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Midterm Changes: The Obligation to Bargain

UNION REPRESENTATIVES need to know about NLRA midterm (midcontract) bargaining rules. In many cases, these rules require employers to bargain with the union before announcing or implementing new work rules, schedules, or job assignments.

THE BARGAINING DUTY

Section 8(d) of the NLRA requires employers to bargain collectively with unions. Application of this principle to the negotiation of contracts is well known. But Section 8(d) also applies during the term of a collective bargaining agreement with respect to subjects not covered by the agreement.

Under the NLRA, if an employer wishes to adopt a new policy that affects employees or to make a change in a past practice, it must notify the union of the proposed change, and allow the union an adequate opportunity to bargain prior to implementation.[225]

Policies implemented without notice or bargaining are called *unilateral changes*. Unless the union has waived (given up) its bargaining rights, a unilateral change is an unfair labor practice in violation of Section 8(a)(5), even if the employer has a legitimate reason for its actions.

NLRB charges. A union can file a ULP charge up to six months after a unilateral change. After a hearing, the NLRB can order the employer to rescind the new rule or policy and compensate employees for any lost wages or benefits. The NLRB can also cancel discipline, including discharges or suspensions, imposed on employees for failing to follow a unilaterally-imposed policy or rule.

NOTE: The NLRB often defers unilateral-change ULP charges to the grievance and arbitration procedure. (See page 12.) When a unilateral-change charge is combined with a failure-to-provide-information charge, however, deferral can sometimes be avoided. (See page 108.)

SAMPLE DESCRIPTION OF BARGAINING VIOLATION FOR NLRB CHARGE FORM

1. On February 1, 1999, the employer unilaterally changed working conditions by implementing a new educational leave policy.

2. The employer has failed to respond to the union's request for information relating to the new policy.

WHICH CHANGES MUST BE BARGAINED?

The NLRB divides bargaining subjects into two categories: mandatory and permissive. Mandatory subjects, which must be bargained, include wages, hours, benefits, working conditions, and other matters which vitally affect employees. Permissive subjects, for which bargaining is not required, include managerial prerogatives such as the selection of supervisors, choice of production methods, and decisions to close operations. The following subjects have been classified by the NLRB:

MANDATORY SUBJECTS

(May not be adopted, changed, or eliminated without prior notice to the union and bargaining on request.)

- absence rules
- automation decisions
- bathroom procedures
- bonus programs
- business ethics policies
- clean-up rules
- disciplinary procedures or penalties
- dress codes
- drug/alcohol testing
- elimination of positions
- employee privileges (right to listen to radio, receive telephone calls, smoke, etc.)
- employee purchase plan rules
- enforcement of company rules
- evaluation systems
- food service hours
- free coffee
- grievance procedures
- grooming standards
- incentive plans
- insurance benefits
- job qualifications
- layoffs for economic reasons
- light duty policies

- meal or coffee break rules
- merit increases
- new hours or shifts
- number of employees in job classification or department
- outside conduct rules
- outside employment rules
- parking rules
- pay check procedures
- pay rates
- physical examinations
- production quotas
- relocation of bargaining-unit work (generally)
- rest periods
- retirement benefits of current employees
- safety and health rules
- safety awards
- smoking rules
- subcontracting decisions (not including decisions based on a change in the scope or direction of the enterprise)
- tardiness rules
- time off prior to holidays
- transfer of bargaining-unit work to nonbargaining-unit employees
- union steward and officer privileges (paid leave, access to facilities, time off, etc.)
- vacation policies
- wages
- workloads
- work rules
- work schedules

PERMISSIVE SUBJECTS

(May be adopted, changed, or eliminated without notice to the union or bargaining.)

- decisions to close plants or eliminate departments
- general business practices such as advertising and financing
- nondiscriminatory hiring practices
- pension benefits of already-retired employees

- pre-employment testing procedures
- production methods
- selection of supervisors
- subcontracting and relocation decisions accompanied by basic changes in the employer's operation

NOTE: The midterm bargaining obligation only applies to new policies or changes in past practice that have a material, substantial, or significant impact on employees.[226] For example, moving up employee starting times has a substantial impact and must be bargained. But substituting a time clock for a sign-in procedure does not need to be bargained.

