

STRATEGIES FOR DEALING WITH ORGANIZING AND BARGAINING

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I. INTRODUCTION

Although union membership has been on a steady decline over the last few decades, union organizing is on the increase once again. Unions are aggressively seeking their piece of the action, preaching that they will be able to get the employees more than employers are willing to give on their own and that employers have plenty to give. The hot-button issue of how best to focus organizing efforts was one of the major issues that led to the recent defections from the AFL-CIO. Unions are in agreement, however, that they need to focus more effort on organizing. Once union a represents your employees, you are obligated by law to negotiate in good faith with it regarding the wages, hours and other terms and conditions of employment of the individuals that they represent.

This paper is designed to provide insight into union organizing tactics and to present ideas on how to combat them. We will also provide tips on negotiating with unions.

II. UNION TARGETS - COULD YOU BE NEXT?

A. The Resurgence In Organizing And New Target Industries

Who is a potential union organizing target? All employers. Unions have recognized that they cannot limit their organizing efforts to traditional union sections such as mining, automobile and steel. Unions are now focusing their organizing efforts on traditionally low paid service workers, as well as any other businesses that appear ripe for organizing. Unions are also focusing on efforts to recruit female workers, who occupy a large percentage of the service industry. Additionally, unions are beginning to target the computer industry because it sees an organizing potential, especially among contract employees who typically do not receive benefits. Although companies typically represent that these individuals are independent contractors, often these workers will qualify as "employees" for the purposes of the National Labor Relations Act.

B. Salting - Organizing From The Inside Out

One organizing method that has gained popularity in recent years is known by the term "salting." Salting consists of a union organizer obtaining a job with the employer and attempting to create interest in the union from the inside. Salts, in many cases, receive salaries from the union in addition to the wages paid by the employer. The salting

tactic has developed in response to well-established doctrine that employers may generally prohibit non-employee union organizers from soliciting employees on company property so long as the employer applies established no-solicitation rules uniformly. *Lechmere Inc. v. NLRB*, 112 S.Ct. 841 (1992); *NLRB v. Babcock & Wilcox Co.*, 76 S.Ct. 679 (1956). As a result of this rule, unions have developed the salting strategy to gain access to the employer's facility when a non-employee organizer would be prohibited.

In 1995, the United States Supreme Court upheld an NLRB order finding that union-paid organizers who seek employment with an employer are protected under Section 7 of the Act and cannot be discriminated against because of their relationship with the union. *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995). However, the *Town & Country* decision does not prevent the employer from discharging a union-paid organizer who engages in misconduct. *Sam's Club v. NLRB*, 160 F.3d 191 (4th Cir. 1997); *But see M. J. Mechanical Services Inc.*, 324 NLRB 812 (1997)(employer cannot discharge salts for the misconduct of engaging in non-work related conversations concerning unions -- employer did not present evidence that such conversations interfered with work).

C. Waiting For The Employees To Express Interest

Since unions have great difficulty organizing workers unless the workers believe that the employer is not treating them fairly, and because organizational campaigns are very costly for the unions, in many instances unions simply wait for disgruntled employees to contact them. Once the dissatisfied employees contact the union, the union knows that a base group that is interested in organizing exists. The union will then focus on helping this core group to generate interest among their coworkers. With the union's help, the core group will begin campaigning by speaking with their coworkers and distributing leaflets, letters, and other materials espousing the benefits of unionization.

D. Generating Interest From Outside The Company

Unions often target companies that are vulnerable to adverse publicity. Unions will engage in a campaign of damaging the company's reputation by attacking its products or services and/or accusing the company of discriminating, polluting the environment or of mistreating/misleading consumers. The idea of this tactic is to convince the company not to resist the organizing campaign in order to protect its public image. If the company acquiesces, the union will have a much easier time organizing the workers.

