

UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

NEXSTAR BROADCASTING GROUP, INC.  
d/b/a WIVB-TV

Respondent- Employer

v.

Case 03-CA-210156

NATIONAL ASSOCIATION OF  
BROADCAST EMPLOYEES  
AND TECHNICIANS –  
COMMUNICATION WORKERS  
OF AMERICA, AFL-CIO

Charging Party -Union

**RESPONDENTS' REPLY TO THE OPPOSITION FILED BY GENERAL COUNSEL  
TO ITS' MOTION FOR SUMMARY JUDGMENT**

NEXSTAR BROADCASTING GROUP, INC., properly denominated as  
NEXSTAR BROADCASTING, INC. d/b/a WIVB-TV (hereinafter "Nexstar" or  
"Respondent") by one its attorneys Charles W. Pautsch of PAUTSCH, SPOGNARDI  
& BAIOCCHI LEGAL GROUP LLP hereby provides its REPLY TO THE  
OPPOSITION FILED BY GENERAL COUNSEL TO ITS' MOTION FOR  
SUMMARY JUDGMENT, filed herein pursuant to Section 102.24(c) of the NLRB  
Rules and Regulations, and submits rebuttal arguments and points and authorities  
supporting its Motion for Summary Judgment filed on September 6, 2018

seeking dismissal of the Complaint against it and a finding that it has not violated Sections 8(a)(1) and (5) of the National Labor Relations Act as it has not unlawfully changed any of the terms and conditions of its employees represented by NABET-CWA.

**ARGUMENT IN RESPONSE TO GENERAL COUNSEL’S OPPOSITION:**

**I. Introduction**

The sole substantive allegation posed against Respondent in the Complaint is that it “unilaterally ceased its past practice of paying employees on the Union’s bargaining committee for work time spent in collective bargaining negotiations with Respondent.” (Complaint, para. 7(a)) A review of uncontested facts, consisting almost entirely an examination of the Collective Bargaining Agreement between the parties, leads to the conclusion that the Company did not violate the National Labor Relations Act when it sought reimbursement for amounts paid to the union’s bargaining committee and otherwise declared it would not pay the Union’s bargaining committee when they took leave from their normal work assignments to bargain a new contract on the Union’s behalf in the spring of 2017. As a result, the Complaint should be dismissed by the Board as a matter of law. This is the case because the law has recognized numerous circumstances where even action that is wholly unilateral can be taken by an employer with running afoul of section 8(a) (5) and the *Katz* doctrine, as will be discussed below.

In our initial Brief supporting this Motion, we set forth four possible exceptions that apply to this situation, any one of which, if deemed applicable by this Board, should result in dismissal of this Complaint. In presenting this Reply we continue to press each of these exceptions as they should result in dismissal as a matter of law. In so doing, we accept the Board’s allegation as stated above as factually true. In this regard, we reserve additional factual and legal arguments that are present in the

dispute between the Parties, including, but not limited to, the defenses asserted in our First Amended Answer that the discussions over this alleged “change” were in fact made “bilaterally” following notice and an opportunity to bargain with the Union, and that the Union has engaged in bad faith bargaining in connection with this alleged “change”. This reservation should not be used to obfuscate the analysis of this Motion for Summary Judgment, as the General Counsel’s Opposition has sought to do. Indeed, the facts are simple and undisputed on each of the points raised that establish that Summary Judgment should be granted as a matter of law.

**II. In Response to the GC’s Arguments, Nexstar Continues to Assert that Summary Judgment Should be Entered on the Sole Allegation of the Complaint Alleging an Unlawful Unilateral Change Was Made Because the Union Had Previously Entered into a Collective Bargaining Agreement with the Company:**

- A. Which Comprehensively Covered the Issue of Union Leave but Does Not Provide for Pay for Bargaining (the ‘Contract Coverage Standard’), and**
- B. Also Contains a Clear and Unequivocal Waiver of their Right to Bargain Over the Issues Relating to Union Leave (the ‘Clear and Unequivocal Waiver Standard');**

In the following section of this Reply Brief, we will respond to the General Counsel’s response to our contentions on the first two exceptions to the *Katz* doctrine developed by the Board and the courts, that provide that even purely unilateral changes can be made because the collective bargaining agreement covers the issue (“the contract coverage standard”) or because the Union has waived its right to bargain over the subject (“the clear and unequivocal waiver standard”). In later sections of this Reply Brief, we will respond to the General Counsel’s Opposition to our contentions as to the other two established exceptions to the *Katz* doctrine, namely situations wherein ‘changes’ deemed “unilateral” can be made because they are either deemed ‘consistent with the parties collective bargaining agreement’ or the change was made in a way that was consistent with the status quo.

