Department of Labor and Industry
Board of Personnel Appeals
PO Box 201503
Helena, MT 59620-1503
(406) 444-2718

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 13-2010

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, AFL-CIO Complainant, -vs- ANACONDA SCHOOL DISTRICT NO. 10, Defendant.	INVESTIGATIVE REPORT AND FINDING OF PROBABLE MERIT

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I. Introduction

On December 7, 2009, the International Union of Operating Engineers, Local 400, AFL-CIO, hereinafter Local 400 or Union, filed an unfair labor practice charge with the Board of Personnel Appeals alleging that the Defendant unilaterally changed work schedules without notice and without an opportunity for Local 400 to bargain about the changes or their impact on bargaining unit employees. Violations of 39-31-401 (1) and (5) are alleged by the Union. Karl Englund, attorney at law, represents Local 400.

John Andrew was assigned by the Board to investigate the charge and has reviewed the information submitted by the parties and communicated with them as necessary in the course of the investigation.

II. Discussion

The certified mail receipt on record with the Board of Personnel Appeals shows that the summons in the above matter was served on Anaconda School District No. 10 on December 9, 2009. The summons required a response from the Defendant within 10 days of service. To date no response to the summons has been filed with the Board.

On their face, and particularly in the absence of a response from Anaconda School District No. 10, the allegations of Local 400 are sufficient to warrant a finding of probable merit. If shown to have occurred the actions of the District constitute unilateral changes in mandatory subjects of bargaining and a violation of 39-31-401 (1) and (5) MCA. Accordingly, pursuant to Section 39-31-405, MCA, probable merit to the charge is found and a notice of hearing will be forthcoming.

Dated this 29th day of December, 2009.

BOARD OF PERSONNEL APPEALS

By: _____
John Andrew
Investigator

NOTICE

ARM 24.26.680B (6) provides: As provided for in 39-31-405 (4), MCA, if a finding of probable merit is made, the person or entity against whom the charge is filed shall file an answer to the complaint. The answer shall be filed within ten (10) days with the Investigator at PO Box 201503, Helena MT 59620-1503.

* *

CERTIFICATE OF MAILING

I, _____, do hereby certify that a true and correct copy of this document was mailed to the following on the 30th day of December 2009, postage paid and addressed as follows:

KARL ENGLUND
ATTORNEY AT LAW
PO BOX 8358
MISSOULA MT 59807

JOHN RIORDAN
IUOE LOCAL 400
58 WEST QUARTZ
BUTTE MT 59701

SUPERINTENDENT TOM DARNELL
ANACONDA SCHOOL DISTRICT NO 10
400 MAIN STREET
ANACONDA MT 59711

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 13-2010:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, AFL-CIO,	)	Case No. 956-2010
Complainant,	)	**FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER**
vs.	)	
ANACONDA SCHOOL DISTRICT NO. 10,	)	
Defendant.	)	

* * * * * * * * * *

I. INTRODUCTION

On December 7, 2009, the International Union of Operating Engineers Local 400, AFL-CIO ("Local 400") filed an unfair labor practice charge with the Board of Personnel Appeals, alleging that Anaconda School District No. 10 ("District") unilaterally changed work schedules without notice and without an opportunity for the Local 400 to bargain about the changes. On December 29, 2009, Board Agent John Andrew issued an Investigative Report and Finding of Probable Merit, transferring the charge to the Hearings Bureau for hearing.

The original charges alleged that the District had made two unilateral changes to work schedules, in violation of Mont. Code Ann. § 39-31-401(1) and (5). One change (dropped by Local 400 at hearing) involved requiring the affected employees to come to work on weekends in the winter to check the boilers and then adjusting the employee's regular weekday schedule to avoid paying overtime. The second change involved changing the hours of work for employees working the day shift.

Hearing Officer Terry Spear convened a contested case hearing in this matter on June 21, 2010. Karl Englund represented Local 400. Tony C. Koenig represented the District.

Local 400's Exhibits 1, 2, and 3 were admitted into evidence. John Riordan, Joel Morales, John Andrews (member of Local 400 and an affected employee, not Board Agent John Andrews), Tom Darnell, and Paul Furthmyre testified under oath.

The parties submitted post-hearing proposed decisions and briefs, with Local 400 filing the final brief on July 29, 2010.

