20-71480

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD
Petitioner

v.

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

v.

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES AND TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATION WORKERS OF AMERICA, AFL-CIO, CLC, LOCAL 51
Intervenor

On Petition for Review and Application for Enforcement of an Order of the National Labor Relations Board

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REPLY BRIEF OF RESPONDENT –EMPLOYER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

STATUTORY AUTHORITIES (presented in original Brief)

SUMMARY OF ARGUMENT IN REPLY

Despite the General Counsel's and the Intervenor Unions' arguments to the contrary, we submit that KOIN acted lawfully when it changed the time at which it posted employees' work schedules and its motor vehicle policy to require a drivers' license review. Without sufficient rationale to support its analysis, the Board failed to properly apply the 'contract coverage' standard that it adopted from well-developed circuit court case law as the proper means to analyze the lawfulness of unilateral changes. The Board also failed to properly apply other standards it has used in making this analysis in the past, including the 'clear and unequivocal waiver' or the arguable basis' standards. Applying these standards, which this Court may deem pertinent to this case instead of the 'contract coverage' standard, KOIN acted lawfully when it made the changes at issue herein.

The NLRB erred in not deferring this matter to arbitration under its' *Collyer/United Technologies'* doctrine to the extent that it had determined that any portion of the Consolidated Complaint had arguable merit, as such deferral would have been consistent with the national policy favoring the arbitration of labor disputes and given the involvement of vested rights in the alleged changes.

ARGUMENT IN REPLY

I. KOIN ACTED LAWFULLY WHEN IT CHANGED THE TIME AT WHICH IT POSTED EMPLOYEES' WORK SCHEDULE AND ITS MOTOR VEHICLE POLICY TO REQUIRE A DRIVERS' LICENSE REVIEW AS THE BOARD FAILED TO PROPERLY APPLY THE CONTRACT COVERAGE STANDARD AND OTHER STANDARDS IT UTILIZES TO DETERMINE WHETHER A UNILATERAL CHANGE VIOLATES THE NLRA

KOIN did not violate the National Labor Relations Act when it allegedly changed its practices regarding motor vehicle driving record background checks and schedule posting. The General Counsel for the NLRB and the Intervenor Union, and the NLRB itself, reach the opposite conclusion only by vastly downplaying the analytical significance of the collective bargaining agreement simply because it has expired. As a result, the Complaint should have been dismissed by the Board as a matter of law. This downplaying of the significance of the parties' collective bargaining agreement is evident in the application of all of the standards for determining the lawfulness of unilateral changes but is most evident in connection with the application of the 'contract coverage' standard. As discussed at length in our opening Brief the NLRB adopted a new test (the 'contract coverage' standard) in *MV Transportation* 369 NLRB No. 66 (2019) for analyzing whether or not a unilateral change by an Employer should be regarded as unlawful. For many years, the Board had applied the 'clear and unequivocal waiver' standard to this sort of analysis rejecting the application of the 'contract coverage' approach,

widely used in the Circuit Courts of Appeal in reviewing such cases. It is a better standard for a variety of reasons to be discussed below, but it's chief attribute is that it is more closely tied to honoring the nature and extent of the parties' bargaining relationship as it has manifested itself in a contract. For that reason, KOIN had argued to the ALJ and the Board to apply the standard, prior to the holding in *MV Transportation*, supra. However, the ALJ in proceedings below gave it short shrift and instead applied 'clear and unequivocal waiver' standard analysis and found that the unilateral changes at issue were unlawful. (ER016-020)

As we noted, the 'contract coverage' standard had been adopted and followed in a number of circuits, but most often in D.C. Circuit where it was applied with the following corollaries being used to determine whether unilateral changes were lawful: 1) that coverage under the standard would be viewed broadly, and 2) the standard applied after the contract expired. When the NLRB finally considered the instant case, it applied the 'contract coverage' standard, but it did not apply the second corollary principle as it should have. Instead, it held that the standard would not be applied given the fact that the contract had expired. (ER011)

The Board while fully endorsing and adopting the D.C. Circuit's contract coverage standard in *MV Transportation*, supra , as will be discussed below, failed to adequately explain why it should not apply when

the contract has expired even though the contract still serves as the required to be maintained status quo.

Additionally, we re-submit our contentions that the Board erred in not finding that KOIN acted lawfully since the Union had waived its right to bargain over the changes at issue and because the changes were arguably consistent with parties' agreement.

