

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ABF FREIGHT SYSTEM, INC.

and

CASES 09-CA-208379  
09-CA-210267

GENERAL TRUCK DRIVERS, WAREHOUSEMEN,  
HELPERS, SALES AND SERVICE, AND CASINO  
EMPLOYEES AND INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS (IBT), LOCAL 957

**BRIEF OF THE GENERAL COUNSEL**

This brief is submitted by the General Counsel in response to questions posed by the Board on October 31, 2019, concerning the application of *MV Transportation, Inc.*, 368 NLRB No. 66 (Sept. 10, 2019), to the Administrative Law Judge’s (“ALJ”) decision that ABF Freight System, Inc. (the “Employer”) did not violate Sections 8(a)(5) and (1) of the Act by failing to bargain with the International Brotherhood of Teamsters, Local 957 (the “Union”) before unilaterally installing video surveillance cameras in break/locker rooms of the Employer’s facility in Dayton, Ohio.<sup>1</sup> On October 1, 2018, Counsel for the General Counsel filed exceptions to, *inter alia*, the ALJ’s failure to find a violation over the alleged unilateral change. On October 15, 2018, the Employer filed a brief in opposition to the General Counsel’s exceptions arguing that the ALJ’s decision should be upheld.

On October 31, 2019, in light of its recent decision in *MV Transportation*, the Board solicited the parties to file briefs addressing the following questions: (1) How, if at all, should the Board’s decision in *MV Transportation* affect the Board’s analysis in this case? (2) If *MV Transportation* does impact this case: (a) Is the issue of camera installations “covered by” the

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<sup>1</sup> The ALJ made additional findings, but the only findings relevant to the instant brief in response to the Board’s invitation are those regarding the alleged unlawful unilateral installation of cameras.

NMFA? (b) What is the significance, if any, of the parties' grievance-arbitration proceedings and their arguments in those proceedings?

### **I. Summary of the Argument**

The installation of video surveillance cameras is a term and condition of employment and the Employer's unilateral installation of cameras, without giving the Union notice and an opportunity to bargain, violates Section 8(a)(5) unless the Employer provides a sufficient defense. The Board's contract coverage analysis from *MV Transportation* is applicable to the instant case because the Employer defends its unilateral installation of cameras in employee break/locker rooms by claiming the installations were covered by a clause in the parties' collective-bargaining agreement ("CBA") and a past practice of installing cameras throughout most of its facility without objection from the Union. However, the applicability of *MV Transportation* does not necessarily give sanction to the Employer's unilateral action. Rather, in this case, a correct application of *MV Transportation* shows that the Employer fails to establish a bona fide defense under the contract coverage test.

A CBA's mere mention of a term or condition of employment does not give an employer an automatic right to unilaterally change that term. Rather, the employer must first point to the contract language that privileges it to change the employment term and that there is no other contract language limiting or prohibiting the employer from taking the specific action.

Accordingly, CBA language may allow *or* prohibit parties' actions. It is well-established that unambiguous contract terms should be interpreted according to their plain meaning, and specific terms and provisions are given more weight than general ones. Only where language is ambiguous may extrinsic evidence, such as past practice or bargaining history, be used to determine the parties' intent or provide context to the CBA's terms.

Here, Article 26 of the parties' CBA expressly and unambiguously prohibits the Employer from installing cameras in privacy spaces, including where "employees change clothing." This specific prohibition, where implicated, supersedes the Employer's general and implied right to place cameras around the facility. The Employer's arguments interpreting Article 26's reference to "change clothing" as requiring something more than that simple act ignore the plain language of the parties' CBA and its specific prohibition to the Employer's general right. However, even if the term "change clothing" was ambiguous, there is ample record evidence that the parties' 20-plus years of past practice clearly demonstrates they mutually agree the break/locker rooms are places where employees change clothing within the meaning of Article 26's prohibition. Accordingly, the Employer's unilateral installation of cameras in privacy areas where employees change clothing, where none had been installed before, is not privileged by the plain and unambiguous language in Article 26. Further, the Union did not clearly and unmistakably waive its right to bargain over the installation. Instead, the Employer was required to give the Union notice and opportunity to bargain and its failure to do so was a violation of Section 8(a)(5).

