STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
International Brotherhood of Teamsters, Local No. 26,	)	
	)	
Complainant,	)	
and	)	Case Nos. 2007-CA-0015-S
	)	2007-CA-0031-S
Board of Trustees/University of Illinois at Urbana-Champaign,	)	2007-CA-0043-S
	)	
Respondent.	)	

OPINION AND ORDER

On November 13, 2006, the International Brotherhood of Teamsters, Local No. 26 ("Union") filed an unfair labor practice charge. The charge alleged that the Board of Trustees/University of Illinois at Urbana-Champaign ("University") violated Sections 14(a)(5) and 14(a)(1) of the Illinois Educational Labor Relations Act, 115 ILCS 5/1 et seq. ("Act") by repudiating and unilaterally changing terms and conditions of employment relating to wages and overtime, including provisions of a successor collective bargaining agreement. On June 1, 2007, the Executive Director issued a Complaint and Notice of Hearing, in which he alleged that the District violated Sections 14(a)(5) and 14(a)(1) of the Act by repudiating and unilaterally changing terms and conditions of employment relating to wages and overtime, specifically prevailing rate "upgrading," "man haul" assignments, and overtime procedures.

On May 16, 2007, the Union filed another unfair labor practice charge. The charge alleged that the University violated Sections 14(a)(5) and 14(a)(1) of the Act by unilaterally abrogating overtime provisions in the collective bargaining agreement and by assigning bargaining unit work to non-unit personnel. On June 1, 2007, the Executive Director issued a Complaint and Notice of Hearing, in which he alleged that the District violated Sections 14(a)(5) and 14(a)(1) of the Act by unilaterally diverting overtime work and refusing to offer it to unit personnel. The Union requested preliminary injunctive relief pursuant to Section 16(d) of the Act. By order of the Executive

Director dated June 1, 2007, the cases were "consolidated for hearing and for all other proceeding before the Illinois Educational Labor Relations Board."[1]

The parties have set forth their positions on the Union's request for injunctive relief through written submissions and through oral argument held on June 12, 2007. We have carefully considered those positions. For the reasons set forth below, we grant the Union's request that the Illinois Educational Labor Relations Board ("IELRB") seek preliminary relief pursuant to Section 16(d) of the Act.

I.

Section 16(d) of the Act provides that, upon issuance of an unfair labor practice complaint, the IELRB may petition the circuit court for appropriate temporary relief or a restraining order. Because the Executive Director has issued a Complaint in this case, the statutory prerequisite has been satisfied.

In *University of Illinois Hospital,* 2 PERI 1138, Case Nos. 86-CA-0043-C, 86-CA-0044-C (IELRB Opinion and Order, October 21, 1986), we held that preliminary injunctive relief is appropriate where there is reasonable cause to believe that the Act may have been violated and where injunctive relief is just and proper. Thus, we examine this case to determine whether those prerequisites have been satisfied.

II.

A. <u>Is there reasonable cause to believe that the Act may have been violated?</u>

In order for there to be reasonable cause to believe that the Act may have been violated, there must be a significant likelihood of the complainant prevailing on the merits. *Cahokia Community Unit School District No. 187,* 11 PERI 1059, Case No. 95-CA-0029-S (IELRB Opinion and Order, June 15, 1995). In this case, we determine that there is a significant likelihood that the Union will prevail on the merits. Therefore, there is reasonable cause to believe that the Act may have been violated.

The Union represents the following bargaining unit of University employees:

> Driver, Route Driver, Route Driver Helper, Campus Transportation Operator, Head Campus Transportation Operator, Disability Transportation Specialist, Head Disability Transportation Specialist.

The Union and the University are parties to a collective bargaining agreement, which is effective from August 28, 2005 through August 22, 2009.

[1] A Complaint has also issued on the University's alleged refusal to supply information in Case No. 2007-CA-0031-S, and that case was also consolidated with Case Nos. 2007-CA-0015-S and 2007-CA-0043-S. However, the Union has not sought injunctive relief with respect to the University's alleged refusal to supply information.

Article IV, Section 6(b) of the collective bargaining agreement provides that "F & S shall maintain a single overtime list, excluding drivers assigned to trash hauling and the Illinois Inter-Library Loan System. Overtime shall be divided as equally and impartially as possible among employees." According to the Union, the language concerning a "single overtime list" requires the University to give all drivers the opportunity to work overtime based on who had the least overtime at the time, regardless of whether he/she was a prevailing rate driver or a negotiated rate driver and regardless of whether the overtime was prevailing rate overtime or non-prevailing rate work. The University states that it believed that the Union was only seeking to clarify that the University had an obligation to equalize overtime among all drivers, including both prevailing rate and non-prevailing rate. A Memorandum of Understanding classifies drivers as prevailing rate or non-prevailing rate (negotiated rate) according to the duties that they perform. Specifically, the Memorandum of Understanding provides that drivers who work with prevailing rate crafts or drive certain trucks are to be paid the prevailing rate of pay. The Memorandum of Understanding states that the Operation and Maintenance Division shall provide six prevailing rate positions and the Housing Division shall provide one prevailing rate position. The Memorandum of Understanding also states that persons filling the prevailing rate positions will continue to normally drive the "man haul"[2] pick-up trucks.

