This case was submitted for advice on whether the Board’s “contract-coverage doctrine” privileged the Employer’s unilateral decision to eliminate certain public transit services and subcontract them to a taxi service, and because the case presents the opportunity to place before the Board the issue of whether effects bargaining is subject to the contract-coverage test. We conclude that the Employer was not obligated to bargain over the decision to make the changes at issue. Nonetheless, we conclude that the Employer violated Section 8(a)(5) under extant Board law by failing to bargain about the effects of this decision. The Region should therefore issue a Section 8(a)(5) complaint, absent settlement, alleging an effects-bargaining violation and an unlawful failure to provide requested information relevant to effects bargaining.

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1 847 F.3d 547, 554 (7th Cir. 2017).
FACTS

A. Background

The Employer is a nationwide company that provides bus transportation/paratransit services for disabled or elderly persons for various municipalities and other entities. This case concerns the Employer’s paratransit program contracted through the Los Angeles Department of Transportation (LADOT), also known as the “City Ride” program.

City Ride does not provide transportation along fixed routes; rather, clients call and pre-schedule rides to various locations (doctor’s appointments, grocery stores, etc.) within the greater Los Angeles area. The Employer’s City Ride call center employees receive clients’ calls and communicate the rides needed to the dispatchers, who create and assign designated routes for the City Ride drivers. City Ride drivers call or text their dispatchers the day before their shift to determine what time they need to report to work and what their route will be that particular day. At times, and as needed, dispatchers adjust drivers’ routes as rides are cancelled or added throughout the day.

The Union represents the City Ride drivers, call center employees, and dispatchers. The call center employees and drivers are covered under one collective-bargaining agreement. The dispatchers and road supervisors employed by the City Ride program are covered under a separate agreement along with other Union-represented employees.

The Union has represented the above-referenced employees since approximately 2013. The current collective-bargaining agreements went into effect in about 2014 for a term of five years. The parties extended those agreements in 2019, and they are now in effect through 2022.

B. Relevant Provisions in the CBAs

The following excerpts are the relevant provisions in both collective-bargaining agreements:

ARTICLE V - MANAGEMENT RIGHTS

Section 1 - Company Rights. Except as expressly modified or restricted by a specific provision of this Agreement, all statutory and inherent managerial rights, prerogatives and functions are retained and vested
exclusively in the Company, in accordance with its sole and exclusive judgment and discretion, including, but not limited to these rights:

(c) To set . . . the services to be rendered, to maintain the efficiency of operations; to determine the personnel, methods, means, and facilities by which operations are conducted . . .
(d) To . . . expand, reduce, alter, sub-contract, combine, transfer, assign, or cease any job, department, operation, or service, to control and regulate the use of vehicles, facilities, equipment, and other property of the Company or the client.

(g) [T]o carry out the lawful directives of the customers to whom the Company contracts its services.

ARTICLE XXVII - GENERAL CONDITIONS

Section 1 - Flexibility. The Union agrees for itself and on behalf of its members that the Company must enjoy flexibility of operations, and therefore, may utilize an employee to the degree that no employee's compensated time shall be waived and employee seniority shall prevail.

Section 2 - Revenue Contract to Prevail. The relevant portions of the revenue contract between the Company and its customers under which an employee of the Company performs work shall be incorporated by reference into this Agreement, to the extent only that such provision imposes terms, conditions or requirements upon the Company and its employees that are not required under the terms of this Agreement. In a situation in which a provision of this Agreement is in conflict with any of the provisions of such revenue contract, the relevant portions of the revenue contract shall prevail for all purposes.

C. Alleged Unilateral Changes

In response to a high volume of trip denials due to an insufficient number of drivers, on January 18, 2019, LADOT sent an e-mail to the Employer mandating key changes to the City Ride program. These changes included the utilization of a Taxi Demand Overflow Service and transferring eleven-to-twenty-mile City Ride trips to this taxi service. LADOT informed the Employer that while 95% of City Ride trips are between one and ten miles, it was eliminating eleven-to-twenty-mile trips for City Ride drivers, and this small percentage of trips would be provided under the Taxi Demand Overflow Service. LADOT also informed the Employer that, by eliminating the longer City Ride trips, the one-to-ten-mile trips would become more efficient and
on time. LADOT directed the Employer to assure that those changes take effect beginning April 1, 2019.

