I Thought We Had a Deal?! – the NLRB, the Courts and the Continuing Debate Over Contract Coverage vs. Clear and Unmistakable Waiver

Matthew D. Lahey
Schiff Hardin, LLP
Chicago, Illinois

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I. INTRODUCTION

A deal is a deal. Get it in writing. Your word is your bond. It’s all there in black and white. These are all common phrases in popular culture, and they all relate in some form or another to the importance of agreements and contracts. Indeed, Federal labor law relies on the sanctity of the contract to define the relationships between labor and management. The National Labor Relations Act protects this fundamental principle by requiring unions and employers to bargain over terms and conditions of employment, and it prohibits changes to the terms included in those fully negotiated contracts while the parties’ agreement is in effect. However, the current approach of the National Labor Relations Board (the “Board”) is to intervene and alter the deal struck by the parties. This paper analyzes the Board’s current approach to unilateral actions, the clear-and-unmistakable waiver analysis, and also discusses a better reasoned approach, the contract coverage analysis.

II. WHERE ARE WE NOW? – THE CURRENT BOARD STANDARD

The Board’s approach to unilateral actions during the term of a contract was last raised at this conference in 2006, as a result of the NLRB’s decision in Bath Iron Works, 345 NLRB 499 (2005). That case, and the discussions that it spawned, focused on the appropriate standard for the Board to apply when an employer allegedly modifies a contract mid-term. This paper focuses on a different, but related issue, the standard that the Board should apply when an employer allegedly imposes a term or condition of employment that was not previously subject to bargaining. Under the Board’s current approach, the employer has committed an unfair labor practice unless it can show that the union has waived its right to bargain over the relevant subject. The waiver must be clear and unmistakable. In a series of recent cases, the Board demonstrates its approach to the clear-and-unmistakable standard in situations where the employer has allegedly failed to bargain – as required by Section 8(a)(5).

As a result of the cases discussed below, it is clear that at present (and for the foreseeable future), absent other compelling extrinsic evidence, an employer must show a clear-and-unmistakable waiver by pointing to specific contractual language that authorizes a unilateral change to terms or conditions of employment, despite the fact that the employer may have previously secured the right to act unilaterally with less specific language.
A. The Board’s Approaches to Section 8(a)(5) and 8(d) Claims

Sections 8(a)(5) and 8(d) of the National Labor Relations Act (the “Act”) contain provisions that relate to an employer’s duty to bargain over terms and conditions of employment.1 Section 8(a)(5) specifies that “[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. . . .” Therefore, it is well established that when an employer unilaterally implements a term or condition of employment mid-term, *without ever having bargained over the issue*, the employer has violated Section 8(a)(5) and has committed an unfair labor practice (“ULP”). At its core, a Section 8(a)(5) “allegation is a failure to bargain.” *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005) (emphasis in original).

In addition, Section 8(d) provides an explanation of the phrase “bargain collectively.” Section 8(d) specifies that during the term of a contract, the duty to bargain collectively “shall also mean that no party to such contract shall terminate or modify such contract, unless [certain requirements are met].” As a result, when an employer modifies a clear term of a contract mid-term, the employer has violated Section 8(d) – and therefore has committed a ULP under Section 8(a)(5). A Section 8(d) “allegation is a failure to adhere to the contract.” *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005).

The Board has specific tests for determining whether an employer has committed a ULP under Sections 8(a)(5) and 8(d). For alleged 8(a)(5) unilateral changes without bargaining, the Board applies a clear-and-unmistakable waiver standard to determine whether the union has waived its right to bargain over the unilaterally implemented term or condition of employment. *Trojan Yacht*, 319 NLRB 741, 742 (1995). While this waiver standard is the current Board approach, several U.S. Courts of Appeal, in addition to numerous Board members, have adopted or argued for a more reasoned approach referred to as the contract coverage approach. For alleged 8(d) contract modifications, the Board applies a “sound arguable basis” analysis to determine whether the employer’s action is supported by (or contrary to) the contract. These three approaches will be explained below.

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1 In addition, Section 8(a)(1) specifies that it is a ULP for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed [by the Act].”
1. **Section 8(a)(5) Claims – Clear-and-unmistakable Waiver Versus Contract Coverage**

Under the Board’s clear-and-unmistakable waiver approach to Section 8(a)(5) actions, as noted above, the employer must show that the union waived its rights to bargain over the particular subject at issue. This can be accomplished by referring to express provisions in the contract that relate to the specific subject, by a review of the conduct of the parties (bargaining history, past practice, action or inaction), or by a combination thereof. *American Broadcasting Co.*, 290 NLRB 86, 88 (1988). However, the Board will not find a clear-and-unmistakable waiver due to a general management rights clause that gives the employer broad and unspecified rights. *Provena Hospitals*, 350 NLRB 808, 2007 WL 2375089, at *4 (2007). The clause must reference the particular topic in dispute. *Id.*

In contrast, the ‘contract coverage’ approach places an emphasis on the bargain already struck between the parties. Under this approach, a unilateral change allegation under Section 8(a)(5) will be dismissed “where there is a contract clause that is relevant to the dispute.” *Baptist Hospital of East Tennessee*, 351 NLRB No. 12, n.7 (2007). Where there is such a clause, it can reasonably be said that the parties have bargained about the subject and have incorporated the results of that bargaining into the contract. *Provena Hospitals*, 350 NLRB 808, 2007 WL 2375089, at *11 (2007) (Battista dissenting).

