Weavexx, LLC *and* Teamsters Local Union 984. 15–CA–119783

November 2, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On August 6, 2015, Administrative Law Judge William Nelson Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to reverse the judge's decision and dismiss the complaint.

The judge refused to defer to an arbitrator's decision and found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its employees' payday and pay cycle without providing the Union with notice and an opportunity to bargain. We find, for the reasons set forth below, that deferral to the arbitral decision is appropriate. Accordingly, we dismiss the complaint.

A. Facts

Teamsters Local Union 984 (the Union) has long represented the Respondent's production and maintenance employees at the Respondent's Starkville, Mississippi facility, where the Respondent manufactures felt used in the production of paper products. The most recent collective-bargaining agreement between the parties was effective from March 20, 2011, to March 20, 2016, and contained a grievance-arbitration provision. Since at least 2002, the Respondent had paid its employees on a weekly basis, every Thursday. In November 2013, the Respondent's parent company, Xerium Technologies, decided to standardize payroll practices across its subsidiaries. As a result, the Respondent's plant manager, Ross Johnstone, informed the Union's representatives that the Respondent would be changing its pay cycle from weekly to biweekly and its payday from every Thursday to every other Friday. It is undisputed that the Respondent did not offer to bargain with the Union about these changes, which were implemented in January 2014.

Many employees filed grievances protesting the changes, including employee Mitchell Jones, who protested the change in pay cycle.[1] On December 9, 2013, Plant Manager Johnstone denied all of these grievances, including Jones' grievance, stating that the unilateral changes were a legitimate exercise of the Respondent's management rights under article III of the collective-bargaining agreement.[2]

The Union filed the initial charge in this case on December 30, 2013, alleging that the Respondent had violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union about the change in pay cycle and payday. Upon learning that the parties had agreed to arbitrate Jones' grievance, the Acting Regional Director deferred the charge to arbitration on March 31, 2014. On July 8, 2014, the arbitrator issued a decision denying the grievance. On November 26, 2014, the Acting Regional Director notified the Respondent she was revoking deferral of the charge because the "evidence fails to reflect that the facts relevant to resolving the unfair labor practice were presented, considered, and decided by the arbitrator."

B. The Judge's Decision

The judge found that deferral to the arbitrator's decision was not appropriate because the decision was clearly repugnant to the Act. He reasoned that the arbitrator's decision was not susceptible to an interpretation consistent with the Act because the arbitrator relied on extracontractual management prerogatives in determining that the Respondent was privileged to implement its changes. The judge further found that deferral was inappropriate because one of the statutory issues alleged in the complaint—the change in payday—had not been presented to the arbitrator, who thus considered only the change in pay cycle grieved by Jones.

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[1] While the judge's decision states that Jones's grievance protested both the change in pay cycle and change in payday, the grievance specifically objected to the change in pay cycle. However, the grievance reasonably encompassed both changes by broadly requesting that the Respondent "[s]top the pay period change from one week to 2 weeks *and leave everything as is*" (emphasis added).

[2] Art. III provides:

> The Employer retains all authority not specifically abridged, delegated or modified by the Agreement, including, but not limited to, the right to make and enforce work and safety rules, and the right to subcontract work so long as the Employer is motivated to do so because of economic reasons and not to displace regular employees . . . . During the term of this agreement, the Company will not implement new work rules or policies relating to terms and conditions of employment without notice to the Union and the opportunity for the Union to raise concerns and to grieve any change it deems unreasonable.

C. Discussion

We find, contrary to the judge, that the arbitrator's decision is not repugnant to the Act and that deferral to the decision is warranted.

The Board will defer to an arbitration award when the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). An arbitration award is "clearly repugnant" only if it is "palpably wrong" and "not susceptible to an interpretation consistent with the Act." *Olin Corp.*, 268 NLRB 573, 574 (1984).[3] Additionally, the arbitrator must have considered the unfair labor practice issue that is before the Board. The arbitrator has adequately considered the unfair labor practice issue if "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice." Id. The party opposing deferral bears the burden of proof. Id.

It is undisputed that the arbitral proceedings here were fair and regular and that all parties agreed to be bound by the arbitrator's award.

When the Board is considering—as in this case—whether or not an arbitrator's award is repugnant to the purposes and policies of the Act, deferral is appropriate where one interpretation of the arbitrator's decision is consistent with the Act, even if the Board would not necessarily reach the same result. *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659–660 (2005). In *Smurfit-Stone*, the Board deferred to an arbitrator's decision where a reasonable interpretation of the decision was that the employer was privileged to implement unilateral changes based on the management-rights clause contained in the parties' collective-bargaining agreement. Id. at 659. The Board reasoned: "(1) the [r]espondent argued to the arbitrator that the management-rights clause privileged it to unilaterally implement the new attendance control policy; (2) the arbitrator referred to the [r]espondent's argument; (3) the arbitrator prominently quoted the management-rights clause; and (4) the arbitrator immediately followed his quotation of the management-rights clause with the assertion that the [r]espondent had the right to make rules." Id. at 661. Based on these factors, the Board found that the arbitrator's decision was based on his construction of the management-rights clause and was thus susceptible to an interpretation consistent with the Act. The Board accordingly concluded that the decision was not repugnant to the Act, even though the arbitrator also discussed an inherent management prerogative theory.