Finally, the parties' grievance-arbitration machinery is insignificant to this stage of the proceeding before the Board because the General Counsel exercised his exclusive discretion to not defer to that process when he issued complaint in this case. In any event, there is no evidence of what has been substantively argued under that process and the matter is currently on hold waiting for the Board's decision.

## **II. History of the Case**

This case was first tried before ALJ Keltner W. Locke on June 13, 2018 on the issue of, *inter alia*, whether the Employer made an unlawful unilateral change when it installed video

surveillance cameras in employees' break/locker rooms. *ABF Freight System, Inc.*, JD–53–18, at 4 (Aug. 20, 2018). At the time, the General Counsel's theory of the case was that the Union had not clearly and unmistakably waived its right to bargain over the placement of cameras in employee break/locker rooms and therefore the Employer was required to give the Union notice and an opportunity to bargain before installing the cameras. (Tr. 333).<sup>2</sup> Although the ALJ agreed that the Union had not clearly and unmistakably waived its right to bargain over the cameras, he found "the [Employer] did have an established past practice . . . of installing cameras anywhere on its premises," except in bathrooms or where employees changes clothes or give specimens for drug testing. *ABF Freight*, JD–53–18, at 8. The ALJ reasoned that if an area is not, as he termed it, a "personal privacy space," then the Employer has the unilateral right to place cameras in those locations. *Id.* He then discounted evidence from the General Counsel that employees engage in some level of undress in the break/locker rooms and, notwithstanding that evidence, found that the Employer intended the break/locker rooms to only be used by employees to eat lunch and to store their possessions in lockers while they work. *Id.* at 8–9. Accordingly, the ALJ dismissed the unilateral change allegation in the complaint. The General Counsel filed timely exceptions to the ALJ's decision, arguing that the ALJ's conclusions regarding the unilateral change allegation were contrary to record evidence and controlling law. The Employer filed an answering brief arguing that the ALJ correctly found the Employer was privileged to unilaterally install the cameras.

On October 31, 2019 the Board invited the parties to file briefs on how the Board's recent decision in *MV Transportation* may affect the unilateral change allegation.

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<sup>2</sup> References to the ALJ hearing official transcript will be presented as "Tr."

### **III. Facts**

#### **A. Background**

The Employer is a national trucking company that provides shipping services through its various service center terminals located across the country and employs approximately 8,600 employees represented by various locals of the International Brotherhood of Teamsters. (Tr. 145–46). Service centers are warehouse operations where freight is dropped off from one truck and moved to another to be sent to its destination. (Tr. 145). The instant case involves the Employer’s service center in Dayton, Ohio, whose approximately 300 employees are represented by the Union and are engaged primarily in moving freight between trucks. (Tr. 21, 23–24). At the time of the events at issue, the parties had in effect a national collective-bargaining agreement, titled the National Master Freight Agreement (“NMFA”) that covered all the Employer’s employees. (Tr. 148–49). Although the NMFA contemplates the existence of local agreements to supplement the NMFA at individual locations, no local agreement for the Dayton service center was presented in evidence.

Article 26 Section 2 of the NMFA discusses the installation of video cameras.

Specifically,

The Employer shall not install or use video cameras in areas of the Employer’s premises that violate the employee’s right to privacy such as in bathrooms or places where employees change clothing or provide drug or alcohol testing specimens.

Article 26 is the only place in the NMFA that discusses the placement and use of video cameras.

The above language is identical to Section 2 language in the previous CBA and the privacy

language has remained substantially the same since 2003. (Tr. 168–69).<sup>3</sup> The current NMFA does not contain a management rights clause or other similar language setting out general rights reserved by the Employer. (Tr. 191).

