www.morganbrown.com

CLIENT ALERT: NLRB Alters Longstanding Bargaining Rights Doctrine – By Keith H. McCown

I. NLRB Issues Landmark Decision

In a major change of labor law doctrine, the National Labor Relations Board ("the Board"), in *MV Transportation, Inc*., 368 N.L.R.B. No. 66 (September 10, 2019), abandoned the Board's longstanding requirement for a "clear and unmistakable" waiver of union bargaining rights before an employer can make unilateral changes during the term of a collective bargaining agreement.

Now, the Board will make a relatively cursory examination of contract language only to determine whether there was "contract coverage" that generally allowed the unilateral action in question. If there is "contract coverage," then no bargaining violation will be found.

Doctrinal changes in labor law this substantial are not common. *MV Transportation* effects historic change in every collective bargaining relationship, and in the interpretation of every collective bargaining agreement.

II. The *MV Transportation* Decision

The details of *MV Transportation* reveal much about the Board's new doctrine. The employer unilaterally implemented a series of changes to its disciplinary policies, including a new health and safety policy with various levels of discipline for offenses under the policy. The union argued that the company could not unilaterally issue such new policies and establish new categories of disciplinary offenses.

Adopting the new "contract coverage" standard, the Board found that the language of the management rights clause gave the employer the right to issue new policies without further negotiations with the union:

Section 5.1 of the management-rights clause granted the Respondent the "sole[] and exclusive[] "right to" discipline and discharge for just cause[,] and to adopt and enforce reasonable work rules." Section 5.4 of the management-rights clause provided that the Respondent "shall have the right to issue, amend and revise policies, rules and regulations" so long as such action does "not violate the terms of this Agreement."

Read together, these provisions demonstrate that the parties bargained and agreed to vest in the Respondent the exclusive right to discipline and discharge employees for just cause and to issue reasonable new and revised work rules and policies. These provisions evidence the parties' intent to grant the Respondent the exclusive right to establish reasonable policies related to employee discipline.

In addition to revising the health and safety policy, the employer unilaterally modified its schedule

adherence policy, eliminated the "rolling six-month period" for the implementation of progressive discipline, modified its customer complaint progressive discipline policy, added bereavement leave documentation requirements, added new criteria for license fee reimbursement for its drivers, and added a new policy about when an employee can be excused from extra assignments.

Under then-existing law, all of these changes plainly would have been subject to a bargaining obligation. In *MV Transportation*, the Board deemed permissible all of these unilateral actions, based primarily on the language in the management rights clause as well as language throughout the collective bargaining agreement.

To arrive at these conclusions the Board expressly overruled longstanding Board doctrine that an employer cannot make unilateral changes in terms and conditions of employment during the term of a contract unless there was a "clear and unmistakable waiver" of the union's right to bargain over such changes. Decades of Board jurisprudence had narrowly defined a "clear and unmistakable waiver" to mean language unambiguously reserving unilateral action for the employer. (Strictly by way of example, a "clear and unmistakable waiver" had to resemble this kind of language: "the employer reserves the unilateral right to … [take a specified action] … which shall not be subject to grievance and arbitration.")

From the face of *MV Transportation*, it appears that the Board will defer to "contract coverage" without delving too deeply into contract interpretation. The Board specifically declared that "we will not require that the agreement specifically mention, refer to or address the employer decision at issue," and instead, will find "contract coverage" where "the challenged unilateral act … falls within the compass or scope of contract language."

III. The Broad Impact of MV Transportation

Virtually every collective bargaining agreement has language that now could be interpreted to grant the employer the right to take many actions without any mid-term bargaining obligation. It is extremely common for "management's rights" clauses to mention management's "sole" right to operate the business, determine the scope of the business, maintain efficiency, manage and direct the workforce, adopt reasonable work rules or policies, evaluate employee performance, establish work standards, and so on. Beyond identified "management rights" clauses, contracts very often have additional terms that describe specific management rights, such as terms about scheduling, job content, or standards for just cause discipline, to name just a few.

MV Transportation declares that unilateral changes falling within the "compass or scope" of that kind of contract language may no longer violate the National Labor Relations Act's bargaining requirements. This historic shift in the law of labor relations has many immediate and longer-term impacts:

- **Re-Allocation of Power between Management and Unions**. Parties in collective bargaining relationships are accustomed to the pre-*MV Transportation* world, where typical management rights contract language did not have the newfound unilateral power the Board has now endorsed. The entire history and jurisprudence of labor relations reduces to allocations of power

– typically, whether management has the power to act as it has acted, or whether the union has tempered or seized some of management's power. *MV Transportation* is a major realignment of relatively settled power principles. Parties in every collective bargaining relationship will now be examining, experimenting, and exploring this new alignment of rights in real terms, through real actions and real decisions.