The arbitrator's decision in this case is much like the arbitral award in *Smurfit-Stone*. Here, the Respondent argued that the management-rights clause in the collective-bargaining agreement privileged it to act, the arbitrator acknowledged that argument in his decision, and the arbitrator prominently quoted the management-rights clause in the section listing relevant contract provisions in his decision. The arbitrator ultimately concluded that the "Company's use of managerial discretion was proper and should not be seen as a violation of a binding past practice." Taken as a whole, the arbitrator's decision is thus susceptible to the interpretation that he found that the management-rights clause sanctioned the Respondent's change in the employees' payday and pay cycle.

We recognize that the arbitrator here also discussed the Respondent's noncontractual inherent management prerogatives. As in *Smurfit-Stone*, however, the arbitrator's decision is not dependent on that theory but contains sufficient textual evidence to establish that it is susceptible to the interpretation that he relied upon the management-rights clause. We accordingly find that the arbitrator's decision is not clearly repugnant to the Act.[4]

Columbian Chemicals Co., 307 NLRB 592 (1992), which the judge found to be controlling in this case, is plainly distinguishable. There, the respondent did not rely upon the management-rights clause in its argument, and the arbitrator did not cite it in his decision. Id. at 594. The arbitrator in *Columbian Chemicals* started his analysis from the position that the employer had a "fundamental right to establish reasonable plant rules," without referring to the management-rights clause, and then found that nothing in the collective-bargaining agreement took away the employer's right to make attendance rules. Id. Here, as in *Smurfit-Stone*, the arbitrator clearly relied upon the management-rights clause in reaching his decision. The arbitrator laid out the relevant provisions of the collective-bargaining agreement, including reciting the management-rights clause, at the beginning of his decision. As in *Smurfit-Stone*, he described the Company's arguments based on the clause, and concluded that the Company had the right to make the changes at issue.[5]

[3] See *Verizon California*, 364 NLRB No. 79, slip op. at 3 & fn. 9 (2016) (collecting cases).

[4] In this regard, we observe that the General Counsel bore the burden of proving that the arbitrator did not rely on the management-rights clause. We find that the General Counsel failed to carry his burden.

[5] As our dissenting colleague correctly points out, the arbitrator did frame the issue as whether "the Company's decision to change the pay period of the bargaining Unit and all non-salaried positions from weekly to bimonthly, despite the Union protest, violate[d] an established past practice that effectively bound the parties." The arbitrator did so because the parties were unable to stipulate to the wording of the issue,

We further find that the arbitrator adequately considered the unfair labor practice issue under the *Olin* standard: the contractual issue is factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to the unfair labor practice.[6] In this regard, we disagree with the judge's finding that the change in payday was not presented to the arbitrator. In reaching this conclusion, the judge relied on *Professional Porter & Window Cleaning Co.*, 263 NLRB 136 (1982). *Professional Porter*, however, is inapposite. The Board in that case found that the issue of whether the respondent violated Section 8(a)(1) of the Act by discharging an employee was neither presented to nor considered by the arbitrator because the union "submitted no evidence to the arbitrator on whether [the employee's] discharge was an unfair labor practice" and because "the issue was not litigated in any respect in [the arbitration] proceeding." Id. at 137. Here, in contrast, the factual and statutory issues presented are identical with regard to the change in pay cycle and payday. Both changes were implemented at the same time, prompted by the same event, made in reliance on the same contractual provisions, and deviated from the same past practice. Those are exactly the facts relevant to the statutory issue in this case with respect to both changes.[7] Furthermore, the Union's representative clearly presented the change in pay day to the arbitrator at the arbitration hearing. There is no additional factual evidence that the parties could have presented for the payday issue that would have led the arbitrator to a different conclusion from the one he reached on the pay cycle issue.

In sum, the General Counsel has failed to meet his burden to show that the standards for deferral have not been met in this case. Accordingly, we reverse the judge's decision and dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. November 2, 2016

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN PEARCE, dissenting.

Contrary to my colleagues, I would find that deferral to the arbitrator's decision is inappropriate. The arbitrator failed to make any finding whatsoever on the key contractual issue of whether the management-rights clause in the collective-bargaining agreement privileged the Respondent's unilateral changes. To the contrary, the arbitrator explicitly framed his inquiry around past practice and, as found by the administrative law judge, concentrated his analysis on the extra-contractual considerations pertinent to that inquiry. Although my colleagues speculate that the management-rights clause must have been part of the arbitrator's analysis, doing so is not reasonable when the arbitrator himself stated that he was focusing his analysis elsewhere. Accordingly, deferral is unwarranted because the arbitrator failed to consider the unfair labor practice issue. I would thus adopt the judge's finding, for the reasons stated in his decision, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Respondent over the change in payday and pay cycle.

As my colleagues acknowledge, one of the conditions for deferral is that the arbitrator adequately considered the unfair labor practice issue. *Olin Corp.*, 268 NLRB 573, 574 (1984). That condition is met if "(1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally

and therefore the arbitrator invoked the principal argument of the Union based on the Mitchell Jones grievance. This statement, however, does not establish that the arbitrator's decision cannot reasonably be interpreted to address whether the management-rights clause privileged the employer to implement the unilateral changes, which was the Company's counterargument, as set forth by the arbitrator.