B. Break/Locker Rooms and Employees Changing Clothes

The Dayton service center as it currently stands was constructed around 1996 and replaced a smaller service center terminal. (Tr. 200). Nowhere at the Dayton facility is an area specifically designated as a place where employees may change clothes. (Tr. 87–88, 121, 133). There is also no written policy on where and when employees may change clothes. (Tr. 169, 222).

There are three “shacks,” designated A, B, and C, at the Dayton facility that serve as employees’ break and locker rooms. The break rooms were built and lockers installed during the 1996 rebuild as a convenience for employees. (Tr. 202). Only shacks A and B are at issue in the instant case.<sup>4</sup> Approximately half the space of the shacks is comprised of break room tables and vending machines, and the other half is comprised of lockers. (Tr. 29–30). No windows look in on the locker portion of the room. (Tr. 31–32, 229, 265). Supervisors’ offices are set up in each of the shacks that look over part of the break room and can see where the lockers end, but cannot see into the locker area. (Tr. 33, 292). There are no signs in the locker room prohibiting changing clothes. (Tr. 266).

Employees regularly change clothes in the shacks. Employee Webb testified employees often use the shacks to change layers of clothes during their shift as the weather changes. (Tr.

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<sup>3</sup> The only relevant change to Article 26 from the previous NMFA is, in the current NMFA, Section 3, which added language allowing the Employer to use video footage for employee discipline. (Tr. 152–53).

<sup>4</sup> Hereinafter, “shacks” will refer to only A and B shacks.

41–42). Employee Jackson testified he uses the shacks to change into gym clothes after work. (Tr. 120). Employee White testified he has come to work from another location and changed from his street clothes to his work clothes. (Tr. 133). Some employees, including employees Webb and Jackson, use the shacks to fully change their clothes, including undressing to their underwear. (Tr. 42, 66, 119, 133–34). Employees do not use the bathrooms to change clothes because the bathrooms are too dirty; employees and the Union have complained to the Employer about the state of the bathrooms. (Tr. 46–47, 95–96). Matthew Godfrey, the Dayton Service Center manager and highest-ranking Employer official at the facility, testified that “[h]ypothetically, someone could change anywhere [at the Dayton service center].” (Tr. 274).

Notwithstanding employees’ actual use of the shacks to change clothes, William Evans, the Employer’s vice president of employee relations and human resources, and the Employer’s chief negotiator during the previous round of negotiations for the NMFA, testified that the “change clothing” language in Article 26, as it related to “employee’s right to privacy,” was intended to only be applicable in places where employees stripped down to their underwear. (Tr. 142, 150, 155). He explained that the expectation of privacy, and thus Article 26’s prohibition on cameras, was intended to only apply to areas where employees chose to strip down to their underwear in order to provide a specimen for drug or alcohol testing. (Tr. 155). Mr. Evans claimed the only appropriate changing that should take place in the shacks is changing outerwear such as coats. (Tr. 157). Steve Dusko, the Employer’s regional manager of employee relations, testified that he had never seen employees fully undress during his occasional visits to the shacks. (Tr. 219). Mr. Dusko also claimed, despite the Employer having no written policy on where employees may change clothes, if he had witnessed employees changing more than outerwear, he would have issued discipline to the employees involved. (Tr. 221–22, 232).

### C. Video Cameras

The Employer has placed video surveillance cameras throughout much of the Dayton facility without objection from the Union. (Tr. 78–79). Employee Webb explicitly stated in his testimony that the Union did not object to the Employer’s placement of cameras in areas of the facility other than the shacks. (Tr. 80–81).