BARGAINING PROCEDURES

The following rules apply to changes in mandatory subjects:

- The employer must give the union notice that a change is desired. Notice must be provided before the employer announces the new policy to employees.
- If the union wants to bargain, it must submit a prompt request to the employer.
- The employer must refrain from implementing the change while bargaining takes place.
- Bargaining must be conducted in good faith, with the intention of reaching an agreement. The employer must provide relevant information requested by the union.
- Bargaining must continue until agreement is reached or the parties come to impasse (a deadlock after bargaining is exhausted). If the parties come to impasse, the employer can implement the proposed change without union consent. The employer cannot declare impasse if it has failed to supply the union with relevant requested information.

Don't fall into the trap of going to the first bargaining session, rejecting the employer's proposal, and walking out. This only helps the employer to declare impasse. Instead, ask for further meetings, make detailed requests for information, and submit counterproposals. Prolonging the bargaining process puts pressure on the employer to abandon its proposal or to agree to a middle ground.

BARGAINING REQUEST

To: Vinnie Lamothe

From: William Haywood, President Local 10

Subject: Request for bargaining

Date: July 15, 1998

The union hereby requests bargaining concerning the company's proposal that employees wear safety shoes at all times.

Please advise the union as to when the company will be able to negotiate concerning the proposed change. As you know, labor law forbids any implementation of a new policy until the bargaining process is completed.

MANAGEMENT RIGHTS

Employers often argue that contractual "management-rights" clauses permit them to make midterm changes without bargaining with the union. Management-rights clauses usually set out an

employer's right to direct the enterprise. But according to the NLRB, a management-rights clause constitutes a waiver of union bargaining rights only if the clause "clearly and unmistakably" allows management to take unilateral action in a specific area or areas.

A clause giving management the "exclusive authority to adopt safety rules" is sufficiently specific to constitute a bargaining waiver. But a general expression of managerial rights, as found in many agreements, does not reach the waiver status.[227] Nor do most "zipper" clauses.[228] Absent a waiver, the failure of a union to request bargaining on previous occasions does not affect the union's right to demand bargaining on future changes.[229]

A union that is concerned that a contract's management-rights clause may be construed as a bargaining waiver should try to obtain new contract language; perhaps by adding a sentence affirming that the union is not waiving its right to bargain. If this is not practicable, notify management during your next contract negotiations that the union does not view the management-rights clause as a waiver of its bargaining rights.

Some changes in past practice violate the contract as well as the employer's duty to bargain. Under labor relations principles as applied by arbitrators, longstanding ways of doing things (past practices) involving benefits, privileges, and favorable working conditions, are considered implied terms of the contract. Their elimination can be grieved in the same

manner as a violation of a written provision.[230] *This allows the union, in many cases, to file a past practice grievance as well as a ULP charge.*

QUESTIONS AND ANSWERS

SICK LEAVE

Q. Last week, without prior notice, our company announced that anyone out sick for two days or more must submit a doctor's note. Is this rule legal?

A. No. Sick-leave rules are mandatory bargaining subjects.[231] The company's failure to give the union an opportunity to bargain makes the rule illegal.

DRESS CODE

Q. A new general manager announced that employees will no longer be allowed to wear shorts at work. When we asked to bargain, he refused to meet. Can the new policy be enforced?

A. No. Employees' dress is a mandatory subject.[232] The manager's refusal to bargain makes the new policy unlawful.

DISCIPLINE

Q. Last month, management unilaterally announced a rule requiring employees to get permission before leaving their work stations. Two employees have received written warnings for ignoring the rule. Does the discipline have to be rescinded?

A. Yes. When a rule is implemented unlawfully, discipline based on the rule is also unlawful.[233]

WORKLOAD

Q. A union housekeeping employee is responsible for cleaning two floors of offices. Yesterday, her supervisor told her she would be responsible for a third floor. The union was never consulted. Is this an NLRA violation?

A. Yes. A change affecting an employee's workload is a mandatory bargaining subject if it has a substantial impact on the worker.[234]

DRUG TESTING

Q. Does an employer have to bargain before instituting a drug testing policy?

A. Yes. A drug testing policy is a significant employment condition. An employer must bargain over the decision, including issues such as the nature of the test, safeguards, the purposes for which the test can be used, and the consequences of a refusal to take the test.[235]

FOOD PRICES

Q. Does management have to give the union an opportunity to bargain before raising prices on food items in the company cafeteria?