In our view, the decision is susceptible to the interpretation that the arbitrator reasoned as follows. First, under article III, section 4 of the parties' agreement—the management-rights provision—management retains all authority not specifically abridged, delegated or modified by the agreement. Second, no provision of the agreement limits the Respondent's right to make the disputed changes. Third, the grievance is therefore to be denied *unless* the Union established the existence of a past practice that effectively bound the parties. Fourth, the Union did not establish a binding past practice. Conclusion: the grievance is denied. In other words, the arbitrator considered the issue of past practice only in response to the Union's principal defense to the conclusion that would otherwise follow from the management-rights clause. Finding that the Union failed to establish that defense, the arbitrator based his decision on the management-rights clause.

[6] We disagree with our dissenting colleague that the arbitrator failed to consider the unfair labor practice issue. The Company presented the arbitrator with arguments based on the management-rights clause, which the arbitrator considered among other contract provisions, and there are no facts relating to the contractual issue that do not also apply to the unfair labor practice issue. As explained above, the arbitrator's decision is susceptible to an interpretation that the management-rights clause privileged the employer to implement the unilateral changes without bargaining, and this is determinative of the unfair labor practice issue. See *Smurfit-Stone*, supra at 659.

[7] See *Dennison National Co.*, 296 NLRB 169, 170 (1989) (finding that the parties' contract and evidence of past practice constituted "ample evidence" relevant to the statutory issue).

with the facts relevant to resolving the unfair labor practice." Id. The unfair labor practice issue here is whether the Respondent violated its duty to bargain with the Union by unilaterally changing employees' payday and pay cycle. In *Dennison National Co.*, 296 NLRB 169 (1989), the Board considered whether to defer to an arbitrator's decision that a contractual management-rights clause gave the respondent the right to eliminate job classifications without giving the union notice and an opportunity to bargain. Id. at 169. In finding that the contractual issue was parallel to the unfair labor practice issue, the Board explained:

> The arbitrator considered the contractual question of whether the Respondent's unilateral elimination of the . . . job classification without giving the Union advance notice and opportunity to bargain violated the collective-bargaining agreement. The arbitrator, however, did not limit himself to that issue but also found that under the management-rights clause of the contract the Respondent had the right to act unilaterally. In an unfair labor practice proceeding on the merits of the statutory issue, the Board must consider whether the Respondent's action constituted a unilateral change in violation of its bargaining obligation under Section 8(a)(5) of the Act. The presence of contractual authorization for the Respondent's action is determinative of the unfair labor practice allegation.

Id. at 170 (footnotes omitted). Because the arbitrator had found that the contract authorized unilateral action, the Board concluded that the arbitrator had adequately considered the unfair labor practice issue.

In this case, however, the arbitrator framed his inquiry as whether "the Company's decision to change the pay period of the bargaining unit and all non-salaried positions from weekly to bimonthly, despite the Union protest, violate[d] an established past practice that effectively bound the parties?" The arbitrator's subsequent analysis focused on the common law of arbitration, considering factors such as whether the collective-bargaining agreement explicitly forbids a change in pay cycle or payday, whether the changes caused financial hardship to the employees, and whether the changes were "excessive or unnecessary." Indeed, the judge correctly found that the arbitrator had relied on these latter extra-contractual considerations in reaching his decision. While the arbitrator's analysis was thoroughly in line with his stated inquiry, that inquiry did not address what *Dennison National* properly described as the determinative issue under the National Labor Relations Act: the presence of contractual authorization for the Respondent's unilateral action.

My colleagues rely on *Smurfit-Stone Container Corp.*, 344 NLRB 658 (2005), in finding that the arbitrator's decision in this case was not repugnant to the purposes and policies of the Act. However, the Board in *Smurfit-Stone* found that it could reasonably interpret the arbitrator to have concluded that "the management-rights clause authorized [the Respondent's] implementation" of the change in policy at issue and "that the agreement gave the Respondent the right to make rules as long as they did not conflict with any provision of the agreement." Id. at 659. The *Smurfit-Stone* majority found this interpretation plausible, given the arguments presented to the arbitrator and the fact that the arbitrator followed his recitation of the management-rights clause with the statement that "it is the right of the Company to make the rules." Id. at 660 (internal quotations omitted). Here, conversely, there is no inferential or textual link between the arbitrator's summary of the parties' arguments and quotation of the management-rights clause and any assertion that the clause gave the Respondent the right to make rules. The arbitrator's later, isolated reference to "managerial discretion" is, as properly explained by the judge, simply one of the extra-contractual considerations relied upon in the arbitrator's past practice analysis. And unlike the arbitrator's decision in *Smurfit-Stone*, the arbitrator's decision in this case is not so ambiguous that it leaves open room for speculation. Id. Rather, the arbitrator's decision clearly sets out his analysis—an evaluation of past practice rooted in the common law of arbitration—and then considers the distinct contractual and extra-contractual factors that analysis entails. The management-rights clause was simply not one of those factors.[1]

