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MV Transportation, Inc. and Amalgamated Transit Union Local #1637, AFL-CIO, CLC. Case 28–CA–173726

September 10, 2019

DECISION AND ORDER

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In this case, we once again visit an issue that has repeatedly sown division among the members of the National Labor Relations Board and between the Board and reviewing courts of appeals. That issue is whether a “clear and unmistakable waiver” standard or a “contract coverage” standard should apply when considering whether an employer’s unilateral action is permitted by a collective-bargaining agreement. When the full Board last visited this issue in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), a majority reaffirmed adherence to the “clear and unmistakable waiver” standard. Today, for reasons that follow, we overrule *Provena St. Joseph* and adopt the “contract coverage” standard.

I. INTRODUCTION

The National Labor Relations Act (the Act) imposes on employers and unions the mutual duty to bargain in good faith concerning wages, hours, and other terms and conditions of employment. The resulting collective-bargaining agreement imposes obligations and confers rights on the parties to the agreement, as well as on the employees it covers. The terms of the agreement represent the parties’ bargained-for deal, arrived at through the give-and-take of negotiations, and the parties are entitled to the benefit of their bargain based on the language they agreed to include in their contract. As the provisions of a collective-bargaining agreement come to be applied to the particulars of everyday workplace life, however, unanticipated circumstances inevitably arise. Despite the most diligent bargaining and most careful drafting, there are times during

the term of a collective-bargaining agreement that the agreement must be interpreted in order to ascertain the parties’ respective rights and obligations.

It is well established that an employer does not violate the Act if the collective-bargaining agreement does, in fact, grant the employer the right to take certain actions unilaterally (i.e., without further bargaining with the union). The question presented in this case concerns the standard the Board should apply to determine *whether* a collective-bargaining agreement grants the employer that right. As noted, the Board currently applies the “clear and unmistakable waiver” standard, under which the employer will be found to have violated the Act unless a provision of the collective-bargaining agreement “specifically refers to the type of employer decision” at issue “or mentions the kind of factual situation” the case presents.¹ This is not the standard applied by courts (or arbitrators) when interpreting collective-bargaining agreements, and several courts of appeals have expressly rejected the Board’s “clear and unmistakable waiver” standard and adopted instead a “covered by the contract” or “contract coverage” standard. Importantly, these courts include the United States Court of Appeals for the District of Columbia Circuit, which, by statute, has plenary jurisdiction to review Board decisions.² Recognizing that “a collective bargaining agreement establishes principles to govern a myriad of fact patterns,” the D.C. Circuit will find that an employer’s unilateral change in a term or condition of employment is covered by the contract if the change is “within the compass” or “scope” of a contract provision that grants the employer the right to act unilaterally.³ In making this determination, the D.C. Circuit applies “ordinary principles of contract law”⁴ and “give[s] full effect to the plain meaning of such provision.”⁵

After careful consideration, we decide today to abandon the “clear and unmistakable waiver” standard and to adopt the “contract coverage” standard. For the reasons explained below, we conclude that the contract coverage standard is more consistent with the purposes of the Act than the clear and unmistakable waiver standard.

¹ *Postal Service*, 306 NLRB 640, 643 (1992).

² See Sec. 10(f) of the Act: “Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . .” (Emphasis added).

³ *NLRB v. Postal Service*, 8 F.3d 832, 838 (D.C. Cir. 1993) (“[I]t is clear that service reductions are within the compass” of contract provision granting employer certain rights of unilateral action.); *Department of Justice v. FLRA*, 875 F.3d 667, 674 (D.C. Cir. 2017) (“[W]hat matters

is whether the policy falls within the scope of the collective bargaining agreement in light of the . . . policy of encouraging such agreements by fostering their stability and repose.”); see also *NLRB v. Solutia, Inc.*, 699 F.3d 50, 67 (1st Cir. 2012) (determining whether the language of the management-rights clause contained in the parties’ agreement “encompass[ed]” the disputed unilateral change).

⁴ *Wilkes-Barre Hospital Co., LLC v. NLRB*, 857 F.3d 364, 373 (D.C. Cir. 2017) (quoting *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015)).

⁵ *Id.* at 376 (quoting *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 641 (D.C. Cir. 1991)).

Under contract coverage, the Board 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. For example, 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 would not violate Section 8(a)(5) and (1) by unilaterally implementing new attendance or safety rules or by revising existing disciplinary or off-duty-access policies.⁶ 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. In other words, under contract coverage the Board will honor the parties' agreement, and in each case, it will be governed by the plain terms of the agreement.

On the other hand, if the agreement does not cover the employer's disputed act, and that act has materially, substantially and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will have violated Section 8(a)(5) and (1) unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change⁷ or that its unilateral action was privileged for some other reason.⁸ Thus, under the contract coverage test we adopt today, the Board will first review the plain language of the parties' collective-bargaining agreement, applying ordinary principles of contract interpretation, and then, if it is determined that the disputed act does *not* come within the compass or scope of a contract provision that grants the employer the right to act unilaterally, the analysis is one of waiver.

We also conclude, in accordance with the Board's usual practice, that it is appropriate to apply the standard we adopt today retroactively. Accordingly, we will apply the contract coverage standard in this case and in all pending unilateral-change cases where the determination of whether the employer violated Section 8(a)(5) turns on whether contractual language granted the employer the right to make the change in dispute.

⁶ Provided, of course, that no other provision of the agreement limits the employer's right of action. For example, if the agreement contains a matrix of progressive discipline for safety violations that *must* be followed, the general contractual right to revise existing policies would not privilege the employer to dispense with progressive discipline for safety violations.

⁷ A clear and unmistakable waiver may be found even where the contract does not cover the disputed change because a waiver of the right to bargain may be established through extra-contractual evidence. Waiver

II. BACKGROUND

Upon a charge filed April 8, 2016, by Amalgamated Transit Union Local #1637, AFL-CIO, CLC (the Union), and an amended charge filed by the Union on July 29, 2016, the General Counsel issued a complaint and notice of hearing on August 10, 2016, alleging that MV Transportation, Inc. (the Respondent) violated Section 8(a)(5) and (1) of the Act by implementing five policies affecting unit employees' terms and conditions of employment without first bargaining with the Union to impasse (the "unilateral-change allegations"). The complaint also alleges that the Respondent violated Section 8(a)(5) and (1) of the Act within the meaning of Section 8(d) when it implemented five other policies related to unit employees' terms and conditions of employment and, in so doing, modified the collective-bargaining agreement without the Union's consent (the "contract-modification allegations"). On August 24, 2016, the Respondent filed an answer in which it denied the unilateral-change and contract-modification allegations and asserted various affirmative defenses.

On October 11, 2016, the Respondent, the Union, and the General Counsel filed a joint motion to waive a hearing by an administrative law judge and to submit this case to the Board for a decision based on a stipulated record. On March 9, 2017, the Board granted the parties' joint motion. Thereafter, the Respondent and the General Counsel filed briefs, and the Respondent filed an answering brief.

III. FACTS

At all material times, the Respondent has been a corporation with an office and place of business in Las Vegas, Nevada (the Las Vegas facility or Respondent's facility), and has been engaged in the operation of a fixed route transit system. In conducting its business operations during the 12-month period ending April 8, 2016, the Respondent derived gross revenues in excess of \$250,000, and purchased and received at its Las Vegas facility goods valued in excess of \$50,000 directly from points outside the State of Nevada. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

can be established through bargaining history and past practice as well as through the provisions of a collective-bargaining agreement. See *American Diamond Tool*, 306 NLRB 570 (1992). And even where a contract does not cover the disputed change, contractual language still may be relevant to a waiver analysis together with bargaining history and past practice. See *E. I. DuPont de Nemours & Co.*, 367 NLRB No. 145 (2019).

⁸ See, e.g., *RBE Electronics of S.D.*, 320 NLRB 80 (1995) (holding that compelling economic considerations may justify unilateral action).

Since May 24, 2013, the Respondent has recognized the Union as the exclusive collective-bargaining representative of a unit of its employees. The Union and the Respondent negotiated and concluded a collective-bargaining agreement effective January 1, 2015 through August 31, 2018 (the Agreement).

On February 19, 2016, the Respondent sent the Union a letter announcing its intent to implement new and revised work policies and, pursuant to the terms of the Agreement, asking for the Union's input prior to implementation.⁹ The Union responded on February 26, 2016, accepting some policies, rejecting some, and proposing revisions to others. On February 29, 2016, the Respondent agreed to some of the Union's proposed revisions and rejections. That same day, the Respondent presented new and revised policies to its employees by posting a memorandum on all bulletin boards at the Respondent's facility and on its internal website. On March 26, 2016, the Respondent unilaterally implemented new and revised policies, 10 of which are at issue in this case.

IV. CONTENTIONS OF THE PARTIES

Regarding the unilateral-change allegations, the General Counsel contends that the Respondent violated Section 8(a)(5) and (1) when it implemented 5 of the 10 policies at issue here on the basis that the Respondent should have first bargained with the Union to impasse before implementing them. The General Counsel acknowledges that language in the parties' Agreement generally grants the Respondent the right to issue, amend and revise policies, rules, and regulations. But the General Counsel asserts that under the applicable clear and unmistakable waiver standard, this language is insufficiently specific to demonstrate that the Union waived its statutory right to bargain over these changes, and therefore the Respondent violated the Act when it implemented them unilaterally.

As to the remaining five disputed policies, the General Counsel contends that the Respondent violated the Act under a different theory. Specifically, the General Counsel asserts that when the Respondent implemented these policies, it modified the Agreement without the Union's consent and thereby failed to continue in effect all the terms of the Agreement as required by Section 8(d) in violation of Section 8(a)(5) and (1) of the Act.

⁹ See Agreement sec. 5.4 (the Respondent will "obtain input from the Union prior to implementation of policy, rules, and regulations"); Sec. 14.5 (the Respondent "may obtain input from the Union prior to implementation of policy, rules and regulations"). These provisions and other pertinent provisions of the Agreement are discussed in greater detail below.

¹⁰ It is well established that "work rules, especially those involving the imposition of discipline, constitute a mandatory subject of bargaining." *Toledo Blade Co.*, 343 NLRB 385, 387 (2004). Workplace safety, training, and unit employees' job duties and work assignments are also

Concerning the unilateral-change allegations, the Respondent argues that it had no obligation to bargain over some of those five policies because implementing them did not materially, substantially, and significantly change employees' terms and conditions of employment. The Respondent also contends that the Agreement authorized it to implement those policies unilaterally, and it asks the Board to assess the merits of this defense under the contract coverage test rather than the clear and unmistakable waiver standard. Applying contract coverage, the Respondent argues that the Agreement granted it the right to implement these policies unilaterally. Thus, according to the Respondent, the Union had already exercised its right to bargain with respect to those matters, and the Respondent had no further obligation to bargain before implementing these policies. Turning to the contract-modification allegations, the Respondent argues that implementing those policies was not unlawful within the meaning of Section 8(d) because doing so did not modify the Agreement.

V. DISCUSSION

A. *The Unilateral-Change Allegations*

Sections 8(a)(5) and (d) require an employer to bargain with the union representing its employees "with respect to wages, hours, and other terms and conditions of employment," commonly referred to as "mandatory" subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). The duty to bargain continues during the term of a collective-bargaining agreement with respect to mandatory subjects of bargaining not covered by the agreement. See *Jacobs Mfg. Co.*, 94 NLRB 1214, 1217-1218 (1951), *enfd.* 196 F.2d 680 (2d Cir. 1952). An employer violates Section 8(a)(5) and (1) if it makes a material, substantial, and significant change regarding a mandatory subject of bargaining without first providing the union notice and a meaningful opportunity to bargain about the change to agreement or impasse, absent a valid defense. *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).¹⁰

mandatory subjects of bargaining. See, e.g., *Alamo Cement Co.*, 277 NLRB 320, 323-324 (1985) (duties and assignments); *Voith Industrial Services*, 363 NLRB No. 109, slip op. at 17 (2016) (workplace safety); *Southern California Gas Co.*, 346 NLRB 449, 449 (2006) (training). The unilateral-change allegations at issue here involve new or revised policies concerning work assignments, safety, discipline, and training. Thus, it is clear, and the parties do not dispute, that the policies put at issue by the unilateral-change allegations concern mandatory subjects of bargaining.

1. The clear and unmistakable waiver standard

One such valid defense is that the union waived its right to bargain. When an employer asserts that language in a collective-bargaining agreement authorized it to change a term or condition of employment constituting a mandatory subject of bargaining, the Board has traditionally applied the clear and unmistakable waiver standard. See *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007) (reaffirming the clear and unmistakable waiver standard). This standard “is predicated on the union’s waiver of its right to insist on bargaining,” and it “requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.” *Id.* at 811 (emphasis in original). The Board has explained that the waiver standard “reflects [its] policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes.” *Id.*

Waiver may be based on express contractual language, bargaining history, the parties’ past practice, or a combination thereof. *American Diamond Tool*, 306 NLRB at 570. For express contractual language to establish waiver, the Board has required that the language in question be “sufficiently specific.” *Johnson-Bateman Co.*, 295 NLRB 180, 189 (1989); see also *Allison Corp.*, 330 NLRB 1363, 1365 (2000) (“[T]he Board looks to the *precise wording* of the relevant contract provisions in determining whether there has been a clear and unmistakable waiver.”) (emphasis added).¹¹ This statement—that contract language must be “sufficiently specific” to establish a waiver of the union’s right to bargain—was a minor masterpiece of understatement. The D.C. Circuit long ago observed that the clear and unmistakable waiver standard “is, in practice, impossible to meet.” *Department of Navy v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992). Board cases applying this standard vindicate the court’s observation. See *infra* fn. 17.

In *Provena*, the panel majority explained the rationale of the waiver standard and defended the Board’s insistence that contractual language be specific in order to establish waiver:

The waiver standard . . . effectively requires the parties to focus on particular subjects over which the employer

seeks the right to act unilaterally. Such a narrow focus has two clear benefits. First, it encourages the parties to bargain only over subjects of importance at the time and to leave other subjects to future bargaining. Second, if a waiver is won—in clear and unmistakable language—the employer’s right to take future unilateral action should be apparent to all concerned.

350 NLRB at 813.

2. The clear and unmistakable waiver standard does not effectuate the policies of the Act

a. *The waiver standard results in the Board impermissibly sitting in judgment upon contract terms*

Interpreting and applying Section 8(d) of the Act, the Supreme Court has held that the “Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.” *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952). But that is just what the Board does when it applies the clear and unmistakable waiver standard: it sits in judgment upon the substantive terms of a collective-bargaining agreement. In every case in which a contract provision is cited as authorizing unilateral action, the parties will have already bargained, reached an agreement, and reduced that agreement to writing, as Congress envisioned.¹² Under the clear and unmistakable waiver test, however, the Board will refuse to give effect to contract provisions granting rights of unilateral action to the employer unless those provisions meet the exacting standards imposed by the Board. Again, those standards require the contract provision to “unequivocally and *specifically* express [the parties’] mutual intention to permit unilateral employer action with respect to a *particular* employment term.” *Provena*, 350 NLRB at 811 (emphasis added). As the cases cited below in footnote 17 demonstrate—and they are just the tip of the iceberg—the clear and unmistakable waiver standard “is, in practice, impossible to meet,” or virtually so. *Department of Navy v. FLRA*, 962 F.2d at 59. Since application of the clear and unmistakable waiver standard typically results in a refusal to give effect to the plain terms of a collective-bargaining agreement, the Board in applying that standard effectively writes out of the contract language the parties agreed to put into it. Doing so, the Board sits “in judgment upon the substantive terms of collective bargaining agreements,” thereby exercising a power it does not possess.¹³

¹¹ For bargaining history to constitute evidence of waiver, the Board requires the “matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter.” *Johnson-Bateman Co.*, 295 NLRB at 185.

¹² See Sec. 8(d) of the Act.

¹³ The *Provena* Board asserted that the waiver standard was justified all the same as a “policy choice” in favor of “bargaining over changes in working conditions.” *Provena*, 350 NLRB at 811. This justification, however, presumes that the bargaining that has taken place, and the agreement that has been reached, did not authorize the disputed change, which is the very issue to be decided in these cases.

b. The waiver standard undermines contractual stability

Even assuming the Board's application of the clear and unmistakable waiver standard does not result in decisions that exceed the Board's statutory powers, that standard remains subject to criticism on several grounds. To begin with, and ironically enough, *Provena's* defense of the clear and unmistakable waiver standard throws into sharp relief one of its principal defects. The *Provena* majority defended clear and unmistakable waiver on the ground that it "encourages the parties to bargain only over subjects of importance at the time and to leave other subjects to future bargaining." 350 NLRB at 813. In other words, clear and unmistakable waiver *results in perpetual bargaining at the expense of contractual stability and repose*. It does so because the level of specificity demanded under that standard requires "near-supernatural prescience for the parties to have foreseen . . . what . . . issues would arise." *Department of Navy v. FLRA*, 962 F.2d at 59. Indeed, the very premise of the clear and unmistakable waiver standard is that parties will *not* achieve such prescience but rather will limit their negotiations for a collective-bargaining agreement to matters of immediate concern and leave everything else to "future bargaining," as the *Provena* majority candidly acknowledged.

To be sure, Section 1 of the Act declares that it is the policy of the United States to promote industrial peace by "encouraging the practice and procedure of collective bargaining," and that policy was the first thing the *Provena* majority cited in support of the clear and unmistakable waiver standard. *Provena*, 350 NLRB at 810–811 ("The clear and unmistakable waiver standard is firmly grounded in the policy of the National Labor Relations Act promoting collective bargaining."). But collective bargaining is a means to an end, not an end in itself. Section 1 of the Act provides that it is the policy of the United States to encourage collective bargaining "for the purpose of negotiating the terms and conditions of [employees'] employment." In other words, the purpose of collective bargaining is to reach a collective-bargaining *agreement*. Moreover, Section 8(d) of the Act demonstrates Congress' intent to stabilize such agreements by imposing multiple requirements on any party that seeks to modify or terminate them.¹⁴

The misconception at the heart of the clear and unmistakable waiver standard is that almost no matter what

rights of unilateral action the union bargains and contractually agrees to grant the employer, it has the right to demand further bargaining. But "the duty to bargain under the [Act] does not prevent parties from negotiating contract terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment," and a union "may exercise its right to bargain about a particular subject by negotiating for a provision in a collective bargaining contract that fixes the parties' rights and forecloses further mandatory bargaining as to that subject." *Postal Service*, 8 F.3d at 836 (quoting *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991)). By all appearances, however, the *Provena* Board was indifferent to the values of contractual stability and repose. Indeed, the *Provena* majority defended clear and unmistakable waiver precisely on the ground that it *weakens* the parties' incentive to seek a comprehensive agreement.¹⁵

The Court of Appeals for the District of Columbia Circuit has repeatedly criticized the clear and unmistakable waiver standard on this very ground, and we cannot improve upon the penetrating accuracy of its critique. Decades ago, the D.C. Circuit (in a case arising under the statute administered by the Federal Labor Relations Authority) stated that once an agreement has been reached, applying the clear and unmistakable waiver standard to require further bargaining "out of purported concern for the preservation of 'statutory rights'" actually "undermin[es] the stability of the very collective bargaining process those rights exist to nourish" because it "guards the building blocks of collective bargaining at the expense of the edifice itself," i.e., the collective-bargaining agreement. *IRS v. FLRA*, 963 F.2d 429, 440 (D.C. Cir. 1992). Twenty-five years later, the D.C. Circuit amplified this theme, explaining how the waiver standard, by requiring perpetual bargaining, in fact *undermines* collective bargaining by discouraging parties from trying to negotiate comprehensive labor contracts in the first place:

[C]onstruing collective bargaining agreements as covering only those outcomes the parties concretely foresaw would make extensive future bargaining inevitable, removing the parties' incentive to try to comprehensively bargain in the first place. Promotion of contractual repose is needed to avoid discouraging parties from engaging in the effort, as part of negotiation of their basic

¹⁴ Sec. 8(d) provides that no party shall terminate or modify a labor contract unless it (i) serves 60-days' written notice on the other party to the contract, (ii) offers to meet and confer with the other party, (iii) timely notifies the Federal Mediation and Conciliation Service and any state or territorial counterpart, and (iv) continues in effect, without resorting to a strike or lockout, all the terms and conditions of the existing contract for 60 days after notice of the proposed termination or modification is given

or until the expiration date of the contract, whichever occurs later. If the employer is a healthcare institution, more exacting requirements apply.

¹⁵ See 350 NLRB at 813 (citing as one of the "clear benefits" of the clear and unmistakable waiver standard that "it encourages the parties to bargain only over subjects of importance at the time and to leave other subjects to future bargaining").

collective bargaining agreement, to foresee potential labor-management relations issues, and resolve those issues in as comprehensive a manner as practicable. . . . We have therefore consistently held that whether the parties intended a particular outcome does not resolve the “covered-by” analysis. Instead, what matters is whether the policy falls within the scope of the collective bargaining agreement in light of the . . . policy of encouraging such agreements by fostering their stability and repose.

Department of Justice v. FLRA, 875 F.3d at 674 (internal quotations and alterations omitted).

c. The waiver standard alters the parties’ deal reached in collective bargaining

In addition, the collective-bargaining process envisioned by Congress is one in which the parties exchange proposals in an effort to reach an agreement that will compromise their differences, *Reed & Prince Mfg. Co.*, 96 NLRB 850 (1951),¹⁶ and an evenhanded approach to resolving disputes over the interpretation of such agreements is therefore necessary to support that process. However, the clear and unmistakable waiver standard undermines this process by imposing exacting scrutiny solely on those contract provisions that grant the employer the right to act unilaterally, even though such provisions are part and parcel of an agreement that represents the parties’ compromise, reached through the give-and-take of negotiations. Application of the waiver standard typically ends with the Board impermissibly “abrogat[ing] a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement.” *Postal Service*, 8 F.3d at 836.

