DOING WELL BY BEING GOOD: HOW U.S. LABOR LAW ENCOURAGES EMPLOYER GOOD FAITH BEHAVIOR

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Introduction

It is a pleasure to participate in this symposium honoring the service of John and June Mary Makdisi. Their teaching, leadership, scholarship, and service to students and colleagues have made the St. Thomas University School of Law a better place and increased its impact, both locally and globally. The symposium topic, "The Importance of Morals to Law," is a fitting one in light of the direction of their life's work. This essay will attempt to provide an example of how law and legal consequences can encourage moral behavior. While much of law is based on a society's general understanding of morality, the law can itself also contribute to how a society defines morality by establishing social norms of expected behavior. It can also contribute by encouraging behavior that comports with morality, whether through the threat of penalty or punishment or by conditioning legal privileges on "good" behavior. Although defining morality is well beyond the scope of this essay, it does, in this author's opinion, include dealing in good faith and honesty, keeping one's promises, and seeking to avoid unnecessary harm to others, all values encouraged by the law that has developed around the statutory duty to bargain in good faith encompassed in Section 8(a)(5) of the National Labor Relations Act.[1]

The importance of this bargaining duty cannot be overemphasized. Private sector collective bargaining under the auspices of the National Labor Relations Act[2] has played a vital role

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1 29 U.S.C. § 158(a)(5).

2 29 U.S.C. §§ 151-69.

in developing the U.S. economy and improving the quality of life experienced by employees. Union contracts can affect the national market for labor and influence the pay and benefits of employees throughout the economy, having an impact far beyond just unionized establishments. Negotiations between individual employers and the labor organizations representing their employees produce regular pay raises and increase standards of living as productivity increases. Some benefits and protections initially attained through union contracts, such as family medical leave and health insurance, have become the model for national protective legislation. Through union representation and collective bargaining, employees achieved a voice in setting their working conditions and attained both job security and economic security. Through negotiation and enforcement of collective bargaining agreements, employees achieved contractual terms and conditions of employment on which they could rely, obtained just cause protections against unwarranted termination, and, through the grievance and arbitration process, could ensure that management decisions affecting their conditions of employment would be thoroughly examined and mistakes rectified. The National Labor Relations Act's directive that private sector employers must bargain in good faith with the union representatives of their employees[3] has been the key to these advances.

This essay will discuss ways in which that duty of good faith bargaining is enforced and how a series of decisions by the courts and the National Labor Relations Board designed to increase employer power and flexibility have inadvertently encouraged and compelled employers to bargain in good faith by conditioning use of their most powerful weapons on their participation in good faith bargaining. The presence of economic weapons held in reserve is a powerful negotiating lever and an employer which has forfeited the ability to use weapons such a permanent striker replacement, lockout, and unilateral change will have substantially less leverage at the bargaining table and risk economic peril if it seeks to use these tools without having bargained in good faith. Because the law of good faith bargaining is complex, nuanced and difficult to define at the margins,

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[3] 29 U.S.C. § 158(d).

this "reward" system also discourages borderline bargaining behavior.

This essay will first provide an introduction to legal rules and concepts governing private sector collective bargaining under the National Labor Relations Act.[4] The union's status as exclusive representative requires the employer to bargain solely with the union that represents a majority of employees in the relevant bargaining unit. Exclusive representative status gives the union authority to bind all employees in the unit, whether union members or not, to the terms of any resultant collective bargaining agreement.

The statutory requirement of good faith bargaining applicable to both employers and unions will be explored as will the component concept of mandatory and permissive subjects of bargaining, a court-created construct that defines and limits the range of employment-related topics over which the parties are compelled to bargain in good faith. This essay will then discuss the parties' use of economic weapons during bargaining and the importance of those employer weapons which are conditioned on good faith bargaining such as unilateral changes to working conditions, permanently replacing striking employees, locking out employees to inflict bargaining pressure and even withdrawing recognition from unions which have provably lost employee majority support.

Finally, the essay will demonstrate the practical effect of conditioning employer use of economic weapons, such as unilateral change, permanent replacement of strikers, locking out unit employees and withdrawal of recognition on good faith bargaining. Employers who wish to retain the opportunity to use or threaten to use these weapons, whether for bargaining leverage or actual use, will have to come to the bargaining table, stay there, provide the union information it needs for bargaining and, hopefully, participate in honest communication and an exchange of proposals designed to help the parties reach successful agreement and maintain labor peace. Although it would be naïve to expect such positive results in every case, the hope is that a regime that requires careful listening, respectful responses and discussions, and the submission of legitimate counter-

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[4] 29 U.S.C. §§ 151-69.

proposals may lead to solutions that meet the needs of all parties and foster labor peace without the need for strike or lockout.

