) If, after only six months, Crowley could not remember the number of calls he had with Lee regarding the flexible start times, he certainly cannot remember the specific details of a conversation that occurred 1½ years ago. More importantly, Crowley never testified that he made a request to bargain during the December 15th call. Again, neither Crowley nor Local 743 made any further effort to communicate with the Fund after that call, and the Salaried Unit start time change was implemented by the Fund on January 1, 2021. (Tr. 99:15-19; 117:12-14.) The next communication the Fund received concerning the Salaried Unit start time was the Charge – which was filed five months after the December 15th telephone conversation.

The fact that Local 743 failed to clearly demand decision or effects bargaining is also shown by the General Counsel’s own pleadings in this matter. When the original Complaint was filed, the General Counsel only alleged that Local 743 had demanded effects bargaining. (GCX 1(c) – Complaint, ¶¶ VI(a)-(b).) There was no allegation of a request to bargain about the decision to change the flexible start times. This is because, as discussed below, Local 743 had already admitted that the Fund had the right to change the flexible start times under the Management Rights provision. (Tr. 65:17-66:12.) It was not until the General Counsel filed the First Amended Complaint that it was alleged that Local 743 had requested decision and effects bargaining. (GCX 1(f) – First Amended Complaint, ¶¶ VI(b)-(c).) If the General Counsel could not figure out whether Local 743 had demanded decision and/or effects bargaining, the Fund certainly could not know. Since Local 743 failed to clearly request bargaining, the Fund did not violate Section 8(a)(5) of the Act.
B. Even if Local 743 Demanded Bargaining, the Fund Was Not Obligated to Engage in Decision or Effects Bargaining.

Section 8(a)(5) of the Act requires employers to engage in collective bargaining prior to making significant changes to the “wages, hours, and other terms and conditions of employment.” First Nat’l Maint. Corp. v. NLRB, 452 U.S. 666, 674 (1981). Employers are required to bargain not only over the decision itself, but also the effects that the decision might have upon employees’ terms and conditions of employment. However, bargaining is not required where the collective bargaining agreement grants an employer the unilateral right to make a decision. MV Transportation, Inc., 368 NLRB No. 66 (2019); Enloe Med. Ctr. v. NLRB, 433 F.3d 834 (D.C. Cir. 2005). Here, the Fund was not obligated to engage in decision or effects bargaining because the Salaried Unit CBA gave the Fund the right to change the flexible start times.

1. Local 743 Admitted that the Fund Had the Right to Establish New Flexible Start Times Under the Management Rights Provision.

The General Counsel alleges in the First Amended Complaint that the Fund violated Section 8(a)(5) of the Act by refusing to bargain regarding the decision to change the flexible start times and the effects of that decision. (GCX 1(f) – First Amended Complaint, ¶¶ VI(b)-(c).) However, as noted above, when the original Complaint was filed, the General Counsel only alleged that the Fund failed to engage in effects bargaining. (GCX 1(c) – Complaint, ¶¶ VI(a)-(b).) This is because Local 743 had admitted that the Fund had the right to change the flexible start times under the Management Rights provision. In his affidavit to the Field Investigator, Crowley stated:
The Union is not alleging that the employer had an obligation to bargain over the decision itself. The Union acknowledges that the employer has the right to set employee work schedules based on the language in the management rights clause.

(Tr. 65:17-66:12.) Even without Local 743’s admission, the plain terms of the Salaried Unit CBA clearly show that the Fund had the right to change the flexible start times.

The statutory right to bargain over significant changes in working conditions can be waived by the employees’ bargaining representative. Prior to MV Transportation, the Board held that a waiver of the right must be “clear and unmistakable.” See Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). In MV Transportation, the Board rejected the “clear and unmistakable waiver” standard and adopted the “contract coverage” standard that had been espoused by several circuit courts when considering whether an employer’s unilateral action is permitted by a collective bargaining agreement. See Local Union No. 47 v. NLRB, 927 F.2d 635, 641 (D.C. Cir. 1991); Chicago Tribune Co. v. NLRB, 974 F.2d 933, 937 (7th Cir. 1992); Bath Marine Draftsmen’s Assn. v. NLRB, 475 F.3d 14, 25 (1st Cir. 2007). Under that standard, the Board examines the plain language of a collective bargaining agreement to determine whether action taken by an employer was “within the compass or scope of contract language” that grants the employer the right to act unilaterally. MV Transportation, 368 NLRB No. 66, *17.