2. **Section 8(d) and the Sound Arguable Basis Standard**

In Section 8(d) contract modification cases, the Board applies a “sound arguable basis” approach to determine whether the employer’s action was a modification of the contract.\(^2\) Generally speaking, Section 8(d) is satisfied where an employer “has a sound arguable basis for its interpretation of a contract and is not motivated by union animus or . . . acting in bad faith.” *Bath Iron Works Corp.*, 345 NLRB 499, 502 (2005). In addition, the union must identify a “specific term contained in the contract that the [contested action] modified.” *Milwaukee Spring Div.*, 268 NLRB 601, 602 (1984). The Board is not required to find that the employer’s interpretation is correct, nor is it required to find that the employer’s interpretation is a better interpretation than that presented by the union. *Bath Iron Works*, 345 NLRB 499, 503 (2005).

\(^2\) As the First Circuit stated in *Bath Marine*, “the Board’s role [in Section 8(d) cases] is to prevent such economic warfare by prohibiting as unfair labor practices clear mid-term modifications of a contract that disrupt the economic relationship.” *Bath Marine Draftsmen’s Assoc. v. NLRB*, 475 F.3d 14, 20 (1st Cir. 2007).
The Board leaves that decision to the arbitrator. *Id.* Instead, the Board must decide whether the union has proven that the employer’s interpretation is not colorable. *Id.*

**B. Clarifying the Current Board’s Position on Clear-and-Unmistakable Waivers**

A review of the relevant facts and the Board’s rulings in the recent cases below provides helpful guidance on the way in which the Board will handle Section 8(a)(5) failure to bargain cases where the employer raises the language of the contract as a defense (thereby arguing that the union has already bargained over the issue).

1. *Provena Hospitals*

The Board (Members Liebman and Walsh; Chairman Battista dissenting) took an opportunity to “reaffirm” its adherence to the clear-and-unmistakable waiver standard in *Provena Hospitals*, 350 NLRB 808, 2007 WL 2375089, at *3 (2007), a Section 8(a)(5) case. The union in *Provena*, the Illinois Nurses Association, filed an unfair labor practice against the employer, alleging the employer unilaterally implemented an incentive pay policy and changed its attendance and tardiness policy, both in violation of Section 8(a)(5). *Provena Hospitals*, 350 NLRB 808, 2007 WL 2375089, at *1-2 (2007).

a. **The incentive pay policy.**

In December of 2000, due to staffing concerns over the holidays, the employer implemented an incentive policy for bargaining unit nurses. *Provena Hospitals*, 350 NLRB 808, 2007 WL 2375089, at *2 (2007). Under this policy, nurses who worked extra shifts would be paid premium pay, above and beyond the overtime pay specified in the collective bargaining agreement (the “Agreement” or “CBA”). The employer had implemented two similar incentive plans earlier in the year. *Id.* Under the terms of the Agreement, the employer had the right to provide “extraordinary pay” for extra hours worked, but it did not specifically discuss incentive pay. *Id.* The employer did not inform the union about this incentive pay program, and it did not give the union an opportunity to bargain prior to implementation. *Id.*

b. **The revised discipline policy regarding attendance and tardiness.**

In addition, in January of 2001, the employer informed the union that it would be implementing a revised attendance and tardiness policy on February 1, 2001. This policy included disciplinary provisions, and it replaced the policy that had been in effect since January of 1997. *Provena Hospitals*, 350 NLRB 808, 2007 WL 2375089, at *2 (2007).
c. The Majority’s ruling.

The Board majority first defined and then applied the clear-and-unmistakable waiver standard. The Board majority specified that the standard requires an unequivocal and specific expression of intent to permit an employer to take unilateral action about a particular term or condition of employment. *Provena Hospitals*, 350 NLRB 808, 2007 WL 2375089, at *4 (2007).

The Board found that the employer had committed a ULP regarding the incentive pay policy. The majority affirmed the Administrative Law Judge’s ruling that there was no unequivocal and specific expression of intent to allow the employer to impose the incentive pay policy. *Id.* at *8. The majority found no contractual provision expressly covering incentive pay, and no evidence that such a policy was “consciously explored in bargaining or that the union intentionally relinquished its right to bargain over the topic.” *Id.* Regarding the express provision in the contract granting the employer the right to give bargaining unit members ‘extraordinary’ pay, the majority simply stated in a footnote that the policy made no reference to ‘incentive’ pay, and that the Board declined to interpret the word ‘extraordinary’ as including “ongoing, periodic, and predictable requirements as holiday staffing needs.” *Provena Hospitals*, 350 NLRB 808, n.34, 2007 WL 2375089 (2007).