Background

Labor unions or trade unions in the U.S. are private organizations falling under the definition of "labor organization" under the National Labor Relations Act,[5] and they represent workers in a broad range of industries, with a focus on collective bargaining with individual employers over the wages, benefits, and working conditions of those they represent and enforcing collective agreements through labor arbitration or court action. Although most labor unions are national and international organizations, the great majority of collective agreements are negotiated at the individual plant unit level by locals of the national or international unions. Multi-employer bargaining is possible, but it is lawful only if the union has majority support from each employer's employees and if each employer and the union agree to be bound on a multi-employer basis. In some situations, as in the case of major automobile manufacturers, centralized bargaining in the form of national agreements covering several worksites within a single company occurs. Such national agreements are often then supplemented by local riders which deal with local conditions at individual plants.

The Statutory Foundation of Collective Bargaining Law

Collective bargaining in the U.S. is a law-based system. Federal statutes govern bargaining between private sector unions and employers, by railway and airline employers and unions,[6] and by federal employees.[7] Collective bargaining involving employees of individual states and local governments is governed by the laws of the individual states. This essay deals only with private sector collective

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[5] 29 U.S.C. § 152.
[6] 45 U.S.C. §§ 151-88.
[7] 5 U.S.C. § 7101 *et seq.*

bargaining.

Passed in 1935 and amended in 1947 and 1959, the National Labor Relations Act[8] governs labor relations in the private sector. It applies to any private sector enterprise whose operations affect commerce. The National Labor Relations Board, comprised of five members appointed by the President and an enforcement branch led by the General Counsel, regulates union organizing, union elections, and unfair labor practice proceedings including those involving the duty to collectively bargain. Its rulings are reviewable in the U.S. courts.[9]

Section 7 of the Act[10] provides employees the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act[11] makes it unlawful for an employer to "interfere with, restrain, or coerce employees" in their exercise of collective bargaining or representational rights and Section 8(a)(3)[12] makes it unlawful for the employer to discriminate against them for doing so. Section 8(b)(4)[13] limits union picketing, forbidding picketing for the purpose of causing one entity to stop doing business with another, usually labeled a "secondary boycott" because it seeks to threaten or coerce "secondary" employers which have no direct involvement in the employment relationship between the employer and its employees.

Under the Act, representation elections and any subsequent collective bargaining take place in a bargaining unit comprised of employees who share a community of interest in their conditions of

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[8] 29 U.S.C. §§ 151-169. For a full treatment of private sector labor law, including collective bargaining law, *see* DOUGLAS E. RAY, CALVIN W. SHARPE, ROBERT N. STRASSFELD, UNDERSTANDING LABOR LAW (4th ed. 2014).

[9] In interpreting the statute, the courts, especially the U.S. Supreme Court, have had a dramatic impact on development of the law. Although the U.S. system is statute-based, the decisions of the Court interpreting the statute are the final authority.

[10] 29 U.S.C. § 157.

[11] 29 U.S.C. § 158(a)(1).

[12] 29 U.S.C. § 158(a)(3).

[13] 29 U.S.C. § 158(b)(4).

employment. Generally, this occurs in a single location but can include multiple locations if the parties agree or if the employer or union establishes a community of interest among employees at several locations. A single business location of the employer can include more than one bargaining unit if employees who perform different functions have different communities of interest. For example, a manufacturing plant may have a production and maintenance unit and an office and technical unit if working conditions and supervisory relationships differ between units. Multi-employer bargaining can occur only with the consent of both union and the employers.

Sections 8(a)(5),[14] 8(b)(3),[15] and 8(d)[16] require that the employer and union bargain in good faith over wages, hours, and other terms and conditions of employment. The Act does not require that they reach agreement, only that they meet and confer at reasonable times, bargain in good faith, and execute any agreement that is reached. Section 301 of the Act[17] gives U.S. federal courts the authority to enforce collective bargaining agreements.

Collective Bargaining under the National Labor Relations Act

Once a union wins an election by majority vote, or is voluntarily recognized by the employer as majority representative—after the employer takes steps to ensure that it does indeed represent a majority of employees in the bargaining unit,[18] it becomes the exclusive representative of those employees. This representative status is presumed to continue unless and until employees either vote to decertify the union or the employer establishes through other means

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[14] 29 U.S.C. § 158(a)(5).

[15] 29 U.S.C. § 158(b)(3).

[16] 29 U.S.C. § 158(d).

[17] 29 U.S.C. § 185.

