

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

**and**

**NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES &  
TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION  
WORKERS SECTOR OF THE COMMUNICATIONS WORKERS  
OF AMERICA, LOCAL 51, AFL-CIO**

**Intervenor**

**v.**

**NEXSTAR BROADCASTING, INC., d/b/a KOIN-TV**

**Respondent**

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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**USHA DHEENAN**

*Supervisory Attorney*

**BRADY FRANCISCO-FITZMAURICE**

*Attorney*

*National Labor Relations Board*

**1015 Half Street, SE**

**Washington, DC 20570**

**(202) 273-2948**

**(202) 273-1967**

**PETER B. ROBB**

*General Counsel*

**ALICE B. STOCK**

*Deputy General Counsel*

**RUTH BURDICK**

*Acting Deputy Associate General Counsel*

**DAVID HABENSTREIT**

*Assistant General Counsel*

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**UNITED STATES COURT OF APPEALS  
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**No. 20-71480**

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**NATIONAL LABOR RELATIONS BOARD  
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**BRIEF FOR  
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## **STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION**

This case is before the Court on an application for enforcement of a Decision and Order issued by the National Labor Relations Board (“the Board”). The Board’s Decision and Order found that Nexstar Broadcasting, Inc., d/b/a KOIN-TV (“the Company”) committed unfair labor practices by unilaterally changing employees’ terms and conditions of employment without first notifying National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, Local 51, AFL-CIO (“the Union”) and giving it an opportunity to bargain.

The Board’s Decision and Order issued on April 21, 2020, and is reported at 369 NLRB No. 61. (ER 11.)<sup>1</sup> The Board had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices affecting commerce.

The Board’s application for enforcement was timely filed on May 27, 2020, as the Act places no time limit on such filings. The Union has intervened in

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<sup>1</sup>“ER” references are to the Excerpts of Record filed by the Company. “AR” references are to the Agency Record filed by the Board in Case No. 20-71232. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” references are to the opening brief filed by the Company.

support of the Board's application for enforcement.<sup>2</sup>

This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. §§ 160 (e), (f)), because the Board's order is final and the unfair labor practices occurred within this Circuit.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to its motor vehicle/driving history reporting requirements and its work schedule posting procedure without notifying the Union in advance and affording it the opportunity to bargain over such changes.

### **STATEMENT OF THE CASE**

#### **I. PROCEDURAL HISTORY**

Upon charges filed by the Union, the Board's General Counsel issued an unfair labor practice complaint against the Company alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 29 U.S.C. 158(a)(5) and (1)) when it unilaterally implemented changes to employees' terms and conditions

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<sup>2</sup> The Union filed its own petition for review, in which it sought review of the remedy ordered by the Board. On September 16, 2020, the Union withdrew that petition (Case No. 20-71232, Docket Entry 23). Accordingly, the issue of the remedy is not contested before this Court and this brief does not address the Company's argument in opposition to the Union's now-withdrawn petition (Br. 45-46).

of employment without providing the Union notice and an opportunity to bargain over those changes. The parties submitted a joint stipulation of facts and a motion to submit the case on a stipulated record, which requested that an administrative law judge issue a decision without a hearing based solely on the stipulated record. That motion was granted, and thereafter, an administrative law judge issued a decision in which he found that the Company violated the Act as alleged. The Company filed timely exceptions challenging the administrative law judge's finding of unfair labor practices.

Chairman Ring and Members Kaplan and Emanuel sustained the administrative law judge's finding that the Company violated the Act. In doing so, the Board adopted the judge's analysis on some points, clarified the judge's analysis on other points, and performed its own analysis concerning the contract coverage standard for unilateral changes, a principle that the Board first adopted in a case that post-dated the judge's decision, *MV Transportation*, 368 NLRB No. 66 (Sept. 10, 2019).

## **II. THE BOARD'S FINDINGS OF FACT**

### **A. The Company's Operations and Relationship with the Union**

The Company operates a television station in Portland, Oregon. (ER16; AR3.) On January 17, 2017, the Company purchased LIN Television Corporation, a Media General Company, d/b/a KOIN-TV, which was a party to a collective-bargaining agreement with the Union covering two bargaining units of the Company's employees—one of engineers and production employees and the other of creative service employees and web producers. It is undisputed that the Company adopted that agreement and applied it through an extension to September 8, 2017. (ER11-12; AR5-6.) The agreement contains four pertinent provisions.

The first pertinent provision, Article 1, entitled "Management Rights," states:

NABET-CWA recognizes the exclusive right and responsibility of the Company to direct the working force and to direct the operations of the Company. The Company's rights shall include, but not be limited to, those necessary to maintain order and efficiently manage the Company, and to discharge, suspend, or discipline Employees for just cause and to establish working rules and to control station operations, provided, however, that the exercise of such rights does not violate the terms and provisions of this Agreement. (ER11; ER23.)

The second pertinent provision, Article 8.1, entitled "Hours of Work," states:

The "normal work week" shall be defined as commencing at 12:00 a.m. Monday and ending at 11:59 p.m. on Sunday. All work schedules, continuing hours of work and days off will be prepared and posted two (2)

weeks in advance of the commencement of the workweek. The Employer will post work schedules as soon as they are known to the Employer. (ER11; ER24.)