According to the University, a foreman hired in August 2004 improperly assigned prevailing rate work to non-prevailing work drivers and non-prevailing rate work to prevailing rate drivers. The University states that, upon discovering this, it began efforts to correct these deviations from past practice and pressed forward with its plan to divide the Transportation Shop drivers into "maintenance" and "construction" teams. According to the Union, the University implemented this division on March 13, 2006.

According to the University, the parties met for a bargaining session on August 15, 2006. The University asserts that, at that bargaining session, the parties agreed to settle certain grievances and a pending unfair labor practice complaint. According to the University, its chief negotiator, Bryan Perrero, told the Union's chief negotiator, Robert Cervone, that, as part of the settlement, the University would be permitted to continue applying the Memorandum of Understanding as it had been prior to that date. The University asserts that Perrero proposed that the University would pay $15,000 to settle the outstanding litigation, with the understanding that the parties would use the grievance arbitration procedure to resolve their remaining disagreements over the Memorandum of Understanding, while the University continued to apply its prior interpretation of the Memorandum of

[2] "Man haul" refers to transporting prevailing rate crafts employees in a pick-up truck or similar vehicle.

Understanding while any arbitration proceedings were pending. According to the University, Cervone agreed to accept these terms on behalf of the Union, and, specifically, acknowledged that the parties would resolve their remaining disputes over the proper interpretation of the Memorandum of Understanding through the grievance arbitration procedure instead of through the IELRB, while the University continued to apply the Memorandum of Understanding as it had prior to August 15, 2006.

According to the Union, the Union demanded and received assurances on August 16, 2006 that the University would revert to historic practices effective the Monday following ratification of the new collective bargaining agreement. The Union states that, at all times since August 16, 2006, the University has refused to pay negotiated rate drivers the prevailing rate when it should be paid them according to the Memorandum of Understanding. According to the University, it pays non-prevailing rate drivers the prevailing wage rate when it assigns non-prevailing rate drivers to perform prevailing rate work. The Union asserts that, since August 16, 2006, the University has reduced the number of prevailing rate drivers assigned to transport prevailing rate craft employees from six to three. The Union argues that this violates the Memorandum of Understanding. The Union also asserts that, since August 16, 2006, the University has continued to offer overtime only by category of overtime and category of driver rather than by the amount of overtime a driver has worked.

According to the University, the Union has filed numerous grievances challenging the University's application of the Memorandum of Understanding. The University asserts that it stands ready and willing to arbitrate each of these grievances.

The Union asserts that, on May 13, 2007, the University offered negotiated rate overtime to all negotiated rate drivers, but all of them declined the overtime. According to the Union, the University then, instead of offering the overtime to prevailing rate drivers based on the amount of overtime they had worked, assigned the overtime work to a janitor employed in a different bargaining unit. The University asserts that it has historically assigned overtime opportunities to non-bargaining unit personnel when special circumstances arise, but that this is a rare event. According to the University, it has assigned only 22 hours of overtime driving work in the Transportation Shop to non-bargaining unit employees since May 13, 2006.

Where a mere violation of the collective bargaining agreement is alleged, there is no unfair labor practice. *West Chicago School District 33*, 5 PERI 1091, Case Nos. 86-CA-0061-C, 87-CA-0002-C (IELRB, May 2, 1989), *aff'd on other grounds*, 218 Ill.App.3d 304, 578 N.E.2d 232 (1st Dist. 1991); *Moraine Valley Community College*, 2

PERI 1050, Case No. 85-CA-0068-C (IELRB, March 18, 1986). However, the IELRB has ruled that "a party to an agreement violates its statutory duty to bargain collectively by modifying the terms of a such a contract, where those terms are of such importance to the agreement that their unilateral modification would negate the very statutory duty to bargain collectively," *Chicago Board of Education*, 7 PERI 1114 at IX-462, Case No. 92-CA-0026-C (IELRB, October 25, 1991). It could be found that the University's alleged modifications of the collective bargaining agreement and the Memorandum of Understanding, taken as a whole, concern terms that are "of such importance to the agreement that their unilateral modification would negate the very statutory duty to bargain collectively."

