

What does
“Good Faith”
mean?

Preface:

This document is intended to partially define “good faith” under the Law and under the Agreement for NALC activists. I hope that readers come to understand some basics in their relationship with postal management. I hope that all learn how very important it is that we all recognize that, anytime that we are dealing with management in our capacity as a union steward, we are equals with management. It’s not in the best interest of our members when we forget that and behave in a subservient manner at those times. Another important premise is that the law, and the Contract, require that both parties act in “good faith” during those dealings.

This document is designed to be used in two ways. One way is as a paper document. As you read along, you will see citations that are referred to in the text such as this (Title 29 Chapter 7, Sub Chapter II USC §158(a)(5) (Employer); (b)(3) (Union)). That citation will identify a law, a Supreme Court or District Court ruling, an NLRB decision, or our Agreement. You will need to read that document for a full understanding of its implications.

Additionally, the document can be used electronically. When the electronic document and the related files are located in the same directory on a computer, those citations will be hyperlinked to the source documents. If you have problems with it, feel free to contact me and I’ll try to help.

Please remember that I am neither a lawyer nor a legal scholar, nor do I claim to be. This is simply a compilation of information that I’ve come across that I think can be useful to activists in the field.

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good faith, n. Honesty, fairness, and lawfulness of purpose. Absence of any intent to defraud, act maliciously, or take unfair advantage Merriam-Webster's Dictionary of Law 1996.

The Law

The Wagner Act was enacted by Congress in 1935. It later came to be known as the National Labor Relations Act (NLRA). Before that law, employers had been free to spy on, interrogate, discipline, discharge, and blacklist employees with impunity. Union members, and specifically union activists were prime targets. But, the NLRA guaranteed workers the right to join unions without fear of **legal** management reprisal. The Act created the National Labor Relations Board (NLRB) to enforce this right and prohibited employers from labor practices which might discourage workers from organizing, or which would prevent workers from negotiating a union contract. (The National Labor Relations Act)

The Act didn't apply to the United States Post Office then because the "Post Office" was a federal agency. But, the Postal Reorganization Act of 1970 (PRA) made the newly created United States "Postal Service" subject to the provisions of the NLRA. (Title 39 Part II Chapter 12 §1209; NALC, 337 NLRB 130 [pg820]) Since then, the Act has required that Postal management and its Unions bargain in "good faith" with each other. This led to the question, "What does it mean, under the Law, to 'bargain in good faith?'"

Under the Law, both Parties are equals in the bargaining process. The union is never subordinate to management at any time when they're negotiating. (Crown Central Petroleum Corp. v NLRB, 430 F.2d [pgs 724, 731])

Section 8(d) of the NLRB requires the Parties to conduct "good- faith bargaining" . . .

- (i) with respect to wages, hours, and other terms and conditions of employment; or
- (ii) the negotiation of an agreement; or
- (iii) any questions arising thereunder. (29 USC 158(d))

The Act defines "unfair labor practices" which might be committed by either the Employer or the Union. The Law says that it's an unfair labor practice for either Party to refuse to bargain collectively with the other. (Title 29 Chapter 7, Sub Chapter II USC §158(a)(5) (Employer); (b)(3) (Union)) It also says that our mutual obligation to bargain continues throughout the life of the Agreement. This is a very important element for us. We must remember that enforcement of the Agreement is "bargaining collectively." The Law applies, not only when we're negotiating the National Agreement, or our LMOUs, but also includes all of our labor/management relations including the processing of grievances. (Title 29 Chapter 7, Sub Chapter II USC §158 (d); NLRB v C & C Plywood Corp., 385 US 421, 87 S. Ct.[pg 559]; Timken v United Steelworkers 301 NLRB 838 2-91[pgs 949, 954])

The Parties are obligated to meet at reasonable times to discuss issues related to wages, hours, and working conditions. The Law also requires the Parties to bargain collectively in order to resolve any issues related to the execution of their agreements such as **grievance processing**. (Title 29 Chapter 7, Sub Chapter II USC §158 (d))

In most cases, management's obligation to bargain with the Union arises when its employees elect to be represented by a Union. (NLRB v Movie Star Inc., 361 F.2d [pgs 346, 351])

For Letter Carriers, however, that point came about in 1912 when the Lloyd-LaFollette Act gave us the right to organize. Later, in 1962, President Kennedy signed Executive Order 10988. That Order was titled, "Employee Management Cooperation in the Federal Service." Section 6(b) of 10988 reads,

*When an employee organization has been recognized as the exclusive representative of employees of an appropriate unit it shall be entitled to act for and to negotiate agreements covering all employees in the unit . . . **Such employee organization shall be given the opportunity to be represented at discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. The agency and such employee organization. . . shall meet at reasonable times and confer with respect to personnel policy and practices and matters affecting working conditions . . . This extends to the negotiation of an agreement, or any question arising thereunder, the determination of appropriate techniques, consistent with the terms and purposes of this order, to assist in such negotiation, and the execution of a written memorandum of agreement or***

understanding incorporating any agreement reached by the parties. . .

The signing of Order 10988 gave the NALC the exclusive right and responsibility to represent all Letter Carriers employed by the USPS. (Executive Order 10988)

The Service **must** bargain with the representative of the Union who has been identified as representing the designated bargaining unit. (Medo v NLRB 321 US 678 4-44 [pg197]) In its discussion of the Weingarten Rule, the Board pointed out that the representative **must** be an agent of the labor organization that represents the employee. The Employer is not obliged to meet with anyone else. (USPS 277 NLRB 1382 12-85 [pg 3])

Over the years since 1935, decisions made by the NLRB, the Circuit Courts, and the Supreme Court have added further definition to what is meant by "bargaining in good faith." This document refers to some of those decisions.