In April 2019, the Employer and LADOT entered into the Third Amendment to the City Ride Contract. It states that the Taxi Paratransit Overflow Service is intended to “supplement current Cityride . . . service and meet the demand for increased service.” It also states that “the goal of Cityride Paratransit Taxi Overflow service is to reduce the high number of trips denied due to lack of capacity,” with a requirement that the Employer “reduce the total number of trip denial[s] to three percent per year.” Denials are defined as those trips that cannot be scheduled within a window of one hour before or after the requested time. Pursuant to the Employer’s agreement with LADOT, “[a]ny unmet trip[] requests will be transmitted from [the Employer] to the taxicab company(ies).” Such unmet trip requests have included eleven-to-twenty-mile trips, referenced in LADOT’s January 2019 communications with the Employer, and other trips that City Ride bargaining unit drivers have been unable to service due to a lack of capacity. Pursuant to the Third Amendment to the Contract and the City’s directive to subcontract for taxi driving services, the Employer entered into City Ride Contract No. C-127028 Subcontractor Agreement with LA Checker Cab Co. (“Checker”), effective April 1, 2019.

The Employer did not give the Union advance notice of its decision to end the eleven-to-twenty-mile City Ride trips or subcontract that work. After the Union learned about the change from unit employees in June 2019, the Union’s Business Representative contacted the Employer’s General Manager and told the Employer was obligated to notify the Union and bargain over any changes to unit work. The General Manager responded that he did not think this was necessary because the City had mandated the change, adding that it did not affect unit employees because the use of taxis was just to handle overflow work. The Business Agent disagreed that the change did not impact unit employees. He also stated that, in view, the Third Amendment to the Contract with LADOT permitted the Employer to subcontract the work but did not require the Employer to do so. On August 16, the day the Union filed the original charge in this matter (which did not include an information allegation), the Union sent the Employer a letter demanding bargaining and requesting various contracts, documents, and other communications between the Employer and the City. The Employer refused to provide this information, describing it as “improper prehearing discovery.”

ACTION

We conclude that the Employer lawfully changed the parameters of the City Ride program at the direction of LADOT, including subcontracting eleven-to-twenty-mile City Ride trips to a taxi service per the City’s requirement to reduce trip denials, because the management rights clause explicitly covers subcontracting and the General Conditions provision states the Employer’s revenue contracts shall prevail
when in conflict with a provision in the collective-bargaining agreement. We also conclude, under extant Board law, that the Region should issue complaint, absent settlement, alleging the Employer violated Section 8(a)(5) by failing to bargain over the effects of that decision and for failing to provide information relevant to effects bargaining. \((6) (5)\)

In *MV Transportation*, the Board adopted the “contract coverage” standard to determine whether an employer’s unilateral action is permitted by a collective-bargaining agreement.\(^5\) The contract coverage standard provides that the Board will now give “effect to the plain meaning of the relevant contractual language, [and] apply ordinary principles of contract interpretation,” and that it “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.”\(^6\) The Board clarified that the contract need not “specifically mention, refer to or address the employer decision at issue” because so long as the “contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally.”\(^7\)

While the Board has traditionally treated effects bargaining separately from decisional bargaining, and it did not change that dichotomy in *MV Transportation*, the Board noted in *Columbia College Chicago*\(^8\) that the Seventh Circuit and the D.C. Circuit had found that where an employer has no decisional-bargaining obligation pursuant to the contract-coverage doctrine, it also has no duty to bargain over the

\(^{5}\) 847 F.3d at 554.

\(^{4}\) 433 F.3d at 838-39.

\(^{5}\) *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 1, 11 & n.28 (Sept. 10, 2019).

\(^{6}\) Id., slip op. at 11.

\(^{7}\) Id.

\(^{8}\) 368 NLRB No. 86, slip op. at 2 n.7 (Sept. 30, 2019).
effects of that decision unless the contract or the parties’ bargaining history indicates that the parties intended to treat effects bargaining separately from bargaining over the decision itself. The Board stated that these courts’ positions had “considerable force” and would warrant “serious consideration” in a future appropriate Board case.