My colleagues read the arbitrator's analysis to include evaluation of the management-rights clause. Their interpretation, however, contains a fatal flaw: there is no textual support for their assertion that the arbitrator first reasoned that "under Article III, Section 4 of the parties' agreement—the management-rights provision—management retains all authority not specifically abridged, delegated or modified by the agreement." Although the arbitrator's analysis section does, as my colleagues assert, reject the Union's contractual and past practice arguments, it does not mention the management-rights clause. Nor, as explained above, is it reasonable to

[1] In addressing the Union's argument that the contract specifically prohibited changes to payday and pay cycle, the arbitrator examined provisions relating to the official workweek and the hours an employee must work in a given workday, the grievance procedure, and the provision preventing the Respondent from making additions to the collective-bargaining agreement without mutual consent of the parties. The arbitrator did not examine the management-rights clause.

assume that the arbitrator engaged in this first analytical step when he overtly and exclusively framed his inquiry in terms of past practice. My colleagues' contention that the arbitrator's analysis "clearly" relied upon the management-rights clause is thus without foundation.[2]

Under these circumstances, it is unreasonable to find that the arbitrator made any finding on the issue of contractual authorization for the Respondent's actions. As a result, deferral to the arbitrator's decision is inappropriate.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. November 2, 2016

Mark Gaston Pearce, Chairman

NATIONAL LABOR RELATIONS BOARD

Susan B. Greenberg, Esq., for the General Counsel.[1]
Barry J. Rubenstein, Esq., for the Respondent.[2]

DECISION

STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. This case was tried before me in Starkville, Mississippi, on June 4, 2015.[3] The charge initiating the case was filed by Teamsters Local Union 984 (the Union) on December 30, 2013, and amended on March 19, 2015. After an investigation, the Government, on March 30, 2015, issued a complaint and notice of hearing (the complaint) against Weavexx, LLC (the Company). The complaint alleges (the Company, a subsidiary of Xerium Technologies, Inc., in January changed the unit employees' pay cycle from weekly to every other week and changed their payday from Thursday to Friday; and, did so without affording the Union an opportunity to bargain with the Company with respect to this conduct and the effects of this conduct. It is alleged these actions violate Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

The Union elected to take the case to arbitration and it was deferred by the Regional Director for Region 15 to the parties' grievance and arbitration procedure by letter, dated March 31.[4] In early July, the arbitrator issued an award, denying the grievance, concluding the Company's actions fell within its management rights.[5] On November 26, the Acting Regional Director for Region 15 notified the Company in writing she was revoking deferral of the charge.[6]

The Company in its answer to the complaint, at trial and in its post trial brief denies having violated the Act in any manner alleged in the complaint. Among other affirmative defenses, the Company contends the matter should have remained, or again be deferred, to arbitration and that its unilateral actions were within its contractual management rights.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. The parties entered into a written four page, 32 paragraph, stipulation of facts which was received into the record,[7] after which the Government called six witnesses and then all parties rested. I have reviewed the whole record, the post trial briefs, and the authorities cited. I conclude and find the Company violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT

The facts set forth below are compiled from the parties agreed and stipulated facts, as well as, from testimony, admissions, documentation received in evidence, and the pleadings. The facts are undisputed.

I. JURISDICTION

It is admitted the Company is a limited liability company, with an office and place of business located in Starkville, Mississippi, where it is engaged in the business of manufacturing, for nonretail sale, paper machine clothing products. Annually the Company, in conducting its operations, sold and shipped from its Starkville, Mississippi facility, goods valued in excess of $50,000 directly to points outside the State of Mississippi. The Company also purchased and received at its Starkville, Mississippi facility, goods valued in excess of $50,000 directly from points outside the State of Mississippi. It is admitted and I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Union's Certification and the Collective-Bargaining Agreement

The Union was certified on December 2, 1966, as the exclusive collective-bargaining representative of certain employees described in the related-representation case, Case 26–RC–002780. The unit, as described in the parties collective-

[2] Although the Respondent raised the issue of the management-rights clause, the arbitrator's analysis was plainly focused elsewhere.

[1] I shall refer to counsel for the General Counsel as counsel for the Government and to the General Counsel as the Government.

[2] I shall refer to counsel for the Respondent as counsel for the Company and to the Respondent as the Company.

[3] All dates are 2014, unless indicated otherwise.

[4] The Regional Director indicated she was deferring the matter because: the parties collective-bargaining agreement provides for final and binding arbitration; the changes regarding moving from a weekly to biweekly pay cycle and moving the payday from Thursday to Friday were encompassed by the terms of the collective-bargaining agreement; the Company was willing to process a grievance concerning the changes, and, if necessary, arbitrate the grievance and waive time limitations to ensure arbitration; and, since the issues of the charge appear to be covered by the collective-bargaining agreement it was likely the matter may be resolved through the grievance/arbitration procedure. GC Exh. 10.

[5] GC Exh. 9.

[6] GC Exh. 8.

[7] GC Exh. 16.

bargaining agreement, consists of the following employees:

> All production and maintenance employees including group leaders, employed at the Company's plant located at Highway 12, Starkville, Mississippi, excluding office clerical employees, professional employees, managerial employees, watchmen, guards and supervisors as defined in the Act.