Here, the plain terms of the Management Rights provision states that the Fund has the right to direct and control operations, schedule and assign work, and “to determine the means, methods, process and schedules of work … [and] to maintain and improve efficiency.” (JX 1 – Salaried Unit CBA, § 6.1.) This text clearly encompasses the right to
establish employees’ starting work times. Indeed, since the Salaried Unit employees are paid a salary and do not have a set number of hours they must work, it is hard to imagine what “schedules of work” could refer to other than starting work times. See NLRB v. U.S. Postal Serv., 8 F.3d 832, 838 (D.C. Cir. 1993) (employer allowed to unilaterally rearrange employees’ work schedules where management rights provision gave the employer the right “to transfer and assign employees,” “to determine the methods, means and personnel by which [its] operations are to be conducted” and “to maintain the efficiency of the operations entrusted to it”); Uforma/Shelby Bus. Forms, Inc. v. NLRB, 111 F.3d 1284, 1290 (6th Cir. 1997) (employer allowed to unilaterally reschedule employees to different shifts where management rights provision gave the employer the right “to schedule and assign work to employees; to establish and determine job duties and the number of employees required thereof”). As such, the Fund had the right to change the flexible start times without bargaining with Local 743.4

Notwithstanding the plain text of the Management Rights provision, the General Counsel may try to argue that the provision is ambiguous. However, such an argument would be futile for two reasons. First, “[t]he Board has recognized that an employer has not violated Section 8(a)(5) by modifying terms and conditions of employment under a CBA where the employer has a ‘sound arguable basis’ for its interpretation of a contract and it is not motivated by animus or bad faith.” Pac. Mar. Ass’n v. NLRB, 967 F.3d 878, 882 (9th Cir. 2021).

4 Even though Crowley unequivocally admitted in his affidavit that the Fund could change the flexible start times under the Management Rights provision, Crowley tried to retract his admission by testifying that “work schedules” could refer to “places of work” or the “days of the work week that they work.” (Tr. 66:13-67:13.) Regardless, Crowley then conceded that it could be interpreted to apply to the flexible start times. (Tr. 67:14-17.)
885 (D.C. Cir. 2020) (quoting Bath Iron Works Corp., 345 NLRB 499, 502 (2005)). Here, there is clearly a sound arguable basis for the Fund’s interpretation of the Management Rights provision since it is consistent with Local 743’s interpretation and there is no evidence of animus or bad faith. (Tr. 65:17-67:17.) Second, when interpreting an ambiguous collective bargaining agreement, the Board gives “controlling weight to the parties’ actual intent underlying the contractual language in question.” Knollwood Country Club & Unite Here Loc. 100, 365 NLRB No. 22, *1 (2017). Here, Robbins testified that, since at least 2000, the Fund has always interpreted the Management Rights provision to allow the employer to unilaterally set and change the Salaried Unit’s flexible start times. (Tr. 94:3-95:3; 96:22-97:8.) More importantly, Local 743’s actual intent was clearly stated in Crowley’s affidavit: “[t]he Union acknowledges that the employer has the right to set employee work schedules based on the language in the management rights clause.” (Tr. 65:17-66:12.) Since the parties’ intent was to allow the employer to unilaterally change the flexible start times under the Management Rights provision, the General Counsel’s trumped-up charge that the Fund had a decision-bargaining obligation must be rejected.

At the hearing, counsel for the General Counsel stated in opening arguments that the clear and unmistakable waiver standard applies. (Tr. 14:20-22, 16:15-22.) It is unclear whether counsel was arguing that standard applies to the decision to change the flexible start times or just the effects of that decision – or both. If the General Counsel is arguing that the clear and unmistakable waiver standard should apply to the decision, then the argument must be rejected because the General Counsel is arguing for a standard that was abandoned by the Board in MV Transportation. See Iowa Beef Packers, Inc., 144 NLRB
615, 616 (1963) (it is the trial examiner’s “duty to apply established Board precedent which the Board or the Supreme Court has not reversed.”) Even if the Judge could disregard current Board law and applied the clear and unmistakable waiver standard, that standard was satisfied by the plain text of the Management Rights provision which states that the Fund has the right to direct and control operations, schedule and assign work, and “to determine the means, methods, process and schedules of work … [and] to maintain and improve efficiency.” (JX 1 – Salaried Unit CBA, § 6.1.) The provision clearly and unmistakably confers the Fund with the unilateral right to change the flexible start times.

