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SHEET METAL & AIR CONDITIONING
CONTRACTORS' NATIONAL ASSOCIATION

Labor Law 101

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KEY TERMS

Collective bargaining agreement – The union contract between the chapter and the local union, or between a signatory contractor and the local union.

Grievance – A claim that the collective bargaining agreement was violated or breached.

Contract expiration – The last day on which a collective bargaining agreement is effective.

The Standard Form of Union Agreement – The SMACNA | SMART model collective bargaining agreement.

NLRA – National Labor Relations Act – The federal statute that governs private sector labor relations.

NLRB – National Labor Relations Board – The federal agency that administers and enforces the NLRA.

THE COLLECTIVE BARGAINING AGREEMENT

The collective bargaining agreement…

- Governs matters such as the wages, hours, benefits – and total package increases – of the sheet metal workers covered by the agreement.
- Other topics include, for example, scope of work covered by the contract, territory covered, potential limitations on subcontracting, grievance procedure, and more.
- Does not govern a contractor's budget or financial objectives, it's plan on how to grow the business, what projects to bid on, who the leaders are, or how the company is run.

CONTRACT NEGOTIATIONS

The collective bargaining agreement has a stated duration – that is, a specific effective date and an identified expiration date.

For example: March 1, 2021, through February 29, 2024.

Prior to the expiration of the contract, the parties will engage in negotiations for a new contract.

- If not completed by expiration, but the parties are continuing to negotiate:
  - Contract extension; or
  - Business as usual ("working without a contract")

THE GENERAL NATURE OF BARGAINING

HOW THE PROCESS WORKS

1. Both parties come to the bargaining table with proposals.
   - ✓ Proposals to modify or add or delete contract language.
   - ✓ Economic changes.
   - ✓ Items for discussion (not really proposals, but may lead to them).

THE GENERAL NATURE OF BARGAINING

HOW THE PROCESS WORKS, *continued*

2. During the process,
   - ✓ proposals may be agreed-to ("***tentative agreement***" or "***TA***").
   - ✓ Proposals may be withdrawn or dropped.
   - ✓ Proposals may be modified (which may lead to TAs or withdrawals or further modified proposals, and so on).

❑ In essence, the parties make a series of counter-proposals and modified proposals, while also reaching TAs and withdrawing proposals.

THE GENERAL NATURE OF BARGAINING

HOW THE PROCESS WORKS, *continued*

- Generally start with ***language*** proposals, and later address ***economics***, but this is a general rule, and things typically are not so clean in practice.

- This back-and-forth results in the narrowing and narrowing of remaining proposals until the final remaining proposals are addressed and *ideally resolved.*

THE GENERAL NATURE OF BARGAINING

HOW THE PROCESS WORKS, *continued*

3. ***The goal.*** Ideally, the end result is a ***Tentative Agreement*** on the entire contract for the membership to ratify.
    - Where possible, get the Union committee to agree to ***unanimously favorably recommend*** that the membership vote to ratify the TA.

❖ Otherwise the membership will need to vote on a ***proposal*** made by management.

CONTRACT NEGOTIATIONS

Does the contract contain Article X, Section 8, from the Standard Form?

Yes: Article X, Section 8 = Interest arbitration provision.

- National Joint Adjustment Board (NJAB) determines the resolution to issues the parties were unable to agree upon.
- Union cannot strike while negotiations are ongoing, or while the matter is being presented to the NJAB. Can only strike ***after*** NJAB wasn't able to reach unanimous decision, ***if*** that's what occurs before the NJAB.

No: U can call a strike upon the expiration of the contract, or the expiration of the extension if the contract was extended

We will return to Article X, Section 8, and union strikes below.

DUTY TO BARGAIN UNDER THE NLRA

PER SE REFUSALS TO BARGAIN

1. Failure / refusal to "meet at reasonable times."
2. Refusal to provide info or data to the union that it has requested and is entitled to receive.
3. Refusing to negotiate over a *mandatory* subject of bargaining.
4. Insisting upon a *permissive* subject of bargaining.
5. Direct dealing a/k/a bypassing the union.
6. Unilateral changes.
7. Refusal to sign an agreement that was reached.

OVERALL BAD FAITH BARGAINING
a/k/a SURFACE BARGAINING

The overall pattern of conduct establishes that the party is trying to frustrate negotiations and not reach an agreement.

DUTY TO BARGAIN UNDER THE NLRA

Running afoul of these rules =

"**bad faith bargaining**" = "**failure to bargain in good faith**"

This would be an **unfair labor practice** under the NLRA.

DUTY TO BARGAIN
PER SE REFUSALS TO BARGAIN

1. **Failure / refusal to "meet at reasonable times."**
   - The parties have a mutual obligation to "meet at reasonable times" for collective bargaining negotiations.
   - Problem = Simply refusing to meet, or failing to schedule any meetings, or being "unavailable" only on dates that are far apart.