There are approximately 200 employees in the bargaining unit. The most recent collective-bargaining agreement is effective by its terms from March 20, 2011, to March 20, 2016. The agreement includes a management-rights clause at article III, which reads, in pertinent part, that the Company retains all rights not specifically "abridged, delegated or modified by the Agreement, including, but not limited to, the right to make and enforce work and safety rules."[8] Section 4 of article III states: "[d]uring the term of this agreement, the Company will not implement new work rules or policies relating to terms and conditions of employment without notice to the Union and the opportunity for the Union to raise concerns and to grieve any change it deems unreasonable." Additionally, article XIII, section 48, sets forth a grievance procedure as well as a provision for the Company and the Union to have regular monthly meetings. The scope of authority for an arbitrator is outlined in article XIII, section 48, as follows:

> The jurisdiction and authority of the arbitrator and his opinion and award shall be exclusively limited to disputes arising under the express terms of this Agreement. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement or any Agreements supplemental hereto. The arbitrator shall not have jurisdiction or authority to substitute his judgment or discretion for that of management in any area that has not been delegated him by the parties and the terms of this Agreement.[9]

B. Changes to Pay Period and Payday

For at least 12 years prior to the January 10 payday, the Company paid its bargaining unit employees on a weekly basis; every Thursday. Commencing with the January 10 payday, the Company paid its bargaining unit employees every other Friday.

On November 6, 2013, Plant Manager Ross Johnstone, Human Resources Manager Jennifer Lanier, Chief Steward Fara Sue Brooks, and Shift Stewards Darryl Grace and Kenny Jackson met at the Company's facility for a monthly meeting as provided for at article XIII of the parties collective-bargaining agreement.[10] At this meeting, Johnstone informed the Union's representatives the Company would be changing its pay cycle from weekly to every other week and payday would be every other Friday instead of every Thursday. Johnstone told the Union's representatives the Company was implementing the new pay cycle and Friday payday as part of a corporate wide change effective the first pay period after January l. The Company did not tell the Union's representatives there were any exigent circumstances necessitating implementation of the changes to its pay cycle from weekly to every other week or its payday from Thursday to every other Friday, nor did the Company explain that any exigent circumstances existed at the time the changes were implemented.[11] The parties stipulated that the changes to the pay cycle and the payday are a mandatory subject of bargaining and, the Company did not afford the Union an opportunity to bargain about the implementation of the changes to the pay cycle and payday of the bargaining unit employees.[12]

On November 14 and 15, 2013, the Company held meetings with its employees to announce the Company was implementing a new pay system effective January 1. At these meetings, the Company distributed a memorandum from Mike Bly, executive vice president for Global Human Resource for Xeriurn Technologies, Inc. The memorandum, dated November 11, 2013, announced to the bargaining unit employees the Company was implementing a new pay system effective January 1, and bargaining unit employees would be paid every other week on Friday beginning January 10. On November 27, 2013, the Company issued a memorandum dated November 26, 2013, to "Starkville Unit Team Members" from "Xerium Human Resources" with the subject "Response to Questions You Raised." The last weekly pay date was December 26, 2013, and the next payday for the bargaining unit employees was January 10.

On November 18, 2013, unit employee Mitchell Jones filed a grievance protesting the announced implementation of changes to the pay cycle and payday of bargaining unit employees. Additional bargaining unit employees subsequently filed grievances protesting the announced implementation of changes to the pay cycle and payday of bargaining unit employees.

On December 9, 2013, Plant Manager Johnstone issued a third-step answer to the grievances filed by bargaining unit employees, denying the grievances. The answer, signed by Human Resources Manager Lanier on Johnstone's behalf, reads, in part: "The change to a biweekly payroll schedule is a legitimate exercise of the Company's Management Rights under Article III of the contract."

On December 5, 2013, the Company and the Union met to discuss work-related issues at a contractually sanctioned monthly meeting. At the meeting, the Union again did not agree to the announced changes to the pay cycle and payday of bargaining unit employees. The Company again did not afford the Union the opportunity to bargain about the implementation of the changes to the pay cycle and payday of bargaining unit employees.

[8] GC Exh .2, p. 5, secs 3–4.

[9] GC Exh. 2, p. 17.

[10] The parties admit or stipulate that Plant Manager Ross Johnstone and Human Resources Manager Jennifer Lanier are supervisors and/or agents of the Company within the meaning of Sec. 2(11) and (13) of the Act. It is specifically stipulated that on November 6, 2013, Johnstone and Lanier held those positions and that Terry Lovan was union president, Fara Sue Brooks was the chief steward, Darryl Grace the swing-shift steward, Bruce Spencer the first-shift steward and Kenny Jackson the second-shift steward. As of the trial herein Byron Myers serves as plant manager.

[11] The parties specifically stipulated the Union did not agree to the announced changes to the pay cycle and paydays of the bargaining unit employees.

[12] The parties also stipulated, for purposes of this hearing, the change to the pay cycle from weekly to every other week and of the paydays from Thursday to Friday were material, significant, and substantial changes.

