STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 3-2003:

TEAMSTERS LOCAL 190, INTERNATIONAL	)	Case No. 398-2003
BROTHERHOOD OF TEAMSTERS,	)	
Complainant,	)	
vs.	)	
CITY OF BILLINGS, MONTANA ,	)	
	)	
Defendant,	)	

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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

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I. INTRODUCTION

On August 15, 2002, Teamsters Local 190, International Brotherhood of Teamsters (Local 190) filed a charge with the Board alleging that the City of Billings had unilaterally changed the licensing requirements for members of the local and was refusing to bargain over wages. On September 10, 2002, the City filed a response to the charge denying that its actions constituted an unfair labor practice and requesting that the charge be dismissed. On December 2, 2002, Local 190 filed an amendment to the charge, contending that the City's action in paying members of the local an additional wage of $200.00 for obtaining the Class A commercial drivers license constituted an unfair labor practice. On December 23, 2002, the City filed an amended response to the charge, denying that its actions constituted an unfair labor practice.

On May 2, 2003, an investigator for the Board issued a finding that the charges had probable merit and transferred the case to the Hearings Bureau for a hearing on the charges.

Hearing Officer Anne L. MacIntyre conducted a hearing in the case on July 17, 2003. William J. O'Connor II represented Local 190. Bonnie J. Sutherland represented the City. Mel Armstong, Dirk Korn, Joe Dwyer, Bill Kemp, and David Mumford testified as witnesses in the case. Exhibits J-1 through J-3 were admitted into evidence, pursuant to the stipulation of the parties. The City's exhibit 1 was admitted without objection. The Hearing Officer took notice of the provisions of the U.S. Department of Transportation, Federal Highway Administration regulations, 49 C.F.R. Parts 382, 383, 387, and 390 - 399, and particularly 49 C.F.R. § 383.91.

The parties filed initial post-hearing briefs on August 21, 2003 and reply briefs on September 5, 2003. At that time, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether the City of Billings committed unfair labor practices in violation of Mont. Code Ann. § 39-31-401, as alleged in the charge filed by Local 190 on August 15, 2002 and the amended charge filed December 2, 2002.

III. FINDINGS OF FACT

1. Teamsters Local 190, International Brotherhood of Teamsters (Local 190) is a "labor organization" within the meaning of Mont. Code Ann. § 39-31-103(6).

2. The City of Billings is a "public employer" within the meaning of Mont. Code Ann. § 39-31-103(10).

3. Local 190 and the City are parties to a collective bargaining agreement effective July 1, 2001 through June 30, 2004, covering, among other employees, the employees of the City's Street/Traffic Division.

4. Article 11 of the collective bargaining agreement contains a clause, commonly known as a "zipper clause," which states:

> The parties acknowledge that during the negotiations that resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that all the understandings and agreements arrived at by the parties after their exercise of that right and opportunity are set forth in this Agreement. Therefore, Employer and Union, for the life of this Agreement, each voluntarily and unqualified [sic] waives the right and releases the other from the obligation to bargain collectively with respect to any subject or matter referred to or covered in the Agreement, or with respect to any subject or matter not referred to or covered in the Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

5. The City's Street/Traffic Division employs senior equipment operators/ maintenance workers (senior operators) and equipment operator/maintenance workers (equipment operators). Local 190 represents these operators for collective bargaining purposes.

6. Prior to April 15, 2002, the position description for senior equipment operator/maintenance worker in the City's Street/Traffic Division required employees to have "an appropriate, valid commercial driver's license." The position description for maintenance worker and equipment operator/maintenance worker required employees to have "an appropriate, valid driver's license." Prior to April 15, 2002, the City required all of the affected employees to have a commercial driver's license (CDL), Class B.

7. The City also required the operators to have a tanker endorsement, or "N" endorsement.

8. Based on state and federal law, drivers of a combination of vehicles which includes a trailer with a gross vehicle weight rating (GVWR) of more than
10,000 pounds must have a CDL, Class A.

