OFFENSIVE BARGAINING

by

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Preface

What follows are a number of sections which are theoretical discussions of the law. The union official who wants to get to the heart of the matter can skip Parts One through Four and go directly to the offensive bargaining strategies. Part Five describes offensive bargaining techniques when bargaining for an initial contract. Part Six describes techniques to bargain for a successor agreement and avoiding impasse. Part Seven concerns use of information requests. Part Eight describes techniques to respond to particularly onerous conditions. Part Nine is a list of offensive techniques. Part Ten is a brief discussion of offensive techniques during the period of a contract. Finally, Part Eleven describes the Colorado-Ute problem and is somewhat theoretical.

We encourage everyone to read the earlier parts since they explain the theory of offensive bargaining and provide many additional examples of offensive techniques.[1] It is worth reading Part One to get some idea of the usefulness of offensive bargaining.

Part One: Offensive Bargaining

Today unions are faced with intransigent employers some of whom do all they can to avoid reaching a contract on any terms. Unions are faced with employers who will use the bargaining table to achieve unfair ends and drastic concessions through illegal methods. Unfortunately the NLRB has effectively deregulated the bargaining process. Except in very unusual circumstances the General Counsel of the Board will not issue complaints on a theory of surface bargaining. Only in rare cases has the Board found surface bargaining violations by employers. Rather employers are encouraged to engage in unlawful bargaining to the point where bargaining becomes useless. Even where bargaining is regulated by other laws such as the Railway Labor Act or public employee laws, the same lack of regulation forces unions to develop new tactics.[2] The purpose of offensive bargaining is to add another tactic to the union's arsenal. It should not be used alone but should be coupled with other tactics the union can utilize to apply pressure upon the employer.

Employers defeat a first contract by bargaining a union to death until the certification period expires and then they withdraw recognition. Or they bargain to an impasse after a contract has expired, implement part of their last proposal and walk away from the bargaining table without an agreement. The employer then withdraws recognition after the workers conclude that bargaining is useless.

The purpose of this paper is to describe a theory of bargaining which we have called "offensive bargaining." It is really a method of responding to employers who refuse to bargain in good faith and whose goal is to bust the union. It outlines techniques which unions can use to expose the illegal tactics of employers and to achieve leverage through aggressive bargaining techniques.

This technique is useful in three circumstances.

1. *When employers avoid negotiating a first contract.* During the period when the union is bargaining for a first contract the employer may not make unilateral changes. Moreover, the employer is required by law to bargain over every action which affects wages, hours and working conditions. If the action is a change, the employer is usually obligated to bargain about the change before it is made. If the action is not a change, the union may still demand bargaining to the extent that the employees are affected. For example, the movement of someone from one machine to another, the change of someone's shift, the issuance of a warning and every other action affecting employees are the subject of bargaining. The union can use this to its advantage in several ways. First, the union can make the experience expensive and time consuming by bargaining over *everything.* Second, the union can make it expensive to make any changes which may cause any economic impact. Third, the union can make extensive information requests accompanying each bargaining issue. Us-

ing these tactics the union can teach an employer that the better alternative to this time consuming bargaining is a contract for a period of time during which the employer is generally relieved of its bargaining obligation and the rules of the work place are set and established by the contract.

2. *During the life of the contract where there is generally no bargaining.* On the other hand, there are circumstances where a bargaining obligation arises. For example, there may be new legal requirements imposed upon the employer such as the enactment of the Americans With Disabilities Act. Or the employer make take some action which triggers an obligation to provide information. Or the employer make take some unilateral action such as relocating or subcontracting which will trigger a bargaining obligation.

3. *Where the contract expires and the employer's purpose is to avoid a contract by reaching an impasse quickly and thereafter implementing concessions.* Often a union is helpless in these circumstances because the strike weapon is ineffective. Through offensive bargaining it is possible to delay impasse for a long time and in some cases to avoid the impasse altogether. The result is that the employer continues to be obligated to the terms of the expired agreement and cannot implement proposed changes including reducing wages and benefits. Often employers become frustrated and impatient and commit unfair labor practices. Alternatively they fire their union busting consultant or lawyer.

If the employer commits an unfair labor practice the union has substantial additional leverage. If the union strikes, it has the added protection of striking for unfair labor practices. Alternatively the employer may prematurely implement concessions or changes which will require a substantial back pay remedy. The employer may also be nervous about whether it can prove an impasse in order to implement changes. As a result it may decide not to make changes or may decide to remove certain proposed changes from the bargaining table.

In this paper we will show that traditional bargaining techniques can actually play into the hands of employers who have no interest in legitimate bargaining. We will show that these alternative methods of offensive bargaining will meet and can defeat these employer tactics.[3]

Part Two: The Fundamentals of Bargaining Law

Only a few fundamental principles of law govern collective bargaining; understanding them and how employers abuse the law explains an offensive bargaining strategy.

The principles discussed below generally govern all bargaining obligations whether created by state or other federal laws. The Railway Labor Act and various state laws which govern public employee bargaining all have the same fundamental concepts. Often the courts have ruled that the principles developed under the National Labor Relations Act will govern the interpretation of other laws. The offensive bargainer must be careful to get advice as to when these tactics may be used in such other settings.

The National Labor Relations Act says very little about the bargaining process. Section 8(d), 29 U.S.C. 158(d), provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representatives of the employee to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party but such obligation does not compel either party to agree to a proposal or the making of a concession.

Section 8(a)(5), 29 U.S.C. §158(a)(5), provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees..."

The same obligation is imposed upon unions for it is also an unfair labor practice of a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees ..."

These words have been interpreted and applied by the NLRB and the courts for more than fifty years. Unfortunately, those interpretations have not been very favorable to unions.

The experienced bargainer will note that many of the following tactics are simply employer tactics reversed. Where employers bargain unions to death there is no reason we cannot engage in offensive bargaining in response. It requires some creativity to turn these tactics against employers. Note, however, that many of these tactics would not be feasible if the NLRB had ruled them unlawful to begin with. But because employers can get away with these tactics, there is no reason unions cannot equally apply the same tactics of hard bargaining.

The law does not regulate the contents of the collective bargaining agreement.

The law does not compel the inclusion of any particular provision in a collective bargaining agreement. The parties may agree to an agreement of one year or 40 years, the agreement may have no grievance procedure or binding arbitration, the agreement may provide for minimum wages or high wages; the terms are entirely left to the negotiating parties.

There are two relevant exceptions: (1) a prohibition against certain kinds of subcontracting restrictions to the effect that a union may not force an employer to sign an agreement requiring that any subcontractors be union[4], and (2) a prohibition against a closed shop. The union may require membership after 30 days (or 7 days in construction).[5]

Other than these two restrictions[6] the labor law does not prohibit or mandate any term or condition of employment. There are certain provisions which are otherwise unlawful such as a contract which is discriminatory on account of race, sex, national origin or a disability. Otherwise the union and the employer are wholly free to negotiate the terms of the contract without any interference from the law.[7]

Since the law does not compel the terms of any agreement, the only aspect of bargaining which is regulated is the process of bargaining.[8] The law only requires that the parties meet and bargain at reasonable times and places. The parties must bargain with the intent to reach an agreement; they cannot approach the task of bargaining with an intent to frustrate bargaining.

The law severely limits the use of economic weapons in support of bargaining demands. Where there is a contract a union may only strike after a 60 day notice required by Section 8(d) is given and provided further that the union has given the appropriate notice to state authorities and provided further that the contract has been otherwise properly terminated.[9] The union's right to engage in economic action is severely limited in other respects; for example, slowdowns, concerted refusals to work overtime, and quickie strikes are generally unprotected activity for which the employer may discipline and discharge employees. Similarly, the union is limited in its right to engage in secondary boycotts. The only economic weapons which the union can use are the strike or certain boycotts.[10]

The construction industry bargainer will note that so long as the contract is governed by Section 8(f), 29 U.S.C.§158(f), these principles are inapplicable because the employer may repudiate the bargaining relationship at the expiration of the contract.[11] Where the bargaining relationship has been established under section 9(a), these principles are fully applicable.

The employer's right of action is not greatly limited. If the notices

required by Section 8(d) have been given, the employer may engage in a lockout provided it has not engaged in any unfair labor practices. It may lockout and hire temporary replacements.[12] The employer may not lockout and hire temporary replacements if it has committed any unfair labor practices.

In summary the law regulates in a very general way the bargaining process and affords the parties the freedom to engage in the use of limited economic weapons. But unions are additionally prohibited from their most effective weapon: the secondary boycott.

The duty to bargain requires only that the parties meet at reasonable times and places and confer in good faith with the intent of reaching an agreement.

Because the law requires only that the employer meet and confer, the law has little effectiveness. So long as the employer meets the minimal duty to meet and bargain which means to explore and discuss proposals it can satisfy the bargaining obligation. Indeed, the employer can satisfy this obligation by meeting on an irregular and infrequent basis and bargaining. The law does not require an employer to meet on a regular sustained basis. Management will make itself available once every few weeks and insist that this is enough. The employer may engage in "hard bargaining" which means it can make proposals and insist on conditions that are objectively unreasonable and unacceptable to the union. Through these techniques any employer can bargain a union to death in order to avoid a first agreement.[13]

The duty to bargain includes the obligation to provide relevant information.

The duty to bargain includes the obligation of each party to provide relevant information to the other in order to aid bargaining or enforcement of the collective bargaining agreement. A union may request such obvious items as a list of the employees in the bargaining unit or in other circumstances may demand financial information to verify a claim by an employer that it cannot afford to meet a union's demands. An employer also has the right to request relevant information from the union such as copies of collective bargaining agreements. The purpose behind this requirement is to force the parties to exchange information as part of the bargaining process in order to aid them in reaching an agreement. The theory of the NLRA is that by exchanging information as part of the bargaining process each party can understand the other's position and arrive at a compromise. The Supreme Court has explained this rationale as follows:

> Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims.... If...an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.[14]

This complements the overall purpose of the Act which is to avoid labor disputes. The duty to supply information enables the union to understand and intelligently discuss the issues raised in collective bargaining. It furthermore aids the union in performing its duty of representing the bargaining unit members. For example, it aids the union in determining whether a member's grievance is warranted or not. The obligation to provide information requires that the information be provided without undue delay.[15] What is required is a reasonable good-faith effort to respond to the request as promptly as circumstances allow.[16]

The bargaining process is essentially one whereby parties often lie to each other. The employer makes demands and proposals which it cannot expect to achieve. Similarly the union makes demands that it cannot expect to achieve. Both parties try to bluff the other side into accepting their proposals. The purpose of the obligation to provide information is to afford parties the ability to expose the truth or facts which support or undermine a position. This obligation is one which helps the union. There is little an employer can ask for in negotiations. This right when exercised skillfully becomes a powerful weapon the union can use to achieve a good contract.

The employer may defeat a union request for information by showing that it was not made in good faith. All that the union need show is that "at least one reason for the demand can be justified."[17]

The failure to provide relevant information is a violation of Sections 8(a)(1) and 8(a)(5).[18] The failure to provide information usually makes any impasse invalid.[19]

The duty to bargain applies to mandatory subjects of bargaining; those subjects which are non-mandatory do not require bargaining by either party.

The law distinguishes between mandatory and non-mandatory subjects of bargaining. The obvious mandatory subjects are wages, hours and working conditions. This includes health and welfare, pension, schedules, work load, no-smoking policies, parking privileges, telephone use, bulletin boards, absenteeism policies, and so on. Those subjects which are non-mandatory are also called permissive subjects. The parties may bargain over those subjects or they may refuse to bargain over those subjects. Examples of non-mandatory subjects include pension or health and welfare benefits for retired members, union label agreements, withdrawal of unfair labor practice charges, benefits or wages already accrued, the

scope of the bargaining unit and items reserved exclusively for managerial decision making (such as pricing, advertising and so on).[20] The law makes this distinction because the bargaining process is contemplated to be of relevance only to those issues which concern the work place; it makes no sense to enforce the obligation over those items which collective bargaining is not designed to resolve.

Some bargaining issues are non-mandatory because they are illegal. For example, a union may not insist on a closed shop or an employer cannot insist upon a members-only contract. Some are non-mandatory because the issue is resolved through the processes of the National Labor Relations Board. In particular the scope of the bargaining unit is resolvable through representation procedures (a unit clarification procedure) and therefore neither party can insist on changing the bargaining unit. Some are non-mandatory because they interfere with bargaining. For example, insisting on a stenographic record or tape recording of bargaining are both non-mandatory subjects.

As we shall see the effective bargainer must be able to distinguish between mandatory and non-mandatory subjects. Unions must avoid striking over such issues and unions may want to trap employers into insisting on non-mandatory subjects.

No unilateral changes may be made by the employer until an impasse in bargaining occurs or the parties reach a bargaining agreement.

The most important element of the employer's duty to bargain is the status quo obligation. The rule means that from the moment a union is either voluntarily recognized or the election is conducted which ultimately results in a union certification, the employer may not make any unilateral changes in wages, hours and working conditions. Similarly this obligation exists during the life of the agreement although the status quo is generally enforceable through the written terms of the agreement.

Finally, once the contract expires the employer is not permitted to make any unilateral changes until an impasse occurs or the parties reach a new agreement embodying those changes.[21]

"The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. 'Both parties must believe that they are at the end of their rope.'"[22]

The burden of demonstrating the existence of an impasse is upon the party asserting the existence of the impasse; that burden normally rests squarely with the employer. *Roman Iron Works,*[23] and *North Star Steel Co.*[24] The Board imposes a relatively heavy burden to establish an impasse. "[T]he Board does not lightly find an impasse." *Powell Electrical Mfg. Co.*[25] The Board has used the word futile to describe the circumstances of an impasse. In fact a mere showing of frustration is insufficient to demonstrate impasse.

The employer may not establish impasse and implement unilaterally its position on its "asserted perception that no acceptable agreement could be reached, rather than giving the bargaining process a chance to work."[26] In one leading case, an impasse has been defined as the situation where "good faith negotiations have exhausted the prospects of concluding an agreement."[27]

The Board has often used the word deadlock to determine whether an impasse is reached:

"A genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position."[28]

The Board has approved language in which the Administrative Law Judge used the word "complete deadlock"[29] in testing whether an impasse was demonstrated. No impasse was found in *Dahl Fish Co.*[30], because the negotiations had not resulted "in a closure of all avenues to an agreement or a complete deadlock with no prospect of reaching an agreement."

Even the low probability of reaching agreement does not demonstrate a true impasse:

> Respondent's duty to bargain on this issue is not negated by the possibility or even the substantial probability that the Union would not have agreed to respondent's proposed economic concessions. The purpose of the duty to bargain is to give the collective bargaining process a chance to operate regardless of the possibility of success. To hold otherwise would allow employers and unions to skip the bargaining stage altogether based upon their perceptions regarding the low probability of reaching an agreement.[31]

The employer must put to the test the question of whether the union will make concessions or adopt the employer's position.[32]

Strong opposition to a proposal or position does not establish impasse.[33]

This status quo obligation has two purposes. First, it would undermine the bargaining representative and the bargaining process if the employer could make changes with total disregard for the union. Second, the unilateral change doctrine encourages the parties to avoid economic warfare since no changes are permitted while they are bargaining.

Some explanation of this doctrine will be helpful. In general, "[a] refusal to negotiate *in fact* as to any subject which is [a mandatory subject of bargaining], and about which the union seeks to negotiate, violates §8(a)(5), though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end."[34] Applying this broad proposition, *Katz*

held "that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of §8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) as much as does a flat refusal." *Katz* arose where the union and the employer were negotiating an initial contract. Thus, the terms and conditions which the employer could not change were defined by the existing employer policies and practices.[35]

Five years after *Katz*, the Supreme Court confronted a factual variation on the same theme, and confirmed that the unilateral change doctrine also applies where the change occurs *during* the life of a collective bargaining agreement, except to the extent that the contract can be read as a waiver of the union's §7 right to bargain collectively as to the particular question.[36] And, most recently, *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.*,[37] reaffirmed the unilateral change doctrine, as applied to a situation in which there is an expired collective bargaining agreement:

> Freezing the status quo ante after a collective bargaining agreement has expired promotes industrial peace by fostering a noncoercive atmosphere that is conducive to serious negotiations on a new contract. Thus an employer's failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of Sections 8(a)(1), 8(a)(5), and 8(d) ... Consequently, any unilateral change by the employer in the pension fund agreements provided by an expired agreement is an unfair labor practice.[38]

The statutory obligation to maintain the status quo during negotiations, then, governs throughout the collective bargaining relationship, because "an employer's unilateral [changes] during the bargaining process tends to subvert the union's position as the representative of the employees in matters of this nature,"[39] by "showing the employees that it is useless to try to negotiate."[40] "[T]he real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees."[41]

The employer may only implement proposals reasonably contemplated within the terms of its last proposal.[42]

This unilateral change doctrine works almost exclusively in favor of the union. Normally it is the employer who wants to make unilateral changes such as reducing wages, changing health and welfare or otherwise adversely affecting the bargaining unit. In the alternative the employer may need to make operational changes which impact the unit and

therefore needs to bargain changes in wages hours and working conditions.[43]

Where the employer illegally implements, the Board will order the employer to restore the status quo. This means the former wages, hours and working conditions must be restored with back pay. If the employer has implemented wage cuts this liability can be substantial. If the employer has implemented a new health and welfare plan or new pension plan, the employer will be ordered to reimburse the plans the contributions owed with interest.[44]

As we shall see below, this status quo obligation is a powerful weapon against employers who are trying to avoid a contract and to bust a union.

The Employer's Obligation to Bargain in Good Faith

Because the NLRB has suffered from so many years of conservative appointments the duty to bargain has been watered down to where it is virtually meaningless. The employer can pretend to bargain in good faith and avoid a collective bargaining agreement without much trouble or skill if unfortunately a union is not skilled in bargaining.

The law defines surface bargaining as simply going through the motions of bargaining while trying to avoid an agreement. The Board examines the totality of the circumstances to determine whether the employer has concealed a purpose to frustrate bargaining or to avoid the reaching of an agreement. Because the conservative Board has effectively deregulated the bargaining process it rarely finds surface bargaining.

The Board also defines surface bargaining as bargaining for the purpose of reaching an impasse. Thus, where the employer bargains for the apparent purpose of implementing rather than reaching a contract or for the purpose of withdrawing recognition, the Board will find surface bargaining.[45]

There are certain indicia of surface bargaining which the union negotiator must recognize. Examples of these indicia are as follows: (1) Employer rejects a union proposal which the employer had made; (2) Failure to make counter-proposals; (3) Withdrawal of proposals previously agreed upon; (4) Failure to reach agreement on even minor issues; (5) Proposals which are regressive without an adequate explanation or which are contradictory to the employer's treatment of non-union work force; (6) Failure to meet regularly and at convenient places; (7) Using a bargainer without sufficient authority to reach an agreement; (8) Proposals for contracts of excessive length or very short duration; (9) Insistence on over broad management rights clause which undermines the union's ability to represent the employees; (10) Statements which suggest bargaining for the purpose of withdrawing recognition, forcing impasse or avoiding an agreement; and (11) Proposals which deprive the union of its ability to effectively represent the employees.

It must be emphasized that making regressive or harsh proposals, even proposals which are seemingly totally unacceptable, does not prove bad faith bargaining. The NLRB has generally said that it will not consider the substance of an employer's proposals except in the most extreme circumstances.[46] The typical employer who wants to avoid a contract will design proposals that are unacceptable to the union and stick to them so as to avoid a contract. The employer will agree to minor issues or even major ones while rejecting issues which are necessary and critical to the union.

The offensive bargainer should not expect the Board to find that an employer has engaged in surface bargaining. As the NLRB has deregulated the bargaining process and sanctioned harsher and harsher employer measures, employers have been encouraged to use more and more outrageous tactics. Sometimes, however, employers have overreached, believing that there are no limits on their conduct.

Where the employer violates the obligations of the National Labor Relations Act any strike caused in part by those unfair labor practices is an unfair labor practice strike.

1. The status quo obligation described above is an effective weapon against employers who demand concessions. If the employer prematurely makes unilateral changes, the NLRB will order it to restore the prior conditions and to make employees whole for any losses which they have suffered. For example, where an employer lowers wages, the employer will have to pay the difference between the lower wage and the higher wage to the employees with interest. Where the employer implements a different health and welfare plan or a different pension plan, it will be required to reimburse the prior plan unpaid contributions as well as reinstate that plan. If the employer implements a new absenteeism policy and an employee is discharged as a result of that policy, the employer will be ordered to reinstate the individual with back pay.[47]

If the employer fails to provide information necessary to bargaining or if the employer engages in surface bargaining, there is no monetary remedy.[48] However, the employer will be ordered to supply the information requested by the union. Where the employer has failed to supply information, the employer cannot reach a valid impasse and implement any proposal.[49]

2. The force of these provisions is that any strike which is caused in part by the unfair labor practices becomes an unfair labor practice strike. Replacement workers hired after the strike becomes an unfair labor practice strike must be considered as temporary replacements. That means, that if the unfair labor practice strikers request reinstatement, the employer must reinstate them within five days and discharge the replacements who were hired. If the employer refuses to bring back the strikers,

the employer's back pay obligation begins five days after the unfair labor practice strikers have requested reinstatement. Where there are no unfair labor practices, the strikers are only economic strikers and can be permanently replaced.

It is obvious that establishing an employer's unfair labor practice is a critical strategic weapon in any contract campaign. The more outrageous the employer's proposals the more likely the union can find unfair labor practices in insistence on non-mandatory terms, in surface bargaining or a refusal to provide relevant information. Or the more insistent the employer is upon concession, the more likely the employer will prematurely implement before reaching impasse.

Additionally, an employer may not lockout in the context of any unfair labor practices. Where there is the threat of a lockout or the hiring of permanent replacements it is essential to expose the employer's unfair labor practices during bargaining. It is often possible to maneuver employers to commit unfair labor practices if the skilled union bargainer is aware of the nature of unfair labor practices and consciously watches for when the employer commits them.

3. It may be premature or a mistake to immediately file an unfair labor practice where the union believes that an employer has committed an unfair labor practice. In fact, the union may be better off never filing a charge. In many areas the law is unclear whether employer conduct violates the law. Moreover, the conservative NLRB has more often leaned in favor of employers. Conservative regions will avoid issuing complaints where unions employ novel and aggressive tactics.

What is often more useful is making the employer *unsure* and *hesitant*. So long as the employer believes that it *may* have committed an unfair labor practice, it may temper its action or avoid unilateral changes. The risk is upon the employer and the union has more leverage asserting the existence of the unfair labor practice than actually filing the charge. The offensive bargainer should tell the employer that an unfair labor practice has been committed and remind the employer that if it engages in a lockout, or if there is a strike or if there is unilateral implementation, the employer may incur very substantial liability. But filing the charge may lead to the dismissal of the charge at which point *all* the leverage is gone. Thus, the threat of the charge is sometimes more effective.

It may be necessary to file the charge. The offensive bargainer may be convinced the employer has committed an unfair labor practice and the membership needs to know that the NLRB has agreed. Or the union may need to have a complaint issued to embarrass the employer's bargainer or to feel more comfortable in calling for an unfair labor practice strike.[50] Nonetheless, it is important to remember that the union may well be better served by not filing the charge but rather using the threat.

The law does not require that an unfair labor practice be filed before the strike in order to assert that a strike is an unfair labor practice strike.

All that is necessary is that the unfair labor practice in part cause the strike. Thus, if there is a strike vote meeting it is imperative to make a record that the membership has been advised that the union believes that an unfair labor practice has been committed and that one of the reasons why the leadership is recommending a strike is because of the unfair labor practice. If the unfair labor practice is never mentioned, the NLRB is likely to find that the action was not a cause of the unfair labor practice strike.[51]

Part Three: Offensive Bargaining Requires Use of the Same Strategies Used by Employers to Avoid a Contract

The Labor Board requires that employers and unions bargain in good faith.

An important element of the law is that neither party engage in surface bargaining which means bargaining to avoid a contract. It is difficult to imagine circumstances where a union will want to avoid a contract. On the other hand, employers will often bargain to avoid a contract. The problem is that the NLRB has effectively sanctioned surface bargaining by approving much employer conduct which avoids a contract.

We shall show that the NLRB has deregulated the bargaining table to the extent that a "free for all exists." This means employer tactics which avoid a contract are sanctioned. That means that these tactics used in *reverse* are the tactics of an effective, offensive union bargainer. What follows is a somewhat theoretical discussion. Some readers may want to proceed directly to Part Five where we discuss application of offensive tactics.

Ordinary and lawful bargaining tactics are useless against the employer intent on avoiding an agreement or destroying the union.

If the union is negotiating a first contract, the employer will probably be satisfied with the status quo of conditions which were in existence when the union won recognition. If the employer can bargain the newly recognized union to death it rids itself of the union. If the employer is bargaining for a successor contract, the employer will attempt to reach an impasse so that the employer can implement its last proposal and cease further bargaining. Recent decisions of the Labor Board have made it much easier for employers to accomplish either purpose.