There is no evidence that the Employer ever tried to install video cameras in the shacks between the time the Dayton center was constructed in 1996 and 2014. Around 2014, the Employer attempted to install surveillance cameras in the shacks. (Tr. 49, 82). However, the Union and rank-and-file employees vociferously complained to the Employer about the installation, explaining that they change clothes in the shacks. (Tr. 49, 82). Employee Webb testified that employees specifically informed the Employer at a dock meeting that they objected to the camera installation in the shacks because employees change clothes there and they did not want to be recorded changing clothes. (Tr. 83). Employee Jackson testified that Union stewards and a business agent confronted the Employer about the cameras. (Tr. 122). Because of employee and Union complaints, the Employer relented and did not install cameras in the shacks. (Tr. 82, 122).<sup>5</sup>

In mid-September 2017, the Employer installed video cameras in shacks A and B. *ABF Freight*, JD-53-18, at 4.<sup>6</sup> The Union filed a grievance with the Employer on September 21, 2017 claiming that the Employer’s installation of the cameras in the shacks was an invasion of privacy

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<sup>5</sup> The Employer questions whether the Union formally confronted it in 2014, claiming it did not receive any grievance over the cameras. (Tr. 206). Otherwise, Employer witnesses could not recall the Union confronting it on cameras prior to the instant case and the record is silent regarding the Employer’s recollection on being confronted by rank-and-file employees.

<sup>6</sup> The ALJ’s decision claims that the Union’s charge was filed on October 23, 2016, which appears to be a typographical error as the charge is dated October 23, 2017.

and in violation of Article 26 of the NMFA. The Union demanded bargaining over the installation and sent a follow up letter on September 23, which stated its continued objection to the cameras and ongoing bargaining demand. (Tr. 71). The Employer refused to bargain. (Tr. 71). The grievance was subsequently deadlocked at the local and state level. (Tr. 73–74). The parties have since placed the grievance on a mutual hold pending the outcome of the instant case.

#### **IV. Argument**

##### **A. MV Transportation and the Contract-Coverage Standard**

In *MV Transportation*, the Board abandoned its “clear and unmistakable waiver” standard and adopted a contract-coverage standard for determining whether an employer’s unilateral change is privileged by language or a provision of a collective-bargaining agreement. 368 NLRB No. 66, slip op. at 1. Under the contract-coverage analysis, the Board will conduct a limited review of the parties’ CBA to determine whether it covers the disputed unilateral change. *Id.*, slip op. at 11. Specifically, the Board will,

[G]ive 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.

*Id.* The Board will not require the agreement to specifically address the employer decision at issue, recognizing that “a collective bargaining agreement establishes principles to govern a myriad of fact patterns[.]” *Id.* (quoting *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 838 (D.C. Cir. 1993)). If the agreement does not cover the disputed action, the Board will then consider whether the union waived its right to bargain under a “clear and unmistakable” standard. *Id.*, slip op. at 12. The Board will look to a combination of contractual language, bargaining history, and past

practice to determine whether the union waived its right to bargain over the challenged unilateral change. *Id.*

B. Under a Contract Coverage Analysis, the Board Should Construe the Contract Language's Plain Meaning and Should Consider Extrinsic Evidence such as the Parties' Past Practices or Bargaining History Only Where that Language is Vague or Ambiguous

In *MV Transportation*, the Board explicitly stated that a CBA should be interpreted according to its “plain meaning” and using “ordinary principles of contract interpretation.” 368 NLRB No. 66, slip op. at 11. Accordingly, the Board should not resort to extrinsic evidence if the CBA terms at issue are unambiguous. *See, e.g., Am. Fed'n of Gov't Emp. v. FLRA*, 470 F.3d 375, 383 (D.C. Cir. 2006) (parties may not create ambiguity in CBA terms by using extrinsic evidence when the disputed language was unambiguously clear to begin with); *Aeronautical Indus. Dist. Lodge 91 of the Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. United Tech. Corp.*, 230 F.3d 569, 576 (2d Cir. 2000) (unambiguous CBA terms must be given effect as written—extrinsic evidence may only be considered if terms are ambiguous).

