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Our Deal Trumps My Bargaining Rights Only if I Said So: The National Labor Relations Board's Reaffirmation of Its Waiver Doctrine in Unilateral Change Cases

Kenneth L. Wagner*

I. Introduction

The National Labor Relations Board (Board or NLRB) has applied its "clear and unmistakable" waiver standard in unilateral change cases for several decades.[1] Since the early 1990s, however, the Board has faced judicial criticism,[2] numerous denied enforcement petitions,[3] and dissenting opinions from some of its own members[4] on the ground that, where an employer's unilateral change on a mandatory subject was allegedly dealt with in the collective bargaining agreement, the waiver standard is irrelevant and the contract-coverage standard is the proper test to apply.[5] The Board has nevertheless adhered, often

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1. *E.g.*, Provena Hosps., 350 N.L.R.B. 808, 810, 182 L.R.R.M. (BNA) 1589 (2007). *See* Colgate-Palmolive Co., 323 N.L.R.B. 515, 519, 155 L.R.R.M. (BNA) 1034 (1997); GTE Hawaiian Tel. Co., 296 N.L.R.B. 1, 4–5, 131 L.R.R.M. (BNA) 1801 (1989); Globe-Union Inc., 233 N.L.R.B. 1458, 1460, 97 L.R.R.M. (BNA) 221 (1977); Durfee's Television Cable Co., 174 N.L.R.B. 611, 613, 70 L.R.R.M. (BNA) 1265 (1969); Int'l News Serv. Div. of the Hearst Corp., 113 N.L.R.B. 1067, 1070, 36 L.R.R.M. (BNA) 1454 (1955).

2. *E.g.*, NLRB v. U.S. Postal Serv., 8 F.3d 832, 836–37, 144 L.R.R.M. (BNA) 2691 (D.C. Cir. 1993) (criticizing the standard used by the NLRB in reviewing collective bargaining contracts).

3. *E.g.*, BP Amoco Corp. v. NLRB, 217 F.3d 869, 873–74, 164 L.R.R.M. (BNA) 2889 (D.C. Cir. 2000) (finding "the Board incorrectly applied a 'waiver analysis'"); *U.S. Postal Serv.*, 8 F.3d at 838 ("[N]either the Board nor the courts may abrogate a lawful agreement merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement.").

4. *E.g.*, Cal. Offset Printers, Inc., 349 N.L.R.B. 732, 737, 181 L.R.R.M. (BNA) 1425 (2007) (Member Schaumber, dissenting).

5. *See, e.g.*, *id*. ("Under a contract coverage analysis, if the subject at issue is 'covered by'…the collective-bargaining agreement,…the question to be answered is simply one of contract interpretation.").

reflexively with scant explanation, to the rule that a purported waiver of bargaining rights must be clear and unmistakable.[6]

In *Provena Hospitals*, however, the Board reaffirmed its commitment to the traditional waiver test and offered an extensive justification for the doctrine.[7] A Board majority rejected the contract-coverage approach as inconsistent with settled law,[8] parties' expectations, and the preference of the National Labor Relations Act (NLRA or the Act) for the collective bargaining process.[9]

This Article sets forth the governing principles of the Board's waiver doctrine, does the same for the contract-coverage analysis, and discusses the Board's recent *Provena* decision. It argues that, contrary to the assessments of some circuits, the U.S. Courts of Appeals owe substantial deference to the Board's policy determination that its waiver doctrine applies. Given the misapplication of well-established rules for judicial review of agency decision making by some circuit courts, the Board should seek review of an appropriate case before the Supreme Court.

II. The Board's Waiver Analysis

During the term of a collective bargaining agreement, the parties have a continuing duty to bargain over mandatory subjects that are not otherwise covered in the agreement.[10] Where an employer unilaterally alters a term and condition without bargaining to impasse, it may defend against a failure-to-bargain charge on the ground that the contract already authorized the challenged action: "If the employer's reading of the contract and antecedent negotiations is correct, it has already discharged its duty to bargain about the matter and is not acting in violation of section 8(a)(5)."[11] Thus, if the matter is specifically

6. *E.g.*, *Colgate-Palmolive Co.*, 323 N.L.R.B. at 516 (applying a waiver analysis without explanation); *GTE Hawaiian Tel. Co.*, 296 N.L.R.B. at 4 (same).

7. Provena Hosps., 350 N.L.R.B. 808, 810–11, 182 L.R.R.M. (BNA) 1589 (2007) (finding that the waiver standard promotes collective bargaining, and that the Board, with Supreme Court approval, has historically applied it).

8. *Id*. at 811 (noting the relative newness of the doctrine and that the Board, not appellate courts, develops federal labor policy).

9. *See, e.g.*, National Labor Relations Act (NLRA) § 1, 29 U.S.C. § 151 (2006) (declaration of policy in favor of collective bargaining); § 7, 29 U.S.C. § 157 (2006) (right to collective bargaining); § 8, 29 U.S.C. § 158 (2006) (unfair labor practice to impede collective bargaining).