Sometimes, management would rather deal with individual employees rather than the Union. But, any employer who tries to bypass the Union and negotiate directly with the employee(s) violates section 8(a)(1) and (5) of the NLRA (NLRA, p232, 233). **Any** bargaining without Union presence would be in direct conflict with the mandate of section 9(a) of the NLRA which requires that the representative be elected by majority vote. That language allows an individual to bargain for themselves **only** so long as the agreement reached is not inconsistent with the existing agreement and that a representative of the Union is present at any adjustment. (NLRA, p239, Hajoca Corp. v NLRB, 872 F.2d [pgs1169, 1176]; General Electric Co., 150 NLRB [pgs 192, 194])

Therefore, even if an employee negotiates their own grievance settlement, the Union must be present for the settlement. The Board consistently rules against employers who even **make offers** without the Union being present.

(USPS 281 NLRB 215 8-86; Rorer Pharmaceutical - 311 NLRB 232 5-93; Van Can 304 NLRB 1085 9-91))

The Board found that the Postal Service violated Section 8(a)(5) and (1) of the Act when it adjusted a grievance with an employee without affording her collective-bargaining representative the opportunity to be present at the adjustment as required. (USPS 281 NLRB 1031 9-86)

Even an EEO complaint may not be adjusted directly with the complainant when the EEO allegations also form the basis of a pending grievance, without giving the Union representative the opportunity to be present at the negotiations. The Board ruled that Section 9(a) of the National Labor Relations Act must prevail over EEO administrative regulations that require anonymity of the complainant at the pre complaint stage of an EEO proceeding.

A management-initiated “quality committee” constitutes a “labor organization” under the Law. As such, they interfere with the Union’s right to serve as the bargaining unit’s **exclusive representative**. Those committees are considered illegal if employees participate to “deal” with employers regarding any terms or conditions of employment. Issues like that should be discussed **only** in joint labor/management committees. However, if those committees deliberately set aside issues that are appropriately “collective-bargaining issues,” the committee doesn’t violate the law. (Electromation 309 NLRB 990 12-92; EI Dupont 311 NLRB 893 5-93)

Additionally, management is free to discuss its bargaining proposals with the employees during contract negotiations. They have the right to explain their side of things to them. (NLRB v Gissel Packing Co. [pg 395]; NLRB v Pratt & Whitney [pg 789]United Technologies 274 NLRB 1069 3-85)

Bargaining Subjects

The NLRB and subsequent court rulings have divided bargaining subjects into three distinct categories — mandatory, permissive, and illegal. (NLRB v Borg-Warner, [pg 356]) Management has an explicit duty under the law to bargain with the Union on those subjects determined to be mandatory. (North Bay Dec Disabilities Services v NLRB, 905 F.2d [pgs 476, 479-80]) With respect to mandatory subjects of bargaining, absent a union waiver, an employer may not;

- (1) take unilateral action; or
- (2) deal directly with individual employees.

They may not make unilateral changes in matters that are mandatory subjects of bargaining during the life of an Agreement. (NLRB v Katz, [pg 369]) Mandatory subjects of bargaining are generally those set forth in section 9(a) of the Act as “rates of pay, wages, hours of employment, or other conditions of employment,” and in section 8(d) as “wages, hours, and other terms and conditions of employment.” Examples of mandatory subjects of bargaining include issues as diverse as:

- health and safety programs,
- insurance coverage,
- holidays,
- grievance procedures,
- bonuses,
- pension plans,
- benefits, vacations,
- retirement loans,
- seniority rights,
- plant rules which could lead to discipline,

drug or alcohol testing, and even the use of vending machines on company property.

An employer **may** unilaterally make changes in matters that are mandatory subjects of bargaining **after** the current Contract expires, and when good-faith bargaining has come to an impasse.

(Paperworkers v NLRB, [pg 981])

The Board has ruled that information sought by union concerning health and safety conditions is presumptively relevant because these are mandatory bargaining subjects. In order for a matter to be subject to mandatory collective bargaining it must materially or significantly affect the terms or conditions of employment. (NLRB v Borg-Warner [pg 356]; American National Can 293

NLRB 901 4-89; Seattle First Nat Bank v NLRB, 444 F.2d [pgs 30, 33]) A party may bargain in good faith to an impasse about a mandatory subject of collective bargaining without committing an unfair labor practice. (NLRB v Davison, 318 F.2d [pgs 550, 554])

Permissive subjects of bargaining are those which bear a mere remote, indirect or incidental impact on wages, hours, or other conditions of employment. (Westinghouse Electric Corp. v NLRB, 387 F.2d [pgs 542, 547]) Management **may** unilaterally make changes in matters that are not mandatory subjects of bargaining. (Allied Chemical & Alkali Workers Local 1 v Pittsburgh Plate Glass Co., 404 US 157, 92 S.Ct. [pg 383])

Examples of permissive subjects of bargaining include the use of a stenographer or recording device at labor-management meetings, withdrawal of grievances or unfair labor practice charges, voluntary assignments, and minor procedural changes in the execution of established rules.

Changes in procedures or issues of voluntary training also would normally be “permissive subjects” for bargaining.

(Champion Parts Rebuilders Inc. v NLRB, 717 F.2d [pgs 845, 853-55]); El Dupont 301 NLRB 155 1-91; Bartlett-Collins Co., 237 NLRB 770 (1978))

A union, therefore, may bargain to agreement with an employer on a particular subject, thereby fixing the parties’ rights and foreclosing its ability to bargain further about that subject during the term of the contract. Alternatively, a union may also “waive “its right to bargain over a mandatory subject of bargaining.