Only where a term is reasonably susceptible to more than one meaning will it be deemed ambiguous such that extrinsic evidence is appropriately considered to determine the parties' intent. *See, e.g., Moore v. Menasha Corp.*, 690 F.3d 444, 451 (6th Cir. 2012) (consider extrinsic evidence only if CBA's plain language is susceptible to more than one interpretation); *Alexander v. City of Evansville, Ind.*, 120 F.3d 723, 727 (7th Cir. 1997) (“A [CBA] that lends itself to only one reasonable interpretation is considered to be unambiguous.”). Extrinsic evidence includes the parties' past practices and relevant bargaining history. *E.g., Aeronautical Indus. Dist. Lodge 91*, 230 F.3d at 576. Further, “[i]t is a well-settled principle of contract construction that where a contract contains both general and specific provisions relating to the same subject, the specific provision controls.” *Carr v. Gates Health Care Plan*, 195 F.3d 292, 298 (7th Cir. 1999).

### C. Contract Coverage as Applied to the Instant Case

The installation of video cameras is a term and condition of employment and a mandatory subject of bargaining. *Colgate-Palmolive Co.*, 323 NLRB 515, 515 (1997). Accordingly, the Employer's unilateral installation of cameras is a violation of Section 8(a)(5) unless it can provide a sufficient defense. *NLRB v. Katz*, 369 U.S. 736, 746–47 (1962). If the Employer can show that its unilateral action was “covered by” the NMFA or, if not, that the Union clearly and unmistakably waived its right to bargain over the camera installation in the shacks, then the Employer will have provided a sufficient defense for its unilateral action. *MV Transportation*, 368 NLRB No. 66, slip op. at 11–12.

Giving effect to the relevant, specific, and unambiguous NMFA terms, the Employer cannot identify any contractual language that would privilege it to unilaterally install cameras in the shacks where cameras have not been installed at any time in the past 21 years. Article 26 contains a specific and unambiguous prohibition that “[t]he Employer *shall not* install or use video cameras in areas of the Employer's premises that violate the employee's right to privacy . . . such as . . . where *employees change clothing*[.]” (emphasis added). Indeed, Article 26 even gives examples of privacy areas by specifically identifying bathrooms or places where employees change clothing or provide drug and alcohol testing specimens. The implied right of the Employer to install cameras in non-privacy areas does not negate the specific and unambiguous language of Article 26 prohibiting the Employer from installing cameras where employees change clothing. There is no management rights clause granting the Employer general rights about the placement of cameras and, even if there was, the specific and unambiguous prohibitions in Article 26 would supersede any general language. *See, e.g., Carr*, 195 F.3d at 298.

The Employer's development of testimony at the ALJ hearing regarding the meaning of "change clothing" is an impermissible attempt to use extrinsic evidence to create an ambiguity where none exists by reading additional terms into Article 26. *See Am. Fed'n of Gov't Emp.*, 470 F.3d at 383 (party may not "conjure[] up" ambiguity where none existed by using self-serving extrinsic evidence). Notably, in identifying examples of privacy areas, Article 26 is consistently worded in the disjunctive. The Employer's unreasonable attempt to create ambiguity by claiming that Article 26's reference to "change clothing" really means to strip down only when providing a specimen for drug testing ignores the fact that Article 26's examples of personal privacy spaces include places where "employees change clothing *or* provide drug or alcohol testing specimens," (emphasis added). The plain meaning is that a privacy space includes areas where employees simply change clothes; it does not require them to also provide a testing specimen. Further, Article 35 of the NMFA describes the types of specimens needed for drug and alcohol testing, namely providing urine in a collection container or a breath sample for a breathalyzer test. Neither method of testing typically requires an employee to change clothes or undress to their underwear to provide a sample. Indeed, the Employer's unreasonable interpretation of Article 26 appears to read into the NMFA's express language of "change clothing" three requisite yet unexpressed steps employees must follow: (1) remove clothes; (2) to provide a specimen; and (3) then put those same clothes back on.