[18] Under Section 8(a)(2), 29 U.S.C. 158(a)(2), it is unlawful for the employer to recognize the union as exclusive representative if it does not have majority support. This provision was originally put in the statute to prevent employers from setting up minority "company unions" and thereby blocking employees from selecting a freely chosen representative labor organization as their majority representative.

that the union no longer represents the majority. The presumption of continued majority status is a strong presumption and means that a union, once recognized or certified, can remain the representative for decades despite a complete turnover of employees and other changes.

Bargaining typically occurs in two settings; newly certified unions negotiating first contracts and established unions negotiating continuing contracts. In both cases, bargaining generally follows a pattern of several meetings.[19] At the first meeting, the parties will agree on times and locations for bargaining and the party desiring change, most often the union, will present a complete contract proposal, explaining its reasons for each provision. At the second meeting, the other party, most often the employer, will present its contract proposal and explain its reasons. At that point, bargaining commences. Most often, the parties will seek to resolve the easiest matters first, reserving economic issues for the latter stages of bargaining. At subsequent meetings, parties will seek tentative agreement on various issues, trading proposals and reaching agreement on some. At the end stage, after the parties have had full discussions and explored areas for mutual agreement, the employer will often present its "last, best, and final offer," the offer that will be submitted to the union membership for a ratification vote. If bargaining has gone well, the union will recommend this proposal to the membership. If the membership votes to ratify, the union and employer will formally sign the collective bargaining agreement. If not, the parties will return to the bargaining table.

If the parties are unable to reach agreement, employees may

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[19] In most cases, the parties are represented by bargaining teams. The employer is often represented by an attorney, who serves as chief spokesperson, and one or more company officials. The union may be represented by an attorney but most often is represented by an international union representative who serves as chief spokesperson. The union team will also usually include the elected local union president, the shop steward who is an employee chosen to represent fellow workers at the employer, and union bargaining committee members, a group of employees chosen to participate with the union. These employees provide a vital link of communication between members of the bargaining unit and the bargaining table. Their recommendations can have an important impact on whether union members vote to accept the contract proposed at the end of negotiations.

vote to strike. If the union and employees continue to work without a contract while bargaining, the employer may sometimes lock the employees out until an agreement is reached.

The Duty to Bargain in Good Faith

Section 8(d) of the NLRA obliges the parties "to meet at reasonable times and confer in good faith."[20] It also states that "such obligation does not compel either party to agree to a proposal or require the making of a concession."[21] Thus, as the Supreme Court established in *NLRB v. American National Insurance Company*,[22] engaging in hard bargaining or insisting on proposals the other side will not accept is not necessarily unlawful bad faith bargaining. In that case, the Court held that the employer did not necessarily violate the Act when it insisted on a broad management functions clause that would have given the company virtually unreviewable discretion over several terms and conditions of employment, noting that the Act does not compel agreement. On the other hand, if the company's proposals, coupled with its other behavior, indicates that it "entered into bargaining with no real intention of concluding a collective bargaining agreement," its conduct will be found unlawful.[23]

The NLRB and the courts have identified some behaviors as *per se* violations of the duty to bargain. In *NLRB v. Truitt Mfg. Co.*,[24] the Supreme Court held that the duty to bargain included a duty to disclose requested information relevant to bargaining. In that case, the union asked for a pay raise. The company responded that such a raise would "break the company" but refused to disclose the financial information on which it based its claim. The Court reasoned that withholding relevant information could be the equivalent of removing the subjects under consideration from the bargaining table, which

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[20] 29 U.S.C. § 158(d).

[21] *Id.*

[22] 343 U.S. 395 (1952).

[23] *See* NLRB v. A-1 King Size Sandwiches, Inc., 732 F. 2d 872 (11th Cir. 1984). Nor may a party merely present a "take it or leave it" position. It must bargain over every mandatory topic. *See* NLRB v. General Electric, 418 F.2d 736 (2d Cir. 1969).

[24] 351 U.S. 149 (1956).

would be a *per se* violation. In many cases, however, it is not entirely clear whether information would be held relevant to bargaining or whether the employer has claimed an inability to pay sufficient to trigger the duty to provide supporting information.[25]

Another *per se* violation is the unilateral change of wages, hours, or terms and conditions of employment before the parties have reached an impasse in good faith negotiations.[26] This rule applies whether the change reduces benefits or increases them. For example, in *NLRB v. Katz*,[27] the employer unilaterally implemented a new sick leave policy, began an automatic wage increase system, and awarded merit increases to a substantial part of the workforce while those subjects were still being considered at the bargaining table. The Supreme Court held that such unilateral action before impasse, even in the presence of good faith bargaining during negotiations, circumvented bargaining on these topics just as much as would a flat refusal to bargain over them. Subsequent cases demonstrate that the issue of impasse itself can be one of controversy.[28] Nor may the