As courts have noted, this undermining of the parties’ agreement favors the union because the heightened scrutiny is directed exclusively to those parts of the collective-

bargaining agreement that authorize unilateral employer action. See, e.g., *Enloe Medical Center v. NLRB*, 433 F.3d 834, 837 (D.C. Cir. 2005) (the waiver standard “imposes an artificially high burden on an employer”); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992) (observing that the waiver standard “tilts [the] decision in the union’s favor”). As the D.C. Circuit stated in *IRS v. FLRA*, supra, under clear and unmistakable waiver, “the union would almost invariably prevail in duty to bargain cases, because it almost always could find some ambiguity in the relevant contractual language.”¹⁷ This one-sided jurisprudence hardly serves to foster the practice and procedure of collective bargaining.

d. The waiver standard results in conflicting contract interpretations between the Board and the courts

Moreover, the inescapable result of this exacting Board scrutiny of contractual management-rights language under the clear and unmistakable waiver standard is that in unilateral-change cases, collective-bargaining agreements will likely be given one interpretation by the Board and a completely different interpretation by the court—and the court will accord the Board’s interpretation no deference. Section 301 of the Labor-Management Relations Act (LMRA) “authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements.” *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 202 (1991) (quoting *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448, 451 (1957)) (ellipsis and emphasis in *Litton*). “Although the Board has occasion to interpret collective-bargaining agreements in the context of unfair labor practice adjudication,” it “is neither the sole nor the primary source of authority in such matters.” Rather, “[a]rbitrators and courts are still the principal sources of contract interpretation.” *Id.* (internal quotation omitted). The Court in *Litton* explained:

reassigned to other shifts), enf. denied in relevant part sub nom. *Uforma/Shelby Business Forms, Inc. v. NLRB*, 111 F.3d 1284 (6th Cir. 1997) (rejecting the view that “collective bargaining agreements must catalog every conceivable permutation of a decision to lay off”); *Elliot Turbomachinery Co.*, 320 NLRB 141 (1995) (finding, despite management-rights clause granting the employer the right to “decide location of its plant, and to relocate the same,” that the union did not waive its right to bargain over the employer’s unilateral decision to relocate a manufacturing plant); *Postal Service*, 306 NLRB 640 (1992) (finding, despite management-rights clause granting the employer the “exclusive right to . . . transfer [and] assign . . . employees . . . maintain the efficiency of the operations entrusted to it . . . [and] determine the method, means and personnel by which such operations are to be conducted,” that the union did not waive its right to bargain over the employer’s decision to reduce window service hours, close facilities on Saturdays, and discontinue Sunday mail processing and collection work), enf. denied 8 F.3d at 832.

¹⁶ Enfd. 205 F.2d 131 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953).

¹⁷ Board decisions applying clear and unmistakable waiver attest to the accuracy of the D.C. Circuit’s observation. See, e.g., *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (finding, despite management-rights clause granting 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,” that the union did not waive bargaining over the employer’s changes to certain work rules and to its attendance and progressive discipline policies); *Miami Systems Corp.*, 320 NLRB 71, 71-72, 74 (1995) (finding, despite management-rights clause granting the employer the “sole” right “to schedule and assign work to employees . . . [and] to hire, layoff or relieve employees from duties,” that the union did not waive its right to bargain over the employer’s unilateral elimination of a third shift, which resulted in employees either being laid off or

We would risk the development of conflicting principles were we to defer to the Board in its interpretation of the contract, as distinct from its devising a remedy for the unfair labor practice that follows from a breach of contract. We cannot accord deference in contract interpretation here only to revert to our independent interpretation of collective-bargaining agreements in a case arising under § 301.

501 U.S. at 203. Simply put, the “Board is not an expert in contract interpretation,” nor was it intended to be. *Chicago Tribune*, 974 F.2d at 937; see also *NLRB v. IBEW Local Union 16*, 425 F.3d 1035, 1039 (7th Cir. 2005) (stating that the Board has “no special expertise” in interpreting contracts). Congress cannot possibly have envisioned, much less intended, the spectacle of the Board and the courts adopting completely different interpretations of the same contract provisions.¹⁸

e. The waiver standard undermines grievance arbitration

The clear and unmistakable waiver standard also undermines the Congressional policy of encouraging the use of grievance arbitration to resolve contractual disputes. This well-established policy is made explicit in LMRA Section 203(d), which relevantly provides that “[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.”¹⁹ As the Supreme Court has explained, “the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government,” and “arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.” *Warrior & Gulf Navigation Co.*, 363 U.S. at 581. In *American Mfg.*, the Court similarly stated that “[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling *any and all* disputes that arise under the agreement.” 363 U.S. at 567 (emphasis added).

The clear and unmistakable waiver standard runs counter to this strong federal policy in favor of resolving

disputes over “the application or interpretation of an existing collective-bargaining agreement” through grievance arbitration. Indeed, as former Chairman Battista recognized in his separate opinion in *Provena*, the clear and unmistakable waiver standard encourages unions to bypass arbitration and bring their unilateral-change claims to the Board, see 350 NLRB at 817, where the waiver standard tilts the playing field in their favor, *Chicago Tribune*, 974 F.2d at 937. Even though a union has contractually agreed to a grievance-arbitration procedure, it will naturally prefer that the Board determine the lawfulness of an employer’s disputed unilateral action because “the Board [will] start with the proposition that the unilateral change is unlawful, unless the right to bargain has been ‘clearly and unmistakably’ waived.” *Id.* And as case after case demonstrates, a union is far more likely to receive a favorable determination from the Board than from an arbitrator given the “near-supernatural prescience” required to formulate contract language that achieves the degree of specificity required under the clear and unmistakable waiver standard. *Department of Navy v. FLRA*, 962 F.2d at 59.

f. The waiver standard has become indefensible and unenforceable

The Board’s dogged adherence to the clear and unmistakable waiver standard has become an exercise in futility. Based on the “fundamental and long-running disagreement” between the D.C. Circuit and the Board concerning this issue²⁰ and the Board’s “obstinacy” and “bad faith” in continuing to defend the clear and unmistakable waiver standard in enforcement actions before that court, the D.C. Circuit finally sanctioned the Board by ordering it to reimburse an employer for its costs of opposing the Board’s position. See *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 19–20, 27 (D.C. Cir. 2016) (granting employer’s motion for attorneys’ fees). Thus, if the Board finds an 8(a)(5) unilateral-change violation applying clear and unmistakable waiver, and the employer files a petition for review in the D.C. Circuit, the Board must yield its position or suffer a further sanction—and *every* employer on the losing end of a Board decision can petition for review in the D.C. Circuit. Thus, the clear and unmistakable waiver standard has become indefensible. Except for the rare case in which an 8(a)(5) unilateral-change violation

¹⁸ We recognize that the courts will not defer to the Board’s contract interpretations under the contract coverage standard, either, but the fact that we will be giving effect to the plain meaning of the contract and applying the same standard as the D.C. Circuit in particular will necessarily reduce the potential for conflicting interpretations.

¹⁹ The labor policy declared in LMRA Sec. 203(d) was underlined by the Supreme Court in the so-called *Steelworkers* trilogy. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

The Board has also recognized that effectuation of the national labor policy demands that it “give hospitable acceptance to the arbitral process as part and parcel of the collective bargaining process itself” *International Harvester Co.*, 138 NLRB 923, 927 (1962) (internal quotations omitted), *enfd. sub nom. Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964), *cert. denied* 377 U.S. 1003 (1964). This “hospitable acceptance” includes a policy of deferring to an arbitrator’s award that satisfies certain criteria. See *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955).

²⁰ *Heartland Plymouth Court MI, LLC v. NLRB*, 650 Fed.Appx. 11, 12 (D.C. Cir. 2016) (citation omitted).

would be found under either clear and unmistakable waiver *or* contract coverage, every Board decision in which the waiver standard is applied will likely be denied enforcement.

3. The contract coverage test

Three courts of appeals have rejected the clear and unmistakable waiver standard in favor of a standard commonly referred to as contract coverage, while a fourth has rejected the clear and unmistakable waiver standard in favor of a framework that embraces contract coverage principles. As the D.C. Circuit has explained, when parties have *already* bargained and agreed to contractual language that covers the change in dispute, asking whether the union has waived its right to bargain simply misses the point:

“A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant.”

Postal Service, 8 F.3d at 836 (quoting *Department of Navy v. FLRA*, 962 F.2d at 57) (emphasis in *Department of Navy*). In *Postal Service*, the court more fully explained that “the duty to bargain under the [Act] does not prevent parties from negotiating contract terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment,” and therefore a “union may exercise its right to bargain about a particular subject by negotiating for a provision in a collective bargaining contract that fixes the parties’ rights and forecloses further mandatory bargaining as to that subject.” 8 F.3d at 836 (quoting *Local Union No. 47, IBEW*, 927 F.2d at 640). Thus, when parties “bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules governing their future relations,” and “[u]nless the parties agree otherwise, there is no continuous duty to bargain during the term of an agreement with respect to a matter covered by the contract.” *Id.* To determine if a disputed unilateral change is covered by the contract and therefore lawful, the D.C. Circuit “give[s] full effect to the plain meaning” of the agreement and determines whether the change at issue is “within the compass of the terms of the agreement.” *Wilkes-Barre Hospital*, 857 F.3d at 376-377 (internal quotations omitted). Unlike clear and unmistakable waiver, a contract coverage analysis does not require that the agreement mention, refer to, or address the specific action the employer has taken. *Id.* (citations omitted).

²¹ Recognizing the conflict between these courts and itself, the Board has sometimes applied both clear and unmistakable waiver and, in the alternative, contract coverage. See, e.g., *Tramont Mfg. LLC*, 365 NLRB

The Seventh and First Circuits have also adopted the contract coverage test. See *Chicago Tribune Co. v. NLRB*, 974 F.2d at 937 (“We agree, therefore, that ‘where the contract fully defines the parties’ rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say that the union has ‘waived’ its statutory right to bargain; rather the contract will control and the ‘clear and unmistakable’ intent standard is irrelevant.”) (quoting *Local Union No. 47, IBEW*, 927 F.2d at 641); *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007) (“[W]e adopt the District of Columbia Circuit’s contract coverage test to determine whether the [u]nions have already exercised their right to bargain. . . . If so, the waiver standard is meaningless.”)²¹

The Second Circuit has adopted a somewhat modified framework, but one that also rejects the Board’s clear and unmistakable waiver standard as applied by the Board. See *Electrical Workers Local 36 v. NLRB*, 706 F.3d 73 (2d Cir. 2013), cert. denied 134 S.Ct. 2898 (2014). Under its framework, the Second Circuit first determines “whether the issue is clearly and unmistakably resolved (or ‘covered’) by the contract. If so, the question of waiver is inapposite because the union has already clearly and unmistakably exercised its statutory right to bargain and has resolved the matter to its satisfaction.” *Id.* at 83–84. Only if the disputed change is not covered by the contract does the court proceed to determine “whether the union has clearly and unmistakably *waived* its right to bargain.” *Id.* (emphasis in original). The court explained that when the Board’s

determination regarding waiver is based upon an interpretation of a contract, we begin by making a threshold, *de novo* determination of whether a matter is ‘covered’ by the contract—meaning that the parties have already bargained over the matter and set out their agreement in the contract. Only if we conclude as a matter of law that the matter was not covered by the contract can we consider whether the Board’s finding regarding waiver was supported by substantial evidence.

Id. at 83 (emphasis in original). In support, the court cited approvingly to *Bath Marine Draftsmen’s Assn. v. NLRB*, *supra*.

These courts are by no means alone in their embrace (or partial embrace, for the Second Circuit) of a contract coverage standard. Several former Board members also

No. 59, slip op. at 2 (2017), petition for review granted in part and denied in part 890 F.3d 1114 (D.C. Cir. 2018).

would have adopted contract coverage.²² Commentators, too, have questioned the viability of the waiver standard.²³

4. Adoption of the contract coverage test

Having carefully considered this important issue, we have decided to adopt the contract coverage test. We believe that the contract coverage test is more consistent with the purposes of the Act and sound labor policy than is the clear and unmistakable waiver standard.

Contract coverage supports the practice and procedure of collective bargaining, in alignment with Section 1 of the Act, by encouraging employers and unions to “engag[e] in the effort . . . to foresee potential labor-management relations issues, and resolve those issues” through collective bargaining “in as comprehensive a manner as practicable.”²⁴ Moreover, by ensuring that *all* provisions of the parties’ agreement are given effect, the contract coverage test will end the Board’s practice of selectively applying exacting scrutiny only to those provisions of a labor contract that vest in the employer a right to act unilaterally. The contract coverage test will also end the Board’s practice of sitting in judgment on certain provisions of the parties’ agreement—contrary to the authoritative teaching of the Supreme Court—by refusing to give effect to those provisions unless a standard of specificity is met that is, in practice, all but impossible to meet. By adopting contract coverage, we will also ensure that the Board’s contract interpretations remain within the Board’s limited authority to interpret collective-bargaining agreements in the exercise of our primary jurisdiction to administer the Act, but because we will apply the same standard the courts apply, our interpretations will predictably align with theirs as well. Finally, adopting contract coverage will discourage forum shopping. Since the Board will resolve unilateral-change disputes under the same standard that arbitrators apply, there will no longer be any incentive to bypass grievance arbitration, and such disputes will be channeled into the “method agreed upon by the parties,” as Congress intended.²⁵

Because it gives effect to the plain meaning of language in collective-bargaining agreements, the contract coverage standard we adopt today is fully consistent with recent

Supreme Court precedent. In *M & G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926, 933 (2015), the Court stated:

We interpret collective-bargaining agreements . . . according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy. See *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 456–457 (1957). “In this endeavor, as with any other contract, the parties’ intentions control.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010) (internal quotation marks omitted). “Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.” 11 R. Lord, *Williston on Contracts* § 30:6, p. 108 (4th ed. 2012) (internal quotation marks omitted).

Under contract coverage, the Board will ascertain and give effect to the parties’ intent “plainly expressed” in a collective-bargaining agreement, in alignment with the standard the Supreme Court articulated in *M & G Polymers*, properly limited to “the context of unfair labor practice adjudication,” as the Court has also instructed. *Litton*, 501 U.S. at 202.

Likewise, nothing in our holding today is inconsistent with prior Supreme Court decisions addressing waiver in the collective-bargaining context, specifically *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), and *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). In *C & C Plywood*, the Board found that a union did not waive its right to bargain over an employer’s unilateral implementation of a premium pay schedule. See *C & C Plywood Corp.*, 148 NLRB 414 (1964), enf. denied 351 F.2d 224 (9th Cir. 1965). However, the Supreme Court granted certiorari to consider a different issue: whether the Board had the authority to interpret a collective-bargaining agreement that did not contain an arbitration clause. 385 U.S. at 425–426. The Court held that the Board did have the authority to interpret the contract. *Id.* at 430. It then considered the employer’s argument that the collective-bargaining agreement had waived the union’s right to bargain over the premium pay schedule. The Court stated that it “[could not] disapprove of the Board’s approach” in applying the waiver standard, which it noted was based on

²² See *Exxon Research & Engineering Co.*, 317 NLRB 675, 676–677 (1995) (Mbr. Cohen, dissenting in part), enf. denied on other grounds 89 F.3d 228 (5th Cir. 1996); *Dorsey Trailers, Inc.*, 327 NLRB 835, 836–837 (1999) (Mbr. Hurtgen, dissenting in part), enf. granted in part and denied in part 233 F.3d 831 (4th Cir. 2000); *California Offset Printers*, 349 NLRB 732, 737–739 (2007) (Mbr. Schaumber, dissenting); *Provena*, 350 NLRB at 816–818 (Chairman Battista, dissenting); *Centurylink*, 358 NLRB 1192, 1194–1195 (2012) (Mbr. Hayes, dissenting in part).

²³ See Lahey, *I Thought We Had a Deal!?: The NLRB, the Courts, and the Continuing Debate over Contract Coverage vs. Clear and*

Unmistakable Waiver, 25 ABA J. Lab. & Emp. L. 37 (2009); Carron & Broughton, *When Is “No” Really “No”?*—the NLRB’s Current Position on the Freedom of Contract, Management Rights and Waiver, 13 Lab. Law. 299 (1997).

²⁴ *Department of Justice v. FLRA*, 875 F.3d at 674.

²⁵ LMRA Sec. 203(d). We recognize that some unilateral-change disputes involve an alleged change to an extra-contractual past practice and do not depend for their resolution on interpretation of a collective-bargaining agreement. We refer here to those that do.

the Board’s “experience with labor relations and the Act’s clear emphasis upon the protection of free collective bargaining.” *Id.* at 430. The Court did not expound further upon its views of the waiver standard.

In *Metropolitan Edison*, the Court considered a “narrow question”: whether an employer violated Section 8(a)(3) of the Act when it disciplined union officials more severely than other employees for engaging in a work stoppage that violated a no-strike clause. 460 U.S. 693, 695–697, 700 (1983). The Court held that Section 8(a)(3) prohibited this disparate treatment of union officials and, in so doing, it rejected a waiver defense asserted by the employer. See *id.* at 706–708. Specifically, the employer argued that the parties’ earlier contract included a general no-strike clause that had been interpreted by arbitrators to impose a higher duty on union officials. *Id.* at 708. By remaining silent concerning these arbitral decisions during subsequent contract negotiations, the employer argued, the union implicitly waived union officials’ statutory right not to be disparately treated. *Id.* The Court rejected this defense, stating, “[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’ More succinctly, the waiver must be clear and unmistakable.” *Id.*

These Supreme Court decisions do not detract from our holding that the contract coverage test better promotes the purposes and policies of the Act than does the clear and unmistakable waiver standard. In *C & C Plywood*, the principal issue before the Court was *whether* the Board has authority to interpret collective-bargaining agreements, not *how* the Board should do so. Although the Court stated that it could not disapprove of the waiver standard, it did so in deference to the Board’s experience and expertise. Since deciding *C & C Plywood*, the Board has had a great deal of experience applying the clear and unmistakable waiver standard, and as explained at length above, that experience has made the drawbacks of that standard starkly apparent. Accordingly, we have relied on the Board’s experience to adopt a different approach—an approach, moreover, that is consistent with the Court’s words of caution that Board interpretation of contracts should go “only so far as [is] necessary.” *C & C Plywood*, 385 U.S. at 428; see also *id.* at 427 (noting Congress’s refusal to give the Board “generalized power to determine the rights of the parties under all collective agreements”).²⁶ *Metropolitan Edison* is also not to the contrary. The waiver defense asserted in *Metropolitan Edison* did not even involve interpretation of collectively bargained

language, and in approving the waiver standard, the Court had no opportunity to consider the circuit court decisions that inform our decision today, all of which postdated *Metropolitan Edison*.

We reject any claim that the contract coverage test removes any meaningful limits on unilateral employer action. Rather, this test rightly gives effect to the limits—or absence of limits—upon which the parties themselves have agreed. Under contract coverage, *the parties* are firmly in control of negotiating the parameters of unilateral employer action, as they should be. We are not adopting a test that allows employers to do just as they wish, and no court would endorse such a test. Indeed, courts applying contract coverage have not acted as a rubber stamp for unilateral employer action. They have not hesitated to reject spurious contract coverage defenses, and we find the reasoning in these decisions persuasive.

For example, in *Regal Cinemas, Inc. v. NLRB*, the D.C. Circuit considered whether an employer had the contractual authority to unilaterally convert its facilities into manager-operated theaters. This change eliminated the need for projectionists, a bargaining-unit position, by transferring that unit work to managers. 317 F.3d 300, 306–307 (D.C. Cir. 2003). The employer argued that a management-rights clause in the parties’ contract authorized this unilateral action. That clause granted the employer the “right to introduce new or improved work methods, facilities, equipment, machinery, processes and procedures of work and to change or eliminate existing methods, facilities, equipment, machinery, processes and procedures or work.” *Id.* at 304.

The court found that the contract did not cover the employer’s unilateral change, and it criticized the employer for “advocat[ing] a more expansive reading of a much narrower management rights clause” than was at issue in *Postal Service*. *Id.* at 313. The court explained:

Regal . . . fashions its “covered by” argument around the language giving it the authority to change or eliminate existing methods, procedures “or work.” . . . But Regal’s actions here are not embraced by the literal language of the management rights clause. . . . [T]he record shows that Regal’s decision involved no change in the “methods” or “procedures” of projection and no elimination of “work.” Rather, Regal merely transferred to managers work that was previously done by projectionists. . . . [W]e are loath to conclude that a union would knowingly agree to a clause that would effectively permit the

²⁶ For these reasons, we reject the dissent’s claims that we have not “adequately come to terms with the Supreme Court’s decision in *C & C Plywood*” or that *C & C Plywood* “forecloses” today’s decision.

employer to unilaterally extinguish the bargaining unit altogether.

Id. (internal quotations and citations omitted).

Applying contract coverage, the First Circuit also rejected an employer's attempt to give a management-rights clause a breadth of construction that the language of the agreement would not reasonably bear. In *NLRB v. Solutia, Inc.*, the court considered whether an employer had the contractual authority to consolidate two product testing labs at different locations into one lab, which resulted in a reduction in unit positions and unit work. 699 F.3d 50, 55 (1st Cir. 2012). The management-rights clause provided that "the operation of the plant, including but not limited to the right to employ, promote, lay-off, discipline or discharge for just cause, and to judge the qualifications and competency of all employees, are reserved by and vested in the Company." Id. at 66. The court found that the list of rights reserved to management merely covered routine employment actions, and the "plain language of the management rights clause would not suggest to any reader that the geographical allocation of work had been one of the bargaining topics" between the parties. Id. at 67. The court concluded that the "language of the management-rights clause clearly does not encompass cross-plant work consolidation and elimination of unit positions." Id.²⁷

In sum, consistent with the D.C., First, and Seventh Circuits, and for all the reasons set forth above, we adopt today the contract coverage standard.²⁸ In doing so, we emphasize that the interests of contractual stability and repose are better protected by the contract coverage test, and that protecting those interests is perfectly consistent with the policy of encouraging "the practice and procedure of collective bargaining." As the D.C. Circuit has explained, a union's statutory right to bargain does not prevent the union from exercising that right "by negotiating for a provision in a collective bargaining contract that fixes the parties' rights and forecloses further mandatory bargaining as to that subject." *Postal Service*, 8 F.3d at 836 (internal quotations omitted). Accordingly, when parties "bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules governing their future relations," and "[u]nless the parties agree otherwise, there is no continuous duty to bargain during the term of an agreement with respect to a matter covered by the contract." Id. In such a case, to apply clear and unmistakable waiver, which almost invariably gives

rise to a "continuous duty to bargain" notwithstanding the parties' agreement, is to "guard[] the building blocks of collective bargaining at the expense of the edifice itself." *IRS v. FLRA*, 963 F.2d at 440.