The third pertinent provision, Article 10.1, entitled “Automobile Travel,”

states:

Automobile travel by Employees shall be covered by the Vehicle Use Policy in the Company’s Employee Guidebook. It is understood that under no circumstances shall an Employee be required to use their car under this Article.

Employees who are ticketed for a moving violation for which they are responsible while driving on Company business must pay the fine for such ticket, whether the moving violation occurred while driving a Company owned vehicle or their own vehicle. (ER11; ER25.)

The fourth pertinent provision, Article 26.2, entitled “Complete Agreement,”

states:

This contract and any accompanying Letters of Understanding which have been executed by the parties with respect to items of interpretation is the complete agreement between the parties. It cannot be modified or terminated except in writing executed by the Parties hereto. (ER18; ER26.)

At all material times, the parties were engaged in or were preparing to engage in bargaining for a successor collective-bargaining agreement. (ER12; AR6.) That bargaining began as early as June 2017, when the Company proposed to eliminate any requirements regarding the advance posting of employee work schedules. (ER12; AR9.) The Union rejected the proposal, and the parties did not subsequently reach agreement on the issue. (ER12; AR9.)

## **B. The Company Unilaterally Implements Changes**

After the collective-bargaining agreement expired on September 8, 2017, the Company made two changes to employees' terms and conditions of employment. (ER12; AR6, 9.) For each change, the Company stipulated that it did not provide the Union with notice or an opportunity to bargain over the change. (ER12; AR6, 9.)

First, on or about September 21, 2017, the Company implemented a new requirement that employees complete a motor vehicle/driving history background check annually on their anniversary dates. (ER12; AR6, 80-98, 138-56.) Previously, employees completed driver-background checks only if they were involved in a vehicular accident on the job. (ER12; AR6.)

Second, in February 2018, the Company began posting employees' work schedules two weeks in advance. (ER12; AR9, 157-60.) Previously, since 1993 at the latest, the Company had posted schedules four months in advance, a practice that exceeded the contract's minimum two-week requirement and satisfied the contract's requirement to post schedules "as soon as they are known." (ER12; AR10.)

## **III. THE BOARD'S CONCLUSIONS AND ORDER**

Based upon the foregoing, the Board (Chairman Ring and Members Kaplan and Emanuel), in agreement with the administrative law judge, found that the

Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally implementing the annual driver-background check and changing when it posted work schedules, without notifying the Union in advance and affording it the opportunity to bargain over such changes. (ER14.) In doing so, the Board rejected the Company's defense that the collective-bargaining agreement granted it the right to act unilaterally under the contract coverage standard, which the Board first adopted in a case that post-dated the judge's decision, *MV Transportation*, 368 NLRB No. 66 (Sept. 10, 2019). (ER12-14.) Additionally, the Board found "the sound arguable basis standard inapplicable because it applies only where the issue is whether the employer modified an existing collective-bargaining agreement—not where, as here, the issue is whether the Respondent unilaterally changed employment terms constituting mandatory subjects of bargaining after the expiration of the agreement." (ER12 n.5.)

The Board largely adopted the rest of the judge's analysis. For example, the Board agreed with the judge, "for the reasons he stated, that the Union did not clearly and unmistakably waive its statutory right to bargain over the changes." (ER12 n.5.) Additionally, the Board agreed with the judge that deferral to arbitration is inappropriate because the Company implemented the changes after the parties' collective-bargaining agreement expired, but clarified that it did not rely on the judge's rationale that "[e]ven assuming that deferral might otherwise

apply to the clear violations here, there was never a contract grievance filed over the changes.” (ER12 n.5.)

To remedy the violations, the Board ordered the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the Act. (ER14.) Affirmatively, the Board ordered the Company to rescind both unilateral changes, notify and, on request, bargain with the Union before implementing any further changes to terms and conditions of employment, and post and electronically distribute a remedial notice to employees. (ER15.)

### **SUMMARY OF ARGUMENT**

Substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing employees’ terms and conditions of employment without first providing the Union notice and an opportunity to bargain over those changes. Well-settled law holds that, following the expiration of a collective-bargaining agreement, an employer violates that section of the Act when it implements changes to the existing terms and conditions of employment without entering into a new agreement or bargaining in good faith to impasse. The Company concedes that it unilaterally changed the existing terms, without bargaining to impasse, when it implemented the annual driver-background

check and began posting work schedules with only two weeks' advance notice.

The Company ignores the undisputed past practices that it altered and instead focuses exclusively on language in the collective-bargaining agreement in an attempt to justify its changes under multiple legal theories. That narrow focus overlooks the bedrock principle that, following the expiration of a collective-bargaining agreement, terms and conditions of employment continue in effect by operation of the Act, not the expired contract. *Litton Fin. Planning Div. v. NLRB*, 501 U.S. 190, 206-07 (1991). As the Company's various justifications are all based on a faulty premise, they all fail.

Finally, the Company claims that the Board should have deferred the dispute to arbitration, but under controlling Supreme Court precedent, arbitration is inappropriate to resolve disputes that arise after the expiration of a collective-bargaining agreement. Accordingly, the Board did not abuse its discretion in declining to defer to arbitration.

