

FACTS

The parties have a current collective bargaining agreement (“CBA”) effective June 1, 2012 through May 31, 2015 for employees at the Respondent’s Fort Calhoun Nuclear Station (“FCNS”). Long ago, Article 1, Section 4(E) was added to the CBA, which states that “Notwithstanding anything in Sections 1, 2 and 4 of Article IV hereof to the contrary, effective as of January 1, 1979, all employees covered by this Agreement who are hired after that date may be assigned to an eight (8) hour shift commencing and concluding at any time during the twenty-four hour day when, in the opinion of the Company, such assignment will aid the more efficient utilization of the Company’s facilities and equipment and its service to its customers.”

The majority of workers at FCNS are non-shift workers, or employees that work one day shift per day. The parties had negotiated changes in shifts for non-shift workers in the past, and memorialized those changes in Memorandums of Understanding (“MOU”). On February 8, 2010, the parties entered into an MOU to create a temporary staggered shift for the non-shift employees called “Memorandum of Understanding Nuclear Operations Division- Monday through Friday Staggered Shift Scheduling IBEW Local #763” (“Staggered Shift MOU”). The Staggered Shift MOU set forth the terms and conditions under which a staggered shift would be scheduled at FCNS, addressed the Nuclear Regulatory Commission’s work hour rule change, and Respondent’s desire to have employees work a shift outside the regular day shift set forth in the CBA.

In August 2012, Respondent contracted with Exelon Generation, LLC (“Exelon”) to manage nuclear operations at FCNS while FCNS was shut down. When it was determined that the second shift was no longer necessary, Respondent and Petitioner agreed to suspend the Staggered Shift MOU on or about December 20, 2012.

On March 7, 2014, Union President Charlie Perkins sent an email to Assistant Labor Relations Director Paula Pittman which included an attachment listing several questions from the Union for an upcoming meeting regarding potential changes about integration issues with Exelon, including the possible creation of shift work for non-shift employees. A meeting was held on March 10, 2014, where several topics were discussed. On March 26, 2014, Ms. Pittman sent Mr. Perkins an email stating that she had been contacted about creating a second shift for the non-shift employees. Mr. Perkins responded that he would recommend that the suspended

Staggered Shift MOU be reinstated, and asked Ms. Pittman to set up a meeting for the parties to discuss the issue.

On April 2, 2014, the Parties met to discuss the Staggered Shift MOU and Exelon integration issues, described during trial as a contentious meeting. No written documents or offers were exchanged, but Respondent verbally told Petitioner of about seven changes that it wanted to make to the shift. Petitioner requested that Respondent send its proposed changes to the Union in writing. On April 24, 2014, Petitioner received an email from Respondent inquiring on the status of the creation of the new shift. That same day, Petitioner sent a letter to Respondent stating that Petitioner was not interested in negotiating any changes to the Staggered Shift MOU until the parties negotiated a new CBA in 2015 and it would recommend that Respondent follow the suspended MOU. According to testimony at trial, Mr. Perkins and Ms. Pittman continued to have informal conversations after other meetings at least once a week in March, April, and May, 2014.

On May 15, 2014, Mr. Perkins emailed Ms. Pittman to inquire about the status of the staggered shift issue and what changes Respondent wanted to make. Ms. Pittman replied on May 18, stating that Respondent wanted to create a separate backshift under the 24 Hour Coverage Clause of the CBA that would not be implemented until June. Ms. Pittman also asked Mr. Perkins to let her know if he wanted to meet and discuss the issue. No meetings were scheduled. On May 21, 2014, Respondent emailed to FCNS employees its “first take” on the backshift rotation, which was then passed on to Mr. Perkins. According to the document, the new backshift would begin at 3:00 p.m. and end at 11:30 p.m. Monday through Friday, and would not include crew leaders. Respondent informed Petitioner that it would implement the new shift on June 2, but did not implement the new shift until June 9. Petitioner filed its Petition with the Commission on June 6, 2015.

DISCUSSION

Petitioner alleges that Respondent violated NEB. REV. STAT. §§ 48-824(1), (2)(a), (e), and (f) when it refused to bargain in good faith regarding the creation and implementation of the new backshift rotation and then unilaterally implemented the new backshift rotation after Petitioner filed its Petition with the Commission.

Duty to Bargain

Section 48-824(1) states that it is a prohibited practice for any public employer to refuse to negotiate in good faith with respect to a mandatory subject of bargaining. In *NLRB v. Katz*, the U.S. Supreme Court held that unilateral changes to mandatory subjects of bargaining before impasse are per se violations of the party's duty to bargain in good faith. 369 U.S. 736, 737 (1962). The question as to whether OPPD had a duty to bargain with the Union regarding the creation and implementation of the second shift hinges on whether the topic is a mandatory subject of bargaining.

