

Bargaining Tools of Last Resort: Strikes, Lockouts and Implemented Offers

ROPA Negotiating Orchestras Workshop
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“The Collective Bargaining Relationship”

- NOT:
 - “The Collective Bargaining War”
 - “The Collective Bargaining Co-Dependency”
 - “The Collective Bargaining Serfdom”
- ...although we see these dysfunctional dynamics (and lots of others!) between employers and musicians.
- Like good marriages, collective bargaining relationships work best where there is:
 - mutual respect
 - open and constructive communication
 - honesty and integrity
 - shared values

What is good faith bargaining?

- **Negotiating with a bona fide intent to reach an agreement.**
- Includes:
 - Duty to meet and confer at reasonable times.
 - Duty to bargain over certain “mandatory subjects” of bargaining.
 - Duty to refrain from making unilateral changes where those same subjects are concerned.
 - Duty to provide information that is necessary and relevant to bargaining.
 - If the parties reach agreement, they are obligated to execute a written contract.
- Parties are not required to agree on any particular terms or even to reach an agreement at all.

Some indicia of bad faith bargaining

- Always assessed on the basis of **the totality of the circumstances**.
Indicia include:
 - Failure to meet regularly and at convenient places.
 - Failure to provide a representative with sufficient authority to bind the party s/he represents.
 - Withdrawal of proposals previously agreed upon.
 - Failure to make counter-proposals or respond to proposals.
 - Regressive proposals not justified by genuinely changed circumstances.
 - Failure to reach agreement on even minor issues.
 - Proposals for contracts of excessively long or short duration.
 - Insistence on overbroad management rights clause or other proposals which deprive union of ability to represent employees
 - Statements which suggest bargaining for the purpose of avoiding agreement or driving at impasse.

Healthy vs. Unhealthy Relationships

Healthy

- Parties bargain with genuine intention to reach agreement that addresses chief concerns of both employer and musicians.
- Parties' starting positions diverge, but a livable compromise lies somewhere in the middle
- Parties' positions are based on the relevant objective facts.
- Parties attempt to bargain efficiently and respectfully.
- Relevant and necessary requested information flows freely from the party that controls it.

Unhealthy

- Parties make unreasonable offers or demands and refuse to budge.
- Parties' starting positions are so far apart compromise is unimaginable.
- Parties' positions are driven by ideology.
- Negotiations are prolonged and rancorous, continuing long after contract expiration.
- Party with information unreasonably delays or refuses to provide it in response to requests.

Mandatory vs. Permissive Subjects of Bargaining

- The parties are required to bargain in good faith concerning certain subjects the NLRB has deemed "mandatory" subjects.
- The parties may, but are not obligated to, bargain concerning other subjects that have been deemed "permissive" and may include the results of that bargaining in their agreements. However, it is unlawful for one party to insist to impasse on a permissive subject.
- Still other subjects are considered illegal subjects of bargaining. While it is not unlawful for a party to propose an illegal subject, it is unlawful to insist to impasse on that subject and unlawful to include it in the agreement.

Examples of Mandatory Subjects

- General rule of thumb: if it directly relates to compensation or benefits or if it has to do with the employee's experience of being at work it is likely a mandatory subject.
- All kinds of compensation: salaries, per-service rates, overtime, doubling, banda, cartage, per diem, travel
- All kinds of benefits: pension (and other deferred compensation); health, dental, life and instrument insurance; sick, vacation and other leave; meals; complimentary tickets; parking
- Discipline standards and procedures
- Grievance and arbitration; no strike/no lockout provisions
- Work rules and policies, where they affect employees' work and/or could trigger discipline

More Examples of Mandatory Subjects

- Hours and days of week worked; workloads
- Work assignments
- Safety and health
- Drug and alcohol testing
- Dress code
- Non-discrimination provisions
- Use of bulletin board by union
- Union security, dues check-off, hiring hall provisions
- Management rights and waiver clauses
- Major changes in operations or decisions to shut down, wholly or partially—as well as effects of those decisions on bargaining unit employees

Examples of Permissive Subjects

- Scope/definition of the bargaining unit (e.g., inclusion of librarians)
- Selection of bargaining representative (e.g., designating who will represent the union at a particular grievance step)
- Internal union affairs, including conduct of strike votes and ratification requirements
- Permission for the employer to negotiate personal service contracts directly with employees
- Loyalty clauses (employees' best efforts to promote employer's interests)
- Settlement of Unfair Labor Practice charges

Examples of Illegal Subjects

- Right to discharge employees for union activity
- Rule requiring preference for union members
- Separation of employees by race
- Insistence on impartial arbitration in which one party cannot choose its representatives



What happens if the contract expires and there is no agreement on a new one?

- The employer must maintain the same terms and conditions unless the parties agree otherwise or reach impasse.
- Absent contract language to the contrary, the employer is obligated to continue deducting work dues for employees who have signed dues check-off authorizations and not revoked them.
- The employer must continue to process grievances but not necessarily to arbitrate them.
- The parties may utilize the “economic weapons” of strike and lockout.
- If the parties reach impasse and the contract has expired, the employer may implement new terms and conditions of employment.

