

1 STRAUB, *Circuit Judge*, concurring:

2 Because I am in substantial agreement with the majority opinion, I concur. I write  
3 separately to note that the majority opinion articulates settled legal doctrine in a novel way,  
4 creating a “two-step framework” which I regard as an unnecessary innovation. However, this  
5 reformulation does not, in my view, disturb the substance of the established principles that apply  
6 to, and dictate the outcome of, this appeal.

7 The National Labor Relations Board’s (the “Board”) “clear and unmistakable” waiver  
8 standard—a product of the Board’s considerable experience in labor-management relations—  
9 “requires bargaining partners to unequivocally and specifically express their mutual intention to  
10 permit unilateral employment action with respect to a particular employment term,  
11 notwithstanding the statutory duty to bargain that would otherwise apply.” *Provena Hosps.*, 350  
12 N.L.R.B. 808, 811 (2007). Employees’ statutory right to bargain will not be deemed to have  
13 been waived based merely on “general contractual provisions.” *Id. Cf. NLRB v. N.Y. Tel. Co.*,  
14 930 F.2d 1009, 1011 (2d Cir. 1991) (“A clear and unmistakable waiver may be found in the  
15 express language of the collective bargaining agreement; or it may . . . be implied from the  
16 structure of the agreement and the parties’ course of conduct.”).

17 Although the majority opinion uses the term “coverage” and recasts our precedent as a  
18 two-step inquiry, it continues to adhere, as we long have, to the “clear and unmistakable” waiver  
19 standard developed by the Board and endorsed by the Supreme Court. *See, e.g., Metro. Edison*  
20 *Co. v. NLRB*, 460 U.S. 693, 708 (1983) (“[W]e will not infer from a general contractual  
21 provision that the parties intended to waive a statutorily protected right unless the undertaking is  
22 explicitly stated. More succinctly, the waiver must be clear and unmistakable.”). In remaining  
23 faithful to the “clear and unmistakable” standard, the majority opinion affords the Board’s

1 waiver rule appropriate deference. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991)  
2 (“[i]f the Board adopts a rule that is rational and consistent with the [National Labor Relations]  
3 Act . . . then the rule is entitled to deference from the courts”) (quotations omitted). *See also*  
4 *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 787–88 (noting the “considerable deference”  
5 the Board is due “by virtue of its charge to develop national labor policy”) (quotations omitted);  
6 *Civil Serv. Emps. Ass’n v. NLRB*, 569 F.3d 88, 91 (2d Cir. 2009). The majority opinion’s two-  
7 step analysis does not depart from the foregoing principles, which, in part, lead it to correctly  
8 reject the “contractual coverage” approach of certain of our Sister Circuits.

9       Indeed, the majority opinion notes that any “contractual indicia of exercise of the right to  
10 bargain or proffered proof of waiver must clearly and unmistakably demonstrate the coverage or  
11 waiver sought to be proved.” (Maj. Op. at 12.) Therefore, the majority opinion’s new  
12 articulation of the long-settled law governing waiver of statutory bargaining rights should not be  
13 read as a retreat from the “clear and unmistakable” standard developed by the Board, to which  
14 we remain, under binding precedent, required to defer.