



professional development expenses was not going to be negotiated.<sup>2</sup> Thus, the parties did not bargain over this issue. The Union believed that reimbursements for these expenses would continue as required by past practice and thus that it was not necessary to put the issue into the contract.

The Employer is refusing to reimburse employees for professional development educational expenses that were incurred after the current contract became effective. To support its position, the Employer relies on the contractual Recertification/Mandatory Training clause and the Bargaining Waiver and Zipper clause. The Training clause does not address professional educational expenses, but it states that:

The Company will provide adequate classes to all personnel ... for the opportunity to obtain their [professional] recertification ... at no tuition cost. In the event a medic's schedule does not allow for attendance at one of the offered classes, the Company will reimburse the employee for tuition upon appropriate approval through the Company's tuition reimbursement policy.

The Bargaining Waiver and Zipper clause provides that:

the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subjects or matters specifically referred to or covered in this Agreement.

The contract specifically obligates the Employer to reimburse employees only for training necessary to maintain their professional certification. Thus, the Employer contends that, under the Zipper clause, all past practices that were not specifically included in the current contract, such as reimbursements for other educational expenses, are null and void. Further, although not specifically relied on by the Employer, the contractual Management Rights clause grants the Employer all rights over the company's business, "except to the extent that they are specifically relinquished or modified by an

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<sup>2</sup> The Employer did not present evidence concerning this exchange or regarding its reported intention not to negotiate reimbursement of professional development expenses.

express provision of this Agreement." The clause requires the Employer to notify the Union prior to the implementation of any decision that impacts matters within the employees' scope of employment.

### ACTION

Based on the evidence uncovered during the Region's investigation of this matter, we conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by failing to bargain with the Union over the elimination of professional development tuition reimbursements, as the Union did not "clearly and unmistakably" waive its right to bargain over the matter.<sup>3</sup>

In Provena St. Joseph Medical Center, the Board recently reaffirmed its long-held position that a purported contractual waiver of a union's right to bargain is effective if and only if the relinquishment was "clear and unmistakable."<sup>4</sup> In Metropolitan Edison Co. v. NLRB,<sup>5</sup> the Supreme Court held 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.'" The requirement that a waiver of bargaining rights be "explicitly stated" does not, however, require that the action be authorized *in haec verba* in a contract. As the Board noted in Provena, a waiver may be found if the contract either "expressly or by necessary implication" confers on management a right unilaterally to take the action in question.<sup>6</sup>

The Board's application of its standard in Provena makes it clear that it will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver when a contract does not specifically

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<sup>3</sup> [FOIA Exemptions 2 and 5

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<sup>4</sup> 350 NLRB No. 64, slip op. at 8 (2007). See also, e.g., Johnson-Bateman Co., 295 NLRB 180, 184 (1989) ("[i]t is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable").

<sup>5</sup> 460 U.S. 693, 708 (1983).

<sup>6</sup> 350 NLRB No. 64, slip op. at 5, n.19, citing New York Mirror, 151 NLRB 834, 839-40 (1965).

mention the action at issue.<sup>7</sup> Thus, in interpreting the parties' agreement, the relevant factors to consider include: (1) the wording of the proffered sections of the agreement at issue; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement that may shed light on the parties' intent concerning bargaining over the change at issue.<sup>8</sup>

Applying those factors here, we conclude first that neither the Recertification/Mandatory Training or the Bargaining Waiver and Zipper clause privileges the Employer to unilaterally eliminate reimbursements for professional development expenses. The Training clause is silent on this issue; the parties focused on employees' recertification expenses, rather than professional development expenses. The Employer argues, however, that because the Training clause only speaks to reimbursement for training to maintain certification, the necessary implication is that the parties thereby agreed to eliminate reimbursement for all other educational expenses. This is belied by the fact that the Employer apparently routinely made the contested payments to employees under previous IAM contracts containing substantially the same language as the present agreement.<sup>9</sup>

Further, the generally-worded Bargaining Waiver and Zipper clause does not contain the kind of language that the Board has held to be, in and of itself, a clear and unmistakable waiver of the union's right to bargain over

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<sup>7</sup> 350 NLRB No. 64, slip op. at 8-9 (Board based its waiver conclusions on such factors as express contractual language, the parties' bargaining history, and the reading of several contractual provisions "taken together").

<sup>8</sup> The first three of these factors have generally been considered by the Board in making "clear and unmistakable" waiver determinations. See generally Johnson-Bateman, 295 NLRB at 184-87; American Diamond Tool, 306 NLRB 570, 570 (1992). It is also appropriate to consider any other relevant contract provisions that shed light on the contractual intent of the parties in this regard.