10. *See* NLRB v. Katz, 369 U.S. 736, 738–39, 50 L.R.R.M. (BNA) 2177 (1962) (holding that employers have a duty to bargain during the collective bargaining period); Jacobs Mfg. Co., 94 N.L.R.B. 1214, 1217–18, 28 L.R.R.M. (BNA) 1162 (1951) (explaining that the purposes of the mandatory bargaining rule are to avoid industrial strife and production interruptions), *enforced*, 196 F.2d 680, 30 L.R.R.M. 2098 (2d Cir. 1952).

11. ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW § 20.15 at 622 (2d ed. 2004).

covered by the agreement, the employer has fulfilled the duty to bargain under section 8(d).[12]

Commonly, the employer's defense is that the union waived its right to bargain collectively regarding the subject.[13] In these situations, the Board utilizes its waiver doctrine to determine whether the employer was free to take the disputed action unilaterally.[14]

The Board's waiver doctrine carefully protects the statutory rights of parties to bargain over terms and conditions of employment.[15] "National labor policy disfavors waivers of statutory rights by a union and thus a union's intention to waive a right must be clear before a waiver can succeed."[16] The rationale for such a demanding standard has been to protect the congressionally conferred right to collective bargaining, and to avoid disrupting collective bargaining were a lesser standard to be applied.[17] Thus, "[i]n the atmosphere of collective bargaining in labor relations, it is reasonable to require that the parties set forth the terms on which they have agreed. But the drawing of broad inferences of waiver from their silence would be disruptive rather than fostering of amicable relations."[18]

A party may waive its right to bargain over a subject in three ways.[19] An express provision in the contract may unambiguously waive the party's bargaining rights; the conduct of the parties—including past practices, bargaining history, action, or inaction—may constitute a waiver; or a mix of contractual provisions and objective conduct of

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12. Section 8 provides in part:

> [T]he duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

NLRA § 8(d)(4), 29 U.S.C. § 158(d)(4) (2006).

13. *E.g.*, Provena Hosps., 350 N.L.R.B. 808, 810, 182 L.R.R.M. (BNA) 1589 (2007); Colgate-Palmolive Co., 323 N.L.R.B. 515, 518, 155 L.R.R.M. (BNA) 1034 (1997).

14. *E.g., Provena Hosps.*, 350 N.L.R.B. at 814–15 (finding "no good reason to depart from the Board's traditional waiver standard"); *Colgate-Palmolive Co.*, 323 N.L.R.B. at 519–20.

15. *See Provena Hosps.*, 350 N.L.R.B. at 815 ("The standard reflects the Board's policy choice…in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes.").

16. Suffolk Child Dev. Ctr., 277 N.L.R.B. 1345, 1349, 121 L.R.R.M. (BNA) 1103 (1985) (quoting Chesapeake & Potomac Tel. Co. v. NLRB, 687 F.2d 633, 636, 111 L.R.R.M. (BNA) 2165 (2d Cir. 1982)).

17. *See, e.g.*, Friendly Ford, 211 N.L.R.B. 834, 837–38, 86 L.R.R.M. (BNA) 1407 (1974) (Members Fanning and Jenkins, dissenting) (discussing the historical acceptance of the waiver doctrine).

18. NLRB v. Otis Elevator Co., 208 F.2d 176, 179, 33 L.R.R.M. (BNA) 2129 (2d Cir. 1953) (Clark, J., concurring in part and dissenting in part).

19. *Chesapeake & Potomac*, 687 F.2d at 636.

the parties may demonstrate waiver of the right to bargain over a subject.[20]

Written waivers must be specific as to the subject matter.[21] "It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable."[22] Thus, "[m]anagement-rights clauses that are couched in general terms and that make no reference to any particular subject area will not be construed as waivers of statutory bargaining rights."[23]

In *KIRO*, for example, the managers of a television station decided to begin producing an additional weekday news program; management refused to engage in bargaining over the effects of the additional programming, contending that the labor agreement's management-rights clause constituted a waiver.[24] While the employer had reserved the general rights to "schedule," "assign work," and "establish production standards," there was no express reservation concerning the employer's "right to increase working hours or to increase the workload when changing schedules and assignments."[25] Nor was there any specific reservation as to either the effect that the program's lower production standards would have on the reputation of employees or the right of employees to negotiate contracts for personal services.[26] Because of these factors, the Board rejected a claim of waiver.[27]

Specific and direct references to the subject of the challenged action suffice to effectuate a waiver.[28] Thus, where a hospital unilaterally altered the holiday-shift scheduling procedure for employees assigned to its inpatient radiology unit, the management-rights clause privileged the employer's action by vesting the employer with the rights to "determine and change starting times, quitting times and shifts," to "assign" employees, and to "change methods and means by which its operations are to be carried on."[29]

Where an employer invokes the parties' conduct in attempting to satisfy the waiver standard, it must establish that the matter was "fully

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20. *Id*.

21. *See, e.g.*, KIRO, Inc., 317 N.L.R.B. 1325, 1327–28, 151 L.R.R.M. (BNA) 1268 (1995) (requiring a specific reference to the subject matter at issue to constitute a clear and unmistakable waiver); Johnson-Bateman Co., 295 N.L.R.B. 180, 184, 131 L.R.R.M. (BNA) 1393 (1989) ("generally worded management rights clauses…will not be construed as waivers of statutory bargaining rights").

22. *Johnson-Bateman Co.*, 295 N.L.R.B. at 184.