In *Reichhold Chemicals, Inc.*[52], the Board weakened Section 8(d) and Section 8(a)(5) of the Act. In the initial decision the Board held that the employer had not engaged in surface bargaining. On motions for reconsideration, the Board reaffirmed its prior decision and clarified its position with the following language:

> The Board's original decision in this case found that the judge improperly based his finding of unlawful surface bargaining on the Respondent's insistence on a broad management rights clause, a narrow grievance definition, and a comprehensive no-strike provision which included a waiver of access to Board processes. The Board held that the Respondent's adherence to these three proposals was not evidence of an intent to frustrate the collective-bargaining process. In revising the judgment, the Board stated that '[t]he Board will not attempt to evaluate the

reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith.'

On further reflection, we conclude that this statement is an imprecise description of the process the Board undertakes in evaluating whether a party has engaged in good-faith bargaining. Specifically, the quoted sentence could lead to the misconception that under no circumstances will the Board consider the content of a party's proposals in assessing the totality of its conduct during negotiations. On the contrary, we wish to emphasize that in some cases specific proposals might become relevant in determining whether a party has bargained in bad faith. The Board's earlier decision in this case is not to be construed as suggesting that this Board has precluded itself from reading the language of contract proposals and examining insistence on extreme proposals in certain situations.

That we will read proposals does not mean, however, that we will decide that particular proposals are either 'acceptable' or 'unacceptable' to a party. Instead, relying on the Board's cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract. The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct. In performing this task we will strive to avoid making purely subjective judgments concerning the substance of proposals.[53]

In the same opinion the Board made it clear that as long as the employer meets the procedural requisites of bargaining, the content of proposals is largely irrelevant:

Nevertheless, having thoroughly reviewed the record in this case again, we reaffirm the Board's prior finding that the Respondent's overall conduct – including its proposals – establish the Respondent engaged in hard bargaining, rather than surface bargaining. As noted in the Board's previous decision, the Respondent was willing at all times to meet and bargain with the Union, attended all scheduled meetings, fulfilled its procedural obligations, exchanged proposals, and shortly after the last meeting notified a Federal mediator that it was willing to bargain with the Union in March. During the course of 29 bargaining meetings held with the Union over a 13-month period, the Respondent made concessions which led to agreement between the parties on numerous subjects, including grievance and arbitration procedures, seniority rights, job classifications

> and requirements, probationary period, layoff and recall, and safety and working conditions. In addition, the parties reached substantial agreement on provisions regarding subcontracting and the substantive and procedural aspects of a disciplinary system.

Thus, as long as the employer fulfills the procedural requisites of meeting, it can make proposals that are predictably unacceptable to the union, make some agreements on limited areas and never reach agreement. In effect, *Reichhold Chemicals* allows the employer to propose and stick to totally unreasonable bargaining demands as long as it is careful to meet the procedural requirements of bargaining. And these procedural prerequisites are generally easy to meet.

Reichhold Chemicals does, however, contain the seeds of another doctrine which partially limits the damage done by the Board's failure to scrutinize bargaining proposals. In *Reichhold*, the employer had insisted upon a waiver of access to the Board where there was a claimed violation of the no-strike clause. Thus, the Board held that "the in futuro waiver of the right to Board access sought...is not a mandatory subject of bargaining because it is contrary to a fundamental policy of the Act and is unrelated to terms and conditions of employment." Although the employer could lawfully insist that the union waive its right to engage in unfair labor practice strikes, the union could not waive the right of individuals or itself to access to the Board's processes. The Board's holding points out that although employers can insist upon virtually any proposal, there are other areas where those proposals, which if pushed to impasse, may constitute a violation of Section 8(a)(5). Since *Reichhold*, the Board has consistently declined to find any unlawful surface bargaining by considering the content of the employer's proposals. It has, thus, gone out of its way to decline to rely upon bargaining proposals to find any unfair labor practice.[54]

In *American Commercial Lines, Inc.*[55] the ALJ found that the employer had engaged in surface bargaining relying to some degree upon the context and text of the proposals made by management. The Board rejected the ALJ's decision noting among other things that some of the employer proposals were in response to specific problems which the employer pointed out, that certain management rights which the company sought were subject to the grievance procedure and that the employer modified its proposals during the course of bargaining. Once again, since there was compliance with the procedural niceties the Board found there was no surface bargaining:

> In this regard, the record reflects that the Respondents met with the SIU at reasonable times and places, agreed to the presence and assistance of a Federal mediator, presented many proposals and counterproposals, offered justification for their bargain-

> ing positions, substantiated their claims of problems with various provisions contained in the most recent contracts, agreed to modify proposals in response to the SIU's opposition, and otherwise fulfilled their procedural obligations.[56]

The direction which *Reichhold Chemicals* takes unfortunately is accelerated by other positions which the Board has adopted in surface bargaining cases. For example, conduct away from the table is now of significantly less value in ascertaining an employer's unlawful bargaining strategy. In *American Commercial Lines*, the Board rejected the reliance on conduct which was committed by the employer away from the bargaining table. Similarly, in *River City Mechanical*[57] the employer committed unfair labor practices including 8(a)(1) statements to certain employees that it wanted to go non-union during the course of negotiations and made unilateral changes. The Board held that such away from the table conduct which it labeled "provocative" was insufficient to taint the bargaining process.[58] Similarly, in *Litton Microwave Products*[59] the Board reversed an ALJ who had found surface bargaining where among other positions the employer had initially insisted that the union agree to a zipper clause which would have waived rights under the NLRA. These cases all use the vague test that "the Board examines the totality of the employer's conduct, including conduct at and away from the bargaining table."[60]

To this otherwise bleak trend there are a few exceptions. In *Prentice-Hall, Inc.*, the Board affirmed a surface bargaining finding of an ALJ while disavowing the judge's reliance upon certain employer proposals during the course of bargaining.[61] For example, without scrutinizing the proposals, the Board noted "that the combination of the Respondent's proposals on management rights, grievance and arbitration, 'sole recourse' and prohibitions against strikes rendered substantial portions of the proposed contract virtually unenforceable." This, plus other conduct, persuaded the Board "by the totality of the record evidence that the Respondent was not negotiating in good faith with a view to trying to reach a complete agreement with the Union."

In another case, *Marina Associates d/b/a Harrah's Marina Hotel and Casino*[62], the Board found surface bargaining where an employer (1) refused to negotiate about work rules, (2) claimed inability to meet regularly for long period of time, (3) repeatedly rejected a hiring hall when the union was not proposing it, (4) implied to union that management wanted an election rather than continued negotiations, (5) unilaterally and peremptorily scuttled further negotiations, (6) refused to even express willingness to modify its contract proposals, and (7) expressed determination that the union would have nothing to say about wages and seniority. In *Sparks Nugget, Inc.*[63], the Board found surface bargaining where the employer (1) effectively foreclosed bargaining on an impor-

tant work schedule issue by making unilateral changes, (2) engaged in certain misrepresentations in order to stall bargaining on wages and, (3) suggested that the union walk away from the bargaining unit effectively demonstrating a "take it or leave it attitude." The ALJ had also relied upon the employer's insistence upon unilateral control over wage increases. The Board, however, rejected reliance upon that particular position consistent with its opinion in *Colorado-Ute Electric Association*.[64] There are several other occasions where the Board has upheld surface bargaining charges but without relying upon the content of the employer's proposal.[65]

Surface bargaining is found where employers make relatively stupid statements indicating an intent not to bargain. For example, in *Tennessee Construction Company*[66], the employer made statements indicating "he had agreed only to talk with the Union and that he had done so..." Additionally, the employer proposed a non-mandatory subject, namely a performance bond.[67] In *Dayton Electroplate, Inc.*[68], the employer offered no explanation for proposals. Additionally, there was away from the table conduct supporting the finding of bad faith. In another case there were independent unfair labor practices.[69] The NLRB also focused upon what it characterized as a "perpetual reopener" which would have allowed the employer "to alter or discontinue any of the benefits or other policies...at any time 'according to the needs of the business.'"[70] This illustrates that on occasion where an employer goes too far the NLRB will find surface bargaining. It also demonstrates that the offensive bargainer must be alert to such proposals which may be either non-mandatory subjects or indicative of surface bargaining.

What these cases demonstrate is that establishing surface bargaining is virtually impossible under current Board law if the employer is at all skillful in its approach to avoiding a contract. However, what is good for the employer must also be useful for the union. What we shall show is that the same techniques of bargaining can be extremely effective for the union which wants to bargain a bad-faith employer into submission, either with regard to the initial contract or to avoid impasse after negotiations commence for a new contract. But first it is worth looking at how traditional bargaining techniques are not only worthless in the context of much employer bargaining, but worse, how these techniques often play into the hands of employers who are bent on destroying the union and fair working conditions.

Part Four: Traditional Concepts of Bargaining Play into the Hands of Employers Who Want to Avoid a Contract

The approach of the traditional bargainer is to come to the bargaining table well prepared with complete proposals to modify the current agreement or to enter into an initial agreement. The union bargainer believes that with well reasoned arguments and a strike threat a contract will be achieved. But in the presence of an employer or consultant intent on busting the union this is the wrong strategy to secure a decent contract. Rather, the bargaining table must become a tool (1) to push endlessly against the employer's positions, (2) to obtain information which will be useful to apply pressure through in-plant tactics and comprehensive campaigns, and (3) to expose the employer's unfair labor practices. Ultimately, the goal is to force the employer to signal that it is willing to seriously bargain rather than endure more of the union's campaign. Therefore, the purpose behind bargaining in these situations is to achieve maximum pressure on the employer to ultimately agree to a contract. The traditional methods of bargaining encourage the illusion that a contract can be achieved and allow employers to engage in surface bargaining or to reach an impasse and walk away from the bargaining process.

Here is one description of bargaining:

> After parties have sufficiently prepared, they must engage in face-to-face discussion to identify the issues, present demands and positions, give facts and supporting data and attempt to arrive at mutual solutions. Negotiations are conducted through joint sessions, separate caucuses and side-bar (summit) meetings. Each party is not only dependent upon the other for a fair settlement, but also for the information about a possible agreement. A lasting agreement can only be accomplished through accommodations.
>
> Negotiation has three basic stages: a beginning, a middle and an end. Parties will go through an initial period of probing each other with surface mannerism and rhetoric, and subsequently will engage in hard and serious bargaining on the issues. Eventually, the parties will start critical negotiations marked by crises, uncertainties and settlements. Unless there is an impasse, the parties will be able to reach a closure and an agreement.[7]

The presumption of this kind of advice is that the employer has a genuine interest in reaching an agreement. Our assumption is that often employers have the opposite interest: either in reaching no agreement or in reaching an agreement totally on their terms.

One more current theory of bargaining is known as "getting to yes" bargaining. This theory of bargaining describes traditional bargaining as "positional." That is, parties come to the table with "positions" and bar-

gain by arguing for their respective "positions." The "getting to yes" theory is that such "positional" bargaining gets in the way of reaching an agreement because bargainers become enmeshed in their positions rather than in solving the problems of the other side. Under this type of bargaining, the parties attempt to avoid making proposals. Rather, they discuss problems in an effort to avoid stating positions until the solution to the problem becomes clear and an agreement on that issue is reached. It is described by one source as follows:

> To sum up, in contrast to positional bargaining, the principled negotiation method of focusing on basic interests, mutually satisfying options, and fair standards typically results in a *wise* agreement. The method permits you to reach a gradual consensus on a joint decision *efficiently* without all the transactional costs of digging into positions only to have to dig yourself out of them. And separating the people from the problem allows you to deal directly and emphatically with the other negotiator as a human being, thus making possible an *amicable* agreement.[72]

These techniques cannot be ignored or totally discarded. They are however largely useless in some bargaining contexts. Worse they simply play into the hands of an employer who wants to impasse early to force a strike or to force the union to abandon the bargaining unit because it cannot get a decent contract.

Part Five: Bargaining for the First Contract

Employers often employ a strategy of bargaining the union to death to avoid a first contract.

Many unions have organized employers only to be unable to obtain a first contract. The reason is obvious: the National Labor Relations Act does not compel any employer to reach an agreement and so skillful employers will bargain the union to death. The employer will meet albeit on a very delayed schedule and discuss the union's proposals. Little progress will be made. There is usually no economic incentive for the employer to make any changes since they will all be adverse to the employer.

As a result the employer easily engages in surface bargaining until the employees become frustrated and disaffected with the union.

The certification issued by the NLRB creates a one year irrebuttable presumption that the majority of the employees support the union. After the one year, the presumption is rebuttable. What normally happens is that after one year of surface bargaining, the employer finds some company sympathizers who circulate a petition rejecting the union among the employees who have become disaffected. Once more than half of the employees sign the petition which need only say something as simple as "We don't want the union," it magically appears on management's desk and the next day the union receives a letter withdrawing recognition. Thus the employer has avoided a contract and destroyed the union's organizing effort.

Some employers challenge an NLRB certification or the union's recognitional status through legal proceedings. This strategy involves an employer refusal to bargain with the union thus setting up a direct challenge to the union's recognition status whether that status occurs through an NLRB certification or otherwise. Once the employer refuses to bargain, the union files an 8(a)(5) charge which results in the issuance of a complaint.[73] The Board in Washington grants summary judgment and then the matter proceeds to the Court of Appeals. This process takes a year or considerably longer. During this time the employer refuses to bargain and convinces the employees to become more disaffected with the union.

There are ways through offensive bargaining to bring substantial additional pressure upon the employer during either a period when the employer is refusing to bargain[74] or while the employer is surface bargaining. These tactics which are discussed in more detail below are an alternative to the strike and boycott.

During any period while the employer refuses to bargain, the union must increase the liability for unilateral changes and utilize broad information

requests.

1. During the period when the employer is refusing to bargain the union remains the bargaining representative for all legal purposes. This employer obligation arises upon the date of the election[75] and continues until the union is decertified by the issuance of such a certification or when the employer lawfully withdraws recognition. Thus, the employer proceeds at its own risk when it ignores or challenges a union's representational status.[76] The union should take advantage of this refusal by increasing the risk to the employer in several ways.

2. The union should serve comprehensive, detailed, legitimate and thorough information requests. The employer who refuses to bargain will ignore the information requests or respond by declining to answer them. To answer them is an admission that the union represents the employees and is contrary to the employer's legal position. The advantage of serving the requests is that it imposes a difficult choice upon the employer. Under the NLRA, the employer who asserts confidentiality concerns or argues that production of the requested information would be burdensome has an obligation to request bargaining over these issues. In order to do this the employer must ask to bargain over such issues. Absent such a request the employer has waived its right to bargain over these issues and to assert confidentiality as a defense to providing the information. Thus, the union poses a difficult choice: either the employer agrees to bargain over the issue or it waives its rights to do so. Ultimately if the recognitional issue is resolved in favor of the union, the employer will be required to produce all the records without a confidentiality agreement![77]

It is, however, critical to offer an explanation of the need for the information when serving the request. A simple statement of the relevance is necessary so that the NLRB can ultimately establish the relevance.

Let us illustrate. In a manufacturing facility ask for a list of all Material Safety Data Sheets or a list of all chemicals in the plant. Some of this information may be extremely confidential. The union needs to explain the relevance of the information: the union wants the information to bargain over health and safety issues and the union wants to insure that the work place is safe.[78] The employer may insist on bargaining for a confidentiality agreement. The union must then bargain over accommodating the confidentiality. If the employer refuses to bargain over the confidentiality of the material the result is that the employer waives its right to bargain over confidentiality and cannot later assert it. Thus, the employer has an uncomfortable choice: either concede to bargaining or waive its right to bargain over confidentiality. If it refuses to bargain, the union can argue that the employer has waived its right to bargain over these issues. The union's remedy is to file an unfair labor practice charge with the NLRB.[79] If the Board refuses to entertain any confidentiality argument, the employer will be under tremendous pressure to settle the contract as

a trade for retaining the confidentiality of the information.

Another example: The union should ask for a list of all customers of an employer wherever it can find any relevance of such a list. Throughout this paper we suggest circumstances where customer lists are relevant. The employer will have to demand to bargain over the burdensomeness of the request or the confidentiality of the list. If it does not, the union can argue the waiver theory. Obviously the union doesn't get the list until after the legal proceedings are completed. But the threat that the employer may have to turn the list over may be sufficient to achieve a significant advantage![80] The union may be able to trade the information for significant concessions from the employer.

3. The union should demand bargaining over every unilateral change where employees are adversely affected. For example, where the employer decides to lay off employees, the union should demand bargaining over the decision to lay off and the effects of the decision.[81] In either case, if the employer refuses, there will be back pay.[82] If an employee is demoted or moved to a position which pays less, demand to bargain over the demotion or transfer. The appropriate remedy is reimbursement for the lost wages because of the employer's refusal to bargain. Similarly where the employer unilaterally transfers work out of the bargaining unit, the employer must reimburse the lost wages of those adversely affected.[83]

Thus, the union must find every type of conduct where members are adversely affected and demand bargaining over the decision and the effects. The employer's refusal to bargain as to these specific issues[84] will be a continuation of its overall refusal to bargain and the employer will be faced with the choice of continuing in its refusal or paying back pay.[85]

Particularly appropriate is the discharge of employees. If employees are discharged for cause, demand to bargain over the discharge.[86] The employer will refuse. Take the position that the employer should pay back pay to the discharged individual because of the employer's refusal to bargain over the discharge.

4. When the NLRB and the courts require the employer to bargain, remind the employer by requesting information relating to the entire period when it was refusing to bargain.[87] Ask for every minute piece of information. When the employer responds that it will be burdensome to go back to the date of recognition, point out that it is burdensome only because the employer delayed bargaining and that its delay was unlawful.[88]

5. The union also has the right during this period to strike over the unfair labor practice of refusing to bargain. Whether the strike is an unfair labor practice wholly depends upon the outcome of the enforcement proceedings in the Court of Appeals.

Once bargaining begins, bargain the employer to death until the employer chooses the alternative of a contract.

1. The employer will resist bargaining and will want to preserve the status quo. Take advantage of three weapons: (1) The status quo obligation; (2) The obligation to provide information; and (3) The obligation to bargain over every detail of the employment relationship where there is no collective bargaining agreement.

2. Often the employer will hire an expensive management lawyer. Every bargaining session will be expensive. Take advantage of this. The union may make the lawyer wealthy but eventually the employer may choose to get rid of the lawyer.[89] One tactic is to make repeated legitimate information requests both verbal and written on routine matters occurring on a day to day basis such as discipline, transfers, promotions. Make those requests of the lawyer: each letter and call and response will be billed to the employer. For example, if a member is given a warning, ask the lawyer in writing for the reason for the warning. Even if the employer tells the union to contact him on certain issues, continue to copy the lawyer on letters; lawyers often bill simply for reviewing correspondence to determine that they need take no action. Some lawyers will review the letter, call their client to find out if they should take any action, and then send a confirming letter that they should take no action. And it is all billable.[90]

3. One management technique is to delay bargaining by being conveniently unavailable. The union must use the opposite technique to make life miserable and expensive until a contract is reached. Try to force bargaining as often as possible. One aggressive technique is to bargain over events which are imminent and/or for which management has an immediate deadline. For example, if the union learns that an employee needs to take a leave of absence in the next few days, insist on a bargaining session to discuss the terms of the leave. When the employer refuses to meet until it is too late to effectively bargain, assert an unfair labor practice. If a member needs to take time off for a medical appointment, insist on bargaining over the conditions of the time off and bargaining over who will take the employee's place. If the lawyer or representative is unavailable, insist that someone else do it. Offer even to come to his/her office or to bargain by conference call.

Another effective response is to demand that the employer set dates long in advance and to make itself available on set dates over the following months. Any refusal can be used to argue a refusal to meet. Equally, the union can refuse to set dates except on an ad hoc basis. Set dates at the end of each session or tell the employer that the union will call in a few days to set a date. This makes it harder for the management lawyer who wants to set dates to get to impasse and he/she cannot control his/her schedule as well and the employer faces the same problem. Obviously if the union knows the lawyer is going to be busy doing something else or the employer will be unavailable, offer those dates for negotiations.[91]

4. During the period when there is no agreement, take advantage of the absence of an agreement. There is a theory supporting this. The collective bargaining agreement sets out the rules of the work place; these rules are the rules by which the employees govern their behavior and the agreement is the limit on the employer's discretion. Once that agreement is reached the employer is generally free of any bargaining during the life of the agreement. As long as the employer abides by the contract's rules, there is little the union needs to do. If the employer violates the rules, a grievance is filed and processed according to the rules established in the grievance and arbitration procedure.

Thus, the purpose of offensive negotiations is to demonstrate that agreeing to a collective bargaining agreement is better than the alternative of endless, expensive and fruitless negotiations over routine and minor matters. When there is no agreement, *everything* is subject to bargaining. This means the smallest aspect of the work place can be the subject of a bargaining demand with an accompanying relevant information demand.

In applying this theory, there are two different circumstances over which bargaining is mandated. First, the employer must bargain over proposed changes by notifying the union in advance of the change and affording the union a chance to bargain over that change.[92] Second, as to matters which are not changes, the employer still has an obligation to bargain over the action although it does not have the obligation to notify the union in advance; rather it can assert its normal management rights and bargain after the event has occurred. In effect, the employer is forced to bargain over the effects of each action which it takes.[93]

Insist on bargaining in advance where the union can identify actions before they take place. For example, demand to bargain before normally scheduled pay raises would take effect, or demand to bargain over employee evaluations before they are made. The union could even demand to bargain over discipline in advance by making a timely demand if it learns that an incident has occurred which might lead to discipline.

For the purpose of this kind of bargaining, the union must demand bargaining over every act taken by the employer no matter how insignificant. Bargaining over minutiae will drive the employer crazy. As noted above, bargain over who will temporarily fill a position for any brief time while an employee will be absent. If an employee will be absent for half a day, demand bargaining over who will fill the position and that substitute's rate of pay. The union normally insists that strict seniority (whether plant or classification) will govern. Do not insist that the position be filled by seniority since this will limit the union's options to bargain. Rather insist that the parties consider everybody in the facility. Get the employer first to state his/her choice then go person by person as to everybody in the facility as to why that person was not chosen or why someone else should be chosen. In even a 25 person unit, this can be

excruciating for the employer. The union can even arrange with the bargaining unit members to have them set appointments and to notify the union before telling the employer. With the Family and Medical Leave Act this kind of bargaining has become not only more complicated but more important.

It is the continued legitimate insistence on bargaining over *everything* of concern which is the reverse of the employer's bargaining the union to death.[94] Except that it is the union's proper aim to reach an agreement and a contract. That has often not been the employer's motive.

5. Use complete exhaustive and relevant information requests. See Part Seven. During the period of bargaining for a new contract, there are few limits on the kind of information which will be relevant because all issues are open for negotiations. And the union can make requests on an ad hoc basis as each incident occurs. The cost of time and effort to that employer will be more than most employers can bear.[95]

Take, for example, a case where someone is going on maternity leave for four months. Demand bargaining over who will fill the position. The employer will take the position that it wants to put the most qualified person in the position. Do not insist that it be the most senior person. Rather say that on an interim basis until the contract is completed, the union would like to look at the qualifications, skill, attendance, attitude and aptitude of everyone in the facility to determine who would have an opportunity to temporarily fill the position. Ask the employer by way of an information request to specify the "qualifications, skill, attendance, attitude and aptitude" of everyone in the facility.

The employer may insist on using the "qualifications" test. Ask the employer to detail the qualifications for the job in question and then to specify the qualifications of each and every person in the facility.

Tell the employer that the union has people who are out of work who should be considered as temporary replacements. Insist that the employer interview each one. If the employer isn't willing to consider them take the position that the employer is discriminating against union members.

6. Some unions have made an attempt at negotiations on the work place floor as part of work place actions.[96] These unions have insisted on discussing every little item and have forced management to respond on the shop floor, often during work time. This is an extension of the kind of bargaining we have described above. It is an effective weapon to grind down the recalcitrant employer.[97]

7. Finally, the union can take advantage of the employer's status quo obligation. Sometimes the employer will want to make changes and will recognize an obligation to bargain. For example, suppose the employer wants to subcontract bargaining unit work and offers to bargain over the decision. Readily agree to bargain over the decision to subcontract but insist that the union's agreement will depend upon reaching an overall agreement. This may forestall the employer's ability to save money

through subcontracting and force a resolution of the agreement.[98] The union may want to put other issues on the table to trade for agreement on the issue over which the employer seeks change. Be careful not to insist on bargaining on any non-mandatory subjects. Similarly, even if the employer has no obligation to bargain over the decision, but must bargain over the effects, the union can insist that other matters be discussed at those bargaining sessions. If the employer delays in bargaining over the effects, the conduct may be an unfair labor practice.

Another tactic is to agree to bargain over the particular proposed action provided the employer agrees that any agreements be included in the final agreement. For example, the union may agree to the layoffs provided that they be accomplished by seniority and that the employer agree to seniority in the final and complete agreement.

8. Part of offensive bargaining is avoiding impasse even while bargaining for a first agreement. The reason to avoid impasse is that the employer can legitimately refuse to continue meeting once an impasse has been reached unless the impasse is subsequently broken. This is described in more detail below when we describe avoiding impasse in negotiations for a successor agreement. The offensive bargainer must be careful to avoid impasse which might excuse the employer's refusal to meet. Although such an impasse might excuse the employer's refusal to meet on the terms of a new contract; it would not excuse the employer's obligation to meet on the day to day events within the plant.