<sup>9</sup> See Suffolk Child Development Center, 277 NLRB 1345, 1351 (1985) (no contractual waiver; disputed benefits continued for nearly 1½ years after the contract became effective, thus implying that zipper clause was not intended to strike all prior agreements).

employer changes in extra-contractual past practices.<sup>10</sup> While the Zipper clause provides that neither party is obligated to bargain over subjects "specifically referred to or covered in this Agreement," it is undisputed that the contract does not specifically mention reimbursement of professional development expenses. Nor does the evidence here fit a pattern in which the Board has held that a union "consciously yielded" its right to bargain over changes in past practice during bargaining. Thus, the Zipper clause by its terms does not purport to supersede all past agreements, understandings, and past practices.<sup>11</sup> Further, based on the evidence gleaned from the Region's investigation, we cannot conclude either that the parties negotiated over the reimbursement issue but failed to include it in the contract containing a zipper clause,<sup>12</sup> or that the Union acknowledged that the Zipper clause would permit the Employer's unilateral elimination of educational reimbursement expenses.<sup>13</sup>

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<sup>10</sup> See, e.g., ANG Newspapers, 350 NLRB No. 89, slip op. at 1 n.3, 7-8 (2007); Burns International Security Services, 324 NLRB 485, 487 (1997), enf. denied 146 F.3d 873 (D.C. Cir. 1998).

<sup>11</sup> Compare Columbus Electric Co., 270 NLRB 686, 686-87 (1984), enf. sub nom. Electrical Workers IBEW Local 1466 v. NLRB, 795 F.2d 150 (D.C. Cir. 1986), in which the Board dismissed an allegation that the Employer unlawfully discontinued non-contractual Christmas bonuses in reliance on a contractual zipper clause, which the parties agreed would supersede all prior agreements and understandings, i.e., would "wipe the slate clean." See also TCI of New York, 301 NLRB 822, 823 (1991) (zipper clause providing that contract "supersedes all prior agreements, understandings and past practices" privileged employer's unilateral conduct).

<sup>12</sup> Cf. Radioear Corporation, 214 NLRB 362, 364 (1974) (union consciously yielded right to bargain over non-contractual turkey bonus by proposing and then eliminating provision requiring the maintenance of existing non-contractual benefits in contract containing zipper clause waiving the right to bargain over any subjects not covered by the agreement).

<sup>13</sup> Johnson-Bateman, 295 NLRB at 186-87 (drug testing program was not even mentioned during contract negotiations, so it could not have been "consciously explored" and the right to bargain waived).

As to the second factor, the evidence regarding past practice does not support the Employer's position. It is undisputed that the Employer consistently made the disputed payments to employees prior to its invocation of the contract to deny payments here.

As to the third factor, evidence concerning the bargaining history does not establish a waiver here. According to the Union's negotiator (and absent contradictory evidence from the Respondent), it appears that the Employer announced early on that it would not bargain about education reimbursements. Thus, neither party subsequently bargained about the elimination of educational reimbursements. The Union's tactical decision to rely on past practice rather than demand that the Employer negotiate in the face of its avowed refusal to discuss does not reasonably constitute a "consciously yielding" to the Employer's unilateral change.

Finally, as to the fourth factor, the generally-worded Management Rights clause, like the Zipper clause, does not constitute a waiver of the Union's statutory right to bargain. The clause gives the Employer all rights over the company's business, "except to the extent that they are specifically relinquished or modified by an express provision of this Agreement." The agreement is silent on the topic of educational expenses or the Employer's right to unilaterally eliminate a long-standing past practice. As with zipper clauses, the Board does not recognize general language of this sort to constitute a waiver of statutory rights.<sup>14</sup>

For these reasons, we conclude that the Region's investigation uncovered nothing in the parties' contractual language, past practice, or bargaining history to establish a clear and unmistakable waiver. Accordingly, based on record evidence, complaint should issue, absent settlement, alleging the Employer violated Section 8(a)(5) by unilaterally eliminating reimbursements for educational expenses associated with employees' professional development.

B.J.K.

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<sup>14</sup> See, e.g., The Bohemian Club, 351 NLRB No. 59, slip op. at 3 (2007); Hi-Tech Cable Corp., 309 NLRB 3, 4 (1992), enfd. mem. 25 F.3d 1044 (5th Cir. 1994)