2nd Circ. Ruling Signals Decisive Shift To NLRB Contract Test

By **Frederick Braid** (August 26, 2021)

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When has a party waived its right to bargain over a mandatory subject of collective bargaining? Looking at it from the other side, when is a party free to act unilaterally with respect to a term or condition of employment?

For 70 years, the National Labor Relations Board employed a "clear and unmistakable waiver" test in making such determinations. This was first articulated by the NLRB in 1949 in Tide Water Associated Oil Company,[1] and it was eventually approved more than three decades later, in 1983, by the U.S. Supreme Court in case Metropolitan Edison Co. v. NLRB.[2]

Since then, the waiver test has been under increasing attack in the appeals courts.[3]

Finally, in MV Transportation Inc. in 2019, the board abandoned the waiver test in favor of the contract coverage test.[4]

And earlier this month, in International Brotherhood of Electrical Workers, Local Union 43 v. NLRB,[5] the U.S. Court of Appeals for the Second Circuit became the first court to explicitly approve the NLRB's recently adopted contract test.[6]

Generally, the waiver test requires a finding that negotiations over the specific subject matter in dispute has been clearly waived.

This requires that the language at issue be sufficiently specific to establish a waiver, which was criticized as "impossible to meet" in practice by the National Labor Relations Board's MV Transportation opinion, quoting the U.S. Court of Appeals for the District of Columbia Circuit's 1992 ruling in Department of the Navy v. Federal Labor Relations Authority.[7]

In 2016, the D.C. Circuit in Heartland Plymouth Court MI LLC v. NLRB went as far as to sanction the board for continuing to seek enforcement of its waiver test after the court rejected it.[8]

Under the waiver test, even though the parties might have addressed a subject in their collective bargaining agreement without restricting an employer's actions with respect to the subject, the NLRB required a finding that the CBA specifically and unequivocally authorized the employer to take unilateral action regarding the matter, thereby manifesting a union's waiver of negotiations over it.

In contrast, the board described its newly adopted contract test in MV Transportation Inc.:

> [T]he Board will ... determine whether the parties' collective-bargaining agreement covers the disputed unilateral change ... [and] will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of contract interpretation; and the Board will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally. In applying this standard, the Board will be cognizant of the fact that "a collective bargaining agreement establishes principles to govern a myriad of fact patterns," and that "bargaining parties [cannot]

> anticipate every hypothetical grievance and ... address it in their contract." Accordingly, we will not require that the agreement specifically mention, refer to or address the employer decision at issue.[9]

The practical effect of the contract test is to give employers with collective bargaining agreements covering a subject matter greater flexibility with issues concerning that subject matter that were not foreseen when the collective bargaining agreement was negotiated.

Under the waiver test, the burden was on the employer to defend itself against a charge of refusal to bargain in good faith for having made a unilateral change by proving that there was a clear and unmistakable waiver by the union to bargain over the specific subject matter.

Even if the subject matter were generally covered in the agreement and there was no restriction precluding the employer's unilateral action with respect to the specific matter at issue, the board would find a violation absent a specific, unequivocal waiver by the union with respect to that specific matter.

Coupled with the inability to compel negotiations during a contract term over a subject matter covered by the agreement,[10] this left employers without the ability to address new circumstances absent a union's willingness to negotiate during the term of the agreement.

Under the contract test, the employer is more easily able to act unilaterally if the subject is generally covered in the agreement and the agreement does not restrict the employer from taking the unilateral action implemented.

The burden would be on the union to prove that the agreement precluded the employer from acting unilaterally by pointing to specific limiting language in the agreement.

Only where the disputed action does not come within the compass or scope of a contract provision authorizing unilateral action by the employer does the board continue to use the waiver test.[11]

In its analysis abandoning the waiver test in favor of the contract test, the board found that the waiver test impermissibly undermined numerous policies by doing the following:

- It put the board in judgment of the parties' contract terms in violation of longstanding Supreme Court authority;

- It undermined contractual stability by perpetuating ongoing negotiations after the parties had reached a settlement;

- It altered the deal made by the parties in settling their negotiations;

- It resulted in conflicting contract interpretations by the board and the courts as the board strained contract interpretation to avoid giving effect to the plain language of the agreements before it; and

- It undermined grievance arbitration by encouraging unions to avoid the grievance procedure to resolve contract disputes by arbitration in favor of framing the issue in terms of unfair labor practice charges alleging unilateral action in violation of the duty to bargain in good faith and pursuing relief at the board.

The board explained that the contract test would remedy these deficiencies in the waiver test by

> examin[ing] the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally.[12]

Although the IBEW Local 43 case explicitly approved the board's contract test, the Second Circuit did find that the board misapplied its test.