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[25] The issue is often one of nuanced interpretation dependent on context. In addition, an employer which promptly and truthfully retracts a claim of inability may be able to avoid the duty to provide information if the retraction is "unmistakably clear," another standard the borders of which are difficult to discern. *See* Int'l Chemical Workers Union Council v. NLRB, 467 F.3d 742 (9th Cir. 2006) (company that claimed inability to pay at bargaining table and supported its proposal to reduce benefits by stating "things were tough" and that "company would go broke" if it had to maintain benefit levels did not effectively retract those claims in subsequent letter amending claim to unwillingness to pay) There will also be times when the employer's interest in keeping information confidential will outweigh the union's interest in obtaining it. *Cf.* Detroit Edison Co. v NLRB, 440 U.S. 301 (1979) (company did not violate bargaining duty by withholding employee names associated with test scores for reasons of employee privacy and test integrity), *and* AT&T Services, 366 NLRB No. 48 (2018) (Employer must provide names and test results for individual employees from technical tests relevant to layoff protection under collective bargaining agreement).

[26] Impasse occurs when good faith negotiations "[h]ave exhausted the prospects of concluding an agreement, leading both parties to believe that they are at the end of their rope." TruServ Corp. v. NLRB, 254 F.3d 1105, 1114 (D.C. Cir. 2001).

[27] 369 U.S. 736 (1962).

[28] *See, e.g.,* Laurel Bay Health & Rehab. Ctr., 353 NLRB 232, 232 (impasse on a single issue can create an overall impasse only if that issue "is of such overriding importance that it frustrates the progress of further negotiations"). The employer's

employer justify unilateral action without bargaining merely by asserting a business need to move quickly.[29]

The Scope of Bargaining: What Must Be Discussed

Section 8(d) of the NLRA requires that the union and the employer bargain in good faith over "wages, hours, and other terms and conditions of employment."[30] Although it is easy to define wages and hours, controversies often arise over whether other potential subjects fall within the statutory definition. In a pivotal 1958 decision, *NLRB v. Wooster Div. of Borg-Warner Corp.*,[31] the U.S. Supreme Court interpreted the statute to create a distinction between subjects over which the parties had a duty to bargain, labeled "mandatory," and those over which parties were free to bargain or not to bargain, labeled "permissive."

The subjects listed in 8(d) are mandatory subjects of bargaining.[32] The parties must bargain in good faith over these

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overall good faith will be assessed in determining whether impasse has been reached. *See* Carey Salt Co. v. NLRB, 736 F.3d 405, 416 (5th Cir. 2013) ("employer may not use a 'final' offer's anticipated rejection to engineer a premature impasse and swift unilateral rejection. If an employer wishes to bring an end to talks, it must do so by good-faith bargaining and not by seizing upon magic words abstracted from their context") (majority upholding Board's finding that strike occurring after employer's unilateral change was unfair labor practice strike).

[29] *See* Vincent Indus. Plastics Inc. v NLRB, 209 F.3d 727, 734 (D.C. Cir. 2000) (employer facing a "heavy burden" to show that economic exigency requires prompt implementation). *See also* Oak Harbor Freight Lines v. NLRB, 855 F.3d 436 (D.C. Cir. 2017) (employer failing to show economic exigency sufficient to allow it to unilaterally impose medical plan on employees following strike); Thesis Painting, Inc. 365 NLRB No. 142 (2017) (finding painting contractor's financial problems not to excuse it from bargaining over employee layoffs with recently certified union; laid off employees reinstated with back pay).

[30] 29 U.S.C. § 158(d).

[31] 356 U.S. 342 (1958).

[32] In addition to wages and benefits, matters that "vitally affect" the interests of bargaining unit employees are mandatory. Ford Motor Co. v NLRB, 441 U.S. 488 (1979) (price and availability of in-plant food services). Mandatory subjects under this test include drug-testing of employees, Star Tribune, 295 NLRB 180 (1999), layoffs, Thesis Painting, Inc. 365 NLRB No. 142 (2017), no-strike clauses, NLRB

subjects, a duty that includes the duty to disclose information relevant to bargaining. A party must also refrain from making unilateral changes to mandatory subjects without giving the other party notice and an opportunity to bargain and, if requested, bargaining to impasse before making any change. If a matter is labeled mandatory, parties may insist on it to impasse and may use economic weapons such as strike or lockout in support.

Lawful subjects that are not mandatory are labeled permissive. Parties may bargain over them but have no legal obligation to do so and may not insist to impasse nor use economic weapons to achieve them. A third category involves unlawful topics on which bargaining is not permitted. Thus, under this mode of analysis, the label affixed to a subject has significant and outcome determinative consequences.