- **Impact on Collective Bargaining.** Contract language creating a "clear and unmistakable waiver" is fairly easy to identify. "Contract coverage" that might allow unilateral management action seems to be a cloudier concept. In bargaining, unions will now become extremely cautious not to agree to language that might result in an open door to unilateral changes during the life of the contract. Management will be equally drawn toward language that takes advantage of the "contract coverage" principle. Both sides will be reassessing all of their existing contract language for whatever effects the "contract coverage" principle may be creating. All of this uncertainty alone will add complexity to bargaining. Both sides will be tempted to use even more detailed and precise language than ever before. In a first contract negotiation, when a union newly represents employees, the parties are much more likely to have intractable differences of opinion about the wording of any "management rights" clause, given the stakes.
- **New NLRB Investigations.** This new legal standard seems likely to provoke a spate of unfair labor practice charges as employers explore the newfound right to act unilaterally where "contract coverage" may so allow, and unions disagree that unilateral action is permitted.
- **Impact on Pending Cases.** The Board applied *MV Transportation* retroactively to all pending cases. One of the more common unfair labor practice charges involves a union alleging that management made a unilateral change or took unilateral action without bargaining. Often these charges are deferred to arbitration, as they can essentially allege grievances or contract violations. Every pending charge of this genre will now require a new look to assess "contract coverage."
- **Development of Guiding Law.** Collective bargaining agreements are highly individualistic. No two are the same, and parties have developed all manner of wording to address common workplace issues, including terms governing exercises of management rights. A finding of "contract coverage" in one case may not have easy, universal application to all cases. The "contract coverage" doctrine would seem to require considerable development in case law before truly guiding principles might emerge. But if the Board does not intend to dwell long on issues of "contract coverage," perhaps some sweeping principles will readily appear.
- **The NLRB as Arbitrator.** The new "contract coverage" principle means that the Board, far more than in the past, will be engaging in contract interpretation to determine the meaning and application, or at least the scope, of contract terms. But in *MV Transportation*, the Board explained that the new doctrine will actually reduce its need for contract interpretation. This is surely a clue as to how cursory the Board intends to be when assessing whether "contract coverage" allows a unilateral management action.
- **The Impact of Past Practice.** With the Board's major re-interpretation of parties' rights under

collective bargaining agreements, the impact of past practice is uncertain. Past practice, of course, is one of the primary tools of contract interpretation. In *MV Transportation,* the Board noted that, even when a unilateral action is not authorized by "contract coverage," the employer might still be able to invoke past practice to show that the union waived bargaining rights. But what about the contrary argument – that past practice shows that an employer has never exercised the unilateral authority now being asserted? One could expect unions now to contend that there has been a longstanding practice contrary to a newfound management initiative to try to act unilaterally without bargaining. Does the new ruling erase the impact of past practice and provide management with a clean slate to act unilaterally where there is "contract coverage," or is past practice still a potential guide about the breadth of management rights?

- **Impact on Arbitration.** The jurisprudence of Board and of labor arbitration has always been closely related, even if not in lockstep. In the past, labor arbitrators have been the primary interpreters of contract language and the Board has only dabbled in that arena as needed, in certain types of cases. Now the Board will be far more engaged in contract interpretation than ever, at least by making preliminary judgments about "contract coverage" and permissible unilateral management action. If a body of Board case law develops about permissible unilateral action under certain kinds of contract terms, will arbitrators follow that lead? It is easy to picture an arbitrator coming to a different conclusion about the meaning and application of contract terms, even when the Board initially found that the terms allowed unilateral management action without violating the NLRA. But where the Board has engaged in contract interpretation to find that management permissibly acted unilaterally, it is equally easy to see the challenge in trying to persuade an arbitrator that the management action somehow still violated the contract.

- **Impact on Unfair Labor Practice Charge Tactics**. *MV Transportation* plainly aimed to deter one common union tactic. Unions often file unfair labor practice charges alleging unlawful unilateral changes when the issues in question are really no more than typical grievances involving matters of contract interpretation. The Board observed that historically, "even though a union has contractually agreed to a grievance-arbitration procedure, it will naturally prefer that the Board determine the lawfulness of an employer's disputed unilateral action because the Board will start with the proposition that the unilateral change is unlawful, unless the right to bargain has been 'clearly and unmistakably' waived." *MV Transportation* will tend to flip that advantage. If a union files an unfair labor practice charge alleging a unilateral change, the union runs the risk that the Board will find that the employer's action was lawful under the "contract coverage" approach – with the resulting implications that could flow into the grievance and arbitration process. The Board has thus incentivized unions to avoid filing unilateral change charges. One further effect of the new doctrine is therefore a likely reduction in "*Collyerized*" charges – unfair labor practice charges that are deferred to arbitration for initial resolution.

IV. The Political Pendulum

The NLRB has become increasingly politicized in recent years, with changes in law and process alternatively aimed at promoting the interests of unions or management, depending on the party in

power. But many of the pendulum swings, important in their own ways, had only limited effect on the labor relations process and did not change core principles of labor law.

MV Transportation represents a massive shift in Board doctrine, but this ruling cannot easily be dismissed as just another political pendulum swing. The Board emphasized that four United States Courts of Appeal have reversed Board rulings and rejected the "clear and unmistakable waiver" doctrine, and instead applied some version of the "contract coverage" doctrine.

In 2016 the United States District Court for the District of Columbia Circuit sanctioned the Board, issuing a very strongly worded rebuke and ordering reimbursement of an employer's legal fees and costs for an appeal, because the Board had sought enforcement of the "clear and unmistakable" doctrine in defiance of the D.C. Circuit's earlier rulings. See *Heartland Plymouth Court MI, LLC v. NLRB*, 838 F.3d 16, 19–20, 27 (D.C. Cir. 2016). Because every Board appeal can be taken to the D.C. Circuit, the 2016 ruling essentially made the Board's continued use of the "clear and unmistakable waiver" doctrine ultimately unenforceable, and even sanctionable.

The D.C. Circuit's rebuke was a key element of the Board's reasoning in *MV Transportation*. Political pendulum swing or not, *MV Transportation* will be changing labor relations in a manner rarely seen.

Keith H. McCown is a partner with Morgan, Brown & Joy, LLP, and may be reached at (617) 788-5013 or at KMcCown@morganbrown.com. Keith is admitted to practice in Massachusetts and Ohio, and before the United States Supreme Court and the Federal courts in Massachusetts. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was prepared on September 17, 2019.