No. S-25-26

IN THE NEBRASKA SUPREME COURT

NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES,
Appellant,

v.

STATE OF NEBRASKA,
Appellee.

Appeal from the Commission of Industrial Relations

SUPPLEMENTAL BRIEF OF APPELLEE

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QUESTION PRESENTED

Whether Nebraska law imposes an obligation on the State of Nebraska to engage in "impact and implementation bargaining," *see Department of Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992), and, if so, the statutory or other authority that establishes such an obligation.

INTRODUCTION

Nebraska's labor laws require bargaining in good faith on terms and conditions of employment. That mandate is, however, tempered in certain circumstances. Management prerogatives need not be bargained. Parties can also waive their right to bargain. And, crucially, there is no need to bargain *further* when bargaining on a particular subject has *already occurred*. There—and ultimately, here—the contract coverage doctrine controls.

Impact and implementation (also called "effects") bargaining arises at the intersection of the duty to bargain regarding terms and conditions of employment and the exemption of management prerogatives from the bargaining mandate. The exercise of a management prerogative will often impact the terms and conditions of employment for some employees. Nevertheless, because management prerogatives are exempt from bargaining, an employer can act unilaterally (without bargaining) when exercising a prerogative. But, in some jurisdictions, effects bargaining operates as a constraint on management's freedom of action. There, the exercise of a management prerogative gives rise to a duty to bargain about the resulting impact: Management is free to make the initial decision unilaterally, but must engage in bargaining over the effects of that decision on affected employees.

This Court has never held that impact and implementation bargaining is required in Nebraska. Nor does any Nebraska statute expressly impose such an obligation. While this Court possesses the common law power to impose it, there is no reason to do so in this case.

This is the wrong case to address effects bargaining because even if such an obligation *can* or *does* exist, it is not implicated *here*. The Commission on Industrial Relations (CIR) found that the issue of remote work was a subject covered by the operative collective bargaining agreement (CBA). And when contract coverage applies, it obviates any need to engage in effects bargaining. As one federal court has explained, in jurisdictions that apply contract coverage, "granting an employer the unilateral right to make a decision"—that is, when a subject is recognized to be a management prerogative—"almost always means that the union has also given up the right to bargain about the effects of that decision." *Loc. Union 36, Int'l Bhd. of Elec. Workers v. NLRB*, 706 F.3d 73, 85 (2d Cir. 2013).

That principle resolves this case. The contract coverage doctrine applies in circumstances where the parties have already engaged in bargaining and the subject of a dispute is "within the compass" of their collective bargaining agreement. *Fraternal Ord. of Police v. City of York*, 309 Neb. 359, 373 (2021). Absent a specific reservation in the CBA to bargain over the effect or implementation of some decision, application of contract coverage precludes the need for *additional bargaining*. Instead, the proper remedy is straightforward application of the terms of the CBA.

That is the path the Court should follow here. The CIR correctly determined that the issue of remote work was covered by the operative 2023-to-2025 CBA. State's Resp. Br. at 19–23. Because the text of the CBA fully reserved to the State both the

right to control the "site" of the workforce and the right to implement (or terminate) policies controlling how remote work was permitted (or not), the CBA granted the State broad authority to control the contours of remote work. That authority is sufficient grounding for an executive order making in-person work the default rule for state employees.

Concluding otherwise would eviscerate contract coverage. That doctrine serves the goal of collective bargaining, which is to secure industrial peace by creating a framework of settled expectations that minimizes the prevalence of intractable disputes and never-ending employer/employee bargaining. Imposing a duty to engage in effects bargaining even when a subject is covered by a CBA would mean few (if any) issues are actually settled by the CBA itself. Each CBA would be, at best, the starting point for a new round of negotiations that would kick off whenever a fact-specific labor dispute arises.

Contract coverage is firmly entrenched in Nebraska's labor law jurisprudence. And rightly so. This Court should not entertain efforts to muddle a doctrine that advances the important interests Nebraska labor law is designed to secure. When contract coverage applies, impact and implementation (effects) bargaining is unnecessary. Here, the CIR correctly applied contract coverage. This Court should affirm.

ARGUMENT

I. Noncontractual Impact and Implementation Bargaining is Unnecessary When the Contract Coverage Doctrine Applies.

A. Impact and implementation bargaining is aimed at resolving the tension between mandatory bargaining and the exercise of a management prerogative.