The distinction between the categories is not always easy to discern. Working hours, wages and benefits are clearly mandatory. For less clear cases, however, the test seems to be whether such matters govern the relations between employees and the employer in contrast to matters that govern relations between employees and their union or between the employer and outside parties.[33]

In situations in which a company's major financial decisions or its decisions about the direction of the enterprise will impact employee job security, the Supreme Court has created a more nuanced test that may narrow the scope of bargaining. A leading case is *Fibreboard Paper Products v. NLRB*.[34] In that case, the union represented a unit that included maintenance employees and the employer subcontracted maintenance work to an outside contractor without first bargaining with the union. Because the company's decision involved merely replacing bargaining unit employees with

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v. Wooster Div. of Borg-Warner Corp., 356 U.S. 432 (1958), and surveillance cameras, Colgate-Palmolive Co., 323 NLRB 515 (1997).

[33] *See* Borg-Warner, 356 U.S. 342 (1958) (employer insistence on "ballot clause" requiring a pre-strike vote of the union membership held unlawful because it involved union-employee relations, not a mandatory subject); NLRB v. Detroit Resilient Floor Decorators Local Union No. 2265, 317 F.2d 269 (6th Cir. 1963) (employer's contributions to an industry promotion fund not a mandatory subject of bargaining).

[34] 379 U.S. 203 (1964).

those of a contractor to do the same work under similar conditions, the Court determined it to be amenable to bargaining and a mandatory subject. The Court's opinion suggested, however, that, even in decisions directly affecting employees' jobs, some such business decisions could be non-mandatory and beyond the scope of the employer's bargaining duty if they were "at the core of entrepreneurial control" and involved major management decisions on the use of capital.

The Court clarified this distinction in its later decision in *First National Maintenance Corp. v. NLRB*,[35] a case involving a unilateral decision by a unionized contractor performing maintenance services for a nursing home client to terminate its contract with the nursing home due to profitability concerns and to discharge the employees who had been performing work there. Although the employer's decision had a profound and dramatic impact on dismissed employees' terms and conditions of employment, the Court majority, finding no duty to bargain over the decision, applied a balancing test and held that the union's interest in bargaining did not outweigh the burden on management's ability to conduct its business which bargaining would impose.

With regard to major business decisions, then, subcontracting will generally be a subject of mandatory bargaining, meaning that an employer must give notice and bargain to impasse before making a change.[36] On the other hand, major business decisions involving partial or complete business shutdowns will not usually require bargaining over the decision.[37] A company's decision to relocate a plant or jobs lies somewhere between and may turn on the degree of change to the enterprise contemplated by the relocation and whether the company's business reasons for relocating involve matters

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[35] 452 U.S. 666 (1981).

[36] This, of course, assumes that there is not a collective bargaining agreement in effect which bars or limits subcontracting. Such promises are binding for the term of the contract.

[37] Even if there is no duty to bargain over the decision, the employer still has a duty to bargain over the effects of that decision and, if requested, discuss issues such as order of layoff, severance pay, etc.

amenable to bargaining.[38]

Remedies for Bad Faith Bargaining by Employers

The statutory remedies available for bad faith bargaining are somewhat limited and may not always be sufficient to deter employer conduct that may constitute bad faith. Although Section 10(c) of the Act[39] directs the Board to "take such affirmative action including reinstatement of employees . . . as will effectuate the policies of the Act," Supreme Court and Board decisions have limited the Board's ability to remedy breaches of the good faith bargaining duty. In its 1970 *H.K. Porter Co. v. NLRB* decision,[40] the Supreme Court held that, even though an employer had in bad faith refused to agree to the union's dues checkoff proposal, the Board's remedy compelling the employer to agree to a checkoff provision could not stand and that the only appropriate remedy was a cease and desist order. The Court based its decision on its interpretation of the freedom of contract principles embedded in Section 8(d) of the Act.[41]

In cases of unilateral change, however, the Board's ability to restore the status quo can be sufficient to act as a deterrent to the well-advised employer. If the employer's unilateral action has involved laying off or discharging employees, remedies can include back pay and benefits.[42] As in *Fibreboard Paper Products Corp. v. NLRB*,[43] subcontracting before impasse can lead to an order to resume operations, reinstate employees and pay back pay and benefits. In rare cases, courts will issue 10(j)[44] injunctions compelling bargaining

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[38] *See* Dubuque Packing, 303 NLRB 390 (1991), enforced, United Food and Commercial Workers Int'l Union, Local No. 150-A v. NLRB, 1 F.3d 24 (D.C. Cir. 1993), cert. denied, 511 U.S. 1138 (1994).