Unions also are responsible for many complaints to government agencies about the conditions at the targeted employer's facilities in an attempt to create an atmosphere of distrust among the employees. For example, unions may complain to the Occupational Safety and Health Administration about alleged safety violations, or they may complain to the U.S. Citizen and Immigration Service in an attempt to spur investigations by those agencies.

Unions also could call employees of non-union employers in a particular geographic area or industry under the guise of taking a salary survey in the industry. After the organizer tells the employees how little they are making in comparison to union employees, the organizer will attempt to set up meetings with the employees for the purpose of beginning an organizing campaign.

E. Take Notice Of The Warning Signs

Unions typically will attempt to keep the organizational campaign as quiet as possible so that it can generate interest in the union without giving the employer a chance to respond to the union propaganda until it files for an election or requests recognition. Unions will usually wait until they have authorization cards signed by at least 60% of the employees before they will file for an election. Even if the Union does a good job of keeping its efforts quiet, the following behavioral changes may signal that an organizational campaign has begun.

Employees who are interested in becoming unionized generally feel dissatisfaction with their compensation or working conditions. Union propaganda that the employees are being treated unfairly is intended to increase the employees' level of dissatisfaction. This dissatisfaction may manifest in a sharp increase in complaints or questions regarding the differences in pay between the employer and other companies. In addition, since the union is attempting to create a divide between management and the workers, the employees may suddenly seem to be withdrawn and short with supervisors. Indeed, some unions even instruct employees not to socialize or engage in non-work related conversations with supervisors.

Employers may also notice new associations between employees who never seemed to have anything in common previously, or that employee discussions suddenly break up whenever a manager arrives. Also, the employer may notice a sharp divide developing between two groups of employees. Unknown to the employer at the time, these groups may represent union supporters and those who oppose the union. Of course, when rumors of union activity arise, union cards surface, or employees begin talking about grievances, bumping rights, and other union ideas, employers should realize that an organizing campaign is being conducted.

III. EMPLOYER CAMPAIGN STRATEGIES

A. Make The Union Win An Election

The cat is now out of the bag; the union has approached the Company demanding recognition and is requesting the employer to examine the authorization cards. What should you do? If you don't want a union, tell the union to contact the National Labor Relations Board. Under no circumstances should management examine the cards or comment on them. If a manager makes a comment indicating his belief that the signatures are genuine, the union may take the position that the employer has voluntarily recognized the union. In *Jerr-Dan Corp.*, 237 NLRB 302 (1978), the Board ruled that an

employer need not explicitly recognize the union for the recognition to be effective. Rather, an implicit acknowledgement that the union represents a majority of the employees is enough to constitute voluntary recognition.

B. No-Solicitation Rules

One of the best methods of reducing the amount of campaign propaganda that is distributed by the union is to promulgate and enforce a non-discriminatory non-solicitation rule. Generally, employers are free to prohibit employee solicitation in working areas on working time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983). Working time does not include meal periods, scheduled breaks, personal clean-up time or other times when an employee is not required to engage in work duties. *Beverly Enterprises-Hawaii*, 326 NLRB No. 37 (1998). Off-duty employees must be allowed access to exterior parking lots, gates and other outside non-working areas unless justifiable business reasons exist for prohibiting access to these areas. *St. Luke's Hosp.*, 300 NLRB 836 (1990).

Non-employee union organizers, however, may be prohibited from accessing and distributing literature on company property if the no-solicitation rule is uniformly applied to all solicitors, not merely union solicitation. *Lechmere Inc.*, 502 U.S. 527 (1992). The only exception is when the plant and living quarters of the employees are beyond the reach of reasonable union efforts to communicate with them. *Lechmere Inc., supra*.

C. Employer Propaganda

The employer is permitted to communicate with employees either in writing or orally to put forth its side of the story. Employers may even make pre-election speeches on company premises and on company time (captive audience speeches), and can deny a request from the union to respond. In any event, neither the employer nor the union may deliver speeches to massed groups less than 24 hours preceding the election. *Peerless Plywood Co.*, 107 NLRB 427 (1953).