Management **may not** make unilateral changes in matters that are not mandatory subjects of bargaining if the Parties have negotiated that language into their local Memorandum of Understanding. For purposes of **our** local agreements, the “mandatory subjects” of bargaining are defined in Article 30 of the National Agreement. (2004 JCAM [page 30-4]) Even issues as simple as a company “Code of Ethics,” smoking on the premises, or video games in a swing room become negotiable. (American Electric Power 302 NLRB 161 5-91; USPS 302 NLRB 918 5-91; W-I Forest Products 304 NLRB 957 8-91)

However, neither party may require that the other agree to contract provisions that are unlawful under the Act. Conditioning bargaining on the Union’s withdrawal of grievances or making the agreement “terminable at will” would be considered illegal. (National Maritime Union, 78 NLRB [pg 971];

Massillon Hosp. Assn. d/b/a/ Massillon Community Hosp., 282 NLRB [pg 675]; BC Studios Inc., 217 NLRB 307 (1975))

Actively Participate

The duty to bargain in good-faith imposes an obligation on the parties to actively participate in deliberations with an open mind and a sincere desire to find a basis for agreement.

Parties that engage in “pretend bargaining,” or have “closed minds” would not be defined as having “actively participating in the negotiations.” (NLRB v Holmes Tuttle Broadway Ford Inc., 465 F.2d [pgs 717, 719]; NLRB v Montgomery Ward & Co., 133 F.2d [pgs 676, 684])

Whether or not a party makes proposals during bargaining will be considered by the Board as evidence of “good” or “bad- faith bargaining.” If a Party makes no proposals, gives no reason for rejecting proposals, offers no counter proposals, or doesn’t attempt to schedule bargaining meetings, that Party could be construed as not “actively participating.” (National Management Consultants Inc., 313 NLRB [pg 405])

Both the Board and the courts look at the totality of an employer’s conduct, before and during talks, and at and away from the bargaining table to determine whether or not the employer bargained in good faith. The Board has ruled that a violation of the Act need not be motivated by an **intent** to violate the Act. (Radisson Plaza Minneapolis v NLRB, 987 F.2d [pgs 1376, 1381]; Coal Age Serv. Corp., 312 NLRB [pg 572]; Co-Jo Inc. d/b/a/ Clinton Food 4 Less, 288 NLRB [pg40])

The employer’s duty to bargain in good faith doesn’t require that agreement is reached with the Union. However, while the Law doesn’t require reaching an agreement, it does prohibit “mere pretense at negotiation.” (Ford Motor Co v Plant Protection Assn. Nat, 770 F.2d [pgs 69, 75]; NLRB v Holmes Tuttle Broadway Ford Inc., 465 F.2d [pgs 717, 719])

There’s a distinct difference between “surface bargaining” and “hard bargaining.” Surface bargaining is the term used to describe the conclusion, based on the totality of the circumstances, that a party is merely going through the motions rather than negotiating in good faith. Either party is entitled to

engage in “hard bargaining” to achieve a desirable contract that it considers desirable.

A party is entitled to stand firm on a position if they reasonably believe that it is fair and proper, or that they have sufficient bargaining strength to force the other party to agree. (NLRB v Advanced Business Forms Corp., 474 F.2d [pg 457, 467] (2nd Cir 1973))

A critical question to be answered becomes whether or not the party’s conduct shows a “take-it-or-leave- it” attitude. (American Meat Packing Corp., 301 NLRB 835 (1991)[pg 839])

The Board looks at seven factors when determining whether a party has engaged in unlawful “surface bargaining.” Behavior such as delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory bargaining subjects, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of agreed upon provisions, or arbitrary scheduling of meetings would normally all qualify as “surface bargaining.” If, as is often the case, the subject is mandatory, then the available defenses will depend on whether the issue has to do with bargaining mechanics (failure to meet at reasonable times) or bargaining conduct (conditions, inadequate authority, direct dealing, and unilateral changes).

While “good-faith bargaining” doesn’t require either party to make concessions to the other party’s demands, (HK Porter Co. v NLRB, 397 US 99, 106, 90 S. Ct. 821 (1970); NLRB v Holmes Tuttle Broadway Ford Inc., 465 F.2d 717, 719 (9th Cir 1972); Coastal Electric Coop Inc., 311 NLRB 1126 (1993)) a party’s failure to make concessions will be considered by the Board, or the courts, as relevant evidence of “bad-faith bargaining,” where other evidence of “bad-faith bargaining” exists.

In one case, the Board determined that the employer unlawfully refused to bargain when it failed to compromise in its collective bargaining negotiations, expressed unwillingness to schedule long or frequent bargaining sessions, and made proposals that gave management total control over wages, seniority, and work rules. (Sparks Nugget, Inc. v NLRB, 968 F.2d 991, 994 (9th Cir 1992))

At the same time, the fact that a party has made a significant number of concessions has been relied upon as evidence that the party did not engage in “bad-faith bargaining.” (Larsdale Inc., 310 NLRB 1317 (1993))

Conditions on bargaining or entering into agreements are closely monitored by the Board and the courts. An attempt to impose unreasonable conditions is frequently found to constitute evidence of unlawful bad faith bargaining. If an employer insists on terms that no self-respecting union could tolerate, that would be unlawful. (Western Summit Flexible Packaging Inc., 310 NLRB 45 (1993)) But, the simple fact that a party’s proposal is “predictably unacceptable” doesn’t **always** justify an inference of “bad-faith bargaining.” The Board’s review of the proposal is objective and will not be determined by reference to the acceptability of the proposal to the other party in question. (Goldsmith Motors Corp., 310 NLRB 1279,1283 (1993))