DUTY TO BARGAIN
PER SE REFUSALS TO BARGAIN

2. **Refusal to provide info or data to the union that it has requested and is entitled to receive.**
   - The employer is obligated to provide the union with requested information that is relevant or reasonably necessary for the union to perform its duty as the representative of the employees.
   - In the context of ***contract negotiations***:
     - ✓ Info to prepare for negotiations and to formulate proposals and counter-proposals while bargaining.
     - ✓ Info may become relevant by virtue of positions taken and/or statements made across the bargaining table.

Continued →

DUTY TO BARGAIN
PER SE REFUSALS TO BARGAIN

2. Refusal to provide info or data to the union that it has requested and is entitled to receive, *continued.*

- What requested information is "relevant"?
  a. Requested information regarding employees represented by the union is presumptively relevant.
  b. Pleading poverty / inability to pay.
  c. Employer put it at issue by making claims at the bargaining table.

DUTY TO BARGAIN
PER SE REFUSALS TO BARGAIN

3. Refusing to negotiate over a *mandatory* subject of bargaining.

- It is a failure to bargain in good faith to refuse to negotiate over "wages, hours, and other terms and conditions of employment." [NLRA 8(d)]

"wages, hours, and other terms and conditions of employment" = mandatory subjects of bargaining

Continued →

Examples of MANDATORY subjects of bargaining	
Wages	Scheduled work days and hours
H&W & pension	Overtime and premium pay
Holidays	Contract duration
Training	Grievance procedure
Safety measures	Subcontracting bargaining unit work
Work rules	Drug testing of current employees
No-strike clause	Health testing | mandatory vaccines

Examples of PERMISSIVE subjects of bargaining
Matters of internal union affairs, including how the union conducts a contract ratification vote
Industry fund contributions
Union withdrawal of pending ULP charges that it filed
Union label clause
Interest arbitration, such as Article X, Section 8
Political Action Committee or Political Action League payroll deductions

DUTY TO BARGAIN
PER SE REFUSALS TO BARGAIN

4. Insisting upon a permissive subject of bargaining.

A party cannot…

- Condition additional negotiations on inclusion of a permissive subject of bargaining.
- Insist upon a permissive subject of bargaining to the point of impasse
- Require that, in order to reach a collective bargaining agreement, the contract must include something on a permissive subject of bargaining.
- ***Employer*** cannot impose ***lockout*** over permissive subject of bargaining, and ***Union*** cannot ***strike*** over permissive subject of bargaining.

DUTY TO BARGAIN
PER SE REFUSALS TO BARGAIN

5. Direct dealing a/k/a bypassing the union.

- It is a failure to bargain in good faith for an employer to engage in ***direct dealing*** with employees (a/k/a ***bypassing the union***).
- The principle is that, once the union has been lawfully certified or recognized as the representative of the employees, the employer must bargain ***with the union*** concerning mandatory subjects of bargaining, and ***cannot bargain with employees*** regarding such matters.

Examples of improper direct dealing:

- ✓ "At the last negotiations session, the contractors proposed increases of ***x*** in the first year, ***y*** in the second year, and ***z*** in the third year. We are meeting again next week. You wouldn't vote to strike with this on the table, would you?
- ✓ "What two issues are most important to you and the rest of the crew in these negotiations."
- ✓ "I know that you're well-respected among the crew and have been talking to your co-workers. What's it going to take to avoid a strike?
- ✓ "I believe that the management team is trying to get the Union down to ***x***, ***y***, and ***z***. I think that would be a favorable contract settlement for the Union and the sheet metal workers covered by the contract. What do you think?"

Direct dealing general safe harbor:

It is <u>not</u> *per se* bad faith bargaining (as direct dealing) to…

Merely tell employees what has already occurred at the bargaining table (*i.e.*, proposals already made and positions already taken by one party or the other or both).

However, communicating this to the employees may be contrary to a ***ground rule*** established by the parties at the outset of negotiations, and violating this ground rule may be ***used as evidence*** in support of an allegation of ***overall*** bad faith bargaining.

MANAGEMENT COMMUNICATIONS

Management may have a legitimate interest in communicating with the union members regarding the status of negotiations.

- ✓ If the parties can hammer out an agreement, it is often preferred to stand on the sidelines.
- ✓ But it may be advisable to communicate…
  - If the union is delivering messages to the members during the course of negotiations, and the communications are inaccurate, one-sided, and/or hostile to management.
  - If there's a perceived risk of contract rejection (despite the parties' agreement).
  - If the membership is voting on a management proposal (in the absence of a Tentative Agreement).

MANAGEMENT COMMUNICATIONS

Considerations:

- Existing, controlling ground rule?
- Avoid direct dealing.
- What to say and how to say it.
  - What has already been proposed | What is the proposal.
  - What is the union stuck on.
  - We've made movement and have been reasonable.
  - It's a favorable proposal (or TA) and why.
  - Don't receive pay or unemployment while out on strike.