**A. No Unlawful Unilateral Change Occurred under the ‘Contract Coverage Standard’ Which this Board Should Adopt as the Rule of Law in Analyzing Allegedly Unlawful Unilateral Changes**

As we argued in our initial Brief, and the General Counsel acknowledged in its Opposition, (p.5) several federal appeals courts, have applied the “contract coverage” test to determine whether an employer is privileged to act unilaterally. *NLRB v. United States Postal Service*, 8 F.3d 832 (D.C. Cir. 1993); and *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7<sup>th</sup> Cir.1992). *Dept. of the Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992); *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007). Under the standard applied by these courts, where there is a contract clause that is relevant to the dispute, even if it does not explicitly address the subject at issue, it may be concluded that the parties previously bargained over the subject matter and embodied the full extent of their understanding on it in their agreement.

As we also stated in our initial Brief, we would urge this Board to adopt this standard as the governing principle in cases of this nature as it is more likely to generate just results as it will enforce agreements that the parties have made during their collective bargaining relationship and should be obligated to abide by. The General Counsel’s opposition failed to respond to this contention, only noting that “the Board has declined the suggestion to adopt this doctrine....” (p.5). The Opposition did not cite any reason as to why this standard recognized and applied by the First, Seventh and D. C. Circuit should not be re-evaluated in the context of this case.

The Opposition also did not argue that the alleged change in this case would not be ‘privileged’ under the ‘contract coverage’ standard. The GC’s silence on this latter point is not surprising in that there can be little doubt that the Parties clearly ‘covered’ the issue at hand in their collective bargaining agreement when they agreed to an extensive provision governing ‘Leaves of Absence---Union and Other” discussed in detail in our initial Brief. So, if this Board were to apply the ‘contract coverage’ standard to the singular alleged violation herein, Nexstar

would unquestionably be entitled to summary judgment since this issue is clearly “covered” by the 2013 CBA.

We submit that the contract coverage standard is the better rule of law as it more consistently tracks with the Parties’ collectively bargained agreement and yields results consistent with this intent.

In addition to the numerous federal courts of appeal that have adopted this superior standard, many Members of this Board have urged that it be applied in the recent years. *California Offset Printers* 349 NLRB 732, 737 (2007) (Schaumber, dissenting); *Dorsey Trailers, Inc.*, 327 NLRB 835, 836–837 (1999) (Hurtgen, dissenting); *Exxon Research & Engineering Co.*, 317 NLRB 675, 676–677 (1995) (Cohen, dissenting). Member Hayes in analyzing an alleged unilateral change in *Embarq Corp.* 358 NLRB No.134, (2012) discussed this effect:

Inasmuch as I would find the Respondent’s conduct lawful under the waiver analysis, it should be unnecessary here to address the Respondent’s argument that the appropriate standard for determining whether there was a decisional bargaining violation in this case should be the “contract coverage” standard adopted by the United States Courts of Appeals for the District of Columbia, First, and Seventh Circuits,<sup>3</sup> and endorsed by several dissenting Board members,<sup>4</sup> rather than the Board’s “clear and unmistakable waiver” standard. However, I take this opportunity to endorse the “contract coverage” standard and to express my view that the result reached by the majority here is a prime example of the flaws inherent in the “clear and unmistakable” standard.

Waiver should not be an issue here. The parties have bargained about the mandatory subjects of classification, reassignment, lay off, and discharge, and they have included specific language referencing those actions in their contract. **The Union has exercised its statutory right to bargain about such matters.** Should issues arise mid- contract concerning the application of bargained-for terms in particular factual settings, those issues are grist for an arbitrator’s mill, or the parties can litigate the matter in court. The Board has no special expertise and is entitled to no deference in the interpretation of collective-bargaining agreements.