A. No. The price of food is a mandatory bargaining subject, but a special NLRB rule allows an employer to bargain after a price increase is implemented.[236]

SAFETY RULE

Q. Can the company adopt a safety rule without giving the union an opportunity to bargain?

A. No. Safety rules are mandatory bargaining subjects.[237]

NEW ENFORCEMENT POLICY

Q. Our contract specifies fifteen-minute breaks. For years, however, employees have been allowed to take breaks for twenty minutes. Last month, without discussion with the union, the general manager announced a strict enforcement policy. Five workers have been cited for being late and one has been suspended. Was the manager required to notify the union and allow bargaining before he began the new policy?

A. Yes. The consistent failure to enforce a contract provision or work rule establishes a condition of employment. If the employer decides to strictly apply the contract or the rule, it must give the union prior notice and, if the union requests, negotiate to agreement or impasse before announcing the new policy to employees.[238]

PHOTOCOPY MACHINE

Q. For years, the union has been allowed to use the photocopy machine in the Labor Relations office. Last month, without bargaining, Labor Relations stopped the practice because we are "using the machine too much." Is this an NLRA violation?

A. Yes. Union privileges, such as the use of photocopy machines, telephones, and office space are mandatory bargaining subjects.[239] Before they can be eliminated, prior notice and bargaining to agreement or impasse must occur.

GRIEVANCE MEETINGS

Q. We have always held grievance meetings during work hours. Yesterday, Labor Relations announced that because of "new conditions," meetings would have to be held after work. Can this change be made without bargaining?

A. No. Rules relating to grievance meetings are mandatory bargaining subjects.[240]

SUBCONTRACT

Q. To save money, the company hired an outside maintenance firm to perform work previously handled by union personnel. Did management have to bargain before it made the change?

A. Yes. An employer that intends to substitute non-bargaining unit employees for bargaining unit employees doing the same work, with no change in the scope or direction of the enterprise, must give prior notice to the union and allow bargaining prior to implementation.[241]

LIGHT-DUTY POLICY

Q. Our employer met with its workers' compensation insurer to put together a program to require employees to accept light-duty work after an occupational injury. Can the company implement the program unilaterally?

A. No. Light-duty programs are mandatory subjects.[242] Unions must be allowed to bargain on the decision, including the scope of the program, duration, pay, and penalties for refusing to take part.