A. KOIN DID NOT VIOLATE THE NLRA BECAUSE THE CHANGES OCCURED ON TOPICS COVERED BY THE PARTIES' EXPIRED CONTRACT

As discussed at length in our opening brief, numerous federal appeals courts, most prominently the D.C. Circuit 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); *Chicago Tribune Co. v. NLRB,* 974 F.2d 933 (7th 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, and a change can be made on the covered topic without running afoul of the Act. The

NLRB for nearly twenty years, during successive Presidential administrations, resisted applying this particular approach to deciding whether an admittedly unilateral change was lawful.

However, on September 10, 2019, the NLRB adopted the "contract coverage" standard . *See MV Transportation, Inc.*, supra. It is a better standard for a variety of reasons to be discussed in our opening brief, but it's chief attribute is that it is more closely tied to honoring the nature and extent of the parties' bargaining relationship as it has manifested itself in a contract. For that reason, KOIN had argued to the ALJ and the Board to apply the standard, prior to the holding in *MV Transportation*, supra. As noted above, the 'contract coverage' standard had been adopted and followed in a number of Circuits, but most often in D.C. Circuit where it was applied with the following corollaries being used to find unilateral changes lawful: 1) that coverage under the standard would be viewed broadly, and 2) the standard applied after the contract expired. When the NLRB finally considered the instant case, it applied the 'contract coverage' standard, but it did not apply the second corollary principle as it should have. Instead, it held that the standard would not be applied given the fact that the contract had expired. (ER011) This is the error that places us in this court.

The NLRB below was wrong in asserting that the "contract coverage"

standard does not apply where the contract has expired. (ER012-015) The Board should have applied the 'contract coverage' standard in its' entirety as the D. C Circuit obviously did, to include situations where the contract had expired. *Wilkes- Barre Hospital Co. v. NLRB*, 857 F.3d 364, 376–377 (D.C. Cir. 2017) and *Tramont Manufacturing v NLRB* 890 F. 3d 1114 (D. C Circuit, 2018). Repeating the key passage from *Tramont* makes crystal clear that the D. C. Circuit, the primary proponent of the "contract coverage" standard, plainly and in a matter-of-fact way, recognized that the contract has expired, and nonetheless applied the standard to assess whether a violation of law had occurred:

> Instead, Tramont asserts that "[t]his situation is no different than one involving a current collective bargaining agreement, or a situation where an employer must maintain the status quo after expiration of a collective bargaining agreement." Reply Br. 9; *see also Wilkes-Barre Hospital Co. v. NLRB,* 857 F.3d 364, 376–77 (D.C. Cir. 2017) (**applying contract- coverage standard to the terms of a collective-bargaining agreement that had expired but that "continue[d]to 'define the status quo"' between the parties**, *id.* at 374 (quoting *Litton Financial Printing Division v. NLRB,* 501U.S. 190,206 (1991)). This is wrong. **Where 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." *Wilkes-Barre,* 857 F.3d at 376 Emphasis added. *Tramont Manufacturing v NLRB* 890 F. 3d 1114 (D. C Circuit, 2018)(Emphasis added)

As we noted in our initial brief, the Board in the instant case attempted

to distinguish these decisions by stating:

> 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 post-contract expiration unilateral change.** See *Wilkes- Barre Hospital Co. v. NLRB*, 857 F.3d 364, 376–377 (D.C. Cir. 2017); see also *Tramont Mfg., LLC v. NLRB,* 890 F.3d 1114, 1120 (D.C. Cir. 2018) (characterizing *Wilkes-Barre* as having applied the "contract-coverage standard to the terms of a collective-bargaining agreement that had expired but that continued to define the status quo between the parties") (alterations and internal quotation marks omitted).
>
> However, the court did not address the analytically prior question of whether the contract coverage standard should be *applicable* post-expiration 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.(ER013-014, fn.8)

We submit that Board's attempt to distinguish *Wilkes-Barre Hospital* and *Tramont* is not correct either in terms of precedent or analytically, which is, of course, more important to the instant case since we are in a different Circuit where the Court is, of course, not bound to follow the precedent from other circuits, but can give them persuasive effect if it so chooses. We ask the Court to do this applying all of the rules established by the extensive case law developing the contract coverage standard in the D.C. Circuit and other circuits applying the test over the past twenty-five years. Under the contract coverage standard, the contract is, of course, the key. It is used as a gauge or

barometer to determine the nature and extent of the parties' agreement. When the contract is allowed to expire, that gauge or barometer does not vanish completely but instead should serve as the anchor of analysis into the contours of the status quo, which the Employer is obligated to maintain during the hiatus until a new contract is arrived at. We submit this is the reason why the D.C. Circuit in *Tramont* and *Wilkes Barre*, clearly applied the contract coverage standard in the post-expiration setting obviously present in both cases.