5. The Board's contract coverage test

An allegation that an employer has violated Section 8(a)(5) by unilaterally changing a term or condition of employment may be defended against on several grounds. The employer may deny that it *changed* a term or condition of employment at all. It may acknowledge that it made a change but deny that it acted *unilaterally*, or that the change involved a *mandatory subject of bargaining*, or that it was *material, substantial, and significant*. We do not address these potential defenses here, all of which remain available. We solely address those cases in which an employer defends against an 8(a)(5) unilateral-change allegation by asserting that contractual language privileged it to make the disputed change without further bargaining. In such cases, we shall evaluate the merits of the allegation by applying contract coverage.

Although arbitrators and courts remain the "primary sources of contract interpretation," *Postal Service*, 8 F.3d at 837, the 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 doing so, 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. 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." *Postal Service*, 8 F.3d at 838. Accordingly, we will not require that the agreement specifically mention, refer to or address the employer decision at issue. See *Wilkes-Barre Hospital*, 857 F.3d at 377. 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).

²⁷ Based on the foregoing precedent, we note that it is at least arguable, if not likely, that a violation would have been found in *C & C Plywood* even if the Board had applied a contract coverage analysis. See *C & C Plywood Corp.*, 148 NLRB 414, 416-417 (1964) (wage clause granting employer "the right to pay a premium rate to 'reward any particular employee for some special fitness, skill, aptitude, or the like'" did not

authorize the employer to unilaterally change the compensation of a group of employees from an hourly wage to production-based pay) (emphasis added), enf. denied 351 F.2d 224 (9th Cir. 1965), reversed 385 U.S. 421 (1967).

²⁸ Accordingly, we overrule *Provena*, supra, and other prior decisions to the extent inconsistent with this decision.

If an agreement does not cover a disputed unilateral change, the Board will next consider whether the union waived its right to bargain over the change. In such cases, the Board will ascertain whether the union “surrender[ed] the opportunity to create a set of contractual rules that bind the employer, and instead cede[d] full discretion to the employer on that matter.” *Wilkes-Barre*, 857 F.3d at 377 (citations omitted). Under those circumstances, the waiver must be “clear and unmistakable.” *Honeywell International v. NLRB*, 253 F.3d 125, 133 (D.C. Cir. 2001). Accordingly, 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. See *Omaha World-Herald*, 357 NLRB 1870, 1871 (2011); *American Diamond Tool*, 306 NLRB at 570.

6. Retroactive application of the contract coverage test

Finally, we find it appropriate to apply the contract coverage test retroactively. The Board’s “usual practice is to apply new policies and standards retroactively ‘to all pending cases in whatever stage.’” *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)). The Supreme Court has instructed that in determining whether to apply a change in law retroactively, the Board must balance any ill effects of retroactivity against “‘the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.’” *Id.* (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). In other words, the Board will apply a new rule “to the parties in the case in which the new rule is announced and to parties in other cases pending at the time so long as [retroactivity] does not work a manifest injustice.” *Id.* (internal quotations omitted). In determining whether retroactive application will work a manifest

injustice, the Board considers the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application. *Id.*

After considering these factors, we find that applying the instant decision retroactively would not work a manifest injustice. Reliance interests are exceptionally weak here. By the time the Respondent recognized the Union (2013) and the parties entered into their collective-bargaining agreement (2015), the clear and unmistakable waiver standard had been subjected to sustained judicial criticism for more than 20 years, including by the D.C. Circuit, which has plenary jurisdiction to review—and refuse to enforce—Board decisions. Accordingly, the parties could not have *justifiably* relied on the Board continuing to adhere to that standard, nor could the parties in any pending case. Moreover, for the reasons already explained herein at length, the contract coverage standard better promotes the purposes and policies of the Act than does the clear and unmistakable waiver standard. In particular, applying contract coverage retroactively will accomplish the purposes of the Act by promptly ending the Board’s practice, under clear and unmistakable waiver, of selectively refusing to give effect to contract provisions that grant employers a right to act unilaterally and in this way sitting in judgment on those contract terms, contrary to Supreme Court precedent interpreting Section 8(d) of the Act. Finally, we do not believe that retroactive application would give rise to any particular injustice in this or other pending cases. To the extent unions may have relied on the clear and unmistakable waiver standard to ensure they would have further opportunities to bargain and thus to discount the importance of negotiating management-rights language, such reliance was unjustified, as we have explained. For these reasons, we will follow the Board’s usual practice and apply the contract coverage test retroactively to all pending cases in whatever stage.²⁹

²⁹ The dissent opposes retroactive application, but we are not persuaded by her arguments. In addition to the reasons articulated above, we note that the Board applied its decision in *Deklewa* retroactively, which worked a far more extensive change than our decision to apply contract coverage retroactively here; and retroactive application in *Deklewa* was upheld on review by the court of appeals. See *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd. sub nom. Intern. Assn. of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). Among other things, *Deklewa* made Sec. 8(f) collective-bargaining agreements binding and enforceable for the duration of their term, whereas under pre-*Deklewa* precedent, an 8(f) agreement “[could] be repudiated by either party, at any time, for any reason, and it [could] not be enforced through Section 8(a)(5) or Section 8(b)(3).” *Id.* at 1378. Here, in contrast, retroactivity does not bind parties to agreements they previously could have repudiated; it simply holds parties to the terms of agreements to which they are indisputably bound.

The dissent cites several cases for the proposition that “[t]he Board has not hesitated . . . to apply new rules only prospectively, when circumstances warrant.” In all but one of those cases, however, retroactive application either certainly or probably would have resulted in a finding that the employer was guilty of committing an unfair labor practice for action that was lawful at the time it was taken. See *Total Security Management Illinois I, LLC*, 364 NLRB No. 106 (2016) (retroactive application of new rule requiring employers to bargain with newly elected unions before imposing discipline would have put employer in violation of Sec. 8(a)(5), where at the time the employer discharged three employees, applicable precedent—*Fresno Bee*, 337 NLRB 1161 (2002)—did not require pre-discharge bargaining); *Loomis Armored US, Inc.*, 364 NLRB No. 23 (2016) (retroactive application of new rule barring withdrawal of recognition from a mixed-guard union at CBA expiration would have put employer in violation of Sec. 8(a)(5) for action lawful at the time under 32-year-old precedent); *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) (retroactive application of new rule barring discontinuation of

7. Response to dissent

Our dissenting colleague criticizes the contract coverage standard and our decision to adopt it in this case. Taking aim at management-rights clauses, she asserts that “[a] statute intended to encourage collective bargaining as a way to avoid labor disputes necessarily must disfavor unilateral employer action.” She minimizes judicial hostility to the clear and unmistakable waiver standard and contends that the Board should refuse to acquiesce to the many decisions rejecting it. The dissent also believes that adopting contract coverage will destabilize collective bargaining and promote industrial strife. We reject these criticisms for the reasons stated above and those set forth below.³⁰

As an initial matter, the contract coverage standard does not favor and will not encourage unilateral employer action, as our dissenting colleague suggests. Rather, it will give parties the benefit of their bargain based on the terms they agreed to and included in their collective-bargaining agreement.³¹ This is the best way to promote stability in collective bargaining and industrial peace.³²

Notably, the hostility expressed by the dissent towards unilateral action based on management-rights clauses is not new. Years ago, the Board attempted to prohibit employers from bargaining over management-rights clauses

dues checkoff after CBA expires would have put employer in violation of Sec. 8(a)(5) for action lawful at the time under 53-year-old precedent); *Levitz Furniture*, 333 NLRB 717 (2001) (retroactive application of new rule requiring actual loss of majority status at time recognition is withdrawn probably would have put employer in violation of Sec. 8(a)(5) for withdrawal of recognition lawful at the time under 50-year-old precedent). In the remaining case the dissent cites, retroactive application would have deprived the employer of the benefit of a favorable arbitral award to which the Board would have deferred under the standards applicable at the time of that award. See *Babcock & Wilcox Construction*, 361 NLRB 1127 (2014). Here, in contrast, retroactive application puts no party in violation of the Act; it secures to the Respondent collectively bargained rights of unilateral action; and it takes no rights from the Union that it did not voluntarily agree to cede in collective bargaining.

Our colleague's position on retroactive application here is also difficult to reconcile with her position in *BFI Newby Island Recyclery (Browning-Ferris)*, 362 NLRB 1599 (2015), *affd.* in part and *revd.* in part 911 F.3d 1195 (D.C. Cir. 2018), where she was part of a Board majority that radically transformed the joint-employer landscape—a well-settled landscape long relied upon by American businesses in structuring their contractual relationships—and applied its new standards retroactively, with little comment other than that retroactive application is “[t]he Board's established presumption in representation cases.” 362 NLRB at 1600. The change we make here is far less disruptive, considering that every employer in the United States may turn to the D.C. Circuit from an adverse Board decision, and therefore contract coverage has been woven into the context of private-sector collective bargaining ever since that court's *Postal Service* decision in 1993.

³⁰ As a preliminary matter, we reject our colleague's oft-repeated charge that we wrongfully overrule precedent here without public notice and an invitation to file briefs. We find it unnecessary to solicit additional input in light of the fact that the relevant arguments have been

on the premise that “bargaining for a clause under which management retains initial responsibility for . . . a ‘condition of employment,’ for the duration of the contract is an unfair labor practice because it is ‘in derogation of’ employees’ statutory rights to bargain collectively as to conditions of employment.” *NLRB v. American National Insurance Co.*, 343 U.S. at 407–408. The Supreme Court rejected this premise, holding instead that

[w]hether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.

Id. at 409. Rather than view with disfavor unilateral employer action pursuant to a management-rights clause all parties have agreed to, as our colleague does, we agree with the Supreme Court that the extent of the parties' participation in such matters is “to be settled by bargaining.” This, of course, is precisely what the contract coverage standard promotes.

We agree with the dissent that the Board is not required to acquiesce in adverse decisions of the circuit courts.

repeatedly and forcefully articulated. Moreover, the Board has frequently overruled or modified precedent without supplemental briefing, including in decisions in which our colleague participated when she was in the majority. See, e.g., *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) (overruling 12-year-old precedent in *Courier-Journal*, 342 NLRB 1093 (2004), and 52-year-old precedent in *Shell Oil Co.*, 149 NLRB 283 (1964), without inviting briefing); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (overruling 9-year-old precedent in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26 (2007), without inviting briefing); *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (overruling 32-year-old precedent in *Wells Fargo Corp.*, 270 NLRB 787 (1984), without inviting briefing); *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) (overruling 53-year-old precedent in *Bethlehem Steel*, 136 NLRB 1500 (1962), without inviting briefing); *Pressroom Cleaners*, 361 NLRB 643 (2014) (overruling 8-year-old precedent in *Planned Building Services*, 347 NLRB 670 (2006), without inviting briefing); and *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014) (overruling 10-year-old precedent in *Holling Press*, 343 NLRB 301 (2004), without inviting briefing). Our colleague offers post hoc justification in each of the cited cases for not inviting briefing, but that is beside the point. As stated above, the Board had no legal obligation to justify the failure to invite briefing in those or any of the many other cases over the decades in which it has overruled precedent without amicus briefing.

³¹ See generally Sec. 8(d).

³² As the D.C. Circuit observed, once an agreement has been reached, applying the clear and unmistakable waiver standard to require further bargaining “out of purported concern for the preservation of ‘statutory rights’” actually “undermin[es] the stability of the very collective bargaining process those rights exist to nourish” because it “guards the building blocks of collective bargaining at the expense of the edifice itself.” *IRS v. FLRA*, 963 F.2d at 440.

See, e.g., *D.L. Baker, Inc.*, 351 NLRB 515, 529 fn. 42 (2007) (“The Board generally applies its ‘nonacquiescence policy’ . . . and instructs its administrative law judges to follow Board precedent, not court of appeals precedent, unless overruled by the United States Supreme Court.”). We are not, however, simply acquiescing to the position of those federal appellate courts that have chosen to adopt the contract coverage standard. Rather, for all the reasons articulated above, we agree with those courts that a change in Board law is warranted because the contract coverage standard is more consistent with the purposes of the Act. We have explained why this is so.

The dissent disagrees with our reasoning, but her claim that we have failed to engage in reasoned decisionmaking is simply wrong. See *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (“[A] Board rule is entitled to deference even if it represents a departure from the Board’s prior policy” as long as it is “rational and consistent with the Act.”); *Auto Workers Local 1384 v. NLRB*, 756 F.2d 482, 492 (7th Cir. 1985) (observing that the Board “is free to change its mind on matters of law that are within its competence to determine, provided it gives a reasoned analysis in support of the change”). Inasmuch as our fully explained reasons for a change from prior policy are consistent with and based upon the views of at least four circuit courts of appeals, we are comfortable in the belief that the change is rational and consistent with the Act. Our colleague’s contrary view is apparently that there can only be one rational and consistent interpretation of the Act, even when its terms are ambiguous with respect to the issue presented. Obviously, we disagree.

Notably, our dissenting colleague also looks to the courts of appeals to support her position—but in so doing, she overstates judicial support for the clear and unmistakable waiver standard by portraying deference as full-throated endorsement.³³ These courts, like the Supreme Court in *C & C Plywood*, merely acknowledge the narrow scope of their review of Board policies they find rational. See, e.g., *Tocco Division of Park-Ohio Industries v.*

NLRB, 702 F.2d 624, 627 (6th Cir. 1983) (waiver standard is “reasonably defensible”); *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1078 (9th Cir. 2008) (the court will defer to the Board where its rules are rational). For example, our colleague emphasizes that the Ninth Circuit, where this case arises, has “not adopted the ‘contract coverage’ standard.” *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d at 1080 fn. 11. In *Local Joint Executive Board*, however, the Ninth Circuit merely deferred to the Board’s continued adherence to the waiver standard, noting that neither party had suggested it should adopt contract coverage. *Id.* Here, a party has requested that we do so. And one court that has continued to apply the clear and unmistakable waiver standard after the D.C. Circuit’s decision in *Postal Service* criticized the Board’s tendency to apply that standard in a way that “exalts form over substance by suggesting that collective bargaining agreements must catalog every possible permutation” of a right contractually entrusted to management in order to effect a clear and unmistakable bargaining waiver. See *Uforma/Shelby Business Forms, Inc. v. NLRB*, 111 F.3d 1284, 1290 (6th Cir. 1997). In sum, three courts have expressly adopted the contract coverage standard; one court has made it the first step in a two-step standard that resembles the standard we adopt today; and a fifth court, while adhering to the clear and unmistakable waiver standard, has criticized the Board for applying it in an excessively narrow and exacting manner. This criticism suggests the possibility of retaining the waiver standard and revising the way it is applied. Unfortunately, that option must be rejected. As case after case has demonstrated, and as our colleague’s dissenting opinion in this case confirms, in the Board’s hands the clear and unmistakable waiver standard cannot be separated from a deep-seated and indeed *principled* hostility to management-rights language.³⁴ Therefore the standard itself must be abandoned if collectively bargained and agreed-upon language is to be enforced as written and not emptied of meaning.³⁵

³³ Disputing this proposition, the dissent suggests that several courts of appeals have held that Supreme Court precedent “forecloses application of a less stringent standard,” i.e., contract coverage. A sampling of cases she cites from various circuits reveals that those courts were not addressing the question of “contract coverage” versus “clear and unmistakable waiver,” and in some cases were not even dealing with the right to bargain at all. See *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1245 (3d Cir. 1994) (addressing whether management-rights clause survived expiration of the collective-bargaining agreement); *East Tennessee Baptist Hospital v. NLRB*, 6 F.3d 1139, 1144–1145 (6th Cir. 1993) (addressing whether hospital had waived its right to restrict access to confidential information concerning nonunit employees); *Carpenters Local 2848 v. NLRB*, 891 F.2d 1160, 1163–1164 (5th Cir. 1990) (addressing whether union waived its right to enforce the terms of a pension plan through the grievance procedure); *NLRB v. Scherr*, 883 F.2d 69 (4th

Cir. 1989) (per curiam) (addressing whether union waived its right under Sec. 9(a) to be present at adjustment of grievances). Moreover, the point is not whether contract coverage is “less stringent” than clear and unmistakable waiver. The point is that to ask whether the union has *waived* bargaining is to ask the wrong question when the parties have *already* bargained and reached an agreement, and the issue is whether the language of that agreement covers a disputed unilateral change.

³⁴ As our colleague states, “[a] statute intended to encourage collective bargaining as a way to avoid labor disputes necessarily must disfavor unilateral employer action.”

³⁵ Our colleague notes that prior to its decision in *Postal Service*, the D.C. Circuit applied the clear and unmistakable waiver standard “to situations in which contract terms arguably affected the parties’ obligations under [S]ection 8(a)(5).” *Road Sprinkler Fitters Local 669 v. NLRB*, 600 F.2d 918, 922 (D.C. Cir. 1979). Our colleague faults the D.C. Circuit

Finally, we reject our colleague's dire prediction that this decision, in tandem with *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), will destabilize collective bargaining because unions will decide that they are simply better off without a collective-bargaining agreement.³⁶ A moment's reflection shows the improbability of that prediction coming to pass. For starters, union-security arrangements are statutorily required to be contractual;³⁷ dues, as our colleague herself has said, are unions' "financial lifeline";³⁸ and no employer would enter into a naked union-security agreement that was not part of a broader collective-bargaining agreement. Additionally, many employee benefits, such as pension, health and welfare, vacation, and training are paid through employer contributions to union funds, and those contributions must commence with a written agreement in order to be lawful.³⁹ Moreover, it is difficult to imagine how a union could organize employees without holding out the prospect of contractual wages, contractual benefits, and a contractual mechanism for resolving workers' grievances. Absent a collective-bargaining agreement containing a grievance-arbitration provision, the only way to resolve workers' complaints (when bargaining fails to secure a satisfactory outcome) is through direct economic action, and strikes raise the specter of replacement, possibly permanent replacement.

Given these realities, no rational union would forswear the goal of obtaining a collective-bargaining agreement, and no reasonable workers would vote for a union that did. It may turn out that as a result of our decision, unions will bargain harder over management-rights clauses, and bargaining parties may be forced to state their agreement in such clauses more clearly. But that is precisely where the

for its "unexplained about-face" in *Postal Service*, criticizes the court's "inconsistency," and questions whether, under the court's law-of-the-circuit standard, *Postal Service* properly overruled the court's earlier application of the waiver standard.

These musings are all beside the point, since contract coverage is "firmly established as the law of the District of Columbia Circuit," as the dissent concedes. That court has expressed no concerns about the doctrine's antecedents, which are in any event much firmer than the dissent acknowledges. Prior to *Postal Service*, the D.C. Circuit had yet to consider the merits of the Board's waiver standard. Rather, that court, like others, simply deferred to the Board's application of that standard. See *International Union, UAW v. NLRB*, 381 F.2d 265, 267 (D.C. Cir. 1967) (applying the waiver standard and explaining that "[t]he Board has said that a union will not be held to have waived a statutory right unless the waiver is 'clear and unmistakable'"), cert. denied 389 U.S. 857 (1967). When it examined the issue, however, the court in *Postal Service* concluded otherwise and provided a convincing explanation for its adoption of the contract coverage standard, and it has consistently applied that standard ever since. See, e.g., *Regal Cinemas, Inc. v. NLRB*, 317 F.3d at 300; *Heartland Plymouth v. NLRB*, 650 Fed.Appx. 11 (D.C. Cir. 2016). Accordingly, although the court did not explicitly overrule *Road Sprinkler Fitters*, it is undisputed that the court has squarely held that waiver is irrelevant where the disputed change is within the compass or scope of

scope of a union's continuing right to bargain during the term of a collective-bargaining agreement *should* be resolved: in collective bargaining, not by application of a waiver standard to negate contractual language to which the parties voluntarily agreed. In sum, we believe that contract coverage better supports labor relations stability by encouraging employers and unions to foresee potential issues and resolve them through comprehensive collective-bargaining agreements.

8. Application of the contract coverage test to the unilateral-change allegations

The Respondent argues that the following contractual provisions granted it the right to implement the five new and revised policies put at issue by the unilateral-change allegations of the complaint.

Section 5 of the Agreement, "Management Rights," provided, in relevant part, as follows:

5.1 Management Rights

Except to the extent expressly abridged by a provision of this Agreement, the Company reserves and retains, solely and exclusively, all of its rights to manage its business. Among those rights, and by no means a wholly inclusive list, is the right to determine staffing size, to decide and assign all schedules, work hours, work shifts, machines, tools, equipment and property to be used to increase efficiency; to hire, promote, assign, transfer, demote, discipline and discharge for just cause; and to adopt and enforce reasonable work rules.

...

contractual language that grants the employer the right to act unilaterally, and we agree with the court's rationale.

³⁶ In *Raytheon*, the Board held that a past practice continues as a term and condition of employment after the expiration of a collective-bargaining agreement, even if that past practice developed pursuant to a "management-rights clause authorizing unilateral action." *Id.*, slip op. at 16. Our colleague asserts that employers will now "be free to change employees' terms and conditions of employment at will during the term of the agreement and after, [and] the duty to bargain created by the National Labor Relations Act will effectively be set aside." That charge is baseless. First, nothing in our decision today permits employers to change employees' terms and conditions "at will." Second, as explained at length in that decision, *Raytheon* merely ensures that terms and conditions of employment created by past practice during the life of the contract are maintained after the contract expires, along with other status quo terms and conditions of employment. See *id.*, slip op. at 11. Neither *Raytheon* nor this decision speaks to the status of contract provisions authorizing unilateral employer action after the contract containing the provisions has expired.

³⁷ See NLRA Sec. 8(a)(3).

³⁸ *Lincoln Lutheran of Racine*, 362 NLRB at 1657.

³⁹ See Labor Management Relations Act Sec. 302(c)(5), (6).

5.4 The Company shall have the right to issue, amend and revise policies, rules and regulations and the issuance, amending or revision of such policies, rules and regulations shall not violate the terms of this Agreement. The Company will obtain input from the Union prior to implementation of policy, rules and regulations.

Such revisions and amendments will be given to the Union not less than ten (10) business days prior to the intended implementation date and posted to the employees not less than seven (7) calendar days prior to the intended implementation date. These timeframes will be followed unless shorter notice is given by the client for implementation.