[39] 29 U.S.C. § 160(c).

[40] 397 U.S. 99 (1970).

[41] 29 U.S.C. 158(d).

[42] *See* NLRB v. Harding Glass Co., 500 F.3d 1 (1st Cir. 2007) (employer ordered to pay $144,000 in back pay and $360,000 in contributions to union benefit funds).

[43] 379 U.S. 203(1964).

[44] 29 U.S.C. § 160(j).

while the Board conducts administrative proceedings on allegations of bad faith bargaining.[45]

The Use of Consequences and Rewards to Foster Compliance

Although direct Board remedies for bad faith bargaining are quite limited, the consequences of an employer's failure to meet its good faith bargaining obligations can be significant due to the operation of several Court and Board-created employer privileges and economic weapons,[46] the use of which is conditioned on good faith bargaining. The desire to retain these economic weapons for either future use or bargaining leverage and to avoid the consequences of improper use operate as a practical brake on employer bad faith behavior and an inducement to take every step possible to comply with the rules of good faith bargaining, by avoiding the risks of marginal behavior.[47]

First, as noted above,[48] an employer must generally maintain conditions of employment, even after a labor contract expires, unless and until it has bargained in good faith and reached impasse. There will be situations in which employers will have good reasons for change but will first have to meet their bargaining duty. For example, the employer may face substantial increases in the cost of employer-provided health insurance and want to change carriers and the scope of policies. Or it may face market competition from a new competitor and need to change work rules or other job elements. In either case, it cannot go ahead, no matter how good its reason, without bargaining

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[45] *See* Binstock V. DHSC LLC, 2017 BL 312175, 2017 LRRM 312175 (N.D. Ohio 2017).

[46] For a full discussion of U.S. law concerning strikes, lockouts, and the other economic weapons that are part of the collective bargaining process, *see* DOUGLAS E. RAY, WILLIAM R. CORBETT & CHRISTOPHER DAVID RUIZ CAMERON, LABOR-MANAGEMENT RELATIONS: STRIKES, LOCKOUTS AND BOYCOTTS (2017).

[47] Much of bargaining occurs behind the scenes in discussions between employers and their counsel. Once counsel explain the legal consequences of bad faith bargaining, even employers which are hostile to unions will find reason to comply.

[48] *See* text accompanying *supra* notes 25-28.

with the representative of its employees. The law compels it to bargain first and seek mutually acceptable solutions with the union before it may go forward. If it does not, it can be ordered to restore the status quo and make employees whole for any losses suffered. This is a powerful incentive to remain at the bargaining table.

Second, if the union goes on strike, the employer faces a decision as to whether to continue operations during the term of the strike, thereby diminishing the strike's economic impact. Some employers are able to maintain operations by transferring in employees from other locations and by assigning supervisors and employees from unrepresented departments to do the work of strikers. Others choose to hire replacements, persons hired from the outside to do the work of strikers. If replacements are hired only for the duration of the strike, they are called "temporary replacements" and strikers will be reinstated at the end of the strike. The NLRB has ruled that not only may the employer continue operations with such replacements but also that it has no duty to bargain with the union over their terms and conditions of employment.[49]

The more powerful employer response, however, is the use of "permanent replacements." In its 1938 *NLRB v. MacKay Radio and Telegraph Co.*[50] decision, the Supreme Court authorized employer use of permanent replacements for striking employees, a decision not compelled by statute that continues to affect the balance of bargaining power today. Permanent replacement occurs when the employer offers permanent employment to a person hired to take the place of a striker.[51] The rules of permanent replacement provide a primary incentive for the employer to bargain in good faith because this employer privilege may be exercised only in an "economic strike," a strike to achieve union economic objectives which is not caused in

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[49] *See* Capitol-Hustings Co., 252 NLRB 43,45 (1980) enforced 671 F.2d 237 (7th Cir. 1982).

[50] 304 U.S. 333 (1938).

[51] There may be times when an employer needing to continue operations will not be able to find sufficient temporary replacements and needs to offer replacement workers continuing employment to fill the positions. The unavailability of temporary replacements, however, is not a prerequisite to offering permanent replacement.

whole or in part by employer unfair labor practices such as a failure to bargain in good faith. If the strike is called, even in part, to protest an employer unfair labor practice such as bad faith bargaining, it is called an "unfair labor practice strike" and the employer may not hire or retain permanent replacements.[52]