1. Both the Industrial Relations Act, Neb. Rev. Stat. § 48-801 *et seq*., and the State Employees Collective Bargaining Act, Neb. Rev. Stat. § 81-1369 *et seq*., require management and labor organizations to bargain over certain topics. Each statute declares that the "terms and conditions of employment" are mandatory topics of bargaining. Neb. Rev. Stat. §§ 48-816(1)(a); 81-1371(9). And this Court has long held that when a matter is of a "fundamental, basic, or essential concern to an employee's financial and personal concern," it "involve[es] working conditions" and therefore is "mandatorily bargainable." *Metro. Tech. Cmty. Coll. Educ. Ass'n v. Metro. Tech. Cmty. Coll.*, 203 Neb. 832, 842 (1979) ("Metro Tech").

That said, this Court has also long held that some matters—those that involve "foundational value judgments"—are "management prerogatives" and thus are "not a proper subject for negotiation even though such decisions may have some impact on working conditions." *Id*. at 842–43. Management prerogatives concern the "basic direction of the enterprise," *Newspaper Guild of Greater Philadelphia v. NLRB*, 636 F.2d 550, 562 (D.C. Cir. 1980), and encompass "matters of inherent managerial policy," *Ass'n of Penn. State Coll. & Univ. Facs. v. Penn. Lab. Rels. Bd.*,

226 A.3d 1229, 1242 (Pa. 2020) (citation omitted). *See also* 84 A.L.R.3d 242, § 2[b] (in the public sector "management prerogatives" are "policy decisions which are reserved exclusively to government"); 51 C.J.S. Labor Relations § 224 ("There exists a presumption that all terms and conditions of public employment are subject to mandatory bargaining, but some subjects are excluded from collective bargaining as a matter of policy, even where no statute explicitly says so."). Examples of management prerogatives recognized by this Court include "[t]he right to hire; to maintain order and efficiency; to schedule work; [and] to control transfers and assignments." *Seward Ed. Ass'n v. Sch. Dist. of Seward*, 188 Neb. 772, 784 (1972); *see also Cent. City Educ. Ass'n v. Merrick Cnty. Sch. Dist.,* 280 Neb. 27, 32 (2010) (recognizing various management prerogatives, including an "employer's decision to hire, retain, promote, transfer, or dismiss employees" and the "establishment of a pension plan").

While these two principles pull in opposite directions, there are many subjects and decisions which, to one degree or another, implicate both categories. *See Seward*, 188 Neb. at 784 (recognizing there are "many nebulous areas" where management prerogatives and terms and conditions of employment "overlap"); *see also* 84 A.L.R.3d 242, § 2[a] (""Terms and conditions of employment' is obviously a catchall phrase into which almost any proposal may fall"). Drawing the line between nonnegotiable prerogatives (which management can undertake unilaterally) and matters that impact working conditions (which ostensibly must be bargained) is "not easy." *Metro Tech*, 203 Neb. at 842 (quoting *Beloit Educ. Ass'n v. WERC*, 242 N.W.2d 231, 236 (Wis. 1976)).

Some jurisdictions attempt to smooth this tension by requiring effects bargaining. In those jurisdictions, management "has the right to unilaterally exercise its managerial

prerogative"—that is, to unilaterally make an initial decision (hire, promote, or fire an employee; close a work site; adopt a policy addressing some essential subject, etc.). *Sch. Dist. of Indian River v. Fla. Pub. Emps. Rels. Comm'n*, 64 So. 3d 723, 728 (Fla. Dist. Ct. App. 2011). But there then follows an obligation to "bargain over the impact that the decision has on the terms or conditions of employment" of affected employees. *Id.*; *see also* 60 A.L.R.7th Art. 5 (explaining "[i]mpact or effects bargaining" occurs when an employer, "though not required to bargain over an actual nonnegotiable decision itself … must negotiate the effects of the nonnegotiable decision," and collecting authority from approximately 14 jurisdictions where it is required). Thus, a distinction is drawn between "the duty to bargain about a particular business decision … and the duty to bargain about the decision's effects on [impacted] employees." *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1085 (1st Cir. 1981).