Even assuming there was ambiguity regarding the phrase "change clothing," the Employer's unilateral installation of cameras in the shacks is not supported by the parties' past practice and bargaining history showing the parties have interpreted Article 26's privacy area prohibition as including the shacks. The Dayton service center's shacks have been in use since 1996 without any video cameras. Nowhere else at the facility is designated as a place where

employees may change clothes and there is no written policy dictating where employees should change clothes. Thus, employees had come to expect at least some degree of privacy in the locker room portion of the shacks for 18 years before the Employer attempted to install cameras, and the Union and Employer had agreed to the same camera and privacy NMFA language for 11 years. In fact, when the Employer initially attempted to install cameras in 2014, the Union and rank-and-file employees immediately objected, informing the Employer that employees change clothes in the shacks. The past practice was then solidified when the Employer relented on its attempt to install cameras, essentially admitting that cameras did not belong in the shacks because employees use them as a privacy space to change clothing.

Further, the Employer's alleged belief that no employees change more than merely their outer garments in the shacks belies logic, given that the shacks with lockers have been in place since 1996 and there is nowhere else at the service center suitable for employees to change clothes. Indeed, the Employer knew that employees did not and would not change clothes in the bathrooms because the bathrooms are dirty; thus, the only logical place to change clothes is where the Employer has provided employees with lockers. Moreover, regional manager Dusko's testimony that he did not observe employees changing clothes in the shack is of little weight given his testimony he only occasionally visited the facility and because the supervisors' office cannot see into the shacks' locker areas. (Tr. 219, 222-23, 273-74, 288, 292, 301-2, 305). Accordingly, the parties' past practice and bargaining history would resolve any alleged ambiguity to show that "change clothing" indeed means to simply change an article of clothing and the Employer "shall not install" video cameras anywhere that takes place.

i. The ALJ Failed to Give Controlling Weight to the Plain Meaning of Article 26, Including its Specific Terms Over General Terms, and Ignored Critical Facts Concerning the Parties' Past Practice

The ALJ's conclusion that "the [Employer had] an established past practice, not contested by the Union, of installing cameras anywhere on its premises," *ABF Freight*, JD-53-18, at 8, gives undue weight to the Employer's implied and *general* right to place cameras over Article 26's *specific* prohibition on installing cameras where employees change clothing. He ignored unambiguous and specific NMFA language in Article 26 and impermissibly gave weight to extrinsic evidence that sought to create ambiguity in an unambiguous term.

Even assuming there was an ambiguity in the specific terms of Article 26 that would require examination of extrinsic evidence, the ALJ completely ignored record evidence that employees regularly engage in some form of changing clothes in the shacks. Specifically, he failed to account for the parties' past practice and bargaining history, based on over 20 years of having no cameras in the shacks and that Article 26's privacy language has remained unchanged for approximately 11 years. The ALJ inexplicably brushed aside clear testimony that employees change clothes in the shacks by noting, "[t]he General Counsel's witnesses offered testimony that people do change clothes in the break rooms," but then discounted that testimony, without explanation, simply because he was "skeptical of that evidence." *Id.* The ALJ's reason for skepticism is wholly unsupported as he appears to have credited those witnesses' testimony and contradicted himself by his own acknowledgement that, "[i]t is possible that employees sometimes did undress in the break rooms when no one else was around." *Id.* Further, the ALJ impermissibly created his own definition of "personal privacy spaces" and ignored the parties' contractual language and mutual past practice history. *ABF Freight System, Inc.*, JD-53-18, at 8. Accordingly, the Employer's unilateral conduct was not covered by the contract.

ii. The Union Did Not Waive its Right to Bargain over Cameras in the Shacks

Because the Employer's unilateral installation of cameras in an established privacy space is not privileged by the contract under the "contract coverage" test, the Board must next look at whether the Union waived its right to bargain over the change. *MV Transportation*, 368 NLRB No. 66, slip op. at 12. The parties' contractual language, past practice, and bargaining history establish the Union did not waive its right to bargain over camera installation in the shacks.