## ARGUMENT

### **SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING EMPLOYEES’ TERMS AND CONDITIONS OF EMPLOYMENT WITHOUT PROVIDING THE UNION NOTICE AND AN OPPORTUNITY TO BARGAIN**

#### **A. Standard of Review**

This Court upholds the Board’s order if the Board “correctly applied the law and its factual findings are supported by substantial evidence.” *Glendale Assocs. v. NLRB*, 347 F.3d 1145, 1151 (9th Cir. 2003) (citations omitted). In reviewing the Board’s application of the law, the Court accords “considerable deference” to the Board’s interpretation of the Act “as long as it is rational and consistent with the statute.” *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942, 945 (9th Cir. 2008) (internal quotation marks and citation omitted).

Applying that deference to contract interpretation, the Court recognizes that “[i]t is well within the NLRB’s authority to interpret collective bargaining agreements in order to determine whether or not unfair labor practices have been committed . . . . Where the NLRB’s interpretation is reasonable and not inconsistent with the Act’s policies, it is entitled to deference from this court.” *NLRB v. Int’l Bhd. of Elec. Workers, Local 11*, 772 F.2d 571, 575 (9th Cir. 1985) (citations omitted). *See also NLRB v. S. Calif. Edison Co.*, 646 F.2d 1352, 1362, 1367 (9th Cir. 1981) (affording deference to Board’s contract interpretation

because labor agreements differ from commercial contracts and fall within Board's special expertise).

The Court treats the Board's factual findings as conclusive if they are "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). "Substantial evidence is more than a mere scintilla, but less than a preponderance." *NLRB v. Int'l Bhd. of Elec. Workers, Local 48*, 345 F.3d 1049, 1053-54 (9th Cir. 2003). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Recon Refractory & Const. Inc. v. NLRB*, 424 F.3d 980, 986 (9th Cir. 2005).

**B. Under Well-Settled Principles, the Company Violated Section 8(a)(5) and (1) When It Unilaterally Implemented Two Changes**

An employer that makes substantial and material changes to existing terms and conditions of employment without giving notice to the union that represents its employees and giving it an opportunity to bargain over the matter violates Section 8(a)(5) and (1) of the Act, which makes it an unfair labor practice "to refuse to bargain collectively." *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962); 29 U.S.C. § 158(a)(5).<sup>3</sup> That principle applies after the expiration of a collective-bargaining

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<sup>3</sup> A refusal to bargain in violation of Section 8(a)(5) also derivatively violates Section 8(a)(1), which prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of" their rights under the Act, 29 U.S.C. § 158(a)(1). *See, e.g., Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 410 (9th Cir. 1977).

agreement and during negotiations for a new agreement that have not been completed. *Litton*, 501 U.S. at 198. Following the expiration of a collective-bargaining agreement, until the parties negotiate a new agreement or bargain in good faith to impasse, “[t]he employer is required to maintain [the] status quo.” *NLRB v. Auto Fast Freight, Inc.*, 793 F.2d 1126, 1129 (9th Cir. 1986) (quotation omitted).

While “the collective-bargaining agreement survives its expiration date for purposes of marking the status quo as to wages and working conditions,” *NLRB v. Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981), “the obligation not to make unilateral changes is rooted not in the contract but in preservation of existing terms and conditions of employment.” *Litton*, 501 U.S. at 206-07 (“terms and conditions continue in effect by operation of the Act”). Thus, the status quo is ascertained by reference to the substantive terms of the expired contract as well as existing practices.

“An employer’s practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of unit employees’ employment, which cannot be altered without offering their collective-bargaining representative notice and opportunity to bargain over the proposed change.” *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *see also NLRB v. Merrill & Ring, Inc.*, 731 F.2d 605, 608 (9th

Cir. 1984) (unilateral change to past practice violates Section 8(a)(5) and (1)); *Queen Mary Restaurants Corp.*, 219 NLRB 776, 793-94 (1975) (status quo defined by past practice), *enforced*, 560 F.2d at 408. A past practice is one that occurs “with such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or reoccur on a regular and consistent basis.” *Sunoco, Inc.*, 349 NLRB at 244.

Here, it is undisputed that the Company made two substantial and material changes to established practices without providing the Union advance notice and an opportunity to bargain over those changes, and without bargaining to impasse. The Company stipulated that its newly implemented annual driver-background check deviated from its established practice of only requiring such a check when an employee had a vehicular accident on the job. Additionally, the Company stipulated that it began posting work schedules two weeks in advance, after schedules had regularly been posted four months in advance for approximately 25 years. The Board properly found those stipulated facts to establish violations of Section 8(a)(5) and (1) of the Act. (ER14.) The Company does not challenge that analysis on appeal, but instead relies upon various defenses, all of which fail.