Insistence on the attendance of a court reporter or a third party as a precondition to bargaining would be unlawful. (Timken Co., 301 NLRB 838 (1991) [pg 9]; Riverside Cement Co., 305 NLRB 815 (1991)) When an employer insisted that the bargaining sessions be recorded as a condition to meeting, the Board said that too was unlawful. (Water Association, 290 NLRB No. 95 (1988) [pg 839])

The content of a proposal may also be seen as evidence of “bad faith” if it’s so extreme that it calls into question whether the Party is really willing to bargain toward an agreement. (Teamsters Local 515 v NLRB, 906 F.2d [pgs 719, 726], (DC Cir. 1990)) A demand that the union give management the absolute right to determine the terms and conditions of employment would obviously be unacceptable to any union.

Similarly, it would be unlawful for the Service to refuse to bargain unless the union withdrew pending grievances or unfair-labor-practice charges. (Caribe Staple Co., 313 NLRB 877 (1994); NLRB v Fitzgerald Mills Corp., 313 F.2d 260 (2nd Cir),(1963); Lustrelon, Inc., 289 NLRB 378 (1998); Kolman/Athey div. Athey Prods Corp., 303 NLRB 92 (1991))

An attempt by the Service to dictate the composition of the union negotiating committee would be unlawful. The general rule is that each party to a collective bargaining agreement has the right to choose who it wants to represent it. (International Union / United Auto Workers v NLRB, 670 F.2d 663, 664 (6th Cir 1982); USPS, 202 NLRB 823 (1973); Santa Rosa Blueprint Service Inc., 288 NLRB 762 (1988); Mid-State ready Mix, 307 NLRB 809 (1992)[pg 818]) However, it’s not unlawful to refuse to meet with a violent negotiator. (International Union / United Auto Workers v NLRB, 670 F.2d 663, 664 (6th Cir 1982))

A union’s unlawful bargaining conduct may justify an employer who bargained in good faith to unilaterally implement changes in terms and conditions of employment absent an impasse. Stalling tactics and bad-faith bargaining are unlawful. (Southwestern Portland Cement Co., 289 NLRB 1264 (1988))

Good faith bargaining requires that both parties bargain to impasse without the imposition of arbitrary time limits. (Thill Inc., 298 NLRB 669 (1990)) In one case cited, the employer said at the outset of negotiations that it would not negotiate beyond a specific date. The court said that was unlawful. (Kuna Meat Co., 304 NLRB 1005 (1991))

In another, the company president simply said that he was “tired of bargaining.” He said that the employees should “get ready to go on strike.” The Board said that his actions were unlawful. (Goren Printing Co., 284 NLRB 30 (1987))

When an employer set up a precise schedule of days and times that it would be available for negotiations, and then refused to negotiate on the issue of reasonable meeting dates, the Board said that was unlawful. (Drop Forging Co., 144 NLRB 165 (1963))

However, reasonable limits, such as “twenty four hours a week” or “not more than two hours per session,” are permissible. (Taylor Foundry Co., 141 NLRB 765 (1963))

A request from the union is necessary to trigger management’s “duty to bargain.” The employer’s duty to bargain doesn’t arise until the union asks to negotiate. (5021 Post Investors d/b/a Hotel Donatello, 311 NLRB No. 101 (1993); NLRB v. Columbian E. & Stamping Co., 306 US 292 (1939))

That request must be clear enough for the employer to be on reasonable notice that the union desires to bargain (NLRB v Rural Electric Co., 296 F.2d 523, 524 (10th Cir 1961); NLRB v Fosalda, 367 F.2d 784, 788 (7th Cir 1966); National Can Corp. v NLRB, 374 F.2d 796, 800 (7th Cir 1976); Smyth Mfg. Co., Inc., 247 NLRB 1139 (1980)) but, it need not be in writing, on in any particular form. (NLRB v Rural Electric Co., 296 F.2d 523, 524 (10th Cir 1961)) It must also include a reasonable advance notice of the desired meeting date. (NLRB v Hvide, 315 F.2d 376 (5th Cir 1963)) Once the union has asked to bargain, the Service may not legally ignore, nor unreasonably delay, responding to the request. (NLRB v Platte Valley Plumbing & Heating, 748 F.2d 444, 446 (8th Cir 1983); Beverly California Corp. d/b/a Beverly Enterprises, 310 NLRB 222 (1993); Midway Foodmart, 293 NLRB 152 (1989))

Reasonable Time and Place

The Service must meet and confer with the Union at reasonable times, reasonable intervals, and reasonable places.

