IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RED CLAY EDUCATION ASSOCIATION,	)	
Appellant,	)	
v.	)	Civil Action No. 11958
BOARD OF EDUCATION OF THE RED CLAY CONSOLIDATED SCHOOL DISTRICT,	)	
Appellee.	)	

MEMORANDUM OPINION AND ORDER

Date Submitted: December 9, 1991
Date Decided: January 16, 1992

Teresa C. Fariss, Esquire, of YOUNG, CONAWAY, STARGATT & TAYLOR, Wilmington, Delaware, Attorney for Appellant.

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CHANDLER, Vice Chancellor

The Red Clay Education Association (the "Association"), appeals a decision by the Delaware Public Employment Relations Board (the "PERB) on an unfair labor practice charge brought against the Board of Education of the Red Clay Consolidated School District (the "District"). The PERB's decision was a review of a decision by the PERB's Executive Director.

This is my decision on the appeal. Part I of the decision delineates the factual and procedural history of this case. Part II addresses the proper standard of review I must apply. Part III addresses the jurisdictional issue. Finally, part IV contains my conclusion.

I. FACTUAL AND PROCEDURAL HISTORY

The Association is the collective bargaining representative of the teachers and other professional employees whom the District employs. The Association and the District were signatories to a collective bargaining agreement for the period of September 1, 1987 through August 30, 1990. Article 18 of that agreement provided, inter alia, that "[t]he employees' normal in-school work day will be seven (7) continuous hours and will normally fall between the hours of 7:30 a.m. and 4:30 p.m." (Appellant's Brief Exh. A at 28.)

On or about August 3, 1990, one of the companies with which the District had contracted for school bus transportation informed the District that it would not renew its bus contracts with the District. Those contracts represented approximately 18% of the bus routes maintained by the District. The District immediately attempted to fill the non-renewed contracts via

public advertisement for bids pursuant to state law. On August 15, 1990, the District knew that it could not fill the non-renewed contracts.

After the District determined that it could not fill the non-renewed contracts, it asked its remaining bus contractors if they would agree to run three morning and three afternoon routes with each bus rather than the two morning and afternoon routes that they had run the previous year. Those companies agreed to run the three morning and afternoon routes. However, in order to effectuate the three route schedule, the District determined that it would have to establish three different school day starting times instead of the normal two different school day starting times and that it would have to stagger those times. By August 16, 1990, the District had determined that no possible schedule would allow all teachers to start their workday no earlier than 7:30 a.m. and finish no later than 4:30 p.m. Therefore, the District formulated a proposed schedule requiring some teachers to report to work by 7:15 a.m.

On August 16, 1990, the District attempted to contact the Association's President, Marilyn Little, in order to convey the situation. On August 17, 1990, District Superintendent Dr. Reginald Green met with Ms. Little and informed her of the alternative scheduling plan. Dr. Green purportedly told Ms. Little that every effort would be made to revise the schedule and asked Ms. Little what she thought of the plan. Ms. Little replied that she thought it might violate the collective

bargaining agreement and that she would contact him after obtaining feedback from the other leaders of the Association.

Just prior to the meeting between Dr. Green and Ms. Little, the District informed some of its principals of the revised schedule regarding starting times. On that same day, August 17, 1990, at least two of the principals, Rudolph F. Karkosak and Al DiEmedio, wrote to their staffs informing them that teachers would begin work at their schools at 7:15 a.m. beginning with the first day of the school year.

On August 22, 1990, Ms. Little again met with Dr. Green and told him that the Association had concluded that the revised schedule violated the terms of the collective bargaining agreement and that the Association wished to adhere to the terms of the contract. However, Ms. Little also stated that perhaps they could find a way to solve the scheduling problems without violating the terms of the contract. Nonetheless, Ms. Little did not make any concrete alternative proposal or state that the Association had such an alternative proposal. Dr. Green responded that he could not understand why the Association was taking such an unreasonable position on an issue over which the District had no control.

That evening, Ms. Little addressed the District at the public recognition portion of a District meeting. Ms. Little stated that the Association recognized the severity of the busing problem and that she was hopeful that the parties could reach a resolution to the issue whereby the teachers would not

have to report to work before 7:30 a.m.