9. Another aspect of learning to bargain offensively is to bargain *from* the employer's proposals and to make it excruciating both because of information requests and also because of the enormous amount of bargaining that can be required. Although we illustrate this below further, it is worth giving one good example here.

Unions often want some form of strict seniority: "Layoffs, recalls, promotions *etc.* will be by [plant, classification *etc.*] seniority."

When bargaining for a new agreement, the employer will often insist on maintaining the status quo –namely almost complete discretion to layoff or to make assignments without regard to seniority. The employer may propose, then, something like this: "Layoffs, recalls, promotion *etc.* will be based upon skill, ability, attendance, attitude, performance all in the employer's discretion. If these factors are equal then seniority shall be considered."

The normal union response is to say that the employer's proposal is unacceptable and to refuse to discuss the proposal. This is absolutely the wrong tactic. If the union is bargaining the employer to death (or avoiding impasse) the union must respond that it will seriously consider the employer's proposal. This may not be wholly the truth, but it is part of bargaining.

Once the union has said it will consider the employer's proposal, ask the employer to describe the skill, ability, attitude *etc.* of everyone in the

unit! Attempt to agree upon and put in writing each description much like an evaluation. Bargain over each employee as to each factor.

Ask the employer to describe other factors which might be included in the proposed categories. For example, inquire where would attendance, cleanliness, safety, cooperativeness *etc.* be found in each category listed. The creative bargainer can think of 100 additional descriptions to fit in each employer category. The union can ask the same information for each such subcategory!

During this process it will become apparent that in exercising the decision to layoff, recall, promote *etc.*, the decision will depend upon what job is involved. For example some jobs involve certain skills while others do not. The union will want to ask for job descriptions, and descriptions of each job in the facility to determine what skills are required when considering layoffs.[99]

Don't stop there. The union should ask the employer if it has utilized these criteria in the past. Invariably it will have to say yes. Then inquire how many people have been promoted, recalled, laid off, transferred, etc., in the past. As to each such action, ask it to specify what factors it used. The employer will resist but the union should point out that it needs the information to test whether it can accept the employer's proposal. Point out that if the employer has fairly, consistently and reasonably exercised its discretion in the past the union may be more willing to agree to its proposal.

The next step is to insist upon interviewing each supervisor who was involved in each decision.

Next the union should insist on seeing all company records involved in each such past decision.

This bargaining over such an issue can be virtually endless where the employer insists on using many variables to determine the outcome of any decision. Note particularly that this tactic loses much of its effectiveness if the union demands all of this information at once!

Return to the beginning for a moment. The inexperienced bargainer will fall right into the employer's trap. The union will simply say "no" to the employer's proposal and as a result will not be able to bargain over the proposal. The offensive bargainer has to be trained to curb his/her instincts and to say he/she will bargain in good faith and consider the employer's proposals.

Part Six: The Use of Offensive Bargaining Techniques to Prevent Impasse and to Force Employers to Withdraw Concessionary Demands in Negotiation

Bargaining for Successor Agreements.

In this section we deal with the situation where the union has had a collective bargaining agreement for one or many terms. When a union buster appears, the purpose of bargaining is often to reach impasse quickly and to then implement concessions. After that occurs the employer generally does not have any obligation to bargain further until the impasse is broken. If the union does not have an appropriate counter strategy, the members will become disheartened and frustrated. Rather than direct their anger at the employer, often a decertification follows.

Unfortunately, too many inexperienced bargainers fall into the employer's trap. The employer prepares a series of very drastic proposals. In states where union security is prevalent, the employer will propose open shop. Or the employer will propose a very broad management's right clause. Or the employer will propose to do away with the union health and welfare and pension. These are all signs the employer wants an impasse. The inexperienced bargainer will take the proposals, look at them and respond with: "Absolutely no —— way. These are strike issues. We won't reach an agreement with these proposals." The employer will politely say: "We feel very strongly about these issues and in light of your adamant stand, we are at impasse." It is that simple and it happens all too often.

Specific Examples of Avoiding an Impasse.

The response by the union that wants to avoid impasse has to be the opposite. For example, the union must say: "We don't like your proposals, but we will consider and explore them." Once the union indicates a willingness to bargain over these drastic proposals and the union bargains, impasse can be avoided for months or longer. In some cases impasse can be delayed so as to be completely avoided. The following are examples.

1. The first example is the seniority problem discussed above and applying it to the employer proposal designed to radically change a strict seniority system.

A contract that contains a strict seniority system would have language like this:

"Seniority shall govern with respect to layoffs, recalls, promotions, transfers and bidding for all jobs. Seniority shall be by [classification, plant, *etc.*]."

Employers on the other hand seek to avoid or minimize the impact of

seniority. A typical employer proposal to reach impasse would read:

"With respect to layoffs, recalls, promotions, transfers and bidding, the following factors shall be taken into account: ability, skill, demonstrated performance, attitude, aptitude, discipline record and attendance all in the employer's sole discretion. If these factors are equal, then seniority shall be considered."

The normal union response across the bargaining table is to reject management's proposal which leads to a fruitless discussion of the seniority system and management's adamant demand to eliminate seniority. Adamant positions on this issue alone could lead to impasse.

In developing a tactic to deal with this problem the union must remember the power of the status quo: the employer must live by the seniority system in the old contract even after it has expired until impasse is reached. Thus as long as the union avoids impasse the employer is forced to abide by the terms and conditions of the contract.

There is an additional way to make the employer's proposal onerous and that is to offensively bargain about it. The union must not categorically reject the employer proposal. Rather words like this must be used: "We do not like the employer proposal. Our members feel that they want seniority to be the governing factor. They are willing to take a look at your proposal and consider it. We know we owe you the obligation to carefully consider all your proposals and we will do that. However, before we can understand your proposal, we need to know how it would work or how it has worked in practice. For that purpose please provide the following information: "Please provide a description of the ability, skill, demonstrated performance, attitude, aptitude, discipline record and attendance of each current employee."

Explain that this information is needed to determine how the company would apply its proposal to the current unit.

Next ask for the same information for each employee at six month intervals for the last three years. Explain that this is needed to determine how the employer's judgment fluctuates over time since the parties are talking about a multi-year agreement. Explain that if the employer'sjudgments in this area do not fluctuate, the union would be more willing to agree to include some or all of these factors in making employment decisions. If the employer responds that there has been no change,[100] then point out that this constitutes a form of practice. Demand that the employer agree that its judgments will probably not change over the life of the agreement.[101] The employer will refuse and then argue that this is a form of bad faith bargaining; namely refusing to put agreements in writing. Bargain about what would cause the employer's judgment to change.

The union likewise has the right to propose characteristics to include in any list by the employer and then to ask for information regarding those characteristics. If the employer lists five characteristics, the union should be able to think up many more!

Further propose that the employer agree to make a list of employees for layoff purposes and agree not to change that list during the agreement. This follows if the employer says it has not changed its judgment during the three years before the request is made.

Next ask the employer for job descriptions for each job in the facility. This is needed to evaluate how those criteria would be applied against any job. Propose negotiations over those job descriptions as an aid to making layoff decisions.

The union would additionally be entitled to all documents which describe job functions, work processes, machine or equipment operation, procedures and policies. This would be relevant to determining how these factors would be applied against each job.

The union would be entitled to know how the employer has made such decisions in the past:

"Please provide a list of each employee who has been laid off, recalled, transferred, promoted or assigned to a job, shift, *etc.* during the last five years. For each employee describe the criteria that were used to make the determination that a specific person was chosen for the position or action. Please describe the ability, skill, demonstrated performance, attitude, aptitude, discipline record and attendance of each person who was selected. Please describe these factors at the time the decision was made."

In the context where seniority governed because of a union contract or employer policy the employer may simply respond by saying seniority governed per the contract. If however seniority was used only for layoffs, for example, insist the employer give the information for recalls, promotions, *etc.* or other actions which were not governed by seniority. Alternatively, ask how the employer would have applied the criteria if seniority would not have governed under the contract.

Ask the name of each supervisor who made each decision. Ask to interview each supervisor as to each decision in order to determine the manner in which each such decision was made.

Next ask for the same information as to each person who was not selected. This is relevant once again to determine how the employer applied these concepts in the past or would have applied these concepts absent a seniority provision.

If the employer has not given up trying to respond to these requests, begin bargaining about possible layoffs job by job. For example, assume one machine is removed from plant, bargain about who in the present complement would be laid off. Assume loss of certain customer orders, and bargain over who would be laid off.[102] Essentially the parties will bargain all possible layoff decisions during the life of a contract. This will be an impossible task since in large facilities the various possibilities for layoffs will be numerous.

If the employer refuses and says he cannot make decisions in the ab-

stract, the union will have to ask very pointed questions. For example, ask if the employer lost sufficient customer orders to mandate a layoff, would the employer lay off employee X, Y or Z? If the employer says he cannot tell, then point out that the employer is proposing criteria which it cannot apply. This is an indication of bad faith bargaining and may pose *Colorado-Ute* problems. (See Part Eleven)

At any time the employer out of frustration refuses to answer the union's questions assert that the employer is not bargaining in good faith. Remember that the NLRB takes the position that one indication of bad faith bargaining is the refusal of the employer to explain its proposals or to answer information requests about its proposals. The offensive bargainer will thus attempt to fashion questions in such a fashion that the employer will become frustrated and refuse to answer questions.

With respect to future employees insist on the right to bargain each one of the criteria as the employee is hired or is subject to layoff, recall *etc.* If the employer insists on retaining that decision for itself, assert a violation of *Colorado-Ute* doctrine.

Tell the employer the union wants to bargain how seniority will govern such issues as vacations, work assignments, usage of equipment,[103] and each minutia of the workplace. Tell the employer that the seniority principles applicable to each different issue may vary so that different seniority language may apply.

This process serves to expose the ridiculousness of having such undefined criteria.

2. Employers often seek unilateral control over health and welfare. Consider the situation where the current agreement which has expired has a jointly trusteed Taft-Hartley plan or a management controlled plan which is satisfactory to the union. Employers will propose to implement their own health and welfare to substitute for a union plan. Or alternatively, they will seek to substitute a considerably worse plan for their current plan. In most cases, these plans involve administration by a third party administrator. These administrators do not want to be subject to scrutiny and yet the union is entitled to carefully scrutinize the administrator. Use the following rationale:

"We do not want to change health care. But we will take a close look at your proposal. If our members can get equal or better health care for less money, it will benefit them. One important factor then is to evaluate the administrator. If the administrator is conservative in analysis of claims, our members will have more claims denied. If the administrator is slow in determining claims, it will be to the disadvantage of our members. These are all items we need to look into."

The purpose of inquiring about the proposed administration of the plan is several fold: (1) Third parties do not want to get involved in bitter labor disputes or subject themselves to scrutiny; (2) The delay in researching the third party administrator may be unacceptable to the employer;

(3) The time and effort in responding may be unacceptable; and (4) There is a legitimate need to insure that the best administrator is chosen for the plan.

The union can interview the administrator and/or send the administrator an information request. See Exhibit B as an example of a relevant information request.

Note that a list of clients is relevant so that the union can contact the current clients to determine how good the proposed administrator is. A list of former clients is relevant to determine who fired them and why. And the offensive bargainer can well imagine that most third parties are not going to be interested in divulging this! And that is the point. Lists of criminal convictions are relevant since individuals who are convicted of certain crimes cannot serve as fiduciaries of health care plans. Information on claims processing may trigger confidentiality concerns. Tell the administrator that the names of individuals may be removed or covered up which may be expensive for the administrator.

There are numerous questions which can be asked of any plan administrator with respect to the plan itself. For example, most plans have standard lists of exclusions. One normal exclusion may be for "experimental or investigational procedures." Another may be for services which are not "medically necessary." Ask for more precise definitions of each exclusion. Then ask for examples of all devices or procedures which the plan has excluded from coverage. Tell the employer the union wants to submit these examples to its consultant or compare to similar exclusions in the current plan.

Although the purpose of this inquiry is wholly legitimate, it may have the effect of convincing the proposed administrator he would rather not have the account since it is more trouble than it is worth. In any case where the employer is seeking to implement new health care, this will take some time to gather this information.

In bargaining over health and welfare the union must carefully examine the proposed plan. Often it will provide that the plan provider can change the benefits with or without notice. Insist that such right to make unilateral changes is a violation of the *Colorado-Ute* doctrine discussed below. Often the plan will be inconsistent with the employer's proposed language in the contract. For example, the plan will not be consistent with respect to eligibility requirements or will contain restrictions not mentioned in the contract proposal.

The union can propose to find alternatives. The union can do its own search and get health care providers and or plans to bid on the company proposals. Normally the union should not make this offer until the union is forced to accept the company's benefit schedule. At that point the union can say that it will accept the benefit schedule but that it wants to explore alternative providers both to insure members will get best price and to determine whether a better administrator is available. Where an HMO

or PPO is involved, this kind of bargaining may not be as practical. Nonetheless, the union is entitled to bargain over which HMOs will be utilized.[104]

If the employer is anxious or desperate to shift health care because of cost factors, this kind of bargaining will wholly frustrate the employer. The employer will never get to impasse so it can implement. The union's leverage is immense. If the employer implements without a bona fide impasse, its liability can be tremendous. The employer will owe back contributions to the original health care plan as well as interest and liquidated damages as charged by the health care plan or trust fund. Additionally, if any employees have out of pocket medical expenses which would have been covered by the previous plan, the employer will have to reimburse them. If employees paid their own contributions under COBRA those employees will have to be reimbursed. The employer will have already paid for its own health and welfare costs and thus will suffer a *double* obligation which is a very expensive lesson for the recalcitrant employer.[105]

Information Demands

There is often information an employer will not want to disclose for fear the union will misuse it. Try to figure out what that information is and devise a legitimate reason for asking for it. See Part Seven for examples. Be careful not to threaten to misuse the information otherwise the employer may have a legitimate reason to refuse to provide it.[106]

Part Seven: The Use of Offensive Information Requests

The Legitimate Use of Information Requests

An aggressive, offensive and successful tactic is the use of fully detailed and intrusive information requests which are legitimate and justifiable. We have already described many examples of the use of such information requests. In this section we describe the legal theory for such requests and provide some additional examples.

Information requests are a totally legitimate tactic because they force the employer to justify proposals by producing data to explain or justify what are often outrageous proposals. Attached to this paper as Exhibit A are examples of information requests which may be utilized in most circumstances.[107] The attachment is designed to give an idea of the information which may be legitimately requested depending on what issues are being discussed.[108] The theory of offensive bargaining recognizes that employers who want to force a strike or impasse will make proposals which are unacceptable to the union and which require significant changes. The more drastic the proposals, the more bargaining that may occur and the more information for which the union may legitimately ask. First, we present a brief discussion of the principles relevant to the employer's obligation to provide information.

The General Theory of Information Requests

The general legal principles concerning information requests are as follows:

> It is well settled that an employer has a statutory obligation to provide on request, relevant information the union needs for the proper performance of its duties as a collective-bargaining representative.
>
> Where the union's request is for information pertaining to employees in the bargaining unit which goes to the core of the employer-employee relationship, that information is presumptively relevant. However, where a union has requested information with respect to matters occurring outside the bargaining unit, the burden is on the union to demonstrate that the information is relevant. In either situation, the standard for relevancy is the same 'a liberal discovery- type standard.'[109]

In addition, where an employer raises a confidentiality concern[110] the Board is "required to balance the Union's need for the information against any legitimate assertion of confidentiality by the employer."[111] An employer has "a duty to come forward with some offer to accommodate its [confidentiality] concerns with its bargaining obligation."[112] Thus, confi-

dentiality concerns are subject to bargaining in order to accommodate those specific defenses.

Some additional comments are helpful.

The standard of relevance of information requests depends upon the circumstances. The Board in general applies "a liberal, discovery-type standard."[113] All that the union need demonstrate is that there is a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities."[114] The union meets its burden "by a showing of 'probable' or 'potential' relevance."[115] There are two presumptions that the Board applies. Certain information is presumptively relevant. This means that the employer must provide it without further explanation from the union. Examples of presumptively relevant material include names and addresses of bargaining unit employees and other information which goes to the "core of the employer-employee relationship..."[116] Other information is not presumptively relevant and the union needs to make a showing of relevance to bargaining. Here the creative bargainer must be able to explain the need for such information.

That is why we have offered explanations to the relevance of much of the information requested in Exhibit A. The creative and offensive bargainer can think of many more justifications.

Where there are arguments by the employer that the information request is burdensome or confidential, the employer can request bargaining over the burdensomeness. For example, the employer can bargain about the union bearing the costs of locating the records or copying them. Similarly where the union requests confidential information or proprietary information, the employer can bargain about protecting the confidentiality of the information by entering into agreements strictly limiting the disclosure of such information. There is however a very important point: the employer must affirmatively request bargaining over such issues; if it fails to do so, it waives its rights to raise such issues in later proceedings.

In assessing whether confidential information must be disclosed the employer must show that its confidentiality needs outweigh the union's need to know the information for its statutory duties.[117] The employer must, however, come forward and offer to bargain about the confidentiality concerns.

The employer may resist an information request because the union lacks good faith in making the request. The union should avoid comments which suggest that the union's purpose is to harass an employer.[118]

Examples of Information Requests

A. Normally unions do not bargain over workers' compensation because it is regulated by state law. The union can insist on obtaining infor-

mation about workers' compensation (See ¶ 2 of Ex. A) on the theory that the employees are unhappy about the processing of workers' compensation claims and want to negotiate a better system of administering claims. Additionally, the union can claim that it wants to negotiate additional benefits or to integrate other benefits into the workers' compensation system.[119]

B. Normally the union does not bargain about public liability insurance coverage. But the union can ask for information about insurance on the theory that it is concerned that there will be adequate protection for employees if they are sued as individuals. See ¶6 of Ex. A

C. Ordinarily a union is not entitled to information about facilities other than the one included in the bargaining unit. The union needs to find a relevance to such information. The union can assert it wants to determine how certain practices which the employer proposes for the union facility are actually enforced at any other facilities. Alternatively, the union wants to consider transfer rights to other facilities and therefore needs to know the working conditions at the other facilities.

D. Customer complaints may not usually be relevant. But if the union can tie the need to have them to possible discipline, they become relevant.[120] It is possible to tie much information to discipline. For example, in a manufacturing facility ask not only for OSHA 200 Logs but also for descriptions of all manufacturing processes (in a food manufacturing facility these would be recipes) so that the union can train its members to avoid discipline for making mistakes. In a hospital setting, records of infectious disease committees would be relevant to worker health and safety.

E. A slaughterhouse kills what are called "downers." These are cattle which are unable to walk up the shoot to be shackled and slaughtered. The union would like a list of downers which the employer maintains for meat inspection purposes[121] Explain that the union, although opposed to piece rates, is concerned because of the extra work involved in hauling downers up the shoot. Tell the employer the union wants $10 per downer premium to be shared among the crew. The employer will say it doesn't want to pay extra. Ask for a list of downers to cost out the proposal and to determine if it will be expensive! The last thing the employer is going to give any union is a list of "downers." It would be an effective leaflet at the restaurants which serve downers: "Patrons: You may be eating a 'downer' today."[122]

F. Consider the employer which proposes its own profit sharing plan[123] which provides that the employer will determine the amount of contribution to put in the plan. Do not simply reject but agree to carefully look at it. Ask for the following information:

Explain that financial statements of the plan are necessary to evaluate the financial condition of the plan. The employer will resist providing the plan's financial statements. Those financial statements will reveal

such matters as the assets of the plan, any unusual gains or losses, unusual contingencies, plan expenses and so on. Ask for the formula by which the amount of profit sharing contribution is determined.[124] Don't stop there.

Additionally, there are some profit sharing plans where employer contributions are discretionary. That is the employer can determine how much is contributed to the plan in its discretion. In these cases the union should ask for the employer's financial statements for a reasonable number of years. Make the following argument: If the employer has been generous and liberal in contributing to the profit sharing plan in the past, the union will be more interested in agreeing to the plan as part of the agreement. If the employer has been cheap in contributing in the past, the union will be less interested in the plan. This can only be measured by looking at the amount of profit as stated by the financial statements to determine if a small or large percentage of the profit has been contributed. The value of the proposed plan is minimal if there has been no profit from which to contribute to the profit sharing plan.[125]

If the employer provides it, then ask for the salaries of officers on the following theory: The union wants to check to see if profits are squandered in salaries and bonuses to management employees. If profits are reduced by large salaries and bonuses, the union will be less interested. Similarly ask for capital expenditures. These expenditures will have the same impact upon profits of reducing them and therefore reducing the employer contribution to a profit sharing plan. The union can point out that although it may be good for the business to retain earnings and invest those earnings in the business, the workers do not immediately benefit. Consider suggesting an alternative in which the employees share in the ownership of the business through receipt of stock.

The NLRB generally does not require employers to turn over profit and loss information or financial information. By offering profit sharing, the employer will have exposed itself to this information request.

Note that if profit sharing is based on a defined amount such as a specified amount to match employee contributions, then financial statements are not relevant on this theory. If the profit sharing plan would permit the employer to terminate contributions or reduce them if the profits decreased or were inadequate, the information would be relevant.

Note that if an employer does not propose profit sharing the union may be able to trap the employer by asking if it would consider a profit sharing plan. The offensive bargainer would propose one where the employer would contribute a discretionary amount from profits. Then ask for the same information in order to evaluate and construct such a plan!

G. In multi-plant settings, some plants may be non-union. Because the employer will not want the union to use any bargaining for organizing purpose, try to find reasons to visit the non-union plants or to obtain information about them. In one bargaining setting an employer proposed

a piece work plan that was in effect at non-union plants. The employer extolled the plan and described how it worked in the other plants. The union plant had a wage system based on an hourly wage. After getting the employer to explain in detail how the plan worked in the non-union plant including describing the employee committees which helped administer the plan, the union asked to have a union representative visit the non-union plants to observe the operation of the plan! The employer wanted no part of having a union official walk through its non-union plants. It modified its proposal.[126]

H. A union may want the employees to have the right to transfer to other facilities if they either are laid off or want to move for personal reasons. Get the employer to agree that transfers may be possible (often without taking seniority) and then ask for all relevant information at all other facilities. Explain that the employees ought to be able to know the conditions in other facilities to make intelligent decisions as to whether to transfer. And if the employer admits that transfers are permissible, the union won't face the argument that inter-facility transfers are not permitted. If the employer makes that argument, the union will want to ask if it has ever happened. If the union can establish that it has happened the union will argue that the policy is discriminatory or a unilateral change.[127]

I. In another case, the employer and union had worked out a grievance and arbitration procedure except the employer wanted to exclude attorneys from arbitration proceedings. The union did not want to exclude attorneys. The union asked the employer for the reason and the employer said that it was too expensive to have attorneys. The union pointed out that it was the company's choice and the company responded by saying that if union had a lawyer present, the company felt the need to do so and therefore it wanted to exclude lawyers altogether.

The union said it would consider the employer position but wanted some information to back up the employer position. The union asked how much the company lawyer cost -- including billing rate and amount of expenses charged. The employer changed its position rather than divulge information!

J. The employer and union had agreed to a no-strike clause. The employer decided to add no-boycotting to the no-strike prohibition. The union said it would consider agreeing but wanted more information such as lists of customers to see who the employer was proposing the union should not boycott! The union could argue that it would agree to partial no-boycotting such as not boycotting large customers or not boycotting customers in certain areas. See ¶ 5 of Exhibit A.[128]

K. The union states it is concerned about exposure to chemicals in the plant or facility. The union can ask for the items listed in ¶ 26 of Exhibit A.

There are endless examples of information which can be legitimately

asked for which an employer will resist providing. The information request can be used to convince the employer that it is better to withdraw a proposal than provide information. It is worth keeping in mind that if the employer withdraws the offensive proposal, a union can consider making a reverse proposal and then asking for the same information. Here is an example:

The employer proposed a favored nations clause. The union said it would consider it if the employer would narrow it to the geographical area of its competition. This is eminently reasonable because a favored nations clause is to protect the competitive position of the employer from lower wages being paid by competitors. The union and the employer began exploring how to define competitive area. The union suggested it would be a geographical area where customers came from (in this case it could be a retail store, car dealership *etc.*). The employer agreed. The union then asked for a list of customers and their addresses to prepare a proposal with a relevant geographical area to limit the effect of the favored nations clause. The employer withdrew the proposal rather than provide the information.

The union responded with its own favored nations clause to the effect that if the union got a better agreement with another employer any place then the employer would have to put into effect better conditions. The union asked for same customer list to devise a proposal that was limited to employer's geographical area!

Information about supervisors is not generally relevant. In discipline situations, the union can get information about similar discipline imposed on supervisors if the union has specific information that suggest that supervisors were disciplined in situations similar to that of bargaining unit members. If the employer is asserting that it has company wide policies, information about the application of those policies to supervisors may be relevant for purposes of understanding how the policy has been applied.[129]

Information about applicants is generally not relevant. The Board has held that a union may obtain information about the hiring and application process where it can show that there has been a change in hiring which may have a discriminatory impact.[130] Similarly, information about non-unit employees is not presumptively relevant; the union must assert some special need for such information.[131]

In a strike situation, always request the names of scabs, their rates of pay,[132] and dates of hire. Generally, the union is entitled to the information except where the employer can demonstrate a "clear and present danger" to the scabs.[133]

Asking for More Than the Law Arguably Allows

There are many special cases where the Board has adopted rules re-

garding information requests. The offensive bargainer needs to understand these rules and sometimes request more than allowed under current Board rules. The reason the union should ask for more is that the law is not clear and the employer runs the risk of not providing the information. Second, the union may be able to justify receipt of information in a particular case where it was not justified in another case. Third, the employer will not be sure if it can justify refusing to supply the information.

