From:	(b) (6), (b) (7)(C)
To:	Leach, David E.; Santiago, Saulo; Flores, Frank W.; Fox, Richard; Schechter, Eric R.
Cc:	Bock, Richard; Szapiro, Miriam; Dodds, Amy L.; Compton, Kayce R.; Belin, Jeremy S.; Shorter, LaDonna
Subject:	Comcast Cable, 22-CA-259093 (Case-Closing E-Mail)
Date:	Wednesday, August 12, 2020 10:27:27 AM

The Region submitted this COVID-19 case to Advice regarding whether a contractual management-rights clause permitted Comcast (the Employer) to unilaterally implement home garaging for installation and service technicians under the "contract-coverage" doctrine set forth in *MV Transportation*, 368 NLRB No. 66 (Sept. 10, 2019), and, if not, whether the Region should issue complaint to urge the Board to expand the narrow category of "exigent economic circumstances" to include this case, where the Employer argues that the pandemic required it to take prompt action for health and safety (but not economic) reasons. We conclude that the management-rights clause permitted the Employer to unilaterally implement the home-garaging policy and that the Employer bargained to impasse over the effects of that decision. We therefore do not reach the exigent-economic-circumstances issue in this case.

We initially conclude that the "contract-coverage" standard applies here, even though the parties' collective-bargaining agreement expired on February 28, 2018, and lacked explicit language that the management-rights clause would survive contract expiration, *see Nexstar Broadcasting d/b/a KOIN-TV*, 369 NLRB No. 61, slip op. at 2 (Apr. 21, 2020), because the parties signed a MOU agreeing to the terms of a successor contract, which included the same management-rights clause and backdated the successor contract to make it effective from March 1, 2018, through February 28, 2022.

Applying the contract-coverage standard, we conclude that Article 3, the management-rights clause, clearly allowed the Employer to unilaterally enact the home garaging safety rule to protect workers in the context of the COVID pandemic. Article 3, Section 4 provides that the Employer "shall have the right to make and enforce new work rules," including "operational rules and procedures . . . and safety rules and procedures." *See, e.g.*, *Huber Specialty Hydrates, LLC*, 369 NLRB No. 32, slip op. at 3-4 (Feb. 25, 2020) (management right to adopt rules and policies covers right to amend or revise existing policies); *MV Transportation*, above, slip op. at 17 (finding new safety policy covered by management-rights clause, which gave management the right to "adopt and enforce reasonable work rules"). Other provisions of Article 3 further support the Employer's unilateral implementation of home garaging. *See* Section 1 (stating the Employer "retains the exclusive right[] to operate, control and manage the business and to direct employees in the fulfillment of their duties as those duties are determined by the [Employer]"); Section 2 (the agreement "shall not be construed to limit in any way the [Employer's] right to determine the method of operations and services" and to "introduce new or improved methods of operation").

Although the Employer has rejected Union proposals for home garaging in past contract negotiations, and garaging in the facility is arguably a past practice that has become an implied term and condition of employment, *see Smiths Industries*, 316 NLRB 376, 376-77 (1995), the management-rights clause makes clear that it trumps any such past practice or implied reading of the contract. Article 3, Section 4 provides that the Employer is free to make new work rules, including safety rules, "unless it is expressly prohibited from doing so by a provision of this Agreement." Moreover, the relevant management rights set forth in Sections 1 and 2 can be overridden only by an explicit contractual provision or an "established past practice that is acknowledged by the parties and established following the effective date of this agreement," and those Sections further provide that "the explicit language of this Agreement shall govern,

and . . . in no event shall any managerial right, function or prerogative be modified or diminished by any practice or course of conduct."

In (b) (7)(A), (b) (7)(A) Here, there is nothing in the contract to indicate the parties bifurcate bargaining, and even if the parties have bargained these issues separately in past negotiations, this case would not be an appropriate vehicle to put before the Board to urge it to adopt the position of the D.C. and Seventh Circuits because we conclude that the parties did fully bargain over the effects of the home-garaging decision. The parties had numerous conversations regarding home garaging between March 21—the day that both the New Jersey Governor issued an Executive Order providing, *inter alia*, that essential businesses like Comcast whose employees cannot telework "should make best efforts to reduce staff on site to the minimal number necessary to ensure that essential operations can continue" and the Employer proposed home garaging to the Union—and April 15, when the Employer implemented the home garaging proposal (after the virus had become increasingly prevalent and a unit employee died of COVID-19 contracted outside the workplace). The Employer conveyed that home garaging would be temporary, for the duration of the pandemic, and that it was willing to pay for the time technicians drove from their homes to their first job but not for their return ride home. By contrast, the Union insisted that home garaging be permanent and that technicians also be paid for the return ride home after their last job. The parties never really deviated from those positions throughout their many discussions and were therefore simply at an impasse.

Although at one point, one of the Employer's negotiators told the Union representative that (b) (6) was not authorized to "offer" more than the Employer's initial proposal, the Union nevertheless admits that (b) (6) actively solicited counteroffers and that a second Employer negotiator floated a compromise idea in an effort to meet the Union half-way. The second negotiator said (b) (6) would have to run (b) (6) idea past the Employer's other executives, but the parties had at least two conversations in the month that followed, during which the Union did not address the potential compromise; instead, the Union continually reiterated its initial position that technicians be compensated for their full return ride home. Accordingly, the Employer's proposal was not delivered as a *fait accompli*, and the evidence does not show that the Employer's negotiators lacked authority to reach an agreement on effects. Rather, the Employer (unlike the Union) exhibited a degree of flexibility during the parties' numerous meetings, and the two sides reached impasse, given their ultimate failure to budge.

Accordingly, the Region should dismiss the charge absent withdrawal. This closes the case in Advice. Please feel free to contact us with any questions.

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