2. Since the Fund Had the Unilateral Right to Establish New Flexible Start Times, It Was Not Obligated to Engage in Effects Bargaining Regarding that Decision.

Although the Board adopted the contract coverage standard in *MV Transportation*, it did not specifically address how its decision impacted an employer’s obligation to bargain over the effects of decisions that were covered by a collective bargaining agreement. The General Counsel and Local 743 will likely argue that *MV Transportation* only pertained to decision bargaining and is inapplicable to an employer’s obligation to bargain over the effects of a decision. Thus, they will argue that even if the Fund had the right to unilaterally change the flexible start times, it was obligated to bargain over the effects of that decision because there was no clear and unmistakable waiver of effects bargaining. However, recent case law states otherwise.

In *Endurance Environmental Solutions, LLC & Teamsters Local No. 100, an Affiliate of the International Brotherhood of Teamsters, AFL-CIO*, No. 09-CA-273873, 2022 WL 393229 (Feb. 8, 2022), the management rights provision at issue gave the
employer the right to “make changes in equipment.” Relying on that provision, the employer decided to install a camera system for its entire fleet of trucks and refused to bargain with the union regarding the decision or the effects of the decision. The administrative law judge (“ALJ”) specifically noted that prior to MV Transportation, the Board applied the “clear and unmistakable” waiver standard and an employer was required to bargain over the effects of a change if the management rights provision did not clearly and unmistakably waive effects bargaining. Id. at n.12. However, the ALJ noted that post-MV Transportation, there were no cases reaching the same result after the Board abandoned the clear and unmistakable waiver standard in favor of the contract coverage standard. Therefore, the ALJ found that the employer was not obligated to bargain over the effects of its decision to install the camera system since it fell within the contract coverage of the waiver in the management rights provision.

The ALJ’s decision in Endurance Environmental Solutions is consistent with case law from the Seventh and D.C. Circuits. Both circuit courts have held that if an agreement grants an employer the unilateral right to make a decision, the employer has no obligation to bargain over the effects of that decision. See, e.g., Enloe Med. Ctr., 433 F.3d at 839; Columbia Coll. Chicago v. NLRB, 847 F.3d 547, 553 (7th Cir. 2017) (holding that the contract coverage analysis “applies to decisions taken by employers and to the effects of those decisions, unless the parties’ collective-bargaining agreement contemplates treating effects separately from the decisions covered by the terms of the agreement.”).

The D.C. Circuit’s decision in Enloe, 433 F.3d at 834, is on point. In that case, the employer (Enloe) unilaterally changed its policy for staffing on-call nurses. Id. at 836. The
Board agreed that the collective bargaining agreement authorized Enloe to unilaterally change the on-call policy. *Id.* at 838. However, the Board argued that Enloe was required to bargain with the union regarding the *effects* of the policy change and the union had not waived its right to bargain over the effects in a clear and unmistakable manner. *Id.* at 837-38. The court rejected the Board’s argument and held that Enloe had no obligation to bargain over the effects of the policy change. *Id.* at 839. In doing so, the court began its analysis by stating that it had adopted the contract coverage standard. *Id.* at 838. Thus, it stated that whether the parties contemplated that the collective bargaining agreement would treat the effects of a decision separately from the decision itself must also be determined by looking at the contract and applying ordinary contract interpretation principles. *Id.* at 838-39. However, it stated that:

> 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.

*Id.* at 839. As applied to Enloe, the court determined that nothing in the agreement or the parties’ bargaining history indicated that the parties intended to treat the effects of a decision separately from the decision itself. *Id.* at 839.

The Seventh Circuit has agreed with *Enloe*. In *Columbia College Chicago*, the applicable management rights provision allowed the employer to “modify … all aspects of educational policies and practices,” including the “modification [or] alteration … of any … course.” 847 F.3d at 553. Relying on that provision, the college unilaterally decided to
reduce the credit hours of certain courses -- which affected the pay of certain faculty members. *Id.* at 549-50. The Board applied the “clear and unmistakable” standard and determined that the union had not waived its right to bargain regarding the effects of the college’s decision to reduce the credit hours of the courses. *Id.* at 551-52. However, the Seventh Circuit disagreed with the Board and held that the clear and unmistakable standard was “irrelevant” since the management rights provision “fully defined the parties’ rights with respect to the course-credit-hour changes.” *Id.* at 552, 554. The court held that the contract coverage analysis applies to “decisions taken by employers and to the effects of those decisions ….” *Id.* at 553. With respect to the effects-bargaining obligation, the court looked to whether the collective bargaining agreement or the parties’ bargaining history indicated an intent to treat effects bargaining separately from bargaining over the decision itself. *Id.* at 553-54. After determining that the agreement did not create a decisions-effects bargaining dichotomy and finding that there was no bargaining history evidence showing that the parties intended to treat effects bargaining separately from decision bargaining, the court held that the college had no obligation to engage in effects bargaining regarding the credit-hour changes. *Id.* at 554. It stated:

Columbia and PFAC bargained over their respective rights and duties, and agreed to a binding CBA. The terms of that contract gave Columbia the right to alter course credits — the subject area over which PFAC wanted to engage in effects bargaining. Further, the CBA did not indicate separate treatment of effects bargaining and decision bargaining. Therefore, Columbia was not under any further obligation to bargain with PFAC over the effects of the credit-hour reductions. The college had already satisfied its statutory bargaining duty on this issue when it negotiated and entered into the 2006 CBA.

*Id.* at 554.
Here, nothing in the Salaried Unit CBA or the parties’ bargaining history indicates an intent to treat effects bargaining separately from decision bargaining. (Tr. 97:9-98:4.) Further, since the Fund and Local 743 did not bargain over the effects of the Salaried Unit’s flexible start times when it was set by management in 2000 (Tr. 94:7-95:3), the bargaining history and past practice is that there is no effects-bargaining obligation. See Tramont Mfg., LLC, 369 NLRB No. 136, *4 (2020) (union can waive its right to bargain over an otherwise mandatory subject of bargaining by “some combination of contractual language, bargaining history, and past practice.”). Accordingly, the Fund was not obligated to bargain with Local 743 over the effects of establishing new flexible start times for the Salaried Unit.

After its decision in MV Transportation, the Board acknowledged that the Seventh and D.C. Circuits take the position that where an employer has no decision-bargaining obligation pursuant to the contract coverage doctrine, it also has no duty to bargain over the effects of that decision unless the agreement or the parties’ bargaining history indicates an intent to treat effects bargaining separately from bargaining over the decision itself. Columbia Coll. Chicago & Part-Time Fac. Ass’n at Columbia Coll. Chicago, 368 NLRB No. 86, *2 n.7 (2019). The Board stated that “there is considerable force to the … position of the Seventh and D.C. Circuits regarding effects bargaining, and that position warrants serious consideration in a future appropriate case.” Id. at *2 n.7. The Fund submits that this is the “future appropriate case” and the Judge should adopt the Seventh and D.C. Circuit’s position for the same reasons the Board adopted the contract coverage standard in MV Transportation.
In *MV Transportation*, the Board stated that it was abandoning the clear and unmistakable waiver standard and adopting the contract coverage test because the waiver standard: (1) resulted in the Board impermissibly sitting in judgment upon contract terms; (2) undermined contractual stability; (3) altered the parties’ deal reached in collective bargaining; (4) resulted in conflicting contract interpretations between the Board and the courts; (5) undermined grievance arbitration; and (6) had become indefensible and unenforceable. If the Judge rejects *Enloe* and *Columbia College Chicago*, and determines that the Fund was obligated to bargain over the effects of the decision to change the flexible start times even though it had the unilateral right to make the decision, the Judge would be undermining all of the Board’s reasons for abandoning the waiver standard in *MV Transportation*.

The Board stated in *MV Transportation* that the clear and unmistakable waiver standard resulted in the Board impermissibly sitting in judgment upon contract terms, and, somewhat relatedly, that it also altered the parties’ deal reached in collective bargaining. *Id.* at *6, 8. This was so because under that test, the Board refused to give effect to contract provisions which gave the employer the right to act unilaterally unless those provisions met the exacting waiver standards. *Id.* at *6. Since application of the test typically resulted in refusing to give effect to the plain terms of a collective bargaining agreement, the Board effectively negated contract language the parties agreed to put into it. *Id.* at *6, 8. Here, if, as the General Counsel argues, the clear and unmistakable waiver standard is applied to the effects-bargaining obligation, the Board would still be sitting in judgment upon contract terms and would be altering the parties’ deal reached in collective bargaining since the
Board would refuse to give full effect to the agreed upon Management Rights provision which gave the Fund the unilateral right to change the flexible start times.