Where the employer refuses to provide any information because the employer is refusing to recognize the union; assert a waiver of the employer's right to bargain over burdensomeness or confidentiality.

Where the employer refuses altogether to bargain or flatly refuses an information request, the union has additional leverage. An employer places itself in a risk situation when the union makes an information demand and the employer refuses or fails to demand to bargain over confidentiality and burdensomeness concerns because it is testing the union's representation right. In recent cases the Board has adopted the position that where an employer declines to bargain over confidentiality concerns and the burdensomeness of union requests, the employer waives its right to raise those issues in subsequent proceedings. These cases are important for if a union utilizes the information requests we have drafted, the employer will be placed in an impossible dilemma: It will either have to concede and bargain over such issues as confidentiality, or run the risk of having to provide all of the information.

This question arose in *Tritac Corporation*[134], in which the Board relied upon the burdens established in *Oil, Chemical & Atomic Workers v. NLRB*[135], *Minnesota Mining & Manufacturing Company*[136], *Borden Chemical*[137], and *Colgate-Palmolive Company*[138]. In *Tritac* the Board stated:

> Additionally, to the extent that the Company asserted its right to protect itself against liability, the judge concluded it was incumbent on the Respondent to offer to bargain with the Union to accommodate their respective interests. Thus, the judge essentially concluded that the Respondent, in the face of such a request, cannot simply raise its confidentiality concerns, but must also come forward with some offer to accommodate both its concerns and its bargaining obligation, the judge here found, and we affirm, that the Respondent failed to do so.[139]

In *Maben Energy Corporation* the Board stated:

> In affirming the judge's 8(a)(5) and (1) findings based on the Respondents' refusal to provide relevant information requested by the Union, we find no merit in the Respondents' contention that their refusal was justified because some of the requested information was confidential. The Respondents raised confiden-

> tiality concerns for the first time at the hearing, and at no time complied with the duty to come forward with some offer to accommodate its concerns with its bargaining obligation. At no time has the Union indicated that it would not consider such an accommodation, and it implicitly showed a willingness to do so in its information request by providing for the exclusion of arguably confidential contract sales figures from a relevant document requested.[140]

These cases establish a waiver proposition, and the kind of broad and information requests we propose would place an enormous disincentive on employers to challenge union representation.[141]

In those situations where the employer is refusing to bargain the union should be as creative as possible to make demands for allegedly confidential, proprietary or extensive information. Ask for customer lists, recipes, chemical components, trade secrets and so on. It will require creativity to tie that information to relevant information but if done, the employer will have to provide the information without any confidentiality agreement. It is important that the union does not threaten to misuse such information; indeed it is worth assuring the employer that the union will not misuse it!

These two suggestions may not be sufficient to force an employer to withdraw its objections to dealing with the union, but they certainly impose a higher penalty upon the employer's choice of strategies.

Obtaining Financial Information

The Labor Board requires an employer to provide financial records to support a claim of inability to pay. This arises from a Supreme Court decision, *NLRB v. Truitt Mfg. Co.*[142] In the Board's recent decision in *Nielsen Lithographing Co.*[143], it held that the *Truitt* obligation does not arise where the employer claims that it is at a competitive disadvantage or where the employer claims that there may be a future inability to pay. Most employers now avoid producing the records by avoiding any claim that there is "an inability to pay." Instead, the employer utilizes alternative language such as "lack of competitiveness." The following are examples of words which *would* trigger the obligation to provide financial records:

- 1 "There's a real question of whether we shall be in business at the termination of this contract unless prior contractual concepts are radically altered."
- 2 "Unable to agree to wage increase...because of insufficiency of earnings"
- 3 "Did not have the money."
- 4 Employer "couldn't reach union's numbers, too steep for us;"

"desire to maintain proper balance for business."

- 5 Company "in no position" to grant union's economic requests; "order and sales down;" "too much inventory;" "company in recession, costs up."
- 6 "Because of losses need to cut unit costs by 30 percent over 3 years;" "doesn't make sense to give any increase;" "had liquid assets but not profitable."
- 7 Economic conditions had affected employer "very badly, very seriously"; economic situation a matter of "survival."[144]

The following are examples of words which do *not* trigger the obligation to provide such records:

- 1 "About the economy in general...the sad state of affairs and about some of the concessions that some unions were making in order to help the industries out there that were in financial trouble."
- 2 "...The level of business in the industry and for the Company has been very poor for an extended period of time. We are not pleading poverty...."
- 3 "Company is not very healthy...not doing as well as it should...not too rosy...not pleading inability to pay...."
- 4 "Company profitable, not pleading poverty. But costs of collective bargaining agreement is prohibitive. Need concessions to compete with competitors. Your job is on the line...Recent trends of losing work will continue without concessions."
- 5 "Intense competition...imperative that we considerably lower costs...to survive in today's market."
- 6 "Poor competitive position...need to more closely align their labor costs to that of their competitors...relief on labor costs was essential in order for the company to stay in business...otherwise no one will have jobs."

The problem is how to respond when the employer avoids the *Truitt* obligation to provide financial information. The response is to use the reasons for demanding concessions or refusing wage increases and to make appropriate information requests. This tactic is possible because employers will assert reasons for demanding concessions that are likely to justify very broad information requests.

Take the example where a manufacturing employer complains that it is not competitive. Ask for a list of all current customers using the argument that the union will contact those customers to determine if any of

them are contemplating purchasing from some other source. Ask for a list of all customers who have ceased buying from the employer during the last five years. The union needs this information to test the employer's assertion by contacting former customers to learn the reason why they stopped purchasing: it may have been quality as opposed to price.

Ask for a complete list of prices for goods so that the union can compare the prices of competitors. Ask for any market studies, marketing plans, corporate restructuring proposals and so on to determine whether the employer has been unable to sell because of price or other marketing problems.

As this illustrates, the claim of lack of competitiveness will trigger the right to seek very broad kinds of information. Much of this information will be more sensitive than the financial information the employer is avoiding providing.

Once the information is provided, argue that the employer has not shown lack of competitiveness and that this is a smokescreen for an inability to pay. This will give the offensive bargainer the opportunity to reassert the demand for the financial information.

Where a distributor claims it is losing business to competitors who are undercharging, ask the same questions: Ask for a list of all customers both current as well as ones which have been lost to test the employer's assertion that it has lost business due to competition. The union can assert that it is mismanagement or other factors and that the union needs to contact the customers to determine if the employer is accurate![145]

Bargaining Where an Alter Ego Relationship Apparently Exists

In some cases there may be an apparent alter ego or disguised company which the union believes is bound to the contract. The union should ask for relevant information about any entity which it may believe is such an alter ego. Because the information is sought about another entity, it has no presumptive relevancy. The union is entitled to such information if it demonstrates that when the request is made it had "an objective factual basis for believing that such a relationship existed."[146] See ¶ 44 of Exhibit A for a good alter ego information request.[147]

Summary

With these principles in mind, we have drafted the Exhibit A as an information request directed towards initial bargaining. We have deliberately made it broad for those circumstances where the employer is testing the union's representational status. We have generally ignored confidentiality concerns because of the employer's obligation to bargain in an effort to accommodate those confidentiality concerns. We have not drafted these questions to be totally complete. The union must also avoid sug-

gesting that any of these requests are intended for the purpose of harassing the employer. The intent is legitimately to obtain information missing for bargaining and contract enforcement. The union should emphasize the legitimate need for the information. The union should always be prepared, as a matter of strategy, to send more information requests as bargaining continues. We have generally tried to offer explanations why the information is needed in order to meet the question of relevance where the information does not fall within the scope of information which is resumptively relevant.

Part Eight: Techniques to Meet Particular Employer Proposals

Introduction

There are circumstances where employers propose particularly harsh or outrageous proposals. These proposals are often designed to avoid an agreement rather than to force the union to agree to conditions that are unacceptable. A union can often recognize such tactics: employer proposals to eliminate seniority, union health and welfare, and union security are often a sign of an employer's intent to avoid an agreement. In this section we list some of these proposals and describe appropriate responses.

Favored Nations

Where the employer proposes a favored nations clause, the union should respond that it will consider favored nations if the employer will narrow it to the geographical area of its competition. Normally employers ask for favored nations to insure that the union does not sign a cheaper deal with a competitor giving it an unfair advantage. The union and the employer should begin exploring how to define competitive area. In the case of employer which deals with customers such as a retail store, the union should suggest it would be where customers live. For example, where the employer is engaged in a retail business such as a car dealership or market it would make sense to limit favored nations to an area in which customers live and shop. Normally the employer will agree that this is reasonable. The union should then ask for a list of customers and their addresses to prepare a proposal of the relevant geographical area to limit the effect of a favored nations clause. The employer may respond by saying that names are irrelevant and that only address are needed. The response is that the union wants to check people to see if they trade at more than one dealership or market and whether they would go elsewhere if labor rates are raised. As a result of insisting on information which the employer will not want to divulge the favored nations proposals will be withdrawn.[148]

Employer Controlled Health and Welfare

Where the employer proposes its own health and welfare in place of an established jointly trusteed plan, the union can bargain over who will administer the plan and demand information from the administrator. The union can force the employer to bargain over every benefit rather than the plan as a whole. The union can propose different configurations of the plan and bargain over each and every benefit. If the plan which the employer proposes cannot provide the benefit sought, the union can in-

sist upon attempting to find a provider who will provide the coverage with the conditions sought by the union. Even if it takes several months to get an estimate and to interview the proposed substitute, the union has a right to this information before deciding whether to accept or reject the employer's plan.

The union can bargain over such details as how employees will "co-pay". For example, whether the employee share of the cost will be paid out of payroll deduction or direct pay and, if so, whether on a weekly basis, or payroll period or some other period. Other issues will be raised: What procedures will apply if the employee misses a payment or if the employee is on leave (or leave under the Family Medical Leave Act). Look for each and every detail that can be questioned about the proposed health plan.

Make sure that the union has all the relevant documents. Often employers will provide only a summary plan description. Obtain the plan itself, all contracts with providers, the Form 5500, all claim forms, all applications, change of beneficiary forms etc. The union may want to consult a health care consultant to advise it of relevant issues and questions. That consultant may take some time to evaluate the proposals and may suggest additional information which may be necessary.

Often plans have provisions allowing the provider to unilaterally change the plans upon giving notice to the employer. Object to any such change on the ground that the union insists on no changes during the life of the agreement. Such language raises *Colorado-Ute* problems discussed in Part Eleven.

Employer Controlled Pension Plan or Profit Sharing Plan in Place of Jointly Trusted Plan

Much the same technique can be used to avoid the substitution of an employer controlled pension plan in place of a jointly trusteed plan.

Where the employer proposes its own pension plan which also covers its unrepresented employees, the union should first ask for all relevant information. A union may have access to an actuary or other fund administrator who can evaluate the employer's plan and devise information requests. Ask for all the relevant documents. Do not accept simply the Summary Plan Description. Ask for the plan itself, any adoption agreement or subscriber agreement, financial statements, the Form 5500, actuarial studies *etc.*

The employer will often refuse to vary the terms because it applies throughout the company and the employer will not want to vary it just for union members. Note that plans can have different benefit levels or contribution levels. If the employer refuses to consider alternative schedules for benefits or contributions, the union may have a refusal to bargain charge.

Where the employer proposes a profit sharing plan in lieu of a pension, the union should try to force the employer to divulge financial data to support the proposed plan which the employer will not want to divulge. Some employers will propose a "profit sharing" plan where the contributions are "guaranteed" and do not depend upon profits. Here, there is less room to make the following arguments. Many employers however insist upon proposing profit sharing where there is discretion as to the employer's contributions to the plan.

First, explain that financial statements of the plan are necessary to evaluate the financial condition of the plan. These statements are relevant to determine the financial stability of the plan including the assets and liabilities. The union is entitled to them to judge the viability of the plan. These financial statements will often suggest other issues to discuss. In one case the financial statements revealed significant losses and the union began to question these losses. The employer immediately offered to make the plan whole for the losses!

If the profit sharing is discretionary on the part of the employer, ask for the profit and loss statements and other financial statements of the employer (as opposed to the financial statements of the plan). The employer will resist providing its financial statements. Make the following argument: If the employer has been generous and liberal in contributing to profit sharing plan in past, the union will be more interested in agreeing to the proposed profit sharing plan. If the employer has been cheap in contributing in the past, the union will be less interested in the plan. This can only be measured by looking at the amount of profit as stated by the financial statements to determine if a small or large percentage of the profit is contributed. Note where the employer proposes to contribute a defined amount such as matching employee contributions, this will be harder to argue.

One thing to remember is that many employers want to bargain incentive plans. Those plans may be based upon various criteria such as piece rate systems. An alternative is to fashion a profit sharing system where the employees share in the profits rather than a piece rate or commission structure. The union may trap the employer into saying that it will consider profit sharing based on its profits rather than on some other incentive program. Once the union gets the employer's commitment to agree to such a proposal, the union can then ask for the financial statements to aid the union in the formulation of such a plan.

If the employer provides its financial statements, then ask for salaries of officers on the following theory: The union needs to check to see if profits are paid out in salaries and bonuses to management. If profits are kept down by large salaries and bonuses, the union will be less interested. Similarly ask for capital expenditures. These expenditures will have the same impact upon profits.

The union can then ask for all of the company's books and records to

see if profits are hidden in extraordinary expenses or payments to owners or officers. It might be helpful to be able to support such a request by noting the expensive homes of owners or some other indicia of unusual expenses.

The NLRB generally does not require employers to turn over profit and loss information or financial information. In this context of offering profit sharing, an employer may have exposed itself to this information request.

There are I.R.S. rules regarding so called top heavy plans. Ask for the relevant information to determine if the employer complies with these rules. See ¶ 3 of Exhibit A.

Often profit sharing plans are many pages in length. The union is entitled to bargain every word, phrase and punctuation mark even though they are often forms obtained from banks, stock brokers or even stationery stores. If the employer has such a form (called a prototype) insist that the union be provided a summary plan description. Often employers who are proposing these plans to force impasse do not prepare such documents and it is costly to prepare them since they must have a professional consultant do it. In one case, the employer dropped its proposal for a sharing plan after the union insisted on having the summary plan description prepared.

Union Security

Here, the problem is the employer who proposes to delete union security or refuses to agree to union security. Often the employer will say that it is philosophically opposed to employees being coerced into joining or supporting the union. In that case, the union can ask if the employer has any union security agreements anywhere. To many employers that will be an irrelevant request since the employer will be a single site employer.

Where the employer says that some employees have indicated they do not want to join the union, ask for the names and what they said.

If the employer takes the position that it does not want to interfere with the philosophical choices of employees, ask for a list of the employer's political and social contributions. Argue that by making such contributions, it is forcing the employees to indirectly support those causes since without those contributions, the funds would be available for higher wages or better benefits. Argue that this is relevant to test the employer's position that it does not want to force employees to support an organization in which they do not believe. Try to get the employer to say that it does not coerce employees to support organizations that they do not support. This may offer justification for the information request. It may justify asking an employer to which charities or causes it contributes to test its philosophical position!

The employer may say that it will have trouble getting qualified applicants if there is a union security obligation. Ask for lists of applicants including names and addresses to test if this has been a problem.

Zipper Clause

A zipper clause is dangerous because it leaves the employer free to implement any condition of employment during the life of the agreement so long as it is not specifically covered in the agreement. The following is the typical zipper clause:

> The Employer and the Union acknowledge that during the negotiations which resulted in this Agreement, each party had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Employer and the Union for the term of this Agreement each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, including fringe benefits, even though such subject or matter may not have been within the knowledge or contemplation of the parties at the time they negotiated or signed this Agreement.[149]

In response to such a proposal the union should inform the employer it wants to negotiate *everything* which might occur during the life of the agreement no matter how remote! Demand bargaining over such remote possibilities as closure because of hurricanes, tornados and earthquakes, the sale of business, new federal health care, changes in other laws, as well as every detail of mandatory subjects. The employer may give up on the zipper clause rather than have to bargain every condition of employment and to put every agreement into writing.

This is a wholly legitimate technique. If the employer wants the union to waive rights, the union can insist upon bargaining about everything. Explain this to the employer: The union will agree to a zipper clause only after ALL issues have been bargained. Don't be shy about bargaining about ALL issues.

If the employer refuses to bargain about such issues, and insists on its broad zipper clause, it is refusing to bargain.

Management Rights Clause

The technique described above with respect to a zipper clause will also defeat a broad management rights clause. Often employers propose to reserve the right to take action which involve non-mandatory subjects

such as the right to set prices. This will open the door to force the employer to bargain about such issues including supplying information or withdrawing the proposal!

First, the union can ask for information on each such item. For example, where the employer proposes to reserve the right to set prices, ask for the list of prices. The employer will probably state that prices are a non-mandatory subject of bargaining. Respond by agreeing and demanding that the reference be removed from management rights clause. If the employer persists, persist in the demand for information. But do not bargain to impasse over such issues. Employer insistence on such non-mandatory subjects may taint an impasse.

If the employer insists on the right to subcontract, trap the employer into saying that it might be able to save money and get the work done more cheaply. This will enable the union to bargain over the costs of performing this task. It will further enable the union to contact possible subcontractors to determine if they would do the work and the price which would be charged.

If the employer insists on the right to move the facility, ask what the likelihood is. Get the employer to say that it might depend on where customers are, costs of supplies and so on. Then demand relevant information on the theory that the union wants to determine how likely it is that the employer will move.

Part Nine: A Summary of Offensive Bargaining Tactics

What follows is a list of techniques designed to give a union bargaining in good faith a full arsenal for "convincing" a bad faith employer to engage in meaningful bargaining.

1. *Bargaining Location*

There is no obligation to agree to a bargaining location which is convenient to management. If the employer wants to bargain at its place of business, a union may insist that it be done elsewhere such as at a neutral site. Do not fall into the trap of necessarily using a hotel or other expensive meeting place. Consider some local club, library or community center that might have a small room which the parties can use for free or a nominal charge. The site of bargaining can be a matter of discussion at each session, including whether to change location.[150] If the employer wants to bargain at its office, demand that it pay parking fees.

Bargaining at the employer's place may be useful as an organizing tool to show the workers what the union is doing. It may also be useful because during bargaining the union can always suggest visiting the site of some machinery or other process where an issue has come up. Bargaining at union headquarters sometimes may be helpful since management usually resists going to union offices and this may be an unfair labor practice if the union has bargained at company offices.

2. *Ground Rules*

It is appropriate to bargain over ground rules. Setting these early in the bargaining serves to pin both parties down and removes options from both parties. It may well be better to avoid any ground rules. Ground rules can be the subject of each negotiation session.[151] Employers will avoid ground rules as a means of avoiding agreements. They may use them as weapons to force an impasse (such as resisting changes in a union's committee, use of mediator and so on). The union probably will want to avoid agreeing to ground rules in order to preserve the union's flexibility.

Some ground rules may be non-mandatory subjects such as insisting upon tape recording of bargaining sessions.

Nothing prevents the union from proposing to change ground rules. Make sure that there is some reason to do so and express that reason. Lack of progress or change in attitude may be a sufficient reason to bargain over different ground rules as the negotiations proceed.

Normally, the parties may not refuse to meet with the designated representatives of the other side. There are limited circumstances where the union may want to refuse to meet with a management representative who, for example, has assaulted a union representative. These circum-

stances are rare and limited.[152]

Neither party may impose unreasonable time limits on the negotiation sessions or unilaterally announce time limits on such sessions.[153]

3. Do not prepare proposals for the first session.

The union does not have to come to the table with any proposals. In fact, it is sometimes a terrible mistake to make proposals. Bargain from the employer's proposals. If your strategy is to avoid impasse, presenting union proposals allows the employer to kindly thank the union for the proposals, say that it will review them and then politely, quickly and definitively reject them all. In fact if the union makes proposals and the employer rejects them, an impasse may occur -- particularly if the union says that some of the issues which the employer has rejected are "strike issues" or that the union will not ratify without certain provisions.

The union is sometimes much better off to force the employer alone to make its proposals.[154] The union can then bargain the employer proposals to death. If the employer truly wants to get to impasse, this tactic will force the employer to remove from the table all inconsequential subjects and leave only a few items over which it will expect the union to either impasse or strike.

In the context of bargaining for a successor agreement employer lawyers often make the mistake of drafting comprehensive changes in many areas of the contract. These proposals often encompass minor as well as major changes in the agreement. The union should politely receive the proposal, and point out that it may take a long time to review the proposals. The strategy should be to work off the employer's proposals and to insist that as part of the bargaining process the union will have to understand in very great detail the employer's proposals and to review them carefully.

There are risks to this strategy. First the membership may wonder why no proposals are being given. Second it may give the wrong signal to the employer that the union may concede and cave in with respect to some of the employer's proposals. Obviously, the union cannot say to the membership that the union is interested in delay. But the union can tell the membership that the union has a legal obligation to review the employer proposals and that the union anticipates that it will take a long time to get through the employer's proposals. This is especially important to consider because the employer has a right to communicate with employees the status of bargaining as long as it does not attempt to bargain directly with the employees.[155] And the employer will communicate often with the employees under these circumstances. Point out that understanding the proposal may take a long time particularly where significant changes are proposed or it is the first contract.

To counter this strategy, the employer will demand proposals from

the union. The employer will try to use those proposals by pointing out the differences to argue there is an impasse. The union can refuse to present proposals as long as the union continues to work off the employer's issues. The union will find that sometimes it will make a counterproposal as the parties work through the employer proposals. Since it is a sign of bad faith to consistently refuse to make proposals, the union may want to make sure it makes some proposals as the parties move along to discuss certain proposals. The union may find that the parties will reach agreement on very minor matters. Nonetheless, reaching agreement on some matters is a sign of good faith. In fact the NLRB has often found that, where employers refuse to reach agreement on major issues but reach agreement on relatively minor matters, the employer is bargaining in good faith.

It is also worth pointing out to the employer who repeatedly demands a proposal, that there are theories of negotiation which suggest that making proposals gets in the way of reaching agreement. Rather, these theories say the better approach is to talk about problems while avoiding making any proposals. Thus, the parties need to talk about problems before they make suggestions as to resolving the problems. It would be important to use this rationale on the record to demonstrate the union is bargaining in good faith even though it is not making proposals.

4. Do not reject employer proposals.

Never reject any employer proposal. To the contrary, try to keep employer proposals on the table and under discussion as long as possible. Always say that the union will consider all employer proposals and that the union may accept them if other conditions in the contract are acceptable. For example, an employer proposal might begin to require employees to make co-payments on health and welfare where there has been none, or to implement a piece work system where the employees have enjoyed an hourly wage system. Neither change may seem acceptable. Do not reject. Instead avoid impasse by saying that the union will consider such changes but that the union can only do so in context of the overall agreement. The union can add a comment that it may require the employer giving in on some union proposal. Do not allow the employer to get the union to say that any such issue is a "big" issue or that any such issue is a "strike " issue. This allows the employer to argue that the parties reached impasse on one issue which the union said is a "strike " issue and that this would justify impasse being declared.

5. Determine What is Important.

The employer will probably repeatedly say that all of its proposals are important. This means the union has to engage in extended bargaining over each proposal and make information requests over each pro-

posal. Employers will say this if the union asks the employer to indicate the less important issues or to delete the less important issues. No management representative who has spent hours drafting proposals (or at least has billed his client for many hours) wants to admit that some proposal is insignificant. Besides such an admission will lead to a union response: "Well, if it is insignificant take it off the table." If the employer concedes that some proposals are less important, this doesn't diminish the union's right to bargain over them. Do the same with union proposals; say that they are *all* important. But don't state that any issue is a "strike" issue or that without agreement on a certain issue there will be no agreement. This makes it easier for the employer to insist that an impasse exists at an early stage in the negotiations.

Even if the employer finally admits that some proposals are less important, keep bargaining over those proposals until the employer removes them from the table.

When faced with these tactics, some employers have removed issues from the table to avoid bargaining over them. If this happens make the point that the employer proposed the items it has now removed from the table as part of its bad faith tactics. Second, go back over each such proposal and get the employer to agree not to raise that issue during the life of the agreement. For example, an employer proposed drug testing. The union began bargaining over it and the employer removed its proposal from the table. The union then asked if the employer intended to engage in any drug testing during the life of the agreement. The employer avoided bargaining about the issue by agreeing not to engage in any drug testing during the life of the agreement!

6. Caucuses and Punctuality

Sometimes parties may arrive a little late, or take long caucuses, or find that the other party is canceling meetings or cutting them short. None of this is per se illegal. It may be inconvenient to the employer to schedule half-day sessions but if the union has no other available times, too bad for the employer.[156] To avoid unfair labor practice charges, the union should be able to justify its tactics. It is legitimate to take long caucuses on the theory that the union needs to review carefully each proposal management makes. If long caucuses are taken, it helps the record to explain the necessity for such caucuses. Long caucuses often give management a chance to rethink its position. Take the position early that all issues are important and that careful consideration will be given to all issues.