First, there is no contractual language establishing the Union's waiver. The plain language of the NMFA expressly prohibits the Employer from installing cameras where employees have a "right to privacy" where they "change clothing." There is no language expressly giving the Employer the right to unilaterally change what the parties consider to be an established privacy space. While it is undisputed that the Employer may unilaterally install cameras elsewhere in the facility, there is no language waiving the Union's right to bargain over the Employer's attempts to install cameras in established privacy spaces where no cameras have been placed before.

Second, the parties' past practices show the Union did not waive the right to bargain over cameras in the shacks and, instead, the Employer recognized the Union's right to bargain over this issue. In 2014, when the Employer attempted to install cameras in the shacks, the Union and rank-and-file employees objected and the Employer relented. Thus, the Employer, by its prior act, demonstrated that the Union does have the right to object and bargain when the Employer attempts to install cameras in privacy areas.

Third, there is no bargaining history establishing the Union's waiver. The Employer's chief negotiator testified that the only change to Article 26 in the previous round of negotiations was language addressing how camera footage may be used for disciplinary purposes. (Tr. 151–

53). Otherwise, Article 26's privacy language has been in the NMFA since approximately 2003. (Tr. 168–69).

**D. The Parties' Grievance and Arbitration Proceedings Are Immaterial at the Present Stage of Litigation**

The parties' grievance and arbitration proceedings are immaterial at the present stage of litigation. Under Section 3(d) of the Act, the General Counsel has exclusive, final, and unreviewable discretion over "prosecutorial" decisions that is "independent of the Board's supervision and review." *BCI Coca-Cola Bottling Co.*, 361 NLRB 839, 843 n.11 (2014) (internal citations omitted). The decision of whether to defer to pending or potential arbitration of an unfair labor practice charge is encompassed within the General Counsel's 3(d) prosecutorial discretion. *Id.* Accordingly, because the General Counsel opted to prosecute the instant case rather than deferring to the parties' grievance and arbitration proceedings, those proceedings are immaterial to the present case. In any event, there is no evidence in the record of the parties' substantive arguments in the grievance and arbitration proceedings and the parties are holding those proceedings in abeyance pending the Board's decision.

**V. Conclusion**

The Employer was required to bargain with the Union because its installation of cameras in the shacks' established privacy areas, where no cameras had previously been installed, was not privileged by Article 26 of the NMFA, including how the parties have interpreted Article 26 through their past practice, and the Union did not waive its right to bargain over the change. Further, the parties' grievance and arbitration proceedings are immaterial to the present litigation. Accordingly, the Board should find that the Employer violated Section 8(a)(5) by making a unilateral change to a term and condition of employment without first bargaining with the Union.

Respectfully submitted,

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**TABLE OF AUTHORITIES**

*Aeronautical Indus. Dist. Lodge 91 of the Int’l Ass’n of Machinists and Aerospace Workers, AFL-CIO v. United Tech. Corp.*,  
230 F.3d 569 (2d Cir. 2000)..... 10

*Alexander v. City of Evansville, Ind.*,  
120 F.3d 723 (7th Cir. 1997) ..... 10

*Am. Fed’n of Gov’t Emp. v. FLRA*,  
470 F.3d 375 (D.C. Cir. 2006) ..... 10, 12, 14

*BCI Coca-Cola Bottling Co.*,  
361 NLRB 839 (2014) ..... 16

*Carr v. Gates Health Care Plan*,  
195 F.3d 292 (7th Cir. 1999) ..... 10, 11

*Colgate-Palmolive Co.*,  
323 NLRB 515 (1997) ..... 11

*Moore v. Menasha Corp.*,  
690 F.3d 444 (6th Cir. 2012) ..... 10

*MV Transportation, Inc.*,  
368 NLRB No. 66 (Sept. 10, 2019) ..... passim

*NLRB v. Katz*,  
369 U.S. 736 (1962)..... 11

*NLRB v. U.S. Postal Serv.*,  
8 F.3d 832 (D.C. Cir. 1993) ..... 9, 10

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Brief of the General Counsel in Cases 09-CA-208379 and 09-CA-210267 was electronically filed via NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 28th day of January 2020.

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