It is lawful to communicate all of this.

DUTY TO BARGAIN
PER SE REFUSALS TO BARGAIN

6. Unilateral changes.

- **General rule =** Employer violates the law by – during collective bargaining negotiations – making a ***unilateral change*** in an existing term and condition of employment (*i.e.*, a mandatory subject of bargaining).
  - There are exceptions to this rule.

DUTY TO BARGAIN

OVERALL BAD FAITH BARGAINING a/k/a SURFACE BARGAINING

- To bargain in ***good faith*** means that the parties are negotiating with the aim of reaching agreement on the terms for a collective bargaining agreement.
- There is a ***mutual obligation*** to engage in good faith negotiations with the aim of reaching a contract – as opposed to engaging in a course of conduct that's aimed at frustrating the process and not reaching an agreement.
- ***Surface bargaining*** = Where the totality of the parties' conduct demonstrates that the party's real purpose is to frustrate the bargaining process and *not* reach a mutual agreement. (This is an unlawful failure to bargain in good faith.)

PARTIES UNABLE TO REACH A NEW CONTRACT

Do you have Article X, Section 8?

Yes

- The matter is presented to the NJAB – interest arbitration.
- The NJAB can direct the parties to sign a contract that resolves the open issues as directed by the NJAB.
- The Union cannot strike unless and until the NJAB fails to reach a unanimous decision (a/k/a deadlock). (Very rare.) (Also no implementation and no lockout.)

No

- Continue working (with or without a contract extension).
- The parties could agree to take the contract dispute to the NJAB for interest arbitration.
- The contractors can attempt to implement their final offer upon reaching an overall impasse. (Very rare.)
- The Union can call a strike.

ARTICLE X, SECTION 8

smacna.org/resources/labor-relations/njab-dispute-resolution

RESOURCES

+ PROCEDURAL RULES

The NJAB process is conducted using the procedures set forth in the Procedural Rules of the National Joint Adjustment Board for the Sheet Metal Industry. Parties wishing to appear before the NJAB should familiarize themselves with the Procedural Rules.

Procedural Rules

+ SUBMITTAL FORMS

Use the forms below when preparing your submission. If you need assistance please call or email Jen Squirewell, (703) 995-4032.

Panel

Article X, Section 3 Grievance Request for Panel Hearing

NJAB

Article X, Section 4 Grievance Request for NJAB Hearing

NJAB Article X, Section 8 Submittal Forms

PROCEDURE BEFORE THE NJAB

1. **Deadline** for submissions (discussed in Procedural Rules and identified on web page)
2. Limit on **issues** that can be submitted.
   - Each party can raise three issues, not including (a) wage fringe package, and (b) contract duration.
3. **Materials** that must be submitted.
   - Form and other required materials.
   - Ideally jointly submitted, otherwise also provided to other party.

PROCEDURE BEFORE THE NJAB

4. The NJAB may assign and dispatch a pair of **mediators**.
5. The NJAB may designate a **subcommittee** that can resolve the dispute in whole or in part.
6. The parties must be prepared to engage in **bargaining** while at the NJAB.
7. Submission / exchange of **briefs** in advance, and opportunity to present **oral argument and answer questions**.
8. Unanimous decision of NJAB is final and binding upon the parties, and is prepared and delivered in writing.

THERE IS NO ARTICLE X, SECTION 8

CONTINUE WORKING

- There's no requirement that the parties must resolve the contract by a certain date. The parties can simply go past the expiration date, and this is true whether there is or is not a contract extension in place.
  - Presumably the parties are continuing to bargain, or they've agreed, perhaps tacitly, to take a temporary pause in negotiations.

THERE IS NO ARTICLE X, SECTION 8

AGREE TO SUBMIT TO NJAB

- The parties may mutually agree to submit the contract dispute to the NJAB, even if Article X, Section 8, is not in the labor agreement.
  - Contact SMACNA labor relations.

THERE IS NO ARTICLE X, SECTION 8

UNION STRIKE

Preconditions for a strike

- The contract, including any contract extension, must have expired.
- Notice requirements to FMCS and the state mediation agency, if applicable, must be satisfied.
- The SMART Constitution states that there must be two-thirds vote in favor of striking before a strike can occur.
- The local union bylaws may include some additional requirement(s).
- If there *was* Article X, Section 8, the parties received notification that NJAB failed to reach a unanimous decision.

NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA) is the principal piece of legislation regulating labor relations in the private sector in the United States.

- Passed in 1935. Amended in 1947, 1959, and 1974.
- The statute (29 U.S.C. §151 et seq.) is short.
- In almost all situations, you must turn to cases to determine the substantive law under the NLRA.
- New cases are (as of August 2023) going into volume 372 of the Board's decisions and orders volumes.