The majority also dismissed management rights language which permitted the employer to take “any and all actions . . . appropriate . . . to maintain efficiency and appropriate patient care.” The majority refused to find a waiver in such general terms, claiming that such language could then be applied to practically any unilateral change. *Id.* (*citing Dorsey Trailers, Inc.*, 327 NLRB 835, 836 (1999)). Lastly, the Board dismissed the relevance of past practice, citing prior Board precedent that “union acquiescence in past changes to a bargaining subject does not betoken a surrender of the right to bargain” the next time the employer makes similar changes. *Provena Hospitals*, 350 NLRB 808, n.35, 2007 WL 2375089 (2007) (*citing Amoco Chemical Co.*, 328 NLRB 1220, 1222 n.6 (1999), *enf. denied*, 217 F.3d 869 (D.C. 2000)).

The Board, however, disagreed with the Administrative Law Judge and found that there was no ULP related to the disciplinary policy for attendance and discipline. The majority stated that several provisions of the management rights clause, when taken together, explicitly authorized the employer’s unilateral action and satisfied the clear-and-unmistakable waiver standard. *Provena Hospitals*, 350 NLRB 808, 2007 WL 2375089, at *9 (2007). Specifically, the Board pointed to the provisions that gave the employer the right to “change reporting practices
and procedures and/or to introduce new or improved ones,” “to make and enforce rules of conduct,” and “to suspend, discipline, and discharge employees.” *Id.*

2. *Verizon North, Inc., and Quibecor*

In 2008, the two member Board applied the majority’s holding in *Provena* to two cases – *Verizon North, Inc.*, 352 NLRB No. 120 (2008), and *Quibecor World Mt. Morris II, LLC*, 353 NLRB No. 1 (2008). The cases provide guidance into how the current Board will approach the waiver/contract coverage issue in Section 8(a)(5) cases.

In *Verizon North*, the Board (Chairman Schaumber and Member Liebman) held that the employer violated Section 8(a)(5) of the Act by unilaterally eliminating a past practice of allowing employees to ‘stack’ leave – a process by which an employee could preserve his or her FMLA allotment by using paid vacation or personal leave days for an FMLA qualifying absence, with no reduction in FMLA leave. *Verizon North, Inc.*, 352 NLRB No. 120 (2008). The employer argued that the union waived its right to bargain over this issue by agreeing to a contractual provision that stated that “[a]ny leave of absence provided for in the [Agreement], whether paid or without pay, that is qualified under the FMLA, shall run concurrently with the Family and Medical Leave of Absence under the FMLA.” *Id.*

The Board found that the contract language quoted above did not establish a “clear and unmistakable waiver” of the Union’s bargaining rights. *Id.* The Board found “leave of absence” to be ambiguous, in that it could reasonably be interpreted two ways – as including or not including paid vacation and personal leave days. *Id.* The Board noted that during negotiations, the Company’s lead negotiator reassured the Union that the clause was merely a “clarification of existing practice.” As a result, the Board cited *Provena* and found a violation of Section 8(a)(5).³

In *Quebecor World Mt. Morris II, LLC*, 353 NLRB No. 1 (2008), the Board found that the employer did not violate Section 8(a)(5) of the Act by unilaterally implementing a performance improvement plan (“PIP”). According to the Board, the management rights clause in the agreement at issue – which was properly extended past its expiration date by an oral

³ Chairman Schaumber noted that the plain meaning of the clause at issue supported the Company’s waiver argument, but found that the clause was sufficiently ambiguous to resort to extrinsic evidence. *Verizon*, 352 NLRB No. 120, n.2 (2008) Through this intrinsic evidence, Chairman Schaumber concluded, it was clear that the Union did not clearly and unmistakably waive its right to bargain. *Id.*
agreement – specifically permitted the employer to implement a PIP with respect to a bargaining unit member’s performance. *Id.* The PIP was issued in conjunction with the employee’s annual review, and specified that the employee’s performance would be closely evaluated over 90 work shifts. *Id.* If the employee did not improve his performance by the end of that period, he would be subject to further discipline, including discharge or demotion. *Id.* No bargaining unit member had received a PIP previously, nor had any bargaining unit member been disciplined in conjunction with his or her annual performance review. *Id.*

The Board based its holding on several specific phrases in the agreement’s management rights clause – the employer’s “exclusive right” to “demote, suspend, discipline or discharge for cause” in combination with the right to “establish and apply reasonable standards of performance and rules of conduct.” *Id.* According to the Board, these phrases “plainly authorize the unilateral establishment and application of disciplinary procedures for work-performance issues” – such as a PIP. *Id.* (citing *Provena*, the Board found that the union had clearly and unmistakably waived its right to bargain over the employer’s use of the PIP).