My colleagues’ waiver approach—which admittedly is the approach taken by the Board for many years now— so narrowly and strictly defines the coverage of a contract term as to require that it specifically address a particular factual scenario. **As the D.C. Circuit has observed, the problem with this approach is that it imposes the impossible task of requiring parties to bargain with specificity about the unforeseen.<sup>5</sup> Accordingly, a negotiated contract provision becomes merely a starting point for**

**continuing negotiations during the term of a contract about the application of the provision. Rather than protecting statutory bargaining rights, this outcome is contrary to the statutory policy underlying the enactment of Section 8(d), intended to give finality to collective-bargaining agreements.**

In short, applying extant waiver law, I would dismiss the complaint allegations relating to the layoffs of retail cashiers and reassignment of their work to other unit employees. However, I add my voice to those who advocate changing extant law by adopting the “contract coverage” standard for analyzing allegations of this type. Doing so would appropriately limit the Board’s role in contract interpretation and better serve statutory policy. (Emphasis Added) (Citations omitted). *Embarq Corp.* 358 NLRB No.134, at 1193.

Member Hayes’ dissent echoes the rationale from the many decisions emanating from the reviewing courts highlighting the reasons why they have decided that the ‘contract coverage’ standard is the better rule of law. Like Member Hayes in *Embarq*, one Court of Appeals has explained that the ‘contract-coverage’ standard rests on the rationale that, once a union and an employer enter into a collective-bargaining agreement, “the union has exercised its bargaining right,” *United States Postal Service*, 8 F.3d at 836 (quoting *Department of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992)), and that the extent to which the agreement fixes the parties’ rights therefore presents a question of “ordinary contract interpretation,” *Enloe Medical Center v. NLRB*, 433 F.3d 834, 839 (D. C. Cir. 2005) “[I]t is naive to assume that bargaining parties anticipate every hypothetical grievance and purport to address it in their contract. Rather, a collective bargaining agreement establishes principles to govern a myriad of fact patterns.” *NLRB v. Postal Service*, supra at 838. The same reviewing Court has stated that “the duty to bargain does not prevent a union from "exercis[ing] 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 Serv.*, 8 F.3d at 836 (quoting *Local Union No. 47, Int'l Bhd. of Elec. Workers v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991)); see also *Southern Nuclear Operating Co. v NLRB*, 524 F.3d 1350,1358 (D. C.

Circuit, 2007). Thus, pursuant to the contract coverage doctrine, an employer is "free to make unilateral changes ... without running afoul of the Act" when those changes are "covered by the collective bargaining agreement." *Enterprise Leasing v. NLRB*, 831 F.3d 534, 547(D.C. Cir. 2016) (citations and internal quotation marks omitted). A dispute regarding a subject that is "covered by" a collective bargaining agreement presents "an issue of contract interpretation," *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14 (1st Cir. 2007) (citing *Postal Serv.*, 8 F.3d at 836-37), and the D. C. Circuit has held that when parties negotiate for a contractual provision limiting the union's statutory rights, "we will give full effect to the plain meaning of such provision," *Local Union No. 47*, 927 F.2d at 641; *see also Postal Serv.*, 8 F.3d at 836 ("[T]he courts are bound to enforce lawful labor agreements as written...."). Importantly, a subject may be deemed "covered" by an agreement even if the agreement does not clearly and unmistakably address that particular subject. *See Enloe Med.*, 433 F.3d at 837-38; *Postal Serv.*, 8 F.3d at 838; *Connors v. Link Coal Co.*, 970 F.2d 902, 906 (D.C. Cir. 1992); *Local Union No. 47*, 927 F.2d at 641.

Accordingly, in analyzing the Complaint's sole allegation that Company acted unlawfully by "unilaterally ceasing its past practice of paying employees on the Union's bargaining committee for work time spent in collective bargaining negotiations with Respondent." (Complaint, para. 7(a), the proper and recommended analysis for this Board to consider is whether that subject was "within the compass of" the terms of the agreement. *Postal Serv.*, 8 F.3d at 838. Courts, particularly the D. C. Circuit, have, in applying the 'contract coverage' test to determine whether an employer's unilateral decision is covered by a collective bargaining agreement, have consistently rejected previous Board attempts to require the agreement to "specifically mention," *Enloe Med.*, 433 F.3d at 839, "specifically refer[]" to, *Postal Serv.*, 8 F.3d at 838, the issue involved with that

decision,. The D.C. Circuit has stated that the Board's approach fails to recognize that "bargaining parties [cannot] anticipate every hypothetical grievance and purport to address it in their contract," *Postal Serv.*, 8 F.3d at 838, and "imposes an artificially high burden on an employer," *Enloe Med.*, 433 F.3d at 837.