In this regard, in response to the General Counsel's arguments, we assert that there can be no doubt that the D.C. Circuit applied the contract coverage standard in both *Tramont* and *Wilkes-Barre.* As to *Tramont,* the General Counsel attempts to skip over this point by arguing the case dealt with a situation where the Company was arguing that it's handbook applied in lieu of the expired contract of its' predecessor, and as result the Board in the case below determined that the contract coverage standard did not apply and arguing that the D. C. Circuit agreed with that.(GC Brief at p.18)*, when there is absolutely no indication in the decision that the Court ruled that the standard did not apply.* Forced to acknowledge that the Court clearly applied the contract- coverage standard in *Wilkes-Barre* to analyze a post-expiration unilateral change, the Board, and the General Counsel in support of its Order below seek to distinguish the precedential value of *Wilkes-Barre*

with a meaningless distinction. The point that the General Counsel and the Board raised to defeat the application of *Wilkes-Barre* is quite simply a meaningless straw-man argument created to spark a distinction, and not any sort of rationale to support this meaningless distinction. The D.C. Circuit, in *Wilkes-Barre* and *Tramont,* in applying the contract coverage never interposed the requirement that the contract contain express language extending "a contractual right of unilateral action beyond the contract's term", nor gave any indication in those and other cases why such a requirement would be necessary or desirable in applying the standard. Instead, the D.C. Circuit routinely applied the 'contract coverage' standard to changes made after the expiration of the contract in both of these cases. And we submit that the approach consistently applied by the D.C. Circuit is the correct approach as such a practice still honors the parties' agreement while the parties negotiate a new collective bargaining agreement. The Board gave no adequate explanation as to why it did not adopt this important corollary to the basic coverage standard. A prior decision from the D. C. Circuit 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 at 57, 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. "[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. It has also been observed that a dispute regarding whether a subject is "covered by" a collective bargaining agreement presents "an issue of contract interpretation," *Bath Marine Draftsmen's Ass'n v. NLRB,* 475 F. 3d at 26 (citing *Postal Serv.,* 8 F.3d at 836-37), and 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. Applying the 'contract coverage' standard to the two alleged violations herein, leads to the conclusion that the topics were certainly "covered by the parties' Agreement. The Board and its' General Counsel in its brief, completely disregard the persuasive case authority emanating from the circuit courts that have uniformly held that the topic of an alleged unilateral change was considered "covered" if it was mentioned or covered in the contract in a broad sense. The D.C. Circuit, the primary proponent of the standard, has routinely held that 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;

Connors v. Link Coal Co., 970 F. 2d 902, 906 (D.C. Cir. 1992).

Accordingly, in analyzing the Complaint's allegations that Company acted unlawfully by changes to its policies on motor vehicle driving record checks and schedule posting, the proper and recommended analysis for this Court to consider is whether those subjects were "within the compass of" the terms of the agreement. *Postal Serv.,* 8 F.3d at 838.

In the instant case, the subjects put at issue by the alleged changes were clearly 'covered' by the CBA. An analysis of the collective bargaining agreement reveals that the parties negotiated a lengthy section of the Agreement to deal with the subject of automobile travel by unit employees:

> 10.1 Automobile Travel: 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. (Emphasis added)

Another provision of the parties' collective bargaining agreement dealt with the subject of the posting of work schedules for unit employees:

> 8.1 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.

Only by engaging in wholesale flyspecking, can the Board and the General Counsel even attempt call into question the conclusion that these subjects were "covered". At most it enables them to argue that the contract was not followed to the letter due to the changes, but it is not reasonable to suggest that the subjects of motor vehicle use, and safety and advance schedule posting were not "covered" by the CBA in a broad sense suggested by the decisions cited herein.