In addition, the Board has similarly applied the clear-and-unmistakable doctrine in other recent cases. In *Baptist Hospital of East Tennessee*, 351 NLRB No. 12, 2007 WL 2844947 (2007), the Board (Chairman Battista, Member Schaumber; Member Liebman dissenting) found a waiver under the clear-and-unmistakable waiver doctrine related to the employer’s unilateral elimination of the use of preference and seniority in assigning unit members to holiday shifts. The management rights clause gave the employer the right, among other things, to determine and change starting times, quitting times and shifts. Although Chairman Battista and Member Schaumber applied the clear-and-unmistakable waiver standard, both noted their endorsement of the contract coverage analysis. In *California Offset Printers, Inc.*, 349 NLRB 742 (2007), the Board majority (Members Kirsanow and Walsh; Member Schaumber dissenting) refused to find a waiver of the union’s right to bargain over a change that would require employees to be reachable during their off hours in the event of a schedule change. The majority held that there were no contractual clauses that specifically allowed such a change (including the management

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4 *See Cincinnati Paperboard*, 339 NLRB 1079 (2003) (holding that the contract, which conferred to the company the “sole responsibility” to direct the work force, including the “right to hire, schedule, and assign work,” waived the union’s right to bargain over the company’s unilateral elimination of employees’ long-standing practice of swapping partial shifts).
rights clause that granted the employer the right to establish and enforce shop rules and to establish work schedules and make changes therein).\textsuperscript{5}

C. The Minority View – the Contract Coverage Analysis

In many of the opinions discussed above, a Board member expressed his disagreement with the clear-and-unmistakable waiver standard in favor of the contract coverage approach. In both Verizon and Quebecor, Chairman Schaumber reiterated that he previously rejected the clear-and-unmistakable waiver standard in favor of a “contract coverage analysis.” Verizon, 352 NLRB No. 120, n.2 (2008); Quebecor, 353 NLRB No. 1, n.13 (2008). However, Chairman Schaumber concurred with Member Liebman in those decisions because he recognized that Provena is current Board law, and he agreed to apply it in those cases for “institutional reasons.” Id.

In Provena, then-Chairman Battista dissented and argued for the contract coverage approach. Chairman Battista argued that the waiver approach was inapposite: “[T]he issue is not whether the union has waived its right to bargain. The issue is whether the union and the employer have bargained concerning the relevant subject matter.” Provena Hospitals, 350 NLRB 808, 2007 WL 2375089, at *11 (2007). As Chairman Battista states, where it can reasonably be said that the parties have bargained about a subject matter (i.e., where the contract has a clause that is relevant to the dispute), there can be no refusal to bargain. Chairman Battista also pointed to the conflict between the Board and the grievance-arbitration process that is posed by the waiver doctrine. Id. Whereas an employer’s unilateral change is unlawful under the Board’s waiver analysis absent a ‘clear and unmistakable’ waiver of the union’s right to bargain, an arbitrator would determine whether the union has proven a violation of the contract. Id. As a result, adoption of the contract coverage approach would discourage forum shopping. Id. at *12. Chairman Battista also noted that the contract coverage approach would eliminate a conflict between the Board and at least two circuit courts. Id. at *11.

In applying the contract coverage approach to the time and attendance disciplinary policy, Chairman Battista found several provisions relevant to the dispute, and therefore found

\textsuperscript{5} See also Windstream Corp., 352 NLRB No. 9 (2008); Hacienda Resort Hotel & Casino, 351 NLRB No. 32 (2007), vacated by Local Joint Executive Bd. of Las Vegas, 540 F.3d 1072 (9th Cir. 2008); Tribune Publishing Co., 351 NLRB No. 22 (2007); California Newspapers Partnership, 350 NLRB 1175 (2007); Gruma Corp. d/b/a Mission Foods, 350 NLRB 336 (2007); 3-V, Inc., 350 NLRB 227 (2007). 
that the issue of a contractual violation was “grist for an arbitrator’s mill.” *Id.* at *13. Specifically, the provisions included the employer’s right to “make and enforce rules of conduct of employees,” to “change reporting practices and procedures and/or to introduce new or improved ones,” and the right to “discipline employees for breach of those rules.” *Id.* at *13.

Regarding the staff incentive policy, which provided premium payments to those nurses who worked extra shifts, Chairman Battista found multiple clauses that were relevant to the dispute. *Id.* at *13. Chairman Battista pointed to the clauses that permitted “extraordinary pay”, that provided the employer the right to “establish and change the hours of work (including overtime work) and work schedules”, and the employer’s right to take “any and all actions it determines appropriate, including the subcontracting of work, to maintain efficiency and appropriate patient care.” *Id.* Chairman Battista concluded that the contract contained clauses which were “relevant to the dispute about overtime work and the compensation to be paid therefore. Again, this is grist for the arbitral mill.” As a result, Chairman Battista argued that under the appropriate analysis – the contract coverage analysis – there was no refusal to bargain. “The issue of whether the parties reached an agreement on those subjects, and what those agreements were, would be left to the arbitral process.” *Id.*

**III. THE CONTRACT COVERAGE TEST HAS BEEN ADOPTED IN THREE CIRCUITS**

As Chairman Battista’s dissent in *Provena* makes clear, the suitability of the “clear-and-unmistakable waiver” test in unilateral change cases remains subject to debate. The waiver standard has been repeatedly challenged by dissenting Board members and by United States Courts of Appeals.⁶ These opinions argue for the application of a “contract coverage test.” Set forth below is a summary of the approaches taken by the Seventh Circuit, the D.C. Circuit, and the First Circuit.