And as noted in our initial Brief that analysis is simple in this case as the Parties dealt with the topic of leave for union business in an exhaustive way in arriving at Article 13 of their collective bargaining agreement:

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#### LEAVE OF ABSENCE - UNION AND OTHER

- 13.0 The Company will endeavor to arrange leave for Union activity upon written request to not more than one (1) Employee at any time for specific periods, up to, but not exceeding, one (1) year in duration. The Company will consider a request for extended Union leave of absence beyond the first year not to exceed one (1) year and the Company will grant such leave of absence if the request is reasonable in the Company's opinion.
- 13.0(a) In the event that up to two (2) NABET Employees make a written request for leave for Union business, and it is necessary for them to be replaced, the Union will, upon request from the Company, provide a qualified replacement. In the event such replacement must be paid overtime, the Union will reimburse the Company for any premium costs paid to such replacement; provided, however, any such leave for Union business may not exceed two (2) weeks at any one time.
- 13.1 It is agreed that upon the return to employment of a regular Employee from the Union or other leave of one year or less, he shall be given his former position and the Company may release the substitute Employee from employment without penalty. The Employee with the least seniority in the seniority group involved shall at all times be the substitute.

As one can see, this provision deals with the topic of union leaves in considerable depth, providing great detail as to their length, process for requesting the leave, limitation as to the number of employees who can be on such leave at one time, 'replacement responsibilities' of the union, reimbursement by the union when overtime is necessary as a result of the leave, reinstatement rights following leave, and rights and release of 'substitutes'. Finally, and of equal significance, at no point does it provide for pay to any employees while on union leave.

Against this backdrop of undisputed facts and law, it is clear under the "contract coverage standard" that Nexstar did not make an unlawful unilateral change to the terms and conditions of employment of employees represented by NABET-CWA as alleged. This is true because it cannot be disputed that the Union entered into a Collective Bargaining Agreement with the Company which comprehensively covered the issue of Union Leave as detailed above. It has been held that a dispute regarding a subject that is "covered by" a collective bargaining agreement presents "an issue of contract interpretation," *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F. 3d 14, (1st Cir. 2007) (citing *Postal Serv.*, 8 F.3d at 836-37), and the D. C. Circuit has held that when parties negotiate for a contractual provision limiting the union's statutory rights, "we will give full effect to the plain meaning of such provision," *Local Union No. 47*, 927 F.2d at 641; *see also Postal Serv.*, 8 F.3d at 836 ("[T]he courts are bound to enforce lawful labor agreements as written...."). Here the Union's attempt to 'read' a practice into the CBA that is so clearly absent, when related issues have been exhaustively dealt with, and then declare that it has been "unilaterally changed" is wholly improper and should be rejected. This Board should follow the lead of the many circuit court decisions cited above and adopt the 'contract coverage' standard which honors the bargain that the Parties' have

struck in collective bargaining.

**B. Alternatively, No Unlawful Unilateral Change Occurred Under the “Clear and Unequivocal Waiver” Standard**

As we argued in our initial Brief, we believe there no reason why the “waiver” standard recognized in *Provena*, should not remain as an alternative point of analysis, as it can also serve to effectuate the intent of the Parties. In any event as argued below, applying either standard to the facts of this case, results in a finding that no unlawful unilateral action took place as we also submit that the Union clearly and unmistakably waived their right to bargain over the issue of pay while on union leave during the term of the 2013 CBA. "A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter...." *Postal Serv.*, 8 F.3d at 836 (citation and emphasis omitted). By waiving the right to bargain over a particular matter, a union "surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter." *S. Nuclear Operating*, 524 F.3d at 1357 (citation and internal quotation marks omitted). It follows that "an employer's unilateral change to contract terms on that subject does not violate the Act." *Enter. Leasing*, 831 F.3d at 546.