At the end of an economic strike during which permanent replacements have been hired, strikers are not entitled to immediate reinstatement. Rather, permanently replaced strikers are to be placed on a preferential recall list and must be reinstated only as appropriate vacancies occur[53] In contrast, unfair labor practice strikers must be reinstated to their former jobs immediately upon making an unconditional offer to return to work, irrespective of whatever promises the employer may have made to replacements.[54] Thus, if the union offers to end the strike and return to work, the employer needs to be very sure that it has not committed unfair labor practices if it decides to retain replacements.[55] The only way to avoid the risk of substantial back pay liability in such a situation is to ensure that it has engaged in good faith bargaining before and during the strike, provided the union with requested information needed for bargaining, and not unlawfully discharged or disciplined strikers.[56] Too, the threat of permanent replacement, whether acted upon or not, is a powerful bargaining tool. The prospect of permanent replacement can make it less likely a union will strike or reduce the length of any strike. The

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[52] *See* Richmond Recording Corp. v. NLRB, 836 F.2d 289, 293 (7th Cir. 1987).

[53] Permanently replaced strikers remain employees with reinstatement rights unless they take other equivalent employment. *See* DOUGLAS E. RAY ET AL., *supra* note 8, at Section 9.05.

[54] *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); Belknap v. Hale, 463 U.S. 491 (1983). If the unfair labor practice strikers are not then reinstated, the employer will be ordered to reinstate them with full back pay at the end of unfair labor practice proceedings. *See* NLRB v. International Van Lines, 409 U.S. 48, 50-51 (1972).

[55] A failure to reinstate strikers requesting to return to work will result in back pay if it is an unfair labor practice strike.

[56] *See* DOUGLAS E. RAY ET AL., *supra* note 8, at Section 9.06*;* DOUGLAS E. RAY *supra* note 46, at Sections 5:1 -5:5. *See also* Grosvenor Orlando Associates Ltd., 336 NLRB 613 (2001) (Unfair labor practice strike found where employer's insistence on a nonmandatory subject and its entire course of conduct did not demonstrate sincere desire to reach agreement).

possibility of permanent replacement provides leverage the employer does not wish to forfeit.

Third, the NLRB and the courts have also ruled that an employer bargaining in good faith may lock out its employees. In a lockout, the employer rather than the union determines the timing of a work stoppage. A lockout occurs when the employer tells the union that employees may not return to work until the union and employer reach agreement in negotiations.[57] Although the business will often be shut down during the lockout, NLRB and court cases also authorize the employer to maintain operations with temporary replacements under certain conditions. The use of the lockout weapon in the U.S. is on the rise and has become a powerful weapon sometimes used to diminish a union's majority status as well as weaken its bargaining resolve.[58]

There are two kinds of lockouts. A "defensive lockout" occurs when the employer is responding to a union threat to strike or, as a member of a multi-employer bargaining group, locks out employees in response to a union strike against one of the group's members. In *American Ship Bldg. Co. v. NLRB*,[59] the Supreme Court authorized a more powerful weapon, the "offensive lockout" and ruled that an employer bargaining in good faith could lock out employees to bring economic pressure on the union in support of a legitimate bargaining position, without regard to whether the union intended to strike. Subsequent NLRB decisions have broadened this privilege. In its 1968 *Darling and Co.* decision,[60] the NLRB ruled that an employer could lock out employees even before reaching impasse at the bargaining table. Later, in its 1986 *Harter Equipment* decision[61] the

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[57] An employer wishing to lock out its employees must file appropriate notices with state and federal mediation agencies as required by 29 U.S.C. § 158(d) and observe statutory waiting periods.

[58] *See* Douglas E. Ray & Christopher David Ruiz Cameron, *Revisiting the Offensive Bargaining Lockout on the Fiftieth Anniversary of* American Ship Building Company v. NLRB, 31 A.B.A. J. LABOR & EMPLOYMENT L. 325 (2016).

[59] 380 U.S. 300 (1965).

[60] 171 NLRB 801,803 (1968).

[61] 280 NLRB 597 (1986) enforced sub nom. Local 825 IUOE v. NLRB, 829 F.2d 458 (3d Cir. 1987). It was this decision, not required by either the statute or Supreme Court precedent, that made the offensive lockout into such a powerful

NLRB ruled that the employer bargaining in good faith may also hire temporary replacements during an otherwise lawful offensive lockout. The employer may hire only temporary replacements, not permanent replacements, but, because the employer controls the term of the lockout, the union has no way to protect employees from further economic harm other than capitulating to whatever demands the employer may make. This weapon has the potential for devastating consequences. Employees who are willing to continue working while they continue to bargain for new terms can be sent home and replaced by others until they capitulate to the employer's terms. This weapon, too, is conditioned on good faith bargaining[62] If the locking out employer has misjudged the lawfulness of its behavior and is found to have violated its bargaining duty, it will be compelled to reinstate its employees and make them whole for any losses. Given these consequences, employers that wish to consider implementing a lockout are counseled to stay well within the lines.