Section 14 of the Agreement, “Discipline and Discharge Procedures,” included a provision on Work Rules providing, in relevant part, as follows:

14.5 Work Rules

The Company shall have the right to issue, amend and revise policies, rules, and regulations and the issuance, amending or revision of such policies, rules and regulations shall not violate the terms of this Agreement. Any Company rule, policy, or regulation that conflicts with the CBA - the terms of the CBA shall prevail. The Company may obtain input from the Union prior to implementation of policy, rules and regulations.

The Company at least twenty (20) business days prior to the implementation of said rule, regulation or addendum will copy each employee and the Union of any changes to policies, rules and regulations. The twenty (20) day time limit is waived when safety concerns demand immediate address.

Disputes in relation to rules, regulations, and policies may be subject to the grievance and arbitration process should they violate the Collective Bargaining Agreement.

For the reasons explained below, we find that each of the changes at issue here falls within the compass or scope

⁴⁰ Each of the new or revised policies was effective March 26, 2016. Unless otherwise stated, because we find that the Respondent’s new and revised policies were covered by the Agreement, we do not reach the Respondent’s additional argument that it did not violate Sec. 8(a)(5) and (1) because some of its new and revised policies did not result in material, substantial, and significant changes in employees’ terms and conditions of employment. In addition, as noted above, the Agreement required the Respondent to afford the Union opportunity to provide “input” prior to the Respondent’s implementation of policies, rules and regulations. The General Counsel does not allege that the Respondent failed to honor this requirement.

of language in the Agreement that granted the Respondent the right to act unilaterally. Accordingly, the Agreement covered each of the Respondent’s unilateral changes, and the Respondent did not violate Section 8(a)(5) and (1) as alleged.⁴⁰

a. Procedure No. O-25: Acceptable Assignments for Employees on Temporary Modified Work Status (“Light Duty Policy”)

The Respondent has maintained this policy since January 2014, the purpose of which is to “ensure that an employee in a temporary modified work status is given a productive [light duty] assignment that is within any physical restrictions the employee may have.” In March 2016, the Respondent revised this policy by adding the following additional task to a list of suggested assignments for employees on light duty: “Update MSDS binders for Maintenance department(s) (Report to QA Manager).”⁴¹

We find that the Respondent’s addition of this suggested light duty assignment was covered by section 5.1 of the Agreement. Section 5.1 relevantly granted the Respondent the “sole[] and exclusive[]” right “to manage its business,” including the right to “assign all schedules, work hours, work shifts” and “to . . . assign” employees. The Respondent’s addition of MSDS binder work as a suggested light duty assignment involved the assignment of employees—i.e., employees on temporary modified work status could now be assigned to update MSDS binders. The revision of the Light Duty Policy was within the compass or scope of language that granted the Respondent the right to act unilaterally. Accordingly, the Agreement authorized the Respondent to unilaterally revise the Light Duty Policy to add an additional suggested work assignment for employees on temporary modified work status, and the Respondent did not violate Section 8(a)(5) and (1) as alleged.⁴²

b. Procedure No. S-21: Safety Policy

The Respondent implemented this new policy in March 2016, the purpose of which was to “maintain a workplace free of hazards and [to maintain] employees that exercise safe practices . . . in their daily execution of job functions. . . . [T]his Safety Policy shall cover areas that are not

⁴¹ Neither the record nor the parties’ briefing provides any further explanation what this work entails.

⁴² Cf. *Postal Service*, 8 F.3d at 838 (finding that employer’s implementation of service reductions (reduced weekday retail hours, Saturday closures, and adjustment of processing and collection hours) was “well within the scope of” contract language granting the employer the “exclusive right” to “transfer and assign employees . . . [t]o determine the methods, means, and personnel by which [its] operations are to be conducted [and to] maintain the efficiency of the operations entrusted to it”).

addressed in the Accident/Incident Reporting Procedures to ensure our employees will provide service to the public in the safest manner possible.” This policy classifies various safety incidents into three categories (major, moderate, and minor), provides a nonexclusive list of safety incidents for each category, sets forth a disciplinary schedule for each of the three categories,⁴³ and grants the Respondent the right to require retraining after an incident and to impose additional discipline, up to and including termination, for an employee’s failure to complete retraining.

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) by unilaterally “implementing new safety standards, including reclassifying major, moderate and minor safety incidents, under threat of discipline,” and by unilaterally adding “a retraining requirement, including discipline for a failure to complete the training requirement.” We disagree. We find that the Respondent’s unilateral implementation of this new policy was covered by the Agreement.

Section 5.1 of the management-rights clause granted the Respondent the “sole[] and exclusive[]” right to “discipline and discharge for just cause[,] and to adopt and enforce reasonable work rules.” Section 5.4 of the management-rights clause provided that the Respondent “shall have the right to issue, amend and revise policies, rules and regulations” so long as such action does “not violate the terms of this Agreement.”⁴⁴ Read together, these provisions demonstrate that the parties bargained and agreed to vest in the Respondent the exclusive right to discipline and discharge employees for just cause and to issue reasonable new and revised work rules and policies. These provisions evidence the parties’ intent to grant the Respondent the exclusive right to establish reasonable policies related to employee discipline.

Section 14.5 of the Agreement confirms this interpretation. Section 14 addressed “Discipline and Discharge Procedures,” and section 14.5 granted the Respondent the “right to issue, amend and revise policies, rules, and regulations.” By granting the Respondent the right to issue policies, and by doing so in the very section of the

Agreement governing discipline and discharge procedures, section 14.5 further demonstrated that the parties agreed to grant the Respondent the right to issue the Safety Policy at issue here, including the disciplinary consequences of violating that policy. Put differently, the new Safety Policy was within the compass or scope of sections 5.1, 5.4, and 14.5 of the Agreement, as explained above. That none of those sections specifically referred to “safety” standards or “retraining” as a type of discipline does not “detract from the clarity of [the Agreement’s] meaning.” *Chicago Tribune*, 974 F.2d at 937; see also *id.* at 935–936 (contract language granting employer the “exclusive right . . . to establish and enforce reasonable rules and regulations relating to the operation of its facilities and to employee conduct” gave employer “carte blanche to impose rules relating to employee conduct,” including disputed rule establishing employee alcohol and drug standards). Accordingly, we find that the Agreement authorized the Respondent to unilaterally implement its Safety Policy, and the Respondent did not violate Section 8(a)(5) and (1) as alleged.

Our dissenting colleague would find that the Respondent’s unilateral implementation of the Safety Policy violated the Act under a clear and unmistakable waiver standard because the contract provisions did not specifically waive the Union’s right to bargain about any disciplinary policy imposed to implement any new safety rules validly adopted.⁴⁵ The position advanced by our colleague here demonstrates the shortcomings of the clear and unmistakable waiver standard. The parties have negotiated an agreement that the Respondent can unilaterally issue a new policy or revise an existing policy, including a disciplinary policy, during the term of the contract.⁴⁶ Yet the clear and unmistakable waiver standard that our colleague would apply effectively negates the Respondent’s bargained-for unilateral rights by holding that the Respondent could *not* act unilaterally unless there was a negotiated understanding of what specific disciplinary consequence would ensue from a specific new policy, even if the policy change was not contemplated when the parties negotiated their agreement over a year earlier. Our colleague’s view

⁴³ The Safety Policy provides that employees involved in a “major” incident “will be subject to discharge.” Employees involved in “moderate” incidents receive (i) retraining and a 2-day suspension without pay for a first violation, and (ii) discharge for a second violation in a rolling 18-month period. Employees involved in “minor” incidents are subject to a progressive disciplinary schedule: verbal warning, written warning, suspension with retraining, and written discharge.

⁴⁴ The General Counsel does not allege that the Safety Policy or any of the Respondent’s other disputed unilateral changes violated the terms of the Agreement or were unreasonable.

⁴⁵ The dissent reaches the same result with respect to the Schedule Adherence Policy and the Security Sweep/Breach Policy, applying a

similar analysis. In all other respects, the dissent concurs in our disposition of the allegations in this case, albeit on different grounds in some instances.

⁴⁶ To repeat, the Respondent’s “right to issue, amend and revise policies, rules, and regulations” is specifically referenced in the section of the Agreement dealing with discipline, in addition to a separate provision regarding work rules in the section of the Agreement addressing management rights. The dissent unjustifiably fails to give any significance to the fact that the parties specifically included this separate provision in sec. 14 of their Agreement.

of the result compelled by the clear and unmistakable waiver standard perfectly demonstrates why that standard “is, in practice, impossible to meet.” *Department of Navy v. FLRA*, supra, 962 F.2d at 59, and further justifies our decision to abandon it.

c. Procedure No. O-26: Schedule Adherence Policy

The Respondent has maintained the Schedule Adherence Policy since February 2014. The purpose of this policy is threefold: “to ensure that all coach operators are performing their assigned schedules with maximum efficiency,” “to help identify coach operators that are under performing their scheduled work assignments,” and “to ensure consistency and due process when issuing discipline to coach operators for schedule adherence violations.”

Under a prior version of this policy, the “level of discipline” issued to an employee for failing to adhere to an assigned schedule was “based on the total number of violations committed by [the employee] in a rolling six (6) month period,” and the progression of discipline was (1) a “documented verbal” for a first violation, (2) a written warning for a second violation, (3) a 1-day suspension for a third violation, and (4) possible termination for a fourth violation. In March 2016, the Respondent revised this policy to eliminate the 6-month rolling period and to provide that a third violation results in a “written” suspension⁴⁷ and a fourth violation in a “written discharge” rather than possible termination. The General Counsel argues that the Respondent’s failure to bargain over its “modification of discipline for schedule non-adherence” violated Section 8(a)(5) and (1).

We find that the Respondent’s revisions to the Schedule Adherence Policy were covered by the Agreement. For the reasons discussed in connection with the Respondent’s implementation of its Safety Policy, the Agreement established that the parties bargained and agreed to vest in the Respondent the right to discipline employees and to issue, amend, and revise reasonable rules and policies related to that right. The Respondent’s revisions to its Schedule Adherence Policy—eliminating the rolling 6-month period and modifying the prescribed discipline for third and fourth violations of the policy—plainly fell within the compass of these contractual rights. Moreover, Section 5.1 granted the Respondent the sole and exclusive right to assign schedules and to adopt and enforce reasonable work rules, and the Respondent’s revisions to the Schedule Adherence Policy were also within the compass of those rights: the stated purpose of the Schedule

Adherence Policy is to ensure employees perform “their assigned schedules,” and no party contends that the Respondent’s revisions to that policy were unreasonable. Accordingly, we find that the Respondent did not violate Section 8(a)(5) and (1) as alleged.

d. Procedure No. S-20: Security Sweep/Breach Policy

This policy, newly implemented in March 2016, requires employees “to complete a security sweep of the coach at the end of each . . . route and before coming back to the [Respondent’s] facility.” It specifies the tasks a security sweep includes and establishes a progressive disciplinary matrix for failures to complete a security sweep (verbal warning, written warning, written suspension, written discharge). The policy also establishes a more stringent disciplinary progression (2-day unpaid suspension, discharge) for security breaches, defined as “serious infraction[s] that compromise[] the security of the property and the safety of everyone that works at the . . . facility.” The General Counsel argues that the Respondent’s failure to bargain over its implementation of this new policy violated Section 8(a)(5) and (1) because it involved a “new work assignment . . . under penalty of discipline.”

For the reasons explained above, we find that the Respondent’s implementation of its Security Sweep/Breach Policy was covered by the Agreement. The Agreement granted the Respondent the right to assign employees, to discipline employees, and to issue reasonable rules and policies related to employee discipline. The Security Sweep/Breach Policy, in the General Counsel’s own words, involves those very matters: a new work assignment under penalty of discipline. Accordingly, the Respondent did not violate Section 8(a)(5) and (1) when it implemented this policy unilaterally.

e. Procedure No. S-19: DriveCam Policy

The purpose of the DriveCam Policy is to “provide a standard to remediate improper driver behaviors while operating [the Respondent’s] vehicles . . . [including] to proactively identify unsafe behaviors and improve them through coaching, retraining, and if necessary, disciplinary measures in accordance with the . . . Collective Bargaining Agreement.” The policy defines DriveCam as an “event recorder used to identify unsafe behavior that can lead to an accident, in order to correct those behavior patterns.” Under this policy, “[a]ll DriveCam events will be reviewed and evaluated for compliance with the company’s policies and defensive driving standards. Drivers found acting in an improper and/or unsafe manner shall be coached towards behavior improvement and if necessary

⁴⁷ Other than the fact that it is written, the record does not establish whether a “written” suspension materially differs from the prior “one-day” suspension.

retrained and/or disciplined.” The policy further provides that the “heart of the DriveCam program is the counseling and retraining process.”

A prior version of this policy included a section titled “Remedial actions.” This section explained that “[r]emedial actions for improper behaviors identified via the DriveCam event record shall, generally, be progressive in nature and based on the ‘Event Score Risk,’ taking in[to] account both the individual event score and the cumulative score earned by the driver for a specified period of time.” Remedial action for “Individual Events” where employees had an “event risk score” of 9 or more included “Refresher Training.” Remedial action for a “Rolling 30 day period” where employees had an “event risk score” of 24 or more also included “Refresher Training.”

In March 2016, the Respondent replaced the “Remedial actions” section of the DriveCam Policy with one titled “Remedial/Disciplinary actions.”⁴⁸ The General Counsel contends that this new section “create[s] a new requirement that employees complete re-training,” and that by “creating a new requirement that employees complete re-training, [the] Respondent made a unilateral change regarding a mandatory subject of bargaining and thereby violated Section 8(a)(5) and (1) of the Act.”⁴⁹

We do not find a violation as alleged because the General Counsel has failed to establish that the Respondent’s March 2016 revisions constituted a material, substantial, and significant change in employees’ terms and conditions of employment. Although the General Counsel claims that the revisions created “a *new requirement* that employees complete re-training,” the Respondent’s existing policy already required retraining—i.e., “refresher training”—for improper or unsafe driving. Moreover, the Respondent’s 2016 revisions left unchanged that the Respondent will rely on DriveCam footage to determine

whether employees should be “retrained and/or disciplined,” and those revisions also left unchanged the “heart” of the policy, “counseling and retraining.” Contrary to the General Counsel, these unchanged provisions establish that the Respondent has always required employees to complete re-training should DriveCam footage reveal they have engaged in improper or unsafe driving.

More specifically, the prior version required “Refresher Training” for (i) employees whose individual infractions resulted in a risk score of 9 or more, and (ii) employees whose cumulative infractions, during a rolling 30-day period, added up to a risk score of 24 or more. Contrary to the General Counsel’s suggestion, the revised policy contains virtually identical retraining requirements. The 2016 revisions cited by the General Counsel require “Retraining for Improper behaviors identified via the DriveCam event recorder” for “event risk score (9 points or more) [and] repeated unsafe behaviors in a 30-day period.” The General Counsel has not explained how the revised language materially differs from the prior language, and we perceive no meaningful difference. For these reasons, we find that the Respondent did not violate Section 8(a)(5) and (1) as alleged.

Assuming arguendo the Respondent’s revisions were material, substantial, and significant, we would still find that the Respondent did not violate Section 8(a)(5) and (1). Again, the Agreement granted the Respondent the right to discipline employees and to issue reasonable rules and policies related to employee discipline. The Respondent exercised those very rights when it revised the training requirements for improper or unsafe behavior revealed through DriveCam footage, since those revisions involved employee discipline and policies related to discipline. Accordingly, the revisions to the DriveCam Policy were covered by the Agreement.⁵⁰

⁴⁸ This new section provides as follows:

1. Retraining for Improper behaviors identified via the DriveCam event recorder shall be based on: event risk score (9 points or more), repeated unsafe behaviors in a 30-day period, and unsafe behaviors that lead to a near avoidable collision.
2. Follow up trail check by a road supervisor 1 to 2 weeks from event retraining to ensure the unsafe behavior has been corrected.
3. If the unsafe behavior identified by the DriveCam event recorder has not been corrected, progressive discipline will follow.
4. Disregard of traffic laws (i.e. running a red light/stop sign, exceeding the speed limit, and driving on the roadway without a seat belt), will move directly to progressive discipline. Use of cellular device while operating a motor vehicle will be addressed in the MV’s cellular device policy.

⁴⁹ In the Background section of his brief, the General Counsel states that this new section modified the prior one by “provid[ing] for retraining and discipline.” The General Counsel’s theory of a violation, however, solely concerns retraining.

⁵⁰ Although we need not reach whether the Union waived its right to bargain over any of the Respondent’s new and revised work policies, we note that language in the Agreement indicates that it did. Sec. 5.4 of the management-rights clause stated that the Respondent would “obtain *input* from the Union prior to implementation of policy, rules and regulations” (emphasis added). Sec. 14.5 provided that the Respondent “may obtain *input* from the Union prior to implementation of policy, rules and regulations,” and 20 days before implementation, it must “*copy* each employee and the Union of any changes to policies, rules, and regulations” (emphasis added). It is significant that the parties chose the phrase “obtain input” rather than the word “negotiate” or “bargain” and simply required that the Respondent “copy” the Union—i.e., give the Union notice—of any changes. Had the parties intended to preserve the Union’s right to bargain over new or revised policies, rules, and regulations, they would have used the term “negotiate,” as they did elsewhere in the Agreement. Specifically, sec. 3, “Recognition,” provided that “[t]he Company will notify the Union of any newly created job classifications . . . and upon request of the Union the parties will *negotiate* in an effort to reach agreement on the appropriate scope, duties, and the applicable wage for the new job classification” (emphasis added). See *Omaha*

B. *The Contract-Modification Allegations*

The General Counsel alleges that five of the Respondent's new and revised policies modified the Agreement within the meaning of Section 8(d), in violation of Section 8(a)(5) and (1). Section 8(d) provides, in relevant part, that "where there is in effect a collective-bargaining contract . . . no party to such contract shall terminate or modify such contract." As the Board has explained, unilateral-change cases and contract-modification cases

are fundamentally different in terms of principle, possible defenses, and remedy. In terms of principle, the "unilateral change" case does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*. The allegation is a *failure to bargain*. In the "contract modification" case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain. A defense to the contract modification can be that the union has consented to the change. In terms of remedy, a remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract.

Bath Iron Works Corp., 345 NLRB 499, 501 (2005) (emphasis in original), *affd.* sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). The Union here did not consent to any of the alleged contract modifications.

To determine whether an employer has modified, i.e., failed to adhere to the contract, the Board applies the "sound arguable basis" standard. *Id.* at 501–502. Under that standard, if an employer has a "sound arguable basis for its interpretation of the contract and is not motivated by animus or . . . acting in bad faith," the Board will not find a violation. *Id.* at 502 (internal quotations omitted). The employer's interpretation need not be the only reasonable interpretation in order to pass muster under the "sound arguable basis" standard. If an employer has a sound arguable basis for its interpretation and the General Counsel also presents a reasonable interpretation of the relevant contractual language, the Board will not seek to determine which interpretation is correct. See *NCR Corp.*, 271 NLRB 1212, 1213 (1984). Under those

World-Herald, 357 NLRB at 1871 (parties' use of the terms "discuss" and "explain" instead of "bargain over," used elsewhere in their agreement, evinced waiver); *Ingham Regional Medical Center*, 342 NLRB 1259, 1262 (2004) (parties' use of the term "discuss" instead of

circumstances, the employer will not have violated the Act. See *id.*

1. Procedure No. O-21: Operator Fails to Log-in to AMDT

This Respondent has maintained Procedure No. O-21 since January 2014. This policy is "designed to ensure that all coach operators are logged in to the onboard AMDT [Automated Manual Data Terminal] system and that radio dispatchers are aware of how to monitor Orbital and identify operators that are not logged in to the AMDT system and report repeat offenders for possible disciplinary action."⁵¹ The policy established a progressive discipline procedure based on a "rolling six (6) month period": (1) first incident—documented verbal, (2) second incident—written warning, (3) third incident—1-day unpaid suspension, and (4) fourth incident—possible termination.

In March 2016, the Respondent revised this policy in three ways. First, it removed the word *possible* from the phrase "possible disciplinary action." The policy now provides that it is "designed to ensure that all coach operators are logged in to the onboard AMDT system and that radio dispatchers are aware of how to monitor Orbital and identify operators that are not logged in to the AMDT system and report repeat offenders for disciplinary action." Second, the Respondent eliminated the 6-month rolling period. Third, it made the fourth and final step in the progressive disciplinary procedure "written discharge" rather than "possible termination."

The General Counsel contends that these revisions unlawfully modified the progressive discipline steps set forth in section 14.1 of the Agreement. The Respondent argues that it did not modify the Agreement because the Agreement's management-rights clause gave it the right to establish work rules and procedures related to discipline, and it exercised that right in making these revisions.

We find that the Respondent had a sound arguable basis for its interpretation of the Agreement. Contrary to the General Counsel's claim that the Respondent modified the progressive discipline steps in section 14.1, the changes the Respondent made to Procedure No. O-21 actually aligned that policy with the contractual provision the General Counsel claims the Respondent modified. section 14.1 provided that the "normal steps of progressive discipline are first, verbal warning; second, written warning; third, written suspension; and fourth, written discharge," and section 14.1 did not establish any rolling period. The Respondent's original version of Procedure No. O-21

"bargain," used elsewhere in the agreement, demonstrated waiver on union's part).

⁵¹ The record does not reveal what "Orbital" is.

deviated from section 14.1. It included a 6-month rolling period and “possible termination” at the fourth step. As revised, Procedure No. O-21 omits the rolling period and provides for “written discharge” at the fourth disciplinary step, in conformity with section 14.1. In addition, as discussed above, sections 5 and 14.5 of the Agreement granted the Respondent the right to revise policies related to employee discipline, a right that it exercised when it revised Procedure No. O-21. In short, the Respondent adhered to the Agreement when it revised this policy, and we therefore dismiss the allegation that it modified the Agreement within the meaning of Section 8(d), in violation of Section 8(a)(5) and (1).

2. Procedure No. A-38: Bereavement Pay

The Respondent implemented a new Bereavement Pay policy in March 2016. This policy establishes a “Procedure for Determining Bereavement Pay Eligibility,” under which an employee “must be full-time and non-probationary” to receive bereavement pay. The policy also requires that employees submit an “Employee Absence Request” form and, upon return from bereavement leave, provide “proof of death” and “proof of relationship to deceased” to receive bereavement pay.