II. ISSUE

Did the Anaconda School District No. 10 commit unfair labor practices in violation of Mont. Code Ann. § 39-31-401, et seq., by unilaterally changing the work schedules for the stationary engineers without notice and without an opportunity for Local 400, their bargaining representative, to bargain about the changes?

III. FINDINGS OF FACT

1. Local 400 is a "labor organization" and the District is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(6) and (10).

2. Local 400 and the District have been parties to a series of Collective Bargaining Agreements ("CBAs"), the latest of which is from August 1, 2008 through July 31, 2010. The CBAs cover a bargaining unit consisting of stationary engineers ("engineers") – custodians and maintenance workers – that the District employs. There are five members of this bargaining unit,[1] and all but one work the day shift.

3. Local 400 employs a full-time employee as a business agent in Butte who covers southwest Montana and services this bargaining unit. Historically, the business agent is the chief spokesman for the bargaining unit.

4. The collective bargaining agreement does not and historically has not detailed a specific work schedule.[2] The long-standing and well-established practice since 1972 has been that during the school year, engineers assigned to the day shift work from 7:00 a.m. to 3:00 p.m., Monday through Friday. While working this schedule, engineers ate lunch as time allowed or "on the fly."

5. On August 17, 2009, District Superintendent Tom Darnell met with the District's building administrators. No engineers were present. Darnell informed the building administrators that the engineers' hours of work would be changed to include a half-hour lunch break and that their hours of work would be changed to 7:00 a.m. to 3:30 p.m. Darnell informed the administrators he would be meeting with the engineers on August 26, 2009 to discuss this change. On August 24, 2009, Darnell met again with his administrators, with no engineers present. He again

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[1] There were six members until one retired on December 31, 2009. The District either eliminated or has not filled that position.

[2] The collective bargaining agreement provides both that during the summer months, "all engineers have the option of working four ten hour shifts" and that "a work day shall consist of eight (8) hours, and forty (40) hours shall constitute a week's work." Exhibit 1, Article VII, Section A.

informed the administrators that the hours of work of engineers "would probably be moved."

6. The collective bargaining agreement provides that once a month the District and the engineers meet to allocate upcoming overtime necessitated by the District's extracurricular events. The meetings were held on the last Wednesday of each month. During the 2008-09 school year, the meetings were held in the boiler room of the high school and were attended by the engineers, Local 400 business agent John Riordan, and high school principal Paul Furthmyre. Darnell did not attend any of these meetings during the 2008-09 school year. There were no meetings in June or July of 2009, because there were no extracurricular events over the summer. The August meeting was scheduled for August 26, 2009.

7. The District scheduled the August 26, 2009 meeting in Darnell's office. Darnell did not notify the Local 400's business agent or the local unit steward before this meeting that he intended to attend this meeting and to address the subject of changing the day shift hours of work.

8. The August 26, 2009 meeting was held in Darnell's office. All bargaining unit members were present, as were Riordan (the Local 400 business agent), Furthmyre, and Darnell. There are differences in testimony from the persons attending about the words used by Darnell. It is more likely than not that he told the engineers that students were in the buildings before 7:30 a.m. and after 3:00 p.m., and that the District needed engineer coverage from 7:00 a.m. to 3:30 p.m. Darnell told them that the longer shift would include a half-hour duty-free lunch, with lunch times staggered so not all engineers were at lunch at the same time. He directed the engineers to consult with their building administrators to schedule the times of their lunch half-hours. He also invited the engineers to comment upon and make suggestions about the proposal.

9. The District participants in the August 26, 2009 meeting believed that the engineers and Local 400 had just been given a chance to address the change, and the District took no immediate action to implement the change while they awaited a response from Local 400.

10. The Local 400 membership at the August 26, 2009 meeting did not respond with any consensus comments regarding the changes to their day shift schedule. Although Darnell suggested that they think about how they would like their work day and lunch period to be structured, they thought that the decision to change to the 7:00 a.m. to 3:30 p.m. schedule seemed to be a "done deal."

11. After the August 26, 2009 meeting, Local 400 had the right to protest and to request bargaining, but did not protest or request bargaining about the schedule change.

12. At the October 6, 2009 weekly meeting of Darnell and the building principals, which the engineers were directed to attend, Darnell announced that as of October 12, 2009, the engineers' day-shift schedule would be changed to 7:00 a.m. to 3:30 p.m., with a half-hour duty-free lunch, with the lunch times staggered and the exact lunch time for each engineer to be determined by the building administrators.