9. In April 2002, Bill Kemp, Superintendent of the City's Street/Traffic Division, was considering the purchase of a trailer to haul a new paving machine. The trailer had a GVWR of 25,990 pounds. The vendor advised Kemp that towing a trailer over 10,000 GVWR required the driver to have a CDL, Class A. Kemp verified this fact by reviewing the Montana Commercial Driver License Manual.

10. At the time Kemp learned of the licensing requirement, the City had at least three existing trailers with a GVWR of more than 10,000 pounds, including a 1983 trailer with a GVWR of 10,200, a 1995 trailer with a GVWR of 15,350, and a 1997 trailer with a GVWR of 12,800. Employees used these trailers in the regular course of Street/Traffic Division operations to move equipment such as the skid steer and mower tractors, and to move supplies such as light poles.

11. Prior to April 2002, both the senior operators and the equipment operators regularly towed the trailers that exceeded 10,000 GVWR.

12. On April 15, 2002, Kemp notified senior operators who were members of Local 190 that they were required to complete the testing necessary for a CDL, Class A, type 2. He also notified other members of Local 190 that they were encouraged to obtain a CDL, Class A, type 2. He also advised these employees that the City would present a one-time congratulatory bonus of $200.00 to employees who completed the testing and receive their licenses within 30 days of April 15, 2002.

13. All of the senior operators and most of the equipment operators completed the testing and obtained the CDL, Class A.

14. The duties and responsibilities of the senior operators and the equipment operators were not altered in any significant way as a result of the acquisition of the new paver or the new trailer. Nor did they change as a result of obtaining the CDL, Class A.

15. The City did not bargain or offer to bargain over either the licensing requirement or the bonus.

16. Joe Dwyer, officer of Local 190, requested bargaining on the subject, but the City refused to bargain.

17. Under the collective bargaining agreement, an employee required to have a commercial driver's license who encountered difficulties in passing the required tests could be placed on leave of absence without pay. The City considered an employee who was unable to obtain the appropriate, valid commercial driver's license eventually subject to discharge.

18. Of the 27 employees who received their CDL, Class A endorsement, 17 chose to receive their bonus in the form of a $200.00 gift certificate to one of several businesses; the other 10 employees chose to receive $200.00.

IV. DISCUSSION[(1)]

Local 190 contends that the City committed unfair labor practices when it unilaterally and without negotiation changed the license requirement for some members of the bargaining unit and implemented a monetary incentive for obtaining the new license. The City denies committing any unfair labor practice and contends it has always required that the employees in the bargaining unit have the appropriate, valid license, as is evidenced by their job descriptions. The City further contends that the actual job duties of the employees did not change, that the one- time incentive/bonus given to the employees was not an integral part of the wage structure, and therefore did not require negotiation, and that the City was simply exercising its reserved management rights and did not violate the law .

Montana law requires public employers and labor organizations representing their employees to bargain in good faith on issues of wages, hours, fringe benefits, and other conditions of employment. Mont. Code Ann. § 39-31-301(5). The failure to bargain collectively in good faith is a violation of Mont. Code Ann. § 39-31-401(5). The Montana Supreme Court has approved the practice of the Board of Personnel Appeals of using federal court and National Labor Relations Board (NLRB) precedent as guidance in interpreting the Montana collective bargaining laws. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young* (Young III) (1984), 211 Mont. 13, 686 P.2d 185.

The basic, fundamental purpose of labor relations is the good faith negotiation of the mandatory subjects of bargaining--wages, hours, and other terms and conditions of employment. For an employer to make unilateral changes during the course of a collective bargaining relationship concerning mandatory subjects of bargaining is considered a violation of the requirement of good faith bargaining. *NLRB v. Katz* (1962), 369 U.S. 736. Absent waiver or other relief from the obligation, it continues during the term of the collective bargaining agreement. NLRB v. Sands Manufacturing Co. (1939), 306 U.S. 332, 342.

A. Obligation to Bargain

1. The Class A License

At the outset, it is important to note that the City did not require the equipment operators to obtain a CDL, Class A. The City required the senior operators to obtain the CDL, Class A, but it encouraged the equipment operators to do so. Therefore, the question of whether the City acted unilaterally in changing the licensing requirement for employees applies only to the senior operators.