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⁶ See *Bath Marine Draftsmen’s Assoc’n*, 475 F.3d 14 (1st Cir. 2007); *NLRB v. U.S. Postal Service*, 8 F.3d 832, 836 (D.C. Cir. 1993); *Dept. of the Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992); *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); *California Offset Printers*, 349 NLRB No. 71 (2007) (dissent, Member Schaumber); *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999) (dissent, Member Hurtgen); *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995) (dissent, Member Cohen).
A. The Seventh Circuit Finds the Issue of Waiver Inapposite

In *Chicago Tribune v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992), the Seventh Circuit discussed an employer’s unilateral implementation of employee standards related to on- and off-duty drug and alcohol use. The collective bargaining agreement at issue had a broad management rights clause that allowed the employer to establish reasonable rules and regulations regarding the operation of the facility and employee conduct. *Id.* at 935. The union argued, *inter alia*, that it had not clearly and unmistakably waived its rights to bargain over off-duty conduct. The Seventh Circuit found that employee conduct such as off-duty drug use was “comprehended by” (i.e., covered by) the management rights clause: “The management-rights clause gives management carte blanche to impose rules relating to employee conduct, provided only that they are reasonable rules. The alcohol and drug standard is a reasonable rule of employee conduct.” *Id.* at 936. As such, the Court found the concept of waiver inapposite. *Id.* at 937-37 (“we wonder what the exact force of the ‘clear and unmistakable’ principle can be when the parties have an express written contract and the issue is what it means.”)

The Seventh Circuit continued, explaining that the issue has “nothing interesting to do with the doctrine of waiver. It is a question of interpretation. Of course people should not be tripped into forgoing valuable rights, but where as in this case 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 the decision in the union's favor.” *Id.* at 937.

Lastly, the Court responded to questions about the alleged inequity of the “contract coverage” analysis related to broad management rights clauses:

And the breadth of a contractual provision need not detract from the clarity of its meaning. . . . Unions employ experienced contract negotiators, who do not need special rules of construction to protect them from being outwitted by company negotiators. We agree, therefore, that where the contract fully defines the parties’ rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say that the union has ‘waived’ its statutory right to bargain; rather, the contract will control and the ‘clear and unmistakable’ intent standard is irrelevant.

*Id.* at 937 (citations omitted). *See also Local 15, IBEW v. Exelon Corp.*, 495 F.3d 779, 783 (7th Cir. 2007) (“When a union agrees to a management rights clause that gives the employer the exclusive right to regulate employee conduct, no further bargaining on the issue is required by
the NLRA.”) (citing Chicago Tribune Co. v. NLRB, 974 F.2d 933, 937 (7th Cir. 1992)).

B. The D.C. Circuit Adopts the Contract Coverage Analysis

The D.C. Circuit has also rejected the clear-and-unmistakable waiver standard in favor of the contract coverage analysis in Section 8(a)(5) refusal to bargain cases. In NLRB v. United States Postal Service, 8 F.3d 832, 836 (D.C. Cir. 1993), the Court stated that “When employer and union bargain about a subject and memorialize that bargain in a [CBA], they create a set of rules governing their future relations. Unless the parties agree otherwise, there is no continuous duty to bargain during the term of the CBA with respect to a matter covered by the contract.” The D.C. Circuit has also repeatedly reminded that:

The union may exercise its right to bargain about a particular subject by negotiating for a provision in a collective bargaining contract that fixes the parties’ rights and forecloses further mandatory bargaining as to that subject. To the extent that a bargain resolves any issue, it removes that issue pro tanto from the range of bargaining. This court has referred to this inquiry as an analysis of whether an issue is “covered by” a collective bargaining agreement.

United States Postal Service, 8 F.3d 832, 836 (D.C. Cir. 1993). Recognizing that a union can also waive its right to bargain over a mandatory subject of bargaining, the Court called the waiver analyses “analytically distinct” from an inquiry about whether the parties have already bargained over a subject. “A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter; but where the matter is covered by the [CBA], the union has exercised its bargaining right and the question of waiver is irrelevant. . . . Accordingly, questions of ‘waiver’ normally do not come into play with respect to subjects already covered by a collective bargaining agreement.” Id. at 836-37 (emphasis in original) (quoting Dep’t of Navy v. FLRA, 962 F.2d 48, 57 (D.C. Cir. 1992)).

The D.C. Circuit has also reiterated the obligation of the Board and the Courts not to interfere with the bargain the parties have struck. “Thus, neither 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. Quite the contrary, the courts are bound to enforce lawful labor agreements as written.” Id. at 836.

