



SHEET METAL & AIR CONDITIONING
CONTRACTORS' NATIONAL ASSOCIATION



UNDERSTANDING UNFAIR LABOR PRACTICES

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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 July 2024) going into volume 373 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.



THE BOARD (as of July 2024)

David
Prouty

Marvin
Kaplan



Lauren
McFerran

Gwynne
Wilcox





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.



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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*.



What is an *unfair labor practice*?

Most likely charge allegations *against a local union*:

- Failure to represent | duty of fair representation (filed by a union member, *not* a contractor or the local chapter).
- Unlawful secondary picketing (filed by the construction manager or owner based upon the charged-party union establishing a picket line because a non-union contractor is on the project).
- Engaging in bad faith bargaining during negotiations with the local chapter or the contractor(s).
 - Withdrawing from tentative agreements.
 - Giving the contractors a moving target.



What is an *unfair labor practice*?

Most likely charge allegations *against a contractor*:

- Making a “unilateral change” in a “term and condition of employment.”
 - May be subject to *deferral* to the grievance-arbitration procedure especially if the labor agreement is in effect.
- Engaging in bad faith bargaining during contract negotiations. (The *local chapter* can be named as a charged party where the chapter is involved in the negotiations.)
- Engaging in “direct dealing” with the employees (a/k/a bypassing the union) during the period of contract negotiations. (This could also involve the *local chapter*.)



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 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 not *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.



DUTY TO BARGAIN

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 (most notably X-8)
5. Unilateral changes made during bargaining.
6. Refusal to sign an agreement that was reached.
7. Direct dealing a/k/a bypassing the union.

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.



What is an *unfair labor practice*?

Most likely charge allegations *against a contractor, continued*:

- Instructing employees to remove union insignia.
 - May be subject to *deferral* to the grievance-arbitration procedure.
- Threatening or disciplining the union steward or union supporters for engaging in union activity or concerted and protected activity.
 - Also potentially subject to *deferral*.
- Maintaining overbroad policies restricting solicitation, distribution of literature, the sharing of confidential employee information, or on some other topics.



UNFAIR LABOR PRACTICE CASES

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

FORM NLRB-601 (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.	
d. Address (Street, city, state, and ZIP code)		e. Employer Representative		f. Fax No.	
				g. e-mail	
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 (2) 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 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.	
(signature of representative or person making charge)		(print name and title or office, if any)		Office, if any, Cell No.	
Address		Date		Fax No.	
				e-mail	
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. 7494-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of the information to the NLRB is voluntary; however, failure to supply the information may cause the NLRB to decline to invoke its processes.					



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)*



ULP Cases, *continued*

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.
 - e. Witness interviews and depositions (rare).
 - f. Note that the NLRB may issue *investigative subpoenas*.
 - g. *Questionnaires* for the *charging party* to complete.



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 (part of the General Counsel's office) 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 contractors or leaders.
- b. If an attorney is going to represent the local chapter or the contractor(s), 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).



REPRESENTATION 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.



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.
 - a. Keep the evidence focused.
 - b. Present the facts favorably and accurately.
 - c. Is a helpful exercise in preparing the witness for their affidavit taken by the NLRB agent.
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.



DEFERRAL

1. In some cases, the NLRB may be willing or prefer to *defer* the charge to the dispute resolution process in the parties' collective bargaining agreement.
2. This is limited to situations in which the allegation raised by the charging party is cognizable as a ***grievance*** subject to the dispute resolution mechanism.
3. If the grievance is settled or there's a final and binding award, the NLRB will review the terms of the settlement or the award to ensure that it's not palpably inconsistent with the NLRA.
4. If the NJAB deadlocks, the NLRB will commence or resume its investigation, because such deadlock is not a final and binding decision.



NO-MERIT FINDING

1. If the NLRB Regional office, based upon the investigation, finds that the charge lacks merit, it will solicit *withdrawal* of the ULP, and dismiss the charge if it is not *withdrawn*.
 - a. The charging party can only appeal the dismissal of the ULP charge if it is dismissed (as opposed to withdrawn).
 - b. The NLRB's practice has been to honor a request for a long-form versus short-form dismissal letter.
 - c. There can be a partial withdrawal or partial dismissal and/or the NLRB may solicit an amended charge to reflect the merit and no-merit findings.



SETTLEMENT OF MERITORIOUS ULP CHARGE

If you are the charged party, and the NLRB has found *merit* to the charge, the NLRB will issue a Complaint and schedule a hearing, unless the case is settled.

Do you want to sign NLRB *informal settlement agreement*?

Key considerations:

- Remedy
- Timing
- Likelihood of prevailing in litigation
- Cost of litigation

Is there an opportunity to enter into a *non-Board adjustment* with the Union?



WITHDRAWAL OF ULP CHARGE AS PART OF CONTRACT SETTLEMENT

1. It's customary for a union to agree to withdraw all negotiations-related ULP charges as part of a contract settlement.
2. However, this is a permissive (or non-mandatory) subject of bargaining.
 - Cannot insist upon as condition for reaching any new contract.
 - Cannot insist upon to the point of impasse.
3. Be thoughtful about timing (when getting close to an agreement, but not too late) and manner (informally or formally) for raising this.
4. It may be prudent to obtain waiver of additional charges.



STATUTE OF LIMITATIONS

1. NLRA §10(b): “[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge...”
2. However, the NLRB permits “late” amendments to a charge that include allegations that are “closely related” to allegations that were timely filed.

QUESTIONS?

