

NLRB Breaks With 70 Years of Precedent and Develops a New Test for Unilateral Changes

In *MV Transportation, Inc.*, a 3 to 1 majority of the National Labor Relations Board recently abandoned the “clear and unmistakable waiver” standard that the Board had historically used to determine whether unilateral changes in terms and conditions of employment were permitted under a collective bargaining agreement. In its place, the Board majority adopted the “contract coverage” standard. In so doing, the majority was responding to and agreeing with long-standing criticism of the earlier standard by four Circuit Courts of Appeals, including the D.C. Circuit Court that has jurisdiction to review all NLRB decisions.

The clear and unmistakable waiver standard required that the contract provision relied upon for the change unequivocally and specifically express the parties’ mutual intention to permit unilateral action by the employer with respect to a particular employment term. In rejecting this standard, the Board majority noted the D.C. Circuit’s frequently stated view that the standard “is in practice impossible to meet.” Under the contract coverage standard, on the other hand, the Board will examine the language of the collective bargaining agreement to determine whether the employer’s unilateral action “falls within the compass or scope of contractual language that grants the employer the right to act unilaterally.” By way of example, the majority explained “if an agreement contains a provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones the employer [could] ... unilaterally implement new attendance or safety rules or by revising existing disciplinary or off-duty-access policies. In both instances the employer will have made changes within the compass or scope of a contract provision granting it the right to act without further bargaining.” However, if an agreement does not cover a disputed unilateral change, the Board will apply the clear and unmistakable waiver standard to determine whether some combination of contractual language, bargaining history, and past practice privileged the employer’s unilateral change in terms and conditions of employment.

In this case, the collective bargaining agreement between MV Transportation and Amalgamated Transit Union Local 1637 contained a management rights clause that granted the employer the “sole and exclusive” right to “discipline and discharge for cause and to adopt and enforce reasonable work rules.” The clause also provided that the employer “shall have the right to issue, amend and revise policies, rules and regulation” so long as such action does not violate the terms of the Agreement, and that “the company will obtain input from the Union prior to implementation of policy, rules, and regulations”. Also the “Discipline and Discharge Procedures” provision in the Agreement gave the employer “the right to issue, amend and revise policies, rules, and regulations”.

The disputed unilateral changes by the employer involved 1) adding tasks to be performed under the light duty policy, 2) promulgating a new safety rule with a threat of discipline, 3) revising discipline for violating the attendance policy and 4) adding a new work assignment under threat of discipline. In each instance the majority found the unilateral action to be within the compass or scope of the agreement. The dissent, with the exception of the change to the light duty policy that was considered minor, would have found that “nothing in those contract provisions or elsewhere in the Agreement clearly and unmistakably waived the Union’s right to bargain over the discipline to be imposed for violating such policies.”

As can be seen by the application of the contract coverage standard to the facts of this case, it is going to be easier for employers to justify unilateral action by showing a change in employment conditions was within the compass or scope of contractual provisions rather than showing that the contractual provision clearly and unmistakably waived the union’s right to bargain. Unions will no longer be successful under the new standard at the Board and will now have to convince



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arbitrators that the employer's unilateral action violated the agreement.