The Association filed an unfair labor practice charge against the District on August 23, 1990. The charge alleged that the District unilaterally altered the starting times of its secondary schools without first bargaining with the Association in good faith and that these starting times were a mandatory bargaining subject. Therefore, the charge alleged, the alteration of the starting times constituted a violation of the Public Employment Relations Act (the "PERB")under 14 Del. C. § 4007(a)(5) (Supp. 1990). The charge requested that the PERB order the District to cease and desist from its refusal to bargain and to bargain over the proposed changes in working hours in good faith; to rescind its order requiring teachers to report before 7:30 a.m.; to post a notice informing its employees that it had committed this alleged unfair labor practice; and to pay all reasonable costs and expenses.

On January 8, 1991, the Executive Director of the PERB issued a decision on the charge. The Executive Director held that (1) it was appropriate for the Board to exercise its jurisdiction to rule on the merits of the unfair labor practice charge and not defer to arbitration because the zipper clause contained in the collective bargaining agreement did not constitute a waiver of the right to insist on negotiation during the term of the agreement and because deferral to arbitration was inappropriate; (2) the teachers' starting time was a mandatory bargaining subject under 14 Del. C. § § 4002(e)

and (r); (3) the District acted unilaterally without bargaining when it instituted the early starting time; and (4) there was insufficient evidence to demonstrate that the District had altered the status quo and that, therefore, the District did not commit an unfair labor practice. Red Clay Educ. Ass'n v. Board of Educ. of the Red Clay Consol. School Dist., Del. PERB, U.L.P. No. 90-08-052 (Jan. 8, 1991).

On January 14, 1990, the Association filed a Request for Review of the Executive Director's decision by the full PERB. On February 4, 1991, the PERB concluded that "[t]he record does not warrant a finding that the District unilaterally altered a mandatory subject of bargaining without first bargaining in good faith." Red Clay Educ. Ass'n v. Board of Educ. of the Red Clay Consol. School Dist., Del. PERB, A.U.L.P. No. 90-08-052 A (Feb. 4, 1991), at 2. Further, the PERB stayed the unfair labor practice charge pending exhaustion of the parties' contractually agreed upon grievance procedure (i.e., non-binding arbitration). See id. at 4. Also, the PERB retained jurisdiction for the purpose of reconsidering the case upon the application of either party if the arbitration award failed to satisfy the claim; if either party refused to abide by the arbitrator's decision; if the arbitral process had been unfair; if the arbitration failed to resolve the dispute with reasonable promptness; and/or if the parties satisfactorily settled the issue in contract negotiations. See id. at 4-5.

II. STANDARD OF REVIEW

The parties basically agree as to the applicable standard of review as to any questions of law. That is, they agree that

> [i]t is elementary that when an appellate tribunal reviews a [purely legal] question, its function is to reach its own determination of the legal question. In doing so, however, I am not unmindful that the agency whose decision is being reviewed is an expert one functioning in an area that requires or at least is greatly aided by such expertise.

Seaford Bd. of Educ. and Seaford School Dist. v. Seaford Educ. Assoc., Del. Ch., C.A. No. 9491, Allen, C. (Feb. 5, 1988), slip op. at 2 (citations omitted).

As to factual issues, the District contends that I must give great deference to the PERB's factual determinations. The Association argues that I should review the PERB's factual determinations on a de novo basis because the PERB based their determinations on a paper record of stipulated facts. I agree with the Association that I should give less deference to the PERB's factual findings because the PERB based its findings on a paper trial rather than live testimony. See generally Mills Acquisition Co. v. Macmillan, Inc., Del. Supr., 559 A.2d 1261 (1988) (the Court held that it had to examine the entire record and draw its own factual conclusions since the lower Court based its factual determinations on a paper record, the determinations were clearly in error and justice so required); cf. Levitt v. Bouvier, Del. Supr., 287 A.2d 671, 673 (1972) (the Court discussed the more deferential standard applicable

to factual determinations from live testimony). However, I recognize that these determinations, even though factual in nature, were made by experts in this area of the law.