The City argues that there is nothing in the existing collective bargaining agreement which would suggest that the licensing requirement would be a mandatory subject of bargaining.

However, mandatory subjects of bargaining are not defined by the agreement; they are defined by the statute and case law interpreting the statute. Under the statute, mandatory subjects are "issues of wages, hours, fringe benefits, and other conditions of employment."

The parties cited no cases and the hearing officer was unable to identify any cases addressing the question of whether licensing requirements are mandatory subjects of bargaining. Thus, this is a question of first impression in Montana. The City had imposed a requirement that employees hold a Class B license with a tanker endorsement on a long-standing, consistent basis. When such a requirement is a imposed on employees on a long-standing basis, it becomes a condition of employment. **See** *Bonnell/Tredegar Indus.* (1994), 313 NLRB 789, **enforced** (4thCir. 1995), 46 F.3rd 339. An employee who failed to obtain or maintain the required license was subject to being placed on unpaid leave and ultimately discharged. A change in a condition of employment such as a licensing requirement is a mandatory subject of bargaining.

2. The Incentive Payments

Even if the licensing requirement itself were not a mandatory subject of bargaining, wages, including incentive plans, are a mandatory subject. *Katz*, **supra**; *C & S Industries, Inc.*(1966), 158 NLRB 454 (incentive plans); *Homestead Nursing Center v. Hospital & Health Care Employees* (1993), 310 NLRB 678 (implementation of wage increases to employees completing state certification).

The City maintains it was not obligated to bargain over the $200.00 "congratulatory bonuses" because they were one time payments in the nature of bonuses, citing *Phelps Dodge Mining Co. v. NLRB* (10th Cir. 1994), 22 F.3d 1493; *Southern Maryland Hosp. Ctr. v. NLRB* (4thCir. 1986); *Harvstone Mfg. Corp*. (1984), 272 NLRB 939; and *Benchmark Industries* (1984), 270 NLRB 22. These cases stand generally for the proposition that bargaining is not mandatory for bonuses which are gifts. However, bargaining is required for bonuses which constitute compensation. The factors which determine whether an extra payment is a gift or compensation include whether the employer retains discretion with respect to the amount or timing of the extra payments.

In this case, despite the City's attempt to characterize the payments as one-time appreciation payments, they were in fact the quid pro quo offered the union members for achieving an objective that was important to the City. Under these circumstances, it is impossible to characterize the payments as gifts. The City was obligated to bargain with Local 190 about the compensation to be accorded to employees who complied with the City's requirement or request to obtain a new license.

3. Job Classifications and Changes in Duties

Prior to hearing, Local 190 maintained that an issue of fact in this case was whether the City had bargained with the union over job classifications in the 2001 negotiations which led to the current collective bargaining agreement. The City lodged an objection to inclusion of this issue of fact in the prehearing order on the grounds of relevance. The Hearing Officer overruled the objection, subject to Local 190 establishing relevance.

At hearing, Local 190 presented evidence on this point which tended to establish that the parties did bargain over job classifications in 2001. It also presented evidence which attempted to equate the issue of licensing to job classifications. In addressing the waiver issue in its reply brief in the case, Local 190 referred to the issue as being whether the City had unilaterally reclassified jobs. However, the allegations contained in the charge make no mention of job classifications and Local 190 failed to establish the relevance of job classifications to the question of whether the City was obligated to bargain over either the licensing requirement or the incentive payments.

Implicit in Local 190's evidence and arguments was a contention that the duties and responsibilities of the employees had changed as a result of the City's decision to acquire the new paver and the larger trailer for hauling the paver, thereby resulting in a change of job classifications. However, the evidence taken as a whole does not support a finding that the duties and responsibilities or job classifications changed as a result of the acquisition of the new paver or as a result of the change in the licensing requirement. Mel Armstrong testified that at the time of hearing, he had to load and tow the paver on a daily basis because the new paver was on tracks and could not be "roaded" to job sites. In addition, the evidence established that the new trailer for towing the paver had a GWVR approximately twice that of the other trailers. However, the testimony also established that operators had been required to regularly tow trailers in the past in combinations that required drivers to have a CDL, Class A. Thus, the difference in duties is merely one of degree.

