

EMPLOYER LAW BLOG

# NLRB Alert: Collective Bargaining

AUTHOR: JOHN L. GILBERT

Start the New Year off right in your negotiations. Heed the decision of the NLRB in the Twinbrook OpCo, LLC case decided on December 28, 2023 (06-CA-283709). The Board held that an employer violated the Act by unilaterally terminating shift differentials after reaching a collective bargaining agreement with a union.

The new contract did not address the existing shift differentials so the employer believed it could cease paying them relying on two defenses: the contract coverage defense and a waiver defense. The contract defense failed because the Board held that the evidence and the contract, including its management rights clause, did not support a conclusion that simply because the new contract did not provide for the shift differentials, the employer could cease a practice without notifying the union and offering to bargain with the union over the elimination of the shift differentials.

The waiver defense failed because the evidence did not support a clear and unmistakable waiver of the topic, especially since it hadn't been discussed in bargaining. The latter is a requirement for an effective waiver argument based upon a zipper or integration clause. Those clauses typically prohibit bargaining during the term of the contract on anything not addressed in the agreement.

One lesson from this decision is to be sure to bargain over and address terms and conditions of employment in negotiations and not leave a loose end as the employer apparently did in this case.

Another lesson is to not place too much reliance on a management rights clause or a zipper clause. The NLRB has long and often construed those against employers.

The Labor and Employment Law Team at Sandberg Phoenix is here to help employers navigate all labor law issues. Give us a call.