The employer, however, is not permitted to threaten employees with adverse employment actions if they sign a card or vote for the union. Likewise, the employer cannot promise any benefits to employees who do not support the union. Once the organizational campaign starts, the company should not make any changes in the wages or benefits of employees, other than following its general pattern of employee reviews and increases.

Employers are also prohibited from interrogating employees about their feelings regarding the union. Moreover, employers cannot follow or engage in the surveillance of employees to find out who is attending union meetings. Basically, the goal of the company's campaign should be to provide employees with accurate information concerning a union work environment. The following is a list of topics that employees should be made aware of:

1. Union Promises

Be sure that the employees know that the law allows the union to make promises because it assumes that the employees will know that the union cannot fulfill these promises on its own. Also make sure that employees know that the employer cannot promise them any benefits because it is recognized that the company could fulfill those promises.

2. Inform Employees About Collective Bargaining

Employers should point out that employers have no obligation to agree to any of the union's demands or to reach an agreement with the union. All that the company is required to do if the union wins is to bargain with the union in good faith.

3. Union Revenue

Make sure the employees understand that the purpose of the union is to exist and that in order to exist it needs money -- their money -- in the form of dues, fees, fines and assessments.

4. Compensation And Benefits

If the employees receive benefits, make sure they understand exactly what benefits they are getting. Also, if employees are being compensated in accordance with market standards, point this out.

5. Strikes

Make sure employees know that the union can force them to strike. Point out that they will not be paid and will not receive benefits during the period that they are on strike. Also, point out that it is likely that they will be ineligible for unemployment benefits during the strike.

6. Authorization Cards

Make sure that employees understand that they do not need to sign an authorization card if approached by the union.

7. Elections

Encourage employees to vote. Also, make sure that they know that they do not have to vote for the union even if they signed an authorization card.

8. Target The Union

Investigate the union. If its officers have been in the newspaper for criminal activity or other wrongdoing, publicize this fact. Also, get a copy of the union constitution, which is available through the U.S. Department of Labor, and point out all fines and penalties that the union can impose on its members. Also, make sure the employees understand that some of their dues money may be donated to political candidates whose view they may not agree with.

9. Unions Are On The Decline

Make sure employees understand that unions are on the decline because people are realizing that unions are not helping them.

IV. COLLECTIVE BARGAINING

A. Formulate a Strategy and Know the Rules

Employers who have collective bargaining obligations know that bargaining with a union is often a frustrating and time-consuming endeavor. Usually, both sides enter negotiations with expectations of making meaningful gains. For employers, such gains are possible when specific, well-justified goals are sought. As in most business endeavors, goal-setting and formulating a strategy to achieve those goals is essential to success.

It is critical that the employer's preparation for negotiations begin with the development and prioritization of goals. Once prioritized goals are developed, management can begin formulating bargaining strategies designed to achieve its goals. Collective bargaining strategies, however, must not conflict with management's "duty to bargain in good faith." Case law is filled with stories of overzealous employers who have prematurely implemented final offers or who have created innovative bargaining strategies subsequently found to have been in derogation of their duty to bargain in good faith.

Regardless of the gains an employer achieves in bargaining, unless it can prove that it negotiated in good faith, any gain achieved will become a nullity if unfair labor practice charges are filed. Additionally, if a stalemate has been reached and the employer implements its final offer, the employer may find itself defending allegations of a "failure to bargain in good faith."

B. Negotiate Over Achievable Goals

It is of utmost importance that management introduce issues in bargaining only when it can achieve those goals. **Failure to achieve bargaining goals can negatively affect your position future arbitrations.** Quite often, in order to resolve a contractual ambiguity, arbitrators will examine the negotiations between the parties.

C. Duty to Bargain in Good Faith

Collective bargaining is unlike any other type of negotiating session. Unlike commercial or real estate negotiations, the parties are required by law to confer with one another at reasonable times and required to negotiate in “good faith” over wages, hours, and other terms and conditions of employment.