The General Counsel contends that this policy unlawfully modified section 10.12 of the Agreement, “Bereavement Leave.” The General Counsel argues that this policy departs from section 10.12 in two ways: (1) it limits bereavement pay to full-time, nonprobationary employees, and (2) it implements new documentation procedures by requiring employees to submit an “Employee Absence Request” form and provide proof of death and proof of relationship to a decedent.

The Respondent argues that it lawfully implemented this policy because the Agreement did not guarantee employees “any specific right to bereavement pay and [left] that issue to the discretion of the Company.” According to the Respondent, it was entitled to establish procedures for bereavement-pay requests under section 10.12 pursuant to its rights under the Agreement’s management-rights clause.

Section 10.12 provided as follows:

A full-time employee may be granted three (3) paid workdays for bereavement days in the event of the death of a member of their immediate family. For employees needing to travel five-hundred (500) miles or more one way, an additional two (2) paid work days as bereavement days may be granted. (Normal days off are excluded.)

For purposes of this section, immediate family shall be defined as spouse, domestic partner, mother, father,

legal guardian, brother, sister, child, step-child, current mother-in-law or father-in-law, grandparent, grandchild, step-parent, foster-child, foster-parent, and child's current spouse. An additional two (2) days of unpaid bereavement leave will, upon request, be granted provided that the request is made at either the commencement of or during the paid bereavement leave and the two (2) additional days directly follow the paid bereavement leave.

We find that the Respondent had a sound arguable basis for interpreting the Agreement as giving it the right to impose the bereavement-related documentation requirements. Section 10.12 stated that requests for bereavement leave “*may* be granted.” Thus, section 10.12 arguably gave the Respondent discretion to decide whether to grant bereavement leave at all, which arguably included the lesser discretion to determine the circumstances under which such leave would be granted, including documentation requirements. Section 10.12 also restricted bereavement leave to employees who have experienced “the death of a member of their immediate family.” This language arguably implied a right for the Respondent to require verification of this sad fact.

We find, however, that the Respondent lacked a sound arguable basis for interpreting the Agreement as giving it the authority to limit bereavement leave eligibility to full-time, *non-probationary* employees. Section 10.12 explicitly provided that a “full-time employee” may receive paid bereavement leave. The category of full-time employees includes full-time probationary employees. Nothing in section 10.12 limited eligibility for bereavement leave to full-time nonprobationary employees. Accordingly, section 10.12 cannot be colorably interpreted to permit the Respondent to exclude full-time probationary employees from bereavement leave. By doing so, the Respondent failed to adhere to the Agreement.

Our finding in this regard is bolstered by other provisions of the Agreement showing that the parties were fully aware of the distinction between probationary and nonprobationary employees and knew how to limit certain benefits solely to the latter. For example, section 10.2 of the Agreement granted paid time off to “[p]ost probationary employees.” Section 11.2 granted medical and workers’ compensation leave to “[p]ost probationary employees.” Section 12.1 granted vacation time to “all employees” upon “completion of probation.” And section 23.1 granted medical, dental, and other benefits to “full-time, post-probationary employees.” In light of these other sections of the Agreement, an interpretation of section 10.12 that would permit nonprobationary employees to be excluded *sub silentio* from eligibility for bereavement leave cannot be reasonably maintained.

For all these reasons, we conclude that the Respondent lacked a sound arguable basis to interpret the Agreement as authorizing it to limit bereavement leave to full-time, non-probationary employees. Accordingly, to this extent, the Respondent unlawfully modified the terms of the Agreement within the meaning of Section 8(d) in violation of Section 8(a)(5).

3. Procedure No. A-44: CDL Reimbursement Policy

The Respondent implemented this new policy in March 2016, the purpose of which is to “provide detailed instructions for requesting and processing CDL [commercial driver’s license] reimbursement requests per Section 26 of the CBA.” This policy provides that an employee “must be currently employed, active full-time and [in a] non-probationary status” to receive reimbursement. It requires employees to submit a reimbursement request form and provide documentation (a receipt and copy of the license) to the Respondent’s payroll department “within two (2) weeks of their one (1) year anniversary with the Company to be eligible for payment.”

The General Counsel claims that these provisions are inconsistent with section 26 of the Agreement, “Licenses.” Specifically, the General Counsel contends that Procedure No. A-44 unlawfully modified section 26.1 in three respects: (1) it limits reimbursement eligibility to currently employed, active, full-time, and non-probationary employees, rather than extending reimbursement eligibility to all employees; (2) it requires employees to submit requests for reimbursement within 2 weeks of their 1-year anniversary; and (3) it requires employees to submit a specific form with supporting documentation to receive reimbursement.

Section 26.1 of the Agreement provided that

[t]he cost of obtaining and renewing an employee's commercial driver license (CDL) will be borne by the employee. Employees who work for the Company for one (1) year will receive a one-time reimbursement for the cost of their CDL in the pay period immediately following the employee's first anniversary.

The Respondent argues it lawfully implemented the CDL Reimbursement Policy because section 26.1 was “silent as to the procedure for processing CDL reimbursements,” and the policy “simply clarifies the reimbursement process and does not place any restrictions on the employees’ right to obtain reimbursement for the cost of the CDL license.” The Respondent does not argue that the management-rights clause granted it the right to implement this policy.

We find that the Respondent has failed to present a sound arguable basis for its position that the Agreement

gave it the right to limit CDL reimbursement eligibility to currently employed, active, full-time, and nonprobationary employees. Section 26.1 explicitly provided that “employees” are eligible for CDL reimbursement. Except for the requirement that employees must work for 1 year to receive a one-time reimbursement, section 26.1 did not limit employees’ eligibility to receive CDL reimbursement. Accordingly, the Respondent failed to adhere to section 26.1 when it implemented a policy that limited eligibility for CDL reimbursement to certain employees and rendered other employees ineligible.

Moreover, as noted above in connection with the Respondent’s Bereavement Pay policy, other provisions of the Agreement showed that the parties were fully aware that they could limit various benefits to certain categories of employees when they wished to do so. In addition to the examples discussed above, which limited certain benefits to non-probationary employees and others to full-time, nonprobationary employees, Section 29.6 of the Agreement limited retroactive wage increases to “all active employees.” These other sections of the Agreement make it all the more apparent that section 26.1, which extended eligibility for CDL reimbursement to “employees” generally, cannot reasonably be read to permit the Respondent to limit eligibility for CDL reimbursement to currently employed, active, full-time, nonprobationary employees. Accordingly, we find that by doing so, the Respondent unlawfully modified the Agreement.

We find, however, that the Respondent had a sound arguable basis for interpreting the Agreement to permit it to impose the timeframe and documentation requirements. Section 26.1 provided that “the cost of obtaining and renewing [a CDL] will be borne by the employee,” but the employee would receive a one-time reimbursement from the Respondent “in the pay period immediately following the employee’s first anniversary.” The provision *to* employees of the CDL reimbursement benefit reasonably implied a right to require *from* employees a completed reimbursement request form (for recordkeeping purposes), verification that a CDL has, in fact, been obtained or renewed, and proof of the amount of reimbursement the employee is claiming. Thus, we find that the Respondent had a plausible contractual basis for requiring employees to submit these documents. Moreover, the Respondent’s requirement that employees submit this documentation within 2 weeks of their anniversary date is consistent with the agreed-upon timeline established in section 26.1, which provided that employees would receive reimbursement within 2 weeks of their 1-year anniversary.

4. Procedure No. O-40: Customer Service

When adopted in July 2015, the Customer Service policy established a five-step progressive discipline

procedure for “[v]alid customer complaints received within a rolling twelve (12) month time frame”: (1) one complaint–coaching, (2) two complaints–verbal counseling, (3) three complaints–written warning, (4) four complaints–final written warning and 3-day suspension, and (5) five complaints–termination. In March 2016, the Respondent eliminated the 12-month rolling period and revised the progressive discipline procedure to include six steps: (1) one complaint–coaching, (2) two complaints–coaching–Union will be notified, (3) three complaints–verbal warning, (4) four complaints–written warning, (5) five complaints–written suspension–2-day suspension, and (6) six complaints–written discharge.

The General Counsel argues that the Respondent unlawfully modified the Agreement by restructuring the progression of discipline established in the prior policy. The Respondent argues that in revising the Customer Service policy, it exercised its right, under section 14 of the Agreement, to establish policies and procedures related to discipline.

We find that the Respondent had a sound arguable basis for its position that the Agreement authorized its revisions of the Customer Service policy. As discussed in detail above in connection with the Respondent’s Safety Policy and other unilateral-change allegations involving employee discipline, sections 5 and 14 of the Agreement granted the Respondent the right to issue reasonable policies related to disciplinary and discharge procedures. The Respondent’s revisions of its Customer Service policy plainly involve disciplinary and discharge procedures. Accordingly, we find that the Respondent did not unlawfully modify the Agreement by eliminating the Customer Service policy’s 12-month rolling period and altering the policy’s progressive discipline procedure.

5. Procedure No. O-41: Required Extra Assignments Policy

The Respondent implemented this new policy in March 2016, the purpose of which is to “establish written policy and procedures for Operators who require approval to miss a required extra assignment as outlined in the CBA.” For employees seeking to be excused from a required extra assignment, this policy requires that they complete a “Required Extra Assignment Form,” provide a “detailed explanation of why they are requesting to be excused from their forced work assignment,” and “attach documentation as needed, such as copies of proof of travel, medical procedures, etc.” Finally, this policy requires that employees submit these materials to a manager “forty eight (48) hours in advance of the forced work assignment.”

Pertinently, section 31.14 of the Agreement (referenced in the Required Extra Assignments Policy) provided that

[i]n the event an Operator is issued a required extra assignment, such Operator will be excused from performing such work by demonstrating a need compelling enough to be excused to an Operations Manager, preferably in advance.

The General Counsel argues that the Respondent’s policy unlawfully modified section 31.14 by (1) requiring employees to complete the Required Extra Assignment Form and the requisite detailed explanation and supporting documents when seeking to be excused from a required extra assignment, and (2) requiring employees to submit those materials 48 hours in advance of a scheduled extra assignment. The Respondent argues that these requirements are consistent with section 31.14 because they simply provide “a form for employees to complete to provide information related to the ‘compelling’ reason language in section 31.14.”

We find that the Respondent had a sound arguable basis for interpreting the Agreement to permit it to impose the documentation requirements established in this policy. Section 31.14 provided that an employee will be excused from performing a required extra assignment only if he or she can “demonstrat[e] a need compelling enough to be excused.” Because this language placed a burden on employees to prove that their excusal requests were meritorious, we find that the Respondent had a reasonable contractual basis for requiring employees to submit a form, a written explanation, and supporting materials on the basis of which the Respondent can judge the merits of such requests.

We find, however, that the Respondent lacked a sound arguable basis for imposing the requirement that employees submit these materials 48 hours in advance of a scheduled extra assignment. Section 31.14 required that an employee demonstrate a compelling need to be excused from a required extra assignment, “*preferably in advance*.” The Respondent’s policy requires that documentation of a compelling need be submitted “*forty-eight (48) hours in advance* of the forced work assignment.” The Agreement is flexible as to when the compelling need is to be demonstrated; the Required Extra Assignments Policy eliminates this agreed-upon flexibility. Accordingly, in this regard, we conclude that the Respondent unlawfully modified the Agreement within the meaning of Section 8(d), in violation of Section 8(a)(5).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Amalgamated Transit Union Local #1637, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By limiting bereavement leave eligibility to full-time, nonprobationary employees; by limiting commercial driver’s license reimbursement eligibility to currently employed, active, full-time, and nonprobationary employees; and by requiring employees seeking to be excused from performing a required extra assignment to submit documentation 48 hours in advance of the forced work assignment, the Respondent modified the parties’ collective-bargaining agreement without the Union’s consent within the meaning of Section (8)(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully modified the parties’ collective-bargaining agreement without the Union’s consent, we shall order the Respondent to restore the status quo ante and to continue in effect all terms and conditions of employment contained in the expired collective-bargaining agreement unless and until it bargains with the Union to agreement or impasse on different terms and conditions.

We shall also order the Respondent to make whole the unit employees for any loss of earnings and other benefits suffered as a result of its unlawful actions. Such amounts shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by State and Federal law. Additionally, we shall order the Respondent to compensate the unit employees for any adverse tax consequences of receiving a lump-sum backpay award and to file a report with the Regional Director for Region 28 allocating the backpay awards to the appropriate calendar year(s) for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, MV Transportation, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to continue in effect all the terms and conditions of its collective-bargaining agreement with Amalgamated Transit Union Local #1637, AFL–CIO, CLC (the Union) without the Union’s consent by limiting bereavement leave eligibility to full-time, non-probationary employees; limiting commercial driver’s license reimbursement eligibility to currently employed, active, full-time, and nonprobationary employees; and requiring employees seeking to be excused from performing a required extra assignment to submit documentation 48 hours in advance of the forced work assignment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore the status quo ante as it existed prior to March 26, 2016, and continue in effect all the terms and conditions of employment contained in the expired collective-bargaining agreement unless and until the Respondent bargains with the Union to agreement or impasse on different terms and conditions.

(b) Make whole the unit employees for any loss of earnings and other benefits suffered as a result of the Respondent’s unlawful actions in the manner set forth in the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked “Appendix.”⁵² Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 26, 2016.

⁵² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the

United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 10, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, concurring in part and dissenting in part.

Breaking with 70 years of precedent—and yet again overruling precedent without notice or public participation¹—the majority today abandons “one of the oldest and most familiar of Board doctrines”: the clear-and-unmistakable waiver standard, and in its place imposes a new standard that gives employers wide berth to make

¹ This step has now become an unfortunate hallmark of the current Board, departing from past practice. See, e.g., *Bexar County Performing Arts Center*, 368 NLRB No. 46, slip op. at 1 fn. 2 (2019) (dissenting opinion) (collecting cases).

It should be obvious that public participation would be helpful to the Board’s decisionmaking here. This case involves an important issue of public policy, as reflected in multiple Board, Supreme Court, and appellate court decisions. Rather than offer a rationale for rejecting public participation here (and elsewhere), the majority simply asserts that the Board “has frequently overruled or modified precedent without supplemental briefing.” But the six cases the majority cites are all distinguishable from this one. In none of the cases cited by the majority did the Board refuse to request briefing over the objection of one or more Board members or overrule 70-year old precedent and abandon a Board doctrine that has been approved by the Supreme Court and eight federal courts of appeals. See cases cited at fn. 30.

Moreover, in two of the cases cited by the majority, *Loomis* and *Lincoln Lutheran*, amicus briefs were actually filed. See *Loomis Armored U.S., Inc.*, 364 NLRB No. 23 (2016) (amicus brief filed by SEIU urging the Board to overrule *Wells Fargo Corp.*, 270 NLRB 787 (1984)); *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015) (amicus brief filed by National Right to Work Legal Defense Foundation urging the Board not to overrule *Bethlehem Steel*, 136 NLRB 1500 (1962)).

Both *E.I. Du Pont de Nemours*, 364 NLRB No. 113 (2016) and *Graymont PA, Inc.*, 364 NLRB No. 37 (2016), meanwhile, were the culmination of long-running discussions of the precedent they ultimately

unilateral changes in represented employees’ terms and conditions of employment without first bargaining with their union.²

The National Labor Relations Act, of course, is expressly intended to “encourag[e] the practice and procedure of collective bargaining.”³ The Act imposes a duty to bargain on employers where employees have chosen union representation,⁴ and the Supreme Court has made clear that an “employer’s unilateral change in conditions of employment” is a “circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal.”⁵ Until today, consistent with these principles, the Board has always held that an employer cannot make unilateral changes affecting mandatory subjects of bargaining, based on the asserted authority of a contract provision, unless it can demonstrate that the parties “unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.”⁶ As the Board has explained, this waiver standard “reflects the Board’s policy choice, grounded in the [National Labor Relations] Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes.”⁷ The Supreme Court approved the Board’s waiver standard more than 50 years ago in *C & C Plywood*.⁸ Indeed, when the Board mistakenly strayed from the waiver standard, it was rebuked by the United States Court of Appeals for the District of Columbia

overruled. In *Du Pont*, the Board accepted a remand from the United States Court of Appeals for the District of Columbia Circuit for the express purpose of deciding between two conflicting branches of precedent. See *E.I. Du Pont de Nemours and Co. v. NLRB*, 682 F.3d 65, 70 (D.C. Cir. 2012). *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015), in turn, was the culmination of a 15-year dialogue with the United States Court of Appeals for the Ninth Circuit about *Bethlehem Steel*. See *WKYC-TV, Inc.*, 359 NLRB 286, 286 (2012) (discussing history).

The other three cases were substantively far better disposed to resolution without briefing. *Graymont PA, Inc.*, 364 NLRB No. 37 (2016), presented a purely procedural question concerning pleading standards; *Pressroom Cleaners*, 361 NLRB 643 (2014), involved reversal of an anomalous holding concerning remedies that was in conflict with long-standing Board law; *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014), similarly reversed a Board decision because the decision could not be harmonized with long-standing precedent.

² *Provena St. Joseph Medical Center*, 350 NLRB 808, 810 (2007). The waiver standard was first adopted by the Board in 1949. See id. at 811–812, citing *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949).

³ Sec. 1, 29 U.S.C. §151.

⁴ 29 U.S.C. §158(a)(5).

⁵ *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

⁶ *Provena*, supra, 350 NLRB at 811.

⁷ Id.

⁸ *NLRB v. C & C Plywood*, 385 U.S. 421 (1967).

Circuit, in a 1979 decision (*Road Sprinkler Fitters*) that appears never to have been overruled.⁹

Today, the majority discards the waiver standard and adopts the so-called “contract coverage” standard devised by the District of Columbia Circuit *after* it had approved the waiver standard (and long after the Supreme Court had done so). In its 1993 *Postal Service* decision, the D. C. Circuit framed the issue in cases like this one entirely as a matter of contract interpretation—and thus made it easier for an employer to claim that its unilateral action was permitted by the collective-bargaining agreement.¹⁰ But in *Road Sprinkler Fitters*, *supra*, the same court had already rejected an approach that “abolishe[d] any presumption against the loss of [S]ection 8(a)(5) rights, and reduce[d] the question to a simple matter of contract interpretation.”¹¹

This unexplained about-face by the D.C. Circuit has proved unpersuasive to the Board, which properly rejected the “contract coverage” standard. Meanwhile, decisions from the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits have applied the Board’s “clear and unmistakable waiver” standard.¹²

As I will explain, none of the reasons offered by the majority today for abandoning the waiver standard after 70

years withstand scrutiny. Nor does the majority adequately come to terms with the Supreme Court’s decision in *C & C Plywood*, which forecloses any contention that this long-established standard is somehow contrary to the Act. To the extent that the majority feels compelled to acquiesce in the current view of the District of Columbia Circuit, it is mistaken, particularly in light of that court’s conflicting precedent and significant contrary judicial authority. The Board is the agency charged with developing and applying federal labor policy, and the appropriate response to the D.C. Circuit’s shift in position is to adhere to the Board’s traditional view and, as necessary, to seek Supreme Court review.

Instead, the majority makes it easier for employers to unilaterally change employees’ terms and conditions of employment—wages, hours, benefits, job duties, safety practices, disciplinary rules, and more—in a manner that will frustrate the bargaining process, inject uncertainty into labor-management relationships, and ultimately increase the prospect for labor unrest. This unfortunate outcome will be made worse by another recent majority decision overruling Board precedent, *Raytheon*,¹³ which held that employers may lawfully continue making unilateral changes authorized by a management-rights clause, even

⁹ *Road Sprinkler Fitters Local Union No. 669, United Ass’n of Journeymen v. NLRB*, 600 F.2d 918, 921-923 (D.C. Cir. 1979). The court cited three of its own earlier decisions in which it had “applied the ‘clear and unmistakable’ test to situations in which contract terms arguably affected the parties’ obligations under [S]ection 8(a)(5),” including *International Union, UAW v. NLRB*, 381 F.2d 265, 267 (D.C. Cir. 1967). Under District of Columbia Circuit precedent, a panel decision may not be overruled by a later panel decision, but only by the full court. See *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc) (explaining law-of-the-circuit doctrine).

¹⁰ *NLRB v. Postal Service*, 8 F.3d 832, 837 (D.C. Cir. 1993) (“In a case such as this one, where the employer acts pursuant to a claim of right under the parties’ agreement, the resolution of the refusal to bargain charge rests on an interpretation of the contract at issue.”).

¹¹ 600 F.2d at 921.

¹² See, e.g., *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072, 1079–1080 (9th Cir. 2008); *Capitol Steel & Iron Co. v. NLRB*, 89 F.3d 692, 697 (10th Cir. 1996); *Bonnell/Tredegear Industry v. NLRB*, 46 F.3d 339, 346 fn. 6 (4th Cir. 1995); *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 187 (2d Cir. 1991), cert. denied 502 U.S. 856 (1991); *Ciba-Geigy Pharmaceuticals Division v. NLRB*, 722 F.2d 1120, 1127 (3d Cir. 1983); *American Distributing Co. v. NLRB*, 715 F.2d 446, 449-450 (9th Cir. 1983), cert. denied 466 U.S. 958 (1984); *Tocco Division v. NLRB*, 702 F.2d 624, 626–627 (6th Cir. 1983); *American Oil Co. v. NLRB*, 602 F.2d 184, 188–189 (8th Cir. 1979); *Murphy Diesel Co. v. NLRB*, 454 F.2d 303, 307 (7th Cir. 1971).