The parties agreed to arbitrate the grievance filed by Jones. Arbitrator Samuel J. Nicholas Jr. conducted the arbitration on Apri1 25. Company counsel and the president of the Union represented the parties at the arbitration. Arbitrator Nicholas issued his decision, denying the grievance, on July 8. On July 11, Company counsel transmitted a copy of Arbitrator Nicholas' decision, by email, to an agent of Region 15 of the Board. On November 26, Acting Regional Director Susan Crochet issued a letter revoking deferral of the charge in this case. Portions of Acting Director Crochet's letter follow:

> Subsequent investigation has revealed that the grievance was taken to arbitration and the arbitrator issued his decision. However, after review of the arbitrator's decision, it has been determined that the decision in this matter does not meet the standards set out in *Spielberg Manufacturing Co*., 112 NLRB 1080 (1995) and *Olin Corporation*, 268 NLRB 573 (1984) in that the evidence fails to reflect that the facts relevant to resolving the unfair labor practice were presented, considered, and decided by the arbitrator. Therefore, deferral to the arbitrator's decision is not appropriate. See, e.g., *Columbian Chemicals Company*, 307 NLRB 592 (1992) (deferral inappropriate when arbitrator based his decision on an extra-contractual residual rights theory inconsistent with the Act). Consequently, you are hereby advised that the Region is revoking its deferral action and will resume processing the charge.

III. DISCUSSION, LEGAL ANALYSIS, AND CONCLUSIONS

A. Unilateral Changes In Pay Cycle and Payday

It is undisputed the Company changed the timing of the pay cycle form weekly to biweekly and the payday from every Thursday to every other Friday on January 10. It is also undisputed the Company did not give prior notice nor offer to bargain with the Union regarding the changes.

Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." *NLRB v. Katz*, 369 U.S. 736 (1962). Since *NLRB v. Katz*, it has been unlawful under Section 8(a)(5) for an employer to circumvent its bargaining obligation with the 9(a) representative of its employees by making unilateral changes in their wages, hours, and other terms and conditions of employment.[13] A unilateral modification or repudiation of such provisions during a contract term is a violation of Section 8(a)(5). *Rapid Fur Dressing*, 278 NLRB 905 (1986) (the company unilaterally discontinued its contractually required payments to the pension plan and vacation fund in violation of Sec. 8(a)(5)).

A unilateral change of a mandatory subject of bargaining is unlawful only if it is "material, substantial, and significant." *Alamo Cement Co.*, 281 NLRB 737, 738 (1986). It is admitted company employees were subjected to unilateral changes with respect to their payday schedule and pay cycle. The Company simply announced the changes without any effort to bargain with the Union. The parties stipulated the changes were mandatory subjects of bargaining and that changes to the pay cycle from weekly to every other week and payday from Thursdays to Friday were material, significant and substantial changes.

The Union was entitled to notice and an opportunity to bargain over the changes to the payday and pay cycle. See *Abernathy Excavating,* 313 NLRB 68, 68 fn. 1 (1993) (unilateral change of payday from Thursday to Friday was a mandatory bargaining subject and, when made without notice and bargaining, violated the Act); Also see *American Ambulance*, 255 NLRB 417, 421 (1981), enfd. 692 F.2d 762 (9th Cir. 1982); *King Radio Corp*., *Inc.*, 166 NLRB 649, 654 (1967) (Board adopted the judge's finding that changing unit employees pay cycle from weekly to biweekly without notice to and bargaining with the union violated the Act). Accordingly, I find the Company violated Section 8(a)(5) and (1) of the Act when it unilaterally, without notice or bargaining, changed unit employees pay cycle from weekly to biweekly and changed unit employees' paydays from Thursday to every other Friday.

B. The Management-Rights Clause and Other Defenses[14]

The Company failed to establish any exigency that would justify, without notice or bargaining, the unilateral changes made here and the Company so stipulated. Although all elements necessary to constitute unlawful unilateral changes have been established, as set forth above, the Company denies its actions violated its duty to bargain collectively because its conduct was within its contractual rights outlined in the management-rights section of the parties collective-bargaining agreement and/or its conduct was within the parameters of one or more exceptions that would allow for unilateral changes by an employer without violating the Act.

One of the exceptions allowing unilateral changes, the Company advanced, involves the issue of waiver. Did the Union here waive its right to bargain about the payday and pay cycle by its agreement to the management-rights clause of the collective-bargaining agreement? I find it did not. Management-rights clauses typically reserve for an employer the right to act unilaterally with respect to specified topics which may sometimes be construed as a waiver. *Allison Corp.,* 330 NLRB 1363, 1365 (2000). The Board in *Johnson-Bateman Co.,* 295 NLRB 180, 184 (1989), however, noted "It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable. Accordingly, the Board has repeatedly held that generally worded management rights clauses or 'zipper' clauses will not be construed as waivers of statutory bargaining rights [footnotes omitted]." Here, the management-rights clause makes no explicit, or even general, reference to payday or pay cycle nor does the parties' collective-bargaining agreement even mention changing the pay cycle or payday. That portion of the management-rights clause stating the Company "retains all authority not specifically abridged, delegated or modified" by the parties collective agreement is an overbroad general clause and will not, in itself, constitute a waiver of statutory rights, especially where, as here, the subject of the purported waiver is not ex-

[13] The Supreme Court reiterated this rule of law in *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991) ("an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment").