NATIONAL LABOR RELATIONS BOARD

- The **National Labor Relations Board (NLRB)** administers and enforces the NLRA.

- Primary NLRB functions:
  - To conduct ***representation elections***.
  - To investigate and remedy ***unfair labor practices (ULPs)***.

NLRB

- The NLRB has two major arms:
  - The actual ***Board***.
  - The ***General Counsel***.

THE BOARD

- The ***Board*** –
  - The NLRA calls for the Board to consist of five members, but the Board can decide cases and engage in rulemaking when it's down to four or three members.
  - The Board acts as a quasi-judicial body, which decides cases and, in doing so, shapes and even changes the substantive law under the NLRA, including what does and does not amount to an unfair labor practice.
  - The custom is three members from the President's political party, and two members from the other political party.
  - The Board is *political,* and its priorities, decisions, and actions swing back and forth as the result.

NLRB

- The ***General Counsel***:
  - Manages the Regional offices.
    - Approximately 26 Regions, and there are also some subregional offices.
  - **Investigates and prosecutes ULP cases.**
  - Represents the Agency in litigation.

What is an *unfair labor practice*?

- The NLRA prohibits employers and labor organizations from engaging in certain types of conduct.
- **NLRA §8** is the source of these prohibitions.
  - §8(a) = employer ULPs.
  - §8(b) = union ULPs.
  - §8(d) is relevant to ERs and unions.
  - §8(e) applies to both ERs and unions.
- A party that has violated one of these provisions has committed an ***unfair labor practice***.

Most notable unfair labor practices

- Failure to bargain in good faith, or bad faith bargaining, is a ULP in violation of §8(a)(5) for the employers or §8(b)(3) for the union.
- An employer that interferes with employees' rights under the NLRA commits a violation of §8(a)(1) of the NLRA.
- An employer that retaliates or discriminates against an employee for union activities or support, or for engaging in concerted and protected activities, violates §8(a)(1) of the NLRA, and possibly §8(a)(3).

Most notable unfair labor practices

- A union owes a duty of fair representation to the employees who are represented by the union, and breaching this duty is a violation of NLRA §8(b)(1)(A).
- A union that engages in unlawful secondary picketing violates §8(b)(4).
- It is a violation of §8(e) for a union and a company to enter into an unlawful "hot cargo" agreement with each other.

Interfering with employees' rights under the NLRA.

Examples:

- ❑ Discriminating or retaliating against employees based on their union activities or support – e.g., filing grievances and/or participating on the Union's bargaining team.
- ❑ Discriminating or retaliating against employees based on their concerted and protected activity.
- ❑ Maintaining a workplace policy that interferes with employees' exercise of rights protected by the NLRA.

NLRA §7:

Employees shall have 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, and shall also have the right to refrain from any or all of such activities[.]

Prohibited discrimination / retaliation under the NLRA

In general:

Unlawful to **interfere with / restrain employees from** …

Unlawful to **retaliate / discriminate against employees for**…

…union support, activities, membership. §8(a)(3).

"…engag[ing] in other concerted activities for … mutual aid or protection." §8(a)(1).

...participating in an NLRB case. §8(a)(4).

Common forms of scrutinized employer conduct:

(1) Terminating employees or sending them back to the hiring hall.

(2) Other forms of negative changes (*e.g.*, change in hours).

(3) Implementing / maintaining formal workplace policies.

(4) Directives / instructions given to employees (orally and/or in writing).

Discrimination / retaliation

NLRA §8(a)(4).

Unlawful for an employer to retaliate or discriminate against an employee for:

- ✓ Filing a ULP charge against the employer (or union).
- ✓ Expressing the intent to file a ULP charge.
- ✓ Testifying at an NLRB representation case or ULP hearing.
- ✓ Providing an affidavit to an NLRB agent.
- ✓ Receiving a subpoena to testify at NLRB hearing.
- ✓ Attending NLRB hearing but not testifying (*sans* skipping-out of work, which is more complicated).

NLRA §8(a)(3).

It is unlawful to discriminate or retaliate against employees for their union activities or support, such as:

- ✓ Supporting union in organizing campaign.
- ✓ Handing out union flyers.
- ✓ Testifying on behalf of the union at an *arbitration* hearing.
- ✓ Serving as union steward.
- ✓ Filing or pursuing a grievance.
- ✓ Serving as member of union negotiating team.
- ✓ Participating in lawful union strike and/or picketing activity.
- ✓ Wearing union apparel or insignia.
- ✓ Voting in favor of the union (individually or collectively).

Concerted and protected activity.

- Under §7 of the NLRA, employees have the right "to engage in other concerted activities for . . . mutual aid or protection[.]"
- Accordingly, it is a violation of the NLRA (§8(a)(1)) to discipline or in some other way retaliate an employee for engaging in conduct that is ***(1) concerted and (2) for mutual aid or protection.***

CONCERTED AND PROTECTED ACTIVITY

This issue is *implicated* anytime an employer wishes to discipline or otherwise retaliate / discriminate against an employee for engaging in **conduct that is in protest of or seeks to improve wages, hours, or other terms and conditions of employment** (*e.g.,* working conditions, overtime, health insurance, retirement benefits, personnel policies, wage rates, supervision, etc.)