2. Neither the Legislature nor this Court have ever mandated that Nebraska employers engage in effects bargaining. The closest this Court has come is dicta in *Metro Tech*. There, a community college was found *not* to have violated the Industrial Relations Act when it refused to bargain over its "teaching load" mandate—the number of hours during a 40-hour workweek its professors were required to be "available … for teaching purposes." *Metro Tech*, 203 Neb. at 833, 843. The professors sought a reduction in teaching load from 24 to 14 hours. *Id*. at 833–34. The college refused to negotiate because "workload" was "predominately a matter of educational policy" and therefore a "management prerogative." *Id*. at 834.

This Court ruled for the college. It acknowledged that the number of hours professors had to spend teaching "has some effect on whether [being a professor] is an easy job or a difficult job

and … therefore … [affects] 'conditions of employment.'" *Id*. at 838. Nevertheless, teaching load also impacted many core questions of the college's operations: "[T]he number of teachers needed, the scope of the program[s] offered, the number of students, [and] the amount of [resources available for student] financial aid." *Id*. Balancing these considerations, the Court concluded that while workload impacted the professors' conditions of employment, ultimately teaching load "involve[d] a foundational value judgment which is essential to [the college's] basic educational and learning philosophy," making it "a prerogative of management and … not bargainable." *Id*. at 843. The petition seeking to force the college to bargain, *id*. at 832–33, was dismissed, *id*. at 843.

In its *Metro Tech* opinion, this Court made the following pronouncement highlighting the push-and-pull of mandatory bargaining and management prerogatives:

> A matter which is of fundamental, basic, or essential concern to … working conditions … is mandatorily bargainable even though there may be some minor influence on … management prerogative. However, those matters which involve foundational value judgments … are management prerogatives and are not a proper subject for negotiation even though such decisions may have some impact on working conditions. **However, the impact of whatever decision management may make in this or any other case on the economic welfare of employees is a proper subject of mandatory bargaining.**

Id. at 842–43. The final (bolded) sentence was not necessary to the result in *Metro Tech*; its holding was unaffected by this

declaration. Indeed, if the bolded language had been controlling, *Metro Tech* would have come out the other way.

Thus, at most, the bolded sentence was dicta. Dicta is "'[a]n opinion expressed by a court upon some question of law which is not necessary to the decision of the case before it.'" *Sedlacek v. Welpton Lumber Co.*, 111 Neb. 677, 680 (1924) (quoting 1 Bouvier, Law Dictionary 863 (3d Rev.)). Thus, dicta is not controlling law. *See In re Guardianship & Conservatorship of Bloomquist*, 246 Neb. 711, 719 (1994); *see also Duggan v. Beermann,* 245 Neb. 907, 913 (1994) (declining to follow constitutional interpretation from an earlier case because that "[i]nterpretation … was unnecessary to the [prior] decision").

Moreover, not all dicta is created equal. Dicta can have persuasive value, and there is certainly a difference between "subordinate clause, negative pregnant, devoid-of-analysis, throw-away kind of dicta" and "well thought out, thoroughly reasoned" statements that nevertheless are technically dicta. *Littlejohn v. Sch. Bd. of Leon Cnty.*, 132 F.4th 1232, 1241 (11th Cir. 2025). In an appropriate case, the Court may deem it prudent to further explore *Metro Tech*'s dicta, and consider if Nebraska law should (or should not) require effects bargaining. For the reasons highlighted below, however, this is not the appropriate case.

B. When the contract coverage doctrine applies, there is no tension to resolve because the parties have already engaged in bargaining.

1. The ultimate object of collective bargaining is to secure labor peace (and the many benefits that flow therefrom) through mandated negotiation. *See First Nat. Maint. Corp. v. NLRB.*, 452 U.S. 666, 678 (1981); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 210–11 (1964). *Cf.* 29 U.S.C. § 151. Both

management and employees know that they will have an opportunity to be heard and thus can try to advance or preserve the workplace interests that matter to them. *See NLRB v. Ins. Agents' Int'l Union,* 361 U.S. 477, 485 (1960). Both sides also benefit from the durable, settled expectations, standards, and entitlements that are established by (and last for the life of) the CBA. *IRS v. FLRA*, 963 F.2d 429, 439–40 (D.C. Cir. 1992) ("Stable and enforceable collective bargaining agreements protect the interests of [management] and bargaining unit employees alike.").