23. *KIRO*, 317 N.L.R.B. at 1328.

24. *Id*. at 1325–27.

25. *Id*. at 1327–28.

26. *Id*.

27. *Id*.

28. Baptist Hosp. of E. Tenn., 351 N.L.R.B. 71, 72, 183 L.R.R.M. (BNA) 1093 (2007).

29. *Id*. (finding that the plain language of the contract privileged the hospital's change in the scheduling procedure).

discussed and consciously explored during negotiations" and that the other party "consciously yielded or clearly and unmistakably waived its interest in the matter."[30] For example, in *KIRO*, the Board found the union could not have "consciously yielded" its interest in bargaining over the effects of an additional news program because the parties had not discussed the possibility of additional programming during their negotiation of the current agreement.[31] Likewise, a union did not waive its rights to bargain over the relocation of work to a new plant, notwithstanding that the parties had amended their labor contract to include a severance pay clause, where the severance provision made no reference to the employer's right to transfer work. Moreover, during negotiations, the union had both rejected the employer's proposals to relieve it of the obligation to bargain over work transfers and never clearly relinquished its statutory bargaining rights over the issue.[32]

These cases may be contrasted with *Columbus & Southern Ohio Electric Co.*, where the employer unilaterally discontinued a noncontractual Christmas bonus.[33] The Board found a waiver of bargaining rights,[34] citing a newly inserted and exceptionally broad zipper clause that expressly waived the parties' rights regarding "all prior agreements and understandings, oral or written, express or implied…."[35] The bargaining history, moreover, demonstrated the parties' acknowledgment of the breadth of the zipper clause, which "wipe[d] the slate clean" of noncontractual terms and conditions.[36]

III. The Contract-Coverage Approach

In the last two decades, the U.S. Courts of Appeals for the District of Columbia and Seventh Circuits have criticized and rejected the Board's waiver approach in unilateral change cases involving claims of contractual privilege.[37] These courts have held that the Board's

30. Rockwell Int'l Corp., 260 N.L.R.B. 1346, 1347, 109 L.R.R.M. (BNA) 1366 (1982).

31. KIRO, 317 N.L.R.B. at 1328.

32. Tocco Div. of Park-Ohio Indus., 257 N.L.R.B. 413, 414, 107 L.R.R.M. (BNA) 1498 (1981) (noting that the union had rejected the employer's bargaining proposals to relieve it of the obligation to bargain over work transfers and never clearly relinquished its statutory bargaining rights over the issue), *enforced*, 702 F.2d 624, 112 L.R.R.M. (BNA) 3089 (6th Cir. 1983).

33. *See generally* 270 N.L.R.B. 686, 116 L.R.R.M. (BNA) 1148 (1984), *aff'd*, Int'l Bhd. of Elec. Workers Local 1466 v. NLRB, 795 F.2d 150, 122 L.R.R.M. (BNA) 2948 (D.C. Cir. 1986).

34. *Id*. at 687.

35. *Id*. at 686 (quoting the collective bargaining agreement at issue).

36. *Id*. at 687 (quoting an employer letter to the union).

37. *E.g.*, NLRB v. U.S. Postal Serv., 8 F.3d 832, 833, 144 L.R.R.M. (BNA) 2691 (D.C. Cir. 1993) (rejecting the waiver analysis as "inapposite to this case"); Chi. Tribune Co. v. NLRB, 974 F.2d 933, 936, 141 L.R.R.M. (BNA) 2209 (7th Cir. 1992) (stating that the proper standard is whether there is "inconsistent[cy] with language or implications elsewhere in the agreement"). *See* S. Nuclear Operating Co. v. NLRB, 524 F.3d 1350, 1358,

waiver doctrine is inapposite to such situations and, instead, applied a contract-coverage analysis.[38]

The contract-coverage theory is premised on section 8(d)'s provision that the duty to bargain "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."[39] Thus, once the parties have exercised their right to bargain about a particular subject, by negotiating for a provision in the contract, the parties' rights are fixed, foreclosing further mandatory bargaining as to that subject.[40]

The contract-coverage theory holds that once a matter is "covered by" the labor agreement, "the union *has exercised* its bargaining right and the question of waiver is irrelevant."[41] In *Local Union No. 47*, the court stated: "[w]here the contract fully defines the parties' rights as