III. JURISDICTION

At the outset, the parties raise two jurisdictional issues. First, I must determine whether the Association waived its right to insist on negotiations over the District's change in the teachers' starting time. In this case, the zipper clause,[1] Article 2:4 of the collective bargaining agreement, purportedly contains the waiver. This clause provides that

> [t]his Agreement incorporates the entire understanding of the parties on all matters which were or could have been the subject of negotiation. During the term of the Agreement, neither party will be required to negotiate with respect to any such matter whether or not covered by this Agreement and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or executed this Agreement.

(Appellant's Brief Exh. A at 2.) The second jurisdictional issue is whether the parties contractually agreed upon grievance procedure requires an arbitrator to decide the Association's claim.

In the first decision on this claim, the Executive Director held that the zipper clause did not constitute a waiver by the Association of its right to negotiate over the change in the starting times. The Executive Director reasoned

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[1]A zipper clause generally is a contractual provision which provides that the parties' written agreement represents the entire agreement between the parties.

that the intent of the zipper clause, when read in context with Articles 2:1[2] and 2:5,[3] was to prevent unilateral changes to the terms of the collective bargaining agreement. Red Clay Educ. Ass'n v. Board of Educ. of the Red Clay Consol. School Dist., Del. PERB, U.L.P. No. 90-08-052 (Jan. 8, 1991), at 12-13. The Executive Director also stated that contrary NLRB decisions were distinguishable because they were private sector cases where employees had a right to strike and/or the parties had agreed to binding arbitration as their contractual grievance procedure. Further, the Executive Director held that deferral to the contractually agreed upon grievance procedure (non-binding arbitration) was not proper because the claim constitutes an action for an unfair labor practice even if the outcome depends on the interpretation of the collective bargaining agreement and because the grievance procedure would not produce a final and binding result.

In reviewing the Executive Director's decision, the PERB did not address the waiver issue specifically and held that there was insufficient evidence to find an unfair labor practice. Therefore, it opined, the claim was one for breach of contract. Further, the PERB decided that it should expand

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[2]Article 2:1 provides that "[t]his Agreement will be for a period as specified in the Duration of Agreement Article; and negotiations concerned with the terms of this Agreement will not be reopened during that time except by mutual written agreement of the parties." (Appellant's Brief Exh. A at 2.)

[3]This Article provides that "[t]his Agreement will not be modified in whole or in part by the parties except by an instrument in writing duly executed by both parties." (Id.)

the parameters for deferral to include advisory arbitration. Thus, the PERB held that deferral to non-binding arbitration was proper in this case. However, the PERB did retain jurisdiction over the case.

A. Waiver

The District does not dispute that a change in working hours is a mandatory bargaining subject. However, the District contends that the Association waived its right to negotiate over such changes in Article 2:4 of the collective bargaining agreement. Therefore, the District argues, it could not have committed an unfair labor practice by failing to negotiate. In addition, it argues, the PERB and this Court do not have jurisdiction over this dispute since it is merely a contractual dispute that the parties should resolve via the mutually agreed upon grievance procedure.

The District rests its waiver argument primarily upon the purported clear and unmistakable language of Article 2:4. The District also contends that Articles 2:1 and 2:5 are not to the contrary. That is, the District argues that it is incorrect to conclude from these two other Articles that the intent of 2:4 was only to prohibit unilateral changes in the collective bargaining agreement. The District argues that 2:4 waives the parties' right to insist on negotiations and that 2:1 and 2:5 merely set up procedures by which the parties can agree to negotiate even if the contract does not require them to do so. Also, the District argues that the advisory nature of the

agreed upon grievance procedure and the inability of the teachers to strike provided no basis for the PERB and the Executive Director to fly in the face of the express zipper clause contained in the collective bargaining agreement. Finally, the District points out that even if I rule that Article 2:4 constitutes a waiver, the Association would not be left without a remedy since it could pursue a breach of contract claim via the contractually agreed upon grievance procedure.