13. Local 400 did not protest or request bargaining about the schedule change after the October 6, 2009 meeting.

14. As announced on October 6, 2009, effective October 12, 2009, the District unilaterally changed the regular day shift work schedule by requiring the engineers to come to work at 7:00 a.m., to take a duty-free half-hour lunch as scheduled with and by the building administrators, and to work until 3:30 p.m.

15. There is no evidence that Local 400 and the unit members discussed, conferred, or considered providing any counterproposals or arguments regarding the proposed change, from the date they received notice of it through the date it was effectuated.

16. The District's goal in proposing and ultimately implementing the change in shift schedule was to establish expanded engineer coverage. It saw the best method to do so without incurring overtime was by adding a half-hour duty-free lunch, staggering the lunches to maintain some engineer coverage throughout the expanded work day, with engineer coverage throughout the expanded 7:00 a.m. to 3:30 p.m. day shift. There is no substantial and credible evidence that the District would have refused to bargain had Local 400 demanded bargaining.

17. The Hearing Officer considers it self evident that the engineers did not want their work day expanded from eight hours to eight and a half hours, even with a half-hour duty-free lunch. The sole reason proffered in this case for Local 400 not demanding bargaining, to propose an alternative schedule change[3] or to seek recompense for the District's proposed expanded schedule, was that the unit members believed Darnell had already decided upon the particular schedule change proposed by the District at the August 26, 2009 meeting.

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[3] There is no record of available alternatives to the District's proposal. For example, two or three engineers starting eight hour shifts at 7:00 a.m. and the rest of the day shift engineers starting eight hour shifts at 7:30 a.m. would have provided the same overall coverage. The practicality and acceptability of this or any other alternative proposal are therefore unknown.

18. The District asked the engineers and their business agent to comment upon and make suggestions about the proposal, even though bargaining was not mentioned. Local 400 and the engineers had notice of the proposed change, and thereby a genuine opportunity to demand bargaining on the proposal for 47 days (almost seven weeks) before it was actually implemented.

IV. DISCUSSION[4]

Montana law gives public employees the right of self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities. Mont. Code Ann. § 39-31-201. The law further authorizes the Board of Personnel Appeals to decide what units of public employees are appropriate for collective bargaining purposes. Mont. Code Ann. § 39-31-202.

An employer violates Mont. Code Ann. § 39-31-401(5) by unilateral change to any employment term or condition subject to mandatory bargaining. *NLRB v. Katz,* 369 U.S. 736 (1962); *Bigfork Area Ed. Assoc. v. Flathead & Lake Cty S.D. No. 38,* ULP # 20-78; *GTE Automatic Electric*, 240 NLRB 297, 298 (1979) ("It is well established that, during the existence of a collective-bargaining contract, a union has a right to bargain about the implementation of a term and condition of employment, and an employer must bargain about a mandatory subject of bargaining not specifically covered in the contract or unequivocally waived by the union.").[5]

Employee work schedules, the length of the work day, and the length and the scheduling of employees' lunch breaks are all mandatory subjects for collective bargaining. ***E.g.***, *Meat Cutters Locals v. Jewel Tea Co,* 381 U.S. 679, 691 (1965); *Weston & Booker Co.,* 154 NLRB 747 (1965), ***enf'd,*** 373 F.2d. 741 (4th Cir. 1967). Breaks are mandatory subjects of bargaining. *Atlas Microfilming,* 267 NLRB 682 (1982); ***enf'd,*** 753 F. 2d 313 (3rd Cir. 1985).