There are factual disputes as to whether the University has refused to pay negotiated rate drivers the prevailing rate when it was required to do so and as to whether the Union agreed that the University could continue to apply its prior interpretation of the Memorandum of Understanding while any arbitration proceedings were pending. The resolution of these disputes depends on credibility resolutions which can only be made by an Administrative Law Judge after a hearing. In prior cases where a finding of a violation depended on credibility resolutions, the IELRB has ruled that there is not reasonable cause to believe that the Act may have been violated and declined to seek injunctive relief. *Southern Illinois University at Carbondale (Board of Trustees)*, 14 PERI 1006, Case No. 98-CA-0004-S (IELRB, October 30, 1997); *Kirby School District #140*, 11 PERI 1017, Case No. 95-CA-0037-C (IELRB, January 25, 1995). However, the University's alleged failure to offer overtime according to a single overtime list concerns the terms of the 2005-2009 collective bargaining agreement, rather than the University's prior interpretation of the Memorandum of Understanding. Similarly, the Union's allegation that, since August 16, 2006, the University has reduced the number of prevailing rate drivers assigned to transport prevailing rate craft employees from six to three does not concern the University's prior interpretation of the Memorandum of Understanding. Thus, the University has not raised credibility issues with respect to those allegations. We conclude that there is a significant likelihood that the Union will be able to show that the University made unlawful midterm modifications with respect to the allegations in Case No. 2007-CA-0015-S.

In Case No. 2007-CA-0043-S, the Union alleges that the University unilaterally transferred overtime work to a janitor employed in a different bargaining unit. An employer's unilateral change in a mandatory subject of bargaining violates Section 14(a)(5) of the Act. *East Moline School District* 37, 18 PERI 1055, Case No. 2000-CA-0068-C (IELRB, February 22, 2002). We do not regard the transfer of work out of the bargaining unit as a mere contractual violation, but as an infringement on the union's jurisdiction. We conclude that there is a significant

likelihood that the Union will be able to show that the University unilaterally assigned overtime work outside of the bargaining unit—indeed, the University does not dispute that this occurred—and that the assignment of overtime work outside of the bargaining unit is a mandatory bargaining subject.

In *Dearborn Country Club*, 298 NLRB 915 (1990), the National Labor Relations Board ("NLRB") found that the employer committed an unfair labor practice by unilaterally discontinuing the past practice of first offering to its full-time food and beverage servers the opportunity to work overtime and only upon their refusal offering or assigning the work to other employees. In *Peru Associates, Inc.*, 170 NLRB 643 (1968), the NLRB determined that the distribution of overtime between two unions was a mandatory subject of bargaining. The facts here are similar to those in *Peru Associates* and *Dearborn Country Club*. In addition, other Illinois public sector labor relations boards have determined that employers violated their statutory duty to bargain when they transferred work out of the bargaining unit. *City of Marengo*, 20 PERI 99 (ILRB, State Panel 2004); *County of Cook and Cook County Sheriff*, 12 PERI 3021 (ILLRB 1996), *aff'd sub nom. County of Cook v. ILLRB*, 14 PERI 4016 (Ill. App. 1st Dist. 1998) (unpublished order).

The University argues that assignment of work outside of the bargaining unit is a past practice. Given the University's admission that this has been a rare event, we conclude that there is a significant likelihood that the Union will be able to show that the University's transfer of bargaining unit work outside of the bargaining unit violates Sections 14(a)(5) and 14(a)(1) of the Act.

There is a significant likelihood that the Union will prevail on the merits in this matter. Accordingly, there is reasonable cause to believe that the Act may have been violated.

B. Is preliminary relief "just and proper?"

In determining whether preliminary injunctive relief is just and proper, the IELRB considers whether an injunction is necessary to prevent frustration of the basic remedial purposes of the Act; the degree, if any, to which the public interest is affected by a continuing violation; the need to immediately restore the status quo ante; whether ordinary IELRB remedies are inadequate; and whether irreparable harm will result without preliminary injunctive relief. *Johnston City Community Unit School District 1*, 9 PERI 1048, Case No. 93-CA-0026-S (IELRB Opinion and Order, February 5, 1993). Preliminary injunctive relief should be limited to those cases in which the alleged violations are serious and extraordinary. *Id.*