Unlike the District of Columbia Circuit, the Second, Third, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits have consistently deferred to the Board’s application of the clear and unmistakable waiver standard as a rationale and permissible interpretation of the Act. Beyond mere deference to the Board’s choice of legal standard, moreover, these courts appear to have recognized that Supreme Court precedent forecloses application of a less stringent standard. Indeed, the Second Circuit has held that the failure of some Courts of Appeals to “defer[] to the Board’s

standard when the unfair labor practice turns solely on the interpretation of a labor contract . . . is inconsistent with” the Supreme Court’s holdings in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), and *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 283, 287 (1956), that contractual waivers of statutory rights must be “clear and unmistakable” and “explicitly stated.” *Electrical Workers Local 36 v. NLRB*, 706 F.3d 73, 84–85 (2d Cir. 2013), cert. denied 573 U.S. 958 (2014). See also *Capitol Steel & Iron Co. v. NLRB*, *supra*, 89 F.3d at 697 (citing *Metropolitan Edison*, *supra*, for the proposition that contractual waivers of statutory bargaining rights must be “clear and unmistakable in order for courts to enforce them”) (internal quotation marks omitted); *Bonnell/Tredegear Industry v. NLRB*, *supra*, 46 F.3d at 346 fn. 6 (same); *Furniture Rentors of America, Inc. v. NLRB*, 36 F.3d 1240, 1245 (3d Cir. 1994) (same); *East Tennessee Baptist Hospital v. NLRB*, 6 F.3d 1139, 1144 (6th Cir. 1993) (same); *Resorts Intl. Hotel Casino v. NLRB*, 996 F.2d 1553, 1559 (3d Cir. 1993) (same); *United Bhd. of Carpenters & Joiners of Am. v. NLRB*, 891 F.2d 1160, 1164 (5th Cir. 1990) (same); *International Bhd. of Teamsters v. Southwest Airlines*, 875 F.2d 1129, 1135 (5th Cir. 1989) (en banc) (same), cert. denied 493 U.S. 1043 (1990); *NLRB v. Scherr*, 883 F.2d 69 (4th Cir. 1989) (table) (same). See also *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 20 (D.C. Cir. 2016) (recognizing that “the Sixth Circuit embraces the Board’s ‘clear and unmistakable’ standard”), citing *Beverly Health and Rehabilitation Services v. NLRB*, 297 F.3d 468, 480 (6th Cir. 2002).

Meanwhile, the Seventh Circuit, although adopting the contract coverage standard, has acknowledged that “[t]here are strong arguments in favor of” the clear and unmistakable standard. *Columbia College Chicago v. NLRB*, 847 F.3d 547, 555 (7th Cir. 2017), citing *Provena*, *supra*. See also *Beverly California Corp.*, 227 F.3d 817, 838 (7th Cir. 2000) (“The Board was correct to conclude that waivers of statutorily protected rights must be clearly and unmistakably articulated.”), cert. denied 533 U.S. 950 (2001).

¹³ *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017). Along with Member Pearce, I dissented in that case. *Id.*, slip op. at 21.

after the collective-bargaining agreement expires. In enacting the National Labor Relations Act, Congress did not intend to *discourage* collective bargaining, but that is the result of today’s decision, among others recently.¹⁴

I.

This important case must be understood in light of the basic principles that govern the Board’s application of federal labor law and policy, as well as long-established Board doctrine interpreting an employer’s duty to bargain under Section 8(a)(5) of the Act.

A.

To begin, Congress has charged the Board with the task of administering a statute which declares it

to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, *for the purpose of negotiating the terms and conditions of their employment* or other mutual aid or protection.

Act, Section 1, 29 U.S.C. §151 (emphasis added).

The close relationship between collective bargaining and the Act’s central goal of industrial stability is obvious from the language and the structure of the Act itself. Explicit in the Act is Congress’ understanding that fostering the practice and procedure of collective bargaining is essential to reducing and eliminating the causes of industrial strife. As the Supreme Court has observed:

One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory

influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife.

Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 211 (1964) (citations omitted).

In furtherance of these statutory objectives, Section 8(a)(5) of the Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees.”¹⁵ Section 8(d) broadly defines the term “bargain collectively” as the mutual obligation of the employer and the union to “meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder.”¹⁶ An employer violates Section 8(a)(5) and (1) if it changes terms and conditions of employment that are mandatory subjects of bargaining, without providing the union representing its employees with prior notice and the opportunity to bargain.¹⁷

Where a specific term and condition of employment is incorporated in a collective-bargaining agreement, the employer must honor the agreement and may not change the term unless the union *consents*.¹⁸ Section 8(d) of the Act prohibits the nonconsensual mid-term modification of a collective-bargaining agreement, while also permitting either party to refuse to negotiate over the other’s bargaining proposal to make a mid-term change to the agreement,¹⁹ in other words, the agreement fixes those terms and conditions “contained in” the agreement.²⁰ Where a specific term and condition is *not* “contained in” the agreement, the employer’s statutory duty to bargain still applies, but a change can be made *if* the employer bargains to impasse with the union first.²¹ Accordingly, the Board distinguishes between (1) unfair labor practice allegations that an employer has made a unilateral change with respect to a mandatory subject of bargaining, and (2) allegations

¹⁴ In a series of other significant decisions, the majority has held that employers lawfully failed or refused to engage in collective bargaining. See, e.g., *Oberthur Technologies of America Corp.*, 368 NLRB No. 5, slip op. at 7 (2019) (dissenting opinion); *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116, slip op. at 9 (2019) (dissenting opinion); *Ridgewood Health Care Center, Inc.*, 367 NLRB No. 110, slip op. at 12 (2019) (dissenting opinion).

¹⁵ 29 U.S.C. §158(a)(5).

¹⁶ 29 U.S.C. §158(d).

¹⁷ *NLRB v. Katz*, supra, 369 U.S. at 743.

¹⁸ See, e.g., *St. Vincent Hospital*, 320 NLRB 42, 42 (1995), citing *Milwaukee Spring Division*, 268 NLRB 601, 602 (1984), aff’d, 765 F.2d 175 (D.C. Cir. 1985).

¹⁹ The right to refuse to negotiate over a proposal, of course, is not a right to act unilaterally with respect to the subject matter of the proposal. Sec. 8(d) creates a shield, not a sword, for the parties to a collective-bargaining agreement. See *C & S Industries, Inc.*, 158 NLRB 454, 457–458 (1966). As I will explain, the District of Columbia Circuit

fundamentally misunderstood *C & S Industries* in devising the “contract coverage” standard.

²⁰ Sec. 8(d) provides in relevant part that the duty to bargain “shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions *contained in a contract* for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.” 29 U.S.C. §158(d) (emphasis added). Before the National Labor Relations Act was amended by the Taft-Hartley Act, an employer was under a continuous duty to bargain with the union as to terms and conditions of employment, whether or not the subject matter to be discussed was contained in an existing collective-bargaining agreement. See *NLRB v. Sands Mfg. Co.*, 306 U.S. 332, 342 (1939).

²¹ See, e.g., *Milwaukee Spring Division*, supra, 268 NLRB at 602 (“If the employment conditions the employer seeks to change are not ‘contained in’ the contract, . . . the employer’s obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change.”).

that the employer made a unlawful mid-term modification of the collective-bargaining agreement.²²

B.

This case involves several alleged unilateral changes, and one potential employer defense in such cases is that the union waived its right to bargain over the change.²³ The waiver standard—as the Board explained in *Provena*, its most recent defense of that standard—is “based on the long-established proposition that the duty to bargain created by . . . the Act continues during the term of a collective-bargaining agreement.”²⁴ The Board has recognized that these cases do not “involve merely a question of contract interpretation, in the sense of determining what the contract means and whether it has been breached;” but rather consideration of whether the statutory duty to bargain during the term of an existing agreement has been breached.²⁵

The *Provena* Board traced the waiver standard to a 1949 Board decision, *Tide Water Associated Oil*,²⁶ and observed that “[s]ince then, in decisions too numerous to cite, the Board has applied the clear and unmistakable waiver analysis to all cases arising under Section 8(a)(5) where an employer has asserted that a general management-rights provision authorizes it to act unilaterally with respect to a particular term and condition of employment.²⁷ (To read the majority’s opinion here, one might imagine that the waiver standard began in 2007 with *Provena*, but that is far from the case, and so it is fair to say that the majority today overrules “decisions too numerous to cite.”²⁸)

Those decisions necessarily include *C & C Plywood*, which culminated in the Supreme Court’s 1967 decision endorsing the waiver standard. It illustrates how firmly

established the waiver standard is—and why the rival “contract coverage” standard has little solid foundation.²⁹ The case is thus worth examining in detail.

C & C Plywood was a unilateral-change case. The employer unilaterally implemented a premium pay schedule for a classification of employees, citing a wage clause in the collective-bargaining agreement as its authority to do so. The union objected and ultimately filed an unfair labor practice charge, which led the General Counsel to issue a complaint alleging a violation of Section 8(a)(5). The Board’s trial examiner (i.e., administrative law judge) recommended dismissing the complaint, but the Board rejected his rationale that the “dispute . . . involved only a disagreement as to the meaning of terms of a collective-bargaining contract.”³⁰ The Board explained that the “[u]nion was complaining not of a violation of its contract with [the employer], but of the invasion of its statutory right as collective-bargaining representative of employees . . . to bargain about any change in the terms and conditions of employment. . . .”³¹ “*Prima facie*,” the Board observed, the employer’s unilateral change violated the Act, but the “statutory right . . . to bargain may be waived by the union,” and the employer had raised this “affirmative defense,” citing the union’s actions during contract negotiations and the contract’s wage clause.³² A waiver “to be effective must be ‘clear and unmistakable,’” the Board explained, and an “intent” to permit unilateral employer action “should not be inferred unless the language of the contract . . . clearly demonstrates this to be a fact.”³³ The Board saw “nothing in . . . [the] contract to establish that the [u]nion intended to waive its statutory right to bargain

²² See, e.g., *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), *affd.* 475 F.3d 14 (1st Cir. 2007). The *Bath Iron Works* Board explained that:

The “unilateral change” case and the “contract modification” cases are fundamentally different in terms of principle, possible defenses, and remedy. In terms of principle, the “unilateral change” case does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*. The allegation is a *failure to bargain*.

...
In terms of defenses, a defense to a unilateral change case can be that the union has waived its right to bargain.

...
In terms of remedy, a remedy for a unilateral change is [an order] to bargain. . . .

345 NLRB at 501 (emphasis in original).

²³ *Id.*

²⁴ *Provena*, supra, 350 NLRB at 811, citing *Jacobs Mfg. Co.*, 94 NLRB 1214, 1217-1218 (1951), *enf. d.* 196 F.2d 680 (2d Cir. 1952).

²⁵ *Provena*, supra, 350 NLRB at 814.

²⁶ *Tide Water Associated Oil*, supra, 85 NLRB 1096. Observing that it was “reluctant to deprive employees of any of the rights guaranteed them by the Act in the absence of a clear and unmistakable showing of a waiver of such rights,” the *Tide Water* Board rejected an employer’s argument that its unilateral changes to a pension plan were privileged by a “Management Functions” clause in the collective-bargaining agreement. *Id.* at 1098 (footnote omitted).

²⁷ *Provena*, supra, 350 NLRB at 811–812 (footnote collecting cases omitted).

²⁸ As one leading labor-law treatise observes:

The Labor Board has long held that a waiver of a statutory right will not readily be inferred: it must be “clear and unmistakable.” The Supreme Court has endorsed that test, and the Board has consistently applied it. . . .

Robert A. Gorman & Matthew W. Finkin, *Labor Law* §20.16 at 737 (2013) (“Waiver of the Duty to Bargain”) (footnotes omitted).

²⁹ *C & C Plywood Corp.*, 148 NLRB 414 (1964), *enf. d.* denied 351 F.2d 224 (9th Cir. 1965), reversed 385 U.S. 421 (1967).

³⁰ 148 NLRB at 415.

³¹ *Id.*

³² *Id.* at 415–416.

³³ *Id.* at 416.

over the matter in dispute,” and so found a violation of Section 8(a)(5).³⁴

The Ninth Circuit reversed the Board, in line with its view that the Board lacked jurisdiction over cases where an unfair labor practice depended upon the interpretation of a collective-bargaining agreement.³⁵ In such situations, the Ninth Circuit had held, the case must be resolved in arbitration (if provided for) or by the federal or state courts (under Section 301 of the Act), because the Board “‘may not . . . sit in judgment upon the substantive terms of collective bargaining agreements.’”³⁶

The Supreme Court, in turn, endorsed the Board’s view, reversing the Ninth Circuit and directing it to enforce the Board’s order. The Court explained that the Board’s decision was properly focused on the issue of whether the union had waived the statutory duty to bargain by agreeing to the wage clause in the collective-bargaining agreement, on which the employer had relied to make a unilateral change in pay:

[T]he Board has not construed a labor agreement to determine the extent of the contractual rights which were given the union by the employer. It has not imposed its own view of what the terms and conditions of the labor agreement should be. It has done no more than merely

enforce a statutory right which Congress considered necessary. . . . *The Board’s interpretation went only so far as necessary to determine that the union did not agree to give up these statutory safeguards.*

385 U.S. at 564 (emphasis added). But the Court did not stop there. It also addressed the “remaining question . . . whether the Board was wrong in concluding that the contested provision in the collective agreement gave the [employer] no unilateral right to institute its premium pay plan.”³⁷ On this question, too, the Court upheld both the Board’s approach and its conclusion. The Court explained that the “law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying the context.”³⁸ It noted that the Board had “relied upon its experience with labor relations and the Act’s clear emphasis upon the protection of free collective bargaining” to find that the union had not waived its statutory right to bargain.³⁹ No later decision of the Court casts doubt on the continuing viability of *C & C Plywood*.⁴⁰

C.

The *Provena* Board correctly observed that the “contract coverage “standard “is a relatively recent judicial innovation,” adopted by a minority of appellate courts.⁴¹

Id. at 708. An arbitration decision may be relevant to establishing waiver, the Court observed, but only if the arbitrator found that the relevant contract language was clear and unmistakable. Absent such a statement, “the arbitration decision would not demonstrate that the union specifically intended to waive the statutory protection otherwise afforded its officials.” Id. at 709, fn. 13.

Since *Metropolitan Edison*, the Supreme Court has continued to apply the principle that a waiver of statutory rights under a collective-bargaining agreement must be “explicitly stated” and “clear and unmistakable.” See, e.g., *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251, 258, 274 (2009) (finding that collective-bargaining agreement “clearly and unmistakably” required union members to arbitrate Age Discrimination in Employment Act claims); *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 79–80, 82 (1998) (reiterating requirement that waiver of statutory rights under a collective-bargaining agreement must be “explicitly stated” and “clear and unmistakable,” and finding that collective-bargaining agreement did not contain waiver of employees’ right to a judicial forum for federal claims of employment discrimination).

⁴¹ 350 NLRB at 811. In addition to the District of Columbia, the First and Seventh Circuits have adopted a “contract coverage” analysis. See *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992).

The majority states that the Second Circuit also rejected the waiver standard and embraced the contract coverage standard in *Electrical Workers Local 36 v. NLRB*, supra, 706 F.3d 73. That characterization is incorrect. In *Electrical Workers Local 36*, the Second Circuit adopted “a two-step framework to decide whether there has been a valid waiver of the right to bargain over a particular decision or its effects,” pursuant to which it determines “whether the issue is clearly and unmistakably resolved (or ‘covered’) by the contract,” and if it is not, “whether the union has clearly and unmistakably waived its right to bargain.” Id. at 84–85 (emphasis in original). In adopting this framework, the Second Circuit firmly rejected the contract coverage standard devised by the

³⁴ Id. at 417.

³⁵ *NLRB v. C & C Plywood Corp.*, 351 F.2d 224 (9th Cir. 1965), citing *Square D Co. v. NLRB*, 332 F.2d 360 (9th Cir. 1964).

³⁶ Id. at 227–228, quoting *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952).

Sec. 301 provides that “[s]uits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties. . . . 29 U.S.C. §185. But a unilateral-change allegation under Sec. 8(a)(5) of the Act is not a claim that the collective-bargaining agreement has been violated, but rather that the employer has violated its statutory duty to bargain.

Unfair labor practice charges must be brought to the Board, which is solely responsible for administering the Act. See Act, Sec. 10, 29 U.S.C. §160. Notably, Sec. 10(a) of the Act provides that the Board’s “power [to redress unfair labor practices] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.” 29 U.S.C. §160(a).

³⁷ 385 U.S. at 430.

³⁸ Id.

³⁹ Id.

⁴⁰ Sixteen years later, the Supreme Court reaffirmed its approval of the Board’s waiver standard in *Metropolitan Edison Co. v. NLRB*, supra, 460 U.S. 693. There, the Court considered whether a contractual no-strike clause waived the protection afforded union officials against the imposition of more severe sanctions for participating in an unlawful work stoppage. In rejecting the employer’s argument that the right had been waived, the Court explained that it would

not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’ More succinctly, the waiver must be clear and unmistakable.

This case arises in the Ninth Circuit, which has applied the waiver standard and which has described the Supreme Court's decision in *C & C Plywood* as "approving of the Board's adoption of the clear-and-unmistakable standard."⁴²

As already noted, the theory of "contract coverage" originated with the District of Columbia Circuit, decades after *C & C Plywood* was decided. The Circuit's seminal 1993 decision in *Postal Service* is notable both for its failure to address the Supreme Court's decision in *C & C Plywood* and for its inconsistency with Circuit precedent endorsing the Board's waiver standard. *Postal Service* drew not on those decisions, but rather on a then-recent Circuit decision involving federal-sector labor law. As one careful student of the issue has observed, the foundations of the "contract coverage" standard are questionable—which is not to deny that by now, it is firmly established as the law of the District of Columbia Circuit.⁴³

In *Postal Service*, the District of Columbia Circuit rejected the Board's application of the waiver standard and held the Board was required to apply the "contract coverage" standard. The court explained the difference between the two standards this way:

[T]he "covered by" and "waiver" inquiries are analytically distinct: "A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant."

...

[W]hen [the] employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules governing their future relations. Unless the parties agree otherwise, there is no continuous duty to bargain during the term of

an agreement with respect to a matter covered by the contract.

...

[T]he courts attempt to interpret collective bargaining agreements so as to respect the agreements reached by the parties who made them. Accordingly, questions of "waiver" normally do not come into play with respect to subjects already covered by a collective bargaining agreement.

8 F.3d at 836 (emphasis in original), quoting *Department of Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992).

The court's holding rested on two grounds. First, in setting up an analytical distinction between waiver and "contract coverage," the court relied on its own recent precedent in *Department of Navy*, *supra*, which had reversed a decision of the Federal Labor Relations Authority (FLRA) applying the Federal Labor-Management Relations Statute.⁴⁴ Second, in rejecting the Board's choice of standard, the court relied on the primacy of Federal courts in interpreting collective-bargaining agreements. The court stated that the unfair-labor-practice issue turned "on an interpretation of the contract" and observed that it would "accord no deference to the Board's interpretation of labor contracts."⁴⁵

There is no acknowledgement in *Postal Service* that the waiver doctrine was (even then) long and firmly established in Board law, no acknowledgement that the District of Columbia Circuit had previously rejected the Board's deviation from the waiver standard, and no acknowledgement that the Supreme Court had approved the Board's application of the waiver standard in *C & C Plywood*. Indeed, there are striking similarities between *Postal Service* and the Ninth Circuit's decision in *C & C Plywood*, which the Supreme Court reversed.⁴⁶ The analysis deployed in *Postal Service*, by contrast, was developed in *Department*

District of Columbia Circuit and adopted by the majority today, stating that it is inconsistent with the Supreme Court's holding in *Metropolitan Edison*, "undermines our national labor policy that disfavors waivers of statutorily protected rights," and can lead to the unwitting relinquishment of rights. *Id.* at 84. Rather than retreating from the waiver standard, moreover, the court held that any "contractual indicia of exercise of the right to bargain or proffered proof of waiver must clearly and unmistakably demonstrate the coverage or waiver sought to be proved." *Id.*

⁴² *Local Joint Executive Board*, *supra*, 540 F.3d at 1080. The Ninth Circuit pointed out that it "had not adopted the 'contract coverage' standard" and that "neither party ha[d] suggested that [it] . . . do so." *Id.* at fn. 11. There would seem to be a direct conflict between the Ninth Circuit, insofar as it has recognized that the Board is free to follow the waiver standard in light of the Supreme Court's decision in *C & C Plywood*, and the District of Columbia Circuit, which views the waiver standard as impermissible.

⁴³ William E. Persina, "Waiver" vs. "Covered By"—Time to End the Confusion, 60 Labor Law Journal, No. 4 (Dec. 2009), 2009 WESTLAW 10449004.

⁴⁴ 8 F.3d at 836.

⁴⁵ *Id.* at 837, citing *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 202 (1991).

⁴⁶ In *C & C Plywood*, the Ninth Circuit held that the Board lacked jurisdiction to decide the case, because the unfair labor practice turned on the interpretation of the collective-bargaining agreement, a matter for the courts. 351 F.2d at 227. The *Postal Service* court did not question the Board's jurisdiction, but similarly treated the dispositive issue as a contractual one, over which the courts had primacy. 8 F.3d at 837. In *C & C Plywood*, the Ninth Circuit accused the Board of improperly judging the substantive terms of the collective-bargaining agreement, to the union's benefit. 351 F.2d at 227. The *Postal Service* court similarly observed that the Board could not "abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term. . . ." 8 F.3d at 836.

of *Navy*, a federal-sector case. While the Federal-Labor Management Relations Statute reflects some basic similarities with the National Labor Relations Act, it obviously has a very different history and imposes far fewer bargaining obligations on federal agencies than the Act imposes on private-sector employers.⁴⁷

A careful examination of the *Department of Navy* decision shows that there, too, the District of Columbia Circuit failed to examine the long history of the waiver doctrine in Board law, its own precedent under the National Labor Relations Act, and the Supreme Court's *C & C Plywood* decision. The court's analysis of bargaining doctrine under the Act—invoked in the course of rejecting the FLRA's interpretation of federal-sector labor law—relies on inapposite Board decisions in asserting that the FLRA's approach was “patently inconsistent with private sector law.”⁴⁸ Notably, the court elsewhere in the decision cites a leading treatise on the Act that actually describes, in detail, the Board's longstanding waiver analysis, where the issue is whether a contractual provision has given the

employer authority to unilaterally change a given employment term.⁴⁹

From this flawed analytical foundation, the D.C. Circuit reached a flawed result imposing a new test that leading labor law scholars have criticized. Those scholars observe that the Board's waiver standard is “more consistent with the policy of the Act” and that statutory policy “is better realized when bargaining over real and pressing matters is not held hostage to linguistic contests over hypothetical future contingencies.”⁵⁰

II.

Today, the majority nonetheless acquiesces in the view of the District of Columbia Circuit, abandoning the waiver standard and adopting the “contract coverage” standard in its place. It explains that:

Under contract coverage, the Board will examine the plain language of the collective-bargaining agreement to determine whether the action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally.