Against this backdrop of undisputed facts and proper application of law, it is clear under the "contract coverage standard" that KOIN did not make an unlawful unilateral change to the terms and conditions of employment of employees represented by NABET when it made the changes alleged as unlawful in the Complaint. This is true because it cannot be disputed that the Union entered into a Collective Bargaining Agreement with the Company which clearly covered these issues. This Court should hold that the Board erred, as a matter of law in failing to find that the alleged changes do not "fall within the compass or scope of the contractual language," *Postal Serv.,* 8 F.3d at 838 and as a result were covered by the contract.

B. KOIN LAWFULLY MADE THE CHANGES AT ISSUE BECAUSE THE CONTRACT BETWEEN THE PARTIES CONTAINS A CLEAR AND UNEQUIVOCAL WAIVER OF THE DUTY TO BARGAIN OVER THESE ISSUES

Under the contract coverage standard as employed by the Board in *MV Transportation* supra, where an employer is defending against a unilateral-change allegation by asserting that contractual language privileged it to make the disputed change, the Board will assess the merits of this defense by first undertaking a limited review of whether the parties' collective bargaining agreement covers the disputed unilateral change. The Board stated that it will give effect to the "plain meaning of the agreement "specifically mention, refer to or address the employer decision at issue." *Id* .Then it will consider whether the union clearly and unmistakably waived its right to bargain over the change. Under this more expansive analysis, the Board will consider the parties' bargaining history, past practice, and relevant contractual language to determine whether the union waived its right to bargain regarding the disputed change. Thus, the clear and unmistakable waiver test is still relevant as a potential second-line defense to employers' unilateral action.

Recognizing that this Court may choose to employ the 'clear and unequivocal waiver standard to analyze the lawfulness of KOIN's changes, we submit that the Union clearly and unmistakably waived its' right to bargain over these issues during the term of the 2015-2017 CBA and after the expiration of that contract. The clearest support for this conclusion is found in the Board's seminal decision on the clear and unequivocal waiver issue in *Provena St.Joseph Medical Center*, 350 NLRB 808, 811–812 (2007) where it

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 to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failure to adhere to those requirements. In its' Brief to this Court the General Counsel attempts to distinguish, or at least diminish the significance of *Provena:*

> 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. GC Brief at p.25-26.

The General Counsel's attempt to distinguish *Provena* fails in numerous respects. In our numerous Briefs in these proceedings, we have consistently pointed to contract provisions that establish the union's waiver during the term of the contract and continue that waiver through and into the hiatus. These provisions are: 1) the management rights clause, 2) the complete agreement, or 'zipper clause', 3) the provisions dealing with the subjects of automobile travel and schedule posting. When read together in the context of the alleged as unlawful changes there can be no doubt under *Provena,* that a clear and unequivocal waiver was established. The most critical of these provisions in establishing waiver, and a parallel to *Provena*, is the agreement's Management Rights provision wherein the Parties agreed that the Company would be afforded broad management rights both express and reserved:

> 1.0 Management Rights: 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 (ER023)

As noted, in a fashion similar to *Provena's* cited management rights clause, the Company's rights to maintain order and efficiently manage the

Company" and "to establish working rules and to control station operations" were recognized.

In determining whether the Union waived its statutory rights, this Court should consider the language of the 2015-2017 CBA as well as the parties' course of conduct in determining whether a waiver has been given. *See S. Nuclear Operating,* 524 F.3d at 1357-58; *Honeywell Int'l,* 253 F.3d at 133-34. To satisfy its burden on this issue, 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). We contend that the language of the 2015-2017 CBA establishes that the Union clearly and unmistakably waived the employees' right to bargain over the issue of automobile driving background checks and schedule posting. We submit that a review of the 2015-2017 CBA establishes Union and the Company discussed various aspects of "automobile travel" and "schedule posting" and then "voluntarily relinquished [its] right to bargain over them." *S. Nuclear Operating,* 524 F.3d at 1358 by its' express agreement to fairly detailed contract provisions on automobile travel, schedule posting and then assenting to the complete agreement provision set out below:

26.2 Complete Agreement: 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.(ER026)

We submit that this provision, as a matter of law, sharply limits the agreed- upon relationship between the parties to one which is defined by the "four corners" of the agreement**.** The clear intent of this "complete agreement" provision is that the Company and the Union agreed that all prior agreements between the parties would be extinguished upon their entry into this agreement in July of 2015. Given this, it clear as a matter of contract interpretation and law, which this Court can engage in *de novo* that any practice allegedly established with respect to the advance posting of schedules a quarter in advance would not be enforceable against the Company as the Agreement's section 8.1 only required 14 days advance posting of schedules. It has been routinely held, as a matter of contract interpretation, that such 'zipper' clauses bar consideration, or extinguish such past practices or agreements. *Safetrans System*, 119 LA 616, 620-21. (Duff, 2004), *Safeway, Inc.* 120 LA 1630,1636. (Henner, 2004) (zipper clause barred consideration of past practice). The General Counsel in its brief, attempts to diminish the significance of this language arguing that these provisions do survive the expiration of the contract. As we have noted previously, as the the contract is an accurate and useful barometer in determining the extent

and scope of the parties' bargain with respect to gauging whether the Employer has preserved the status quo. And simply because the agreement has expired does not mean that a waiver previously given does not last into the hiatus at least as to defining the status quo required to be maintained during the hiatus. Examining the language of the parties' agreement provides an excellent example of how proper construction of contractual language results in extending a waiver into the hiatus. As noted previously at p.15, language of the automobile travel provision in the parties' Agreement which essentially ceded the area to management discretion: "**Automobile travel by Employees shall be covered by the Vehicle Use Policy in the Company's Employee Guidebook".** (ER025) It would be difficult to argue from a contract interpretation standpoint that this waiver faded away or was extinguished when the contract expired at least insofar as defining the status quo. It is, of course routinely accepted that the expired collective bargaining agreement is central to assessing the status quo. In a case decided this month, the Board stated:

> After a collective-bargaining agreement expires, an employer has a statutory duty to maintain the status quo on mandatory subjects of bargaining until the parties reach a new agreement or a valid impasse in negotiations. See *Triple A Fire Protection*, 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir.1998), cert. denied 525 U.S. 1067 (1999).[2] **The substantive terms of the expired agreement generally determine the status quo**. See *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (2019); *Hinson v. NLRB*, 428 F.2d

> 133, 139 (8th Cir. 1970). The Board may also consider any extracontractual past practices that are "regular and long-standing, rather than random or intermittent." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). *Asociacion de Empleados del Estado Libre Asociado de Puerto Rico and Union Internacional de Trabajadores de la Industria de Automoviles, Aeroespacioe Implementos Agricolas, U.A.W., Local 1850*. 370 NLRB No. 71 (Emphasis added)

While we acknowledge the case law that management rights and zipper clauses may not survive the expiration of a contract, they should certainly be assessed in determining identifying the status quo and whether it has been preserved particularly where their interpretation supports, as it does here,(in the case of the zipper clause) that past practices were extinguished upon entry into the agreement in the past or (in the case of the management rights clause) that the Company maintained certain inherent rights in the collective bargaining relationship.

We submit that the legal effect of negotiating these sections of the Agreement, (auto travel, management-rights and zipper), along with the provision on schedule posting establishes that the Union has 'clearly and unmistakably waived' any right to bargain over these topics beyond what was negotiated into the 2015-2017 Agreement before a change could be made. Given the established facts, and applying the case law regarding the waiver standard, this Court should determine that the changes made were lawful, as NABET had bargained away its' right to bargain over these changes before a

change could be made.

II. DEFERRAL TO ARBITRATION WOULD HAVE BEEN APPROPRIATE IN THIS CASE AND MORE CONSISTENT WITH NATIONAL LABOR POLICY

Upon review of the facts and argument above, we believe that this Court will properly conclude that no violation of the Act has occurred, concluding that no unilateral change in violation of sections 8(a)(1) and (5) can be established because the two alleged changes was either 'covered by the contract' or the subject of a 'waiver' by the Union as discussed above. But if this Court were to determine that any aspect of this Complaint has potential merit or requires a hearing on any factual issues present, we believe that it is crystal-clear based on long- established precedent, that this case should have been deferred to arbitration, rather than determined in an unfair labor practice proceeding.

A. REPLY TO GENERAL COUNSEL'S ARGUMENT ON STANDARD OF REVIEW

The General Counsel in its' brief challenges the applicability of the following standard to this section of our argument: "Whether 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. See *Sidhu v. Flecto Co.,* 279 F.3d 896, 898 (9th Cir. 2002), arguing instead that the Circuit's general standard of review for

reviewing discretionary agency decisions should apply. (GC Brief at p. 31). Given the importance of the national labor policy supporting arbitration and the similarity of the issue involved in *Sidhu,* we believe this Court should review this issue regarding the appropriateness of arbitration in this setting as a question of law to be considered *de novo*.