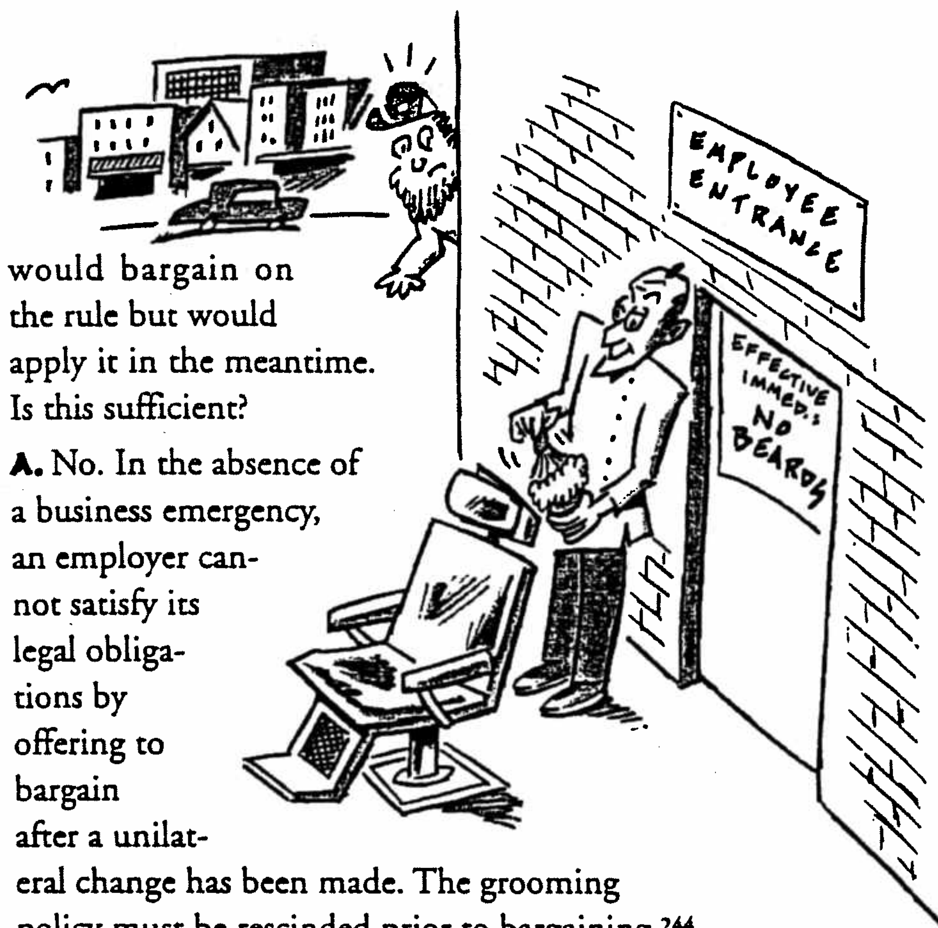
BUSINESS EMERGENCY

Q. We work for a telephone answering service that is open twenty-four hours a day, seven days a week. The day before Easter, three operators quit. To cover the holiday, the company called in employees who were not scheduled to work. This had never been done before. Did the company have to notify the union and bargain before taking these steps?

A. No. An employer can take action without bargaining when a business emergency requires an immediate response.[243]

FAIT ACCOMPLI

Q. Last month, management announced a rule forbidding beards. When we protested to the personnel director, she said she



would bargain on the rule but would apply it in the meantime. Is this sufficient?

A. No. In the absence of a business emergency, an employer cannot satisfy its legal obligations by offering to bargain after a unilateral change has been made. The grooming policy must be rescinded prior to bargaining.[244]

CHANGE MANDATED BY LAW

Q. Labor Relations says it can implement a no-smoking policy without bargaining because a city ordinance requires smoke-free workplaces. Is this right?

A. Perhaps. When a federal, state, or local law requires a change in policies affecting employees, and there is no discretion on how to apply the law, an employer may enforce the law without

bargaining.[245] If, however, there is any discretion on how to comply with the law, the union must be given prior notice and an opportunity to bargain.[246]

JOB QUALIFICATIONS

Q. The company posted a vacancy for a leadperson. On the posting, they listed a high school diploma as a necessary qualification. Doesn't this requirement have to be bargained?

A. Yes. Job qualifications are mandatory bargaining subjects unless clearly ceded to management in a management-rights clause.[247]

OVERCOMING DEFERRAL

Q. Is there any way to avoid NLRB deferral of a unilateral-change charge?

A. One strategy is to make a request for sensitive employer information before filing the ULP charge. Under Board policy, if a valid information-refusal charge (which is not deferrable) is closely related to a unilateral-change charge, the Regional Director can issue an NLRB complaint on both charges despite an employer's request for deferral.[248]

For example, if your employer announces a subcontract and refuses to bargain about it, request a list of the reasons for the decision, as well as all documents, including correspondence and contracts, related to the decision. If the employer fails to comply with the information request, or complies only in part, file an NLRB charge alleging two violations: the unilateral change and the failure to supply information.

RANK-AND-FILE CHARGE?

Q. Our agency implemented changes in work assignments without consulting with the union. The union has no objection to the changes and does not plan to file a ULP charge. If a rank-and-file employee files a ULP charge against the employer, could this lead to an NLRB complaint?

A. Not likely. The NLRB does not look with favor on individually-filed Section 8(a)(5) charges. Unless there are special circumstance, such as a breach of the union's fair representation duty, the Regional Director will almost certainly dismiss the rank-and-filer's charge because it lacks support from the collective bargaining representative.[249]

PLANT CLOSING

Q. What bargaining rights does a union have when an employer decides to close a facility?

A. Not many. In a decision called *First National Maintenance Corp.*, the Supreme Court declared that employers do not have to bargain before making a decision to close a business or part of a business.[250]

The only union bargaining right relates to the effects of the closure on employees, in areas such as severance pay, transfer rights, health insurance, and pensions. Effects bargaining requires that the employer notify the union in advance of the closing to allow an adequate period for negotiations. An employer that fails to give advance notice may be ordered to pay employee salaries until effects bargaining is properly conducted.[251]

LATE-FILED GRIEVANCE

Q. Can we use the unilateral-change doctrine to help a suspended employee who fails to file a grievance by the five-day contractual deadline?