C. The First Circuit Adopts the D.C. Circuit’s Approach

Lastly, the First Circuit has joined the D.C. and Seventh Circuits, and has recently adopted the D.C. Circuit’s ‘contract coverage’ analysis. See Bath Marine Draftsmen’s Assoc’n,
Bath Marine was the result of the union’s appeal of the Board’s decision in Bath Iron Works Corp., 345 NLRB 499 (2005). In Bath Iron Works, the union alleged the employer committed a ULP by unilaterally changing the identity of the pension plan sponsor when it merged its pension plan into its corporate parent’s plan. The Board found that the General Counsel alleged a Section 8(d) contract modification case, and not a Section 8(a)(5) failure to bargain case. Id. at 501. The Board therefore applied the ‘sound arguable basis test’ and determined that the employer’s interpretation of the contract was reasonable, it determined that there was no violation of Section 8(d). Id. at 503.

On appeal to the First Circuit, in Bath Marine, the Circuit Court held that the General Counsel did in fact allege both Section 8(d) and Section 8(a)(5) violations. Bath Marine, 475 F.3d at 24 (1st Cir. 2007). In discussing the Section 8(a)(5) violation, the Court stated it was “adopt[ing] the District of Columbia Circuit’s contract coverage test to determine whether the Unions have already exercised their right to bargain. If so, the waiver standard is meaningless.” Id. at 25. The First Circuit found that from the language in the collective bargaining agreement, it was clear that the parties bargained over the subject in dispute (the identity of the benefit plan sponsor).7 As a result, the CBAs at issue covered the subject of the dispute. Id. at 26.8

In adopting the D.C. Circuit’s ‘contract coverage’ analysis, the First Circuit stated that “once a subject is ‘covered by’ a CBA, any dispute regarding that subject is an issue of contract interpretation, and the question of whether a union has waived its right to bargain over the subject does not come in to play.” Id. at 23.

7 The First Circuit stated that “[a]ll three CBAs explicitly identify the Plan, and the General Counsel admitted in his brief to the Board that the identity of the pension plan was a part of the collective bargaining agreement.” Bath Marine, 475 F.3d at 25-26 (1st Cir. 2007).

8 The First Circuit went on to state that because the CBAs covered the relevant subject matter, the ‘sound arguable basis’ applied, and that therefore the Board did not err in failing to apply the clear-and-unmistakable waiver test. Bath Marine, 475 F.3d at 26 (1st Cir. 2007). It is important to remember that, according to the First Circuit, the union alleged an 8(a)(5) refusal to bargain and the employer responded by asserting it had the right to act unilaterally under the terms of the agreement. The Court therefore analyzed whether the employer had bargained over the issue by using the contract coverage test, and went on to imply that the sound arguable basis test should be used to determine whether the employer was permitted to take the action under the terms of the contract. This approach appears to address both the Section 8(a)(5) allegation (did the employer bargain) and the Section 8(d) allegation (did the employer modify the contract).
V. WHERE TO GO FROM HERE – THE CONTRACT COVERAGE APPROACH

As has been discussed above, the concept of ‘waiver’ is misapplied in the Board’s current approach to Section 8(a)(5) cases. For the reasons discussed above and articulated below, the Board should adopt the ‘contract coverage’ analysis when reviewing Section 8(a)(5) failure to bargain charges.

A. The Majority Approach – Two Steps in One

The Board’s approach to Section 8(a)(5) cases (including the recent Board cases discussed above) conflates two separate and distinct inquiries and rolls them into its ‘clear-and-unmistakable waiver’ analysis. Instead, the Board should engage in a two-step analysis.

The First Step: The initial step should determine whether there has already been bargaining on the disputed issue, i.e., determine whether the contract addresses the disputed topic in any way. If the parties’ agreement is germane to the issue, it is reasonable to conclude that the parties’ bargaining encompassed that issue. Indeed, the agreement is a product of the parties’ bargaining. If the agreement bears on the disputed topic, the Section 8(a)(5) charge should be dismissed and an arbitrator should discern the agreement’s effect on the parties’ rights.

The Second Step: If the agreement is not applicable to the disputed topic, then – and only then – does it make sense to determine whether the union waived its rights to bargain over the issue. See Dep’t of Navy v. FLRA, 962 F.2d 48, 56 (D.C. Cir. 1992) (“[T]he agency must engage in mid-term negotiations over an otherwise bargainable matter raised by the union, except when: (1) the matter is covered by the parties’ collective bargaining agreement; or (2) the union has “clearly and unmistakably” waived its right to bargain.”) Such a waiver may be found in, among other things, the union’s failure to request bargaining upon timely notice, or the parties’ bargaining history. Regal Cinemas, Inc. v. NLRB, 317 3d 300, 314 (D.C. Cir. 2003).