The contract coverage doctrine furthers these laudable ends. *See* Matthew D. Lahey*, I Thought We Had A Deal?!,* 25 ABA J. Lab. & Emp. L. 37, 52–53 (2009). There is little incentive to engage in comprehensive labor negotiations if a party cannot expect enforcement of the bargain ultimately reached. That is why this Court has stressed the "importance of finality" in this context and rejected the notion that a CBA is "but a starting point for constant negotiation" between management and a union. *City of York*, 309 Neb. at 373; *see also IRS v. Nat'l Treasury Emps. Union,* 17 F.L.R.A. 731, 736–37 (Apr. 24, 1985) (discussing the downsides of "continuous bargaining on an issue-by-issue basis"). "[T]he contract-coverage approach places an emphasis on the contract language already struck between the parties." Lahey, 25 ABA J. Lab. & Emp. L. at 40. Application of the contract coverage doctrine thus facilitates the collective bargaining process; it brings the parties to the table via the assurance that the agreement produced by their negotiations will not be illusory.

When applicable—that is, when a subject is "covered by" a CBA—the doctrine also alleviates the tension that justifies effects bargaining. As discussed above, effects bargaining is aimed at vindicating employees' interest in negotiating matters that impact their terms and conditions of employment without unduly

interfering with employers' unilateral exercise of a management prerogative. *See* Argument § I.A.1, *supra*. Critically, although a management prerogative *need not* be bargained (it is not a mandatory subject), there is nothing in Nebraska law preventing an employer from *choosing* to bargain about a prerogative (as a permissive subject), including both its exercise in the first instance and any effects that may flow therefrom. *See Fibreboard*, 379 U.S. at 210 (explaining that parties have a "duty" to bargain over mandatory subjects while "[a]s to other matters, however, each party is free to bargain or not to bargain"). *Cf. Ass'n of Civilian Technicians v. FLRA,* 22 F.3d 1150, 1154 (D.C. Cir. 1994). The likelihood that subjects raised during initial negotiations will be found within the scope of contract coverage encourages parties to undertake *at the outset* the sort of bargaining that would otherwise be handled later via effects bargaining.

2. Indeed, that is what happened here. As detailed in its previous brief and at oral argument, while the availability of remote work falls within the State's management prerogative to control "transfers and assignments" and the "site of the workforce," *see* State's Resp. Br. at 26–30, during the negotiating period for the 2023-to-2025 CBA the Union presented the State with a proposal that would have established a qualified right to engage in remote work, *see id.* at 12–13. *See also* Oral Arg. at 23:58–26:10. That proposal was considered and rejected. *See id.* Thus, although the State was not *required* to bargain on the topic, bargaining nevertheless occurred.

More importantly, having broached the subject, the Union was free to press any concerns it had regarding the implementation or impact of the State's exercise of its management prerogative over transfers, assignments, and control of the site of work (which necessarily includes the availability, or not, of remote

work). *Cf. Dep't of Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d at 58 (D.C. Cir. 1992) ("'impact and implementation' bargaining regarding employee work assignments" is something "about which parties may legally bargain and which may be incorporated" into a CBA). Indeed, if the Union was displeased with the *scope* of the State's purported reservation of its management rights, it could have fought for a narrower version. *See* Lahey, 25 ABA J. Lab. & Emp. L. at 53 ("[U]nions are free to reject broad management-rights clauses.").

Here, the Union chose to focus its attention elsewhere. And that decision was a lucrative one: It produced a "historic" and "record-breaking" wage increase for state employees, the "largest … in the 35-year history of the State Employees Collective Bargaining Act." (T285). Choices of this sort—prioritizing one issue, deemphasizing another—are the sort of tactical maneuvering inherent to collective bargaining.

But those choices have consequences and trade-offs. NAPE chose its priorities. And reaped the benefits. But it must also accept the costs. Rather than "go to the mat" with respect to remote work, NAPE acquiesced to the State's reservation of broad discretion over the subject. It did not insist on the inclusion of procedures for controlling how assignments (and other details) would be handled if remote work was pared back or eliminated. Instead, NAPE *chose* to use its negotiating leverage elsewhere.