- This protection applies in the union and non-union setting.

EXAMPLES OF CONCERTED

- ✓ ***9 employees sign a petition***, asking the company to do ***xyz***.
- ✓ ***3 employees go the Director of Operations or the Vice President of Human Resources***, and complain that ____, or request that _____.

INDIVIDUAL ACTIVITY AS CONCERTED

Collective action not always necessary. An individual's actions are concerted where they are –

1. An honest and reasonable invocation of a right under a union contract [***Interboro doctrine***].
2. Undertaken on behalf of the employee and others [spokesperson].
3. The ***logical outgrowth*** of group activity.
4. Intended to ***initiate or induce group action***.
5. Complaints made to management in the presence of other employees [typically].
6. "***Inherently concerted***" discussions amongst employees.

MUTUAL AID OR PROTECTION (PROTECTED)

1. This obviously includes efforts to improve terms and conditions in the employee's own workplace through various means, including raising concerns / making requests during meetings, signing a petition or collecting petition signatures, sending e-mails or text messages to co-workers and management, distributing flyers after work in the parking lot, sending Facebook postings to co-workers and management, etc.
2. Employees have the right to ***communicate with third parties*** in an effort to obtain their assistance in a labor dispute, or with their efforts to improve terms and conditions of employment (*e.g.*, contacting newspapers, customers / vendors, government entities, and legislators, as well as posting comments on social media).

INSIGNIA

- The Board has long recognized that an employee has the protected right to wear union insignia while at work. In the absence of 'special circumstances,' the promulgation of a rule prohibiting the wearing of such insignia is violative of Section 8(a)(1)." *The Ohio Masonic Home*, 205 NLRB 357 (1973).
  - In fact, the Supreme Court affirmed that employees have the right to wear union insignia while at work in *Republic Aviation*.
- The same protection applies to insignia containing a message or slogan that is otherwise subject to coverage by the mutual aid or protection clause.

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Employees generally have the right to wear ***union insignia*** (buttons/stickers, T-shirts) at work, absent special circumstances.

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In-N-Out Burger, Inc., 365 NLRB No. 39 (2017).

The Board held that the restaurant violated §8(a)(1) of the NLRA by directing employees that they could not wear "Fight for $15" buttons in support of a campaign to raise the minimum wage to $15 per hour, and asking employees to remove them.

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The company's unionized employees have contact with customers. The company prohibited employees from wearing these buttons, contending that they are vulgar and offensive.

WTF

Where's the Fairness

FTW

Fight to Win

AT & T, 362 NLRB No. 105 (2015).

Board (3-0): "We find that the possible suggestion of profanity, or 'double entendre,' as the Respondent characterizes it, is not sufficient to render the buttons and stickers unprotected here, where an alternative, nonprofane, inoffensive interpretation is plainly visible and where, further, the buttons and stickers were not inherently inflammatory and did not impugn the Respondent's business practices or product."

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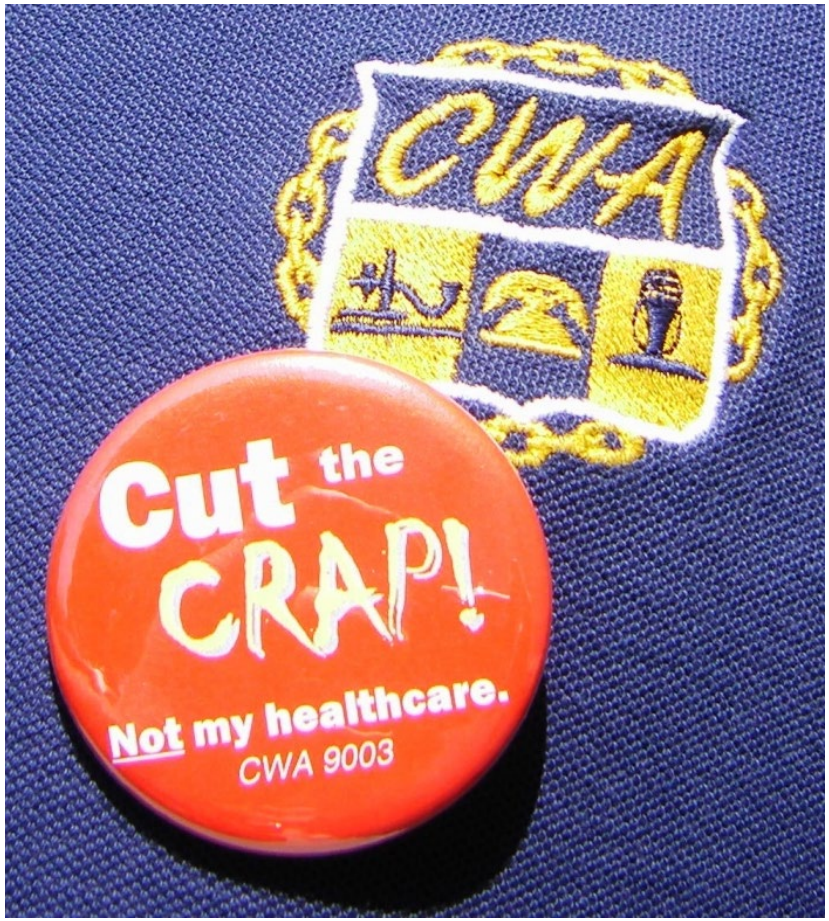
Company prohibits its employees (who are represented by CWA Local 9003) from wearing this button. Company argues, *inter alia*, that "crap" appears in feces font.



