

Labor Law 101 for Private Sector Union Negotiators
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What We'll Cover

The Legal Framework for Bargaining

- Mechanics of Bargaining
- “Good Faith Bargaining”
- Information Requests
- The “Subjects of Bargaining”
- Impasse Resolution
- Job Actions: Legal Considerations

Two Modes of Bargaining

Traditional /
Adversarial /
Distributive



Mutual Gains /
“Win-Win” /
Interest Based Bargaining
(IBB)



Overview of the Legal Framework

Who's Covered by Labor Law?

Railway Labor Act

- covers *some* workers in transportation industry

National Labor Relations Act

- exclusions: agricultural and domestic workers, supervisors and managers, "independent contractors"
- differing rules: health care, guards, professionals, Postal Service

What Labor Law Covers

- Organizing / Bargaining unit eligibility
- Rules of bargaining
- Impasse resolution

The Legal Framework of Bargaining

- Bargaining statute itself; but also...
- Other statutes: federal, state, local
- + employer rules, regulations, handbooks
- + current contract



The Mechanics of Bargaining

Required Processes to Initiate
Negotiations



What's Required Before Bargaining Begins?

Notification
to other
party

Offer to
meet and
confer

Notification
to
mediation
board



“Good Faith Bargaining”

How to Recognize (and how to avoid) Unfair Labor Practices

Origins of the "Good Faith" Bargaining Obligation

- **1935 Wagner Act (NLRA)**
 - obligation of employers to bargain at the request of a union
- **1947 Taft-Hartley amendments**
 - bargaining obligation extended to unions

Section 8(d) of the NLRA

*“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees **to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession...**”*

General Rules for “Good Faith”

- Mutual obligation of the employer and the union
- Must meet “at reasonable times” and “confer in good faith with respect to wages, hours, and other terms and conditions of employment”
- Applies to contract negotiations and disputes
- Must “execute written agreement” if requested by either party
- But...no obligation to agree to a proposal or to make concessions

Two Categories of Violations

***Per Se* Violations**

- the fact that an act has occurred establishes an unfair labor practice (ULP)
- no need to prove motivation, or any other aspect of the context in which the act occurred

Violations Based on General Course of Conduct

- examines “the totality of the conduct”
- inquiry: did the party approach bargaining with “a sincere resolve to reach agreement?”

Per Se Violations

Unilateral change to existing terms and conditions

Refusal to meet (at all)

Refusal to furnish relevant information

Refusal to execute a written agreement

Direct dealing (bypassing the exclusive representative)

Insisting to point of impasse on a permissive subject

U.S Supreme
Court Justice
Potter Stewart

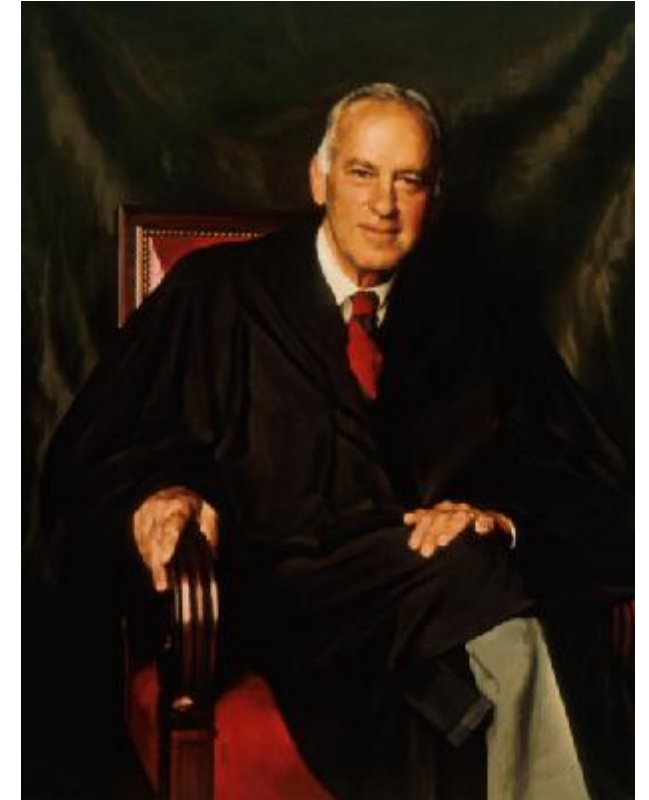
1915 - 1985

Definition of obscenity

"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it..."