Remembering that it is an unfair labor practice for the union to bargain in bad faith, the union has to be careful about some tactics. Employers find it particularly offensive if the union takes relatively long caucuses while management is paying its lawyer $300 per hour to wait.

To avoid a charge of bad faith bargaining by wasting time, always try to accomplish something in the caucus even if it is minor.

It is sometimes justified to have lengthy breaks between sessions. If the employer is looking for quick impasse, it will probably try to extract a series of dates at the first meeting. Politely refuse on the ground that it is hard to schedule a number of meetings in advance but make sure the parties set at least one date at each subsequent meeting. Alternatively do not set a date but promise to do so within a few days by phone (or fax).

Make sure that any cancellations are legitimate. Remember that the union cannot refuse to meet so make a record of regular meetings. If the union's schedule is very busy, set tentative dates which are subject to cancellation if the union cannot move another engagement or if the conflict is not resolved. If the union is available when management is not, make a record of the union's availability and unavailability of the employer.

If the union's strategy is to meet often on minor and insignificant issues during the period while the union is negotiating the first contract, the union will have to continually press for meetings. The employer will find all sorts of excuses not to meet. If the union can trap the employer's bargainer into lying about his/her availability, the union may be able to establish an unfair labor practice. Management lawyers will often claim unavailability for long periods of time to avoid negotiating. Use this to the union's advantage by insisting that the employer take no action until a meeting can be set up. Thus, when persons are to be hired, promotions made, openings to be filled on even a temporary basis, insist on a meeting. If the employer resists, claim that the employer cannot take any action until the parties meet. If the employer wants to take the action (particularly such items as layoff) the employer will make itself available. Then insist on talking about other matters.

7. The Need to Consult a Lawyer, Actuary, or Other Professionals

It is legitimate to refuse to agree to language, economic proposals or fringe benefit concepts until the union has had a chance for a consultant, lawyer or actuary to review the language. There are many settings where consulting other people is legitimate: (1) Piece rates systems may require review by an industrial engineer; (2) Contract proposals may require consultation with other union officials; and (3) Job descriptions may require consultation with an expert in personnel practices. The union should be careful it isn't refusing to bargain by failing to have sufficient authority to effectively bargain. One way to avoid this is to reach agreement in principle subject to review by a lawyer or other professional.[157]

Similarly, a meeting can be recessed or postponed pending meeting with a professional advisor (such as insurance consultant, present trust fund administrator, membership or international official).

Keep in mind that such a professional consultant may need additional information. For example, an industrial engineer may need to visit the facility involved, or to examine production records. The actuary may need census data. Wait until the union's consultant has had a chance to review the material before asking for such information. And do *not* ask for all of the information at once. Piecemeal requests are appropriate.

8. Legitimate Reasons to Refuse to Meet

Sometimes there are legitimate reasons to refuse to meet. This can be dangerous but very effective where the employer is pushing for an early impasse. For example, if the employer has withdrawn from a multi-employer bargaining group, wait until the opening of the first meeting and ask for proof of timely and effective withdrawal. Do it as the first meeting opens. If the parties wait until negotiations have opened the union may have waived the union's right to raise this issue. Insist that all letters of withdrawal be provided, ask for a copy of the multi-employer association by-laws and for copies of the records of the multi-employer association records.

The union needs this information to assure that the employer has properly and timely withdrawn from the association and that the union cannot bargain further until this is assured. Send an information request to the association for the same information. Say that the union will quickly seek to resolve the issue but that the union cannot bargain because the union might waive the union's rights to assert that the employer is bound by the multi-employer negotiations. If the employer threatens to file an unfair labor practice charge against the union for refusing to bargain, say that the union will continue to bargain if the employer will waive any argument that further meetings or negotiations would waive the union's position that the employer remains part of the multi-employer unit.

Another example: At the first meeting, take the position (if arguable) that the employer has not properly terminated the agreement, and that it remains in effect through some "ever-green" language. If the employer insists that it has been properly terminated, offer to arbitrate the issue on an expedited basis. The employer runs some risk in implementing if it is wrong.

In some situations the union may be forced to insist that bargaining be suspended because information is needed. The employer may respond by suggesting that the parties talk about other matters while information is gathered and this may be reasonable. Likewise, the union may suspend negotiations in order to file an unfair labor practice and seek a remedy for the employer's illegal conduct. This is risky if the union cannot establish the unfair labor practice.

If the employer implements illegally the union may want to avoid bargaining until the unfair labor practice has been remedied. Alterna-

tively, the union may want to bargain to cost the employer more money or to force the employer to refuse to bargain and thus create further unfair labor practices. Generally bargaining does not remedy the unfair labor practice unless the employer takes affirmative steps to eradicate the effects of the unfair labor practice.[158]

9. *Piecemeal Bargaining*

Sometimes it is appropriate to engage in piecemeal bargaining. This means the union makes no comprehensive proposal but rather bargains over each provision one at a time. This may require making proposals on each section as the parties go along. Do not make information requests until the union discusses each section and has an understanding of that section upon which to base the union's information request and then make the appropriate information request.

When the employer makes a proposal for massive changes to undermine the union, take the position that the union will carefully examine and consider each and every employer proposal. Too often it is the union's tendency to reject out of hand the more outrageous employer proposals. The union gets further if it says it will consider them because the more outrageous, the more bargaining the union may have to do and the more information requests the union will have to make.

To counter this strategy, the employer will demand a comprehensive proposal. The union should stick to its position that it needs to review, section by section, the employer's proposals. Point out that the employer demand for a comprehensive proposal is an effort to avoid talking and thus bargaining about the employer proposals. It is a form of a refusal to bargain. Obviously it is an effort to get the union to take a position which the employer can reject and declare impasse.

10. *Bargaining About Insignificant Proposals*

Pick out some very insignificant section of management's proposals and give it the same attention as if it were a very important issue. Bargain it at length by asking minute questions. It is often possible with care and skill to bargain about the most insignificant proposals for a half day or more. The employer may reconsider its position as to what proposals remain significant. This is a legitimate tool to demonstrate that some employer proposals or positions are ambiguous or impractical. Make this point for the record.

The union can likewise propose insignificant changes or language on minor issues. If the employer balks, indicate that the subject is mandatory and if the employer claims it is insignificant, then the employer can simply agree to the union's position. Then demand that it be reduced to writing and made part of the contract.

11. Reach an agreement on items even if on a piecemeal basis.

To avoid accusations of bad faith bargaining we recommend reaching at least one agreement each bargaining session even if it is on the most insignificant subject as possible. If the parties reach agreement, explain for the record the progress the parties made and that the union hopes the parties will continue to make such progress. As long as the employer makes the proposals the employer has to keep talking about them, or listen to the union keep talking and inquiring about them. Self-serving statements about progress avoid impasse more than accusatory statements aimed at the employer!

12. Review the previous session at the beginning of the next session.

Use the beginning of each session to review what went on in detail during the last session. Do it on the premise that the union wants to make an accurate record. This will normally take a great deal of time and it serves the useful purpose of keeping the bargaining record straight and insuring that parties understand whatever agreements they make. It will help at the NLRB to have such a record.

13. Keep verbatim notes.

This takes extreme discipline but it keeps the record totally accurate. Justify it by stating that the union is keeping a record in case it is necessary to refer to the record in subsequent grievances or litigation or to document the employer's refusal to bargain in good faith. The employer may become very frustrated if the union writes down everything. Ask the employer representative to slow down while the union keeps up.

The employer may suggest using a shorthand reporter. Agree if the employer bears the entire cost and if the union gets a copy at a nominal sum or at no cost. This itself is a subject for bargaining. The NLRB takes the position that neither side can insist on tape recording but the union (or employer) can insist on verbatim notes. If the employer objects, take time to explain the reasons. Explain that the union doubts the employer's sincerity, and that the union has had trouble with disputes over bargaining history in which such notes have become valuable.

The union can even offer to exchange notes at the end of each session. If the parties examine each other's notes, the union may want to use the next session to review and correct the notes. It is not clear if this is mandatory subject. But insist that it is on theory that notes will help reflect the meaning of the contract and that the union insists that notes be consistent and complete. Get the employer to agree to the contents of notes for bargaining history purposes.

It is sometimes justified for the union bargainer to write out in long

hand his/her responses to employer statements or positions. This can be done in order to keep an accurate record as well as to make careful responses to the employer. The employer will have to wait while each response is written out and then read.

14. Make self-serving statements and avoid heated arguments.

Do not get into heated arguments; do not walk out or do anything that suggests the union is frustrated or close to impasse. Remember the strategy is to bargain at length to avoid impasse or on a first contract to bargain until the employer is ready to give the signal that it has had enough.

The union helps itself more by making speeches about the good faith of the union and self-serving declarations about the union's intentions to reach an agreement.[159]

15. Let the employer talk.

Let the employer's negotiator talk as much as he/she wants. This gives the union the opportunity to take verbatim notes and often the employer will say things which trigger questions and lead to more extended bargaining. The more the employer or his representative talks, the more questions that will be generated. Sometimes out of frustration the employer will talk in a less guarded manner than his representative. Sometimes this draws the employer out and the union can determine his position. Sometimes employers talk too much and say things which become the basis of a surface bargaining charge.[160] If the employer makes a speech, take time to rebut each and every thing said. This isn't exactly a filibuster but it is close!

16. Bargain over every detail.

The law allows the parties to bargain over every detail of mandatory subjects of bargaining. For example, the union need not agree on general work rules. Make them as specific as possible. Here is an example. An employer proposed a rule that no weapons be allowed on the premises. Hours were then used to bargain over what weapons would fit this description. More hours were spent defining what knives would or would not fit within the rule and the parties finally settled on a definition by the blade length. The parties hadn't even discussed other weapons yet. This kind of minute and detailed bargaining is justified where the union is concerned about how the employer will try to evade the contract. It is also justified by the employer's new and unreasonable approach to negotiations. Explain that purpose to the employer. Try to place the blame on the employer for the time it is taking to negotiate each section, word

or phrase.

Just cause is another example. Rather than agree upon a just cause standard for discharge the union may insist on bargaining over all possible circumstances which would lead to discharge or other discipline. For example, rather than agree that a clause which reads "An employee may be discharged for use of illegal drugs" insist on defining all drugs subject to discharge, the amounts which will trigger discharge and so on.

Seniority is another area where bargaining may take a long time. Employers often want as much freedom in this area while unions want strict seniority. When an employer proposes modified seniority where ability and experience are taken into account, the union can bargain about how this would apply to each employee.

Where an employer proposes a very broad zipper clause tell the employer the union wants to negotiate everything which might occur so that the union doesn't waive any bargaining rights.

This just illustrates the point that the more discretion the employer seeks to obtain by way of its proposals the more room there is to engage in "full" bargaining.

17. Bargain over interim issues.

The union has the right to bargain over every problem in the work place irrespective of its importance which arises between bargaining sessions so long as the union recognizes the status quo. For example, someone may have been warned or transferred from one shift to another. Insist upon bargaining about that issue during the session set for bargaining on the terms of the contract. The union may even reach a different solution to the issue than the expired agreement provides or than is proposed for the successor agreement.

There is a legal issue as to whether either side may propose and insist upon bargaining about "hiatus" conditions. "Hiatus" conditions are those which govern after the contract has expired. Because the expired terms remain in effect under the doctrine of *Katz* it is unclear whether such "hiatus" bargaining is a mandatory subject. An example might be a proposal that during the "hiatus" the union's right of visitation be limited. The union might propose that all grievances be submitted to expedited arbitration.

The union can insist upon bargaining about incidents such as warnings, discipline and all incidents in the workplace on an interim basis until a new agreement is reached.

18. Bargain about what will be bargained about.

Often the parties have to bargain over what will be bargained about. If the employer wants to talk about a subject matter which the union wants to bargain about later, bargain about the issue of what subject will

be discussed first. Be careful to choose those subjects about which the union can bargain about to give the union an advantage.

19. Confirm with correspondence.

To the extent possible always use correspondence to confirm information requests and agreements made at the bargaining table. Confirm disputes and allegations of bad faith bargaining. This correspondence may serve as part of the union's evidence if the union asserts an unfair labor practice and, additionally, forces the employer to write back stating its position.

Use the fax at appropriate times to set meetings, confirm events or conversations. The union may be able to control the course of bargaining better if the union avoids face-to-face discussions and uses the fax and correspondence.

The correspondence should be filled with accurate and self-serving statements; abusive and threatening language can be cited as evidence of impasse.

It is sometimes appropriate to "hide" by way of a brief reference to a position or point. Sometimes the union wants the employer to take illegal action to create the unfair labor practice but the union needs to object to the employer's position. It is possible to take a position in such a way that the employer won't notice it.

20. Bargain about issues that involve third parties.

The law allows the union to bargain about items that involve third parties such as health and welfare or pension administrators, health care providers and drug testers. The union has the right to bargain about who will administer such programs and/or who will do the testing. The union has the right to propose alternative administrators and to insist upon interviews and information about those administrators. And the union certainly has the right to explore fully the qualifications and experience of such individuals. The union may wish to interview them, view their operations, talk with other clients and fully explore all aspects of their business.

Sometimes these issues require the concurrence of those third parties. For example, an employer may propose a change in health and welfare such as a co-payment or a provision permitting employees to opt out of coverage. The union may need to tell the employer that the union can agree only if the health care plan will permit the change. Getting the health care provider's view may take considerable time particularly if the trustees have to make the ultimate decision. During any period while the parties are waiting for word on such an inquiry the status quo remains.

Sometimes these third parties will want to avoid getting involved. This may force the parties to seek alternatives. This process can cause

further delay. For example, it is not unlawful to demand information about these third parties who may either refuse to provide it or may not want the union researching into such issues.[161]

21. Bargain about non-mandatory issues.

The parties may bargain about non-mandatory issues. Although either side can refuse to discuss non-mandatory subjects, often employers will discuss them. Sometimes employers will discuss issues not knowing for sure whether they are mandatory or not so as not to risk an unfair labor practice for refusing to bargain. Ascertain what areas may be questionable. It will also be an unfair labor practice in violation of §8(b)(3) for the union to insist on bargaining about a non-mandatory subject. But each time the union demands bargaining over a questionable subject, the employer is put at risk if it refuses to bargain. Alternatively, the employer may cave in to avoid bargaining over that subject.[162]

22. Be aware of impractical proposals.

Often employers who want to avoid a contract will put proposals on the table that are impossible to administer or impractical.[163] Look for employer proposals that are impractical. Be willing to bargain about such issues and then bargain about their details. This may point out the impracticability or impossibility of the proposal. This will demonstrate how the employer is wasting time with such proposals.

For example, one employer proposed that employees with spousal coverage for health and welfare could opt out of coverage under a joint labor-management health and welfare plan. The employer proposed that employees opting out of coverage would receive 2 extra vacation days a year. The union spent hours negotiating an alternative: namely that employees would share in the economic savings realized by the employer at a percentage rate instead of extra vacation days. Then the union pointed out that the trustees of the plan would have to agree and the union agreed to contact the trustees to determine their position. Virtually no health plan will allow self-selection like this so it was clear the plan would reject this. When the plan did reject it later the employer had a choice: drop its proposal or bargain about a new plan. And there are few employer sponsored plans which will accept this kind of self-selection. The employer finally realized how much time had been wasted. In traditional bargaining the union would have first pointed out that the trustees would not accept such a proposal and simultaneously rejected it.[164]

The more outrageous the employer proposals are, the more opportunity to demonstrate the impracticality of the employer's proposals. For example, employers who demand no seniority for layoff decision, open themselves to the kind of bargaining described above.

23. Bargain over matters which are subject to intrusive information requests.

Look for management proposals or union proposals which will give access to information about management. Look for proposals that generate information requests that the employer will resist because it would divulge information which is proprietary or embarrassing. Recent interest in quality management and worker involvement in management decisions offer great opportunities for intrusive requests.[165]

As is noted above, employers and unions may be obligated to bargain over the scope of such an information request. Be prepared to negotiate over such issues. Of course, if the employer wants to rush to impasse to avoid the necessary delay in bargaining over the scope of information requests, the employer will supply everything asked for.

24. Propose items that are unusual or predictably unacceptable to the employer.

Bargain over such proposals always stating that there is no impasse but that the union is looking for new solutions and that the union is willing to move. The employer may refuse to discuss such issues. Be careful not to take an adamant position on such subjects to avoid the appearance of impasse. The more creative and unusual a proposal is, the more bargaining which you can create around such proposals.

25. Use of Mediators

Federal and state mediators are generally useless to prod employers to bargain lawfully in these situations. They also cannot testify in NLRB proceedings so the union will need face-to-face exchanges to establish unfair labor practices.

There are circumstances where use of the mediator is advantageous. The union can exchange written proposals and questions through the mediator. Having the written question and answers gives the union the kind of record it may need to establish an unfair labor practice where oral statements by the mediator are inadmissible. Moreover it often takes time to draft such questions and proposals as well as answers. The union can draft them in long hand or use a lap top computer with a portable printer.

Additionally, there is nothing wrong with calling in mediation just before the employer tries to declare impasse. The union can use the mediator to go over the proposals again. The union can use the mediator to repeat the bargaining step by step. The NLRB would view with suspicion an employer's refusal to use a mediator. Equally true, if no progress is made with the help of the mediator it can be taken as a sign of impasse.

26. Trap the employer into giving up information.

If an employer asks for too much by way of concessions he may take the position that it is unable to pay the wages and benefits sought by the union. This may trigger the obligation to makes its financial books available for inspection by the union.

The employer may complain that the union's proposals will create inequities with non-union plants. Then ask to see the wages and benefits and inspect the working conditions at the non-unionized plants.[166] See the many examples elsewhere in this paper.

27. Avoid impasse by negotiating over insubstantial issues after indicating possible agreement with the employer.

After many sessions the parties may be close to impasse because the employer may have issues on the table to which the union cannot agree. To avoid impasse, the union needs to make movement by indicating that it is considering the employer's position (where the union may not have done so before) but any acceptance depends upon whether the union can get agreement on a number of other details concerning the issues before the parties. This forces the employer to bargain about the other issues. Then propose to talk about a number of relatively inconsequential matters all the time asserting that the union's willingness to agree to basic employer proposals depends on whether the parties can work out these other areas.

For example, the union can indicate willingness to agree to an employer's health program provided all the details are worked out.

It is an important strategy to maintain issues in reserve to be bargained about. This means keeping track of issues so that the union can effectively hold important issues hostage until minor issues are resolved. This is a legitimate tactic since the employer may give in on issues in order to get to impasse.

This is also the appropriate time to invoke mediation if not done so already.

28. Insist on reducing all agreements to writing.

One obligation under the NLRA is to reduce agreements to writing and to execute them. Where the union is successfully bargaining over details of employer proposals, the union should insist that all agreements be placed in writing and made part of the agreement. Insist that each and every detail be made part of the agreement. Explain that this is necessary because of the employer's change in attitude and hard-nosed approach. This detail would not be necessary if there were trust between the parties but that trust is now lacking in light of the employer's proposals. Explain that the intervention of the management lawyer signals a change in the relationship which will require this kind of detail so that there will be no

misunderstandings between the parties during the life of the agreement.

Where any employer insists upon a seniority clause with multiple variables such as ability, skill, attitude and so on, bargain over each variable as to each employee. Then reduce each to writing and make the employer sign each agreement. The union can propose an appendix of agreements relating to seniority factors which will read like this:

> The employer and the union agree that as of the date of the signing of this agreement each employee listed below has the following characteristics:
>
> Employee A: Attendance is excellent, skill level is excellent but slightly less than Employee Y...etc

Reducing each such agreement to writing is a legitimate exercise where the employer insists on using such criteria. Where the employer agrees to a reasonable seniority system, the union can forgo negotiating and reducing to writing each such factor.

Where an employer insists upon insurance co-payments bargain about the manner by which employees will make the co-payments. Those details include such issues as whether employees will pay by payroll deduction or direct pay, which payroll periods will be used for deductions, what happens if the employee is on vacation, what happens if the employee misses payment and so on. Put these agreements in writing.

Do not agree with the employer that issues do not need to be in writing. The union need not agree that these agreements be in side letters. This technique may result in a 300 page agreement instead of shorter agreement. But the necessity of negotiating the words of each such agreement is caused solely by the employer's attitude and tactics, not the union's desire to prolong negotiations.

Similarly, all practices, work rules, understanding and so on can be reduced to writing as part of the bargaining campaign. For example, ask the employer to list all practices, work rules and so on. The employer will list a few and then bargain over those. Then get the employer to agree that there are no others and that employees may do anything the employee wants in regard to that issue. The employer will disagree and this will force the employer to negotiate over the terms of this issue.

For example, an employer proposed language: "The employer may engage in drug and alcohol testing." The union insisted on negotiating details of such a proposal and presented a 12 page drug testing proposal. The employer didn't want to negotiate over the proposals and withdrew its proposals. Instead of dropping the issue, the union asked if the employer intended to engage in any testing during the life of agreement. The employer realized that if the employer said it intended to have any testing the union would insist upon reaching agreement on terms of any such testing. So the employer responded by saying that it would not test

during the life of the agreement. The union demanded that it put this in writing with the following words: "The employer agrees that it will not engage in drug or alcohol testing during the life of this agreement." The employer agreed and was forced to put it into writing.

29. Insist on negotiating details of any employer proposal to avoid final impasse and implementation.

Assume that the union needs to make a substantive move to avoid impasse on an employer insistence upon its own retirement plan.[167] In order to avoid impasse the union can say:

"We are willing to accept the employer's concept and to accept in general the employer's retirement plan. But we need now to work out the details."

Here are some examples.

The employer insisted upon its own 401(k) plan where the employer had previously contributed to a jointly trusteed plan. The union finally indicated that it would consider the employer's 401(k) plan. The employer insisted upon a proposal so the union proposed agreeing to the employer contribution rate. This left numerous details to negotiate such as the following: (1) How employees would contribute their share to 401(k) plan; (2) Each and every word of the proposed plan which was over 50 pages long; (3) Inconsistencies between the plan and the employer's proposal such as the plan provided that only employees who were employed on last day of calendar year would participate for that year while employer's proposal was that all bargaining unit employees would participate;[168] (4) The investments in the plan;[169] (5) The appeal process which is required by ERISA; and (6) The terms of any loan policy to participants.[170]

These are more than legitimate issues about which to bargain. There is no need to raise them or bargain about them until the union indicates a willingness to agree to employer's plan. But there is no reason the union has to forego negotiations on these issues simply because the employer demands the union agree to its retirement plan. The union has every right to bargain every detail of the plan particularly when it indicates willingness to agree to the plan. Mostly employers will illegally attempt to avoid negotiating on such issues particularly where they want to create a premature impasse rather than bargain in good faith.

30. Be on the alert for inconsistencies and use them tactically.

Often employers will put together proposals that are not well thought out and that pose contradictions or inconsistencies. It may be to the union's advantage simply to note that there are such inconsistencies and that the union will have to bargain about them. When the employer impasses and implements the union can point to these problems as areas that pre-

vented impasse since the union did not have time to resolve them. Inconsistencies in proposals are also a sign of bad faith bargaining.

Examples are as follows:

> Employer proposes a health plan that makes employees eligible after six months. Ask for a copy of the plan itself and the plan may provide for eligibility after three months.
>
> Employer proposes $10,000 term life insurance. Ask for the policy which may provide less than $10,000 for certain insured employees (such as older employees).
>
> Employer proposes a 401(k) plan applicable to all employees. Ask for the plan itself which discloses that employees must have worked a specified number of hours and that employees must have been employed on last day of the year.

In all these examples, it may not be in the union's interest to raise these inconsistencies immediately. Rather wait until the union needs to bargain over them.

31. Bargain over proposals which create Colorado-Ute-type problems.

Employers often create problems for themselves. We describe the Board's *Colorado-Ute* doctrine below. It will occur in many places. For example:

> Employer may propose a health care plan which leaves benefits totally within the control of health care provider by permitting the provider to change the benefits.
>
> Employer may propose a piece rate system dependent on piece rate studies done by the employer or outside entity.
>
> Employer may propose a retirement plan where employer has right to unilaterally change investments.
>
> Employer may propose a wage system where it reserves right to implement or change payments based upon its sole discretion.

Where the employer does this, the union will want to find out whether the union may grieve any such issues or whether the union will have opportunity to bargain before any such proposal is put into effect. The union will want to put the employer in the position of making its position clear. If the employer insists that the union may not grieve or bargain, the union may want to leave the issue alone so that if the employer implements, it may be illegal.

In each area the union must press the employer do so by stating that

the union does not want any issues left open to grievance or future bargaining during the life of agreement. Indicate the union wants to bargain to conclusion of all issues. Then insist that the employer put in writing all agreements.

For example, if the union insists on bargaining over benefits, the employer may simply agree that it will guarantee a level of benefits rather than bargain. Or the employer may take the position that the subject is non-mandatory and refuse to bargain. Alternatively, the employer may insist on total control – thus creating a *Colorado-Ute* problem for itself.