There will be irreparable harm if preliminary injunctive relief is not ordered in this matter. The Illinois Appellate Court has repeatedly held that, in the context of injunctive relief, "irreparable harm" does not mean injury that is beyond repair or compensation in damages, but, rather, means injury of a continuing nature. *E.g.*, *Hadley v. Department of Corrections*, 362 Ill.App.3d 680, 840 N.E.2d 748 (4th Dist. 2005); *Lucas v. Peters*, 318 Ill.App.3d 1, 741 N.E.2d 313 (1st Dist. 2000); *Local 1894, AFSCME v. Holsapple*, 201 Ill.App.3d 1040, 559 N.E.2d 577 (4th Dist. 1990); *Wilson v. Benedictine College*, 112 Ill.App.3d 932, 445 N.E.2d 901 (2nd Dist. 1983). Here, the injury is of a continuing nature in that the University allegedly is unilaterally improperly assigning overtime work on a continuing basis and is also assigning three rather than six prevailing rate drivers to transport prevailing rate craft employees on a continuing basis. We view the University's alleged assignment of overtime work to a janitor as a continuation of its alleged violation of the contractual requirement that there be a single overtime list. In addition, the University admits that it has assigned overtime driving work to non-bargaining unit employees on some prior occasions. Thus, the University has been allegedly assigning overtime work to non-bargaining unit employees on a continuing basis. In *Local 1894*, irreparable injury was found where the employer used auxiliary deputies to perform the duties of regular deputies. The facts here are similar.

In addition, the University's alleged failure to bargain is undermining the parties' bargaining relationship in a manner that cannot be undone later. While the IELRB can award a remedy compensating employees for work opportunities of which they have been deprived, the IELRB's remedies are not designed to correct the unquantifiable harm to the parties' bargaining relationship that is being caused by the University's alleged unilateral actions.

In addition, the Union states that at least one employee was at risk of losing his home and was forced to file for bankruptcy as a result of the University's alleged violations. This indicates that employees may suffer financial consequences that cannot later be undone if the University is not ordered to immediately correct its violations.

Because of this irreparable harm, it is necessary to immediately restore the status quo ante. In addition, the public interest would be adversely affected by allowing the University to allegedly continue to violate its statutory duty to bargain. In our view, this is not a case of a single incident, but of continued conduct. The University argues that the parties continue to bargain by using the grievance arbitration process. However, no evidence was presented that the University's alleged unilateral actions have ceased during the pendency of the grievance arbitration process.

Here, the fact that the Union has sought to remedy the University's alleged failure to bargain through the grievance arbitration procedure does not negate that alleged failure to bargain. As Arbitrator Paul Prasow has stated:

> The real problem [in cases where a party deliberately and repeatedly ignores certain provisions] is the break-down in the relationship between the parties. Arbitration is not designed to deal with such problems.

Globe-Union Inc., 42 LA 713, 721 (Prasow, 1963), *as cited in* Hill & Sinicropi, Remedies in Arbitration, 241 (BNA 1981).

We conclude that preliminary injunctive relief is just and proper under the circumstances of this matter. Because there is reasonable cause to believe that the Act may have been violated and because preliminary injunctive relief is just and proper under the circumstances of this matter, we grant the Union's request that we seek preliminary injunctive relief pursuant to Section 16(d) of the Act.[3]

III.

In view of the foregoing conclusion that preliminary injunctive relief is appropriate under these circumstances, we authorize the IELRB's General Counsel to seek the following injunctive relief:

1. To prevent the University, pending the outcome of unfair labor practice proceedings, from unilaterally modifying the procedure for assigning overtime work in the collective bargaining agreement, unilaterally reducing the number of prevailing rate drivers assigned to transport prevailing rate craft employees, and unilaterally transferring overtime work outside of the bargaining unit.

2. To order the University, pending the outcome of unfair labor practice proceedings, to maintain a single overtime list and assign overtime work according to which driver has worked the least amount of overtime without regard to whether the driver is a designated prevailing rate driver or a negotiated rate driver, and to comply with the provision in the Memorandum of Understanding governing the number of prevailing rate drivers assigned to transport prevailing rate craft employees.

[3] The University argues that injunctive relief is inappropriate because the matter should be referred to arbitration, and that it plans to make such a motion before the Administrative Law Judge. However, where injunctive relief is otherwise appropriate, it may extend during the period while arbitration proceedings are pending. The IELRB retains jurisdiction when it refers cases to arbitration.

IV.

This is not a final order that may be appealed under the Administrative Review Law. *See* 5 ILCS 100/10-50(b); 115 ILCS 5/16(a).

Decided: June 12, 2007
Issued: June 14, 2007
Chicago, Illinois

/s/ Lynne O. Sered
Lynne O. Sered, Chairman

/s/ Ronald F. Ettinger
Ronald F. Ettinger, Member

/s/ Michael H. Prueter
Michael H. Prueter, Member

/s/ Jimmie E. Robinson
Jimmie E. Robinson, Member

Board Member Lamont recused and in no way participated in the discussion or deliberation of this case.

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