(Title 29 Chapter 7, Sub Chapter II USC §158 (d); Carbide Staple Co., 313 NLRB 877 (1994)) The Act itself doesn’t define what constitutes “reasonable,” but Board decisions do. The “reasonable time” test is, consistent with other aspects of good-faith conduct, whether the party’s conduct reflects a subjective willingness to reach an agreement. (Insulating Fabricators, 144 NLRB 1325 (1963), enforcer 338 F.2d 1002 (4th Cir1964))

This duty to bargain in good faith includes the obligation to meet and confer at reasonable times with a representative of the union regarding grievances and/or disputes involving other terms and conditions of employment arising under an existing collective bargaining agreement. (Manchester Health Center Inc., d/b/a/ Crestfield Convalescent Home/ Fenwood Manor, 287 NLRB 328 (1987))

The number, frequency, and duration of bargaining meetings are relied upon by the Board as evidence of the parties’ good-faith attempt to meet at “reasonable times.” Whether the parties met and conferred at “reasonable times,” at “reasonable intervals,” and at “reasonable locations” will be a question of fact in every case. (Honaker, 147 NLRB 1184 (1964); Radiator Specialty Co., 143 NLRB 350, 368 (1963))

The Service should meet with the Union representatives at reasonable times, consistent with past practice. In some instances, that may be normal business hours. In other instances, normal business hours may mean “at any time on each tour.” (E I DuPont de Nemours & Company, 294 NLRB 563 (1989))

The Service may not refuse to meet to bargain with the Union. That would be an unfair labor practice on the part of the employer because that refusal fails to satisfy the affirmative mandate of the Act to “meet and confer” at reasonable times.

A refusal itself would constitute a “per se” violation of the Act, and doesn’t require a showing of bad faith **intent**.

(Manchester Health Center Inc., d.b.a. Crestfield Convalescent Home/ Fenwood Manor, 287 NLRB 328 (1987); American Gypsum Co., 231 NLRB 1291 (1977))

Once the Union has requested a meeting, and the Service has responded that it “will get back to them on a meeting date,” the Service violates the Act if it unreasonably delays setting that meeting date. (Carbonex Coal Co., 248 NLRB 779 (1980), enforcer 679 F.2d 200 (10th Cir 1982))

While occasional tardiness to bargaining sessions don’t violate the Act, (Embossing Printers, Inc., 268 NLRB 710 (1984)[pg 720]) **extreme or repeated tardiness or cancellation of scheduled meetings might be a violation of the Act.** (Torrington Extend-A-Care employees Assn. v NLRB, 17 F.3d 580, 593 (2nd Cir 1994); Fern Terrace Lodge of Bowling Green, 297 NLRB 8 (1989); Taurus Waste Disposal, Inc., 263 NLRB 309 (1982) [pg 314-315])

A party’s “busy schedule” is generally not a legitimate reason for failing to meet as scheduled. (Storall Manufacturing Co., 275 NLRB 220, 238 (1985); Barclay Caterers Inc., 308 NLRB 1025 (1992) [pg 1036])

In order to avoid an “unfair labor practice,” both parties should advise each other of potential conflicts with meeting dates or times which might cause delay or cancellation. They should immediately inform each other as much in advance as possible of any need for delay or cancellation of the scheduled meetings.

They should identify the legitimate reason for the need and immediately suggest alternative dates or times. (88 Transit Lines, 300 NLRB 700 (1990)[pg 186]; Dilene Answering Service, Inc., 257 NLRB (1981))

The Board has no set rule for deciding where bargaining should take place, (Queen Anne Record Sales, Inc. d/b/a Tower Books, 273 NLRB 671 N. 8 (1984)) **but when the Board decides whether or not a party acted reasonably in demanding that negotiations take place at a certain location, the Board considers all the facts, including whether the location is unreasonable, burdensome, or designed to frustrate bargaining, and whether the proponent has been intransigent or has acted in “bad-faith.”** (Appel Corp. d/b/a Somerville Mills, 308 NLRB 425 (1992)) **Even though the Board doesn’t take a “per se” approach, it clearly favors bargaining meetings at the site of the controversy.**

To avoid an unfair labor practice for insisting on off-site negotiations, an employer will have to establish an “overriding reason” that negotiations need to take place at a site other than the affected facility. (BPS Guard Service, Inc. d/b/a/ Burns International Security Services, 300 NLRB 1143 (1990); Queen Anne Record Sales, Inc. d/b/a Tower Books, 273 NLRB 671 N. 8 (1984))

When the charge is that the Employer failed to meet at reasonable times, there are essentially two (2) available defenses to charges stemming from delays and other problems with the mechanics of bargaining. The first line of defense for management is simply to argue that the bargaining mechanics are unlawfully unreasonable and the delay is not the fault of the Employer.

The Employer will have to offer legitimate, reasonable business reasons for te bargaining delays.

Another approach is to defend itself by blaming the union for any bargaining delays. In appropriate cases, as set forth above, the Employer might argue that:

- (1) the Union failed to clearly request bargaining;
- (2) the Union broke off bargaining negotiations and failed to request additional bargaining; or
- (3) the Union representative is violent. (Storer Communications Inc., 297 NLRB 296 (1989))

An essential condition of “good-faith” bargaining is that the bargaining principals are entitled to face-to-face negotiations. An offer to discuss the issue in writing only would be insufficient. (NLRB v

US Cold Storage Corp., 203 F.2d 924, 928 (5th Cir); J & C Towing Co., 307 NLRB 198 (1992); Alle Arecibo Corp., 264 NLRB 1267 (1982)[pg 1275])

Waivers/Defenses

A relatively new and successful defense for unilateral employer action has been dubbed the “covered by the contract” defense. (NLRB v. USPS, 8 F.3d 832, 836 (DC Cir. 1993); Chicago Tribune Co. v NLRB, 974 F.2d 933, 937 (7th Cir 1992); Dept. of Navy Marine Corps Logistics Base v FLRA, 962 F.2d 48, 57 (DC Cir. 1992); Local Union No 47 International Broth v NLRB, 927 F.2d 635, 640-41 (DC Cir 1991))

This defense is premised on the established law that, once a union has bargained to agreement on a particular mandatory subject, further mandatory bargaining regarding that subject during the term of the collective bargaining agreement is foreclosed. (NLRB v. USPS, 8 F.3d at 836 (DC Cir 1993))