32. Attempt to undermine the employer's confidence in its representative.

It is not lawful to try to compel an employer to change its bargainer or representative. A union may not refuse to meet with an employer because it has chosen a particular representative. Here are some tactics to embarrass and undermine such a representative:

It is possible to obtain from legal newspapers reports of profits of law firms. Circulate such reports at the bargaining table and congratulate the lawyer and his firm on being successful. Remark how hopefully the negotiations are helping his profits.

Get copies of billing records. These have sometimes fallen into union hands or sometimes can be obtained from court records where lawyers have sought fees in litigation. Pass them out at the table and point out billing practices. Note to the employer that the union hopes that the lawyer will be kinder to them than he has been to others.

Point out that if the lawyer advises the client that impasse is reached and the employer implements, the employer can sue the lawyer for malpractice if it turns out to be incorrect. This means that the employer has no monetary risk because the employer can recover from the lawyer assuming the lawyer is solvent and/or has adequate malpractice insurance.

Find copies of malpractice suits against the lawyer and pass them out.

Find copies of unfair labor practice complaints or decisions involving the lawyer. Point out these problems.

Make jokes or small talk. Remark that the small talk or jokes just cost the employer x dollars at y dollars per hour.

33. Search for inconsistencies, illegalities, and non-mandatory subjects in the employer's bargaining position and use them tactically.

This is part of the larger strategy of carefully reviewing employer proposals for inconsistencies, illegality, non-mandatory subjects and so on. The union may want to avoid calling these problems to the employer's attention. There is a tactical advantage to not raising these issues during bargaining except indirectly. If the employer implements, the union can

point to these issues as grounds for asserting that impasse did not occur and that the employer could not legally implement its proposal.

If the union points out that there are proposals which may be illegal or contain non-mandatory subjects, the employer may attempt to fix them to avoid an unfair labor practice. It is, however, appropriate to at least make some reference to them. The best technique is to object to any implementation and to note in a general way without specifying the exact provision that there are illegal or non-mandatory subjects in the employer's proposals.

As noted above inconsistent proposals are not illegal but only a sign of bad faith bargaining.

34. Using Different Negotiators

The NLRB will find that switching negotiators too often is a sign of surface bargaining. This doesn't mean that the union cannot do it, but there is a limit to the number of times which it can be done. On the other hand sometimes unions have representatives who are knowledgeable in certain areas. There is nothing wrong in bringing in other representatives to negotiate over specific issues. The union could bring consultants to the table where certain issues are raised (such as health and welfare or pension).

35. When bargaining with multi-employer groups different conditions may be bargained for each employer.

Even though it is illegal to attempt to force an employer to abandon a multi-employer group it is not illegal to insist upon different conditions for each employer within a multi-employer group. Unions routinely do this. For example, unions will agree to different wage rates depending upon the employer's location. Often there will be side letters or addendum to the contract to cover specific employers or even specific unions if there is a multi-union bargaining group.

The union may insist upon a higher wage with one employer on the theory that the particular employer is more difficult or its work is more difficult. There may be many reasons to insist upon such different demands.

36. Use information requests to prove unfair labor practices.

Sometimes employers commit unfair labor practices. It is not legitimate to seek information to prove those unfair labor practices. The union can do this if it is careful not to express the position that the purpose for seeking the information is to supply it to the NLRB or to establish an unfair labor practice.[171] The union must find some other legitimate reason for asking for the information.

37. Foreign Language Contracts

In some locations, foreign languages may be used. Depending on the number of employees who cannot read English, it may be necessary to translate the proposed contract into various languages. If the employer says: "Go ahead, do it yourself", demand that the contract be equally valid in any language. Spend time bargaining over the translation!

Part Ten: The Use of Offensive Bargaining During the Term of the Contract

During the life of the agreement, theoretically there is no bargaining, only contract enforcement. However, there are three circumstances where offensive bargaining is useful. The techniques of offensive bargaining are no different than described above.

A. Where a reopener exists in the contract, the union is often the moving party seeking wage increases. However, sometimes it is the employer which is either the moving party seeking wage decreases or is responding to the union's reopener with concessionary demands. Because the NLRB permits the employer to implement after impasse where the employer may make a reopener proposal,[172] offensive tactics may be employed. Likewise the parties are free to utilize economic weapons in support of reopener demands absent clear language to the contrary.[173]

B. There are limited circumstances where the employer intends to make changes in working conditions and must bargain with the union midterm. Generally these situations involve relocations, subcontracting and the like. Here the union may be bargaining over the *decision* in which case these offensive techniques are very useful. If the bargaining concerns only the effects of the decision, the employer has little incentive to reach an agreement since the employer will have already taken the action which is not subject to bargaining.

C. The union is entitled to information from the employer to evaluate and process grievances. In discipline cases for example, the union may ask for a considerable amount of information to evaluate the grievance. Here, the information request must be tailored to the grievance. But the offensive bargainer should always request information necessary to fulfill the union's duty of representation.

Here the union can ask for information to evaluate the discipline imposed. Often where the industry involves public contact the union can think of information about customers or patrons which those customers or patrons may wish to avoid divulging. Only where the employer has promised confidentiality or the customer asks for such confidentiality, can the employer later assert such confidentiality as a defense for not providing information about the customer who may have been involved in an incident which lead to discipline.[174] Some employers may reverse the discipline rather than provide information about customers.

Part Eleven: Employer Excesses and the Board's Decision in Colorado-Ute

A. Since the NLRB has deregulated the bargaining arena employers have taken great license and made proposals which strip the union of bargaining rights. Employers propose broad management rights clauses, merit pay systems, no arbitration and other conditions all of which leave decision-making in the exclusive discretion of the employer and waives any bargaining on the part of the union. These proposals are designed to either force impasse or, if accepted by the weak union, to further strip it of any power in the workplace. These proposals have come under question in a series of cases starting with *Colorado-Ute Electric.* As we have shown above these proposals can be defeated through offensive bargaining.

B. In *Colorado-Ute Electric Association* the employer proposed to continue the existing contractual progression steps and wage rates but added a merit pay system with respect to any increases and described that merit pay program in the following language:

> The merit increase program will provide employees the opportunity of receiving additional increases based on their individual performance and contribution on their job. The amount and frequency of such merit increase will be determined by the Division Head and President and will not be subject to the grievance procedure.

The union rejected the merit pay program and the company unilaterally implemented. After implementation the union specifically inquired "if the Union could talk to management on behalf of the employee [with respect to the merit pay increase]". The employer's response was no.

The Board held that such a merit pay program *proposal* was lawful. First, the mere proposal of this kind of a provision is not an unfair labor practice because merit pay is a mandatory subject of bargaining. The Board held that the proposal that the union "waive its statutory right to bargain over the merit increases timing and amounts" would be lawful. It did so relying upon its decision issued the same day in *Toledo Blade Co.*[176] a case discussed more fully below. Thus, the employer is privileged to at least propose a merit pay system.[177]

What was unlawful, though, was the *implementation* of its proposal without securing the union's agreement. The Board stated:

> Here the Respondent insisted to impasse that employees be eligible for wage increases on the basis of merit, that merit be defined as 'individual performance' and 'contribution on the job,' and that the merit increases be granted at times and in amounts determined solely by management. Having reached impasse, the Respondent was free to consider employees for merit in-

creases and to base its consideration on the criteria mentioned above, for neither of these aspects of its proposal involved the waiver of a statutory right. Employees have no statutory right to be awarded wage increases only on the basis of tenure rather than merit, nor do they have a statutory right not to have merit wage increases based on these two criteria.

The employee's bargaining representative does have the right, on the other hand, to be consulted over the timing and amounts of merit increases before the increases are granted. Having failed to secure a waiver of the Union's statutory right to bargain over the merit increases' timing and amounts, the Respondent was not free to grant increases without consulting with the Union about these matters.

Considerable license is then given to the employer to propose and insist upon a merit system proposal but implementation without the union's agreement is not permissible.

This kind of proposal offers the union an opportunity to engage in offensive bargaining. Where the employer proposes such a merit pay system the union should formulate a response which provides for exhaustive and detailed bargaining over each employee and each proposed merit pay increase. Each such increase should require an exhaustive information request. In the *Colorado-Ute* situation this kind of strategy by the union successfully wore down the employer when in the context of an employer which was granting generous merit pay increases. The employer ultimately withdrew its proposal and went back to a more acceptable pay system.

The problem with this doctrine is that the Courts of Appeal have been hostile to the Board's doctrine. The Tenth Circuit refused enforcement of the Board's decision. In a subsequent case the District of Columbia Circuit rejected the Board's analysis of "waiver" and remanded to the Board to adopt a more reasoned decision.[178]

Colorado-Ute imposes a limitation on the employer's ability to engage in hard bargaining. Although the employer may make such proposals, it cannot unilaterally implement those proposals where the implementation would force the union to waive a statutory right. Thus, once the employer makes such a proposal it places itself in a negotiating box. It is "the settled rule that unilateral changes are lawful only if they are reasonably encompassed by preimpasse proposals made to the bargaining representative;"[179] an employer such as *Colorado-Ute* cannot implement its proposals when it overreaches in this regard.[180]

In *Toledo Blade* the Board initially found no violation. In that case the company demanded that the union continue in effect prior language regarding retirement and/or separation bonuses:

> The company shall have the right to offer other retirement and/or separation incentives in amounts, under terms and conditions, and for periods of time that the Company shall in its sole discretion deem appropriate, and the Union waives the right to raise a dispute or arbitrate with respect thereto.

The Board held that this was a mandatory subject of bargaining and, thus, addressed the question of whether the employer could insist that the union waive its right to bargain over this mandatory subject. The Board held that it was not unlawful for the employer to insist upon that clause. In a footnote, however, the Board conceded that in light of *Colorado-Ute* the "unilateral implementation of such a proposal may not be privileged".

The D.C. Circuit rejected the Board's position with the following reasoning:

> By allowing the Employer to bargain directly with its employees, Toledo Blade's proposal would deprive the Union *pro tanto* of its central statutory role as their representative in dealing with the Employer. This direct dealing clause, therefore, is different in kind from the management rights clause in *American National*, which would have ceded back to the employer an area within which it could set the terms and conditions of employment notwithstanding the union's statutory right to bargain over those matters. The employer's subsequent decisions would be made unilaterally; they would not entail its negotiating with its employees. In contrast, the clause at issue here contemplates direct negotiations between employer and employee: its intent and effect are to exclude the Union from their 'discussions ...concerning the acceptance, rejection or changes in the retirement and/or separation incentive offers.'[181]

The fault of the employer's proposal was that it would permit the employer to deal directly with the employees; had the employer proposed to reserve to itself the exclusive right to decide these issues then it would not have run afoul of Section 8(a)(5). On the other hand, if the employer had reserved to itself exclusively the right to make those decisions it would have run afoul of *Colorado-Ute* had it implemented the proposal.[182]

The Toledo Blade case offers another useful strategy. In that case the contract contained a clear waiver of the union's statutory right to bargain over retirement and/or separation incentives which the union proposed to eliminate in bargaining. This suggests that in every bargaining case where there is a current collective bargaining agreement which contains such waivers, as a part of any "offensive bargaining" strategy, the union should do an inventory of those sections and then propose that each and every one of those statutory waivers be eliminated. The employer's at-

tempted unilateral implementation of any proposal rescinding the waiver would be unlawful under *Colorado-Ute*.

In *Thill Inc.*[183] the employer proposed language which would have contravened the statutory right of employees to engage in union activity involving union related communications under the doctrine of *Our Way, Inc.*[184] Because the employer's proposal would not have permitted union related communications during "working time" and was overbroad the proposal was unlawful when the employer insisted to impasse upon it. Although the Board couched the language of its holding by describing the proposal as "illegal", it was consistent with the doctrine discussed above of employer's proposals which attempt to force the union to waive statutory rights.

Similarly, in *Standard Register Company*[185] the employer's jurisdiction-unit proposal was held to be invalid because it gave the employer unilateral control over the scope of the unit and, therefore, constituted a refusal to bargain. Similarly, in *American Meat Packing Corporation*[186] the Board found bad faith bargaining for among other reasons the employer insisted on the union waiving certain statutory rights without any explanation. The Board in keeping with the decisions mentioned above expressly did not rely upon the employer's failure to make any substantial concessions.

Often waivers of this nature occur in retirement, health plans or insurance plans. Often those plans allow unilateral changes in the plan by the providers or administrators. Raise the contention that such a proposal is a violation of the *Colorado-Ute* doctrine if implemented or is a "perpetual reopener".

In another line of cases the Board has expanded the employer's right to unilaterally impose certain rules of conduct without bargaining. In *Peerless Publications*[187], the Board held that where a rule goes to the "protection of the core purposes of the enterprise" a narrowly tailored rule which is appropriately limited in its application to affected employees could be imposed without bargaining with the union. Defining these rules without running afoul of the Board's relatively strict view is not easy. There are a few situations where the Board has held that employers have overreached. Thus, in one recent case an employer proposed an overbroad disloyalty policy which could not be either unilaterally implemented or bargained to an impasse.[188] Similarly the Board has held that employers may not insist upon changing a unit description in the guise of changing work assignments if the unit description is in the form of describing the work performed by the bargaining unit.[189]

These cases at least place some limitation on the employer's right to engage in hard bargaining and subsequent implementation of its proposals. They reduce the incentive of the employer to make such proposals but, at the same time, afford the union the opportunity to respond with its own proposals which are designed to frustrate the employer's hard bargaining position with a union offensive bargaining position.

Part Twelve: The Union Must Avoid Conduct Which Will Privilege the Employer to Implement Without an Impasse

The union must avoid charges of refusing to bargain in good faith. Just as an employer is susceptible to various charges, the union can commit a refusal to bargain which is a violation of Section 8(b)(3). Such violations may excuse employer misconduct including implementation without an impasse.

There are also a series of cases in which the board has held that an employer may implement when there is no impasse where the union's conduct amounts to a pattern of continual delay and avoidance of bargaining.[190] These cases involve circumstances where the union refuses to meet for a considerable amount of time; delays meetings on a continual basis; expresses an intent not to reach an agreement; asks for last minute information to avoid impasse and similar conduct. The Board looks to the overall conduct of the union to see if it demonstrates the pattern of continual delay and avoidance of bargaining. The offensive bargainer must avoid such conduct otherwise the employer is privileged to implement without an impasse.

The offensive bargainer should continually explain that no impasse has been reached, that the union has flexibility, continue to make movement in various areas even if small, refrain from comments or statements which would suggest no interest in bargaining, meet on some regular basis and otherwise avoid giving the impression that the union is not interested in bargaining.[191]

Equally important, offensive bargaining should never indicate that information is sought for harassment purposes. In fact it is important to make it clear that the union has legitimate reasons for the information requests. Even one statement that the union is intending to "hassle" the employer could be used against the union in unfair labor practice proceedings.

The role of the offensive bargainer is to take charge of bargaining. By using employer tactics which are designed to bust the union, the union can turn the tables on the employer and defeat illegal tactics and force the employer to come to terms on a contract.

Endnotes

[1] We have in some cases repeated legal citations for those who may need them. We also apologize since we have repeated some of the theory of offensive bargaining on the assumption that not all readers will plow through the more theoretical discussions.

[2] Those tactics include comprehensive or corporate campaigns, environmental offensives, community coalitions, shareholder actions, work to rule campaigns, "inside games" and boycotts.

[3] There is one case pending before the NLRB on Exception from a Decision of an Administrative Law Judge which describes some of these tactics. See *Serramonte Oldsmobile, Inc.*, JD(SF)-57-94. In *Sun Valley Ford Inc.*, JD(SF)-97-94, these tactics were successful. The employer did not appeal.

[4] Section 8(e) of the Act prohibits certain kinds of subcontracting clauses which are known as union signatory clauses. Those clauses are lawful in the construction and garment industries. Additionally unions cannot negotiate provisions which allow economic action to enforce otherwise lawful union signatory subcontracting clauses.

[5] Union security is regulated by Section 8(a)(3). A closed shop is one where the employee must be a member of the union before he starts work. Under the NLRA the employee is given a grace period of 30 or 8 days. The obligation to join has been interpreted to mean that the union can only require that the individual pay initiation fees and dues. In terms of bargaining, it is only union security and subcontracting where the regulation occurs.

[6] Section 8(b)(6) prohibits featherbedding but is seldom invoked.

[7] With respect to public employees, the relevant state or federal laws often mandate many conditions of employment which may or may not be incorporated in the agreement.

[8] The Labor Board may not order an employer to agree to a contract provision even to remedy an unfair labor practice. See *H. K. Porter v. NLRB*, 397 U.S. 99 (1970). The NLRB may order an employer to abide by the terms of an agreement once the employer has agreed to those terms.

[9] Unions in the health care field are further restricted in that the notice period is 90 days.

[10] The purpose of this paper is not to discuss the law of secondary boycott. It is worth noting that secondary boycotting can be an effective weapon since neutral parties have little economic interest in a labor dispute. The theory of offensive bargaining employs this concept of entangling neutrals in the bargaining.

[11] *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enforced sub. nom, Iron Workers Local 3 v. NLRB*, 843 F. 2d 770 (3rd Cir. 1989), *cert. den.*, 488 U.S. 889 (1988). See *Morton Electric Inc.*, 314 NLRB 466 (1994)(no remedy for refusal to bargain once employer repudiates).

[12] The employer under current Board law has an incentive to lockout and hire temporary replacements because the employer may implement any conditions for such temporary replacements without bargaining with the union. *Goldsmith Motors Corp.*, 310 NLRB 1279 (1993).

[13] As we shall see there are circumstances where the employer will want to meet repeatedly to get to impasse. In these circumstances the union can utilize the employer tactic of meeting irregularly and inconsistently.

[14] *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956).

[15] *Barclay Caterers*, 308 NLRB 1025, 1037 (1992). A delay as short as 20 days without an explanation has been found to be undue. *Butcher Boy Refrigeration Door Co.*, 127 NLRB 1360 (1960).

[16] *Silver Brothers Co.*, 312 NLRB 1060, 1062, n. 9 (1993).

[17] *Jewish Federation Council*, 306 NLRB 507, 509 (1992) and *Wachter Construction, Inc.* 311 NLRB 215, 216 (1993), enforcement denied, 25 F. 3d 1378 (8th Cir. 1994).

[18] A union also owes the same obligation to supply information. *Newspaper & Periodical Drivers Local 921*, 309 NLRB 90 (1992).

[19] *Bradford Coca-Cola Bottling Company*, 307 NLRB 647 (1992), petition for review granted, enforcement denied, 146 LRRM 2704 (3rd Cir. 1994).

[20] Additional non-mandatory subjects include: (1) insistence upon addition of parties to the contract such as international union; (2) selection of bargaining representative; (3) performance bonds; (4) indemnification agreement; (5) administrative or promotional funds; (6) interest arbitration; (7) union affairs; (8) employees excluded from coverage such as supervisors; and (9) withdrawal or settlement of unfair labor practices or lawsuit.

[21] Because the unilateral change doctrine is grounded in the duty to bargain, the Board recognizes that at some point in negotiations -- the point at which impasse is reached – the employer has sufficiently discharged his bargaining duty so that the obligation to maintain the status quo no longer obtains. See *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enforced *sub nom. Television Artists AFTRA v. NLRB*, 395 F. 2d 622 (D.C. Cir. 1968).

[22] *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993).

[23] 282 NLRB 725, 731 (1987).

[24] 305 NLRB 45 (1991).

[25] 287 NLRB 969 (1987), enforced as modified, *NLRB v. Powell Electrical Mfg.*, 906 F. 2d 1007 (5th Cir. 1990).

[26] *Stephenson-Yost Steel*, 294 NLRB 395, 396 (1989).

[27] *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enforced, 395 F. 2d 622 (D. C. Cir. 1968).

[28] *Hi-Way Billboards*, 206 NLRB 22, 23 (1973).

[29] *Francis J. Fisher, Inc.*, 289 NLRB 815 (1987).

[30] 279 NLRB 1084, 1101 (1986).

[31] *Stephenson-Yost Steel, supra*, 294 NLRB at n. 5 quoting *NLRB v. Eltec Corp.*, 870 F. 2d 1112, 1147 n. 2 (6th Cir. 1989)

[32] See, *Dependable Maintenance*, 274 NLRB 216, 219 (1985) and *Association of D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989), petition for reviewed denied, 924 F. 2d 1078 (D.C. Cir. 1991).

[33] *Stephenson-Yost Steel, supra*, 294 NLRB at 396; *Printing & Communications Local 13 v. NLRB*, 598 F. 2d 267, 273 (D. C. Cir. 1979) and *NLRB v. WPIX*, 906 F. 2d 898 (2d Cir. 1990).

[34] *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

[35] Sometimes those existing policies permit the employer to continue to make unilateral changes. Cf. *Our Lady of Lourdes Health Center*, 306 NLRB 337 (1992).

[36] *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967).

[37] *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988).

[38] *Id.* at 544, n.6. [Citations omitted].

[39] *NLRD v. Insurance Agents*, 361 U.S. 477, 485 (1960).

[40] Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1423 (1958).

[41] *Page Litho, Inc.*, 311 NLRB 881 (1993).

[42] But cf. *Double S Mining, Inc.*, 309 NLRB 1058 (1993)(if union refuses to bargain, employer free to implement whatever it chooses).

[43] A union may not attempt to alter the status quo by imposing work restrictions which are either prohibited by the contract or practice. For example, the imposition of an overtime ban by the union to apply pressure where the expired contract allows overtime at the employer's discretion would be an 8(b)(3) violation. *Graphic Arts International Union Local 280*, 235 NLRB 1084 (1978), *enforced*, 596 F. 2d 904 (9th Cir. 1979).

[44] Even where the employer provides equivalent benefits, the employer will have to reinstate the old health plan including making the plan whole for contributions. *Centra Inc.*, 314 NLRB 814 (1994) and *Fairhaven Properties, Inc.*, 314 NLRB 763 (1994). This threat of double payments for health coverage is a powerful incentive against implementation.

[45] In *Laphani-Hickey Steel*, 294 NLRB 395, 396 (1989) the Board stated:

> In these circumstances, we find the Respondent's precipitous presentation of a 'final offer' instead of exploring the Union's offer to discuss what it was willing to trade for the wage increase, demonstrates its true bargaining objective of declaring an impasse for the purpose of implementing its own terms and conditions of employment rather than reaching an agreement with the union.

Similarly the Board found that bargaining for the purpose of withdrawing recognition is surface bargaining. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enforced, 987 F. 2d 1376 (8th Cir. 1993).

[46] *Reichhold Chemicals*, 277 NLRB 639 (1985), reconsidered, 288 NLRB 69 (1988), petition for review granted in part, enforced in part and remanded *sub nom, Teamsters Local Union No. 515 v. National Labor Relations Board*, 906 F. 2d 719 (D.C. Cir. 1990), cert. denied, 498 U.S.1053 (1991), on remand, 301 NLRB 706 (1992).

[47] The threat to implement without impasse is also an unfair labor practice. *Page Litho, Inc.*, 311 NLRB 881,881 (1993).

[48] On rare occasion the Board has ordered employers to reimburse negotiation expenses to unions. *O'Neill, Ltd.*, 288 NLRB 1354 (1989), enforced, *NLRB v. O'Neill*, 965 F. 2d 1522 (9th Cir. 1993), cert. denied, 509 U.S. (1993).

[49] *Bradford Coca-Cola Bottling Company, supra.*

[50] The union can remind the management lawyer that his/her malpractice policy may be invoked by the client if the lawyer advises the client that no unfair labor practice has been committed.

[51] It is necessary to file the unfair labor practice within six months of the commission of the unfair labor practice because of the statute of limitations contained in the NLRA. It is not necessary to file it immediately upon the commission of the unfair labor practice nor before the strike. Be careful however that the unfair labor practice is filed within six months of the unfair labor practice which in part causes the strike. Similarly make sure that any unfair labor practice attacking the bargaining position of the employer be filed within six months of the unlawful conduct; the six months may begin to run from the unfair labor practices which may be well before implementation!

[52] *supra.*

[53] 288 NLRB at 69.

[54] In one case the Board disingenuously stated that "there may be cases in which the substance of a party's bargaining position is so unreasonable as to provide some evidence of a bad-faith intent to frustrate agreement." *88 Transit Lines, Inc.*, 300 NLRB 177 (1990), enforced, 937 F. 2d 598 (3rd Cir. 1991). Characteristically the Board held that "[this] extreme of conduct [is] not evident here." *Id.* See also, *A. M. F. Bowling Company Inc.*, 314 NLRB 969 (1994) The Board has gone out of its way to disavow reliance on the content of proposals in finding surface bargaining. E.g., *Tennessee Construction Company*, 308 NLRB 763 n. 2 (1992). and *Coastal Electric Cooperative, Inc.*, 311 NLRB 1126 (1993). On the other hand as we note there are circumstances where the contents become relevant because the employer refuses to offer an explanation of the proposal or the proposal contradicts other proposals which will indicate bad faith. But these circumstances relate to the process of bargaining, not the content.

[55] 291 NLRB 1066 (1988).