In determining whether the Union waived its statutory rights, we believe that the language of the 2013 CBA establishes such a waiver. We acknowledge that an employer bears the burden of showing that a union clearly and unmistakably waived its statutory rights. *Sw. Steel*, 806 F.2d at 1114-15. To satisfy its burden, the Company must establish that the parties "consciously explored or fully discussed the matter on which the union has consciously yielded its rights." *S. Nuclear Operating*, 524 F.3d at 1357-58 (citation and internal quotation marks omitted). Again, because the Parties' Agreement dealt so

exhaustively with the subject of union leave, we need look no further than the Parties collective bargaining agreement to find this waiver. We discussed this point extensively in the initial Brief, so we will not belabor at this point other than to briefly summarize it.

We contend that the language of the 2013 CBA, specifically the management - rights, zipper and union leave provisions establish that the Union clearly and unmistakably waived the employees' right to bargain over pay for bargaining on behalf of the Union. It has also been noted that when a particular subject is not "covered by" a collective bargaining agreement, that agreement generally will not "clearly and unmistakably waive bargaining over that matter." *Heartland Plymouth*, 838 F.3d at 26. It follows that the obverse is also true. That is when a particular subject is "covered by" a CBA that agreement it should be deemed a waiver over bargaining on the subject. In this case the subject was, of course, covered at great length supra and the waiver is backed up and established by extensive language discussed at great length in our initial Brief. We submit an analysis of the 2013 CBA establishes Union and the Company discussed various aspects of the "union leave" and by so doing "voluntarily relinquished [its] right to bargain over them." *S. Nuclear Operating*, 524 F.3d at 1358. This deal on "union leave" in its various parameters was then cemented into place by the Parties' express agreement to an extensive provision on union leave and other critical provisions ----- dealing with "previous agreements", and management rights.

An analysis of the collective bargaining agreement between Nexstar and NABET-CWA at WIVB-TV/WNLO-TV reveals that the parties negotiated a lengthy section of the Agreement to deal very comprehensively with the topic of leaves of absence for union business. The agreement also contains a strong 'zipper clause' entitled "Previous Agreements":

## 14. PREVIOUS AGREEMENTS

14.0 It is mutually agreed between the parties that **this Agreement, together with updated side-letters an agreement attached hereto, supersedes all previous Agreements, either oral or written covering Employees employed under the terms hereof, and constitutes the entire Agreement between the parties.** Side-Letters attached are: (omitted)

And in another provision further supporting the notion of waiver the Parties agreed that the Company would be afforded broad management rights both express and reserved:

## 22. MANAGEMENT RIGHTS

22.0 The Union recognizes that the Employer has an obligation to fulfill its responsibilities as a broadcasting licensee under the terms of its grant from the FCC.

22.0(a) **Except as expressly abridged by any provision of this Agreement the Company reserves and retains exclusively all of its normal and inherent rights and authority with respect to the management of the business,** whether exercised or not, including, but not limited to the right **(a) to hire, assign, transfer, promote, demote, schedule, layoff, recall, discipline and discharge its Employees and direct them in their work;** (b) to make, enforce and amend from time-to-time reasonable rules and regulations uniformly applied concerning the conduct and responsibilities of Employees, some of which have been set forth in the Employee's Handbook, subject to approval by the Union which will not be unreasonably withheld; **(c) to determine and schedule work and programming, acquisition, installation, operation, maintenance, alteration, retirement and removal of equipment and facilities;** and (d) to ownership and control of all Company equipment, supplies and property, including the product of any work performed during the course of Employees carrying out job duties as set forth in this Agreement. (Emphasis Added)

The legal effect of negotiating these three sections of the Agreement establishes that the Union has 'clearly and unmistakably waived' any right to bargain over the topic of union business leave beyond what was negotiated into the 2013 CBA.