Whether a subject is “covered by” an existing agreement, or the union has “waived” further bargaining on that subject, are two completely different inquiries. (NLRB v. USPS, 8 F.3d at 836 (DC Cir 1993))

When a “refusal to bargain” claim is answered by the employer with a defense that the matter is covered by the parties’ collective bargaining agreement, the unfair labor practice and contractual dispute merge, and the resolution is governed by an interpretation of the contract at issue. (NLRB v. USPS, 8 F.3d at 837 (DC Cir 1993))

More importantly, unlike “waiver” cases, it is not required that a collective bargaining agreement specifically cover the particular subject matter at issue in order for it to be deemed to be “covered by” the terms of an existing collective bargaining agreement. (NLRB v. USPS, 8 F.3d at 838; Dept. of Navy Marine Corps Logistics Base v FLRA, 962 F.2d 54-61 (DC Cir. 1992)) The courts have so far declined to provide a definitive test for determining when a bargainable matter is “covered by” a collective bargaining agreement. (Dept. of Navy Marine Corps Logistics Base v FLRA, 962 F.2d 62 (DC Cir. 1992))

The Board hasn’t enthusiastically embraced the court’s “covered by” analysis, although it hasn’t specifically rejected it either. (Kiro Inc., 317 NLRB No. 186 n 16 (1995); Exxon Research & Engineering Co., 317 NLRB No. 78 (1995); Ohio Power Co., 317 NLRB No. 21 n 11 (1995))

Because questions of waiver normally don’t come into play with respect to subjects already covered by a collective bargaining agreement, the Board’s requirement of a “clear and unmistakable waiver” is not relevant to the “covered by” defense. (NLRB v. USPS, 8 F.3d at 836 (DC Cir 1993); Chicago Tribune Co. v NLRB, 974 F.2d 933, 937 (7th Cir 1992))

Cases already heard, however, suggest that the term “covered by” is to be interpreted very broadly by the Board. (NLRB v. USPS, 8 F.3d at 838 (DC Cir 1993); Dept. of Navy Marine Corps Logistics Base v FLRA, 962 F.2d 61 (DC Cir. 1992); United Mine Workers of America D31 v NLRB, 879 F.2d 939, 942-44 (DC Cir. 1989))

A Union may waive its rights to bargain through a bargained-for “management rights” clause. Historically, this “management rights” clause defense has been analyzed under the waiver standard, requiring a specific, clear and unmistakable waiver. (Kiro Inc., 317 NLRB No. 186 (1995)) That defense has fared better in the courts under than the “covered by” a collective bargaining agreement analysis. (NLRB v. USPS, 8 F.3d at 832 (DC Cir 1993))

There are instances when an employer may lawfully affect unilateral changes with regards to mandatory subjects of bargaining. One such instance occurs when the union waives its right to bargain about a subject.

Under the “waiver” standard, the Board has generally rejected a no-specific management rights clause as a defense to unilateral employer action.

Such clauses that are couched in general terms without reference to any particular subject area aren’t considered to be a waiver by the Union of statutory bargaining rights. (Johnson-Bateman Co., 295 NLRB 180, 184 (1989))

Once the Union has been put on notice of an intended change, and it doesn’t seek to bargain about it, the employer may unilaterally implement changes. This is otherwise known as the “waiver-by-inaction” defense. (Pinkston Hollar Construction, 312 NLRB 1004 (1993)[pg 1005]) A union’s failure to request bargaining despite notice of an employer’s contemplated unilateral change may constitute a waiver, (YHA Inc. v NLRB, 2 F.3d 168, 173-74 (6th Cir 1993)) and if the union fails to protest unilateral action they may have waived their rights by inaction. (Justesen’s Food Stores, 160 NLRB 687 (1966))

However, the Board requires that the union receive clear and unequivocal notice of the proposed change such that the union’s subsequent failure to demand bargaining constitutes a “conscious relinquishment” of the right to bargain. An actual notice to the union, even if not formally advised of the contemplated change by management, may be sufficient for a “conscious relinquishment” of the right to bargain. (YHA Inc. v NLRB, 2 F.3d 168, 173-74 (6th Cir 1993); Medicenter Mid-South Hosp., 221 NLRB 670, 678 (1975))

In addition to the notice however, the union must also have a sufficient period of time to make an informed decision as to what course of action it wishes to take before the unilateral implementation of the change. (YHA Inc. v NLRB, 2 F.3d at 173; Gulf States Mfg. v NLRB, 704 F.2d 1390, 1397 (5th Cir. 1983)) The union cannot be held to have waived anything that is presented to it as a fait accompli.

A party may contractually waive its right to bargain about a subject, (Ador Corp., 150 NLRB 1658 (1965)) but that waiver must be “in clear and unmistakable” language. (Metropolitan Edison Co. v NLRB, 460 US [pgs 693, 708])

Waivers are generally construed to apply narrowly to the specific item mentioned. (Dubuque Packing Co., 303 NLRB 386 (1991), enforced 1 F.3d 24 (DC Cir. 1993)) The Board, and the courts, consider the bargaining history of the contract language and the parties’ interpretation of the language in determining whether a waiver exists. (Autoworkers Local 449 v NLRB, 802 F.2d 969, 975 (7th Cir. 1986))

The past practices of the parties may constitute a waiver of statutory rights where the matter in question has been fully discussed and consciously explored in bargaining, and the union consciously yielded or unmistakably waived its interest in the matter. (USPS, 308 NLRB 1305 (1992))

If the Union knowingly and voluntarily relinquishes its right to bargain about a matter, that would constitute a waiver.