During the term of an existing CBA, if the employer seeks to change employment conditions covered by that existing contract, the employer must bargain over the change. Mont. Code Ann. § 39-31-306(3) (imposing the requirement that a collective bargaining contract must be "enforced under its terms."). Likewise, if the employer seeks to change employment conditions not covered by the existing CBA, but which have been a long and well-established practice, the employer must also

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[4] Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

[5] A violation of Mont. Code Ann. § 39-31-401(5) necessarily includes a derivative violation of Mont. Code Ann. § 39-31-401(1). ***See e. g.*** *Teamsters Local No. 2 v. City of Missoula,* ULP # 6-86; *Standard Oil Company of California v. NLRB,* 399 F.2d 639, 642 (9th Cir. 1968).

bargain over the change. *Milwaukee Spring Div.,* 268 NLRB 601, 602 (1984), ***aff'd*** 765 F.2d 175 (D.C. Cir. 1985).[6]

The District has not presented persuasive or precedential authority that it had the right to make the change in the engineers' schedule, despite the long and well-established practice of a 7:00 a.m. to 3:00 p.m. day shift for the engineers, without bargaining. Thus, the issue presented can be restated as whether the District unilaterally changed the work schedules for the stationary engineers without an opportunity for Local 400, their bargaining representative, to bargain about the changes. Whether the notice given was adequate and whether the District presented the change as a fait accompli are the two subissues involved.

In this context, a succinct statement of the N.L.R.B.'s position appears in *AT&T Corp.*, 325 NLRB 150, 153 (1997):

> Under the Act, before an employer may effect a material and substantial change in its employees' wages, hours, and other terms and conditions of employment, it must notify the employees' collective bargaining representative and afford the representative an opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736 (1962); *Daily News of Los Angeles*, 315 NLRB 1236, 1237-1238 (1994), ***enf'd.*** 73 F.3d 406 (D.C. Cir 1996). The notice given to the union must be more than a fait accompli and must be sufficient to afford a meaningful opportunity to bargain before the change is implemented. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); *Intersystems Design Corp.*, 278 NLRB 759 (1986); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), ***enf'd.*** 722 F.2d 1120 (3rd Cir. 1983). Once the union is on notice regarding a proposed change, however, it must act with due diligence to request bargaining or be deemed to have waived its rights by inaction. *Kansas Education Association*, 275 NLRB 638 (1985); *City Hospital of East Liverpool*, 234 NLRB 58 (1978).

Basically, if the employer has given adequate and proper notice of the proposed change, it need not bargain over the proposal if the union waives its right to

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[6] *See also, Communications Workers*, 280 NLRB 78, 82 (1986), ***enforced***, 818 F.2d 29 (4th Cir. 1987); *Chemical Workers*, 228 NLRB 1101 (1977); ***cf.*** *E.I. duPont de Nemours & Co.*, 294 NLRB 563 (1989), ***remanded***, *Martinsville Nylon Employees Council v. NLRB,* 969 F.2d 1263, 1269-70 (D.C.Cir.1992)

bargain by failing to request bargaining. *YHA, Inc. v. NLRB*, 2 F.3d 168, 172, 173 (6th Cir. 1993).

In the context of initial bargaining after N.L.R.B. certification of a bargaining representative, a union objection to a unilateral change in employment conditions (elimination of one of the three shifts of work), based neither upon a reasoned alternative to nor a bargaining request about the proposed change, will not preserve an unfair labor practice based upon unilateral implementation of the change without bargaining. *K Mart Corp.*, 242 NLRB 855, 867 (1979). In that case, three weeks' notice to the union of the proposed change, followed after the first week by two weeks' notice of the date of implementation of the change, was adequate and the elimination of the third shift was lawful. In *K Mart*, the union's opposition to the unilateral change was not premised on its right to bargain about the change, but rather came out of its displeasure with the employer's tactics in collective bargaining generally: "[t]hese proceedings largely arise from the union's frustration because of its inability to obtain even a minimally acceptable collective-bargaining agreement," *K Mart* ***at*** 856; and "[t]he union objected to the company's proposal to discontinue the third shift not for any economic reason or for other reasons affecting the welfare of employees, but only as an expression of its petulant exasperation at the slow progress of the negotiations," *K Mart* ***at*** 867. Even though the N.L.R.B. found that K Mart had engaged in other unfair labor practices during bargaining, the union's failure to request bargaining waived any unfair labor practice involved in the unilateral elimination of the third shift.