It doesn't matter that the CBA ultimately included more comprehensive language in other areas concerning (arguably) analogous subjects. *Contra* Oral Arg. at 9:00–9:42 (highlighting CBA's extensive provisions governing the implementation of layoffs). When parties engage in bargaining that encompasses the effects of the exercise of a management prerogative, there is no "prescription" that mandates the subject be addressed in a

particular level of detail. *Dep't of Navy*, 962 F.2d at 58.; *see also Douglas Cnty. Health Ctr. Sec. Union v. Douglas Cnty.*, 284 Neb. 109, 117 (2012) ("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 courts to interfere with the parties' choice."). The "parties to a bargaining relationship may resolve disputes over impact, implementation and consultation as they see fit." *Dep't of Navy*, 962 F.2d at 58. They "may agree on extensive consultation and mitigation procedures, modest procedures or even no procedures at all." *Id.*

Here, with respect to remote work, the parties chose "no procedures at all." At the time bargaining took place, NAPE was happy to make that trade. After all, doing so helped secure a "historic" salary increase, detailed procedures for handling layoffs, and any number of other beneficial CBA terms. But now, despite having granted the State broad powers to control the site of the workforce (and thus, control over the availability of remote work) during those same negotiations, the Union claims the right to force the State back to the bargaining table midstream.

Straightforward application of the contract coverage doctrine dooms that demand. The doctrine reflects the basic reality that where a "contract settles the parties' rights, they have bargained vis-a-vis those rights." Lahey, 25 ABA J. Lab. & Emp. L. at 52. So, as this Court has recognized, a "subject covered by a collective bargaining agreement has already been fully negotiated." *City of York*, 309 Neb. at 372. It would be patently unfair—and antithetical to the fundamental underpinnings of both contract and labor law—to require a party to "bargain midterm over rights that they have already secured during [initial] contract negotiations." Lahey, 25 ABA J. Lab. & Emp. L. at 52. Which is

why, when "a topic is covered by" a CBA, the parties to that agreement have "no further obligation to bargain th[at] issue." *City of York*, 309 Neb. at 372.

The absence of any further obligation to bargain extends to effects bargaining (unless the parties *choose* to incorporate that obligation into the CBA itself). *See Enloe Med. Ctr. v. NLRB,* 433 F.3d 834, 839 (D.C. Cir. 2005). To hold otherwise would both eviscerate the contract coverage doctrine and render hollow an employer's power to unilaterally exercise its management prerogatives. *See* Argument § II, *infra*. CBAs are designed to "establish principles" that will "govern a myriad of fact patterns." *NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 838 (D.C. Cir. 1993); *accord Douglas Cnty.,* 284 Neb. at 117 ("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.") (quoting *Dep't. of Navy*, 962 F.2d at 57). The bargained-for principle here is the State's retention of broad powers to control the site of the workforce and establish (or end) policies concerning remote work, which include determining when (and if) it is permitted. *See* State's Resp. Br. at 13, 18–23. This Court should reject the Union's attempt to selectively deem binding only those portions of the CBA it favors, while treating those it does not as advisory.

3. The precept that contract coverage, when it applies, obviates any further bargaining obligation is ultimately undisputed. To be sure, NAPE certainly disputes that remote work is covered by the CBA. Nevertheless, it concedes that *if* remote work is covered, the State would have no additional obligation to bargain. *See* NAPE Opening Br. at 27; *see also* Oral Arg. at 9:45–9:59.

This concession underlies the Union's claim that the parties did not really engage in bargaining on the subject. *See* Oral Arg. at 6:55–8:23. It also explains its repeated attempt to divorce the "implementation" of the Remote Work Order from the larger subject of remote work. *See, e.g.,* Oral Arg. at 2:35–2:55; 3:45–50; 9:50–10:00; 11:55–12:30. These attempted pivots illustrate NAPE's recognition that if contract coverage applies, its position is untenable.

Neither effort to dodge application of contract coverage can succeed. Despite the Union's protestations to the contrary, what happened here obviously constitutes bargaining. *Bargaining*, Black's Law Dictionary (12th ed. 2024) ("[T]he process of negotiating the terms of a contract or transaction"). *Cf. In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 90 (2d Cir.1992) (reversing lower court's determination that a "take-it-or-leave-it" offer made under time pressure deprived the other side of a "meaningful opportunity to consider and make a counter-proposal"). The State's rejection of NAPE's remote work proposal did not foreclose the Union from making a counteroffer, or offering a concession, or deploying any of the myriad other negotiating tactics routinely employed during labor negotiations. At bottom, it was the Union's *choice*, in the face of the State's opposition, to focus its attention elsewhere. But that choice does not erase from existence the proposal and rejection that actually occurred. Justice Papik's trenchant query during oral argument proves the point: If the proposal of contract language by one party, followed by the counterparty's rejection is not bargaining—"What is it?" *See* Oral Arg. 7:49–8:05. To ask the question is to answer it.