**C. The Company’s Asserted Defenses All Fail**

The Company’s primary defenses share the common—and incorrect—theme that this Court should focus exclusively on the language of the collective-

bargaining agreement, and ignore the undisputed and longstanding practices of the parties, in defining the status quo that the Company had a statutory obligation to maintain. That narrow focus on the contract manifests various erroneous theories: the Company claims that its changes fell within the scope of contractual language granting it the right to act unilaterally (Br. 19-31); that the contract includes language whereby the Union waived its right to bargain over the relevant issues (Br. 35-40); and that its changes were permissible because they were “consistent with the collective-bargaining agreement” (Br. 31-34). All those arguments are based on a flawed premise, and in each instance, the Company fails to show that the contract somehow permitted its undisputed departure from the stipulated past practice.

Apart from those claims, the Company contends that the Board should have deferred the dispute to arbitration, but that argument fails because the Company implemented the changes at issue after the parties’ agreement expired. (Br. 41-45.)

**1. The Board Interpreted the Act Rationally By Finding That the Expired Collective-Bargaining Agreement Did Not Grant the Company the Right to Make Unilateral Changes**

The Company argues that it was privileged to unilaterally implement the changes at issue because, under the contract coverage standard first adopted by the Board in *MV Transportation*, those changes purportedly fell “within the compass

or scope of contractual language granting [it] the right to act unilaterally.” 368 NLRB No. 66, slip op. at 2. (Br. 21.) Simply put, this argument fails because there was no contract in effect when the Company made the changes. By its own terms, *MV Transportation* does not impose the contract coverage standard on changes made after the expiration of a contract. Contrary to the Company’s urging, by declining to extend the principle enunciated in that case to the facts in this case, the Board interpreted the Act in a way that is “rational and consistent with the statute.” *See Local Joint Exec. Bd. of Las Vegas*, 515 F.3d at 945.

In *MV Transportation*, the Board examined an employer’s unilateral changes where the employer contended that the collective-bargaining agreement permitted unilateral action. 368 NLRB No. 66, slip op. at 1. The Board held that, “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).” *Id.* at 11. Significantly, the employer in that case made the unilateral changes while the collective-bargaining agreement was still in effect. *See id.* at 3. The Board carefully noted that its decision did not “speak[] to the status of contract provisions authorizing unilateral employer action after the contract containing the provisions has expired.” *Id.* at 15 n.36. Thus, *MV Transportation* explicitly did not decide whether the contract coverage standard applies to changes made after a contract’s expiration.

The Board did not decide that issue until the instant case, in which it held:

[P]rovisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration.

(ER12.) The Board fully explained its rationale for that policy choice, relying upon ordinary principles of contract law, including that “contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement,” (ER13 citing *M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 435 (2015)), and “any agreement that a particular provision survives the contract’s expiration must be stated ‘in explicit terms,’” (ER13 citing *Litton*, 501 U.S. at 207; *M&G Polymers*, 574 U.S. at 442). Additionally, the Board relied on the need to “respect[] the agreement reached by the parties as expressed in the plain language of the contract, including ‘the limits—or absence of limits—upon which the parties themselves have agreed.’” (ER13 (citing *MV Transportation*, 368 NLRB No. 66, slip op. at 10).) The Board’s approach ensures “that *the parties* are firmly in control of negotiating the parameters of unilateral employer action, as they should be.” *Id.* (emphasis in original).

The Company argues that the Board “was wrong in asserting that the ‘contract coverage’ standard does not apply where the contract has expired.” (Br. 27-29.) Aside from cursorily questioning the adequacy of the Board’s explanation (Br. 17, 19), the Company does not attack the Board’s rationale for its policy

choice. Instead, the Company urges that the Board should have adhered to two decisions from the D.C. Circuit which, in the Company's estimation, hold that the standard "is equally applicable to situations where the contract has expired." (Br. 28 citing *Tramont Mfg., LLC v. NLRB*, 890 F.3d 1114, 1120 (D.C. Cir. 2018), on remand, 369 NLRB No. 136 (Jul. 27, 2020), petition for review filed (7th Cir. Case No. 20-2805); *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 376 (D.C. Cir. 2017).) The Company's reliance on those cases is misplaced because neither holds that the contract coverage standard applies to an expired contract.

In one of those cases, *Tramont Manufacturing*, an employer contended that, under the contract coverage standard, it had no duty to bargain over the effects of layoffs because its employment handbook reserved the right to implement them. 890 F.3d at 1120. Observing that "the [u]nion never agreed to the layoff provision in the [employer's] handbook," the Board found the contract coverage standard inapplicable in "the absence of a negotiated contract," 365 NLRB No. 59, slip op. at 2 (Apr. 7, 2017), and the Court agreed, *Tramont Mfg.*, 890 F.3d at 1120 (remanded on other grounds). Thus, the case does not hold that the contract coverage standard applies to an expired contract.

The Company appears to cite *Tramont Manufacturing* merely for its statement in dicta that, "[w]here a collective-bargaining agreement—either operative or expired—is in play, the Board must, in considering the agreement's

scope, take into account the possibility that the union has chosen to ‘negotiate for a contractual provision limiting [its] statutory rights.’” (Br. 28.) Here, the Board did exactly that by holding that the Act permits an employer to unilaterally implement changes covered by a provision in an expired agreement only if “the agreement contain[s] language explicitly providing that the relevant provision would survive contract expiration.” (ER12.) Unfortunately for the Company, it bargained for no such survival language in its agreement with the Union.