Although job classifications and changes in duties are mandatory subjects of bargaining, the charges filed in this case did not allege unilateral changes in either classifications or duties. Local 190 has failed to establish any connection between the issue of the change in license requirement and either classifications or duties. Any suggestion that the City was obligated to bargain about classifications or duties in the context of this case is expressly rejected.

B. Relief from the Obligation to Bargain

1. Waiver

a. Express Waiver

The obligation to bargain collectively is an obligation that is subject to waiver by clear and unmistakable language. *Metropolitan Edison Co. v. NLRB* (1983), 460 U.S. 693. The City points to the language of the "zipper clause" contained in Article 11 of the collective bargaining agreement in support of its argument that Local 190 waived bargaining. Local 190 objected to consideration of the waiver argument contending that the City did not raise the issue prior to hearing and was therefore precluded from raising it in its legal arguments. Local 190 also contended that the "zipper clause" was unenforceable, asserting that the language of the agreement was not clear and unmistakable, and had not been "reaffirmed" by the parties in the most recent bargaining.

The City is not precluded from raising this issue. The rules of the Board do not require that affirmative defenses be specifically raised in the answer. The prehearing order, although general

in nature, squarely posed as issues of law whether the City had an obligation to bargain over either the licensing requirement or the bonus. The parties stipulated to admission of the collective bargaining agreement into evidence in the case, so the language of the agreement and its significance to the case are properly before the Board.

Local 190 cites Metropolitan Edison, **supra**, for the proposition that the waiver must be by clear and unmistakable language, implying that the language of the agreement in this case fails to meet this test. It further cites *Ohio Power Company and Local Union No. 478, Utility Workers Union of America, AFL-CIO* (1995), 317 NLRB 135, for the proposition that the language of the agreement must contain a clear and unmistakable indication that the union intended to waive its right to bargain, and that the fact that previous contracts contained identical language is evidence that the parties did not intend a change in their practice. The union asserts that the language in the agreement at issue in this case is identical to the language of prior agreements, even though the prior agreements are not in evidence.

The union's contentions concerning enforceability of the "zipper clause" are without merit. The language of the agreement in this case does not pose the issue presented in *Metropolitan Edison* in which the issue was whether the union had waived the right to strike.[(2)] The collective bargaining agreement contained both a general no strike clause and another clause allowing strikes in the case of unfair labor practices. Thus, the Court held there was no clear and unmistakable waiver. In this case, the language in this case waiving further bargaining is clear and unmistakable.

Ohio Power does not hold that, to be valid in a subsequent agreement, a zipper clause must be supported by reaffirmation language. The NLRB adopted such a requirement in an earlier case, *Gannett Rochester Newspapers, a Division of Gannett Co., Inc.* (1991), 305 NLRB 906. The NLRB's reliance on the reaffirmation requirement was rejected on appeal. *Gannett Rochester Newspapers v. NLRB* (D.C. Cir. 1993), 988 F.2d 198. The NLRB recognized the restriction on this rule in Ohio Power, and relied on a number of factors, including the absence of reaffirmation language, in finding that the waiver clause in that case was not effective. Thus, the *Ohio Power* case is heavily dependent on the specific facts of bargaining history which took place in that case, and the absence of reaffirmation language was only one factor. The absence of reaffirmation language in this case does not make the zipper clause unenforceable.