NAPE's attempt to recharacterize its prohibited practices petition as taking aim at the implementation of the Remote Work Order, rather than a demand to bargain about the subject of

remote work generally, also misses the mark. At the threshold, the petition's plain text reveals these efforts for the misdirection they are. The Union's request to bargain was never limited to the "effects" of the Remote Work Order; its petition took square aim at the topic of remote work writ large. *See* (T7) (petition, paragraph 13.f: "*Remote work* is not currently covered by the agreement, and therefore, must be bargained.") (emphasis added). *Cf. Enloe,* 433 F.3d at 839 (rejecting claim that request for bargaining was genuinely aimed at effects when the initial request concerned the prerogatory decision itself).

Beyond that, even to the extent that NAPE may have a legitimate interest in mitigating the effects of the State's exercise of its prerogatory control over remote work, the time to raise those concerns was during initial bargaining. Having raised the issue, and fully aware of the longstanding reservation language regarding the site of the workforce incorporated into at least three previous CBAs, NAPE was on notice about the controlling paradigm. It would be untenable to allow the Union to hold its powder dry, utilize its negotiating leverage in other areas, and then demand to bargain later, after the State has exercised a management prerogative broadly reserved to it in the CBA.

II. Mandating Impact and Implementation Bargaining Over Covered Subjects Would Eviscerate the Contract Coverage Doctrine.

Contract coverage is firmly entrenched in this Court's labor law jurisprudence. *See City of York,* 309 Neb. at 372*; Douglas Cnty.,* 284 Neb. at 117. Mandating parties engage in effects bargaining over subjects covered by a CBA would blow a substantial hole in the doctrine's hull.

Contract coverage is designed to effectuate the foundational purpose of labor law by encouraging robust collective bargaining. *See Mv Transportation, Inc.*, 368 NLRB No. 66, *6–9 (Sept. 10, 2019) *overruled on policy grounds by Endurance Env't Sols., LLC,* 373 NLRB No. 141 (Dec. 10, 2024); *see also* Lahey, 25 ABA J. Lab. & Emp. L. at 51–56. The doctrine accomplishes this aim by ensuring both employers and employees receive the benefit of the bargain struck in the CBA. *U.S. Dep't of Just. v. FLRA*, 875 F.3d 667, 675 (D.C. Cir. 2017). When parties are confident that the "code of conduct," *Douglas Cnty.*, 284 Neb. at 117, they establish for themselves (the CBA) will be enforced, they are incentivized to raise more issues during the initial bargaining process—and to reach *some* framework of understanding—rather than hold back or decline to engage, which makes endless rounds of future mid-stream bargaining an inevitability, *see Dep't of Just.*, 875 F.3d at 674. And, as the D.C. Circuit has remarked, an "endless duty to bargain" would result in an "evisceration" of the "contractual stability and repose" necessary for the effective operation of labor law statutes that mandate collective bargaining. *IRS*, 963 F.2d at 440.

Reduced to its essence, contract coverage is nothing more than the application of quotidian contract law principles to the interpretation and enforcement of a CBA. *See City of York*, 309 Neb. at 372 (describing contract coverage as a "simple question of contract interpretation"). "When the terms of a contract are clear" those "terms are accorded their plain and ordinary meaning" and courts can "ascertain the intention of the parties from the plain language of the contract." *Seemann v. Seemann*, 318 Neb. 643, 651 (2025). Thus, when a topic is "covered by [a] collective bargaining agreement," a party to that CBA can demand execution of "the agreement's provisions in relation to that topic" without

running afoul of any duty imposed by Nebraska's labor laws. *City of York*, 309 Neb. at 373. As *City of York* shows, that includes the duty to engage in bargaining. *Id.* at 372 ("If a topic is covered by the collective bargaining agreement, then the parties have no further obligation to bargain the issue."). Which means that *even if* Nebraska labor law requires effects bargaining (and it is far from clear that it does), contract coverage relieves parties of that duty in circumstances where it applies.