In *Provena St. Joseph Medical Center, supra*, the Board found that the employer did not unlawfully implement a new disciplinary policy or attendance policy because several provisions of the management-rights clause, taken together, explicitly authorized the employer's unilateral action. Specifically, the management-rights clause provided that the employer had the right to "change reporting practices and procedures and/or to introduce new or improved practices," "to make and enforce rules of conduct," and "to suspend, discipline, or discharge employees." By agreeing to that combination of provisions, the Board found that the union relinquished its right demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failure to adhere to those requirements. By contrast, the Board found that the employer unlawfully implemented a new incentive pay policy because there was no express substantive provision in the collective bargaining agreement regarding incentive pay and there was no evidence that the union intentionally relinquished its right to bargain over the topic. The General Counsel attempts to distinguish our reliance on this case because it asserts that the language in the management rights clause in *Provena* 'mapped neatly onto the employer's unilateral change, while the language in the management rights clause or other provisions in the 2013 CBA in this case does not do so. Our review of the 2013 CBA provisions above, and in the initial Brief, establishes that the opposite is true, as it is obvious that the three contract articles involved go into much greater detail laying out the respective rights of management and the Union on the topic that is the subject of this unfair labor practice, than the management rights clause found to accomplish this purpose in *Provena, supra*.

**III. Alternatively, in Response to the General Counsel’s Opposition Nexstar Continues to Assert that Summary Judgment Should be Entered on the Sole Allegation of the Complaint Alleging an Unlawful Unilateral Change Was Made Since Any Change Made Was Entirely Consistent with the Parties’ Existing Collective Bargaining Agreement**

One can see from a review of these various contract provisions----- leave of absence, previous agreement and management rights ----that Nexstar’s actions, and the ensuing discussions and bargaining it engaged in from May 2017 on, with NABET-CWA representatives in relation to making arrangements for collective bargaining of a new agreement were “entirely consistent with the collective bargaining agreement between it and NABET-CWA, and as such lawful under section 8(a)(5).

As noted in our initial Brief, the NLRB issued two decisions in 2015 finding that even clear-cut ‘unilateral’ change in employee working conditions was lawful so long as it was “consistent with the agreement”. *Bay Area Healthcare Group d/b/a Corpus Christi Medical Center*, 362 NLRB No. 94 (2015); *American Electric Power*, 362 NLRB No. 92 (2015).

In *Bay Area Healthcare, supra*, the NLRB affirmed a finding by an administrative law judge who found no violation after a company eliminated a contractually extended illness benefit and replaced it with a substantially different plan. The ALJ found that the company had a contractual right to make this change in benefits and, therefore, the union had clearly and unmistakably waived its right to bargain over that issue. In *American Electric Power, supra*, pursuing a somewhat different analysis, but reaching the same result, the NLRB found that a company’s elimination of retiree medical benefits for future hires was based on a reasonable interpretation of a collective bargaining agreement and, therefore, the company had a “sound arguable basis” for making the change. The NLRB stated that it will not find a violation of the Act if the

employer had a “sound arguable basis” for its belief that the agreement authorized the action. In addition, the NLRB explained that where the dispute is solely one of contract interpretation and there is no evidence of anti-union animus, bad faith, or intent to undermine the union, it will not seek to determine which of two equally plausible contract interpretations is correct.

In the instant case, Nexstar, in submitting a request for reimbursement for monies that it had paid to the NABET bargaining committee, was acting at the heart of its sphere of managerial rights to schedule work and conduct its operations in an orderly fashion. And it is also clear that Nexstar had a “sound arguable basis” for its belief that the agreement authorized the action. As such in these respects it was acting “consistent with the collective bargaining agreement” between the parties, just as the employers in *Bay Area Healthcare, supra* and *American Electric Power, supra* were in making the changes authorized by the contract.

**IV. Alternatively, in Response to the General Counsel’s Opposition Nexstar Continues to Assert that Summary Judgment Should be Entered on the Sole Allegation of the Complaint Alleging an Unlawful Unilateral Change Since Making Such a Proposal was Simply a “Mere Continuation of the Status Quo”**

As an alternative defense and possible ground for summary judgment we presented argument and facts in our initial Brief that the parties engaged in considerable amount of discussions and exchange of correspondence regarding bargaining arrangements, including pay for union committee members, once the issue came to light as a result of the union’s demand for reimbursement for payment for the Union local President’s service as a negotiator for the Union in collective bargaining negotiations with the NHL professional hockey team the Buffalo Sabres. The Parties have not, it is acknowledged,

come to an agreement on these arrangements. It can not be seriously disputed that similar negotiations must have taken place leading agreements reached and memorialized in the two previous collective bargaining agreements between the parties. As such, the process employed in 2017 in attempt to arrive at this agreement represents no departure at all from past practice as to how these arrangements were made, only a memorialization and reiteration for emphasis of same.