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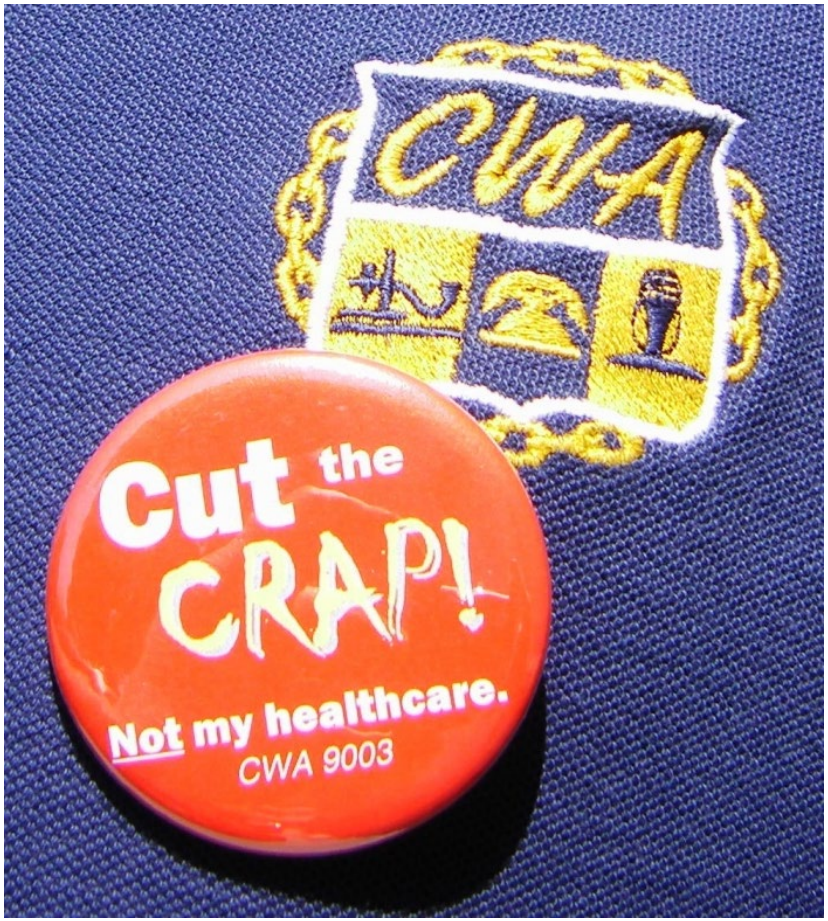
AT & T, 362 NLRB No. 105 (2015).

ALJ: "…I am unable to tell if the word "Crap" represents feces, cheese, or Cheetos."

Board agrees (3-0) that the button, although of "questionable taste," is protected.



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Southwestern Bell Telephone Co. employees wore these shirts to the plant after the second day of negotiations. The parties were far apart on many issues, including wages. The company told employees to remove the shirts or wear them inside out.

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Southwestern Bell Telephone Co., 200 NLRB 667 (1972).

– Everyone at the hearing agreed that this phrase was capable of more than one interpretation, or a double meaning, and there was even (completely unnecessary) testimony that the word "mother" had been joined with another word to create an obscenity.

– ALJ (who was affirmed by the Board): "In view of the controversial nature of the language used and its admitted susceptibility of derisive and profane construction, Respondent could legitimately ban the use of the provocative slogan as a reasonable precaution against discord and bitterness between employees and management, as well as to assure decorum and discipline in the plant."

NOTE ON WORKPLACE POLICIES

- Obama administration = NLRB GC active issuing complaints against employers – both unionized and non-union – who maintained workplace policies that the Agency contended could be reasonably read by employees as prohibiting them from engaging in activities protected by Section 7.
- Trump administration = Less scrutiny based on analytical framework adopted in *Boeing Co.*, 365 NLRB No. 154 (2017), and *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019).
- Biden administration = Just decided the case of *Stericycle, Inc.*, 372 NLRB 113 (2021).