There are three categories of bargaining subjects: mandatory, permissive, and prohibited. Mandatory subjects are those subjects that relate to "wages, hours, and other terms and conditions of employment, or any question arising thereunder." NEB. REV. STAT. § 48-816(1)(A). Additional mandatory subjects of bargaining are those which "vitally affect" the terms and conditions of employment. *Fraternal Order of Police, Lodge No. 8 v. Douglas County*, 16 CIR 401 (2010). The Nebraska Industrial Relations Act only requires parties to bargain over mandatory subjects. NEB. REV. STAT. § 48-816(1)(A). Permissive subjects are legal subjects of bargaining that do not fit within the definition of mandatory subjects. See *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342 (1958). Either party may raise a permissive subject during bargaining, but the non-raising party is not required to bargain over a permissive subject. *Id.* Finally, prohibited bargaining subjects are those topics that the law forbids the parties from agreeing to bargain. In addition, some subjects are considered management prerogatives. "Management prerogatives, such as the right to hire, to maintain order and efficiency, to schedule work, and to control transfers and assignments, are not mandatory subjects of bargaining." *Scottsbluff Police Officers Ass'n v. City of Scottsbluff*, 282 Neb. 676, 683 (Neb. 2011).

Mandatory subjects of bargaining are not just topics for discussion during negotiations. Unless clearly waived, mandatory subjects must be bargained for before, during, and after the expiration of a collective bargaining agreement. *Omaha Police Union Local 101 v. City of Omaha*, 15 CIR 292 (2007). In order to establish working guidelines as to what constitutes a mandatory subject of bargaining, the Nebraska Supreme Court in *Metro Technical Community College Education Ass'n* set forth the following test:

“A matter which is of fundamental, basic, or essential concern to an employee’s financial and personal concern may be considered as involving working conditions and is mandatorily bargainable even though there may be some minor influence on educational policy or management prerogative. However, those matters which involve foundational value judgments, which strike at the very heart of the educational philosophy of the particular institution, are management prerogatives and are not a proper subject for negotiations even though such decisions may have some impact on working conditions. However, the impact of whatever decision management may make in this or any other case on the economic welfare of employees is a proper subject of mandatory bargaining.”

Metropolitan Tech. Community College Educ. Ass’n v. Metropolitan Tech. Community College Area, 203 Neb. 832, 842 (Neb. 1979). Once a topic has been found to be a mandatory subject of bargaining, the burden of proving a waiver falls on the party asserting the waiver.

Petitioner argues that the creation and implementation of the backshift rotation at FCNS and its effect on employees is a mandatory subject of bargaining. Respondent’s argument is two-fold in that the creation and implementation of the new shift was either a permissive subject of bargaining or, in the alternative, management prerogative which did not require negotiation with the Union.

First, Respondent argues that the staffing issue in this case should be considered a permissive subject of bargaining, citing § 48-816(1)(b). Under § 48-816(1)(b), staffing issues related to scheduling work such as daily staffing, staffing by rank, and overall staffing requirements are permissive subjects of bargaining in negotiations between a municipality, municipally owned utilities, or county and a labor organization. Respondent reasons that, although OPPD is a political subdivision and not a municipally owned utility, it should be treated the same under the statute because the issue is identical no matter the ownership of the utility. Although that reasoning may have merit, the Commission is not in the position to expand on the clear language contained in § 48-816(1)(b). If the Nebraska Legislature intended § 48-816(1)(b) to apply to political subdivisions, it would have said so. As such, we decline to follow Respondent’s reasoning.

Decisions of the National Labor Relations Board (“NLRB”) are instructive but not controlling. The NLRB has long held that hours are a mandatory subject of bargaining. *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342, 349 (1958). The term “hours” has been held to mean work schedules and whether there should be Sunday work. See *Timken Roller Bearing Co.*,

70 N.L.R.B. 500 (1946), enforcement denied on other grounds, 161 F.2d 949 (6th Cir. 1947). The NLRB has specifically held work schedules to be mandatory subjects of bargaining. *T-West Sales & Service*, 346 N.L.R.B. 132 (2005); *Pepsi-Cola Bottling Company of Fayetteville, Inc.*, 330 N.L.R.B. 900 (2000) (employer unilaterally changed starting time for an employee in violation of NLRA...unilateral schedule changes unlawful where it affected how employees could arrange their workday); *Our Lady of Lourdes Health Center*, 306 N.L.R.B. 337, 339 (1992).