⁴⁷ As one commentator points out, “one major difference between the federal and private sector schemes is that under the [federal-sector statute], Congress created a statutory management rights clause,” and “as to almost all of these management rights, agency employers cannot waive them by negotiating them away at the bargaining table.” Persina, *supra*, “Waiver” vs. “Covered By,” 60 Labor L. J. No. 4 at fns. 9-10, citing 5 U.S.C. §7106(a). Under Secs. 8(a)(5) and 8(d) of the Act, in contrast, employers are statutorily required to bargain over a broad range of mandatory subjects, unless (and only to the extent that) the union has contractually waived its statutory right to require bargaining.

⁴⁸ 962 F.2d at 61. The District of Columbia Circuit relied primarily on *C & S Industries*, *supra*, which did *not* involve an employer's Sec. 8(a)(5) unilateral change in an employment term, based on a contractual provision arguably authorizing unilateral action. Instead, the case involved the application of Sec. 8(d) of the Act to an employer's mid-term modification of a collective-bargaining agreement, following the union's privileged refusal to bargain over the proposal.

In *C & S Industries*, decided in 1966, the parties had reached a collective-bargaining agreement, which set out an hourly wage rate, but said nothing about an incentive wage system. 158 NLRB at 455. During the term of the agreement, the employer raised with the union the possibility of instituting an incentive wage system, offering to bargain. *Id.* The union refused, citing the employer's failure to seek such a system during the negotiations that culminated in the existing agreement. *Id.* The employer then instituted the incentive system unilaterally. *Id.*

The Board found that this step violated the employer's duty to bargain. Applying Sec. 8(d) of the Act—which, as explained, governs mid-term modifications of a collective-bargaining agreement—the Board rejected the employer's defense that its initial offer to bargain, coupled with the union's refusal, privileged the employer to act unilaterally. *Id.* at 456. The Board explained that a party such as the union “does not violate its bargaining obligation when it refuses to discuss changes proposed by the other party in the terms of an existing contract.” *Id.* at 457 (footnote omitted). In turn, an employer violates the Act “when he unilaterally modifies *contractual terms or conditions of employment* during the effective period of a contract.” *Id.* (emphasis added). In the case before it, the Board observed, the employer's implementation of the

incentive system “operated as [an impermissible] ‘modification’ of contract terms, within the meaning of Section 8(d).” *Id.* at 459. Because the union had not consented to such a modification, it was unlawful. *Id.* at 460.

The Board also rejected the employer's argument that it should have deferred to arbitration, observing that the resolution of the unfair-labor-practice issue did *not* “primarily turn on an interpretation of specific contractual provisions of ambiguous meaning.” *Id.* Unilateral-change cases involving management-rights clauses, of course, *do* involve contract interpretation in this sense, as the District of Columbia Circuit emphasized in *Postal Service*.

The contrast between *C & S Industries*, a case involving contract-modification under Sec. 8(d), and *C & C Plywood*, an 8(a)(5) unilateral-change case, from the same period, implicating the waiver standard, should be apparent. It was not to the *Department of Navy* court, which quoted language from *C & S Industries* out of context. The Board, however, has continued to recognize the difference between the two classes of cases, as already explained. See *Bath Iron Works*, *supra*, 345 NLRB at 501.

⁴⁹ *Department of Navy* cites Professor Gorman's 1976 treatise for its discussion of cases involving an issue quite distinct from unilateral-change cases like this one: whether an employer is required to bargain with the union during the contract term when the union proposes a mid-term modification of the collective-bargaining agreement. 962 F.2d at 57, citing Robert A. Gorman, *Basic Text on Labor Law* 458-463 (1976).

Some pages later, however, the Gorman treatise actually discusses the waiver standard and its application to cases where the employer invokes a management-rights clause to defend against a unilateral-change allegation. *Basic Text* at 466-472. Professor Gorman notes that the “traditional test for union waiver of the right to bargain during the contract term is a most exacting one,” i.e., the waiver must be clear and unmistakable. *Id.* at 467. Indeed, the treatise cites the Supreme Court's *C & C Plywood* decision as illustrating the application of this standard, explaining that “the Board and courts will not conclude, from an express waiver on one subject, that the union has waived on others *even though closely related*.” *Id.* at 470 (emphasis added).

⁵⁰ *Gorman & Finkin*, *supra*, *Labor Law* §20.16 at 741-742.

On the other hand, if the agreement does not cover the employer's disputed act, and that act has materially, substantially, and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will have violated Section 8(a)(5) and (1) unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason.

The implication of the majority's new standard is clear: If a management-rights provision in a collective-bargaining agreement is sufficiently *general*, it will permit an employer to act unilaterally with respect to any *specific* term or condition of employment that plausibly fits within the general subject matters of the provision. (And under the unfortunate rule of *Raytheon*, *supra*, the employer will be able to continue a "past practice" of making unilateral changes even after the agreement expires.)

As the majority explains, the Board "will not require that the agreement specifically mention, refer to or address the employer decision at issue." Employers may well gain broad power to act unilaterally to change employees' terms and conditions of employment—based, it seems, entirely on unspecific language in the collective-bargaining agreement. This approach is just what the Supreme Court condemned in *C & C Plywood*: basing the "law of labor agreements . . . upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying the context."⁵¹ The applicability of the waiver standard will be correspondingly narrow. As Professors Gorman and Finkin have pointed out, "[i]nasmuch as the [contract coverage] approach applies to the language of the typical express management-rights clause . . . , it is difficult to fathom what management powers could be left for a 'waiver' to concern."⁵²

The majority's adoption of the "contract coverage" standard is fundamentally inconsistent with the purposes of the Act and federal labor policy as declared by Congress. In the words of the Supreme Court, the majority has "entirely failed to consider an important aspect of the problem" that the Board, as the administrative agency charged with applying the National Labor Relations Act, must address—namely, the need to promote labor peace.⁵³ A statute intended to encourage collective bargaining as a way to avoid labor disputes necessarily must disfavor unilateral employer action. That, of course, is the core

principle reflected in the Board's 70-year-old waiver standard, which requires that a contractual provision be "clear and unmistakable" before the Board will interpret it to authorize the employer to act unilaterally. "In light of the great importance of protecting the union's representative status, . . . the Board has been anxious to assure that 'waiver' of the duty to bargain is done by the union consciously and clearly."⁵⁴

As the *Provena* Board explained, the waiver standard better promotes productive collective bargaining and minimizes the potential for labor disputes caused by employer unilateral action:

The waiver standard . . . effectively requires the parties to focus on particular subjects over which the employer seeks the right to act unilaterally. Such a narrow focus has two clear benefits. First, it encourages the parties to bargain only over subjects of importance at the time and to leave other subjects to future bargaining. Second, if a waiver is won—in clear and unmistakable language—the employer's right to take future unilateral action should be apparent to all concerned.

350 NLRB at 813–814. By contrast, unilateral employer action—changing employees' terms and conditions of employment without engaging in collective bargaining—tends to lead to labor disputes. A "contract-coverage" standard "creates an incentive for employers to seek contractual language that might be construed as authorizing unilateral action on subjects of no present concern, requires unions to be wary of agreeing to such provisions, and invites future disputes about the scope of the contractual provision." *Id.*

The majority's decision also fails to meet the threshold standards for reasoned decisionmaking. When an administrative agency changes its position on an issue (as the Board does here), it must provide a reasoned explanation for the change that justifies "disregarding facts and circumstances . . . that underlay . . . the prior policy."⁵⁵ The majority's decision does not satisfy this test, for several reasons. First, the majority fails to explain why it is compelled to acquiesce to the District of Columbia Circuit's "contract coverage" test when the adoption of that test was not based on the court's authoritative interpretation of plain statutory language, but instead is grounded in a policy judgement in an area where the Board has primary expertise. Second, the majority improperly disregards both the Board's many-decades-long adherence to the waiver standard and the Supreme Court's clear endorsement of

⁵¹ 385 U.S. at 430.

⁵² *Gorman & Finkin*, *supra*, *Labor Law* §20.16 at 739.

⁵³ *Motor Vehicle Mfrs. Assn. v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 43 (1983). The Administrative Procedure Act applies

to Board adjudications. See *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 364 (1998).

⁵⁴ *Gorman*, *supra*, *Basic Text on Labor Law* §15 at 466.

⁵⁵ *Encino Motorcars, LLC v. Navarro*, --- U.S. ---, 136 S.Ct. 2117, 2125–2126 (2016).

that standard in *C & C Plywood*. Third, on their own terms, the reasons given by the majority for abandoning the waiver standard are untenable. They are inconsistent with the Board's actual experience applying the waiver standard for 70 years, unsupported by empirical evidence, contradicted by common sense, and contrary to Board law in important respects. Finally, as the *Provena* Board persuasively demonstrated, the policy implications of the majority's approach cannot be reconciled with the Act.

A.

The Supreme Court "has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy."⁵⁶ The Board's "special competence in [the] field [of labor relations] is the justification for the deference accorded its determination" of labor policy issues.⁵⁷ The long-established, consistently-applied waiver standard reflects the Board's discharge of this responsibility.

In contrast, the "contract coverage" standard, as shown, is an innovation of the District of Columbia Circuit, developed first under a different statute administered by a different federal agency. In rejecting the Board's waiver standard, the D.C. Circuit did not exercise its authority to construe the statutory language of the NLRA and determine that the Board had acted contrary to Congressional command; instead, the court's decision is clearly based in a policy judgment about what approach to management-rights provisions best serves the goals of the Act.⁵⁸

These policy judgments are properly left to the Board, as the Supreme Court recognized when it overruled the Ninth Circuit's similar decision in *C & C Plywood*. While the District of Columbia may have broad jurisdiction to review the Board's decisions and would certainly have the authority to definitively construe unambiguous statutory

language in the NLRA, the court does not have the "special competence" in steering the policy of labor relations that the Board possesses. Today, the majority arbitrarily reverses the roles of the Board and the court, deferring to the court in an area where it is the court that should have deferred to the Board. By definition, this is not reasoned decisionmaking by an administrative agency.⁵⁹

B.

Second, in embracing the "contract coverage" standard, the majority also fails to properly acknowledge both the Board's long adherence to the waiver standard and the Supreme Court's endorsement of that standard.

The majority today effectively treats the waiver standard as if it had been invented by the *Provena* Board in 2007, not established as early as 1949. In some areas of labor-law doctrine, to be sure, the Board's "policy oscillation" has been notable,⁶⁰ but not with respect to the Board's treatment of managements-rights clauses. Until today, the waiver standard had stood the test of time. The Board has never deliberately abandoned that test.⁶¹ Nor, in the more than 25 years since it was devised by the District of Columbia Circuit, has the Board ever endorsed the "contract coverage" test. What this means, among other things, is that the Board, "in explaining its changed position, ... must be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account."⁶²

Just as serious, if not more so, is the majority's failure to come to terms with the Supreme Court's decision in *C & C Plywood* endorsing the Board's waiver standard (as the Ninth Circuit and labor-law scholars have recognized). The majority grudgingly acknowledges both that the Supreme Court did not *disapprove* the waiver standard and that the Court's decision reflected "deference to the

⁵⁶ *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990).

⁵⁷ *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

⁵⁸ The majority claims that the waiver standard "cannot be separated from a deep-seated and indeed principled hostility to management-rights language." I do not harbor any particular antipathy toward negotiated management-rights clauses, which in the give-and-take of bargaining may be the product of legitimate "horsetrading" by both sides. See *Endo Laboratories, Inc.*, 239 NLRB 1074, 1075 (1978) (recognizing the "the kind of 'horsetrading' or 'give-and-take' that characterizes good-faith bargaining"). But, as previous Boards have correctly recognized, management-rights provisions involve the consensual surrender of a fundamental statutory right: the right to bargain collectively. It is therefore imperative that the parties "unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term." *Provena*, supra, 350 NLRB at 811.

⁵⁹ For reasons already explained—and as the Supreme Court's decision in *C & C Plywood* demonstrates—it is no answer to invoke the uncontroversial principle that the federal courts have primary authority to interpret collective-bargaining agreements, as the District of Columbia Circuit has done. Indeed, the Ninth Circuit has explained that although it reviews the Board's interpretation of a particular collective-bargaining

agreement *de novo*, it nevertheless applies the waiver standard in interpreting the agreement itself, deferring to the Board's rule in line with Supreme Court precedent. *Local Joint Executive Board*, supra, 540 F.3d at 1078–1080, citing *Curtin-Matheson Scientific*, supra, 494 U.S. at 786.

⁶⁰ See generally Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163 (1985).

⁶¹ As noted, when the Board strayed from the waiver standard, it was judicially rebuked—ironically, by the District of Columbia Circuit. See *Road Sprinkler Fitters Local 669*, supra, 600 F.2d at 921–923.

⁶² *Encino Motor Cars*, supra, 136 S.Ct. at 2120, quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009). The majority touches on these interests only in deciding that the "contract coverage" standard should be retroactively applied—a separate error—and its reasoning is circular. The majority dismisses the possibility of reasonable reliance on the Board's waiver standard in the face of the District of Columbia Circuit's adoption of the "contract coverage" standard. In effect, then, the majority asserts that the Board should adopt the "contract coverage" standard because the court has. But this is arbitrary, illustrating again the abdication of the Board's role as the agency responsible for administering the Act.

Board’s experience and expertise.” But the majority insists that “nothing in [its] holding today is inconsistent with” *C & C Plywood*, because in abandoning the waiver standard, the majority now relies on “experience” gained after the Court’s 1967 decision, which has “made the drawbacks of [the waiver] standard starkly apparent.”

That claim is effectively refuted by the majority’s decision itself. It makes clear that the change in position here is not based on the Board’s own experience, but rather on the intervening “contract coverage” decisions of the District of Columbia Circuit. The majority cannot properly justify a policy reversal of this magnitude based on negative “experience” defending its decisions in three of twelve federal courts of appeals, rather than on an exercise of the Board’s own policy expertise.

C.

Even if the majority had genuinely framed today’s decision as a choice between two permissible options still open to it after *C & C Plywood*, the reasons given for adopting the “contract coverage” standard cannot withstand scrutiny. All of these reasons are grouped under the remarkable assertion that the waiver standard “does not effectuate the policies of the Act,” despite the Supreme Court’s endorsement of the standard. Clearly the Court believed that the waiver standard did effectuate statutory policy. The majority makes a half-dozen claims: (1) that the waiver standard “results in the Board impermissibly sitting in judgment upon contract terms;” (2) that the waiver standard “undermines contractual stability;” (3) that the waiver standard “alters the parties’ deal reached

in collective bargaining;” (4) that the waiver standard “results in conflicting contract interpretations between the Board and the courts;” (5) that the waiver standard “undermines grievance arbitration;” and (6) that the waiver standard “has become indefensible and unenforceable.” As I will explain, these claims are unfounded.

1.

The first three of the majority’s reasons, which all invoke the need to protect the collective-bargaining process, can be treated together. To begin, it is easy to dismiss the claim that the waiver standard has the Board “impermissibly sitting in judgment upon contract terms.” That assertion (as noted earlier) was made by the Ninth Circuit in *C & C Plywood*, but the Supreme Court reversed the lower court— and found nothing impermissible about the waiver standard. Having conceded as much, the majority can hardly argue otherwise.

Insofar as the majority’s claim is an empirical one, it turns on the assertion, echoing the District of Columbia Circuit, that the waiver standard “is, in practice, impossible to meet.” That claim is false. There is no shortage of Board decisions finding that the waiver standard has, indeed, been satisfied.⁶³ These cases demonstrate that unions and employers can and do draft contract language that clearly and unmistakably waives the statutory right to bargain over particular employment terms. That the waiver standard may be difficult to meet, of course, has been precisely the Board’s policy point, as the Ninth Circuit has observed.⁶⁴ And to agree with that policy, in any case, is not to say that the Board’s application of the waiver

⁶³ For example, in *The Academy of Magical Arts, Inc.*, 365 NLRB No. 101, slip op. at 1, fn. 2 (2017), the Board adopted the judge’s finding that the union waived its right to bargain over the shortening of shifts and the creation of new shifts with the remaining hours, by agreeing to contract language authorizing the employer “to schedule and change working hours, shifts and days off”.

In *Chemical Solvents, Inc.*, 362 NLRB 1469, 1474 (2015), the Board found that the union waived the right to bargain over subcontracting of unit work by agreeing to contract language stating that the employer retained the right “[t]o transfer any or all of its . . . work . . . to any other entity”, despite the fact that the contract language did not include the precise word “subcontract.” Id. The Board observed that although the language did not “refer to subcontracting by name,” it necessarily included subcontracting, which “cannot be accomplished without transferring work to another entity.” Id.

In *Omaha World-Herald*, 357 NLRB 1870, 1870 (2011), the Board found that the union clearly and unmistakably waived its right to bargain over changes to a pension plan, based on “an amalgam of factors,” even though none of the factors, standing alone, was sufficient to establish waiver under existing precedent. Specifically, the Board relied on un-bargained language in pension plan documents providing that the “Employer shall have the right at any time to amend the Plan;” language in the parties’ collective-bargaining agreement expressly excluding changes to the pension plan from the parties’ grievance and arbitration procedures; and additional language in the collective-bargaining agreement stating that the employer “will advise the Union of proposed

changes [to the pension plan] and meet to discuss and explain changes if requested.” Id. at 1870–1872.

In *Cincinnati Paperboard*, 339 NLRB 1079, 1079 fn. 2 (2003), the Board found that the union waived the right to bargain over the elimination of employees’ long-standing practice of swapping partial shifts by agreeing to contract language conferring on the employer the “sole responsibility” to direct the work force, including the “rights to hire, schedule, and assign work.”

In *United Technologies*, 287 NLRB 198, 198 (1987), enfd. 884 F.2d 1569 (2d Cir. 1989), the Board found that the union waived the right to bargain over changes in the progressive disciplinary procedure by agreeing to contract language conferring on the employer “the sole right and responsibility to direct the operations of the company,” including “the right to make and apply rules and regulations for production, discipline, efficiency, and safety.”

And for a sample of additional cases where the Board has found a contractual waiver of bargaining rights, see *California Pacific Medical Center*, 337 NLRB 910, 910 fn. 1, 914 (2002); *Good Samaritan Hospital*, 335 NLRB 901, 901–902 (2001); *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *United Technologies Corp.*, 300 NLRB 902, 902 (1990); *American Stores Packing Co.*, 277 NLRB 1656, 1658 (1986); *Emery Industries*, 268 NLRB 824, 824, 827–828 (1984); *Cauthorne Trucking*, 256 NLRB 721, 722 (1981), enf. granted in part denied in part 691 F.2d 1023 (D.C. Cir. 1982)

⁶⁴ *Local Joint Executive Board*, supra, 540 F.3d at 1079 (noting that because the “standard for waiving statutory rights . . . is high,” “[p]roof

standard in every case has always led, or always will lead, to the correct finding.⁶⁵

There is no merit in the majority's contention that the waiver standard "undermines contractual stability." The majority insists that the standard "results in perpetual bargaining at the expense of contractual stability and repose." But the majority cites no empirical evidence at all for this claim. If it were true, the majority should be able to support it by pointing to the actual experience of unions and employers, in the real world of labor relations. The waiver standard, after all, is 70 years old. Instead of pointing to evidence, however, the majority rests on the unsupported assertions made by the District of Columbia Circuit. The Supreme Court has made clear, in applying the Administrative Procedure Act, that an administrative agency must do better than this. It "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."⁶⁶ The majority has made no effort even to discover "relevant data" here, much less tried to connect that data to its adoption of the "contract coverage" standard. Perhaps data would have been forthcoming, if the majority had issued a public notice and invitation to file briefs, announcing that it was prepared to reconsider the waiver standard. But here, as in many other cases, the majority has rejected the option of seeking public participation in its decisionmaking.

Meanwhile, the majority fails to consider the destabilizing threat of the "contract coverage" standard, which predictably will encourage employers to seek broadly-worded management-rights provisions, which unions just as predictably will resist. Such conflicts diminish the likelihood of reaching any collective-bargaining agreement at all.⁶⁷ Unions may well decide that they, and the employees they represent, are better off resting entirely on the statutory right to bargain created by the Act. That result is hardly a recipe for stable, dispute-free workplaces. It

represents exactly the regime of "perpetual bargaining" that the majority hopes to avoid.⁶⁸

There is no support either for the majority's assertion that the waiver standard "alters the parties' deal reached in collective bargaining." The waiver standard is a rule for determining what "deal" the parties reached. For the last 70 years, every collective-bargaining agreement reached by parties who are covered by the National Labor Relations Act has been subject to the waiver standard. Expressed in the majority's terminology, the waiver standard is necessarily *part* of the deal. The danger to labor relations stability is far more likely to come from an employer's unilateral changes in employees' terms and conditions of employment than it is from collective bargaining over employer-desired changes, occasioned by the waiver standard. The majority insists that the waiver standard is "one sided" and favors unions. What the standard favors is collective bargaining. With respect to changes in terms and conditions of employment—changes that only an employer has the power to make—the Act imposes a duty to bargain on employers and grants unions a corresponding right to demand bargaining. This framework reflects the reality of the workplace, as well as the overarching goal of the statute. It is "one sided" only in the sense that it redresses an imbalance in power that existed before the Act was passed.

2.

The majority argues that the waiver standard must be abandoned because it "results in conflicting contract interpretations between the Board and the courts," but this argument suffers from three obvious flaws. First, as explained, the Federal appellate courts that apply the Board's waiver standard outnumber those that apply the "contract coverage" standard.⁶⁹ Second, for all the reasons that the majority's adoption of the "contract coverage" standard is erroneous, so, too, should the Circuits that

of a contractual waiver is an affirmative defense and it is the employer's burden to show that the contractual waiver is 'explicitly stated, clear and unmistakable'").

⁶⁵ "[N]o doubt, there are cases where the Board's tilt toward bargaining may seem stretched." *Gorman & Finkin*, supra, *Labor Law* §20.16 at 741 (footnote omitted). As I have previously stated, "Board law requires only that the parties' intent to waive a right be clear and unmistakable, not that the waiver be stated with lawyerly perfection." *Staffco of Brooklyn, LLC*, 364 NLRB No. 102, slip op. 6–7 (2016) (dissenting opinion), enfd. 888 F.3d 1297 (D.C. Cir. 2018).

⁶⁶ *State Farm Auto*, supra, 463 U.S. at 43.