Concluding otherwise would drain the vitality out of contract coverage. The whole point of the doctrine is to ensure that when "parties have agreed to a contractual provision" courts will "give full effect to the plain meaning of such provision." *Loc. Union 47, Int'l Bhd. of Elec. Workers v. NLRB*, 927 F.2d 635, 641 (D.C. Cir. 1991). There is no exception for contract language that concerns a management prerogative. On the contrary, when a CBA contains a "broadly worded management-rights clause," faithful application of contract coverage demands that "the scope of that clause" be determined via "usual principles of contract interpretation." *Chicago Trib. Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992).

The D.C. Circuit's decision in *Enloe Medical* is illustrative. There, a dispute regarding staffing arose between a union representing nurses and the facility (Enloe) where they worked. 433 F.3d at 836. Enloe sought to institute a mandatory "on call" policy; the union claimed that Enloe was required to bargain before making that change. *Id.* After Enloe adopted the policy without bargaining, the union pursued a claim under the National Labor Relations Act (NLRA). *Id.* at 837.

Critically, in *Enloe*, it was undisputed that the CBA governing the relationship between the nurses and the facility "authorized the adoption of the mandatory on-call policy." *Id.* at 836.

Despite this, an administrative law judge found (and the National Labor Relations Board (NLRB) affirmed) that Enloe had violated the NLRA's duty to bargain because although the CBA authorized adoption of the policy, the facility was "required to bargain with the Union regarding the *effects* of that policy." *Id.* at 837.

The D.C. Circuit, applying contract coverage, reversed. The Court rejected the NLRB's determination that impact and implementation bargaining is required even when a CBA "gives an employer the right to make a decision on a particular issue." *Id.* The NLRB had reasoned that when a CBA is "silent as to the effects of [a] decision, the employer must agree to bargain with its union over those effects." *Id.* The D.C. Circuit explained that logic was exactly backwards. The appropriate inference to draw from contractual silence regarding the effects of a prerogatory decision was that the contractual language granting Enloe a "unilateral right to make [that] particular decision" foreclosed any right the nurses' union had to "bargain over the effects of that decision." *Id.* at 839.

It was *possible*, the court noted, for a CBA to distinguish between "the effects of a decision" and the "decision itself." *Id.* at 838–39. But whether that is so in any particular case is "just as much a matter of ordinary contract interpretation as is the initial determination of whether the agreement covers the matter altogether." *Id.* Thus, only when the parties to a CBA "intend[ed] th[at] dichotomy"—that is, where the language of the CBA or unmistakable bargaining history establishes that the parties intended to treat a prerogatory decision and the effects of that decision separately—is there any obligation to engage in effects bargaining when the contract coverage doctrine applies. *Id.* Such circumstances are rare. *See Loc. Union 36*, 706 F.3d at 85 (noting

that "a contract granting an employer the unilateral right to make a decision almost always means that the union has also given up the right to bargain about the effects of that decision"). And in those rare circumstances, it is the *application of contract coverage*, not some underlying labor law statute or principle, that compels impact and implementation bargaining.

Imposing a duty to engage in effects bargaining even after determining the contract coverage doctrine applies would require this Court declare that "the principles governing the interpretation of labor contracts are special." *Chicago Tribune*, 974 F.2d at 937. As *Enloe* illustrates, the D.C. Circuit does not believe that to be so. 433 F.3d at 839 (endorsing a "straightforward reading of the contract"). Nor does this Court's contract coverage jurisprudence so suggest. *See Douglas Cnty.*, 284 Neb. at 115 ("simple matter of contract interpretation"); *City of York*, 309 Neb. at 372 ("simple question of contract interpretation"). This Court adopted contract coverage because it found the D.C. Circuit's logic and reasoning underlying the doctrine persuasive. *Douglas Cnty.*, 284 Neb. at 117–18 (citing *Dep't of Navy*, 962 F.2d at 57). It should do the same—using *Enloe* as a guide—here.

At bottom, there is no good reason to treat CBAs differently than all other contracts, and many reasons to treat them the same. Because that is so, and because the CIR correctly applied contract coverage here, there is no basis to require the State to engage in impact and implementation bargaining in this case.

CONCLUSION

The CIR's decision should be affirmed.

Dated: February 17, 2026

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and word-count requirements of Neb. Ct. R. App. P. § 2-103 because it contains 5,998 words excluding this certificate. This brief was prepared using Microsoft Word 365.

/s/ Zachary A. Viglianco
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Certificate of Service

I hereby certify that on Tuesday, February 17, 2026 I provided a true and correct copy of this *Supplemental Brief of Appellee* to the following:

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