184 L.R.R.M. (BNA) 2065 (D.C. Cir. 2008) (applying the contract-coverage standard to terms within the contract); Enloe Med. Ctr. v. NLRB, 433 F.3d 834, 837, 178 L.R.R.M. (BNA) 2718 (D.C. Cir. 2005) (noting the difficulty that arises when the Board applies the waiver doctrine to the interpretation of the scope of a collective bargaining agreement); Regal Cinemas, Inc. v. NLRB, 317 F.3d 300, 312, 171 L.R.R.M. (BNA) 2944 (D.C. Cir. 2003) ("Waiver analysis does not apply…if a collective bargaining agreement 'covers' the challenged action."); Conoco, Inc. v. NLRB, 91 F.3d 1523, 1525, 153 L.R.R.M. (BNA) 2007 (D.C. Cir. 1996) (per curiam) (according no deference to the Board's interpretation of a collective bargaining agreement itself); Local Union No. 47, Int'l Bhd. of Elec. Workers v. NLRB, 927 F.2d 635, 641, 137 L.R.R.M. (BNA) 2723 (1991) (applying a de novo standard of review when interpreting the contract); United Mine Workers of Am., Dist. 31 v. NLRB, 879 F.2d 939, 944, 131 L.R.R.M. (BNA) 3134 (D.C. Cir. 1989). *See also* Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14, 24–26, 181 L.R.R.M. (BNA) 2267 (1st Cir. 2007) (adopting the contract-coverage approach in section 8(a)(5) unilateral change cases, but also stating that the "sound arguable basis" standard, a different test, applies); Gratiot Cmty. Hosp. v. NLRB, 51 F.3d 1255, 1261, 149 L.R.R.M. (BNA) 2072 (6th Cir. 1995) (rejecting the Board's application of the waiver standard, without rejecting the waiver approach itself). *See generally* United Mine Workers of Am. 1974 Pension v. Pittston Co., 984 F.2d 469, 479, 142 L.R.R.M. (BNA) 2391 (D.C. Cir. 1993) (distinguishing "between a waiver of a right and the exercise of a right that extends into the future"); Connors v. Link Coal Co., 970 F.2d 902, 905 (D.C. Cir. 1992) ("The doctrine of 'clear and unmistakable' waiver…is inapplicable here."); NLRB v. McClatchy Newspapers, Inc., 964 F.2d 1153, 1157, 140 L.R.R.M. (BNA) 2249 (D.C. Cir. 1992) (per curiam) (finding waiver analysis inappropriate where the parties bargained over the disputed action but reached impasse); Dep't of the Navy v. FLRA, 962 F.2d 48, 50, 140 L.R.R.M. (BNA) 2206 (D.C. Cir. 1992) (same analysis under federal-service labor-management-relations statute).

38. Several other circuits have approved of the Board's use of the clear and unmistakable waiver standard in unilateral change cases involving a claim of contractual right. *See* Provena Hosps., 350 N.L.R.B. 808, 812 n.21, 182 L.R.R.M. (BNA) 1589 (2007) (collecting cases).

39. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (2006). The phrases "contained in" and "covered by" are synonymous. *See Dep't of the Navy*, 962 F.2d at 54.

40. *Local Union No. 47*, 927 F.2d at 640 (citing *United Mine Workers of Am., Dist. 31*, 879 F.2d at 944; Int'l Bhd. Elec. Workers Local 1466 v. NLRB, 795 F.2d 150, 155, 122 L.R.R.M. (BNA) 2948 (D.C. Cir. 1986)).

41. *Dep't of the Navy*, 962 F.2d at 57.

to what would otherwise be a mandatory subject of bargaining, it is incorrect to say the union has 'waived' its statutory right to bargain; rather, the contract will control and the 'clear and unmistakable' intent standard is irrelevant."[42]

Judge Harry Edwards of the District of Columbia Circuit, in *Department of the Navy*, explained the rationale for viewing the concepts of waiver and "covered by" as categorically distinct:

> [T]he difference between the two concepts goes to the structural heart of labor law. When parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules—a new code of conduct for themselves—on that subject. Because of the fundamental policy of freedom of contract, the parties are generally free to agree to whatever specific rules they like, and in most circumstances it is beyond the competence of the…National Labor Relations Board or the courts to interfere with the parties' choice. On the other hand, when a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, the courts require "clear and unmistakable" evidence of waiver and have tended to construe waivers narrowly.[43]

Proponents of the contract-coverage approach argue that the Board's traditional waiver analysis is an assault on the principle of freedom of contract and robs the employer of the benefit of its bargain by requiring more bargaining over matters already agreed upon.[44] Thus, once a subject is "covered by" the contract, parties should resolve all questions concerning that subject through the grievance and arbitration procedure.[45]

Courts applying the contract-coverage standard have construed employer rights under disputed contract provisions more broadly than the Board and consequently denied Board enforcement petitions.[46] In *Enloe Medical Center*, for example, the District of Columbia Circuit rejected the Board's finding that the employer had unlawfully refused to bargain over the effects of its newly adopted mandatory on-call policy, which

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42. 927 F.2d at 641.

43. *Dep't of the Navy*, 962 F.2d at 57 (citations omitted).

44. *See id*. at 59–60. *See also* Enloe Med. Ctr. v. NLRB, 433 F.3d 834, 837, 178 L.R.R.M. (BNA) 2718 (D.C. Cir. 2005) ("The Board's doctrine imposes an artificially high burden on an employer who claims its authority to engage in an activity is granted by such an agreement."); Chi. Tribune Co. v. NLRB, 974 F.2d 933, 937, 141 L.R.R.M. (BNA) 2209 (7th Cir. 1992) ("[P]eople should not be tripped into forgoing valuable rights, but where…a union agrees to a broadly worded management-rights clause the scope of that clause depends on the usual principles of contract interpretation rather than on a doctrine that tilts decision in the union's favor.").

45. *See United Mine Workers of Am., Dist. 31*, 879 F.2d at 944.