In the other case cited by the Company, *Wilkes-Barre Hospital*, an employer contended that, under the contract coverage standard, it had no duty to bargain over the post-expiration cessation of longevity-based wage increases because the parties’ expired collective-bargaining agreement “expressly limited ... across-the-board raises to the term of the agreement.” 857 F.3d at 377. The court applied the contract coverage standard and, parsing longevity-based increases from across-the-board raises, rejected the employer’s argument. *Id.* Here, the Board considered *Wilkes-Barre Hospital* and distinguished it:

We acknowledge that the United States Court of Appeals for the District of Columbia Circuit has applied contract coverage in assessing the lawfulness of a postcontract expiration unilateral change. [Citations omitted.] However, the court did not address the analytically prior question of whether the contract coverage standard should be *applicable* postexpiration absent express language extending a contractual right of unilateral action beyond the contract’s term, and there is no indication in the court’s decision that the parties presented that question for the court to decide. Moreover, the court found that the expired contract did not cover the post-expiration change at

issue, so the outcome was the same as it would have been had the court deemed the standard inapplicable. ER13 n.8.

Thus, because the court was not presented with the issue of whether contract coverage applies to a post-contract expiration unilateral change, *Wilkes-Barre Hospital* cannot hold that the contract coverage standard applies post-expiration.

In any event, the contract provisions that the Company cites plainly do not encompass the changes it implemented. (Br. 23, 30-31.) As the Board observed in comparing Article 10.1 with the newly imposed annual driver-background check, that provision addresses only three topics: (1) whether employees must use their personal vehicles for company travel, (2) moving violations, and (3) the terms contained in an extra-record “vehicle use policy.” (ER14 n.10, ER25.) The provision says nothing about annual driver-background checks, the practice of requiring driver-background checks when a vehicular accident occurred, or any right of the Company to create any type of prerequisite to automobile travel. (ER25.)

Additionally, comparing Article 8.1 with the Company’s cessation of its practice to post work schedules four months in advance, the Board noted that provision merely sets a minimum amount of advance notice (two weeks) and requires schedules to be posted “as soon as they are known to the [e]mployer.” (ER14 n.9; ER24.) It does not include any language permitting the Company to withhold schedules until the minimum two-week notice period. And there is no

evidence that the Company suddenly became unaware of its future work schedules until two weeks before each work week, when schedules had been posted four months in advance for approximately 25 years, including by the Company for over a year after acquiring the predecessor employer and for 5 months after the contract expired. Even under the Company's broad interpretation of the contract coverage standard, the cited contract provisions contain no language encompassing the changes it made.

In sum, the Board reasonably decided that provisions in an expired collective-bargaining agreement cannot privilege unilateral changes "unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration." (ER12.) The Company fails to show that the Board's interpretation of the Act is not "rational and consistent with the statute," *see Local Joint Exec. Bd. of Las Vegas*, 515 F.3d at 945, fails to cite any authority that would require application of the contract coverage standard to the facts of this case, and fails to identify any language that would preserve the contract provisions on which it relies. Even if those provisions survived expiration, they do not cover the changes the Company made.

## **2. The Company Failed to Prove That the Union Clearly and Unmistakably Waived Its Right to Bargain Over the Changes**

The Company next argues that its unilateral changes were permitted because the Union purportedly waived its right to bargain over them via language cobbled

together from various contract provisions.<sup>4</sup> (Br. 35-40.) That argument fails because the Company did not carry its burden to prove such a waiver.

“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.” *MV Transportation*, 368 NLRB No. 66, slip op. at 12. “A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter.” *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1357 (D.C. Cir. 2008). Waiver is an affirmative defense and, as the Company concedes (Br. 35, 39), it is the employer’s burden to show that the waiver is “clear and unmistakable.” *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (declining to “infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated’”). Neither “general contractual provision[s],” nor “[e]quivocal, ambiguous language in a bargaining

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<sup>4</sup> The Company’s only asserted basis for waiver rests on language in the collective-bargaining agreement. (Br. 35-40.) The Company does not contest the Board’s finding that the stipulated facts do not establish waiver by any conduct of the Union. (ER18.) Therefore, the Company has waived any argument to that effect. *See* Fed. R. App. P. 28(a)(8)(A) (argument section of brief must contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (“[A]n issue . . . not discussed in the body of the opening brief is deemed waived” and cannot be raised for the first time in reply brief).

agreement,” are sufficient to demonstrate waiver. *Wilkes-Barre Hosp.*, 857 F.3d at 378 (citations omitted).