The Association first responds to the District's waiver argument by contending that the issue is not properly before me since the District failed to file a cross-appeal raising the issue. Thus, the Association argues, I should not consider the issue. Further, the Association argues that even if I do address the issue, Article 2:4 of the collective bargaining agreement does not constitute a waiver of its right to insist on negotiations over changes in starting times. That is, the Association argues, just as the District argues, the language of the agreement supports their position on the waiver issue, especially when one considers the other provisions of the collective bargaining agreement (i.e., Articles 2:1 and 2:5). The Association argues that 2:4 merely permits the Association to refuse to negotiate mid-term contractual changes and does not constitute a waiver of its right to demand that the District comply with its contractual and statutory duties to bargain over desired changes. Indeed, the Association argues,

one cannot possibly interpret Article 2:4 as a waiver if one considers NLRB precedent that waivers of statutory rights must be clear and unmistakable. Finally, the Association argues the District's interpretation of 2:4 nullifies or, at least, is inconsistent with Article 3:7. This Article provides that "[n]o claim by an employee or the Association will constitute an arbitrable matter or be processed through arbitration if it pertains to: (a) [a] matter where a specific method of remedy or appeal is prescribed by law (e.g., the Fair Dismissal Act); and/or by this Agreement." (Appellant's Brief Exh. A at 4.)

The District argues that the Association's Article 3:7 begs the question presented. That is, the District argues that 2:4 waives the parties' right to insist on negotiations. Therefore, the District argues, it has not committed an unfair labor practice. Accordingly, the District argues, the claim is not one which has a remedy prescribed by law as the Association implies. As a result, Article 3:7 does not indicate, in any way, whether Article 2:4 acts as a waiver.

The Association also argues that even if Article 2:4 constitutes a waiver, I can relieve the Association of the waiver. That is, the Association argues that if the District induced it to waive its right to bargain over matters covered by the agreement on the reasonable belief that the District would maintain the terms and does not do so, I have the ability to nullify the effect of the waiver. See NLRB v. Southern Materials Co., Inc., 447 F.2d 15, 18-19 (4th Cir. 1971).

Alternatively, the Association argues, if I find that the Association waived its statutory right to require negotiations, this Court is not necessarily deprived of its jurisdiction because the District's unilateral alteration of the terms of the contract undermines the Association's status as the bargaining representative and is contrary to the intent of the Legislature in enacting the Public School Employment Relations Act.

In deciding the waiver issue, I first must decide whether it is properly before me. An appellee may raise any defense on appeal in support of the order being appealed without raising it on a cross-appeal as long as the defense does not have a view toward enlarging appellee's rights or lessening appellant's rights under the decree. See Mann v. Oppenheimer & Co., Del. Supr., 517 A.2d 1056, 1060 (1986) (citing United States v. American Ry. Express Co., 265 U.S. 425, 435 (1923)). Since the PERB referred the claim to an arbitrator, I agree with the District that if I accepted the waiver argument as the grounds for my decision, the only effect my decision would have on the PERB's decision would be the rejection of the PERB's retention of jurisdiction over the case. I believe that such a holding would have, at most, a minimal effect on the rights of both parties. Therefore, I hold that the issue is properly before me.

Assuming that a waiver of a statutory right to insist on negotiations must be clear and unmistakable, I hold that the

language of 2:4 constitutes such a clear and unmistakable waiver. Article 2:4 states that neither party will be required to negotiate with respect to any matter covered in the contract. Pursuant to this Article, the District had no duty to negotiate during the term of the contract regarding work hours. Therefore, the District could not have committed an unfair labor practice by failing to negotiate regarding the change in the teachers' starting times since it was not required to negotiate regarding work hours. The change in starting times is a breach of contract claim that the parties should resolve through the agreed upon non-binding arbitration process and not through the unfair labor practice forum. See Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine School Dist. Bd. of Educ., Del. PERB, U.L.P. No. 85-06-005 (Feb. 5, 1986), at 142-43. To the extent the Executive Director relied on the fact that the agreed upon arbitration is non-binding and the teachers do not have the right to strike rather than the language of 2:4, it was inappropriate since the language of 2:4 is clear. See City of Wilmington v. Wilmington Firefighters Local 1590, Del. Supr., 385 A.2d 720, 725 (1978)

As should be obvious, I also agree with the District as to the meaning of Articles 2:1, 2:5 and 3:7. Articles 2:1 and 2:5 merely set up procedures for negotiating and modifying the contract during the term of the contract if the parties agree to negotiate and modify the contract. They do not contradict the language of 2:4 that neither party is required to

negotiate. Further, I agree with the District that Article 3:7 is not to the contrary. This Article merely reserves the parties' right to bypass the grievance procedure where a remedy is prescribed by law. Since 2:4 waives the parties' right to require negotiations, 3:7 acts to reserve remedies prescribed by law for claims other than the statutory right to insist on bargaining over starting times.