The more significant question concerning the waiver clause is whether it authorizes the employer to implement unilateral changes. Absent specific language in the collective bargaining agreement allowing the employer to make a unilateral change, a waiver or zipper clause does not allow an employer to make unilateral changes without bargaining. Thus, for example, in *Columbus and Southern Ohio Electric Co.* (1984), 270 NLRB 686, **aff'd sub nom** *International Brotherhood of Electrical Workers Local 1466, AFL-CIO v. NLRB* (D.C. Cir. 1986), 795 F.2d 150, the NLRB held that it was not an unfair labor practice for the employer to eliminate, without bargaining, a Christmas bonus when the parties had included the following waiver clause in the agreement:

> It is the intent of the parties that the provisions of this agreement will supersede all prior agreements and understandings, oral or written, express or implied,

> between such parties and shall govern their entire relationship and shall be the sole source of any and all rights or claims which may be asserted in arbitration hereunder or otherwise. The Union for the life of this Agreement hereby waives any rights to request to negotiate, or to negotiate or to bargain with respect to any matters contained in this Agreement.

270 NLRB at 688. In holding that the zipper clause allowed the employer to eliminate the Christmas bonus without bargaining, the NLRB relied chiefly on the first paragraph of the clause, also known as the integration clause. It also considered the bargaining history which evidenced a clear intent on the part of the employer, which had proposed the clause, to eliminate **all** past practices. **See also** *TCI of New York, Inc.* (1991), 301 NLRB 822.

The zipper clause contained in the parties' collective bargaining agreement does not contain broad integration language as in *Columbus and Southern Ohio Electric Co.* It does not provide that it "supersede[s] all prior agreements and understandings, oral or written, express or implied, between such parties." Rather, it states that all matters discussed during collective bargaining have been included in the agreement or omitted as a result of failure to agree. The zipper clause in this case does not authorize the employer to make unilateral changes without collective bargaining.

The City also suggests that unilateral changes are authorized by the management rights clause of the collective bargaining agreement. The NLRB has consistently rejected management rights clauses that are couched in general terms and make no reference to any particular subject area as waivers of statutory bargaining rights. *Smurfit-Stone Container Corp*., 2003 NLRB LEXIS 557, at 23-25;
Michigan Bell Telephone Co. (1992), 306 NLRB 281. Thus, the management rights clause does not authorize the employer to make unilateral changes in the conditions of employment without collective bargaining.

The effect of the zipper clause in this case is to protect employees from unilateral changes in working conditions, unless the employer can justify the change based on some other exception such as necessity (addressed **infra**). By agreeing that one party cannot force another party to bargain, the parties have agreed to maintenance of the status quo. Neither party may change the contract or an established practice without first bargaining. Since neither party is obligated to bargain, neither party can change the contract or an established practice. The zipper clause in this case precludes the City from implementing new terms or conditions of employment, in the absence of assent by the union. In other words, an agreement that neither party is obligated to bargain is a double-edged sword. It applies to both parties and because neither can be forced to bargain, neither can force the other to accept a change in the status quo. **See** *The Mead Corporation* (1995), 318 NLRB 201; ULP No. 17-98, *Frenchtown Education Association v. Frenchtown Public Schools* (1999). For additional discussion of these principles, **see** *Michigan Bell Telephone Co*. (1992), 306 NLRB 281.

In summary, in agreeing to the zipper clause contained in the collective bargaining agreement between the parties, Local 190 did not agree to allow the employer to make unilateral changes in working conditions. Although the union waived its right to bargain during the term of the

agreement, the employer also waived its right to bargain. Therefore, the language of the agreement precluded the City during the term of the agreement from making changes in the conditions of employment, unless the union agreed to the changes.

b. Waiver by Failure to Request Bargaining

An issue raised in the prehearing order was whether, if the City had an obligation to bargain, Local 190 had an obligation to request bargaining. Prior cases have held that when an employer notifies the union of a proposed change, and the union fails to request bargaining, the union has waived bargaining on the issue. **See e.g**. *Haddon Craftsmen, Inc*. (1990), 300 NLRB 789, 790, review denied sub nom. *Graphic Communications International Union, Local Union No. 97B v. NLRB* (3rd Cir. 1991), 937 F.2d 597. In this case, however, there is no evidence that the City notified the union of the proposed change prior to its implementation. Further, the evidence shows that on learning of the changes, the union did request bargaining. Therefore, the union met its obligation to request bargaining.