A. Yes. File an NLRB charge asserting that the suspension constitutes a unilateral change of enforcement policy. An employer who wants the NLRB to defer the charge will have to agree to process the employee's grievance despite its lateness.

224. *See* Manville Forest Products Corp., 269 NLRB 390, 115 LRRM 1266 (1984); Cook Paint & Varnish Co., 246 NLRB 646, 102 LRRM 1680 (1979). *See also* Service Technology Corp., 196 NLRB 845, 80 LRRM 1187 (1972) (employee has no right to refuse to answer questions about misconduct he has been involved in or has witnessed).
225. Johnson-Bateman Co., 295 NLRB 180, 131 LRRM 1393 (1989).
226. Alamo Cement Co., 277 NLRB 1031, 121 LRRM 1131 (1985).
227. *See, e.g.*, Hi-Tech Cable Corp., 309 NLRB 3, 142 LRRM 1338 (1992) (clause giving employer sole right to make, change, and enforce "reasonable rules", not waiver of union's right to bargain over no-tobacco-usage rule); Johnson-Bateman Co., 295 NLRB 180, 131 LRRM 1393 (1989) (drug and alcohol testing policy, not covered by management-rights clause); Ohio Power Co., 317 NLRB 135, 150 LRRM 1098 (1995) (clause giving company right to determine hours of work and schedules not a waiver of union's right to bargain over cessation of practice allowing union representatives time off work without pay to attend workers compensation hearings). Note: Some federal circuit courts take a more pro-employer view than the NLRB and find bargaining waivers in broad management-rights language. *See* Uforma/Shelby Business Forms Inc. v. NLRB, 111 F.3d 1284, 155 LRRM 2001 (6th Cir. 1997).
228. *See* Suffolk Child Development Center, Inc., 277 NLRB 1345, 121 LRRM 1103 (1985); Ohio Power Co., 317 NLRB 135, 150 LRRM 1098 (1995). *See also* Mead Corp., 318 NLRB 201, 149 LRRM 1329 (1995) (by forbidding bargaining "on all matters" during the term of the contract, zipper clause requires employer to obtain union's consent before making changes in past practice).

229. Owens Corning Fiberglas, 282 NLRB 609, 124 LRRM 1105 (1987); Johnson-Bateman Co., 295 NLRB 180, 131 LRRM 1393 (1989).
230. *See How to Win Past Practice Grievances* by Robert M. Schwartz (Work Rights Press, 1999).
231. Ciba-Geigy Pharmaceuticals Div., 264 NLRB 1013, 111 LRRM 1460 (1982).
232. Concord Docu-Prep, Inc., 207 NLRB 981, 85 LRRM 1416 (1973).
233. G.J. Aigner Co., 257 NLRB 669, 107 LRRM 1586 (1981).
234. *See* Carpenters Local 1031, 321 NLRB 30, 152 LRRM 1049 (1996) (increasing employee's workday by 30 minutes had sufficient impact to constitute a mandatory bargaining subject).
235. Johnson-Bateman Co., 295 NLRB 180, 131 LRRM 1393 (1989). *See also* Paperworkers v. Lithibar Matik, Inc., 109 Lab.Arb.Rep. 446 (1997) (arbitrator overturned discharge for refusing to take drug test because company rules on testing adopted unilaterally).
236. E.I. du Pont de Nemours & Co., 269 NLRB 24, 115 LRRM 1192 (1982).
237. Hanes Corp., 260 NLRB 557, 109 LRRM 1185 (1982). *See also* Armour Oil Co., 253 NLRB 1104, 106 LRRM 1127 (1981) (decision to replace trucks with vehicles more difficult to handle and lacking safety equipment must be bargained); Winona Industries, Inc., 257 NLRB 695, 107 LRRM 1605 (1981) (rule prohibiting employees from wearing "tank tops" for safety reasons, mandatory topic).
238. Intermountain Rural Electric Ass'n, 305 NLRB 783, 787-88, 139 LRRM 1003 (1991), *enforced,* 984 F.2d 1562, 142 LRRM

2448 (10th Cir. 1993); Caterpillar Inc., 321 NLRB 1178, 1182, 153 LRRM 1049 (1996) (employer violated NLRA by failing to bargain before announcing that work rule would be enforced more strictly); Hyatt Regency Memphis, 296 NLRB 259, 263-4 (1989) (discipline unlawful when strict policy implemented unilaterally), *enforced,* 939 F.2d 361, 138 LRRM 2115 (6th Cir. 1991).