The parties cite to a number of cases ostensibly supporting their respective interpretations of Article 2:4. Ultimately, I find that these cases support my interpretation of 2:4 as a clear and unmistakable waiver of the statutory right to bargain.

The District cites cases where courts found that zipper clause similar to the one in 2:4 acted as a clear and unmistakable waiver of the statutory right to bargain. See Aeronca, Inc. v. NLRB, 650 F.2d 501, 502 (4th Cir. 1981); NLRB v. Auto Crane Co., 536 F.2d 310, 312 (10th Cir. 1976); Southern Materials Co., Inc., 447 F.2d at 18; State of Maine v. Maine State Employees Ass'n., Me. Supr., 499 A.2d 1228, 1232 (1985). The Association attempts to distinguish these cases from the instant case because some of the contracts in those cases do not contain provisions similar to Articles 2:1 or 2:5. However, I do not find this to be a meaningful distinction. Again, 2:4 states that no party has a duty to bargain. Articles 2:1 and 2:5 only set up procedures on how to bargain and how to modify the contract if both agree to bargain or

modify. The Association also attempts to distinguish Southern Materials Co., Inc. and State of Maine because the contracts in those cases did not expressly cover the terms at issue, whereas in this case Article 18:1 expressly covers working hours. But I also find this distinction to be unpersuasive: just as the Court in Southern Materials Co., Inc. pointed out, since the zipper clause purports to waive the right to insist on negotiations over matters which were or could have been subject to negotiation, it is immaterial whether or not the collective bargaining agreement explicitly covered the term at issue. See Southern Materials Co., Inc., 447 F.2d at 18. Finally, the Association attempts to distinguish all four cases by stating, as the Executive Director stated, that policy considerations, such as the inability of the teachers to strike and the unavailability of binding arbitration, demand a distinction between how the zipper clauses in those cases should be interpreted and how the zipper clause in this case should be interpreted. However, I also find this purported distinction unpersuasive because, even assuming that the policy considerations support a different interpretation, the language of 2:4 is clear, just as the four cases discussed in this paragraph found similar zipper clauses to be clear. Therefore, I find that these cases support my opinion that the language of 2:4 is a clear and unmistakable waiver of the statutory right

to bargain.[4]

The Association cites three cases which, it argues, support the interpretation of Article 2:4 as not waiving their statutory right to bargain: Unit Drop Forge Div., Eaton Yale & Towne, Inc. v. NLRB, 412 F.2d 108 (7th Cir. 1969); Rockwell Int'l Corp., 260 NLRB 1346 (1982); Arizona Pub. Serv. Co., 247 NLRB 321 (1980). In Unit Drop, the Court held that the zipper clause was too general to waive the parties' statutory right to bargain over an incentive plan issue. Unit Drop is distinguishable from the instant case not because of the different language of the zipper clauses but because of other provisions in the respective collective bargaining agreements. Specifically, in Unit Drop, Article III § 6 of the supplementary agreement provided that "[i]n this Article are the recognized incentive plans in effect, and before any changes in these incentive plans are made or new plans established, they will be agreed upon by the parties." Unit Drop, 412 F.2d at 110. However, in the instant case, Article 2:5 provides that "[t]his agreement will not be modified in whole or in part by the parties except by an instrument in writing duly executed by the parties." (Appellant's Brief Exh. A at 2.)