In *Columbia Coll. Chicago v. NLRB*, the Seventh Circuit applied the contract-coverage analysis and found that a management-rights clause granting a college the right to “modify . . . all aspects of educational policies and practices,” including the “modification [or] alteration . . . of any . . . course,” enabled the college to lawfully reduce the credit hours for some courses unilaterally. The court also found that the college lawfully refused to bargain over the effects of that decision—including the consequential reduction in professors’ pay—because there was no indication in the contract or the parties’ bargaining history that the parties intended to treat effects bargaining separately from the college’s decision-making rights. In particular, regarding the parties’ bargaining history, the court observed that the college had made many credit-hour changes in previous years without any corresponding union demands for effects bargaining. The court also rejected the union’s argument that the college’s prior unsuccessful proposals to insert explicit effects-bargaining waivers into the contract showed that the college had not understood their agreement to have precluded effects bargaining, because “the rejected modifications can also be understood as attempts by [the college] to clarify its pre-existing rights using exceedingly clear waiver language.” It therefore appears that the Seventh Circuit would require “definitive evidence” of the parties’ intent to treat effects and decision bargaining separately, placing a fairly high burden on the party so asserting. The court provided little explanation on its rationale for adopting this standard regarding effects bargaining in a contract-coverage context, other than stating that, where the employer’s unilateral action is covered by the contract, the parties have already

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9 *Id.* (citing *Columbia Coll. Chicago v. NLRB*, 847 F.3d at 554; *Enloe Med. Ctr. v. NLRB*, 433 F.3d at 838-39).

10 *Id.*

11 847 F.3d at 553.

12 *Id.* at 554.

13 *Id.*

14 *Id.* at 554 n.7.

15 *Id.*
“bargained over all of their respective rights and duties” regarding that action, absent definitive evidence to the contrary.\textsuperscript{16}

In \textit{Enloe Med. Ctr. v. NLRB}, the D.C. Circuit observed that the Board had acknowledged an employer-hospital could unilaterally institute a new mandatory on-call policy for nurses because the collective-bargaining agreement authorized the hospital to manage employees’ schedules, including to “compensate nurses for on-call and call-back work”; contained a broad management rights clause stating the hospital “retains the complete and exclusive authority, right and power to manage its operations and to direct its [n]urses”; and contained another provision that allowed the hospital to “revise, withdraw, supplement, promulgate, and implement policies during the term of the agreement, ‘as it deems appropriate.’”\textsuperscript{17} However, the court rejected the Board’s conclusion that, even though the contract gave the hospital the right to make a decision on this matter unilaterally, the hospital was obligated to bargain over the effects of that decision because the agreement was silent regarding effects and there was no clear and unmistakable waiver of the union’s right to effects bargaining.\textsuperscript{18} The D.C. Circuit thus held:

Whether the parties contemplated that a collective bargaining agreement would treat the effects of a decision separately from the decision itself is just as much a matter of ordinary contract interpretation as is the initial determination of whether the agreement covers the matter altogether. It would be rather unusual, moreover, to interpret a contract as granting an employer the unilateral right to make a particular decision but as reserving a union’s right to bargain over the effects of that decision. This is not to say that such an interpretation is inconceivable, but it would seem that there would have to be some language or bargaining history to support the proposition that the parties intended to treat the issues separately.\textsuperscript{19}

Here, we initially conclude that the Employer’s unilateral reduction of the City Ride service area and subcontracting of those trips to Checker falls within the “compass or scope” of the parties’ collective-bargaining agreements. First, the management rights clause—which gives the Employer broad discretion to make

\textsuperscript{16} \textit{Id.} at 554 \& n.7.

\textsuperscript{17} 433 F.3d at 836.

\textsuperscript{18} \textit{Id.} at 837.

\textsuperscript{19} \textit{Id.} at 838-39.
decisions regarding subcontracting, transferring work, controlling the use of vehicles, maintaining operational efficiency, etc.—clearly covers the Employer’s unilateral actions. Second, Section 2 of the General Conditions provision also covers the Employer’s actions.\(^{20}\) It explicitly incorporates by reference provisions of the Employer’s revenue contracts imposing “terms, conditions, or requirements” on the Employer or its employees that are not required by the collective-bargaining agreement, and states that those portions of the revenue contract “shall prevail for all purposes.” The Third Amendment to the City Ride Contract clearly requires the Employer to “reduce the total number of trip denial[s] to three percent per year,” and LADOT’s communications to the Employer before the Third Amendment was executed explained that reducing service to one-to-ten-mile trips and subcontracting the eleven-to-twenty-mile trips was how LADOT wanted to achieve that goal.