2. Necessity

In *Katz*, **supra**, the U.S. Supreme Court stated: "While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here." 369 U.S. at 747-48. Several cases and authorities have inferred from this language an exception based on necessity. **See, e.g.**, *Visiting Nurse Services of Western Massachusetts, Inc. v. NLRB* (1999), 177 F.3d 52, 56 (economic exigencies or business emergencies); *Peerless Publications, Inc*. (1987), 283 NLRB 334 (protection of the core purposes of the enterprise); Patrick Hardin, *The Developing Labor Law* 598 (3d ed., BNA 1992). It should be noted that in none of these cases was actual justification for a unilateral change based on necessity found; however, they did recognize the availability of the doctrine.

The question when necessity can justify imposition of a unilateral change in working conditions appears to be another question of first impression in Montana. However, under the facts of this case, an employer can make unilateral changes in a licensing requirement based on the doctrine of necessity.

The City in this case was forced by business necessity to change a longstanding condition of employment by requiring its senior operators to obtain CDL, Class A licenses. This change came about because the City had historically allowed the operators to perform their duties with only CDL, Class B licenses due to a mistaken understanding of the legal requirements. The City could not operate its enterprise legally without employees who possessed CDL, Class A licenses. Therefore, it was not an unfair labor practice for the City to make this unilateral change with respect to the senior operators. With respect to employees for whom a CDL, Class A license was necessary to perform the duties of the position, the City did not commit an unfair labor practice when it unilaterally changed this condition of their employment.[(3)]

The justification of necessity does not extend to the issue of the incentive bonuses, or *quid pro quo*, offered to the employees for obtaining the CDL, Class A licenses within 30 days. For

senior operators for whom the new license was in fact a necessity, the City could have required the new license without compensation, since it was not required to bargain at all about the requirement. It could not unilaterally change employee compensation. Even though the compensation it afforded was nominal and the City attempted to characterize it as a "congratulatory bonus," its compensatory nature is not changed, and the City was required to bargain over it.

C. Summary

Both the license required for employees in the City's Street/Traffic Division and the compensation for obtaining a new license are conditions of employment about which the City is required to bargain in good faith with Local 190, the representative of the employees in the Division. Except when the union has waived bargaining or when the change is justified by necessity, the implementation of unilateral changes by the employer in these conditions of employment is a failure to bargain in good faith.

Local 190 did not waive its right to bargaining over these terms, either by agreeing to the zipper clause in the collective bargaining agreement, or by failing to request bargaining. The City implemented a unilateral change in the licensing requirement for the senior operators, but not the equipment operators. The change in the licensing requirement was justified by necessity for the senior operators in the Street/Traffic Division, but the incentive bonus was not.

The City maintains that the bonus was an "amicable, employee-friendly approach to insure that employees quickly complied" with the employer's need to have its employees obtain the CDL Class A licenses. The City's motivation is undisputed in this regard. However, when an employer unilaterally grants additional compensation to employees, the right of employees to bargain collectively through representatives of their own choosing on issues of compensation is undermined. For that reason, it is a refusal to bargain collectively in good faith.

D. Remedy

Mont. Code Ann. § 39-31-406(4) provides that when the Board finds that an employer has engaged in an unfair labor practice, the Board shall order the employer to cease and desist from the unfair labor practice, and to take such affirmative action as will effectuate the policies of the Collective Bargaining Act. Thus the appropriate remedy for the City's failure to bargain in good faith is an injunction against making unilateral changes in terms and conditions of employment, an order to bargain with the union about appropriate compensation for employees who obtained their CDL, Class A license, and a posting requirement. The required bargaining is strictly limited to the issue of compensation for obtaining the CDL, Class A, as required or encouraged by the City in April 2002. The bargaining requirement does not extend to issues of job classification.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction of this case. Mont. Code Ann. § 39-31-207.