U.S. Supreme Court

Jacobellis v. Ohio, 378 U.S. 184,
(1964)



Logistics

Availability to meet

Delaying tactics

Identity of negotiators

Authority of negotiators

Ground rules

Table Dynamics

*Did the other
side...*

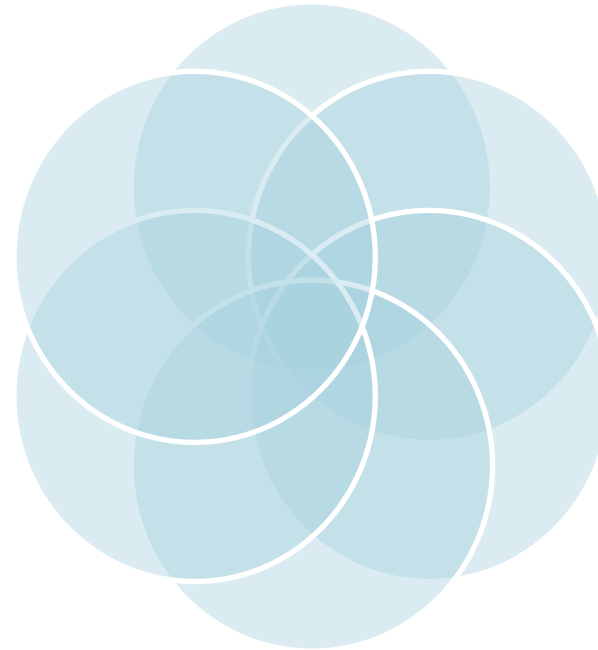
Make
regressive
proposals?

Offer to
change
position?

Offer
counterproposals?

Make
proposals?

Make
concessions?





Information Requests

Forcing the Employer to Furnish Information



Origin and Use of Information Requests

Derives from “good faith” bargaining obligation

The value of information requests

- Getting information needed for bargaining (and representation)
- Using as a tactical device

Different Tools

- National Labor Relations Act
- Contract Provisions
- Statutes and Regulations

Enforcement

Relief may lie through ULP or grievance procedures

At table: threat of enforcement

Away from table: fodder for campaign

Other strategic implications, including striking

Offensive + defensive considerations

The “Subjects of Bargaining”

- Mandatory
- Permissive
- Unlawful

Three Categories

Mandatory: = *must* bargain (upon request by either party)

- “wages, hours, terms and conditions of employment”
- covers the basics: pay, benefits, work schedules, etc.

Permissive = *may* bargain (if both parties agree)

- includes ground rules, unit composition, ratification procedures

Unlawful = *cannot* bargain

- example: bargaining fair share arrangements in private sector workplaces in “right to work” states

Impasse Resolution

The Endgame:

- Mediation
- Unilateral Imposition
- Strikes and Lockouts

What is an “Impasse”

- No set time frame
- Determined by whether or not further progress in negotiations is possible
 - what is the history of bargaining?
 - are the parties still talking?
 - has either party indicated a willingness to consider the issues further?
 - have the parties made statements declaring / acknowledging impasse?

Consequences of an Impasse

- No legally required procedures for impasse resolution
- The law both grants rights and places restrictions on:
 - economic pressure
 - political pressure

Impasse Resolution: Mediation

Mediator

- can be assigned by FMCS, or selected by the parties
- relatively informal and unstructured
- mediator may persuade, but has no binding authority
- mediation can be useful if creativity is needed, or if politics are blocking agreement

Avoiding Impasse

Keep modifying
proposals

Don't firmly reject
proposals

Make information
requests

Never say "never"



Job Actions: Legal Considerations

What's Legally Protected, What's Not



Changes Upon Contract Expiration

Employer must bargain with the union over changes:

- that would have a significant impact on employees' working conditions
- even if the changes are not directly related to wages or benefits

Impasse Resolution Mechanisms

Imposition of “last, best offer”

Lockout

Strike

Unilateral Imposition

Employer may have the legal right to impose “terms and conditions”

- only if the parties are at impasse
- must be the employer’s “last, best offer”
- can be entire “lbo” or just parts

Lockouts

Employer *may* have the legal right to lockout employees, but only if:

- for economic purposes
- *all* bargaining unit members are locked out
- only temporary, not “permanent replacements”, are hired
- the contract is no longer in effect

Overview

Picketing and strikes *can be* “protected, concerted activity”

- Legal protection of strikes / strikers depends on
 - ☐ purpose of strike
 - ☐ timing of strike
 - ☐ conduct of strikers

Unprotected Strikes

Some strikes and strike activity are *not* protected:

- intermittent strikes
- partial strikes
- slowdown (but...“work to rule”?)
- sitdown strike

Exceptions:

- health and safety
- ULP strikes

Rights to Reinstatement

Economic Strikes

If unconditional offer to return to work

- entitled to priority rehiring rights
- employer is not required to lay off “permanent replacements”

ULP strikes

If unconditional offer to return to work

- entitled to immediate reinstatement
- employer is required to lay off replacement workers to create vacancies

So...What's
Wrong With
This Picture?

(and what
can we do
about it?)

Two related obstacles

- Absence of fundamental rights
- Restrictions on rights

How can we overcome these?

- Change the rules
- Create our own reality

Some Legal Interpretations Already Have Changed

- *Noah's Ark*: stronger remedies in ULP cases
- Quicker, fairer union election procedures
- Eliminating “captive audience meetings”
- Expanding “protected, concerted activity” to clearly include social media

The Legislative Fight...

The PRO Act (“Protecting the Right to Organize”)

- bargaining order if employer interference and majority support
- no “captive audience meetings”
- joint employer status
- fair share as a national right
- “permanent replacements”, secondary boycotts
- timely, mandatory first contracts

“To Live
Outside the
Law You Must
be Honest”

Taking matters into our own hands

- Sitdown strikes in the auto industry
- Postal workers' rights
- “Red for Ed” actions by educators

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