We reject the Union’s assertion that because the Third Amendment to the Contract did not specifically require a reduction in service area, the Employer’s action was not covered by Section 2 of the collective-bargaining agreement’s General Conditions provision. Under the totality of the circumstances, the mere fact that the Third Amendment to the City Ride Contract did not recite LADOT’s specific service-reduction and subcontracting requirements does not change our conclusion that the General Conditions provision “covered” the Employer’s decision to act unilaterally. But even were we to accept the Union’s argument regarding the General Conditions provision, we conclude that the management rights clause’s subcontracting language alone privileged the Employer’s unilateral action. Accordingly, the decision-bargaining allegations should be dismissed, absent withdrawal.

Although the Employer lawfully subcontracted the eleven-to-twenty-mile City Ride trips, in the absence of any evidence that the Union clearly and unmistakably waived its right to effects bargaining, we conclude the Employer violated Section 8(a)(5) by failing to bargain over the decision’s effects. We also conclude that the Employer unlawfully refused to provide information relevant for effects bargaining—

\(^{20}\) Although the General Conditions provision is not included in the contract’s management rights clause, it in effect addresses the Employer’s right to act unilaterally. In any event, the \textit{MV Transportation} contract coverage test is not limited to management rights clauses. The Division of Advice has found a variety of contract provisions to permit unilateral employer action under the contract coverage test—including provisions concerning group insurance, discipline and discharge, hours of work, wages and hours, and maintenance of standards—even though they were not included in a management rights clause. Finally, because we have found that the Employer had no decision-bargaining obligation under the contract coverage standard, it is unnecessary to perform a “clear and unmistakable waiver” analysis. \textit{MV Transportation, Inc.}, 368 NLRB No. 66, slip op. at 11.
the requests numbered 1, 2, and 5. In that regard, we reject the Employer's argument that the pre-trial discovery prohibition described in *WXON-TV*, 289 NLRB 615, 617-18 (1988), and the cases cited therein, applies here. The Union requested bargaining well before it made its information request, and it did not amend the charge to include an information request allegation until after the Employer refused to provide any of the information requested.

The Union submitted evidence of past practice, but we conclude that this also fails to show the requisite intent. This evidence includes three instances of service reductions that allowed bargaining for transfers in lieu of layoffs, but none of them occurred under the current collective-bargaining agreements. The Union also presented evidence that, during the current contracts' terms, the parties engaged in effects bargaining regarding a service increase, the creation of a new program, and the inclusion of new employees in the unit, but none of these instances involved subcontracting or other Employer actions covered by the contract language at issue here. Two other incidents involved aborted attempts to implement a new handbook and to institute a new technology, but these appear to have constituted mid-term bargaining rather than effects bargaining. Therefore, there is no "definitive" evidence that the parties intended to treat the obligation to bargain over the effects of a decision covered by the contract separately from bargaining over the decision itself.

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21 Item 1 of the information request sought “[a]ny and all contracts, amendments, memoranda of understanding, or agreements between [the Employer] and the City or any other entity regarding the City Ride program.” Item 2 sought “[a]ny and all contracts, amendments, memoranda of understanding, or agreements between [the Employer] and any taxi cab company or other entity regarding the City Ride program.” Item 5 sought “[d]ocuments reflecting the number of hours worked by each bargaining unit member on a weekly basis since August 1, 2016.”

22 *Columbia Coll. Chicago*, 847 F.3d at 554; *Enloe*, 433 F.3d at 838-39.
Based on the foregoing, the Region should dismiss, absent withdrawal, the allegation that the Employer violated Section 8(a)(5) by unilaterally deciding to eliminate the eleven-to-twenty-mile City Ride trips and subcontract those trips to Checker; issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by failing to bargain over the effects of that decision and failing to provide information relevant to effects bargaining.  

/s/

R.A.B.

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