The Company attempts to demonstrate that the expired collective-bargaining agreement “establishes that the Union clearly and unmistakably waived the employees’ right to bargain over the issue of automobile driving background checks and schedule posting,” but is unable to identify any language to that effect. (Br. 35.) The Company’s recitation of the agreement’s zipper clause and management rights clause (Br. 36-38) ignores the well-settled principle, recognized by the Board (ER18), that those provisions do not survive the expiration of the agreement in the absence of contrary intent, not present here. *Success Vill. Apartments*, 348 NLRB 579, 629 (2006) (zipper clause does not survive expiration); *U.S. Can Co.*, 305 NLRB 1127, 1127 (1992) (management-rights clause does not survive expiration), *enforced*, 984 F.2d 864 (7th Cir. 1993); *Control Servs.*, 303 NLRB 481, 483-485 (1991) (same), *enforced*, 961 F.2d 1568 (3d Cir. 1992). Even if the agreement had not expired, generally worded zipper clauses and management rights clauses “will not be construed as waivers of statutory bargaining rights.” *See Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989) (compiling cases). The Company’s two cited arbitration decisions do not hold that “‘zipper’ clauses bar consideration [of], or extinguish . . . past practices” in the context of this case (Br. 37) because both concern alleged violations of a

contract during its term, not unilateral changes in violation of the Act following a contract's expiration. *See Safetrans Sys.*, 119 BNA LA 616, 620-21 (Duff, 2004); *Safeway, Inc.*, 120 BNA LA 1636, 1639 (Henner, 2004).<sup>5</sup>

In addition to the agreement's zipper clause and management rights clause, the Company refers to Articles 8.1 and 10.1, regarding hours of work and travel, respectively (Br. 36, 38), as evidence of waiver. However, it is not clear where in those provisions the Company reads an "explicitly stated" waiver. Instead of identifying any language indicating that the Union knowingly and voluntarily relinquished its right to bargain over driver-background checks or the posting of work schedules, *see S. Nuclear Operating Co.*, 524 F.3d at 1357, the Company summarily characterizes the relevant articles as "fairly detailed contract provisions" that should be understood to waive the Union's statutory rights. (Br. 36.) A cursory reading of each three-sentence provision, which merely set forth basic terms of employment pertaining to hours of work and travel, demonstrates the falsity of that characterization.<sup>6</sup> Ultimately, the Company's strained reading of

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<sup>5</sup> The Company's actual cite to *Safeway, Inc.*, 120 LA 1217, appears to be a typographical error, as that citation refers to an irrelevant arbitration. (Br. 37.)

<sup>6</sup> The Company briefly attempts to argue that Article 10.1's reference to the "vehicle use policy" ceded complete discretion to unilaterally impose driver-background checks. (Br. 38.) The Board properly rejected that claim, noting that the Company never introduced the vehicle use policy into evidence, and "so far as the record shows, Art. 10.1 does not address driver-background checks." (ER14 n.10.)

various provisions of the contract do not overcome the deference afforded to the Board's interpretation of labor agreements. *See S. Calif. Edison Co.*, 646 F.2d at 1367 (giving deference to Board's determination that language in labor agreement did not establish waiver).

The cases cited by the Company offer no more support for its position than its superficial textual analysis. (Br. 39-40.) In *Provena Hospitals*, the Board dismissed an allegation that the employer had violated the Act by unilaterally implementing a new disciplinary policy regarding attendance and tardiness because the union had waived its right to bargain over the matter. 350 NLRB 808, 815 (2007). In finding waiver there, the Board relied on a combination of contract provisions, including language giving the employer the right to "change reporting practices and procedures and/or to introduce new or improved ones," and "to make and enforce rules of conduct," and "to suspend, discipline, and discharge employees." Here, the Company can cite to no language in the collective-bargaining agreement that gave it the right to change, introduce, or make any practice, procedure, or rule at all, let alone a practice concerning driver-background checks or the advance posting of work schedules. The other cited case, *Gruma Corp. d/b/a Mission Foods*, is entirely inapposite as it contained no waiver analysis. 350 NLRB 336, 336 (2007) (employer violated Act by various unilateral changes, no Section 8(a)(5) allegation dismissed).

### **3. The Company's Claim That Its Unilateral Changes Are "Consistent With the Collective-Bargaining Agreement" Is Wholly Unsupported In Law**

The Company argues that its admitted unilateral changes to employees' terms and conditions of employment did not violate the Act because those changes were, in its words, "consistent with the collective-bargaining agreement." (Br. 31-34.) Despite repeating that phrase throughout that section of its argument, the Company never provides an accompanying citation for such a standard; rather, the Company appears to have drawn inspiration from two inapposite Board cases to weave its own doctrine. Those cases do not provide a foundation for the Company's novel doctrine, which must be rejected.

In the first case, *Bay Area Healthcare Group*, the Board dismissed an alleged violation of Section 8(a)(5) because the union had clearly and unmistakably waived its right to bargain over the employer's unilateral change to a leave policy. 362 NLRB 796, 800 (2015). The case is inapposite because here, as explained above (p. 23-27), the Company failed to prove waiver. Moreover, because *Bay Area Healthcare Group* turns on a waiver analysis, the case provides no support for the Company's novel theory that it may unilaterally change terms and conditions of employment as long as the changes are "consistent with the collective-bargaining agreement."

In the second case, *American Electric Power*, the Board found no unlawful midterm contract modification within the meaning of Section 8(d) of the Act because the employer had a “sound arguable basis” for its belief that the contract authorized its unilateral action. 362 NLRB 803, 803-05 (2015). As the Board explained here, the “sound arguable basis” test “applies only where the issue is whether the employer modified an existing collective-bargaining agreement—not where, as here, the issue is whether the [Company] unilaterally changed employment terms constituting mandatory subjects of bargaining after the expiration of the agreement.” (ER13 n.5, citing *Bath Iron Works*, 345 NLRB 499, 501 (2005), *aff’d sub nom. Bath Marine Draftsmen Ass’n v. NLRB*, 475 F.3d 14 (1st Cir. 2007).)