⁶⁷ Employees already face tremendous employer opposition when they try to form or join a union. Even when they succeed in gaining representation, they face additional challenges when they try to negotiate a first contract with their employer. A 2004 study showed that only 14 percent of union organizing drives that had the level of worker support needed to petition for a representation election resulted in a first contract within 1 year of certification. The same study showed that 34 percent of

union election victories had not resulted in a first contract after 2 or even 3 years of bargaining. John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004*, 62 *Indus. & Lab. Rel. Rev.* 5, 6 (2008) (a study of 22,382 organizing drives that filed election petitions between 1999 and 2004). The majority's adoption of the contract coverage standard will only add to the considerable challenges employees already face when they attempt to bargain collectively with their employer over their terms and conditions of employment.

⁶⁸ The majority dismisses this concern too quickly. It is a particularly viable possibility in the context of renegotiation of existing contracts. Unions may decide, upon expiration of an existing contract, that rather than executing a new contract with a management rights clause that would be read under today's decision to broadly waive the union's bargaining rights, they are better off relying on the employer's statutory obligation to maintain the status quo as to most terms and conditions of employment (i.e., wages, benefits, dues checkoff, and benefit contributions).

⁶⁹ See supra, fn. 12.

have adopted the “contract coverage” standard return to the waiver standard—including the District of Columbia Circuit, whose prior decisions endorsing the waiver standard have never been overruled.⁷⁰ Notably, the Circuit also has never had occasion to address the interplay of the “contract coverage” standard and the Board’s new rule in *Raytheon*, supra, permitting an employer to continue a “past practice” of unilateral changes, based on a management-rights clause, even after the contract expires. Applied together, the “contract coverage” standard and the *Raytheon* rule will give employers wide latitude to make, and keep making, unilateral changes—threatening labor disputes and disrupting the collective-bargaining process. The *Raytheon* rule might well prompt the D.C. Circuit to reconsider its adoption of the “contract coverage” standard. Third, even accepting the dubious view that unilateral-change cases should turn on whether a federal court defers to the Board’s interpretation of a collective-bargaining agreement,⁷¹ conflicting interpretations may result regardless of what standard the Board uses to determine whether the contract authorizes unilateral employer action.

3.

The majority’s argument that the waiver standard “undermines grievance arbitration” is baseless. Essentially

⁷⁰ See supra, fn. 9.

⁷¹ As the Board explained in *Provena*,

The waiver standard . . . does not involve merely a question of contract interpretation, in the sense of determining what the contract means and whether it has been breached. Rather, the waiver standard reflects the Board’s interpretation of the statutory duty to bargain during the term of an existing agreement. . . . Stated somewhat differently, while the Board’s interpretation of a collective-bargaining agreement may not be entitled to judicial deference, the Board’s interpretation of the Act and the duty to bargain is.

350 NLRB at 814: “Congress assigned to the Board the primary task of construing [Secs. 8(a)(5) and 8(d) of the Act] in the course of adjudicating charges of unfair refusals to bargain.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979). Because the Board has “the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain,” its construction of these provisions is “entitled to considerable deference.” *Id.* at 495–496. The Board has determined that the policies underlying the Act in general, and Secs. 8(a)(5) and 8(d) in particular, strongly support the application of the clear and unmistakable waiver standard in cases where an employer asserts a contractual defense to a charge of unilateral action.

⁷² 350 NLRB at 815 (emphasis in original), citing *Smurfit-Stone Container Corp.*, 344 NLRB 658, 660 fn. 4 (2005). See *Weavexx, LLC*, 364 NLRB No. 141, slip op. at 2 (2016); *Southern California Edison Co.*, 310 NLRB 1229, 1231 (1993) (arbitral award “can be susceptible to the interpretation that the arbitrator found a waiver even if the arbitral award does not speak in [terms of clear and unmistakable waiver]”), *affd.* sub nom. *Utility Workers Local 246 v. NLRB*, 39 F.3d 1210 (D.C. Cir. 1994). See also Gorman & Finkin, supra, *Labor Law* §20.16 at 737 (“[O]ver time, the Board has come to express a preference to have union charges of unilateral action during the contract term processed through the

the same argument was refuted by the *Provena* Board, which explained that the Board applies the waiver standard “only where there is no basis for deferral to arbitration” and noted that the Board will defer to an arbitrator’s decision “even where the arbitrator did *not* apply the Board’s waiver standard.”⁷² The majority challenges neither of these points. Meanwhile, its suggestion that unions somehow manage to circumvent arbitration, and do so to gain the benefit of the Board’s waiver standard, is unsupported. Here, for example, the employer did not seek deferral to arbitration. In any case, arbitrators themselves have applied the waiver standard, if not uniformly, and the leading treatise on arbitration recognizes the waiver standard.⁷³ In short, the Board’s waiver standard in no way conflicts with the federal labor policy favoring arbitration.

4.

The majority’s final proffered reason for abandoning the Board’s waiver standard is that it “has become indefensible and unenforceable” in the face of the District of Columbia Circuit’s rejection of the standard and the fact that any waiver decision by the Board may be reviewed in that Circuit. As a factual matter, aggrieved parties can and do seek review in other Circuits,⁷⁴ and the Board, too, can seek enforcement in other Circuits.⁷⁵ But the short answer to the majority’s argument is that the Board is not required

grievance and arbitration provisions of the parties’ contract when that would be capable of disposing of the dispute.”)

⁷³ Compare *Bakery Confectionary Tobacco Workers and Grain Millers International Union Local 366-G v. Nestle Purina Petcare Co.*, 2016 WL 10649399 (2016) (applying clear and unmistakable waiver standard); *International Brotherhood of Teamsters v. Rock Island Integrated Services*, 2004 WL 5841301 (2004) (same); *In re Russell*, 2000 WL 36177202 (2000) (same) with *Minneapolis Automobile Dealers’ Association Rudy Luther Toyota v. Garage Maintenance, Machine Warehousemen, Repairmen, Inside Men, Helpers and Plastic Employees, Local No. 974*, 2011 WL 11540128 (2011) (applying “contract coverage” standard). See also Elkouri & Elkouri, *How Arbitration Works*, Ch. 13.2.A.i.d (7th ed. 2012) (“To establish a waiver of the statutory right to negotiate over mandatory subjects of collective bargaining, there must be a clear and unmistakable relinquishment of that right. Management-rights language that merely reserves to the employer the authority to create and enforce reasonable rules does not rise to the level of a waiver.”).

⁷⁴ See Sec. 10(f) of the Act: “Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . .”

⁷⁵ Since the D.C. Circuit adopted the contract-coverage standard in 1993 in *Postal Service*, a significant number of Board decisions involving the waiver standard have been reviewed in other circuits. See, e.g., *Finley Hospital v. NLRB*, 827 F.3d 720 (8th Cir. 2016); *Electrical Workers Local 36 v. NLRB*, 706 F.3d 73 (2d Cir. 2013), cert. denied 573 U.S. 958 (2014); *Local Joint Executive Board of Las Vegas v. NLRB*, 540 F.3d 1072 (9th Cir. 2008); *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007); *Mississippi Power Co. v. NLRB*, 284 F.3d 605, 612–613 (5th Cir. 2002); *Georgia Power Co.*, 325 NLRB 420, 420–421

to acquiesce in the Circuit’s view—as the Circuit itself acknowledges—but is instead free to seek Supreme Court review.⁷⁶ As the *Provena* Board noted, the “Board has a long-established policy of refusing to acquiesce in the adverse decisions of the appellate courts.”⁷⁷ This case, as other waiver-standard decisions, “involves an issue on which there is an inter-circuit conflict and on which the Board’s position accords with the *majority* view.”⁷⁸ As Circuit Judge Skelly Wright pointed out decades ago, it would be “unwise” to oppose the Board’s nonacquiescence policy “in light of the instances in which positions taken by the Board were first repeatedly rejected by a large number of circuits, then accepted by others, and later accepted by the Supreme Court.”⁷⁹ Here, of course, the Board’s position on the waiver standard has *already* been accepted by the Supreme Court, more than 50 years ago, in *C & C Plywood*—as the majority acknowledges. Its argument that the Board should acquiesce in lower court decisions that are contrary to Supreme Court precedent is supremely irrational.

...

In sum, then, not one of the half-dozen reasons advanced by the majority for abandoning the waiver standard has substance. Some reasons are plainly foreclosed by the Supreme Court’s decision in *C & C Plywood*. Others amount to empirical claims for which the majority cites no evidence—and has deliberately avoided seeking any. Still others reflect a clear misunderstanding of well-established Board law and policy, as well as the basic aims of the

National Labor Relations Act. Taken as a whole, the majority’s decision falls far short of what the Supreme Court requires when an administrative agency makes a radical break from precedent.

III.

The majority compounds its error by deciding to apply its new “contract coverage” standard retroactively. The Board has not hesitated, however, to apply new rules only prospectively, when circumstances warrant.⁸⁰ There is no dispute about what factors the Board must consider under its own precedent: (1) “the reliance of the parties on preexisting law”; (2) “the effect of retroactivity on accomplishment of the purposes of the Act”; and (3) “any particular injustice arising from retroactive application.”⁸¹ Here, all three factors weigh heavily against retroactive application.

First, as the Board has recognized in a similar case ignored by the majority,⁸² applying the new standard in pending cases would be manifestly unjust to parties that have relied on the current standard in negotiating collective-bargaining agreements. The *Provena* Board correctly explained that adopting the “contract coverage” standard would have “threaten[ed] to upset the settled expectations of parties to existing collective-bargaining agreements.”⁸³ Its observation applies here to the issue of retroactivity:

Because the waiver standard has been settled Board law for . . . decades (and its reasonableness has been established by the Supreme Court . . .), it would be sensible to assume that a collective-bargaining agreement negotiated during that period was reached with the waiver

(1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999), cert. denied 528 U.S. 1061; *Bonnell/Tredegar Industry v. NLRB*, 46 F.3d 339, 346 fn. 6 (4th Cir. 1995); *NLRB v. Hi-Tech Cable Corp.*, 25 F.3d 1044 (5th Cir. 1994).

⁷⁶ See *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005).

⁷⁷ 350 NLRB at 814, citing, inter alia, *Insurance Agents (Prudential Insurance Co.)*, 119 NLRB 768, 773 (1957), set aside 260 F.2d 736 (D.C. Cir. 1958), affd. 361 U.S. 477 (1960).

⁷⁸ *Heartland Plymouth Court MI, LLC v. NLRB*, supra, 838 F.3d at 30 (Millett, C.J., dissenting).

⁷⁹ *Yellow Taxi Co. v. NLRB*, 721 F.2d 366, 385 (D.C. Cir. 1983) (Wright, C.J., concurring).

⁸⁰ See, e.g., *Total Security Management Illinois I, LLC*, 364 NLRB No. 106, slip op. at 11–12 (2016) (new rule requiring employers to bargain with newly-elected unions before imposing discretionary discipline, not applied retroactively because the law was uncertain at the time of employer’s alleged unilateral discipline); *Loomis Armored US, Inc.*, 364 NLRB No. 23, slip op. at 2, 7 (2016) (new rule barring withdrawal of recognition from a unit of guards not applied retroactively, because employers had relied on pre-existing law permitting such withdrawal); *Lincoln Lutheran of Racine*, 362 NLRB 1655, 1663 (2015) (new rule that dues-checkoff requirement would not terminate with expiration of collective-bargaining agreement not applied retroactively, because employers had relied on preexisting law); *Babcock & Wilcox Construction*, 361 NLRB 1127, 1139–1140 (2014) (new standard of deferral to arbitration not applied retroactively, because unions and employers had relied on

previous rule in negotiating contracts), review denied sub nom. *Beneli v. NLRB*, 873 F.3d 1094 (9th Cir. 2017); *Levitz Furniture*, 333 NLRB 717, 729 (2001) (applying new, “significantly more lenient” standard prospectively when the previous standard “was the law for nearly half a century”).

⁸¹ *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005).

⁸² See *Babcock & Wilcox*, supra, 361 NLRB at 1139–1140.

My colleagues cite *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987), in support of their decision to apply the new standard retroactively. However, the Board in *Deklewa* found that retroactive application was permissible, in part, because the precedent that it overruled was “unsettled and confusing,” and the “[t]he infirmities and uncertainties in current law” made it unlikely that a party had acted in reliance on the prior standard. *Id.* Stated otherwise, the new rule announced in *Deklewa* merely filled a void in an unsettled area of law. In contrast, the new standard adopted today represents an abrupt departure from “one of the oldest and most familiar of Board doctrines.” *Provena*, 350 NLRB at 810. The Board in *Deklewa* also noted that, to the extent the retroactive application of the Board’s new Sec. 8(f) principles imposed on parties’ obligations and liabilities they would not have incurred under existing law, the additional burden would be “borne only for the duration of the contract involved.” *Id.* As discussed above, however, together with the majority’s recent decision in *Raytheon*, the practical effect of the adoption of the “contract coverage” standard is to impose a near-perpetual waiver of statutory bargaining rights on nonconsenting unions.

⁸³ 350 NLRB at 813.

standard in mind. Any attempt to give effect to the intentions of the parties therefore would entail continuing to analyze those agreements under the waiver standard. *Changing the standard, in contrast, would create a significant and unbargained-for shift of rights to employers and away from employees and unions, who previously thought they were assured of the right to bargain over matters that were not explicitly waived.*

350 NLRB at 813 (footnote omitted; emphasis added).⁸⁴

Second, the failure to apply the new standard retroactively would in no way undermine the purposes of the Act. As the Board has explained, in declining to apply a new standard retroactively where that would affect existing contracts, “a principal purpose of the Act is to promote collective bargaining, which necessarily involves giving effect to the bargains the parties have struck in concluding collective-bargaining agreements.”⁸⁵

Third, the immediate imposition of the “contract coverage” standard would be particularly unjust, because it would defeat the expectations of unions that previously thought they were assured the right to bargain collectively over matters that were not explicitly waived. And, this injustice would have continuing consequences in light of the majority’s *Raytheon* decision, which permits employers to keep making unilateral changes even after a collective-bargaining agreement expires, as the supposed continuation of a past practice developed under the contract.⁸⁶

Given the majority’s acquiescence to the District of Columbia Circuit, finally, it is worth noting that this case arises in the Ninth Circuit, which not only applies the waiver standard, but which has analyzed the retroactivity of Board decisions in a way that makes it unlikely that the majority’s decision here would be sustained.⁸⁷

⁸⁴ The majority is therefore incorrect in its assertion that retroactive application of today’s decision “takes no rights from the Union that it did not voluntarily agree to cede in collective bargaining.”

To the extent the majority suggests that the reliance interests of unions, as opposed to employers, are irrelevant in determining whether retroactive application of a new rule will work a manifest injustice, I disagree.

⁸⁵ *Babcock & Wilcox*, supra, 361 NLRB at 1140.

⁸⁶ My colleagues argue that it is “difficult to reconcile” my opposition to retroactivity here with my support for retroactive application of the revised joint-employer standard in *BFI Newby Island Recyclery*, 362 NLRB 1599 (2015). But that case presented nothing like the “particular injustice” created by the majority today. The *Browning Ferris* Board clarified the applicable standard in an unsettled area of the law by reestablishing longstanding prior precedent that had been altered without explanation. By contrast, the majority today overturns a 70-year old doctrine that has been approved by a majority of the Circuit Courts and the Supreme Court. Further, and importantly, unlike the current majority, the *Browning Ferris* Board provided advance notice to the parties and the public that it was considering revising the joint-employer standard and invited briefing from all concerned. Thus, the parties there—unlike

IV.

It is a cardinal principle of contract interpretation that a contract must be construed in the light of the applicable law at the time it was executed. Thus, changes in the law subsequent to the execution of a contract are not deemed to become part of the agreement unless its language clearly indicates that to have been intention of parties. 11 Williston on Contracts § 30:23 (4th ed.) At the time the Agreement in this case was negotiated, the Board and a majority of Circuit Courts, including the Ninth Circuit where this case arises, applied the waiver standard. Nothing in the Agreement or the specific facts of this case suggests that the parties intended to avoid that standard.

Applying the waiver standard, I would find, contrary to the majority, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the Safety Policy, the Schedule Adherence Policy, and the Security Sweep/Breach Policy. As argued by the General Counsel in his brief, those policies imposed significant changes in discipline affecting employees’ conditions of employment. Even if the Respondent were correct in its assertion that general language in the parties’ collective-bargaining agreement referencing the Respondent’s right “to adopt and enforce reasonable work rules” and “to issue, amend and revise policies, rules and regulations” constituted a waiver of the Union’s right to bargain over new and revised policies governing safety, schedules, and security, nothing in those provisions or elsewhere in the collective-bargaining agreement clearly and unmistakably waived the Union’s right to bargain over the discipline to be imposed for violating such policies.⁸⁸

In all other respects, I agree with the results reached by the majority. Thus, I find that the Respondent violated

here—at least had an opportunity to address the consequences of potential revisions before they were made.

⁸⁷ See *Beneli v. NLRB*, 873 F.3d 1094, 1099–1011 (9th Cir. 2017). In *Beneli*, the Ninth Circuit affirmed the Board’s decision in *Babcock & Wilcox* to apply its new rule on deferral to arbitration only prospectively, because existing collective-bargaining agreements had been drafted in light of the old rule. As factors weighing against retroactivity, the court cited the fact that the Board’s decision was an “abrupt departure from well-established practice” and that the employer had relied on the Board’s old rule. Id. The court observed that “[o]ne of the Board’s primary functions is to foster stability in labor relations, to encourage good-faith negotiation, and to give effect to the parties’ agreements”—all considerations that supported prospective-only application. Id. at 1011.

⁸⁸ See, e.g., *Windstream Corp.*, 352 NLRB 44, 50 (2008), affd. and incorporated by reference 355 NLRB 406 (2010) (management-rights clause referencing employer’s right “to establish reasonable rules and regulations” did not clearly and unmistakably waive the union’s right to bargain over changes in the level of discipline the employer could impose for work rule violations); *Dorsey Trailers, Inc.*, 327 NLRB 835, 835–836 (1999) (management-rights clause referencing employer’s right to make “reasonable rules, not in conflict with this agreement” did not clearly and unmistakably waive the union’s right to bargain over

Section 8(a)(5) and (1) of the Act by implementing the Bereavement Pay Policy, the CDL Reimbursement Policy, and the Required Extra Assignments Policy. The majority found that by implementing those policies, the Respondent modified the parties' collective-bargaining agreement within the meaning of Section 8(d), and that it lacked a "sound arguable basis" for believing that the collective-bargaining agreement authorized its unilateral action. See *Bath Iron Works*, supra, 345 NLRB at 501-502 (2005). I express no opinion on whether *Bath Iron Works* was correctly decided, but I agree that under this standard the Respondent violated Section 8(a)(5) and (1) of the Act by modifying the collective-bargaining agreement without the Union's consent.

I also concur in the majority's dismissal of the unilateral-change allegations concerning the Acceptable Assignments for Employees on Temporary Modified Work Status Policy and the DriveCam Policy, but only because I find that those policies did not result in "material, substantial, and significant" changes in employees' terms and conditions of employment. *Crittenton Hospital*, 342 NLRB 686, 686 (2004); *Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991). I further concur in the dismissal of the contract-modification allegations concerning the Respondent's implementation of the Operator Fails to Log-in to AMDT Policy and the Customer Service Policy, but only because I find that the General Counsel failed to identify a provision in the collective-bargaining agreement that was modified.

v.

Today's decision presents a grave threat to the practice of collective bargaining in the United States. Coupled with the new *Raytheon* rule that permits employers to continue a "past practice" of unilateral changes when the contract expires, the "contract coverage" standard creates a powerful incentive for employers to insist on sweeping management-rights provisions in collective-bargaining agreements. With such contractual language in place, employers will be free to change employees' terms and conditions of employment at will during the term of the agreement and after, the duty to bargain created by the National Labor Relations Act will effectively be set aside, and American workplaces risk returning to the era before 1935 when employers could, and did, exercise their power unchecked.

discipline-linked changes to attendance policy), enfd. in relevant part 233 F.3d 831 (4th Cir. 2000). Cf. *United Technologies Corp.*, 287 NLRB 198, 198 (1987) (Board found that management-rights clause which specifically referenced the employer's "right to make and apply rules and regulations for . . . discipline" constituted a waiver of the union's right to bargain about changes in disciplinary procedures for absenteeism), enfd. 884 F.2d 1569 (2d Cir. 1989).

Alternatively, unions may decide that they and the workers they represent are better off *without* a collective-bargaining agreement that strips them of a crucial statutory right. With no contract in place, the statutory duty to bargain will still apply, and the union will be able to demand that the employer bargain to impasse over all mandatory subjects of bargaining, whenever they come up. This is not the regime that Congress envisioned, where labor disputes would be replaced by collective-bargaining agreements. In short, the majority makes a bad mistake here. Worse, the error is unforced. Nothing requires the Board, against its better judgment, to acquiesce in a court of appeals decision that is contrary to Supreme Court precedent and that contradicts the policies of the National Labor Relations Act. Because the waiver standard is a bedrock principle of Federal labor law that the Board should defend, not abandon, I dissent.

Dated, Washington, D.C. September 10, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to continue in effect the terms and conditions of the collective-bargaining agreement with Amalgamated Transit Union Local #1637, AFL-CIO,

My colleagues' argument that the Respondent's "right to issue, amend and revise policies, rules, and regulations" is referenced in the section of the Agreement dealing with discipline is unavailing, since that language appears in a subsection entitled "Work Rules" and there is no specific reference to discipline in that subsection.

CLC (the Union) without the Union's consent by limiting bereavement leave eligibility to full-time, non-probationary employees; limiting commercial driver's license reimbursement eligibility to currently employed, active, full-time, and nonprobationary employees; and requiring employees seeking to be excused from performing a required extra assignment to submit documentation 48 hours in advance of the forced work assignment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL restore the terms of the collective-bargaining agreement as it existed prior to March 26, 2016, and continue in effect all the terms and conditions of employment contained in the expired collective-bargaining agreement unless and until we bargain with the Union to agreement or impasse on different terms and conditions.

WE WILL make whole our unit employees for any loss of earnings and other benefits suffered as a result of our unlawful actions, with interest.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days from the date the amount of backpay is fixed, either by agreement or Board order, a

report allocating the backpay awards to the appropriate calendar year(s) for each employee.

MV TRANSPORTATION, INC.

The Board's decision can be found at <https://www.nlr.gov/case/28-CA-173726> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