[56] 291 NLRB 1066 at 1080. In one case the employer insisted on short meetings which were 3 hours or less and refused to meet outside business hours. The employer refused to disclose to the union its reason for such short meetings (the reason was subsequently disclosed at the unfair labor practice hearing) and the employer met only 11 times in seven months. The Board overturned an ALJ who had found surface bargaining. *88 Transit Lines, Inc., supra.* See also *K-B Resources, Ltd. d/b/a Commercial Candy Vending Machine*, 294 NLRB 908 (1989) and *Logemann Brothers Company*, 298 NLRB 1018, 1020-21 (1990). In *Lapham-Hickey Steel Corporation*, 294 NLRB 395 (1989) there were only two bargaining sessions before the employer declared impasse. Although the Board noted the "precipitous" declaration of impasse, the Board did not rely heavily upon the lack of additional bargaining sessions. Impasse can be reached after one session if the union takes an adamant position.

[57] 289 NLRB 1503 (1988).

[58] See *Overnite Transportation Co.*, 296 NLRB 669 (1988), enforced, 938 F. 2d 815 (7th Cir. 1991) in which the Board relied upon far more substantial 8(a)(1) threats as

well as the employer's bargaining conduct to find surface bargaining.

[59] 300 NLRB 324 (1990), affirmed on other issues, 949 F. 2d 249 (8th Cir. 1991).

[60] *O'Reilly Enterprises, Inc.*, 314 NLRB 378 (1994).

[61] 290 NLRB 646 (1988). The successor engaged in subsequent "hard bargaining" including making regressive bargaining proposals and avoided a violation. *Prentice-Hall Inc.*, 306 NLRB 31 (1992).

[62] 296 NLRB 1116 (1989).

[63] 298 NLRB 524 (1990) enforced in relevant part, 968 F. 2d 991 (9th Cir. 1992).

[64] 295 NLRB 607 (1989), petition for enforcement denied, 939 F. 2d 1392 (10th Cir. 1991), cert denied, 504 U.S. (1992).

[65] See, e.g., *Association of D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989), petition for reviewed denied, 924 F. 2d 1078 (D.C. Cir. 1991); *Modern Manufacturing*, 292 NLRB 10 (1988) and *Hamilton Standard Division*, 296 NLRB 571 (1989).

[66] 308 NLRB 763 (1992).

[67] Note that the Board also pointed out that the employer insisted on an arbitration provision where its General Manager would be designated as the arbitrator. The Board did not find that proposal per se non-mandatory; rather it found that such a proposal in conjunction with a bond which would have prohibited the union from striking over a dispute to have effectively indicated bad faith bargaining. What is significant is that the Board did not find the proposals that the General Manger be the arbitrator alone to be sufficient indication of bad faith.

[68] 308 NLRB 1056 (1992), petition for review denied, 987 F. 2d 1376 (8th Cir.1993).

[69] *Radisson Plaza Minneapolis, supra*, (1992). An employer lawyer did the negotiations and was responsible for the unfair labor practices. In some states, it would be necessary for such a lawyer to report this misconduct to the state bar organization. The union could do it for him!

[70] 307 NLRB at 95. See also *Fairhaven Properties, Inc.*, 314 NLRB No. 125 (1994) (finding surface bargaining).

[71] *Do's and Don'ts For Effective Contract Negotiations* by American Arbitration Association.

[72] 71 Management Review 16, 21 (1982)

[73] Where the employer challenges the NLRB certification, the issuance of the complaint is automatic and the NLRB grants summary judgment upon motion of the General Counsel. These proceedings take months. Where other issues arise such as the recognitional status in a successorship situation or where the employer withdraws recognition asserting a good faith doubt, a hearing is required before an administrative law judge. These proceedings take considerably longer.

[74] The techniques we describe are equally applicable to employers who are alleged successors and who refuse to bargain with the union pending litigation of their successorship status.

[75] *Equitable Resources Exploration*, 307 NLRB 730, 746 (1992), enforced, 143 LRRM 3120 (4th Cir. 1993).

[76] *Dickerson-Chapman, Inc.*, 313 NLRB 907, 943-44 (1994).

[77] This theory is discussed more thoroughly in Chapter 7.

[78] For the relevance of this information see *Minnesota Mining & Manufacturing Company*, 261 NLRB 27 (1982), *Borden Chemical*, 261 NLRB 64 (1982) and *Colgate-Palmolive Company*, 261 NLRB 90, enforced, *sub nom, Oil, Chemical & Atomic Workers v. NLRB*, 711 F. 2d 348 (D.C. Cir. 1983).

[79] In one recent case the Region issued a complaint while the employer was resisting the Board order. The ALJ issued a conditional order; that is, if the Court of Appeals reversed the representational finding, the order to provide information without the relevant defenses would be void. The Board affirmed the Judge that the employer unlawfully refused to provide information and made the order unconditional. *Antlwny Motors Company d/b/a Honda of Hayward,*. 314 NLRB 443 (1994).

[80] Employers can insist that the union use information for collective bargaining purposes only. Such an agreement would prohibit the union from giving the information to a competitor or using it to achieve boycott goals. This right would be waived by the employer's refusal to bargain. It would be wise to assure the employer in writing that the union will not misuse the information.

[81] Where layoffs occur, the union must distinguish between the decision to reduce certain work functions which may be a non-mandatory subject of bargaining if labor costs are not involved. The employer has an obligation to bargain over the decision to layoff as opposed to retraining, work sharing, and furloughs. This is different from "effects bargaining" over such issues as severance, continued health and welfare and transfers. Where the employer refuses to bargain over such layoffs, the remedy is back-pay. *Dickerson-Chapman, Inc.*, 313 NLRB 907 (1994); *Porta-King Building Systems*, 310 NLRB 539 (1993), petition for review denied, 14 F. 3d 1258 (8th Cir. 1994) and *Synergy Gas Corp.*, 309 NLRB 179 (1992), petition for review granted in part on another issue, 19 F. 3d 649 (D.C. Cir. 1994). As long as the union timely demands bargaining, the back pay liability continues until the employees are returned to their jobs or impasse is reached. The union should have control over this if the employer chooses to run the risk of not reinstating the laid off workers. *Yukon Manufacturing Company*, 310 NLRB 324 (1993).

[82] Where a unilateral change results in the termination of employees (such as the implementation of a new work rule which makes it impossible for employees to schedule their work), those discharged will receive back pay. *Tuskegee Area Transportation System*, 308 NLRB 251 (1992), enforced, 144 LRRM 2616 (11th Cir. 1993). All that needs to be shown is that "the unlawfully imposed work rules were a factor in the termination." *Id.* at 252.

[83] *Taylor Warehouse Corp.*, 314 NLRB No. 84 (1994).

[84] The employer may not avoid the backpay obligation by offering to bargain only about the unilateral change only while refusing to bargain about all other mandatory subjects. *Dickerson-Chapman Inc.*, 313 NLRB 907 (1994).

[85] The union should think of creative items to bargain over. For example, where the employer is hiring, demand to bargain for some referral system whereby union members on an already established referral system would be given consideration for hiring. The employer will refuse. Explain to the employer that the union has a number of qualified people. When the employer refuses take the position that this is an 8(a)(1),(3) and (5).

[86] This will give the union the chance to ask about discipline imposed on non-bar-

gaining unit members under similar circumstances. Where the employer has multiple sites some of which may be non-union, the union can ask for records of discipline in similar circumstances provided the union can show the same policies are applied at both facilities. This is not usually difficult since the non-union employer often issues company wide handbooks!

[87] The union can often justify going back before the period of recognition on the theory that the information will show employer practices. For example, attendance records will show how the employer has administered an attendance program.

[88] In one unreported case, an employer delayed bargaining for 8 years and the union forced the employer to provide information for the entire eight year period. It is legitimate to ask for information for a reasonable period before recognition for historical purposes.

[89] It is an unfair labor practice for a union to refuse to meet with a management lawyer or to strike or picket to force an employer to get rid of its representative. A union can make use of the lawyer so expensive that the employer is forced to abandon him/her. The union will know it has been successful when the lawyer disappears from the table.

Nor is there anything wrong in remarking about the expense. For example, the union might bargain about some insignificant matter and remark that bargaining just cost X dollars at Y dollars per hour. Alternatively, the union might remind the employer that there are other representatives who can better serve them at a cheaper price. But the union should caution its remarks with the statement that the employer is free to chose his/her representative.

Legal newspapers often publish the profits of large law firms. Remark about the remarkable profits of the management law firm. Sometimes information can be gleaned from LM 20 or LM 21 forms which are available through Freedom of Information Act requests of the Department of Labor. Alternatively the lawyer's fees may be available from court records where the employer has sought fees in litigation.

[90] There are times when the union will want to directly contact the employer. It is not unlawful for the union to attempt an end run around the lawyer; the worst that can happen is the employer can say, "Talk to my lawyer."

[91] The NLRB has rejected the "busy lawyer" defense to a charge of dilatory tactics. *Barclay Caterers, Inc.*, 308 NLRB 1025 (1992).

[92] The consolidation of jobs and tasks is an example of a change requiring bargaining. *Westinghouse Electric.*, 313 NLRB 452 (1993).

[93] Employers have argued that where they make discretionary wage increases, such exercise of discretion does not constitute a unilateral change where different amounts of wage increases have been given. When the employer makes this argument, the offensive bargainer can demand to bargain over the exercise of discretion as to either across-the-board increases or individualized discretionary increases. See *Acme Die Casting v. NLRB*, 26 F. 3d 162 (D. C. Cir. 1994).

[94] The union could even bargain over verbal counsellings which are not even warnings. Suppose an employee is two minutes late and the supervisor makes a comment that the employee should try to be on time. The union can demand bargaining about whether even this mild comment is justified.

[95] The small employer will have substantially less burden to answer information requests; the larger employer may have a much larger burden.

[96] Often employers who do not have a collective bargaining agreement have their own internal procedures. The union can insist on using these procedures until a substitute is negotiated.

[97] Other forms of this tactic are "work to rule" campaigns, refusals to work overtime, refusal to bring tools and other job actions.

[98] It is permissible for the union to refuse to discuss one issue (such as the need for layoffs) if the employer unlawfully refuses to discuss a whole contract. The union can hold the layoffs or subcontracting hostage where there is monetary liability to other issues in the context where the employer refuses unlawfully to bargain about other matters. *Dickerson-Chapman, Inc.*, 313 NLRB 907, 943 (1994).

[99] Remember that most employers will have updated job descriptions to comply with the Americans With Disabilities Act. The union will want the opportunity to bargain job descriptions at some point keeping in mind those requirements.

[100] Employers will sometimes take positions to avoid providing information or bargaining. In those cases where the employer proposes change but concedes there is no information to justify such change, point out that the employer's demand for radical change without supporting data indicates surface bargaining. If the employer claims it has no information likewise assert that the employer is bargaining in bad faith.

[101] Where the employer expresses judgments on employees (such as an employee has good attendance), propose that as an agreement to be reduced to writing. Each and every verbal agreement should be made part of the written agreement.

[102] This may be an opportunity to ask for customer or product information. The union has the right to propose different persons be laid off depending on what customer or product is reduced. This is consistent with an employer's demand that skill, ability, etc. govern.

[103] For example, employees may want to bid on which tractors they drive even if all are ostensibly equal.

[104] This paper is being written without analyzing the effect of the current administration's health care proposals. It would be perfectly legitimate to bargain the effects of any legislative proposal on health care particularly if the employer proposed a zipper clause.

[105] In some cases the current agreement will provide for maintenance of benefits. In those cases the employer will have to continue to pay increased costs even after the contract expires.

[106] The employer has the right to demand bargaining over means of insuring confidentiality. Obviously such bargaining can be the subject of meetings and information requests!

[107] This information request was made as generic as possible. It has to be tailored for different circumstances.

[108] The Board has ruled that a union may not force an employer to obtain information for the union to formulate the union's proposals where the information is available to the union. See *Warner Press, Inc*, 301 NLRB 1161 (1991).

[109] *Knappton Maritime Corp.*, 292 NLRB 239 (1988).

[110] *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

[111] *Johns-Manville Sales Corporation*, 252 NLRB 368 (1988).

[112] *Maben Energy Corporation*, 295 NLRB 149 at n.1 (1989).

[113] *United States Postal Service*, 308 NLRB 1305, 1312 (1992), enforced in part, 18 F.3 d 1089 (3rd Cir. 1994), on remand, 314 NLRB 901 (1994).

[114] *NLRB v. Acme Industrial Co.* 385 U.S. 432, 437 (1967).

[115] *Prentice-Hall, supra*, 306 NLRB at 39.

[116] *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992).

[117] *Appel Corporation d/b/a/ Somerville Mills*, 308 NLRB 425, 442 (1992).

[118] *NLRB v. Wachter Construction, Inc.*, 23 F. 3d 1378 (3rd Cir. 1994).

[119] See *Anthony Motor Company d/b/a Honda of Hayward*, 314 NLRB 443 (1994)(specifically approving information requestregarding workers' compensation). In *Jones Dairy Farm*, 295 NLRB 295 (1989) the Board held that an employer's institution of a work hardening/rehabilitation program was a mandatory subject of bargaining and could not be unilaterally implemented without the union's agreement. The employer's argument that it was a minimum condition of employment set by the State and thus exempt from bargaining was rejected.

[120] See *Anthony Motor Company, supra.*

[121] The list may be available through Freedom of Information Act request.

[122] One good example of this is *Leland Stanford Junior University*, 307 NLRB 75 (1992) where the union sought lists and records of animals which had been improperly destroyed by animal health technicians.

[123] See *Ironton Publications Inc.*, 294 NLRB 853 (1989)(employer must disclose profit sharing plan where implemented for bargaining unit employees) and *Winn-Dixie Texas, Inc.*, 234 NLRB 72, 76-77 (1978)(stock incentive plans are mandatory subjects of bargaining).

[124] *Virginian Metal Products Co., Inc.*, 306 NLRB 257,262 (1992).

[125] In *Circuit-Wise Inc.*, 306 NLRB 766, 767-769 (1992), the Board adopted this theory and required an employer who proposed a profit sharing plan with a discretionary contribution to divulge financial information.

[126] The union will need to demonstrate the relevancy of information from other plants. It is important to focus upon information which would be uniform throughout all plants; the employer will try to limit the request to information which may be available at few locations. *Appel Corporation d/b/a Somerville Mills*, 308 NLRB 425 (1992).

[127] Where the union has concern that the employer will transfer employees outside of the unit, information regarding the other employees is relevant. *Prentice-Hall. Inc.*, 306 NLRB 31, 39 (1992).

[128] The information would also be relevant so that employees would avoid discipline for boycotting the wrong entity.

[129] *United States Postal Service*, 310 NLRB 701 (1993).

[130] *United States Postal Service*, 308 NLRB 1305 (1992). In that case the Postal Service implemented new hiring procedures. The Board was careful to note that it would not require bargaining over the changes in procedure because it has held that employers do not have to bargain over the application and hiring process. On the other hand, the union asserted that the new hiring process would have a discriminatory impact on the bargaining unit. Therefore the Board held that the employer had a duty to bargain over elimination of the allegedly discriminatory practices. The Third Circuit refused to enforce this part of the Board's decision on the ground that subsequent information demonstrated that the union's concern was unfounded. 18 F. 3d 1089 (3rd Cir. 1994), on remand, 314 NLRB No. 152 (1994)

[131] *Westinghouse Electric Corp.*, 304 NLRB 703 (1991).

[132] The union may not insist on the right to bargain over the wages and working conditions of replacements. *Goldsmith Motors*, 310 NLRB 1279 (1993) and *Capitol-Husting Co.*, 252 NLRB 43 (1980), enforced, 671 F. 2d 237 (7th Cir. 1982). Using the rationale of *United States Postal Service, supra*, 308 NLRB 1305, a union might demand to bargain over the discriminatory impact of hiring replacements where there is evidence the employer hired a different ethnic or racial or age group than was on strike.

[133] *Chicago Tribune Company*, 303 NLRB 682 (1991), enforcement denied, 965 F. 2d 244 (7th Cir. 1992).

[134] 286 NLRB 522 (1987).

[135] 711 F. 2d 348 (D.C. Cir. 1983).

[136] 261 NLRB 27 (1982).

[137] 261 NLRB 64 (1982).

[138] 261 NLRB 90, enforced, *sub nom, Oil, Chemical & Atomic Workers v. NLRB*, 711 F. 2d 348 (D.C. Cir. 1983).

[139] 286 NLRB at 522. In this case the Administrative Law Judge found that the employer's failure to come forward with any confidentiality defense until the hearing was another form of delay.

[140] See also, *Kitchen Fresh*, 258 NLRB 523 (1981) and *Anthony Motor Company d/b/a/ Honda of Hayward, supra.*

[141] The union would have the initial burden of showing relevance of the information requests and the waiver would prohibit the employer from raising a confidentiality or burdensomeness defense. Thus, the union must be willing to at least put forth fairly radical proposals in order to justify some of these information requests. See *Anthony Motor Company d/b/a Honda of Hayward, supra.*

[142] 351 U.S. 149 (1956).

[143] 305 NLRB 679 (1991), petition for review denied *sub non. Graphic Communications Union Local 508 v. NLRB*, 977 F. 2d 1168 (7th Cir. 1992) See also, *Burruss Transfer, Inc.*, 307 NLRB 226 (1992); *Beverly Enterprises*, 310 NLRB 222, 226-27 (1993), petition for review granted on another issue, 17 F. 3d 550 (2nd Cir. 1994).

[144] See *The Shell Company (Puerto Rico) Limited*, 313 NLRB 133 (1993)(employer required to turn over financial information even when it expressly disclaims making an inability to pay claim).

[145] In one case the NLRB ordered an employer to turn over a list of customers. Al-

though the employer claimed the list was confidential, the NLRB found that the employer had not maintained the confidentiality of the list and rejected the defense. *Finn Industries, Inc.*, 314 NLRB No. 94(1994). This leaves open the issue of when such lists are confidential and when such lists may be refused to the union even under a promise of confidentiality.

146 *M. Scher & Son*, 286 NLRB 688, 691 (1987). See also *Bohemia, Inc.*, 272 NLRB 1128, 1129 (1984).

147 Good lists appear in *Magnet Coal, Inc.*, 307 NLRB 444 (1992), enforced, 145 LRRM 2200 (D. C. Cir. 1993) and *Construction Labor Unlimited, Inc.*, 312 NLRB 364 (1993)..

148 It would then be possible for the union to propose its own favored nations clause to the following effect:" If the union signs any contract with more favorable conditions, then at the union's option the employer agrees to immediately place into effect the more favorable conditions without affecting or modifying any other conditions." This union proposal may trigger the right to the same information. If the employer refuses to consider the union proposals it may be an unfair labor practice.

149 *TCI of New York*, 301 NLRB 822 (1991).

150 In one case an employer was found to have violated §8(a)(5) where it insisted that negotiations occur at a point which required both parties to travel substantial distances since the purpose was to force the union and its bargaining committee at the three involved units to travel rather than meeting at one of the sites. *BPS Guard Service Inc.*, 300 NLRB 1143 (1991). Cf. *Appel Corporation d/b/a Somerville Mills*, 308 NLRB 425 (1992) (not unreasonable to propose bargaining location away from unit workers but not unreasonable distance to travel).

151 In one case, the Board relied upon the employer's violation of the ground rules as one element to determine that the employer bargained in bad faith. *E. I. DuPont de Nemours and Company*, 303 NLRB 631 (1991).

152 See *Fitzsimmons Manufacturing Company*, 251 NLRB 375 (1980) and *Caribe Staple Co., Inc.*, 312 NLRB 877 (1994).

153 *Caribe Staple Co., Inc, supra*,(1994).

154 The Board has said that it is not unlawful to fail to come to the table with proposals but to develop them as the parties move along in negotiations. *A. M. F. Bowling Company Inc.*, 314 NLRB No. 969 n. 26 (1994).

155 See, *Putnam Buick Inc.*, 280 NLRB 868 (1986), petition for review denied *sub nom, Machinists District Lodge 190, Local 1414 v. NLRB*, 827 F. 2d 557 (9th Cir. 1987)

156 In one case, the employer refused to meet except for limited periods during the day without disclosing why it would not meet at other times. The Board did not find this to be an unfair labor practice since the employer had a legitimate reason for this position even though not disclosed to the union during bargaining. *88 Transit Lines, Inc., supra*..

157 This was employer's tactic in *88 Transit Lines, Inc., supra*.

158 *Larsdale Inc., supra*.

159 In one case the NLRB specifically noted that the union characterized the employer's offer as "bullshit" in determining that an impasse had been reached. *McAllister Bros. Inc.*, 312 NLRB 1121 (1993). The union could have responded with

a self-serving statement such as "questionable, unreasonable, etc." and perhaps avoided impasse!

[160] An extreme example is *Radisson Plaza Minneapolis, supra,* where the NLRB noted that the employer's "extensive perambulations on such topics as changes in tax laws, a former HEW Secretary...union corruption..." indicated an avoidance of bargaining. *Id.* at 96.

[161] The employer must make reasonable efforts to obtain information from third parties. *Rice Growers of California (P.R.) Inc.,* 312 NLRB 837 (1993).

[162] It is safer to raise an objection to bargaining over a non-mandatory subject. Otherwise the employer may lawfully impasse if the union consents to bargain over the issue. *Community Television,* 312 NLRB 15 (1993).

[163] Keep in mind that such a proposal may have a *Colorado-Ute* problem or indicate bad faith bargaining.

[164] An alternative would be to accept the proposal contingent upon acceptance by the Trustees or other appropriate third party.

[165] *ITT Rayonier,* 305 NLRB445 (1991).

[166] For example, one notorious antiunion trucking company was found by the Board to have failed to bargain in good faith where it took that position amongst others. The union should have been entitled to information regarding the nonunion sites to verify the employer's claims. See. *Overnite Transportation Co.,* 296 NLRB 669 (1989), enforced, 938 F. 2d 815 (7th Cir. 1991).

[167] Such moves by the union, strategically timed, are strong indicators of lack of impasse. *Larsdale, Inc.,* 310 NLRB 1317, 1317-18 (1993).

[168] Unfortunately that means the union will have to review the plan very carefully. Often these plans are developed as forms by firms which develop such plans. The employer will not be able to explain apparent ambiguities or inconsistencies. This will require the employer to contact the firm which drafted or provided the plan. It also will impose a tremendous burden on the negotiator who may not be familiar with the terms of such a plan. The union negotiator may have to enlist the aid of a consultant who can review the plan and point to issues about which to bargain.

[169] This is a novel area of negotiating over retirement plans. Often such plans permit investments in various mutual funds. The union can insist that the employer bargain over which mutual funds will be available. Often these plans have an investment advisor who determines where the money will be invested in some investment option instead of mutual funds. The union should insist upon bargaining over each and every investment. Thus the union should demand a list of the investments and then demand to bargain over each stock, bond or other investment in the plan.

[170] The union negotiator can easily think of many more issues to bargain about and, if necessary, ask a consultant to prepare a list of such issues.

[171] *Western Summit Flexible Packaging, Inc.,* 310 NLRB 45, 46 (1993).

[172] *Speedrack Inc.,* 293 NLRB 1054 (1989).

[173] *Hydrologics, Inc.,* 293 NLRB 1060 (1989).

[174] *Resorts International Hotel & Casino,* 307 NLRB 1437 (1991),enforced, 996 F. 2d 1553 (3rd Cir. 1993)

[175] Note that as of this writing the Board has not altered its position in light of the Tenth Circuit's denial of the Board's petition for enforcement. As is also noted above, the Regions have submitted pending cases which implicate *Colorado-Ute* to the Division of Advice. The Division of Advice as adhered to the principle and authorized the Regions to pursue cases on this theory.

[176] 295 NLRB 626 (1989), petition for review granted, *sub nom, Toledo Typographical Union No. 63 v. National Labor Relations Board*, 907F. 2d 1220 (D.C. Cir. 1990), cert. denied, 498 U.S.1053 (1991), on remand, 301 NLRB 498 (1991).

[177] See *The Cincinnati Inquirer, Inc.*, 298 NLRB 275 (1990), petition for review denied *sub non, Cincinnati Newspaper Guild Local 9 v. NLRB*, 938F. 2d284 (D.C. Cir. 1991).

[178] *NLRB v. McClatchy Newspapers, Inc.*, 964 F. 2d 1153 (D.C.Cir. 1992), denying petition for enforcement and remanding, *McClatchy Newspapers, Inc.*, 299 NLRB 1045 (1990). As of May, 1995, the case remains pending before the NLRB.

[179] *Logemann Brothers Company, supra*, at 14.

[180] The employer may be able to implement other parts of its proposals because the Board does not restrict an employer from implementing some, but not all, of its preimpasse proposals.

[181] 907F. 2d at 1223-24.

[182] In a later case the Board held that an employer's insistence on unilateral control of wage increases was not unlawful. In that case the employer deleted its initial proposal which would have given it the right to bargain with the employees directly over the wage increases and in its later proposal reserved to itself exclusively the right to make those increases based upon performance reviews. See, *The Cincinnati Inquirer, Inc.*, 298 NLRB 275 (1990), petition for review denied *sub nom, Cincinnati Newspaper Guild Local 9 v. NLRB*, 938 F. 2d 284 (D.C. Cir. 1991).

[183] 298 NLRB 669 (1990), enforcement denied, 980 F. 2d 1137 (7th Cir. 1992).

[184] 268 NLRB 394 (1983).

[185] 288 NLRB 1409 (1988).

[186] 301 NLRB 835 (1991).

[187] 283 NLRB 334 (1987).