1. What is Good Faith?

A party’s “good faith” in bargaining is a subjective concept without a statutory definition. As a result, it is necessary to look to National Labor Relations Board (“NLRB” or “the Board”) and court decisions for guidance. Very early in the history of NLRA case law, the courts provided some general definitions of “good faith” which are still applicable today. These definitions include: [The duty to bargain in good faith is an] obligation . . . to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement . . . NLRB v. Reed & Prince Mfg. Co., 118 F.2d 874, 885 (1st Cir. 1941); NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943); “[T]here is a duty on both sides, though difficult of legal enforcement, to enter into a discussion with an open and fair mind, and a sincere purpose to find a basis of agreement . . .” Globe Cotton Mills v. NLRB, 103 F.2d 91, 94 (5th Cir. 1939).

2. Concessions Not Required

Section 8(d) of the Act explicitly states that the duty to bargain in good faith does not require either party to “agree to a proposal or require the making of a concession . . .” Thus, the Board does not, “either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements”” Chevron Chemical Co., 261 NLRB 44, 110 LRRM 1005 (1982). Nevertheless, the National Labor Relations Board and the courts are suspicious of an employer’s hard line position to the extent that it takes the position that no concessions whatsoever are possible. See NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131 (1st Cir. 1953). Moreover, because the Act does not require either party to make any concessions on any particular issue, if the employer is found to have bargained in bad faith, the NLRB and the courts are prohibited from imposing contractual terms on the parties. H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970)

3. “Totality of the Circumstances”

In general, the employer’s good or bad faith at the bargaining table is measured by “the totality of the circumstances making up his conduct.” NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). Application of the totality of the circumstances test is best illustrated by the famous Second Circuit Court of Appeals decision of NLRB v. General Electric Co., 418 F.2d 736 (1969). In General Electric, the Second Circuit found that the employer’s conduct both away

from and at the bargaining table demonstrated its bad faith in bargaining. The court found that General Electric had failed to bargain in good faith despite the fact that an agreement had actually been reached and a contract signed.

Prior to entering negotiations, General Electric adopted an overall bargaining strategy designed to accomplish its goals; this strategy has subsequently been dubbed "Boulwarism." Boulwarism is named for Lemuel R. Boulware, a vice-president of General Electric. Boulware designed a bargaining tactic in which the company formulated a single offer, based on its own research, which anticipated the union's demands. The company engaged in a massive media and communications program to employees which was designed to discover what was "best for employees." From the information gathered, the company formulated what it considered a "firm but fair" offer to the union. General Electric also took the position that the offer would be subject to change only if new information showed that its offer was not "right." After eighteen bargaining sessions, only four changes in the offer were made. Eventually, the union, who had struck General Electric, abandoned the strike and signed a contract.

The NLRB, however, found that General Electric had failed to bargain in good faith. The Board reached this conclusion because, among other things, General Electric's overall attitude evinced a failure to approach collective bargaining as a bilateral procedure through which the employer and the bargaining representative jointly attempt to set wages and working conditions. The Board also held that General Electric failed to bargain in good faith because it presented a proposal regarding insurance on a "take it or leave it" basis. The Second Circuit Court Appeals affirmed the Board's holding.

The General Electric case stands for three important propositions: 1) collective bargaining must be approached as a bilateral procedure and it is the procedure itself that is open to scrutiny; the mere fact that the parties reach an agreement does not conclusively show that the parties have bargained in good faith; 2) an employer's conduct both at and away from the bargaining table will be scrutinized if charges of "failure to bargain in good faith" are levied by the union; and 3) "take it or leave it" proposals are not lawful.

4. Surface Bargaining

A fine line exists between the illegal bargaining strategy of "surface bargaining" and the legal strategy of "hard bargaining." Surface bargaining is said to occur when an employer is merely "going through the motions" of bargaining with no real intent on reaching an agreement or when it bargains with the designated purpose of frustrating or avoiding a mutual agreement.