Section 8(e) of the NLRA

- Section 8(e) of the NLRA provides that a multi-employer association, or individual contractors, cannot enter into an agreement with a union whereby the employer agrees to not handle, use, sell, or transport the products of another employer.
- Any time the union is seeking to get the association or the contractor to agree to not do business with another company, this is a red flag.
- Look for anything that is different from, or in addition to, what is set forth in Article II of the Standard Form.

ARTICLE II of the Standard Form

SECTION 1. No Employer shall subcontract or assign any of the work described herein which is to be performed at a job site to any contractor, subcontractor or other person or party who fails to agree in writing to comply with the conditions of employment contained herein including, without limitations, those relating to union security, rates of pay and working conditions, hiring and other matters covered hereby for the duration of the project.

SECTION 2. Subject to other applicable provisions of this Agreement, the Employer agrees that when subcontracting for prefabrication of materials covered herein, such prefabrication shall be subcontracted to fabricators who pay their employees engaged in such fabrication not less than the prevailing wage for comparable sheet metal fabrication, as established under provisions of this Agreement.

UNLAWFUL SECONDARY PICKETING

NLRA §8(b)(4) concerns union conduct directed at secondary (neutral) employers.

Primary employer – The employer with whom the union has the dispute.

Secondary (neutral) employer – Any employer that is not the primary employer, unless it is an ally of the primary employer.

UNLAWFUL SECONDARY PICKETING

Examples of Primary Versus Secondary (Neutral) Distinction.

1. Union is in dispute with dairy that supplies cheese to McDonald's for its cheeseburgers. The dairy is the primary employer; McDonald's is a secondary or neutral employer.
2. IBEW is in dispute with non-union electrical contractor. The owner of the project or the general contractor awards a contract to the non-union electrical contractor. The non-union electrical contractor is the primary employer; the owner and general contractor are secondary or neutral employers.

In general, the union cannot picket a secondary employer.

UNLAWFUL SECONDARY PICKETING

PICKETING ACTIVITY AT A COMMON SITUS – VIOLATION OF §8(B)(4) OR NOT?

Common situs = Employees of primary employer work on the same premises as employees of secondary employer (*e.g.*, construction site, strip mall, industrial office park, commercial office buildings).

Issue – The union engages in picketing activity at the common situs where both the primary employer and the secondary employer are located with employees. Is this lawful primary picketing, or unlawful secondary picketing ?

Solution – ***Reserved gate system*** is established.

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Carpenters Local 1506 (Eliason & Knuth of Arizona), 355 NLRB 797 (2010). [Obama Board 3-2 decision]

- Banner --- 3-4 feet high, 15-20 feet long.
- Held stationary by a couple of people.
- No one patrolling or carrying picketing signs.
- Away from entrance; no one interfering with ingress / egress.
- Directed at passing traffic, not persons entering or leaving the premises.
- This was not picketing and, therefore, there was no violation of §8(b)(4).

Sheet Metal Workers Local 15 (Brandon Medical Center) [Brandon II], 356 NLRB 1290 (2011). [Obama Board 3-2 decision]

- Inflated rat balloon on flatbed trailer.
- 16-feet tall and 12-feet wide.
- "WTS" (non-union labor supply company) written on abdomen.

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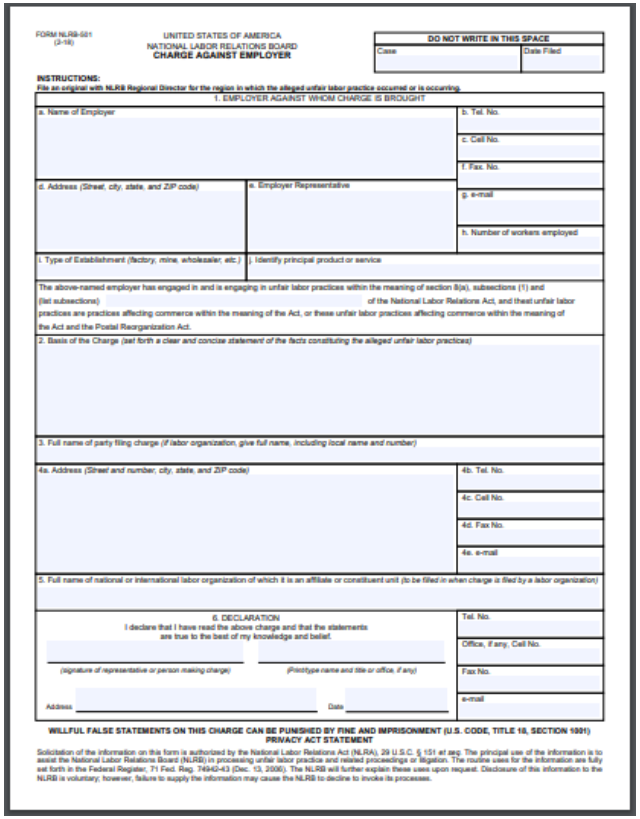
UNFAIR LABOR PRACTICE CASES

