

NLRB: Contract Coverage Standard Is No Defense to Unilateral Change Unless CBA ‘Explicitly’ Says So

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Provisions in an expired collective-bargaining agreement (CBA) do not cover post-expiration unilateral changes under the National Labor Relations Act (NLRA), unless the expired CBA contains language explicitly providing that the relevant provision survives contract expiration, the National Labor Relations Board (NLRB) has decided. *KOIN-TV*, 369 NLRB No. 61 (Apr. 21, 2020).

KOIN-TV is a case of first impression for the NLRB under *MV Transportation, Inc.*, 368 NLRB No. 66 (2019). In that case, the NLRB decided that, to determine whether an employer committed an unlawful unilateral change, it would apply a “contract coverage standard,” rather than requiring the employer to prove the union “clearly and unmistakably” waived its right to bargain about the change in the CBA.

Contract Coverage Standard

In *MV Transportation*, the NLRB held that under the contract coverage standard, it will “examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally.”

The NLRB also held that, in conducting that inquiry, it will apply “ordinary principles of contract interpretation.” If the NLRB finds the language in the CBA covers the employer’s unilateral act, it will hold the CBA “authorized the employer to make the disputed change unilaterally” and, therefore, lawfully. (The NLRB did not eliminate the more-difficult-to-prove defense.)

KOIN-TV Facts

When the employer purchased LIN television (a unionized employer), it assumed the CBA and agreed to extend the CBA for several months. During bargaining for a successor agreement, it proposed eliminating advance posting requirements for schedule changes. The union rejected this proposal.

After the extended agreement expired, the employer made the following two changes:

- A requirement that employees complete a motor vehicle/driving history background check annually on their anniversary dates. Previously, employees completed the checks only if they were involved in a vehicular accident on the job.
- The employer began posting employees’ work schedules two weeks in advance. Previously, the employer had posted schedules four months in advance, a practice the parties stipulated had been followed since about 1993.

In response to these changes, the union filed an unfair labor practice charge alleging that both changes were unlawful because the employer had an obligation to bargain with the union before making them.

Administrative Law Judge’s Decision

After an investigation, an unfair labor practice complaint was issued alleging both changes were unlawful. A trial was held before an NLRB Administrative Law Judge (ALJ). Although the case was decided and argued before *MV Transportation* was decided (meaning, the contract coverage defense was not in effect), the employer defended under a contract coverage theory. The ALJ rejected the employer’s defense on two grounds: first, the contract coverage standard was not extant law at the time, and second, even if it were, contract coverage would not apply to the changes at issue because they were made after the CBA had expired.

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Relevant CBA Provisions

The expired CBA had three provisions relevant to alleged unilateral changes.

The first addressed management rights and provided as follows:

NABET-CWA recognizes the exclusive right and responsibility of the Company to direct the working force and to direct the operations of the Company. The Company's rights shall include, but not be limited to, those necessary to maintain order and efficiently manage the Company, and to discharge, suspend, or discipline Employees for just cause and to establish working rules and to control station operations, provided, however, that the exercise of such rights does not violate the terms and provisions of this Agreement.

The second addressed hours of work and provided, in part:

All work schedules, continuing hours of work and days off will be prepared and posted two (2) weeks in advance of the commencement of the workweek. The Employer will post work schedules as soon as they are known to the Employer.

The third addressed travel and provided as follows:

Automobile travel by Employees shall be covered by the Vehicle Use Policy in the Company's Employee Guidebook. It is understood that under no circumstances shall an Employee be required to use their car under this Article. Employees who are ticketed for a moving violation for which they are responsible while driving on Company business must pay the fine for such ticket, whether the moving violation occurred while driving a Company owned vehicle or their own vehicle.

NLRB Decision

The NLRB noted it had decided the *MV Transportation* contract coverage standard was to be applied retroactively. Therefore, that standard applied to this case.

The NLRB next held that "provisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration." The NLRB reasoned that post-expiration, the duty to maintain the status quo is not a contractual requirement, it is a statutory requirement:

Thus, after a labor contract expires, an employer has a duty to maintain the status quo. Although the status quo is ascertained by looking to the substantive terms of the expired contract, ... the obligation to maintain the status quo arises out of the Act, not the parties' contract. After a contract expires, "terms and conditions continue in effect by operation of the NLRA. They are no longer agreed-upon terms; they are terms imposed by law."

Based upon these "principles," the NLRB held the expired CBA could not "provide a defense for the Respondent's allegedly unlawful unilateral actions." Thus, the NLRB held the employer was bound to maintain the status quo, thereby violating the NLRA when it failed to do so.

Takeaways

- Employers should consider seeking to add language to their CBAs that terms that benefit the employer survive the expiration of the agreement.
- Employers should factor in this case when deciding whether, during negotiations for a successor agreement, to agree to extend an expired CBA. If the CBA does not contain the requisite "survive" language and the contract expires, the employer will lose the right to rely on contract coverage as a defense to an unfair labor practice charge on unilateral change. (The more-difficult-to-prove clear and unmistakable waiver defense will still be available.)
- While a CBA provision may not survive as a matter of contract law, it may survive as a matter of law as part of the status quo. This applies to both the employer and the union.
- This line of cases benefits employers post-CBA expiration because a case that arises will be within the jurisdiction of the NLRB, not an arbitrator. Unlike the NLRB, an arbitrator would review extrinsic evidence, and may even ignore the contract coverage standard and instead apply the much-less-employer-friendly clear and unmistakable waiver standard.

Please contact a Jackson Lewis attorney with any questions about this case or the NLRB.

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