Strike: employees withhold their labor

- Can happen at any time after expiration so long as one party (usually the union) has fully complied with NLRA Section 8(d) notice requirements.
- Two potential objectives, thus two kinds of strikes:
 - An *economic strike* has as its object convincing the employer to accede to union demands regarding wages and working conditions.
 - An *unfair labor practice strike* wholly or partly protests a ULP by the employer.
- Difference in reinstatement rights:
 - ULP strikers are entitled to reinstatement even if the employer has hired replacement workers during the strike; but
 - economic strikers may be permanently replaced.

Lockout: employer withholds work

- Subject to same 8(d) notice requirements as strike. Employer that intends to lock out its employees must say so clearly.
- Two kinds of lockouts:
 - *offensive lockout* in support of employer's lawful bargaining position
 - *defensive lockout* in order to protect itself from unusual or extreme hardships that would result from an apparently imminent strike.
- A lockout will be unlawful when it interferes with employees' exercise of Section 7 rights (to engage in or refrain from union activity) or is otherwise undertaken in support of a ULP.
- An employer may hire temporary—but not permanent—*replacement workers* during a lockout; hiring permanent replacements during a lockout is considered to be *inherently destructive of employee Section 7 rights*.

Strike and Lockout Questions

- Do employees get paid while locked out or on strike?
- Does an employer have to maintain health insurance for employees who are on strike or locked out?
- How does a strike end? Can the employees end a strike and go back to work without accepting the employer's contract offer?
- If the employer locks us out and is no longer paying pension contributions on our behalf, isn't that a withdrawal from the fund?

Impasse: what is it & how does it occur?

- Very generally defined as *the point at which both parties are warranted in assuming that further bargaining would be futile*
- Inquiry into the existence of impasse is highly fact-specific; deadlock on a single issue does not create overall impasse
- Valid impasse can occur only where there has been a course of *good faith bargaining*
- Failure to provide information generally invalidates impasse
- Employer generally bears burden of proving existence of impasse

Are we at impasse?? Factors:

- number and duration of bargaining sessions
- continuation of bargaining
- either party's demonstrated willingness to consider issues further or fluidity of either party's position
- strike or consultation with employees about one
- engagement of a mediator, but...cuts both ways
- statements of parties concerning impasse are not necessarily determinative but can be revealing
- insistence on non-mandatory subject destroys valid impasse
- evidence of union animus undermines impasse declaration

How does impasse change things?

- The overall duty to bargain remains in place but is temporarily suspended.
- However, the duty to bargain is re-activated with any change of circumstance that renews the possibility of fruitful bargaining.
- Employer may *implement* or *impose* new terms and conditions of employment consistent with offers that have been presented to and rejected by the union.
 - Employer may not simply pull new terms and conditions out of the air and it may not make any changes at all until a bona fide impasse has been reached after a course of good faith bargaining.
 - An employer who miscalculates, imposing an offer before impasse has been reached, commits an unfair labor practice.
 - 8(d) notice requirement applies to implementation as well as strike or lockout

How can we (legally) avoid impasse?

- Bargain in good faith!
- Never express the view that further bargaining would be futile.
- Never allow an employer's assertion that further bargaining would be futile or that the parties are at impasse to go unchallenged.
- Be careful about stating unequivocally that the Employer's package is unacceptable.
- Continue to request information relevant to issues being bargained.
- Always express willingness to meet and discuss unresolved issues.

Questions about imposed offers

- What can we do if the employer imposes new terms and conditions?
 - Continue to work under the new terms
 - Strike
- Does an imposed offer constitute a new contract?
- If the musicians continue to work under the new terms and conditions have they tacitly accepted them?
- If the musicians continue to work under the new terms and conditions, can they still go on strike?
- Or can the employer lock them out?
- After the employer imposes its offer, do the parties still have a duty to bargain?

“They can’t do that, can they?!?”

- Our contract expired June 30. We have met 6 times, starting in April. The employer has proposed drastic cuts in wages and service guarantees. Because things were not going well, a federal mediator participated in our most recent bargaining session on October 1.
- We brought with us to that meeting a new comprehensive proposal. We told the employer about it but they cut short the meeting before we had time to present the document and go over it.
- At that meeting, we requested additional information on subjects that were still unresolved and reiterated our request (made originally in April) for the employer’s unaudited financial information (audited info was not yet available) from the most recent season.
- Later that same day, the executive director sent us a “last, best, final” offer, told us she wanted the musicians to vote on it, and gave us a deadline to respond. In her cover letter, the ED asserted: “It was apparent to all, including the federal mediator, that any further discussions are futile at this particular juncture to resolve the significant gap between the parties on the primary issue of economics.”
- The musicians voted down the offer and we informed the Employer of that outcome. In response, the Employer announced it would be implementing the LBF offer’s terms and conditions that same day.

Was it legal for the Employer to implement new terms and conditions of employment?

- Contract was expired
- Had the parties reached impasse?
 - Six bargaining sessions
 - Use of mediator
 - Union's new proposal
 - New information requests
 - Old information request outstanding
 - Employer's assertion regarding futility of further discussion
 - Musicians voted down LBF

Opinion

- No, it was not legal for the Employer to unilaterally implement changed terms and conditions of employment.
- The parties were not at impasse.
- All else aside, the fact that the Union had requested and the employer failed (for more than 6 months) to provide financial information was most likely an unfair labor practice and evidence of bad faith, which would undermine any assertion that a valid impasse had been reached.

Questions?