In Unit Drop, the language of § 6 addressed only the issue

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[4]I recognize, as does the PERB, that the decisions of other states' PERBs are valuable sources of reference. See New Castle County Vo-Tech. Educ. Ass'n v. Board of Educ. of the New Castle County Vo-Tech. School Dist., Del. PERB, U.L.P. No. 88-05-025 (Aug. 19, 1988), at 12.

of changes to the incentive plans, while the zipper clause in that case addressed all matters covered by the collective bargaining agreement. Further, § 6 was located under the incentive schedules portion of a supplementary agreement to the collective bargaining agreement, while the zipper clause was located in a paragraph of the master (company wide) agreement. The scope, language and the location of § 6 and the zipper clause make it obvious that § 6 was a specific provision of the collective bargaining agreement and that the zipper clause was a general provision of the collective bargaining agreement. Therefore, § 6 was meant to take precedence over the zipper clause.

Unlike Unit Drop, Article 2:5 cannot be said to be a specific provision intended to take precedence over the zipper clause. Article 2:5, just like the zipper clause, applies to all matters covered by the collective bargaining agreement and is located within the same Article (Article 2-Negotiation of Agreement). Therefore, I hold that a general/specific distinction does not apply to the interpretation of the two provisions as it did in Unit Drop.

As far as the interpretation of the zipper clauses as affected by § 6 in Unit Drop and Article 2:5 in this case, § 6 was clear in providing that the parties had to agree to any change to the incentive plans before the change was made. Some sort of negotiating always precedes an agreement to a change in a contract. Therefore, § 6 required negotiations before any

change to the incentive plans. Because § 6 overrode the zipper clause, the Unit Drop Court was correct in holding that the zipper clause did not waive the right to insist on negotiations over a change in the incentive plans. On the other hand, the reservation of the right to negotiate as Article 2:5 purports to indicate is not as obvious. Article 2:5 requires an agreement (and, therefore, negotiations) only when an agreement has been "modified," whereas § 6 required an agreement (and, therefore, negotiations) as to any change in the incentive plan. The concept of requiring negotiations prior to the modification of an agreement is a more vague concept than requiring negotiations as to any change in an incentive plan. Indeed, the District argues that it did not alter the terms of the contract with regard to work hours. Ultimately, because the reservation of a right to require an agreement (and, therefore, negotiations) in Article 2:5 is somewhat vague, because the language of 2:4 is clear and because 2:5 is not a specific provision meant to override 2:4, I hold that the closer analysis of 2:5, as Unit Drop requires, does not dissuade me from holding that 2:4 acts as a waiver of the parties' right to negotiate.

In Rockwell Int'l Corp., the NLRB held that a zipper clause did not constitute a waiver of the parties statutory right to bargain over cafeteria food prices for two reasons. First, the purported waiver made an express reservation for the right to negotiate over long-established working conditions.

Second, even if the zipper clause made no such express reservation, the waiver was not effective as to cafeteria food prices. That is, at the time of contracting in Rockwell Int'l Corp., the union probably was not able to know it was waiving its statutory right to bargain over cafeteria food prices since it was not until the parties already had consummated the contract that the United States Supreme Court held in Ford Motor Co. V. NLRB, 441 U.S. 488 (1979), that cafeteria food prices were a mandatory bargaining issue. Further, even if the union knew it could demand bargaining on the issue, the issue was not a subject of the collective bargaining negotiations. Therefore, the NLRB decided that the waiver did not cover the issue.

The instant case is distinct from the circumstances in Rockwell Int'l Corp.. Unlike that case, Article 2:4 contains no express reservation of the statutory right to bargain over long-established practices. Also, the subject matter for which the parties were to waive negotiations was known to be a mandatory bargaining subject at the time of contracting. Finally, the matter was expressly covered in Article 18:1 (work hours) of the collective bargaining agreement. Therefore, Rockwell Int'l Corp. does not undermine my view that Article 2:4 constituted a waiver of the parties' statutory right to bargain.

In Arizona Pub. Serv. Co., the NLRB held that the employees did not waive their statutory right to bargain over

subcontracting in their collective bargaining agreement because an express provision of the agreement called for the reopening of negotiations if a provision of the contract was deemed unlawful. Thus, since the provision regarding subcontracting was deemed unlawful, the employer had a duty to bargain over the issue. Arizona Pub. Serv. Co. is distinct from this case because, even though the collective bargaining agreement here has a similar clause in Article 24:2, the Article at issue (i.e., Article 18:1-work hours) has not been deemed unlawful.