The Commission, however, has decided on several occasions that the scheduling of hours worked is a management prerogative. See *County of Hall v. United Food and Commercial Workers District Local 22*, 15 CIR 167 (2006)(Scheduled hours per day, scheduled hours per week and scheduled work cycle were management prerogatives); *General Drivers and Helpers Union, Local 554 v. County of Gage*, 14 CIR 170 (2003)(Number of hours worked per day and per week determined to be management prerogatives); *Lincoln Firefighters Ass'n Local Union No. 644 v. City of Lincoln*, 12 CIR 248 (1997), aff'd 253 Neb. 837 (Neb. 1998)(Hours of work per cycle and overtime are management prerogatives); *Yutan Educ. Ass'n v. Saunders County School Dist. No. 0009*, 12 CIR 68 (1994)(right to schedule work is management prerogative). However, the Commission has also recognized that "an employer's practices, even if not required by a collective bargaining agreement, which are regular and longstanding, rather than random and intermittent, become terms and conditions of unit employee's employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change." *Service Employees International Union Local 226 v. Douglas County School District 001*, 17 CIR 428 (2012), aff'd 286 Neb. 768 (2013)(citing *Sunoco, Inc.*, 349 N.L.R.B. 240, 244 (2007)).

In the present case, the employees affected by Respondent's shift change are those employees designated as non-shift employees. According to the CBA, shift employees work nights, evenings and weekends, while non-shift employees work Monday through Friday between 7 a.m. and 4:30 p.m. The change proposed and implemented by Respondent changed those hours to Monday through Friday, 3:00 p.m. to 11:30 p.m., a drastic change in start and stop times as designated by the CBA. The parties have historically negotiated and agreed to changes to the shift start and stop times as evidenced by the various MOUs entered into by the parties. Respondent argues that it has management prerogative to create and implement the backshift for

its employees based upon the 24 Hour Clause in the CBA. However, whenever the parties wanted to make a change to this start and stop time, they have done so at the bargaining table. This bargaining history and the “vital effect” on the employees’ terms and conditions of employment is enough to find that OPPD could not create and implement a new shift for these employees without notice to the Union and an opportunity to bargain.

Waiver

The Commission has found that the duty to bargain can be waived. The burden of proving waiver was on the party asserting the waiver. *Washington County Police Officers Ass’n/F.O.P. Lodge 36 v. County of Washington*, 17 CIR 114 (2011). In *Fraternal Order of Police Lodge 21 v. City of Ralston*, 12 CIR 59 (1987), the Commission stated that the standard of proving waiver of a statutorily protected right must be clear and unmistakable. Additionally, once a union has notice of a proposed change in a mandatory subject of bargaining, it must make a timely request to bargain. “A union cannot charge an employer with refusal to negotiate when it has made no attempts to bring the employer to the bargaining table.” *Id.* (citing *NLRB v. Alva Allen Indus., Inc.*, 369 F.2d 310, 321 (8th Cir. 1966)). “It is well settled Board law that ‘when an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining.’” *Id.* (citing *Haddon Craftsmen, Inc.*, 300 N.L.R.B. 789, 790 (1990)). Notice from the employer does not have to be formal, and it is not unlawful for the proposed change to be presented as a fully developed plan. *Id.* The NLRB has held that unilateral changes to working hours where employers have notified the union of the proposed change and the union made no reasonable attempt to bargain was upheld as a lawful unilateral change. *K-Mart Corp.*, 242 N.L.R.B. 855 (1979), enforced 626 F.2d 704 (9th Cir. 1980); *Western Electric Co.*, 233 N.L.R.B. 86 (1976)(after employer provided union with such information, union made only vague and ambiguous requests for information and declined to engage in meaningful bargaining).

In this case, Petitioner was informed in March 2014 that Respondent was looking into making a change to the shift schedule currently in place for non-shift employees. Whether the shift was a “staggered” shift or a “backshift” does not change the fact that Respondent made it clear to Petitioner that it was contemplating shift changes. Early discussions between the parties centered around possible changes to the Suspended Staggered Shift MOU, to which Petitioner

made clear in its April 24, 2014 letter that it was not interested in negotiating any shift changes during the term of the collective bargaining agreement. In the email exchange of May 15 and 16, 2014, Respondent notified Petitioner of its intention to instead create a backshift and possibly implement the new shift in June 2014, before bargaining about any new collective bargaining agreement. By Petitioner's own admission, the parties communicated about the shift proposals, but did not engage in any formal negotiations. Petitioner clearly had notice that Respondent wanted to change the shift schedule currently in effect, yet Petitioner indicated an unwillingness to bargain and subsequently never made a request to bargain despite open communications with Respondent. We therefore find that Respondent has met its burden to show that Petitioner waived its right to bargain about the creation and implementation of the new shift, and thus Respondent did not violate § 48-824 when it implemented the shift change.

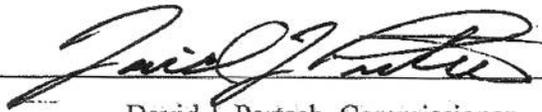
We therefore find that Respondent did not violate § 48-824. The Petition is hereby dismissed.

IT IS THEREFORE ORDERED that:

1. The Petition is hereby dismissed.

Entered June 4, 2015.

NEBRASKA COMMISSION OF INDUSTRIAL RELATIONS



David J. Partsch, Commissioner