46. *See, e.g.*, *Enloe Med. Ctr.*, 433 F.3d at 837–38 (finding no further bargaining necessary over the effects of a mandatory on-call policy authorized in the agreement).

required nurses to work an additional on-call shift every four weeks.[47] The contract authorized the employer's promulgation of the policy; nevertheless, the Board found that the union had not clearly and unmistakably waived its right to bargain over the policy's impact.[48] The circuit court rejected this distinction, holding that "a straightforward reading of the contract" indicated that the parties did not intend to create a dichotomy between managerial rights and the effects of those rights.[49]

Similarly, in *BP Amoco Corp.*, the court applied the contract-coverage standard in holding that an employer's modifications to its medical insurance plans did not violate the Act.[50] The court rejected the Board's waiver analysis, concluding that the medical plans that contained clauses reserving the rights to terminate or amend at any time were incorporated by reference into the collective bargaining agreements.[51] Although the contractual provisions merely referenced the plans and did not expressly incorporate them into the contracts, the court held that the plans were part of the contracts.[52]

IV. The Board's Reaffirmation of Its Waiver Analysis in *Provena Hospitals*

In *Provena Hospitals*, the Board elected to present a full-blown defense of its waiver standard and to offer several reasons for declining to adopt the contract-coverage approach. A majority opinion by Members Liebman and Walsh noted that the case presented

> the opportunity to explain and reaffirm our adherence to one of the oldest and most familiar Board doctrines, the clear-and-unmistakable waiver standard, in determining whether an employer has the right to make unilateral changes in unit employees' terms and conditions of employment during the life of a collective-bargaining agreement. The clear-and-unmistakable waiver standard is firmly grounded in the policy of the National Labor Relations Act promoting collective bargaining. It has been applied consistently by the Board for more than 50 years, and it has been approved by the Supreme Court. By contrast, the contract coverage approach, urged by the Respondent and endorsed by the dissent, is a relatively recent judicial innovation, adopted by two appellate courts. In the framework established by Congress, however, it is the function of the Board, not the courts, to develop federal labor policy.[53]

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47. *Id*. at 838–39.
48. *Id*.
49. *Id*. at 839.
50. 217 F.3d 869, 873–74, 164 L.R.R.M. (BNA) 2889 (D.C. Cir. 2000).
51. *Id*. ("[T]he express incorporation of the AMP [Amoco Medical Plan] into the collective bargaining agreements made the plan's reservation of rights clause a part of each agreement and thereby authorized BP Amoco to unilaterally modify the AMP without the Union's consent.").
52. *Id*.
53. Provena Hosps., 350 N.L.R.B. 808, 810–11, 182 L.R.R.M. (BNA) 1589 (2007) (citations and footnotes omitted).

The case involved a unit of registered nurses employed by the respondent hospital.[54] The collective bargaining agreement contained an elaborate management-rights provision.[55] In early December 2000, the hospital unilaterally implemented a staff-incentive policy to address an anticipated short-term staffing problem during the upcoming holidays.[56] Under the policy, nurses could earn as much as $500 in additional premium compensation.[57] Although the contract mentioned "extraordinary pay" when the employer determined additional work hours or nurses were needed, there was no provision for "incentive pay."[58] As a defense to the ensuing failure-to-bargain charge, the hospital asserted it had the general right to act unilaterally under the management-rights clause as well as the union's historical acquiescence to staffing incentive plans.[59] In addition, in January 2001, the employer implemented a revised "attendance and tardiness" disciplinary policy, which superseded a policy that had been in existence since 1997.[60] The employer cited several clauses of the management-rights provision as reserving its right to adopt the new policy.[61]

The administrative law judge applied the Board's longstanding waiver doctrine, concluding that the union had not waived its rights to bargain over either policy.[62] The Board explained its rationale for

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54. *Id*. at 808.

55. *Id*. at 808–09.

56. *Id*. at 809.

57. *Id*.

58. *Id*. Article VII, entitled "Hours of Work and Extraordinary Pay," provided in relevant part:

> Nothing in this Article or Agreement shall prohibit the Medical Center from scheduling or assigning nurses as it determines appropriate in the event circumstances occur such that the Medical Center determines additional work hours or nurses are needed; however, if a manager determines that additional work hours are needed, the additional hours shall be assigned to those who volunteered before others are assigned provided that the assignment of the volunteers is determined by the manager to be operationally sound and cost prudent.

59. *Id*.

60. *Id*.

61. The respondent's vice president for human resources testified that the employer relied specifically on clauses permitting it "to operate and manage its business and to direct its employees"; "to change or eliminate existing methods, …and reporting practices and procedures and/or to introduce new or improved ones"; "to suspend, discipline and discharge employees"; "to make and enforce the rules of conduct, standards, and regulations governing the conduct of employees"; "to establish and administer policies and procedures related to…operations, services and maintenance" of the respondent's operations; and "to determine or change the methods and means by which its operations are to be carried on; to take any and all actions it determines appropriate…to maintain efficiency and appropriate patient care." *Id*. at 809–10.