But, when a union demand to bargain would be futile, there is no waiver by inaction. In the cited case, a management decision was based on *union animus*. In this case, clearly it would have been futile for the Union to attempt to bargain over it. (Central Transport, 306 NLRB 166 (1992))

If the matter is covered by the collective bargaining agreement and, the union has initiated a grievance, the question of waiver is irrelevant. (NLRB V. USPS, 8 F.3d at 836 (DC Cir 1993))

Information

Providing information to the Union is an integral part of bargaining in good-faith. The Employer is clearly obligated to provide to the Union, all information that is necessary for collective bargaining. That obligation is defined first in the law itself when it says,

“It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159 (a) of this title.” (Title 29 Chapter 7, Sub Chapter

II USC §158(a)(5))

That obligation is also defined several times in our National Agreement and the Joint Contract Administration Manual. Article 17.3 of that National Agreement provides that,

“The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a

grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.”(Article 17.3)

The Postal Service agreed with the NALC on this issue in writing in the JCAM. In Section 17, they agree that, *“A steward may conduct a broad range of activities related to the investigation and adjustment of grievances and of problems that may become grievances. These activities include the right to review relevant documents, files and records, as well as interviewing a potential grievant, supervisors and witnesses.”* (2004 JCAM [page 17-4])

In Article 31, they agreed that, *“This section provides that the Postal Service will make available to the union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of the Agreement, including information necessary to determine whether to file or to continue the processing of a grievance. It also recognizes the union’s legal right to employer information under the National Labor Relations Act.”*(2004JCAM [page 31-2])

The judge in an APWU NLRB case clearly stated that “it’s an unfair labor practice when the employer doesn’t provide information that has been requested for collective bargaining.” He said, the

“ . . . Supreme Court ruled (a) in NLRB V. Truitt Mfg. Co., 351 U.S. 432 (1956) that a union, as exclusive bargaining representative of the bargaining unit employees, is

entitled to receive relevant information from an employer, and (b) in Acme Industrial Co., 385 U.S. 432 (1967) that an employer has a statutory duty to supply information which is potentially relevant and of use to the union in fulfilling its duties as exclusive representative, including its duty to police the contract, and a union is entitled to receive information from an employer that could be used to process and investigate grievances.

The failure to timely provide relevant information is also a violation of Section 8(a)(5) and (1) of the Act” (APWU v USPS JD(ATL)-38-04 [pg 10])

From time to time, the Employer will argue that the Privacy Act prohibits the release of some information to the Union. That position has been consistently rejected by the NLRB. When the Service argued that the requested information was: (1) inconsistent with the Provisions of the Postal Reorganization Act and (2) barred by the Privacy Act of 1974 and its implementing regulations, the Law Judge in an APWU case stated clearly that,

“ . . . these defenses are, and have been on numerous occasions, specifically rejected by the Board and by now must be simply regarded as outworn shibboleths demonstrating the failure and refusal of the Postal Service personnel, even within its legal department, to accept Board law citing United States Postal Service, 310 NLRB 391 (1993); United States Postal Service, 309 NLRB 309 (1992); United States Postal Service, 301 NLRB 709 (1991) and United States Postal Service, 289 NLRB 942, 944-945 (1988).” (APWU v USPS

The Employer must also provide information about persons outside the bargaining unit as long as there is a **probability** that the requested information is relevant to collective bargaining. Even though the judge in an APWU case said that, the requesting party must show that there is a logical foundation and a factual basis for its information request, he also made clear that,

“The standard to be applied in determining the relevance of information relating to non-unit employees is, however, a liberal ‘discovery type’ standard.” (APWU v USPS JD(SF)-36-04 [pg 10])

The relevance of the requested information is frequently at issue. The Board applies a very liberal definition of “relevant.” In one APWU case, the judge said that,

“Under Board law, the fact that the Union did not adequately state the relevance of the information, or its need for it, does not excuse a failure by the Respondent to furnish the information.”

In an NALC complaint, the Board said that,

“The Board uses a ‘liberal discovery standard’ to determine whether the requested information would be useful to the Union in carrying out its statutory obligations It is also well settled that an employer is obligated to furnish information that can be used to process and investigate grievances. Information concerning bargaining unit employees is presumptively relevant and must be furnished upon request.”

Overall, it seems clear that the legal standard concerning just what information must be produced is whether or not there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees exclusive bargaining representative.

(APWU v USPS JD(AII)-73-03[p11]; NALC 339 NLRB 150 [p1165])

When the Employer unreasonably delays in providing information to the Union that also may constitute an “unfair labor practice.”

The decisions reached by NLRB Law Judges on two APWU cases argued that,

“Delay in providing information undermines or defeats the Union’s investigative process, diminishes and impedes the grievance processing and requires expenditure of unnecessary time and effort to continue the process without adequate information.” (APWU v USPS JD(SF)-36-04

[p11]; APWU v USPS JD(AII)-73-03 [p14])

Arguing against one NALC complaint to the NLRB, the Postal Service said that “the charge was moot,” because the Union had proceeded with the grievance despite management’s failure to provide the requested information. The Board responded that,

“To accept the Respondent’s logic here would be to find that the Union’s decision . . . effectively absolves the Respondent from its unlawful refusal to provide it and frees the Respondent from any obligation to provide it in the future. We decline to reach such a conclusion here.” (NALC 337 NLRB 130 [p823])

In another case, the Service begged forgiveness because, the underlying grievance had already been settled. The Board responded that,

“Settlement of the grievance does not excuse the failure to provide the overtime summaries that were clearly relevant at the time they were sought.” (NALC 339 NLRB 150 [p1173])

And in yet another case, the Service argued that they had no obligation to provide the information requested because management had determined that the grievances were “untimely.” The Board decided that,

“Information sought in support of untimely grievances is not irrelevant since ‘[t]he Board does not pass on the merits of the union’s claim that the employer breached the collective bargaining contract.’”