The Board, however, blends these two distinct steps into one question – is the contractual language related to the disputed topic specific enough to demonstrate that the union clearly and unmistakably waived its right to bargain over that issue. Though framed as a waiver question, the Board’s waiver analysis is simply the first step in the two-step analysis noted above – does the language show that the parties bargained over the issue. The Board’s ‘waiver’ analysis actually determines whether the union exercised its right to bargain, not whether it waived that right. As the D.C. Circuit stated in Dep’t of Navy v. FLRA, 962 F.2d 48, 57 (D.C. Cir. 1992), the distinction between the exercise of the right to bargain and the waiver of the right to bargain is a
distinction that “goes to the structural heart of labor law.” *Dep’t of Navy*, 962 F.2d at 57 (D.C. Cir. 1992). The Board, however, fails to adhere to that distinction in an apparent attempt to shift a heightened ‘clear-and-unmistakable’ waiver standard to the employer. As is detailed below, this shift is inappropriate.

**B. Why Shift the Burden and Raise the Bar?**

The Act provides both employers and unions with economic weapons when engaging in collective bargaining. At times, parties base their negotiating strategies on the relative measure of their strengths and weaknesses. Collective bargaining is designed to be a series of give and take, indeed such is the requirement of bargaining in good faith. Concessions gained are often won at the price of concessions given. This environment effectuates the purposes of the Act, and is intended to result in a fully-negotiated agreement between the parties.

Despite this process, the Board’s waiver analysis seeks to deprive employers of the benefit gained from their concessions. The Board alters the playing field by requiring employers to bargain mid-term over rights that they have already secured during contract negotiations. Indeed, management rights clauses are subject to the same negotiations as pay scales and benefit contribution rates. By treating broad grants of rights from unions to management as if they did not exist, the Board is rendering negotiations for an employer an uncertain proposition at best, and an illusory proposition at worst.

A union may argue that it is unfair to render enforceable a broad grant of management rights that the union exchanged for valuable concessions. However, the parties negotiated in good faith, reached agreement, and memorialized that agreement in a contract. If the contract settles the parties’ rights, they have bargained vis-à-vis those rights. The Board should not act as an arbitrator when the results of that bargain seem to favor one side or the other in a given context. As the Seventh Circuit said in *Chicago Tribune*, “the breadth of a contractual provision need not detract from the clarity of its meaning. . . . Unions employ experienced contract negotiators, who do not need special rules of construction to protect them from being outwitted by company negotiators.” *Chicago Tribune v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992).

Indeed, unions are free to reject broad management rights clauses. The narrower the clause, the less likely the clause will satisfy a ‘contractual coverage’ analysis. For example, the employer in *Regal Cinemas, Inc. v. NLRB*, 317 3d 300, 314 (D.C. Cir. 2003), attempted to use a narrow management rights clause to argue that mid-term bargaining over a disputed issue (its
plan to replace union movie projectionists with supervisors) was unnecessary. The D.C. Circuit applied the contractual coverage test and found that the disputed topic was not “covered by” the contract. *Id.* at 313. The Court stated:

Unlike the clause in [*NLRB v. United States Postal Service*, 8 F.3d 832, 835 (D.C. Cir. 1993)] Regal’s management rights clause does not grant the authority to “hire, promote, transfer, assign, and retain employees.” As the General Counsel observes, the plain language of the clause involves “only the right to introduce new technology, machinery, and methods for the projectionists to execute the tasks they are to perform.” In fact, the clause mentions “employees” only with respect to Regal’s obligation “to negotiate the effects [of such decisions] on the employees.” . . . As discussed above, the record shows that Regal’s decision involved no change in the “methods” or “procedures” of projection and no elimination of “work.” Rather, Regal merely transferred to managers work that was previously done by projectionists. We therefore find that the language of the management rights clause fails to support Regal's argument that the clause authorized its unilateral decision.

*Id.* In this way, unions are free to negotiate clauses that restrict the range of topics that will satisfy the contract coverage analysis.9

With these principles in mind, the Board should not interject itself into the parties’ fully bargained agreement and require mid-term bargaining over subjects already covered by the contract. In essence, the parties should not have to re-establish the terms of their deal. Instead, the Board should preserve the sanctity of the contract and allow an arbitrator to interpret and enforce the agreement as written.

C. **Why Encourage Litigation Over Arbitration?**

The practical effect of the Board’s clear-and-unmistakable waiver analysis is that it is easier to bring a Section 8(a)(5) charge for a refusal to bargain. Unions that are faced with an unpopular unilateral employer decision, exercising a right arguably conceded during bargaining, can now force the issue to the Board. While the Board may exercise its discretion to defer the matter to arbitration, deferral is far from certain, and the Board mechanisms add expense and an element of uncertainty.

