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NLRB Dumps Longstanding "Clear and Unmistakable Waiver" Standard for More Employer-Friendly "Contract Coverage" Test

Labor Relations Update Blog on **September 11, 2019**

As we near the end of the agency's fiscal year on September 30, the NLRB is churning out many significant decisions. On September 10, the Board issued a sweeping decision concerning an issue that has divided the NLRB and D.C. Circuit Court of Appeals (as well as the First and Seventh Circuits, and partially, the Second Circuit) for years. A 3-1 majority of the Board (Chairman Ring and Members Kaplan and Emanuel, with Member McFerran dissenting), adopted the "contract coverage" test instead of the "clear and unmistakable waiver" standard for determining whether an employer's unilateral action is permitted by a collective bargaining agreement. *See MV Transportation, Inc.*, 368 NLRB No. 66 (Sept. 10, 2019).

Key Takeaway – Board Adopts the "Contract Coverage" Test and Applies it Retroactively

Rejecting the exacting "clear and unmistakable waiver" standard that had been Board law for nearly 70 years, the NLRB finally adopted the "contract coverage" test that the D.C. Circuit and other courts have utilized for decades. The impact of this decision is that the NLRB has loosened the reins on employers defending against a Section 8(a)(5) unilateral change allegation by asserting contractual language privileged it to make the disputed change without further bargaining. The holding sheds new light on the relevant analysis an employer (and union) now must undertake to determine whether the parties' collective-bargaining agreement (specifically, management-rights provisions) afford the employer the right to unilaterally act. The decision levels the playing field that had previously been skewed towards unions.

The prior "clear and unmistakable waiver" standard – which the Board majority remarked was "'in practice, impossible [for employers] to meet,' or virtually so" – had required an employer to establish that the contract "unequivocally and specifically express [the parties'] mutual intention to permit unilateral action with respect to a particular employment term." In other words, the parties were required to have bargained-over the employer's right to unilaterally act and the collective-bargaining agreement must have specifically codified the parties' agreement as to that issue.

Now, under the contract coverage test:

> "[T]he Board will assess the merits of this defense by undertaking the more limited review necessary to determine whether the parties' collective-bargaining agreement covers the disputed unilateral change (or covered it, if the disputed change was made during the term of an agreement that has since expired). In so doing, the 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."

The Board went on to note that in applying this test, "we will not require that the agreement specifically mention, refer to or address the employer decision at issue." However, the Board cautioned that the contract coverage test does not amount to a rubber stamp for all unilateral actions, citing decisions from the D.C. Circuit and First Circuit where courts rejected employers' attempts to utilize management-rights clauses to apply to subject matters not reasonably addressed by those provisions.

The Board decided that the contract coverage standard applies ***retroactively*** – i.e., to all pending cases in whatever stage – concluding that doing so would not work a "manifest injustice" because the waiver standard has sustained judicial criticism for nearly 20 years and the parties could not have justifiably relied on the Board continuing to adhere to that standard.

Basis for the Majority's Decision to Adopt the "Contract Coverage" Test

As is typical when overturning precedent, the Board majority went to great lengths to outline why it decided to depart from the "clear and unmistakable waiver" (in short, "waiver") standard in relation to this defense, reiterating that it had "carefully considered this important issue" and that the holding is "more consistent with the purposes of the Act and sound labor policy."

The Board majority outlined the bases for its holding, as follows:

- The waiver standard necessarily required the Board to sit in judgment upon parties' contract terms, which, according to Supreme Court precedent, it is not permitted to do. The majority cited several cases in a footnote (just the "tip of the iceberg") where the Board declined to find a "clear and unmistakable waiver" based on the contract's failure to expressly identify the specific unilateral action at issue, even though the agreement otherwise covered the employer's conduct generally.
- The waiver standard undermined contractual stability by requiring "perpetual bargaining" over contract terms instead of encouraging parties to negotiate comprehensive labor contracts in the first place.
- The waiver standard also altered the deal the parties reached in collective bargaining by applying an exacting standard *only* to an employer's right to act unilaterally, and not any other provisions or union obligations. In doing so, the waiver standard ignored that such a contractual right was part and parcel of the give-and-take of collective bargaining, and tilted the playing field in the union's favor.
- The waiver standard resulted in conflicting contract interpretations between the Board and the courts, and Section 301 of the LMRA authorizes federal courts, *not the Board*, to "fashion a body of federal law for the enforcement of…collective bargaining agreements."
- The waiver standard also undermined grievance arbitration because it encouraged unions to raise contractual disputes before the Board, where it was more apt for a favorable determination, which runs contrary to the policy established by the Supreme Court in the *Steelworkers* trilogy to resolve contractual disputes in arbitration.
- Finally, the waiver standard has been "indefensible and unenforceable," as the D.C. Circuit, which has plenary jurisdiction to review NLRB decisions, recently sanctioned the Board for continuing to adhere to it in NLRB decisions on appeal.

The majority commented that its decision did not conflict with Supreme Court precedent that referred to a "clear and unmistakable waiver" standard (*see, e.g., Metropolitan Edison v. NLRB*, 460 U.S. 693 (1983)), because those decisions did not squarely address the issue before the Board here, and to the extent those decisions relied on the Board's expertise and experience in interpreting and applying the Act at the time, those same reasons underscore the Board's holding here and warrant application of the contract coverage test.

Applying the Contract Coverage Standard to the Employer's Unilateral Acts

At issue in the case was whether the employer, who operated a fixed route transit system, violated Section 8(a)(5) and (1) of the Act by implementing the following five policies without union agreement or first bargaining with the union to impasse: (i) the addition of a light duty assignment; (ii) implementation of a new safety policy; (iii) modification of a schedule adherence policy; (iv) implementation of a new security sweep / breach policy; and (v) application of a new drive cam or event recording policy.

Applying the contract coverage test, the majority found that MV Transportation was within its contractual rights, among other reasons, to unilaterally implement the aforementioned changes. Generally, each revision or new policy was covered by the parties' CBA, specifically the broad management-rights clause where the company reserved and retained the right to, among other things, "adopt and enforce reasonable work rules."

Member McFerran's Dissent

Member McFerran issued a lengthy dissent, in which she lambasted the majority for overturning 70 years of precedent without notice or public participation, and for abandoning "one of the oldest and most familiar of Board doctrines" by, according to McFerran, failing to engage in reasoned decision making. McFerran defended the waiver standard and suggested that instead of siding with the D.C. Circuit's "shift in position" on this issue, the Board should have adhered to its traditional view and sought Supreme Court review. As we have noted in prior posts, the agency's overturning precedent in the last several years is hardly new. Many longstanding decisions were overturned without notice and public participation.

McFerran, in dissent, asserted that the majority's decision will result in industrial strife and destabilize collective bargaining because in light of this decision and others, unions may decide they are simply better off without a CBA. The majority responded to this "dire prediction" by reeling off several reasons such a dystopian outcome is unlikely, such as the impetus for unions to enter into a security / dues arrangement in a CBA, the pressure to codify employee benefits in an written agreement, and the desire to institute a grievance-arbitration system to resolve employee complaints.

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To be sure, the impact of the Board's precedent-changing decisions in recent years (and weeks) bears close monitoring. We will continue to keep you informed as new decisions from this active Board are issued!

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