1. An unfair labor practice case is initiated by the filing of an unfair labor practice ***charge.***



FORM NLRB-501 (2-18)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE
Case | Date Filed

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
b. Tel. No.
c. Cell No.
f. Fax No.
d. Address (Street, city, state, and ZIP code)
e. Employer Representative
g. e-mail
h. Number of workers employed
i. Type of Establishment (factory, mine, wholesaler, etc.)
j. Identify principal product or service

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

4a. Address (Street and number, city, state, and ZIP code)
4b. Tel. No.
4c. Cell No.
4d. Fax No.
4e. e-mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.
Tel. No.
Office, if any, Cell No.
Fax No.
e-mail
(signature of representative or person making charge)
(Print/type name and title or office, if any)
Address
Date

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information may cause the NLRB to decline to invoke its processes.

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2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

UNFAIR LABOR PRACTICE CASES

1. An unfair labor practice case is initiated by the filing of an unfair labor practice ***charge.***
2. The Regional office conducts an ***investigation***.
   a. Position statements.
   b. Documents and records.
   c. Party-prepared witness statements or affidavits.
   d. Witness ***affidavits*** taken by the investigating agent.

ULP Cases, *continued*

3. The Region reviews the results of the investigation and decides whether it believes the charge does or does not have ***merit***.
4. If no merit, the charge is ***withdrawn*** or ***dismissed***.
   a. The charging party may appeal a ***dismissal*** to the NLRB Office of Appeals in Washington, D.C.

Note—Some charges are deferred to the parties' own dispute resolution process as opposed to the NLRB conducting a full investigation into the merits.

Note—The Union can withdraw the charge for other reasons – *e.g.*, it agreed to do so as part of a contract settlement.

ULP Cases, *continued*

5. If merit, then the Regional Office changes hats from investigator to prosecutor.
    a. A ***Complaint*** is issued, and a trial is scheduled.
    b. The trial is held before an ***Administrative Law Judge***. The ALJ issues a decision.
    c. The ALJ's decision is subject to appeal (called "exceptions") to the Board. The Board issues a decision.
    d. The Board's decision is subject to appeal to the U.S. Court of Appeals.

ULP Cases, *continued*

6. The Regional Office will attempt to get the charged party to settle rather than go to trial.
   - Settlements are typically in the form of an ***NLRB informal settlement agreement*** or a ***non-Board adjustment.***

RECEIVING THE CHARGE

1. If you are the **charged party**, you should receive a copy of the charge from both the union (or the employee, if the charge was filed by an individual) and the NLRB.

   Initial steps—

   a. Notify relevant leaders.

   b. If you are going to be represented by an attorney, the attorney will file a Notice of Representative form.

   c. The allegations identified charge form are often poorly prepared; ask the NLRB agent to clarify or provide additional details as to precise nature of the allegation(s).

   d. Don't start responding to the charge until you know and understand precisely what is being alleged.

FILING THE CHARGE

1. If you are the **charging party**, then…
    a. Make sure that the contents of the charge form are accurate and complete.
    b. E-mail and mail the charge form to the union representative, and file the charge with the NLRB.
    c. Ideally, you have a packet of evidence prepared to send to the investigating agent immediately.
        - Position statement.
        - Canned affidavit(s) (often but not necessarily always).
        - Documents (exhibits to the position statement or canned affidavit(s).

    d. Be prepared to present your witnesses for affidavits.

REPRESENTATION BY AN ATTORNEY

1. Whether you are the charging party or the charged party, you have the right to have an attorney represent you before the NLRB.
    a. If you have an attorney, the NLRB agent will not contact you directly to ask you questions, seek your position, or request your evidence. Those communications *must* go through your attorney.
    b. Based upon their expertise, the attorney can present the evidence most effectively, and avoid pitfalls (*e.g.*, making factual admissions that prove the union's case, or asserting a legal argument that is not supported by the case law).

REPRESENATION BY AN ATTORNEY, *continued*

c. Your attorney can provide advice with respect to what you should or shouldn't supply to the NLRB in response to their request for particular records or documents, taking into account how to present the best case, and the potential for an investigative subpoena.

d. If an employer agent or representative is going to have their affidavit taken by the NLRB agent, the attorney can be present for the affidavit.

   - To make sure that favorable evidence gets into the affidavit.
   - To make sure that the affidavit is accurate as part of reviewing it and making corrections.

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PRESENTING YOUR EVIDENCE

1. Position statement.
2. Documents that support your case.
3. Canned affidavits. These can be effective, even though the NLRB gives them less weight.
4. Other documents requested by the NLRB??????
5. Affidavits taken by NLRB agent.
    a. If you are the charging party.
    b. If you are the charged party.