*American Electric Power* is inapposite for the same reason. Here, the Company implemented changes to the status quo after the agreement expired, which precluded an allegation of a midterm contract modification. Because *American Electric Power* involves an entirely separate test that applies only to midterm contract modifications, the case provides no support for the Company’s novel theory that it may unilaterally change terms and conditions of employment as long as the changes are “consistent with the collective-bargaining agreement.” Thus, as both *Bay Area Healthcare Group* and *American Electric Power* concern

separate established analyses, there is no support in Board law for the Company's effort to craft a new doctrine here.

The Company's emphasis on "consisten[cy] with the collective-bargaining agreement," a doctrine without support in the law, suggests an argument that the Company does not quite make explicit: it implies that its unilateral changes do not violate the Act because they do not breach the four corners of the contract between the parties. That is beside the point. The "expired contract has by its own terms released all its parties from their respective contractual obligations," and following expiration, "terms and conditions continue in effect by operation of [the Act]."

*Litton*, 501 U.S. at 206. The Company relies on *Laborers Health & Welfare Trust Fund For Northern California v. Advanced Lightweight Concrete Company* for the proposition that "the unilateral change doctrine requires employers 'to honor the terms and conditions of an expired collective-bargaining agreement,'" but honoring the terms of the contract is not enough. (Br. 34 quoting 484 U.S. 539, 544, (1988)). "The obligation not to make unilateral changes is rooted not in the contract but in preservation of existing terms and conditions of employment."

*Litton*, 501 U.S. at 206-07 ("[*Laborers Health and Welfare Trust Fund*, 484 U.S. at 539] demonstrates the distinction between contractual obligations and postexpiration terms imposed by the [Act]").

The Company risks leading this Court astray when it attempts to limit the definition of the status quo to only “the substantive terms of the 2015-2017 collective bargaining agreement.” (Br. 34.) The Company cites *E.I. Du Pont De Nemours*, 364 NLRB No. 113 at 5 (Aug. 26, 2016), overruled by *Raytheon Network Centric Sys.*, 365 NLRB No. 161 (Dec. 15, 2017), in support of that proposition, but ignores the Board’s subsequent statement in that case which refuses to so limit the status quo:

It is also well established that the status quo that must be maintained after a contract’s expiration includes extracontractual terms and conditions of employment that have become established by past practice.

*E.I. Du Pont*, 364 NLRB No. 113, slip op. at 6. The Company’s other citations are similarly blinkered. *See Intermountain Rural Elec. Ass’n v. NLRB* 984 F.2d 1562, 1567 (10th Cir. 1993) (looking beyond “contract language itself” to define status quo); *NLRB v. Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982) (no relevant past practice to examine). Furthermore, they ignore contrary in-circuit precedent. *See Merrill & Ring, Inc.*, 731 F.2d at 608 (employer violated Section 8(a)(5) and (1) by deviating from past practice); *Queen Mary Restaurants*, 560 F.2d at 408 (status quo defined by past practice).

Simply put, the Act required the Company to preserve the existing terms and conditions of employment after the collective-bargaining agreement expired, and the Company did not do so. As explained above (pp. 21-22), nothing in the

collective-bargaining agreement's language is "consistent" with the Company's changes. Regarding the posting of work schedules, based on the stipulated record, the Board properly found that the existing status quo was to post schedules four months in advance, and the Company departed from those existing terms by posting schedules only two weeks in advance. Even the contract language setting a two-week floor for advance notice is modified by subsequent language requiring the Company to post schedules as soon as they are known. Regarding driver-background checks, based on the stipulated record, the Board properly found that the existing status quo required a check only when an employee was involved in an accident on the job, and the Company departed from those existing terms by requiring annual checks. The contract says nothing about driver-background checks whatsoever.

**4. The Board Did Not Abuse Its Discretion By Finding Deferral Inappropriate Because the Company Implemented the Changes After the Collective-Bargaining Agreement Expired**

Finally, the Company argues that the Board erred by declining to defer this case to the arbitration procedure that the parties agreed to in the expired collective-bargaining agreement. (Br. 41-45.) As an initial matter, the Company urges an artificially heightened standard of review of this issue, stating that "[w]hether a plaintiff is required to exhaust remedies provided by the collective bargaining agreement prior to filing an action in federal court is a question of law reviewed de

novo.” (Br. 41.) In the case cited by the Company, this Court examined a lawsuit filed by an employee alleging a breach of a collective-bargaining agreement under Section 301 of the Labor Management Relations Act. *Sidhu v. Flecto Co.*, 279 F.3d 896, 898 (9th Cir. 2002). The standard of review applied in that case is irrelevant to this Court’s review of a decision by the Board whether to defer to the arbitration procedure, which “is limited to determining whether the Board has abused its discretion.” *Servair, Inc. v. NLRB*, 726 F.2d 1435, 1438-39 (9th Cir. 1984) (citations omitted). In light of controlling Supreme Court precedent holding that arbitration is inappropriate to resolve disputes that arise after the expiration of a collective-bargaining agreement, the Company cannot meet that high bar.