239. *See* Champion Parts Rebuilders, Inc., 260 NLRB 731, 733-34, 109 LRRM 1220 (1982), *enforcement denied in part,* 717 F.2d 845, 114 LRRM 2674 (3d Cir. 1983) (single refusal to allow use of company photocopy machine does not constitute a new policy).

240. The Mead Corp., 256 NLRB 686, 107 LRRM 1309 (1981).

241. Furniture Rentors, Inc., 311 NLRB 749, 143 LRRM 1249 (1993). *But see* Oklahoma Fixture Co., 314 NLRB 958, 960, 147 LRRM 1105 (1994) (noting exception to rule when decision involves "core entrepreneurial concerns outside the scope of mandatory bargaining").

242. Southern California Edison Co., 284 NLRB 1205, 126 LRRM 1324 (1987). *See also* Jones Dairy Farm, 295 NLRB 113, 131 LRRM 1487 (1989) (new policy requiring injured employees to enter work hardening program, mandatory bargaining subject).

243. *See* Southern Coach and Body Co., 141 NLRB 80, 52 LRRM 1279 (1963); Lapeer Foundry, 289 NLRB 952, 954, 129 LRRM 1001 (1988).

244. Mercy Hospital, 311 NLRB 1159, 143 LRRM 1295 (1993).

245. Standard Candy Co. 147 NLRB 1070, 56 LRRM 1316 (1964) (increase in minimum wage); Murphy Oil USA, 286 NLRB 1039, 127 LRRM 1111 (1987) (coming into compliance with OSHA standard, no bargaining requirement according to ALJ).

246. *See* Murphy Oil USA, Id.; Architectural Fiberglass, 165 NLRB 238, 65 LRRM 1332 (1967).

247. *See* Scott-New Madrid-Mississippi Electric Coop., 323 NLRB No. 63, 156 LRRM 1189 (1997).

248. U.S. Postal Service, 302 NLRB 918, 137 LRRM 1352 (1991).

249. *See* discussion in ITT Continental Baking Co., 103 LRRM 1499 (Advice Memorandum 1980).

250. First National Maintenance Corp. v. NLRB, 452 U.S. 666, 107 LRRM 2705 (1981).

251. *See* Los Angeles Soap Co., 300 NLRB 289, 136 LRRM 1032 (1990); Riedel International, 300 NLRB 282, 135 LRRM 1137 (1990); Chun Cha Fu, Inc., 305 NLRB 143, 139 LRRM 1047 (1991).

252. Vaca v. Sipes, 386 U.S. 171, 190, 64 LRRM 2369 (U.S. Sup. Ct. 1967).

253. SEIU Local 579, 229 NLRB 692, 695, 95 LRRM 1156 (1977). *See also* Airline Pilots v. O'Neill, 499 U.S. 65, 67, 136 LRRM 2721 (Sup. Ct. 1991) (conduct is arbitrary under DFR standard only if it is wholly without a rational basis or explanation).

254. Bowen v. U.S. Postal Service, 459 U.S. 212, 112 LRRM 2281 (U.S. Sup. Ct. 1983).

255. *See* Tokar v. Teamsters Local 726, 154 LRRM 2772 (D.C.N.Ill 1997) (union may refuse to process untimely grievance); Stevens v. Moore Business Forms, Inc., 18 F.3d 1443, 145 LRRM 2668 (9th Cir. 1994); Pacific Northwest Bell Telephone Co., 110 LRRM 1559 (Advice Memorandum 1982).

256. *See* Vaca v. Sipes, 386 U.S. 171, 195, 64 LRRM 2369 (U.S. Sup. Ct. 1977) ("[A] breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious") .