(NALC 339 NLRB 150 [p1167])

In a 1971 case called *Collyer Insulated Wire*, the NLRB adopted a policy toward union-filed ULP charges called deferral. Under the policy, a Regional Director must defer investigation of a charge if the union can file a grievance against the employer’s alleged wrongdoing and arbitration of such a grievance is available under the contract.

The NLRB justifies its deferral policy as a way of conserving agency resources when another means is available to resolve a dispute. Unions oppose deferral because it takes away their statutory right to have NLRA violations decided by the NLRB. “Collyer deferral” is applied to most charges filed by unions. There are, however, some important exceptions.

Charges alleging refusals to provide information, violation of Weingarten rights, or retaliation for filing at the NLRB are not deferred. (APWU 280 NLRB 685 [p2]; APWU 302 NLRB 154 [pg 918])

A simple matter of contract interpretation would normally be deferred to the parties' grievance-arbitration process pursuant to the Board's Collyer doctrine. (McDonnell Douglas Corp. v NLRB, 59 F.3d 230-236 (DC Cir 1995); Chicago Tribune Co. v NLRB, supra, 974 F.2d at 938))

But, charges of "interference with union activities" may escape deferral if the labor agreement restricts an arbitrator's ability to issue a cease- and-desist order.

Deferral is also withheld if it is too late to file a grievance and the employer does not waive the contract's timeliness requirement.

Because of the number of "failure to provide information" charges levied by its Unions, the Postal Service entered into an agreement with the NLRB. Language in the agreement relates that,

"The USPS has made a commitment to enhance its training program for managers and supervisors with respect to the duty to expeditiously supply information that is relevant and necessary for collective bargaining, and to underscore that unprivileged refusals to supply information will not be tolerated."

Additionally, the Service has also agreed that even after an unfair labor practice charge is filed, representatives of the Local USPS office will continue to consider the request for information, particularly where they recognize that the information should have previously been provided. (NLRB Memorandum OM 03-18)

Bargaining Mechanics

An integral part of "good faith" is that the Parties give their negotiators sufficient authority to carry on meaningful negotiations. It can be an unfair labor practice to send negotiators who can't seal the deal, or who don't have enough information to carry on "fruitful, informed bargaining sessions." (Kasser Distiller Prods Corp., 307 NLRB 899 (1992); Coronet Casuals, 207 NLRB 304 (1973))

Both Parties are obliged to advise each other beforehand of any limitations on their negotiators authority.

When a representative has the apparent authority, but refuses to execute an agreement without higher approval, and hasn't previously notified the other Party, that's unlawful. (Metco Products Inc. v NLRB, 884 F.2d 156, 159-60 (4th cir. 1989), enforcing 289 NLRB 76 (1988))

Unilateral changes are sometimes lawful, but sometimes not. Generally, an employer **may** unilaterally modify a permissive subject without first bargaining with the union. (Allied Chem. & Alkali Workers Local 1 v Pittsburgh Plate Glass Co., 404 US 157, 187, 92 S. Ct. 383 (1971))

However, if a supervisor strays from an otherwise established postal policy without that underlying policy being changed, that would not constitute an unfair labor practice. The Board has ruled that an isolated departure from an established company policy doesn't constitute a "unilateral change." (Champion Parts Rebuilders v NLRB, 717 F. 2d 845, 852 (3rd Cir 1983))

Impasse

Where the parties have bargained in good faith to impasse regarding a **mandatory** subject of collective bargaining, the employer can unilaterally implement the bargained-for changes.

But, management needs to be careful with that. Several cases have been decided against them where they thought that impasse had been reached. Similarly, cases have been decided against them where they unilaterally imposed their proposals in the belief that the Union was not bargaining in good faith.

(Columbia Portland Cement Co., 294 NLRB 410 (1989))

However, a party that insists on bargaining to impasse on a **permissive** subject of collective bargaining commits an unfair labor practice. (Local 666 v NLRB, 904 F.2d 47, 50 (DC Cir. 1990)) The unilateral change must have been the subject of pre-impasse negotiations or the Act will be violated. (Cuyamaca Meat Service v San Diego & Imperial counties Butchers' & food Employers' Pension Trust Fund, 827 F.2d 491, 496 (9th Cir. 1987))

Additionally, legal impasse cannot be reached if the employer has engaged in surface bargaining (Benjamin F Winninger & Son, 266 NLRB 1177 (1987) [pg 1182])

Conclusion

The National Labor Relations Act imposes a mutual obligation on both Employer and Unions to bargain collectively in good faith at reasonable times regarding mandatory terms and conditions of employment. That bargaining obligation continues throughout the term of a collective bargaining agreement. Experience has shown that labor disputes can be lessened if both parties recognize the legitimate rights of each other in their relations with one another.

Everything is open to interpretation, except the JCAM of course. Read the cited cases carefully to ensure that they truly apply to your situation.

The National Labor Relations Board — www.nlr.gov

The Legal Institute (LII) — www.law.cornell.edu/topics/collective_bargaining.html

Labor Policy Organization (LPA) — www.lpa.org

US Department of Labor — <http://www.bls.gov/cba/home.htm>

American Rights at Work — <http://www.americanrightsatwork.org>