[14] GC Ehx. 2, art. III, secs. 3 & 4.

plicitly stated. See: *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). The Board has repeatedly held that a generally worded management-rights clause does not constitute a clear and unmistakable waiver of statutory rights. See, e.g., *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992) ("general" contractual right to make "reasonable rules and regulations" insufficient to constitute clear and unmistakable waiver), enfd. mem. 25 F.3d 1044 (5th Cir. 1994). In summary, on the waiver issue, I find the language "retains all authority not specifically abridged, delegated or modified by the Agreement" to be too broad and vague to find the Union clearly and unmistakably waived the right to bargain over any change in working conditions, such as payday and pay cycles, not covered in the parties collective-bargaining agreement and the language in no way permits the Company to make the unilateral changes it made, without violating the Act.

Another exception allowing unilateral changes, in limited circumstances, is where there is an established or traditional past practice that a company would be following. Was the Company here privileged to make the unilateral changes it did in keeping with an established past practice? I find it was not. The change in pay cycle and payday did not result from a traditional practice existing prior to any negotiations or collective-bargaining agreement; in fact, the change was a significant deviation from a longstanding (12 year) practice of unit employees being paid every week on Thursday.

C. Arbitrator's Decision

The Company, in its post trial brief, limited its analysis of the case exclusively to the deferral issue. It argues this matter has already been resolved by the parties' arbitration mechanisms and the decision of the arbitrator, finding no violation on behalf of the Company, should be upheld, as the Regional Director originally deferred the matter to arbitration.

In *Spielberg Mfg. Co*., 112 NLRB 1080 (1955), the Board ruled it would give deference to an arbitrator's resolution of an unfair labor practice claim if certain conditions are met. The Board's policy to defer has been refined in subsequent cases following *Spielberg*; however, *Spielberg* remains the seminal statement of the Board's deference policy. The Board's conditions are: (1) the unfair labor practice was presented to and considered by the arbitrator; (2) the arbitration proceedings were fair and regular; (3) the parties agreed to be bound by the arbitration award; and (4) the arbitration award was not clearly repugnant to the purposes and policies of the Act. The Board in *Olin Corp*., 268 NLRB 573, 574 (1984), spoke to the considerations necessary with regard to the unfair labor practice being presented to and adequately considered by the arbitrator and stated in part as follows:

> Accordingly, we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer. Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.

I am persuaded the Government affirmatively demonstrated the standards for deferral here have not been met.

First, the arbitrator did not consider one of the two unfair labor practices alleged in the complaint. The issue of the Company's changing the payday from Thursday to Friday was not presented to, considered, or decided by the arbitrator. The arbitrator's description of the "issue" before him: ("The parties were unable to stipulate to the wording concerning the issue of the grievance. Therefore, your Arbitrator has framed the issue(s) as follows: did the Company's decision to change the pay period of the bargaining Unit and all non-salaried positions from weekly to bimonthly, despite the Union protest, violate an established past practice that effectively bound the parties?"); reflects he did not consider the change in the payday issue. The Board will not defer where a statutory issue is not presented to the arbitrator. *Professional Porter & Window Cleaning Co*., 263 NLRB 136, 136–137 (1982).

Second, the arbitrator did not base his decision on contractual provisions but rather on extra-contractual considerations. The arbitrator concluded the change in the payroll period from weekly to biweekly was a "managerial decision" that allowed the Company to make "an institutional change" and was a proper use of "managerial discretion" and should not be seen as a violation of "a binding past practice." The arbitrator's decision, simply stated, is not "susceptible to an interpretation consistent with the Act." The arbitrator, while setting forth the management-rights provisions of the collective-bargaining agreement, did not discuss and/or address whether, or how, any provision(s) of the two sections of the management-rights clause authorized the Company to take the action it did or that the Union waived its right to bargain about pay periods or cycles which are mandatory subjects of bargaining. Stated differently, there is no indication in the arbitrator's decision that he found any language in the management-rights clause that constituted, or that he considered constituted, a waiver of bargaining rights by the Union. The arbitrator found, without explanation, a managerial right not contained in the applicable provisions of the collective-bargaining agreement that conveyed to the Company the right to change pay cycle, a mandatory subject of bargaining. The Board has long held that deferral is not appropriate where a respondent's defense is not reasonably based on an interpretation of the collective-bargaining agreement. See *Oak Cliff-Golman Baking Co*., 202 NLRB 614, 616–617 (1973). The arbitrator here did not look to any particular language in the management-rights clause that might