The Company relies on two foundational cases that outline the Board’s deferral policy, but neglects to mention that in each of those cases, the Board deferred to arbitration to resolve a dispute that arose during the term of a collective-bargaining agreement. *See United Technologies Corp.*, 268 NLRB 557, 558-59 (1984); *Collyer Insulated Wire*, 192 NLRB 837, 840, 842–43 (1971). Here, because the agreement and its arbitration provision had expired when the Company made its changes, deferral is inappropriate.

The Board’s general view, approved by the Supreme Court, is that “an arbitration clause does not [. . .] continue in effect after expiration of a collective-bargaining agreement.” *See Litton*, 501 U.S. at 200-01, 204-06. The Company

recognizes that general rule but contends that arbitration is appropriate because the hypothetical post-expiration grievance here would “assert rights that ‘arise under’ the expired agreement or may be ‘vested’ or ‘matured’ under that agreement.” (Br. 43.) That is incorrect.

In *Litton*, the Supreme Court explicitly rejected the view that all “post-expiration grievances concerning terms and conditions of employment remain arbitrable,” and instead limited its presumption of arbitrability to “to disputes arising under the contract.” 501 U.S. at 205. For example, an arbitrable post-expiration dispute that arose under a contract concerned an employer that ceased operations four days after its collective-bargaining agreement expired but refused to make severance payments called for in the agreement. *Id.* at 203 (discussing *Nolde Brothers, Inc. v. Bakery Workers*, 430 U.S. 243 (1977)). The Court found that dispute to be arbitrable because, even though the employer’s disputed action occurred after the contract expired, it “infringe[d] a right that accrued or vested under the agreement,” namely, a “form of deferred compensation for time already worked.” *Id.* at 206, 209.

By contrast, the Court found that a dispute concerning post-expiration layoffs did not arise under the agreement, even though the contract had provided that “in case of layoffs, lengths of continuous service will be the determining factor if other things such as aptitude and ability are equal.” *Id.* at 209. Because

“aptitudes and abilities can either improve or atrophy,” the Court found that the “employees lacked any vested contractual right to a particular order of layoff.” *Id.* at 210, 210 n.4. The Court pointed out that, in the absence of a contractual right, “the Union would remain able to argue that the failure to lay off in inverse order of seniority [. . .] amounted to an unfair labor practice, as a unilateral change of a term or condition of employment.” *Id.* at 210 n.4.

Here, despite claiming that a post-expiration grievance would assert a right that vested under the agreement, the Company fails to identify any such right. That is because the Company’s post-expiration unilateral changes to driver-background checks and advance posting of work schedules did not infringe on a contractual right. “Instead, under *Katz*, the Union ha[d] a *statutory* claim to continuance of the status quo with respect to those practices.” (ER14 (emphasis in original).) *See Litton*, 501 U.S. at 206 (“Under *Katz*, terms and conditions continue in effect by operation of the [Act]. They are no longer agreed-upon terms; they are terms imposed by law...”). As argued throughout this brief, the Company’s reliance on contractual language to justify its changes to the status quo is misplaced as a matter of law and basic contract interpretation. For these reasons, the Board properly adjudicated the unfair labor practice and did not abuse its discretion by declining to defer to the arbitration procedure in the parties’ expired agreement.

## CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Court should enter judgment enforcing the Board's Order in full.

/s/ Usha Dheenan

USHA DHEENAN

*Supervisory Attorney*

/s/ Brady Francisco-FitzMaurice

BRADY FRANCISCO-FITZMAURICE

*Attorney*

National Labor Relations Board

1015 Half Street, S.E.

Washington, D.C. 20570

(202) 273-2948

(202) 273-1967

PETER B. ROBB

*General Counsel*

ALICE B. STOCK

*Associate General Counsel*

RUTH E. BURDICK

*Acting Deputy Associate General Counsel*

DAVID HABENSTREIT

*Assistant General Counsel*

*National Labor Relations Board*

December 2020

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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NATIONAL LABOR RELATIONS BOARD )

Petitioner )

and )

NATIONAL ASSOCIATION OF BROADCAST )  
EMPLOYEES & TECHNICIANS, THE BROADCASTING )  
AND CABLE TELEVISION WORKERS SECTOR OF THE )  
COMMUNICATIONS WORKERS OF AMERICA, )  
LOCAL 51, AFL-CIO )

Intervenor )

v. )

NEXSTAR BROADCASTING, INC., d/b/a KOIN-TV )

Respondent )

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No. 20-71480

Board Case Nos.  
19-CA-219985  
19-CA-219987

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that this brief contains 7,501 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 365.

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 15th day of December 2020

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Respondent )

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No. 20-71480

Board Case No.  
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**CERTIFICATE OF SERVICE**

I hereby certify that on December 15, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that the

foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit  
David Habenstreit  
Assistant General Counsel  
NATIONAL LABOR RELATIONS BOARD  
1015 Half Street, SE  
Washington, DC 20570  
(202) 273-2960

Dated at Washington, DC  
this 15th day of December 2020