The Board also stated the waiver standard undermined contractual stability. *Id.* at *6-7. In particular, that it “undermines collective bargaining by discouraging parties from trying to negotiate a comprehensive labor contract.” *Id.* at *7. This is evidenced by the facts of this case. Crowley’s affidavit shows that Local 743 understood that management had the right to change the flexible start times under the Management Rights provision. (Tr. 65:17-66:12.) If Local 743 wanted to treat effects bargaining separately from bargaining over the decision to change the flexible start times, it could have done so by proposing such terms during negotiations for the Salaried Unit CBA. However, Local 743 made no mention of the flexible start times during the Salaried Unit negotiations even though it had been a hot button issue that resulted in a strike for the Hourly Unit.⁵ (Tr. 32:19-22; 62:14-18; 74:2-15; 75:25-76:4; 91:1-7.) Applying the waiver standard here would reward Local 743’s negotiations approach and discourage any future collective bargaining efforts for a comprehensive agreement.

The Board also indicated in *MV Transportation* that one of the main reasons it adopted the contract coverage standard was so that its test would be consistent with the test

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⁵ Testimony at the hearing showed that changes to the flexible start times was an important issue for the Salaried Unit. (Tr. 33:10-13; 34:12-36:2.) As such, it is unclear why Local 743 did not raise the issue during the Salaried Unit CBA negotiations. Crowley testified that he knew from the Hourly Unit CBA negotiations that management made it a priority to restrict the flexible start times provision so that more employees would be in the office during core business hours (Tr. 74:2-15), so Local 743 should have known the changes would also apply to the Salaried Unit. The General Counsel and Local 743 may attempt to argue that it was somehow the Fund’s obligation to propose the changes during the Salaried Unit CBA negotiations. However, such an argument would be meritless since the Management Rights provision clearly allowed management to unilaterally change the flexible start times.
applied by the courts -- particularly the D.C. Circuit which has jurisdiction to review Board decisions regardless of where the charge was filed. *Id.* at *9. As discussed above, at least two circuits, including the D.C. Circuit in *Enloe*, has already held that an employer has no obligation to bargain over the effects of a decision it had the unilateral right to make under the collective bargaining agreement. If the Judge applies a contrary rule, the rule would again conflict with the courts -- including the D.C. Circuit.

Another reason why the Board abandoned the waiver standard was because it undermined the use of grievance arbitration to resolve contractual disputes. *Id.* at *9. The Board correctly noted in *MV Transportation* that the waiver standard encouraged unions to bypass arbitration and bring their unilateral-change claims to the Board “where the waiver standard tilts the playing field in their favor.” *Id.* at *10. If the Judge determines that the Fund was required to engage in effects bargaining, it will undermine the policy of encouraging parties to use grievance arbitrations to resolve contractual disputes -- which is contrary to what the Board sought to achieve via *MV Transportation*.

The Board also stated in *MV Transportation* that the waiver standard had become indefensible and unenforceable due to the “fundamental and long-running” disagreement between the D.C. Circuit and the Board. *Id.* at *10. Indeed, the court had noted the Board’s “obstinacy” and “bad faith” in continuing to defend the waiver standard and had even sanctioned the Board. *Id.* at *10. If the Judge and the Board were to reject the *Enloe* holding.
and adopt a contrary rule, the Board would again be faced with defending a rule that is indefensible and unenforceable in the D.C. Circuit.⁶

It is undisputed that, under the Management Rights provision, the Fund had the unilateral right to establish new flexible start times for the Salaried Unit. If it is determined that the Fund still had the obligation to engage in effects bargaining over that decision, all the reasons stated in *MV Transportation* for abandoning the waiver standard would be undermined. Thus, the Judge should determine that the Fund had no effects-bargaining obligation regarding the Salaried Unit’s new flexible start times.

**VI. CONCLUSION**

For all the foregoing reasons, the Fund respectfully submits that the General Counsel’s First Amended Complaint be dismissed in its entirety.

Respectfully submitted,

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⁶ As mentioned above, the Seventh Circuit held in *Columbia College Chicago* that if a collective bargaining agreement grants an employer the unilateral right to make a decision, the employer has no obligation to bargain over the effects of that decision. 847 F.3d at 553. If there was an appeal in this matter to the Seventh Circuit, that precedent would control.
CERTIFICATE OF SERVICE

I, Charles H. Lee, attorney for the Respondent Central States, Southeast and Southwest Areas Health & Welfare and Pension Funds, certify that on June 6, 2022, I electronically filed the foregoing Respondent’s Post-Hearing Brief with the Division of Judges of the National Labor Relations Board using its E-filing system. I also served a copy of Respondent’s Post-Hearing Brief by emailing the document to the following individuals:

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