2. A public employer may not refuse to bargain collectively in good faith on questions of wages, hours, fringe benefits, and other conditions of employment with an exclusive representative of its employees. Mont. Code Ann. §§ 39-31-305 and 39-31-401(5). An employer that makes unilateral changes during the course of a collective bargaining relationship concerning wages, hours, fringe benefits, and other conditions of employment has refused to bargain in good faith. *NLRB v. Katz* (1962), 369 U.S. 736.

3. A longstanding requirement that employees hold a CDL, Class B, with N endorsement is a condition of employment.

4. An incentive bonus offered as compensation for obtaining a new or different license is a wage or a condition of employment.

5. Although the licensing requirement was a condition of employment, the unilateral change made by the City of Billings in the licensing requirement for the senior operators was not a violation of Mont. Code Ann. § 39-31-401(5) because the change was justified by necessity.

6. The City of Billings did not unilaterally change the licensing requirement for the equipment operators in violation of Mont. Code Ann. § 39-31-401(5); it encouraged but did not require the equipment operators to obtain the CDL, Class A.

7. The City of Billings unilaterally changed the compensation of the members of Teamsters Local 190, International Brotherhood of Teamsters, and
refused to bargain collectively in good faith in violation of Mont. Code Ann. § 39-31-401(5) when it offered compensation in the form of an incentive bonus to its senior operators and equipment operators to obtain CDL Class A licenses.

8. Teamsters Local 190, International Brotherhood of Teamsters, did not waive its right to bargaining over compensation to its members.

9. As a result of the unfair labor practices committed by the City of Billings, Teamsters Local 190, International Brotherhood of Teamsters, is entitled to cease and desist orders, an order directing the City to bargain with the union about compensation for employees who obtained the CDL, Class A, and an order to post and publish the notice set forth in Appendix A.

VI. RECOMMENDED ORDER

The City of Billings is hereby **ORDERED**:

1. To immediately cease the practice of unilaterally altering terms and conditions of employment subject to the collective bargaining agreement without bargaining with Local 190; and

2. Within 30 days of this order:

a. To initiate collective bargaining with Teamsters Local 190, International Brotherhood of Teamsters, about the compensation accorded to employees who obtained their CDL, Class A license;

b. To reinstate all leave taken by members of Local 190 to participate in these proceedings;

c. To post copies of the notice contained in Appendix A at conspicuous places, including all places where notices to employees are customarily posted, at the City for a period of 60 days and to take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material.

DATED this 21st day of November, 2003.

BOARD OF PERSONNEL APPEALS

By: /s/ ANNE L. MACINTYRE
Anne L. MacIntyre, Chief
Hearings Bureau
Department of Labor and Industry

NOTICE: Pursuant to Admin. R. Mont. 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than December 15, 2003. This time period includes the 20 days provided for in Admin. R. Mont. 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.

The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

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

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

2. Courts and the NLRB have extended the rule allowing waiver by clear and unmistakable language to permit waiver of the duty to bargain. ***See e.g.*** *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers v. Southwest Airlines Co.* (5th Cir. 1989), 875 F.2d 1129, 1135; *Honeywell International, Inc. v. NLRB*, (D.C. Cir. 2001), 253 F.3d 125.

3. As noted ***supra***, the City did not unilaterally change this condition for the equipment operators, but it encouraged but did not require them to obtain the CDL, Class A.

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE STATE OF MONTANA

BOARD OF PERSONNEL APPEALS

The Montana Board of Personnel Appeals has found that we violated the Montana Collective Bargaining for Public Employees Act and has ordered us to post and abide by this notice.

We will not fail to bargain in good faith with Teamsters Local 190, International Brotherhood of Teamsters;

We will not unilaterally change the terms and conditions of employment of employees covered by the collective bargaining agreement with the Teamsters Local 190, International Brotherhood of Teamsters without prior negotiations with the Association;

We will engage in negotiations with Teamsters Local 190 over compensation for employees in the Street/Traffic Division who obtained their CDL, Class A licenses within 30 days of April 15, 2002;

We will reinstate all leave taken by employees to participate in the hearing of ULP 3-2003.

DATED this _____ day of December, 2003.

CITY OF BILLINGS