The Association also contends that even if it has waived its right to negotiate over starting times, the waiver does not deprive the PERB and this Court of jurisdiction over the dispute. That is, in NLRB v. C & C Plywood Corp., 385 U.S. 421 (1967), the Supreme Court held that it was proper for the NLRB to retain jurisdiction over a dispute where an employer unilaterally changed wages where the collective bargaining agreement, which contained a zipper clause that the Supreme Court barely noted, might have allowed the unilateral change in a clause regarding wages.

This case is similar to C & C Plywood Corp., in that the employer (the District) argues that a clause in the collective bargaining agreement deprives the Court of its jurisdiction over the case. However, the employer does not take issue with jurisdiction because the dispute involves an interpretation of a clause in the contract, as did the employer in C & C Plywood Corp., but because a contract clause waives the statutory right

which is the basis for the suit and my jurisdiction over the subject matter. Further, in C & C Plywood Corp., the Supreme Court twice noted the lack of an arbitration referral clause and the difficulty the employees would have if the NLRB was unable to retain jurisdiction, C & C Plywood Corp., 385 U.S. at 426, 429, while, in the instant case, the contract provides for non-binding arbitration for contract grievances. Indeed, in C & C Plywood Corp., the Supreme Court recognized the policy of using arbitration as an instrument for resolving contractual differences. Therefore, I find that the availability of the contractually agreed grievance procedure and the differences between the arguments as to why the respective decisionmakers lack subject matter jurisdiction are sufficient differences between the cases that the holding in C & C Plywood Corp. does not change my decision that Article 2:4 acts as a waiver of the Association's right to negotiate over starting times, that I do not have jurisdiction over the case because of the waiver and that the parties should resolve the dispute via the contractually agreed arbitration process.

As far as the Association's argument as to a fraudulent inducement of the waiver (which waiver, therefore, I purportedly could ignore under Southern Materials Co., Inc.), the Association provides no basis upon which I can find that the District somehow fraudulently induced the waiver in the zipper clause as to their right to negotiate over starting times. Therefore, I find the argument to be meritless.

I note one final case: Christina Educ. Ass'n v. Board of Educ. of Christina School Dist., Del. PERB, U.L.P. No. 88-09-026 (Nov. 29, 1988). In that case, the District argued that the PERB lacked jurisdiction because a decision on the unfair labor practice issue required an interpretation of the contract. However, the PERB held that it had jurisdiction because there was a reasonable suspicion that the District had committed an unfair labor practice. Christina Educ. Ass'n is distinct from this case because the purported lack of jurisdiction does not flow from the necessity of interpreting the contract but from the plain terms of the contract. That is, there is no reasonable suspicion that the District committed an unfair labor practice because the Association waived its right to negotiate over starting times and, therefore, the District could not have committed an unfair labor practice. Therefore, Christina does not persuade me to retain jurisdiction over the dispute.

Although my decision may seem unfair to the Association, I disagree. The collective bargaining process is one of give and take. Article 2:4 is an instance where the Association clearly gave up a right. However, the District also gave up the same right to insist on negotiations. The Association cannot accept the benefits of a contract without also bearing the corresponding burdens. Finally, I note, as the District points out, the Association is not without a remedy: the mutually agreed grievance procedure.

B. Deferral

Since I have decided that the Association waived its right to negotiate over starting times and, therefore, the proper forum for the dispute is the contractually agreed arbitration process, the PERB's decision to defer the case to an arbitrator is moot. Therefore, I do not decide the propriety of the deferral.

IV. CONCLUSION

Article 2:4 of the parties' collective bargaining agreement acts as a waiver of the Association's right to negotiate over starting times. Therefore, the District could not have committed an unfair labor practice by failing to negotiate over the issue. The Association's claim is one for breach of contract that it cannot pursue in this forum but can pursue through the contractually agreed upon grievance procedure.

An Order implementing this decision has been entered.