Finally, the Supreme Court and the Board have ruled that an employer may, in certain situations, withdraw recognition from a union and refuse to further recognize or bargain with such union by establishing that it no longer has the support of a majority of employees in the bargaining unit.[63] This privilege, too, requires prior

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employer weapon. Even though employees express a willingness to continue to work without a contract while negotiations continue, the *Harter Equipment* ruling permits an employer to send them out, creating great hardships for employees and their families, while continuing to run its own operations and suffering little disruption. *See* Ray & Cameron, *supra* note 58.

[62] A unilateral change of a term or condition of employment, for example, can invalidate a lockout as can overall bad faith. *See* D.C. Liquor Wholesalers, 292 NLRB 1234 (1989) (lockout unlawful where employer had sought to abort bargaining process with false claim of impasse after proposing substantial wage cut at 12th bargaining session). Failing to provide information which the union requires for bargaining can also invalidate a lockout. *See* Clemson Bros., 290 NLRB 944 (1988) (employer refused to provide information verifying its claim of inability to pay higher wages); Globe Business Furniture, 290 NLRB 841 (1988) (Refusal to provide information on insurance costs and experience data union needed to evaluate employer's insurance proposals). Locking out employees to force agreement on a nonmandatory subject of bargaining is also unlawful. *See* Movers & Warehousemen's Assn of Washington, DC 224 NLRB 356 (1976).

[63] Allentown Mack Sales & Service, Inc., 522 US 359 (1998); Levitz Furniture,

good faith behavior by the employer because if the statements of employee disaffection on which the employer relies have been caused by bad faith bargaining or other unfair labor practices, such statements cannot be used as evidence. Similarly, a petition by employees to decertify their union is invalid if the loss of support was caused by employer unfair labor practices.[64]

Conclusion

All of the employer privileges discussed above are court-created and Board-created and not compelled by statute. Taken together, they have changed the balance of power at the bargaining table and reduced the effectiveness of union representation.[65] The one silver lining in this scheme is that their use is conditioned on employer good faith bargaining. Given the limited remedies otherwise available to limit employer bad faith, these conditions at least have the effect of getting the employer to the bargaining table for effective communication. While they may not compel actual good faith, forcing employers to observe the trappings of good faith may help lead to better and more effective bargaining that will make use of economic weapons less necessary.

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333 NLRB 717 (2001). *See also* DOUGLAS E. RAY ET AL., *supra* note 8, at Section 8.04; and DOUGLAS E. RAY ET AL., *supra* note 46, at Section 8:4.

[64] *See Radisson Plaza Minneapolis*, 307 NLRB 94 (1992) (employee decertification petition tainted by employer bad faith bargaining could not be used to justify withdrawal of recognition).

[65] Levels of private sector representation in the U.S. have fallen dramatically. In the 1950's, unions represented approximately 35 percent of the private sector workforce. By 2016, that percentage had fallen to 7.3 percent. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, www.bls.gov/news.release /pdf/union2.pdf (last visited March 30, 2019). Possible factors contributing to this decline include globalization, automation, relocation of many U.S. manufacturing from the North to the less unionized South, a shift in the economy away from manufacturing jobs to the more difficult to organize service industry, technical industry, independent contractor and project based jobs, and a more aggressive stance by many employers in resisting union organizing drives. The growth of national protective laws concerning employment and employers' increasing willingness to use striker replacement and lockout weapons may have contributed as well.

For those employees who gain or retain representational rights and those employers whose employees have voted for union representation, collective bargaining remains a vital process, combining the art and psychology of persuasion with the rigor of economic and legal analysis. For those in continuing and mature bargaining relationships, the process can be quite effective and, despite the adversarial nature of the U.S. model, often quite cooperative.[66] Even in relationships that are not as good, employers have strong incentives to fully participate in bargaining and meaningful communication, steps that enhance the possibility agreement can be reached.

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[66] As a labor arbitrator and mediator, I have had the privilege to be involved, in one way or another, in hundreds of negotiations, mediations, and arbitrations. I have observed experienced negotiators and advocates create solutions that benefit both sides by showing respect for the process and for those on the other side. Experienced parties realize they are part of a continuing relationship and that future relations and morale can be harmed by overly aggressive adversarial conduct. They know that they can learn through good listening and, although firm in their resolve, can often achieve their goals through well designed compromises that preserve employee morale and, through it, increase productivity. Most disputes arising under a grievance and arbitration procedure, for example, are settled by union and management short of arbitration aided by the positive atmosphere created in negotiations.