62. *Id*. at 810 (finding that the contract's terms were too broad to authorize the employer's unilateral incentive policy, there was no evidence that the parties negotiated incentives, and the Union's acquiescence to previous incentives did not sanction the new policy).

adhering to the waiver standard at length. First, at bottom, the waiver standard is a "policy choice, grounded in the Act, in favor of collective bargaining concerning changes in working conditions that might precipitate labor disputes."[63] The waiver standard therefore "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply."[64]

Second, the *Provena* majority contrasted its preference-for-bargaining approach with that of contract-coverage proponents who reason that the waiver question is "irrelevant" once the matter is covered by the agreement because "the union *has exercised* its bargaining rights."[65] This view incorrectly "assumes that determining whether a matter is covered by the collective bargaining agreement is simply a matter of contract interpretation, which can be resolved independent of the existence of a statutory duty to bargain."[66] Conversely, the Board's waiver standard "properly takes the Act's policies into account in determining *whether* a collective-bargaining agreement covers a statutory subject of bargaining. Because a union's statutory right to demand bargaining persists unless it is contractually relinquished the issue is appropriately analyzed in terms of waiver."[67]

Third, the *Provena* majority said the doctrine has become "exceptionally well-established."[68] Thus, at least sixty years ago the Board applied the standard in finding that, by agreeing to a broadly phrased management-rights clause, a union had not relinquished its right to bargain over the terms of a pension plan.[69] In seemingly countless decisions since then, the Board has consistently applied the waiver doctrine "to all cases arising under Section 8(a)(5) where an employer has asserted that a general management-rights provision authorizes it to act unilaterally with respect to a particular term and condition of employment."[70]

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63. *Id*. at 811.

64. *Id*.

65. *Id*. at 811 n.17 (quoting NLRB v. U.S. Postal Serv., 8 F.3d 832, 836, 144 L.R.R.M. (BNA) 2691 (D.C. Cir. 1993)).

66. *Id*. at 811 (internal quotation marks omitted).

67. *Id*. (citing Kenneth L. Wagner, *"No" Means "No" When a Party "Really" Says So: The NLRB's Continued Adherence to the Clear and Unmistakable Waiver Doctrine in Unilateral Change Cases*, 13 LAB. LAW. 325, 338 (1997) ("observing that the 'statutory right to bargain precedes the negotiation of particular terms and conditions into a contract'")).

68. *Id*. at 812.

69. *See* Tide Water Associated Oil Co., 85 N.L.R.B. 1096, 1099–1100, 23 L.R.R.M. (BNA) 2448 (1949).

70. *Provena Hosps.*, 350 N.L.R.B. at 812.

Fourth, the Board noted that in *C & C Plywood Corp.*,[71] the Supreme Court expressly approved of the Board's approach to unilateral change cases. The employer adopted a premium-pay schedule for a particular job classification and argued that the union had contractually waived its right to bargain over the matter.[72] The Supreme Court upheld and explicitly endorsed the Board's finding of no waiver under the clear and unmistakable standard: "the Board relied upon its experience with labor relations and the Act's clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board's approach."[73]

And the Supreme Court expressly reaffirmed the Board's waiver approach in *Metropolitan Edison Co. v. NLRB*,[74] a case involving whether a no-strike clause permitted the employer to impose greater discipline on union officials found not to have acted affirmatively to end an unlawful strike. The *Provena* Board noted that "[n]o later decision of the Court casts doubt on the continuing approval that the Board's traditional analysis enjoys."[75] In the wake of the Supreme Court decisions in *C & C Plywood* and *Metropolitan Edison*, no fewer than eight circuits of the court of appeals have upheld the Board's use of the waiver standard in unilateral change cases.[76]

The Board went on to explain why it declined to adopt the contract-coverage approach. Its primary rationale is that abandoning the waiver test "threatens to upset the settled expectations of parties to existing collective-bargaining agreements" presumably bargained with the waiver standard in mind.[77] Thus, "[c]hanging the standard . . . would create a significant and unbargained-for shift of rights to employers and away from employees and unions, who previously thought they were assured of the right to bargain collectively over matters that were not explicitly waived."[78]

Moreover, the Board reasoned, the contract-coverage approach is deleterious to the collective bargaining process.[79] The waiver standard

71. *See* NLRB v. C & C Plywood Corp., 385 U.S. 421, 430–31, 64 L.R.R.M. (BNA) 2065 (1967).

72. *Id*. at 423.

73. *Id*. at 430.

74. 460 U.S. 693, 708, 112 L.R.R.M. (BNA) 3265 (1983) ("[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is explicitly stated. More succinctly, the waiver must be clear and unmistakable.") (internal quotations omitted).

75. *Provena Hosps.*, 350 N.L.R.B. at 812.

76. *See id*. at 812 n.21.

77. *Id*. at 813.

78. *Id*. (citing Wagner, *supra* note 67, at 340 (arguing that the "contract-coverage approach incorrectly puts the burden, or the risk, of ambiguity on unions . . . [which] frequently results in the drawing of an unwarranted inference that the parties bargained over the disputed subject")).