On the other hand, the N.L.R.B. has found an unfair labor practice when an employer announced a change in shift assignments to the bargaining unit members, without prior notice to the bargaining representative, and then proceeded to implement the change despite bargaining representative protests that bargaining was required. *Indian River Memorial Hospital, Inc.*, 340 N.L.R.B. 467, 468-69:

> . . . . Once the union learned of the change, [it] immediately notified the [employer] that this was a mandatory subject of bargaining and requested rescission. [The union's] letter to [the employer] was undoubtedly a request for bargaining, which "need take no special form, so long as there is a clear communication of meaning." *Armour & Co.*, 280 NLRB 824, 828 (1986) (***quoting*** *Scobell Chemical Co. v. NLRB*, 267 F.2d 922, 925 (2d Cir. 1959)) (although the union never used the word "bargain," events left little doubt that the union was interested in bargaining, if necessary). Indeed, [the employer's] response indicated [it] understood [the union] was requesting bargaining. Furthermore,

> [the union] previously informed [the employer] that any shift changes required bargaining, and [the employer] responded that no schedule change had been implemented at that time. Thus, the union timely requested bargaining about the schedule change prior to implementation. ***Cf.*** *AT&T Corp.*, 337 NLRB No. 105, slip op. at 4 (2002) (union's entire course of conduct demonstrated lack of due diligence in pursuing bargaining). We therefore find no merit in the [employer's] assertion that the union waived its bargaining rights, and we adopt the judge's finding that the union made a bona fide demand for bargaining.

The defense of waiver of the right to bargain, interposed to an unfair labor practice charge, always requires clear and convincing evidence establishing the waiver. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708 (1983). Waiver will be found if the evidence shows that the union did receive a sufficient timely and meaningful notice of the proposed change, and yet failed to demand bargaining on the issue, because the union's failure to demand bargaining under such circumstances manifests a "conscious relinquishment" of its right to bargain. *YHA, Inc.*, ***op. cit.***

Waiver defenses fail in cases in which the employer makes the unilateral change without any regard for the union's right to bargain. A rush to implement a unilateral change without according the union time to request bargaining manifests such a disregard for the union's right to bargain. "An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals." *Pontiac Osteopathic Hosp.,* 336 NLRB 1021, 1023 (2001), ***quoting*** *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964); *Toma Metals, Inc.*, 342 NLRB 787, 787, fn. 1 (2004).

A timely notice of a proposed change that is given under circumstances that show that the employer had no intention of bargaining about the change will <u>not</u> support finding a waiver of the right to bargain in a subsequent failure of the union to request bargaining. In labor law parlance, such notices are nothing more than the announcement of a "fait accompli." *Ciba-Geigy Pharm. Div.*, 264 NLRB 1013, 1017 (1982), ***enf'd*** 722 F.2d 1324 (7th Cir. 1983); *Mercy Hospital,* 311 NLRB 869, 873 (1993).

Absent proof that the notice of August 26, 2009 was simply presented as a fait accompli, Local 400's silence for the six weeks following that notice until the District announced the implementation date of the change, and continued silence between that announcement and the actual implementation of the change, constituted a waiver of the right to bargain the change. This was a six person unit (five person now). There is no evidence that Local 400 was caught without time to consider and

decide whether to request bargaining. Only if, as Local 400 contends, the change was presented as a "done deal," can the failure of the union to request bargaining not be a waiver of the right. The time the District waited after notice of the proposed change before implementing it clearly was sufficient for Local 400 to request bargaining on the change.

That leaves the question of waiver versus fait accompli. A final decision made before any notice to labor of the proposed change manifests the same kind of disregard for the union's bargaining rights as does a rush to implement the proposed change. *Ciba-Geigy*, 264 NLRB ***at*** 1018. "Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense [can be] predicated." *International Ladies Garment Workers Union v. NLRB,* 463 F.2d 907, 919 (D.C. Cir. 1972); *Gratiot Community Hosp.*, 312 NLRB 1075, 1080 (1993), ***enf'd in part***, 51 F.3d 1255, 1259-60 (6th Cir. 1995).

A union may be denied "a reasonable opportunity for counterarguments or proposals" if the proposed changes are announced to the employees at the same time they are announced to the union. "[A]nnouncement of changes to employees before notification to the union is sufficient to establish that an employer's decision is a fait accompli." *Bell Atlantic,* 336 NLRB 1076, 1087 (2001); *Roll & Hold W. & D.*, 325 NLRB 41, 42 (1997) ***enf'd*** 162 F.3d 513, 519 (7th Cir. 1998).