Surface bargaining is often found when an employer makes no real attempt to reconcile the differences between its proposals and the union's

proposals. Hard bargaining, on the other hand, is distinguished from surface bargaining in that the employer's conduct evidences that it has a sincere desire to reach and agreement and to discuss the issues despite taking a firm stance on one or more issues in negotiations.

5. Refusal to Meet

The duty to bargain in good faith requires that the parties confer at reasonable times and at reasonable intervals. There is no doubt that an employer's outright refusal to meet with the union would constitute a failure to bargain in good faith. A finding that the employer refused to bargain in good faith has also been made when the employer's conduct evidences an intent to delay or avoid meeting with the union.

D. Make Only One Final Offer

It cannot be stressed enough that employers should make one and only one final offer. If management makes a second "final offer" it will lose credibility at the bargaining table as the union will, in the future, most likely consider the term "final offer" to be mere rhetoric and posturing. As a result, employers should never make final offers unless they truly believe they have reached impasse and can support that belief with evidence of the negotiations between the parties. Employers should also be prepared to implement the terms of their final offer if the union rejects the proposal.

E. Implementing Your Final Offer

1. Private Sector

For private sector employers, if the employer has bargained in good faith and has reached impasse, the employer may implement the terms and conditions encompassed within its final offer. However, until impasse is reached any unilateral change in the wages, hours or other terms and conditions of employment constitutes an unfair labor practice. An impasse in negotiations occurs when a stalemate or deadlock in negotiations has been reached -- that is, when despite the parties' good faith in negotiations, neither party is willing to change its position. The factors the Board will examine to determine if an impasse has been reached include: 1) the bargaining history; 2) the good faith of the parties in negotiations; 3) the length of the negotiations; 4) the importance of the issue or issues as to which there is disagreement; and 5) the contemporaneous understanding of the parties as to the state of negotiations.

2. Public Sector

Generally, both mediation and fact finding must be exhausted before it is safe for an public sector employer to implement its final offer. To this effect, the

Michigan Employment Relations Commission has stated: “[t]he Commission has uniformly required the use of mediation and fact-finding by the public employer prior to implementation of their last offer upon impasse.” Mona Shores Board of Education, 2 MPER ¶ 20081 (1989); Southfield Police Officers Ass’n v. City of Southfield, 437 Mich. 168, 186 (1989).

F. The Bargaining Committee and Note Taking

First and foremost the bargaining committee must be include at least one individual with the authority to make modifications to management’s proposals or, if need be, to make concessions or consummate the agreement. It is an unfair labor practice to send representatives without adequate authority to the bargaining table. National Amusements, Inc., 155 NLRB 1200, 60 LRRM 1485 (1965). It is also essential that at least one member of the bargaining committee have responsibility for making a record of the negotiating sessions. In this regard, management must assign a copious note taker to the bargaining team. Detailed notes of each and every bargaining session are essential. Such notes may be used in subsequent proceedings, long after negotiations are complete. They may become the employer’s chief evidence in defending unfair labor practice charges if such charges are alleged based on the employer’s conduct in negotiations. Likewise, bargaining notes may become critical in future arbitrations where the parties’ intent regarding the contractual language is at issue.

In order to build a useful record, the note-taker should record the name and title of each individual attending the bargaining session, the date and time of each session, and the length of each session. This individual should also compile copies of each proposal and counter proposal offered. Finally, from this individual’s notes, detailed minutes of the discussions between the parties should be transcribed. All of the bargaining notes, proposals, and minutes should be compiled into binders, organized in chronological order for each bargaining session.