9 Moreover, even where a broad management rights clause satisfies the contract coverage analysis, an arbitrator still determines the meaning of the clause and therefore whether the employer’s action is a breach of the parties’ agreement.
A ULP over a unilateral change should be reserved for situations where the contract does not speak to the issue and therefore there was no bargaining under Section 8(a)(5), or where a clear term of the contract was modified in violation of Section 8(d). This is especially true given that arbitrators are to play the central role in the enforcement of collective bargaining agreements. As the United States Supreme Court made clear, “[a]lthough the Board has occasion to interpret collective-bargaining agreements in the context of unfair labor practice adjudication, the Board is neither the sole nor the primary source of authority in such matters. Arbitrators and courts are still the principal sources of contract interpretation. Section 301 of the [LMRA] authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements.” Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 202, 111 S.Ct. 2215 (1991).

Under the Board’s clear-and-unmistakable waiver approach, the machinery of the National Labor Relations Board will be applied more frequently in routine contractual disputes. This approach runs counter to the notion, expressed in by the Supreme Court in Litton, that the arbitral process was intended to be the primary vehicle for the resolution of contractual disputes.

D. Certainty is Better Than Uncertainty

As discussed above, the ironic part of the ‘waiver versus contract coverage’ debate is that the analysis under both standards utilizes the same primary tool – a review of the contract language – to answer the same primary question – does the contract language relate to the disputed issue (in which case the disputed issue is “covered” by prior bargaining, or future bargaining and has been “waived” by the union – depending upon the name of the analysis used). The only real difference is the level of specificity required. The waiver analysis requires a much higher degree of specificity of contractual language to reach the conclusion that the parties bargained over an issue. In fact, the Board’s wavier analysis provides no coherent way to determine, prior to a decision from the Board, whether the parties already bargained over the disputed issue (i.e., whether the Board would find a waiver). The Board could always require a greater level of specificity than that provided in the contract. For example, consider the following clauses:
Clause no. 1 grants the employer the right to pay more than the contracted rate of pay.

Clause no. 2 grants the employer the right to pay more than the contractual rate of pay, including extraordinary pay.

Clause no. 3 grants the employer the right to pay more than the contractual rate of pay, including extraordinary pay for extra hours worked.

Clause no. 4 grants the employer the right to pay more than the contractual rate of pay, including extraordinary pay for extra hours worked, and incentive pay.

Clause no. 5 grants the employer the right to pay more than the contractual rate of pay, including extraordinary pay for extra hours worked, and incentive pay for ongoing, periodic, and predictable requirements such as holiday staffing needs.

Under the clear-and-unmistakable waiver doctrine, based on the Board’s *Provena* decision, clauses 1 – 3 above would not waive the union’s right to bargain over incentive pay. It appears that the Board would not find a waiver unless the clause included the word “incentive” in the relevant clause, and possibly not even then. Indeed, when explaining why a clause similar to clause no. 3 above did not waive the union’s right to bargain over the holiday incentive pay at issue, the majority stated that they “declined to interpret the word ‘extraordinary’ as encompassing such ongoing, periodic, and predictable requirements as holiday staffing needs.” *Provena*, 350 NLRB 808, n.34, 2007 WL 2375089 (2007).

As demonstrated by the majority in *Provena*, the Board could always require one level of specificity more than that found in a contract, unless the exact situation is identified precisely in the contractual language. The D.C. Circuit foreshadowed this issue, more than 15 years before the Board’s *Provena* decision:

The rather obvious problem with [this type of specificity requirement] is that it is, in practice, impossible to meet. Surely it would have required near-supernatural prescience for the parties to have foreseen, at the time of drafting the MLA, what implementation issues would arise with respect to “specific individual details” that had not even been conceived, much less implemented, at the time. Nor could any mortal drafter anticipate, perhaps months or years in advance, the “full range of impact and implementation issues” that could arise from an as yet unforeseen modification of performance standards.

*Dep’t of Navy v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992).
An employer and a union should not be required to bargain over every possibility that might arise during the term of their contract. Instead, it is reasonable to take the position that bargaining over broad clauses (such as clause no. 1 or no. 2 above) encompasses the more specific scenarios that fall under that clause (such as clause nos. 3-5). This allows arbitrators to fulfill their intended role of contract interpretation when specific issues arise.  

In this way, the Board’s use of the waiver standard leads to uncertain bargaining and uncertainty in mid-term implementation.

VI.  CONCLUSION

Although it appears that for the foreseeable future the Board will be clarifying, and not revisiting, its application of the clear-and-unmistakable waiver standard in Section 8(a)(5) cases, the contract coverage analysis is a better reasoned approach. As specified above, the contract coverage approach properly assesses whether the parties’ negotiations covered a specific disputed topic, it discourages forum shopping and unnecessary appeals to the Board for relief, and it provides greater certainty in the bargaining process. However, and most importantly, the contract coverage approach respects the sanctity of the parties’ agreement, in that it does not provide for an extra-contractual means by which a party can force mid-term bargaining over rights that are already addressed and established in the contract. Under the contract coverage approach, a deal is a deal.

10 It is telling that the Provena majority specifically defended its position by providing such a careful and narrow interpretation of “extraordinary” pay, so as to exclude holiday staffing needs that require overtime. In light of the Supreme Court’s statements in Litton, such parsing is better left for an arbitrator.