B. DEFERRAL WOULD HAVE BEEN APPROPRIATE DESPITE THE EXPIRATION OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT AS VESTED RIGHTS WERE INVOLVED

The Board's doctrine of pre-arbitral deferral is principally derived from the twin policy goals of promoting collective bargaining and of promoting the private resolution of disputes, through the grievance and arbitration mechanism set up in the typical collective bargaining agreement. *See United Technologies Corp.*, 268 NLRB 557, 558–59 (1984); *Collyer Insulated Wire*, 192 NLRB 837840, 842–43 (1971). Under this doctrine which has persisted as an integral part of the national labor policy for fifty years, so long as an alleged violation of the Act is covered by the parties' grievance-arbitration agreement, the Board will defer the dispute to that process if certain conditions are met. *Id.* Specifically, the Board will defer a potentially meritorious unfair labor practice charge to the parties' contractual grievance-arbitration procedure where: 1) the conflict arises out of a long and productive bargaining relationship, 2) there is no claim of employer enmity towards employees' exercise of protected rights, 3) the

arbitration clause covers the dispute at issue, 4) the employer manifests a willingness to arbitrate the dispute, and the alleged unfair labor practice lies at the center of the dispute. *United Technologies Corp.*, 268 NLRB at 558; *Collyer Insulated Wire*, 192 NLRB at 843.

As noted in all of our filing in the proceedings below and in this court, all these factors are present here. At the time of the changes, the parties had a long and productive relationship and there was no record claim of employer enmity toward the employees' exercise of protected rights. There was a collective bargaining agreement which contained a broad arbitration clause and the Company was willing to arbitrate the dispute underlying the dispute. While the Board rejected deferral here because the contract had expired, it denied deferral by ignoring the well-established principle that even though the contract had expired, arbitration was still appropriate to determine matters arising from rights established during the term of the agreement. *Litton Financial Printing Division v NLRB,* 501 U.S. at 198. In *Litton,* the Supreme Court held that where post-expiration grievances assert rights that "arise under" the expired agreement or may be "vested" or "matured' under that agreement, the duty to arbitrate may continue as to such agreements by operation of contract law. The General Counsel in its' brief , rejects the notion that such "rights" are not involved here. To the extent that the union has resisted the alleged changes , they have implicitly

endorsed the position that rights vested under the agreement, as to both changes. As to the change requiring a motor vehicle background check they are implicitly invoking a right to privacy , and as to the change with respect to schedule posting they are implicitly invoking a right to advance notice of schedule posting, a right important enough to be recognized by a new Oregon law. ORS Section 653.436(2018) These rights are certainly to be considered more "vested" than the seniority layoff provisions encountered in *Litton.*, which were not applied in the post-expiration context as requiring arbitration.

Given the presence of these factors, there is no doubt that this case should be deferred to the mechanism established by the Parties' Agreement. The Board reasons that since it is fundamental to the concept of collective bargaining that the parties to a contract be bound by the terms of their agreement, it would be detrimental to "jump into the fray" and preempt that agreement. *United Technologies Corp.*, 268 NLRB at 559.

Ultimately, the deferral doctrine is founded on a policy of holding the parties to their contractual obligations. And here NABET should be obligated to follow through on that obligation by the process that the parties agreed to for determining disputed over whether those obligations have been breached.

CONCLUSION

This Court should refuse to enforce the Decision of the National Labor Relations Board rendered in this case. The Decision and Order is not supported by substantial evidence and it was entered only by erroneously and arbitrarily failing to properly apply the law. The General Counsel and the Union have failed to sustain their burden that the Company has violated section 8(a)(1) or 8(a) (5) of the National Labor Relations Act as alleged. In the alternative, in the event that the Court sees merit to any of the allegations of the Complaint the matter should be deferred to arbitration. If it enforces the Order, this Court should affirm the Remedy ordered by the Board.

Dated: January 27, 2021

NEXSTAR BROADCASTING , Inc. d/b/a KOIN-TV

/s/ Charles W. Pautsch
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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NEXSTAR BROADCASTING , Inc. d/b/a KOIN-TV

/s/ Charles W. Pautsch
By: Its Attorney
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