V. GOAL SETTING

A. Issue Identification

Long before the first negotiating session takes place, management must define the goals its seeks to accomplish in collective bargaining. Goal setting is a process whereby management defines the topics/issues which it believes to be important to the efficient operation of its business. From these topics/issues, realistic, achievable goals must be formulated. One important source of information which can help management assess the goals it needs to achieve in bargaining are those issues which have been in controversy at one time or another over the life of the existing contract. Invariably, during the life of the contract certain initiatives contemplated by management will be stifled by existing contractual language.

1. Interview Supervisors

A good place to begin the process of gathering information is to interview foremen and supervisors with knowledge of the day-to-day operation of the business and who might have ideas as to how a more efficient operation can be gained by changing the contractual language. In other words, confer with supervisors and line-managers who know how the current contract has impeded the efficient operation of the business over the life of the contract. Meetings with foremen and supervisors should result in an inventory of issues which have arisen during the life of the agreement. Bargaining goals designed to change, clarify, or eliminate the contractual language governing these issues can then be formulated.

2. Grievances

Another resource for determining your goals in collective bargaining are the grievances which were filed under the current agreement. It is advisable to inventory all grievances filed by the union. This inventory should include a list of the issues arising in each grievance, the contractual language implicated and the final resolution of the grievance. Based on this inventory, management can pinpoint issues which it may want to address in bargaining. Specifically, a grievance inventory will help management assess whether there are: a) ambiguities in the current contractual language that it desires to clarify or eliminate; and b) whether there have been arbitration awards, entitled to precedential value, that it desires to modify.

3. Business Changes

Other important issues to consider when setting bargaining goals are the expected or desired changes in the operation of the business. For example, suppose an employer has determined that it can save three dollars per hour in labor costs if it subcontracts its maintenance work to an independent contractor. Further, suppose there is a broad "no-subcontracting" clause in the current agreement. In this case, the employer will need to negotiate a change in the contractual terms to allow subcontracting of the maintenance function. A similar analogy can be drawn to a city or township wishing to privatize its trash collection services.

B. Prioritization and Business Justification

1. Define Specific Goals

After management has identified all possible issues which may have an impact on its bargaining goals, specific, well-justified goals must be defined. In order to determine the specific goals which are most important for the company to

accomplish, it is a good idea to meet with the various groups within the company which are affected by the terms and conditions of the contract. In these sessions, issues of concern to the employer should be examined and specific, realistically achievable goals formulated.

2. Develop a Good Business Justification

Management must develop a good business justification for each goal. Business justifications are critical to avoiding or defending possible unfair labor practices charges of "failure to bargain in good faith." If unfair labor practice charges are filed, management will need to convince a neutral third party of the legitimacy of its position at the bargaining table. A good business justification for each goal is essential to convincing a third party that it bargained in good faith.

3. Prioritize

After formulating a list of specific goals, it is important to prioritize these goals. Management must decide which goals are most important and which are least important to accomplish in collective bargaining. Obviously, management will want to focus on formulating a bargaining strategy which is designed to achieve the most important goals. These bargaining strategies, however, must not conflict with the employer's duty to bargain in good faith under Section 8(a)(5) and 8(d) of the National Labor Relations Act.

4. Are There Any Strike Issues?

It is also critical to decide which, if any, issues are "strike issues." Strike issues are those issues of such importance that management is willing to sustain a strike if its goals are not accomplished. If management is willing to sustain a strike, a strategy must be formulated for positioning the business so that it is able to operate during a strike. In doing so, management must consider whether it can maintain a sufficient level of production with supervisors and/or non-union employees or whether the hiring of replacement workers (temporary or permanent) would be necessary for the business to operate. Management should also consider whether any training of supervisors, non-union employees and/or replacements would be necessary to maintain production.

VI. SUMMARY

Don't be lulled into a false sense of security by media reports of unions losing membership and influence. Unions are fighting for their lives and will do what it takes to remain viable. They are stepping up organizing efforts. Be prepared to fend off organizing efforts if they unions come knocking on your door. If you have a union, know the rules for dealing with unions and develop a well-conceived bargaining strategy to put you on track towards achieving your goals in bargaining.