At issue in the case was the employer's temporary establishment of a mandatory six-day workweek to address specific service issues following the acquisition of a competitor in order to more closely align the performance of the combined entities.

The collective bargaining agreement's management rights provision gave the employer broad rights to operate its business and direct its workforce, including specifically "the right to ... determine the reasonable amount and quality of work needed ... subject, however to the provisions of this agreement."

In addition, the agreement provided that "[t]he workweek shall be forty (40) hours during any one workweek or eight (8) hours during any workday" in a five-day workweek from Monday to Friday for some employees, and from Monday to Saturday for others.

There was also provision for four-day workweeks.

Lastly, there was an overtime provision for time and a half an employee's regular rate for hours worked beyond eight or 10 in a day, respectively, for five- and four-day workweeks, and beyond 40 hours in any workweek.

The board found that the management rights provision giving the employer the right to determine the amount of work needed, coupled with its obligation to pay overtime for hours worked beyond the daily and weekly limits, allowed it to institute the mandatory six-day workweek unilaterally.

However, the Second Circuit found that this ignored the specific restrictions in the agreement that the workweeks were to be either four or five days, noting both that the management rights provision was explicitly limited by other provisions of the agreement and that a cardinal principle of contract construction is to give specific and exact terms greater weight than general terms.

The contract test gives greater flexibility to employers to address circumstances that were unforeseen at the time the collective bargaining agreement was negotiated.

As long as the parties have negotiated over a subject and the matter at issue can be said to fall within the compass or scope of the agreement without any restriction on the employer to act unilaterally, the employer will be able to assure that such circumstances will be addressed in a timely manner.

This does not necessarily mean that employers will address such circumstances unilaterally, even though they may have the right to do so under the contract test.

Relieved of the burden of having "near-supernatural prescience ... to have foreseen ... what ... issues would arise"[13] after negotiating a collective bargaining agreement, as the D.C. Circuit has criticized the waiver test, an employer is free to seek the union's input to address such circumstances, knowing that ultimately, it can act unilaterally in the absence of agreement.

Knowledge of such reality might motivate a more serious attempt by unions to reach an accommodation in addressing such circumstances.

Will the abandonment of the 70-year-old waiver test stick? Will it survive the changes of administration that alter the board's political alignment?

Hopefully, the D.C. Circuit's sanctioning of the board for continually seeking enforcement of its remedial orders based on the waiver test, as well as the rejection of the waiver test by several other circuits, will ensure that the contract test will have some permanence, especially given the Second Circuit's acknowledgment that its basis is supported by a thorough and carefully reasoned opinion of the board.

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[1] Tidewater Oil, 85 NLRB 1096 (1949).

[2] Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983).

[3] E.g., NLRB v. Postal Service, 8 F.3d 832 (D.C. Cir. 1993); Chicago Tribune Co. v. NLRB, 974 F.2d 933 (7th Cir. 1992); Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14 (1st Cir. 2007); Electrical Workers Local 36 v. NLRB, 706 F.3d 73 (2d Cir. 2013).

[4] MV Transportation, Inc., 368 NLRB No. 66, 2019 WL 4316958.

[5] International Brotherhood of Electrical Workers, Local Union 43 v. National Labor Relations Board, __ F.4th __, 2021 WL 3556083 (2d Cir. 2021).

[6] Although the District of Columbia Circuit made passing reference to MV Transportation and the contract test in addressing an employer defense to a bargaining order in DuPont

Specialty Products v. NLRB, ___ F.4th ___, 2021 WL 3579384, about a month before the Second Circuit decided IBEW Local 43, the Second Circuit expressly approved of the Board's adoption of the contract test in MV Transportation as "thorough and carefully reasoned." ___ F.4th at ___, 2021 WL 3556083 *6. Interestingly, in both cases, the only cases to reach the courts of appeal in enforcement proceedings to date, the courts denied employer attempts to justify unilateral action under the contract test, reversing the Board and vacating its decision in IBEW Local 43.

[7] 368 NLRB at ___, 2019 WL 4316958 *5.

[8] Heartland Plymouth Court MI, LLC v. NLRB, 838 F.3d 16 (D.C. Cir. 2016).

[9] MV Transportation, 368 NLRB at ___, 2019 WL 4316958 *17 (citation omitted).

[10] 29 U.S.C. § 158(d).

[11] MV Transportation, 368 NLRB at ___, 2019 4316958 *2.

[12] Id.

[13] Id. at ___, 2019 WL 4316958 *6, citing Department of Navy v. NLRB, 962 F.2d at 59.