The N.L.R.B. in *Roll & Hold* held that notice to the employees given at an employee meeting was inadequate notice because it "totally undermined" the union's role as exclusive bargaining representative. *Roll & Hold* ***at*** 42; ***see also*** fn. 4. "By announcing the new policy to the union at the same time as all other employees, the respondent essentially ignored the representative status of the employees' bargaining agent. Such a failure to acknowledge the union's proper role in negotiating terms and conditions of employment severely diminished, if not effectively foreclosed, any meaningful opportunity for the union to exercise its authority in a subsequent discussion on the matter." The 7th Circuit endorsed this reason for enforcing the N.L.R.B.'s order. *Roll & Hold*, 162 F.3d ***at*** 520; ***see also*** *Ciba-Geigy,* 264 NLRB ***at*** 1017 (the "most important factor" in finding that the employer's announcement of change was a fait accompli was that the union was notified at the same time as the employees).

As the District pointed out in its briefing, there are also cases that reject this "direct dealing" lynchpin to finding a fait accompli, based upon the particular facts of the individual case. In *Americare Pine Lodge Nursing and Rehab. Center v. NLRB*, 164 F.3d 867, 877 (4th Cir. 1999), the court rejected the reasoning of *Roll & Hold*, and concluded that copying the employees on a letter to union officials regarding a proposal was proper because the bargaining representative will not, in all instances,

have a mandatory right to consider a proposal before the employer can permissibly provide information about it to the employees.

There is some evidence from which the Hearing Officer could find that the District presented the proposed schedule change as a "done deal" about which it had no obligation to bargain. Darnell appeared to view and to talk about the proposed change as if it were the only possible way to provide the engineer coverage the District wanted. He at least alluded to "management rights" when he presented the proposal to Local 400 and the bargaining unit members at the same time. But in presenting its proposal, even though the District invited the bargaining unit and its representative to respond during that meeting, the District also invited a later response from Local 400. The District then waited for that response before implementing the proposed change. Waiting for a response is not consistent with presenting Local 400 and the unit members with a "done deal."

Ciba-Giegy is distinguishable from the present case. In *Ciba-Giegy*, the employer announced a major complicated policy change related to chronic absences. The announcement was immediately followed by the mailing of letters to the members of the bargaining unit who would be affected, stating an effective date for the policy changes within a week.

In the present case, the original notice of the change, with a request for union comments, was given almost seven weeks before the District implemented it, and the implementation date was not set until six weeks after that initial notice. In addition, the initial notice was given to the bargaining unit representative as well as the unit members. For at least six weeks before the notice of the effective date of change, Local 400 and its unit members had a chance to consider their options, including whether to request bargaining.

It is possible that the District's presentation of the proposal was carefully orchestrated to discourage Local 400 from requesting bargaining, while avoiding being caught giving a fait accompli notice. It is equally possible that Local 400 decided that filing a ULP after the fact was a more effective tactic than bargaining. The evidence does not establish either motive.

Finding a waiver of the right to bargain when the bargaining agent fails to make such a request should not be done lightly. In this case, the Hearing Officer finds that the District's presentation of the proposed change, in a clumsy and "mixed message" manner, did provide Local 400 and its unit members with a sufficient and meaningful opportunity to make a request to bargain. Evidence about management's conduct before the August 26 meeting and about presentation of the proposed change at that meeting did not rebut the District's evidence of the waiver. There is

clear and convincing evidence that Local 400, by failing to make a request to bargain the proposed change before its implementation, waived its right to bargain about it.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction over this Unfair Labor Practice Complaint. Mont. Code Ann. § 39-31-405.

2. The District presented clear and convincing evidence that Local 400 waived its right to bargain over the change of shift time for the stationary engineers by failing to request bargaining after the initial notice of the proposed change and before the implementation of that change, approximately seven weeks later.

3. Because of that waiver, the District's implementation of that shift change without bargaining was not an unfair labor practice statutorily prohibited by Mont. Code Ann. § 39-31-401(1) et. seq.

VI. RECOMMENDED ORDER

Unfair Labor Practice Complaint No. 13-2010 is dismissed.

DATED this 18th day of October, 2010.

BOARD OF PERSONNEL APPEALS

By: _____

TERRY SPEAR
Hearing Officer

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NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. Mont. Code Ann. § 39-31-406(6). Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

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Attorney at Law
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Tony Koenig, Attorney
Montana School Boards Association
863 Great Northern Boulevard #301
Helena, MT 59601-3315

DATED this 18th day of October, 2010.

Sandy Duncan