Given these indisputable facts, the Union cannot seriously argue that the initial submission of this proposal was anything “new” at all, but rather was essentially “a mere continuation of the status quo.” *Raytheon Network Centric Systems*, 365 NLRB No. 161 (Dec. 15, 2017) *E. I. du Pont De Nemours & Co. v. NLRB*, 682 F.3d 65, 67–69 (D.C. Cir. 2012).

In the *DuPont* case the D.C. Circuit stated:

Under *Katz*, an employer unilaterally may implement changes “in line with [its] long-standing practice” because such changes amount to “**a mere continuation of the status quo.**” 369 U.S. at 746, 82 S.Ct. 1107; see *Courier–Journal*, 342 N.L.R.B. 1093, 1094 (2004) (“a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo—not a violation of Section (a)(5)”). 682 F.3d 65, 67–69

As the *DuPont* court also stated:

“The purpose of prohibiting unilateral changes is not advanced by freezing in place the terms of employment when doing so disrupts the established practice for making changes. For this reason, an employer may lawfully change the terms of employment pursuant to such an established practice..... We hold *Du Pont*, by making unilateral changes to *Beneflex* after the expiration of the CBAs, maintained the status quo expressed in the Company’s past practice; those changes were therefore lawful under *Courier-Journal*. 342 NLRB at 1094. (Emphasis added) 682 F.3d 65, 67–69

*Raytheon*, of course, clarified the degree to which employers may rely the past process for making changes to make unilateral changes to terms of employment once a collective bargaining agreement has expired. While an employer may not unilaterally

change the status quo as to a mandatory subject of bargaining, “actions constitute a “change” only if they materially differ from what has occurred in the past.” 365 NLRB No. 161, p. 10. An established past practice – whether or not derived from the management rights clause last in effect — may become part of the status quo. The Board in *Raytheon* also rejected the notion that any action involving an employer’s discretion will always constitute a change in terms and conditions of employment. The relevant consideration is whether the challenged action constitutes a substantial departure from past practice, regardless of how that past practice developed. Rather than constitute an unlawful unilateral change, an action taken pursuant to an established practice preserves the status quo. *See Katz*, 369 U.S. at 746, 82 S.Ct.1107; *E.I. Du Pont*, 682 F.3d at 67-68; *see also Aaron Bros. Co. v. NLRB*, 661 F. 2d 750, 753 (9th Cir. 1981)

**V. To the extent, this Board determines that Any Aspect of this Charge Should be Submitted to a Hearing the Determination of the Charge Should be Deferred to Arbitration under the Collyer Doctrine**

Upon review of the facts and argument above, as well as those cited in our initial Brief, we continue to assert that this Board will properly conclude that no violation of the Act has occurred in connection with the unfair labor practice alleged in this case. More specifically, we believe that the Board should, and will, conclude that no unilateral change in violation of section 8(a)(5) can be established because the reimbursement proposal was either ‘covered by the contract’, the subject of a ‘waiver’ by the Union, a “mere continuation of the status quo” or “entirely consistent” with the Parties’ collective bargaining agreement. But in the event, the Board were to determine that any aspect of this Complaint requires a hearing on any factual issues present, we continue to believe that it is crystal-clear based on long-established precedent that this case should be deferred to arbitration, rather than determined in an unfair labor practice proceeding.

We rely on our facts and argument laid out in our initial Brief and will not burden the record further on this point other than make a few observations. The General Counsel recognizes the long-established precedents we cited to in its Opposition. But then the Opposition attempts to defeat the application of the Board's doctrine of pre-arbitral deferral by setting forth several paragraphs full of unsworn facts that supposedly establish that the parties' collective bargaining relationship has 'broken' down. Many of these facts are simply untrue, but we do not believe it necessary or proper to dispute the unsworn assertions. And these alleged facts are presented without even a reference to documentary evidence, sworn or unsworn.

