

NLRB (Finally) Abandons “Clear and Unmistakable Waiver” Standard

Article By:

Anthony B. Byergo

Reversing among its most controversial lines of precedent, the National Labor Relations Board (NLRB) issued a decision on September 10, 2019, that significantly changes the legal standard to determine whether an employer with an existing collective bargaining agreement has a continuing duty to bargain as to particular matters. In [*MV Transportation, Inc.*](#), 368 NLRB No. 66, the Board’s majority held that it would no longer apply the “clear and unmistakable waiver” standard in determining whether agreed language in a collective bargaining agreement relinquishes the union’s right to bargain as to any change made by the employer. Instead—consistent with three federal courts of appeal that have repeatedly been critical of the Board’s analysis—the Board will apply a “contract coverage” analysis to determine whether the issue is within the “scope” or “compass” of the existing contractual language and, if so, the employer will not have a continuing duty to bargain.

Background

In *MV Transportation*, the collective bargaining agreement at issue between the transit-company employer and the union contained language giving the employer the right to issue, amend, and revise policies, rules, and regulations. The employer gave notice to the union of various revised policies and rules, and an opportunity to provide any input or feedback prior to the planned implementation date. The employer and union met and, indeed, the employer agreed to modify certain of the policies in response to union input before implementation.

The union filed an unfair labor practice charge claiming that, despite the language of the collective bargaining agreement, the employer was obligated to bargain to agreement or impasse prior to implementation of certain policies. The union alleged that, by unilaterally implementing, the employer violated the duty to bargain under Sections 8(a)(5) and 8(d) of the National Labor Relations Act (NLRA). The parties submitted the case directly to the Board on a stipulated record without a hearing before an administrative law judge.

The Board used this case to re-examine the “clear and unmistakable waiver” standard it has long applied to determine whether there is a continuing duty to bargain during the term of a contract as to any particular issue. Under this longstanding standard, contract language was examined to determine if it “unequivocally and specifically express[ed] [the parties’] mutual intention to permit unilateral employer action with respect to a particular employment term.” This standard in application resulted

in a finding of a waiver of the union's right to bargain in only the rarest cases. Some practitioners understandably viewed the standard as virtually unattainable based on perplexing decisions such as a 2016 case involving a collective bargaining agreement (CBA), which contained a broad, fairly typical management rights clause that expressly gave the employer

the sole and exclusive rights to manage; to direct its employees; . . . to evaluate performance, . . . to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees . . .

Despite this comprehensive and specific language, the Board, in that case, found that the employer had a duty to bargain over work rules, absenteeism policies, and progressive discipline policies because the contractual management-rights provisions in the CBA did not "specifically reference work rules, absenteeism, or progressive discipline." Thus, the management rights clause did not constitute a "clear and unmistakable waiver" by the union of its right to bargain over such issues.

Adopting "Contract Coverage"

Re-examining these issues in *MV Transportation*, the current Board majority recognized that the "clear and unmistakable waiver" standard has been repeatedly criticized by several federal courts of appeal and resulted in the denial of enforcement of numerous Board orders. Indeed, the NLRB's obstinate refusal to acquiesce to the admonitions from the U.S. Court of Appeals for the District of Columbia Circuit over the last 25 years even resulted in the Board most recently having to pay for an employer's attorneys' fees in a 2016 case. (This decision amounts to a virtual invitation for any employer facing an adverse Board decision based on the "clear and unmistakable waiver" standard to seek review (and its fees) in the D.C. Circuit (which has jurisdiction to review any NLRB decision).) Further, the Board majority recognized that the old standard undermines the stability of collective bargaining agreements and the grievance arbitration process, alters the deals reached by the parties in bargaining, and impermissibly has the Board interpret and sit in judgment of contract terms.

Accordingly, the Board majority adopted the "contract coverage" standard long followed by the D.C., First, and Seventh Circuits. Under this standard, employers do not have a continuing duty to bargain as to an issue during the term of a CBA if the contract language can be said to "cover" the change in dispute. In applying this standard, the Board majority declared:

[T]he Board will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation; and the Board will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally. In applying this standard, the Board will be cognizant of the fact that "a collective bargaining agreement establishes principles to govern a myriad of fact patterns," and that "bargaining parties [cannot] anticipate every hypothetical grievance and . . . address it in their contract." . . . Accordingly, we will not require that the agreement specifically mention, refer to or address the employer decision at issue. . . . Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5).

Further, "if the contract coverage standard is not met, the Board will continue to apply its traditional waiver analysis to determine whether some combination of contractual language, bargaining history, and past practice establishes that the union waived its right to bargain regarding a challenged unilateral change."

Conclusion

The Board's decision in *MV Transportation* has significant implications in stabilizing labor relations and giving effect to the intended and expected consequences of contractual agreements. Multiple generations of management-side labor lawyers and labor relations professionals have lamented the absurdity of reaching agreements at the bargaining table that give the employer the "right to implement rules and policies," only to be told by the NLRB that that does not mean the union waived its right to bargain about (for example) "work rules" or "safety rules." *MV Transportation* finally aligns the Board with what the courts and most arbitrators have long been willing to say—that the contract means what it says and does not require magic words or unworkable specificity to say it.

© 2025, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., All Rights Reserved.

National Law Review, Volume IX, Number 254

Source URL: <https://natlawreview.com/article/nlrb-finally-abandons-clear-and-unmistakable-waiver-standard>