79. *Id*.

requires the parties to particularize subjects over which the employer has unfettered discretion, thus encouraging a focus in bargaining over truly important subjects and promoting clarity in the results.[80] The contract-coverage approach, on the other hand, "creates an incentive for employers to seek contractual language that might be construed as authorizing unilateral action on subjects of no present concern, requires unions to be wary of agreeing to such provisions, and invites future disputes about the scope of the contractual provision."[81]

The Board also defended its refusal to acquiesce to the prevailing views of the District of Columbia and Seventh Circuit Courts of Appeals.[82] The Board disagreed with the appellate courts' holdings—that the issue is one of contract interpretation requiring no judicial deference to the Board—stating:

> The waiver standard, however, does not involve merely a question of contract interpretation, in the sense of determining what the contract means and whether it has been breached. Rather, the waiver standard reflects the Board's interpretation of the statutory duty to bargain during the term of an existing agreement.... Stated somewhat differently, while the Board's interpretation of a collective-bargaining agreement may not be entitled to judicial deference, the Board's interpretation of the Act and the duty to bargain is.[83]

The distinction between analyzing violations of the Act and violations of a contract was observed by the Court in *NLRB v. C & C Plywood*, which held that the Board had "not construed a labor agreement to determine the extent of the [parties'] contractual rights," but rather "went only so far as was necessary to determine that the union did not agree to give up ... statutory safeguards."[84]

Finding no reason to depart from the waiver standard, the Board then applied the approach to the facts.[85] As to the staffing incentive policy, the Board found that the union had not waived its right to bargain.[86] The contractual reference to "extraordinary pay" for extra hours worked was deemed too ambiguous necessarily to encompass "such ongoing, periodic, and predictable requirements as holiday staffing needs."[87] The

80. *Id*.

81. *Id*. at 813–14.

82. *Id*. at 814 (noting that those two appellate courts are a "distinct minority," that the Board has a historical "policy of refusing to acquiesce to the adverse decisions of appellate courts," and that the Board's adherence to the waiver standard is "within its administrative discretion...").

83. *Id*.

84. *Id*. at 814–15 (quoting NLRB v. C & C Plywood, 385 U.S. 421, 428, 64 L.R.R.M. (BNA) 2065 (1967)).

85. *Id*. at 815.

86. *Id*. (finding no specific reference in the contract to incentive pay and no evidence that the parties consciously explored the issue in bargaining).

87. *Id*. at 815 n.34.

Board, however, found that the employer did not violate the Act in implementing the new policy on attendance and tardiness and dismissed that charge.[88] By agreeing to the employer's reservations as to reporting practices and procedures, rules of conduct, and discipline—all set forth in the management-rights provision—the union relinquished the right "to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements."[89]

V. Courts Owe Deference to the Board's Analytical Approach

In adopting the contract-coverage test, courts have held that the normal judicial deference owed to Board rulings is inapplicable; the choice of standard is a matter of contract interpretation, subject to de novo judicial review.[90] This view of the Board's decision making and the role of courts in unilateral change cases is misguided and has led to court decisions incorrectly overturning Board decisions.

As an administrative agency with expertise over its designated subject matter, the Board's decision making is entitled to "considerable deference."[91] "[T]he NLRB has the primary responsibility for developing and applying national labor policy."[92] The Supreme Court explained in *Beth Israel Hospital v. NLRB*:

> Because it is to the Board that Congress entrusted the task of "applying the Act's general prohibitory language in the light of the infinite combination of events which might be charged as violative of its terms," that body, if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions.[93]

The courts are obligated to uphold any Board interpretation of the Act that is "reasonably defensible."[94] The Board is entitled to and charged

88. *Id*. at 815–16.

89. *Id*. at 815 (finding no need to resort to a contract-coverage approach because the language of the contract was clear).

90. *See* NLRB v. U.S. Postal Serv., 8 F.3d 832, 837, 144 L.R.R.M. (BNA) 2691 (D.C. Cir. 1993) (noting that the Labor-Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1988), charges the courts "with developing a uniform federal law of labor contracts," and that deference to the Board would risk creating conflicting principles in interpreting collective bargaining agreements); Chi. Tribune Co. v. NLRB, 974 F.2d 933, 937–38, 141 L.R.R.M. (BNA) 2209 (7th Cir. 1992) ("The Board is not an expert in contract interpretation.").

91. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 786, 133 L.R.R.M. (BNA) 3049 (1990).

92. *Id*. (citing Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500–01, 98 L.R.R.M. (BNA) 2727 (1978)).

93. *Beth Israel Hosp.*, 437 U.S. at 500–01 (quoting Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798, 16 L.R.R.M. (BNA) 620 (1945)).

94. Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891, 116 L.R.R.M. (BNA) 2857 (1984).

with developing federal labor policy "through interstitial rulemaking that is rational and consistent with the Act."[95]

These NLRB-specific precepts are all consistent with, and fall under, the expert-agency-deference umbrella outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*:

> We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.[96]

In overturning Board decisions for failing to apply the contract-coverage standard, the District of Columbia and Seventh Circuits have declined to extend any level of deference to the Board.[97] Thus, while acknowledging the Board has the power to interpret a labor contract to resolve an unfair labor practice charge, the District of Columbia Circuit said this authority is inferior to that of the courts:

> The Board's limited role in interpreting contracts has important implications for our review of its decision in this case, however. Because the courts are charged with developing a uniform federal law of labor contracts under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1988), we accord no deference to the Board's interpretation of labor contracts.[98]

In *Litton Financial Printing Division v. NLRB*,[99] the Supreme Court held that the Board's interpretation of a contract was due no special deference where the Board declined to order arbitration of several grievances to remedy an unfair labor practice. The employer had refused to process the grievances, which arose after expiration of the parties' collective bargaining agreement.[100] The Board's decision not to order arbitration was premised on its interpretation of the agreement's arbitration clause and the federal common law of labor contracts.[101] The

95. Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 788, 152 L.R.R.M. (BNA) 2385 (1996).

96. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (citations and internal quotations removed).

97. *See* NLRB v. U.S. Postal Serv., 8 F.3d 832, 837, 144 L.R.R.M. (BNA) 2691 (D.C. Cir. 1993); Chi. Tribune Co. v. NLRB, 974 F.2d 933, 937, 141 L.R.R.M. (BNA) 2209 (7th Cir. 1992).

98. *U.S. Postal Serv.*, 8 F.3d at 837 (citing Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 201–03, 137 L.R.R.M. (BNA) 2441 (1991)).

99. 501 U.S. at 201–03.

100. *Id*. at 195.

101. *Id*. at 202.

Court concluded that granting deference to the Board on this issue was inappropriate because of the potential conflict with the federal courts' primary role in interpreting labor contracts under section 301.[102] "We cannot accord deference in contract interpretation here only to revert to our independent interpretation of collective-bargaining agreements in a case arising under § 301."[103]

The circuit courts' reliance on *Litton* is misplaced. In that case, the Board interpreted the labor contract to resolve the arbitrability issue—a question of what ultimate rights the parties had under their agreement. In unilateral change cases in the unfair labor practice context, the Board is not resolving a matter of ultimate contractual rights. Rather, it is determining whether, under all of the circumstances, the union has waived its bargaining rights, a matter particularly within its scope of expertise. In finding a lack of waiver, the Board makes no pretense that it is determining the merits of the employer's rights under the contract. Indeed, as the *Provena* majority noted,[104] the Board, rather than apply the waiver doctrine, has deferred to arbitrator decisions that resolve the contract dispute on the merits.[105]

The Board's adoption of its waiver doctrine is fundamentally a policy choice. As the Supreme Court acknowledged in *C & C Plywood Corp.*:

> In reaching this conclusion, the Board relied upon its experience with labor relations and the Act's clear emphasis upon the protection of free collective bargaining. We cannot disapprove of the Board's approach. For the law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context.[106]

Courts that apply the contract-coverage test engage in a policy choice, too, and it is one that favors employers relying on ambiguous contract provisions over unions asserting statutory rights. On this point, consider Judge Edwards's invocation of the "fundamental policy of freedom of contract" in explaining the categorical distinction between the two approaches and arguing for adoption of the contract-coverage test.[107]

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102. *Id*. at 202–03.

103. *Id*. at 203.

104. Provena Hosps., 350 N.L.R.B. 808, 815, 182 L.R.R.M. (BNA) 1589 (2007) (noting that the Board will decide a case of contract interpretation only if there is no basis for deferral to the arbitrator).

105. *See, e.g.*, Smurfit-Stone Container Corp., Container Div., 344 N.L.R.B. 658, 660, 177 L.R.R.M. (BNA) 1142 (2005).

106. NLRB v. C & C Plywood Corp., 385 U.S. 421, 430, 64 L.R.R.M. (BNA) 2065 (1967).

107. Dep't of the Navy v. FLRA, 962 F.2d 48, 57, 140 L.R.R.M. (BNA) 2206 (D.C. Cir. 1992).

The question in each of these cases is where to draw the line. If a matter is "covered by" the contract, then a functional waiver has occurred because the parties have extinguished their bargaining rights over that subject.[108] It does not matter whether the parties have drafted a detailed set of rules or the union has ceded full control to the employer over a broader subject. The question is whether the subject, construed narrowly or broadly, has been dealt with by the parties. If the subject was bargained over, the union cannot complain that it yielded to the employer either specific rights regarding, or complete control over, the subject. But until the union has actually bargained over that subject, it retains those bargaining rights.[109] The interpretation standard that is chosen determines how broadly to define the subject.

Under the contract-coverage test, if the subject, in its broadest possible terms, is referenced in the contract, it is "covered."[110] But this approach does not properly ensure the parties' exercise of their bargaining rights. The "covered by" test puts the burden on unions to show the employer has violated the contract.[111] The Board, however, is statutorily entitled to insist that the protection of bargaining rights has primacy over putative contractual rights based on ambiguous contract terms.

VI. Conclusion

The Board's reaffirmation of the clear and unmistakable waiver doctrine in *Provena Hospitals* fully answered its critics, both internal and external. The doctrine is theoretically sound, longstanding, and judicially approved.[112] The courts that insist on applying the contract-coverage test have misapprehended the measure of deference owed to the Board in such cases. The no-deference rule set forth in *Litton* is inapplicable because the Board is determining whether statutory bargaining rights were exercised, not whether contractual rights were violated. The Board's decisions are subject to review by the District of Columbia Circuit, and thus face that court's categorically contrary position on this issue. The Board therefore should seek review of an appropriate case in the Supreme Court to resolve the question.

108. *Id*.
109. *Provena Hosps.*, 350 N.L.R.B. at 813.
110. *Id*. at 816 n.17.
111. Wagner, *supra* note 67, at 340.
112. *Provena Hosps.*, 350 N.L.R.B. at 810–11.