While the Board's Rules and Regulations at 102.24 allow a Party to oppose a summary judgment motion with or without affidavits, we submit that certainly does not mean that any portion of a summary judgment can be defeated simply by proffering unsworn, non-admissible facts of the Party's own choosing. The Board's rule set forth above simply means that a Party opposing summary judgment can successfully oppose a summary judgment motion by presenting arguments that dispute the legal efficacy of the sworn material facts presented by the moving party. The non-moving takes the approach of opposing a summary judgment motion without affidavits does so at its' own peril should the Board decide that the facts presented by the moving party viewed in the light most favorable to the non-moving party establish the right to judgment as a matter of law. As a result of this approach, the undisputed facts we presented to establish that this is a proper case for deferral in the event it is determined that a hearing is at all necessary, stand unchallenged and should be applied to determine whether deferral is appropriate to this case involving only an alleged *Katz* violation.

It bears repeating that the Board has recognized that there are additional

rationales for deferring Section 8(a)(5) charges. First, in many Section 8(a)(5) cases the issue is whether the employer had a contractual right to take the action contested, and any violation of the Act in such cases turns entirely on contract interpretation *See Roy Robinson Chevrolet*, 228 NLRB 828, 832 (1977) (Murphy, C. concurring) (agreeing that since the dispute centered on a matter of contract interpretation, deferral was preferable). Therefore, unlike Section 8(a)(1) and (3) cases, which require the decisionmaker to interpret the Act, these Section 8(a)(5) cases do not require the Board's expertise. *See General American Transportation Corp.*, 228 NLRB 808, 810–11 (1977) (Murphy, C. concurring) (arguing deferral is not appropriate when it would require the arbitrator to interpret the statute), *overruled by United Technologies Corp.*, 268 NLRB at 557. Indeed, the Board has recognized that matters of contract interpretation “can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute *Collyer Insulated Wire*, 192 NLRB at 839.” Furthermore, it would be particularly detrimental to the goal of promoting stable labor-management relationships through collective bargaining if the Board were to interpose itself in a matter of contract interpretation. Resolution of disputes arising out of contractual provisions are best left to the parties through the steps of the agreed-upon grievance procedure, as well as by the arbitrator specially chosen to interpret the contract. *Id.* at 840.

Ultimately, *Collyer* is founded on a policy of holding the parties to their contractual obligations. And here NABET-CWA should be obligated to follow through on that obligation in the event the Board determines that there are factual issues which need to be determined to adjudicate this Charge.

## VI. CONCLUSION

Given these facts and the argument set forth herein, it is apparent that there is no merit whatsoever to the instant charge filed by NABET-CWA, and as a result, the Charge should be dismissed. The Company has not made any unlawful unilateral changes to the wages, hours or other working terms and conditions of employment of the employees in the unit represented by the Union. However, if the Board finds any reason to conduct a hearing in relation to this Charge, we submit that this Charge be deferred to the Parties' arbitration process established by their collective bargaining agreement for resolution.

For all of the reasons set forth herein, this Board should enter an Order dismissing NABET-CWA's charge in its' entirety.

NEXSTAR BROADCASTING, INC. d/b/a WIVB-TV

*Charles Pautsch*

By: Charles W. Pautsch

PAUTSCH, SPOGNARDI & BAIOCCHI LEGAL GROUP LLP

Dated: September 21, 2018

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**AFFIDAVIT OF SERVICE**

I hereby certify that I served the foregoing RESPONDENT’S REPLY TO OPPOSITION ITS’ MOTION FOR SUMMARY JUDGMENT on counsel for the Charging Party Union, Judiann Chartier by e-mailing a copy of same to [jchartier@cwa-union.org](mailto:jchartier@cwa-union.org) , the Counsel for the General Counsel, Eric Duryea, by emailing a copy of same to [Eric.Duryea@nlrb.gov](mailto:Eric.Duryea@nlrb.gov). and the Regional Director for Region 3, Paul Murphy, by emailing a copy of same to [Paul.Murphy@nlrb.gov](mailto:Paul.Murphy@nlrb.gov) on September 21, 2018.

*Charles Pautsch*

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Charles W. Pautsch