support the Company's position, but did note that section 58 of the contract limited the Union's position. That section of the collective-bargaining agreement states: "The specific provisions of this Agreement are the sole source of any rights which the Union or any member of the bargaining unit may charge that the Employer has violated in raising a grievance." The arbitrator concluded the pay cycle was not part of the agreement, and its absence it allowed the Company to "make an institutional change" that did not affect the agreement. The Board in, *Columbian Chemicals Co*., 307 NLRB 592, 592 fn.1 (1992), rejected recognition by an arbitrator of a right that was not in the contract which afforded the employer "a basic management prerogative" to take unilateral action. The Board specifically stated: "we note particularly that the arbitrator did not rely on the management-rights clause to find the Respondent's conduct privileged. Instead, *quite apart from the contract*, he found that there was a 'basic management prerogative' to take the action. He then found nothing in the contract to take away that prerogative. In these circumstances, it is clear that the arbitrator did not rely on the management-rights clause to find the managerial prerogative [emphasis in original]." In agreement with counsel for the Government, *Columbian* is applicable and controlling here. Managerial discretion, or prerogative, outside the contract, as the arbitrator here found, will not legally permit an employer to unilaterally change mandatory working conditions. See also *Ciba-Geigy Pharmaceuticals Div*., 264 NLRB 1013 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). The case here is distinguishable from *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659–660 (2005), on which the Company seeks to have the matter deferred. In *Smurfit-Stone,* the Board found the arbitrator's decision, while not a model of clarity, was at least susceptible to the interpretation that it was based on his construction of the management-rights clause. Here, as in *Columbian Chemicals*, the arbitrator's decision is clearly repugnant, in that it is based on extra-contractual management prerogatives not susceptible to an interpretation consistent with the Act and is palpably wrong.

Additional facts indicate the arbitrator considered extra-contractual rights in arriving at his decision. He concluded he "must address whether the change in pay period was excessive or unnecessary." The arbitrator presumed "the vast majority of hourly workers in present day bargaining units are paid on a bimonthly basis." And, because the Company "implement[ed]" the change on a nationwide scale, the arbitrator "presumed" that said change "was for the purpose of improving efficiency of operations and did not require the approval of the Union." Further the arbitrator also considered, outside the contract, whether the change in pay periods "negatively" affected the employees' compensation or caused any loss of employment benefits. Concluding no losses he found the change to the pay period "a managerial decision" that did not adversely affect the unit employees.

In summary the arbitrator's decision is repugnant to the Act and may not be deferred to. Thus, the unfair labor practices found here must be remedied.

CONCLUSIONS OF LAW

1. The Company, Weavexx, LLC, Starkville, Mississippi, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Teamsters Local Union 984, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, Teamsters Local Union 984, has been and continues to be, the exclusive bargaining representative for the purposes of collective bargaining within the meaning of Section 9(a) of the Act the employees employed by Weavexx, LLC, in the following unit:

> All production and maintenance employees including group leaders, employed at the Company's plant located at Highway 12, Starkville, Mississippi, excluding office clerical employees, professional employees, managerial employees, watchmen, guards and supervisors as defined in the Act.

4. Failing to provide Teamsters Local Union 984 with notice or an opportunity to bargain concerning any changes to the unit employees pay cycle or payday which are mandatory subjects of bargaining Weavexx, LLC, violated Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices of Weavexx, LLC, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, find it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I specifically recommend the Company be ordered to bargain with the Union concerning any changes to the unit employees' pay cycle and payday and if requested by the Union, rescind the changes in the pay cycle and/or payday the Company unilaterally made on or about January 10, 2014, and make unit employees whole for any loss suffered as a result of the unilateral changes. The money due shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 501 (6th Cir. 1971), with interest as prescribed in *New Horizons,* 283 NLRB 1171 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Additionally, I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Company, Weavexx, LLC, Starkville, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Failing and refusing to bargain with Teamsters Local Union 984 concerning changes to the unit employees pay cycle and payday.

(b) Failing and refusing to bargain collectively in good faith with Teamsters Local Union 984 as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> Including all production and maintenance employees including group leaders employed at the Company's plant located at Highway 12, Starkville, Mississippi, excluding office clerical employees, professional employees, managerial employees, watchmen, guards, and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain with Teamsters Union Local 984 concerning any changes to the unit employees' pay cycle and payday.

(b) Upon request of Teamsters Local Union 984, rescind the changes to the Unit employees pay cycle and payday we unilaterally made on/or about January 10, 2014.

(c) Make Unit employees whole for any losses suffered as a result of the unilateral changes.

(d) Within 14 days after service by the Region, post at its facility at Starkville, Mississippi, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since January 10, 2014

(e) Notify the Regional Director for Region 15 in writing within 20 days from the date of this Order what steps the Company has taken to comply.

Dated, Washington, D.C. August 6, 2015

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT refuse to bargain collectively in good faith with Teamsters Local Union 984 as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> Including all production and maintenance employees including group leaders employed at the Company's plant located at Highway 12, Starkville, Mississippi, excluding office clerical employees, professional employees, managerial employees, watchmen, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to provide notice to and afford an opportunity to bargain in good faith with Teamsters Local Union 984 concerning any changes to Unit employees pay cycle or payday.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL bargain in good faith with Teamsters Local Union 984 as the exclusive collective-bargaining representative of our employees in the above-described appropriate unit.

WE WILL, upon request of Teamsters Local Union 984, rescind the changes to the Unit employees pay cycle and payday we unilaterally made on/or about January 10, 2014.

WE WILL make unit employees whole for any losses suffered as a result of the unilateral changes.

WEAVEXX, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-119783 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.