[188] *GHR Energy Corp.*, 294 NLRB 1011, 1012 (1989). See also, *American Electric Power Co.*, 302 NLRB 1021 (1991).

[189] *Antelope Valley Press*, 311 NLRB 459 (1993) and *Bremerton Sun Publishing Co.*, 311 NLRB 467 (1993).

[190] See such cases as *Paramount Liquor Company*, 307 NLRB 676 (192); *AAA Motor Lines*, 215 NLRB 793,794 (1974); *M&M Contractors*, 262 NLRB 1472 (1982); *Firefighters*, 304 NLRB 401 (1991)(finding no continual delay and avoidance by the union); *Bottom Line Enterprises*, 302 NLRB 373 (1991)(finding no continual delay and avoidance by the union); *R. A. Hatch Company*, 263 NLRB 1221 (1982); *Southwestern Portland Cement Company*, 289 NLRB 1264 (1988); *Jefferson Smurfit Corp.*, 311 NLRB 41 (1993) and *Georgia Pacific Corp.*, 305 NLRB 112 (1991), petition for review denied, 981 F. 2d 861 (6th Cir. 1992).

[191] A good summary of these concepts and the conduct that a union can get away with is in *Sun Valley Ford, Inc.*, JD(SF)-97-94 (1994) and *Serramonte Oldsmobile, Inc.*,318 NLRB No. 6 (1995).

EXHIBIT A: INFORMATION REQUESTS

Since a union must justify information requests of non-bargaining unit employees, it may be important to add the following preface: "These requests are limited to bargaining unit employees unless otherwise indicated. The union reserves the right to ask for information beyond the bargaining unit where appropriate."

Note also that the union often needs this information for historical purposes. Thus it might be appropriate to say: "Unless otherwise indicated these requests should be construed as asking for this information for the last five years." It is easier to justify requests for shorter periods and the offensive bargainer will have to judge what would be an appropriate length of time.

In some situations the union will be bargaining where the union seeks information about the administration of present employer conditions. For example, the union will be seeking information about the administration of a current profit sharing plan. It may be useful to make that clear by saying: "The union is requesting this information because it wants to make sure as to how the current plan is being administered."

Note that the request may have to define the employer carefully. Although obvious in many cases, there may be divisions or other entities which should be included in these requests.

The union may also want to advise the employer that these requests are continuing requests: "Please provide any new or updated information that may become available after these requests have been answered."

1. GENERAL REQUEST

For purposes of bargaining please provide the following information:

1. A list of current employees including their names, dates of hire, rates of pay, job classification, last known address, phone number, date of completion of any probationary period, and Social Security number.

2. A copy of all current company personnel policies, practices or procedures.

3. A statement and description of all company personnel policies, practices or procedures other than those mentioned in Number 2 above.

4. A copy of all company fringe benefit plans including pension, profit sharing, severance, stock incentive, vacation, health and welfare, apprenticeship, training, legal services, child care or any other plans which relate to the employees.

5. Copies of all current job descriptions.

6. Copies of any company wage or salary plans.

7. Copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year.

8. A statement and description of all wage and salary plans which are not provided under number 6 above.

2. WORKERS' COMPENSATION

Although workers' compensation benefits are to a large degree regulated by state law, there are some areas in which the employer has discretion and which affect the terms and conditions of employment.

The union is concerned about offering better benefits for injured workers, insuring that injured workers' receive maximum benefits and integrating other benefits with the workers compensation system. The union is concerned to help the employees obtain all the benefits to which they are entitled. In addition, this information is necessary for us to determine whether there is adequate safety in the work site. For purposes of bargaining over those issues the union is requesting you provide the following information:

1. The name, address and contact person for the current workers' compensation carrier.

2. The premium for the workers' compensation coverage including any breakdowns or documents showing the manner in which the premium has been computed for the last five years and any information with respect to rebates or dividends.

3. A copy of any company manual regarding the handling or administration of workers' compensation claims.

4. A copy of all the job accident reports for the last five years.

5. A copy of all workers' compensation claims along with a copy of any document which shows any resolution whether by settlement or litigation for any such claim for the last five years.

6. The amount and nature of any penalties for late payment or any other reason, the name of the person to whom such payments were made, the amount of the payments and the reason for such payments for the last five years.

7. A copy of any current workers' compensation policy.

8. Copies of the OSHA 200 Logs for the last five years.

3. PROFIT SHARING

Although the employees would prefer to be covered by our union pension plan, the union is prepared to consider as an alternative either the employer's current profit sharing plan or an alternative profit sharing plan to be negotiated between the parties. Such a profit sharing plan would have to be based upon an ascertainable measure of the employer's profit as well as some mea-

sure which would be subject to verification and control. Alternatively, the union would be interested in a stock investment plan. For purposes of bargaining the union is requesting the employer provide the following information:

1. A copy of any current profit sharing plan, stock investment plan, 401(k) plan or similar plan affecting any employees including a copy of the current Summary Plan Description.

2. A copy of the Form 5500s for any such plan for the last five years.

3. A copy of the financial statements whether quarterly, yearly or in some other periodic basis for each such plan for the last five years.

4. A copy of any and all actuarial studies with respect to each such plan.

5. Any document which shows the current assets of each such plan including a description of those assets (showing what stocks, bonds or other assets are held).

6. A list of the amount contributed by the employer to the plan, the dates of the contributions and the nature of the contribution (whether in cash, stock or otherwise) for the last five years.

7. Financial statements for the employer for the last five years to be provided on a quarterly and annual basis or on any other such basis as are routinely prepared for the company.

8. The minutes of all meetings of the Board of Directors where there has been any discussion of contributions to any plan for the last five years.

9. A listing of all management employees, their salaries and benefits including expenses for the last two years.

10. A current list of all owners of stock of the company.

11. The price at which the stock is traded on the first of each month for each month during the last five years, the amount of benefits for each employee and a description of whether those benefits are vested.

12. A list of those individuals who have purchased or sold more than 100 shares in the company during the last five years including the name, address and date of the sale and the purchase price of the stock if known.

13. A copy of all agreements with providers, advisors or consultants to the Plan.

14. Copies of all minutes of meetings of any administrative committee or similar committees of the plans.

The information with respect to the financial statements is necessary for us to evaluate the basis upon which contributions have been made to determine whether the employer fairly and reasonably contributes to the profit sharing plan. The information, furthermore, is needed for us to ascertain whether the profit sharing plan will generate or has generated any amounts to the employees. The information concerning the wages and benefits of management personnel is necessary for us to determine whether the company overpays management or allocates the same money into profit.

4. BULLETIN BOARDS

Bulletin boards or places to post notices to employees are an important means by which this union communicates. In order for us to discuss such bulletin boards the union is asking that you provide the following information:

1. Architect's drawings of all locations.

2. Please designate on those drawings where any bulletin board or other area is located where notices have been customarily posted to employees and/or customers.

3. Copies of any policies or procedures with respect to the use of such bulletin boards or places where notices are routinely posted.

4. Copies of all materials which have been posted on bulletin boards.

Upon receipt of this information the union will need to schedule an appointment to inspect all of the work locations to view those areas where notices have been posted. The union has a right to the information with respect to locations other than where the union is recognized in order to evaluate the company's policies and procedures with respect to the posting of such notices.

5. BOYCOTTS

One of the areas of bargaining is the question of whether the union should give up the right to engage in boycotts during the life of the agreement. The union does not intend to waive any of its rights without carefully evaluating what it may be waiving. For example, although the union may be willing to waive the right to boycott certain entities, the union may consider preserving the right to boycott a limited group of entities. The union may agree to define those entities which the union will not boycott by using specific criteria or the union may agree to a provision prohibiting all boycotting. The union may agree not to boycott those entities to which boycotting would be effective or the union may agree only to avoid boycotting those entities where a boycott would be ineffective. In *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988), the Supreme Court established that a union has a broad right to engage in boycotting and this right is an important and effective weapon and will not be lightly given up. Additionally the union needs this information so that if the union engages in a boycott, the union wants to insure

that our members do not erroneously boycott someone illegally and thus subject themselves to discipline. For purposes of bargaining over any such issue the union is asking the employer to provide the following information with respect to those so called "neutrals" with whom the employer does business:

1. The complete list of all vendors and suppliers including the names, addresses, nature of products sold or provided, the amount of purchases from said supplier or vendor within the last 12 months and a copy of any agreement with said supplier or vendor.

2. A list of all banks with whom the employer does business including the addresses of the banks, and the nature of the business with the bank. If there is a loan, the amount of the loan. If there is a checking or savings account, the amount of money in the savings or checking account.

3. The names of all newspapers, radio stations and/or television stations where you place advertisements, the amount of the advertisements placed during the last year and copies of any agreements which you have with respect to such advertising medium. If you use an advertising agency, a copy of any agreement with the advertising agency, as well as the name and address of the agency.

4. If the company leases any equipment or property from anyone, please provide the amount of the lease, the nature of the property leased as well as a copy of any such lease.

5. If the company leases any property including personal or real property to anyone, the name of the person to whom the property is leased, a description of the property and a copy of any such lease.

6. A list, including the names, addresses and phone numbers of any customers of the employer (whether that list is generated from accounts receivable, accounts payable, or advertising).

6. LAWSUITS AGAINST EMPLOYEES BY THIRD PARTIES

The bargaining unit is concerned that they be insulated from any lawsuits filed by third parties which might occur in the course and scope of their employment. For example, they are concerned about whether they would be defendants in lawsuits where there were personal injuries occurring on the premises or elsewhere or claims arising out of the sale of merchandise or out of defects in products. They are also concerned that the employer will adequately protect them by way of hiring lawyers and providing indemnification if there is a settlement or judgment. For purposes of bargaining over some adequate protection from these suits, the union is requesting the employer provide the following information:

1. Copies of all lawsuits filed against the company and/or its employees during the last five years including a copy of the complaint and any document showing the disposition through settlement or judgment of such action.

2. A list of all the law firms and lawyers which have represented the company in any litigation for the last five years including a current fee schedule for those law firms or lawyers.

3. Copies of all public liability policies currently in effect including the amount of premium paid for such policies.

7. FAVORED NATIONS

The union is willing to consider the concept of a favored nations clause which runs in favor of the employer. In order to bargain over such an issue the union will need to know a great deal of economic data to determine whether such a favored nations clause should be limited in geographical area or restricted in terms of the circumstances under which it would be invoked. For purposes of such negotiations the union is asking the employer to provide the following information:

1. The name and home address of all customers of the employer, identifying the location where that customer principally purchases.

2. Financial statements including profit and loss statements for each facility of the company for the last five years.

3. A list of the job classifications, rates of pay and the number of incumbents in each job classification for each of the company's facilities.

4. A list of all entities which are competitors of the employer including all information upon which the employer bases its contention that these entities are competitors. For each such competitor please give all information which the employer has in its possession regarding wage rates and profit and loss for those competitors at each location of those competitors.

8. CIVIL PENALTIES AND CRIMINAL PENALTIES

The union is concerned with respect to any possibility that the employees will be charged with any civil penalty or criminal offense arising out of the performance of their duties. For purposes of bargaining over working conditions that will prevent such charges against the employees or protect them in the event such charges are brought the union is asking the employer to provide the following information:

1. A list of all local, state and federal laws, statutes, regulations or ordinances which the employer believes govern the operation of the business.

2. A list of all notices required by any state or federal law that you have posted at your work locations.

3. Copies of all citations, indictments, criminal charges, civil complaints, information, other documents reflecting any charges by any public agency or authority under any criminal or civil statute against the company for the last five years. For each such document, please provide a complete copy of the document reflecting the charges, and any document which reflects the disposition of said charges.

4. A copy of all company policies which concern, mention or relate to any of the laws, statutes, regulations or ordinances referred to in paragraph 1.

5. A list of all employees who were, in any way, involved in the charges or citations mentioned above. For any employee who was alleged to have or accused of any wrong doing, please provide the nature of the alleged wrong doing and the nature of any discipline, if any, which was imposed upon said employee.

6. A copy of all inquiries from any public official concerning the operation of the business where that inquiry concerned any matter with civil or criminal penalties attached to the operations of the business. Included should be a copy of the company's response if any.

7. Copies of all public liability policies currently in effect including the amount of premium paid for such policies.

9. DISCIPLINE FOR CRIMINAL OFFENSES

The employees are concerned with respect to whether they will be disciplined under any circumstances where the company has knowledge that they have committed any criminal offense or violated any legal duty whether at work or outside of work. For purposes of evaluating this, the union is asking the employer to provide the following information:

1. List the names of all company employees whom to the company's knowledge have been charged with or convicted of any criminal offense no matter how minor (whether misdemeanor, infraction, felony or otherwise).

2. For each employee please provide the name of the employee, the date upon which the employee was charged or convicted of said offense, the results of the criminal proceeding, any action, if any, taken by the company.

3. The same information requested in paragraph 1 and 2 for all company employees who have violated any legal duty.

10. PICKET LINES

To the extent that negotiations concern the union's waiving the right of the employees to respect picket lines, information is needed to evaluate that proposal. To evaluate the extent to which the employees would be faced with a possibility of respecting or crossing picket lines at other locations, the union needs the following information:

1. A list of all locations to which employees have gone in the course of their employments. For each location please give the name of the business entity to which they have gone, the number of times they have gone there in the last five years, the nature of the business which the employees conducted at that location and the nature of the business of the entity to which they traveled.

2. A list of all circumstances where employees have gone to other locations to transact business and have been unable to complete the transaction. For each such instance given the circumstances, the name of the employee involved and describe the consequences to the employer's business.

3. Copies of all collective bargaining agreements governing any other facility of the employer.

11. TRANSFERS

Our members are concerned about their ability to transfer to other locations of the company's business. Such transfers could occur upon either a layoff or closure, or just for personal reasons such as wanting to work closer to home or in a different environment. For purposes of bargaining over such transfers, the union will need to know not only the circumstances under which transfers are permitted but, as well, the jobs and working conditions to which they might transfer. For purposes of this bargaining the union is asking the employer to provide the following information:

1. Copies of all transfer policies or procedures.

2. A statement of all company policies or procedures with respect to transfers.

3. A list of all employees who have transferred from any location to any other location with the date of transfer, the location from which transferred, the location to which transferred, the job classification from which the employee was transferred and the job classification to which the employee transferred. In addition, please provide us the reason or reasons for the transfer.

4. A list of all company locations.

5. A list of all classifications which exist at all other locations as well as a copy of job descriptions; the current pay rates for those jobs and copies of all personnel policies and/or fringe benefits which apply.

6. If any employee has been denied the right to transfer please give the employee's name, the date the person was denied the right to transfer as well as the reason or reasons for such denial.

12. ATTENDANCE POLICY

The union is interested in a reasonable and fair attendance policy. In order to negotiate or administer such a policy the union will need information as to the company's current policy as well as the manner in which that policy has been administered in the past. For purposes of this bargaining, the union is requesting that the employer provide the following information:

1. A copy of any attendance policy or program.

2. A statement of any company policy or program with respect to attendance.

3. A copy of the attendance record of any employee who has been warned either orally or in writing, suspended, terminated or otherwise disciplined because of an attendance problem.

4. A copy of any attendance policies which were in existence during the last five years but which are no longer in effect or have been modified.

5. A copy of the attendance record of any employee who has been late, tardy or absent who has not been warned either orally or in writing.

13. OPERATION OF POWER EQUIPMENT

In the facility there are various kinds of power operated equipment. The employees want to be sure that they are operating that equipment safely and correctly. The union also wants to make sure that the equipment has been safely maintained. As part of bargaining the union will want to negotiate the circumstances under which the equipment is operated to insure safety and correct operation as well as to determine possible premium rates. The union also wants to make sure that the employees will not operate the equipment improperly so as to subject themselves to discipline. For that purpose the union is requesting the employer provide the following information:

1. A list of all power equipment at the facility.

2. With respect to each such piece of equipment please identify the equipment, describe its function and location, and specify the individuals who are expected to operate the piece of equipment.

3. With respect to each such piece of equipment, please provide a copy of any manual or document describing its operation and use.

4. Please provide a copy of all accident reports with respect to the use of each such piece of equipment.

5. Please provide copies of all correspondence with the manufacturer or distributor of that equipment with respect to its operation.

6. Copies of all disciplinary warnings within the last five years with respect to the operation of that equipment.

7. For each such piece of equipment provide a detailed description of the method by which it is to be operated.

8. Provide a copy of all maintenance records.

9. Provide a copy of all maintenance programs.

14. FAMILY LEAVE

The employees are concerned about negotiating a fair maternity and/or paternity leave and/or family leave and/or adoptive leave policy. The union is also concerned that any such leave comply with the Family Medical Leave Act and any applicable state law on leaves. For purposes of such negotiation please provide the following information:

1. A copy of any maternity/paternity/family/adoptive leave/Family Medical Leave Act or state leave act policy or program.

2. A statement of any maternity/paternity/family/adoptive leave/Family Medical Leave Act or state leave act policy or program.

3. Copies of all disability plans or programs including copies of all disability policies maintained by the company.

4. A list of all employees who have taken any kind of maternity/paternity/family/adoptive leave/Family Medical Leave or state leave for the last five years, giving the dates of their leave, the reasons expressed for the leave as well as the reasons expressed for any extensions or changes in the times for those leaves.

5. A list of all employees who have been denied such leave or denied any extension or change in the time of their leave.

6. A list of all employees in the last five years who have had their hours changed or working conditions in any way changed on account of pregnancy or child birth or family emergency. With respect to each such employee please describe the circumstances under which the change occurred.

15. HEALTH CARE BENEFITS

With respect to bargaining over health care benefits, the union is willing to consider the employer's current health care [or proposed plan]. The union would prefer the current [or proposed] union health care plan for many reasons and the union will be willing to discuss those reasons across the table. In order to consider the employer's plan [or proposed plan] the union needs the following information:

1. A copy of the summary plan description as well as the plan.
2. A copy of Form 5500.
3. A copy of any rules, regulations, procedures, administrative manual or procedures or policies which affect or relate to the plan.
4. A cost breakdown of the plan to the employer.
5. The name, address and principal contact of the office which administers the plan.
6. Copies of all claims for coverage under the plan made by employees during the last five years as well as copies of any correspondence or other documents with respect to the processing of those claims and the payments of those claims.
7. Copies of all sick leave and absence records of all employees.
8. A copy of any contracts with health care providers, insurers or health care plans.

16. MERIT PAY

The union is not unwilling to consider a form of merit pay. In order for the union to evaluate any merit pay plan the union needs the following information:

1. A list of all employees who have received any merit pay increases or decreases. For such employee please give the name of the employee, the date that the merit raise or decrease was given, the amount of the increase or decrease, the name of the supervisor(s) involved in the decision and the reasons for the increase or decrease.
2. Please provide a copy of all documents or evaluations which were used by the employer in the course of all merit increases.
3. Please provide a copy of any merit pay plan.
4. Please provide a statement of the company's merit pay plan.

5. If any employee has been denied merit pay please give the name of the employee, the date upon which the employee was denied any merit pay and the reasons for the denial.

6. Please list the name of each supervisor and/or other person who was involved in each merit pay evaluation.

7. With respect to each merit pay evaluation, please list the factors which were used in evaluating whether the person was entitled to a merit pay increase and, if so, how much.

8. If any employee complained of or protested his merit pay increase please give the name of the employee, the date of the protest, the nature of the complaint or protest and describe the results of the protest.

9. Please provide copies of all wage surveys conducted.

10. Please provide names of employees, wage rates and classification of employees at all other locations of the employer where similar work is performed.

17. CUSTOMER COMPLAINTS

Customer complaints can often lead to discipline. The union is concerned about understanding the nature of customer complains, their frequency, which customers complain and so on so that the union can advise the employees so that they avoid possible discipline. The union needs this information to help train the employees to avoid such problems. The union is concerned about establishing a fair procedure to deal with customer complaints and for that purpose asks that the employer provide the following information:

1. Copies of all written customer complaints. Please also provide copies of all internal memorandums concerning oral customer complaints. If the complaints were oral and there is no written record, please provide a description of each such complaint including the customer's name, nature of complaint, employee involved and disposition both with respect to the complaint as well as any discipline which might have been imposed.

2. A description of the investigation which arose out of the complaint and any action taken with respect to any employee involved in the customer complaint.

3. A copy of any company policy or procedure with respect to handling customer complaints.

4. A statement of any company policy or procedure with respect to the handling of customer complaints.

5. A list of all employees who have been disciplined as a result of any customer complaints. For purposes of this question please provide the name of the employee, the date of the customer complaint, the nature of the customer complaint and a description of the discipline imposed. If no discipline was imposed please state the reason why no discipline was imposed.

18. UNSAFE PRODUCTS

The union is concerned that the employees may be handling or exposed to products which are unsafe or unhealthy to any degree. The union may need to bargain over appropriate procedures for handling that material, procedures for protecting the employees from any liability as well as appropriate pay rates or classifications with respect to handling of such products. For purposes of such bargaining please provide the following information:

1. Please provide copies of all reports of inspections by any public agency having to do with health or safety.

2. Copies of all bulletins or documents concerning health or product safety with respect to any product handled by this employer.

3. Any documents which concern or mention or relate to discipline imposed on any employees concerning the handling of an unsafe product.

4. A copy of all MSDSs maintained by the employer.

19. HEALTH AND HANDICAP RISKS

The union is concerned about the health of the employees. The union is also concerned that the union is able to negotiate an acceptable health and welfare program. For purposes of that please provide with respect to all current employees and past employees for the last five years:

1. A list of any known diseases, disabilities or illnesses which any employee has suffered from during the last five years.

2. Please describe any action with the employer has taken with respect to such illness, disease, or disabilities.

3. Please state any company policies with respect to employees with diseases, disabilities or illness.

4. Provide copies of any company polices with respect to employees with diseases, illnesses or disabilities.

20. COLLECTIVE BARGAINING AGREEMENTS

In order to evaluate the company's position and/or policies with respect to these issues the union is asking that the employer provide the following:

1. Copies of all collective bargaining agreements which are currently in effect between this employer and any union. We are also asking that you provide copies of all collective bargaining agreements between this employer and any union which have expired at any time during the last five years.

21. PROMOTIONS

The employees are interested in their right to promotion both within the bargaining unit as well as to promotion from positions within the bargaining unit to positions outside the bargaining unit. They are also concerned about those who have been hired from the outside. For purposes of this bargaining the union needs the following information:

1. Copies of all company procedures or policies with respect to promotions.

2. A statement of all company policies or procedures with respect to promotions.

3. A list of all employees who have been promoted either within classifications within the bargaining unit or from classifications within the bargaining unit to positions outside the bargaining unit. For each such person please give the job classification, the classification to which promoted, the date of the promotion, the pay rate when promoted, the pay rate of the promotion, the reason or reasons for the promotion.

4. With respect to all positions which have been filled by hiring from the outside please state the date an opening occurred, the nature of the position, the pay rate and the reason or reasons individuals were hired from the outside rather than promoting individuals from within.

5. With respect to all employees who have been denied a promotion please give the name of the employee, the date of the denial of the promotion and the reason or reasons the person was denied a promotion.

22. TRAINING PROGRAMS

The employees are interested in having training programs so that they may perform their current tasks better and/or be trained for better positions. For such bargaining the union is asking that you provide the following information:

1. A copy of any and all company training programs.

2. A statement of any and all company policies regarding training.

3. The names of all employees who have been involved in any training program during the last five years with the date or dates of such training program, a description of the training program and the name of the individuals conducting the training program.

4. Please provide the names of all employees who have asked to be trained but have been denied any training during the last five years with the dates of the denial and reason for the denial.

5. Copies of all manuals, directives, policies, operating directions, service manuals, maintenance manuals.

23. LIFE INSURANCE

The employees are interested in a company paid or company sponsored life insurance program. The union will have to negotiate the costs of such a program and often the cost of any such program may be dependent upon the group of individuals who participate in any such program. For the purpose of bargaining over life insurance the union is asking that the employer provide the following information:

1. A copy of all company life insurance plans or programs including a cost breakdown or cost analysis.

2. A list of all company employees with their age and sex.

3. Copies of all company insurance programs along with a cost analysis or cost breakdown.

24. SUMMER OR TEMPORARY HELP

The union is concerned about the circumstances under which summer or temporary help is hired. For purposes of bargaining over this issue the union asks that the employer provide the following information:

1. A list of all individuals who have been hired as summer or temporary help giving the names, the date of hire, the rate of pay, classification, the date of termination and the reason that the temporary or summer help was hired.

2. A copy of any company policies or procedures with respect to the hiring of temporary summer help.

3. A statement of any company policy or procedure with respect to the hiring of any summer or temporary help.

25. LEAVE POLICIES

The employees are interested in having a fair and equitable leave policy whether those leaves are for short or long periods. Such leaves may be for many purposes including funeral, further study, travel, maternity, paternity, family obligations, adoption, illness, recreation or to comply with state or federal laws regarding leave. For purposes of bargaining over such an issue the union asks that the employer provide the following information:

1. A copy of all company leave policies.

2. A statement of all company policies or procedures with respect to leaves.

3. A list of all employees who have taken leave for any period of time for any purpose. For each employee give the name of the employee, the date the leave began, the date the leave ended, and the reason for the leave.

4. With respect to any employee who has been denied any leave please give the name of the employee, the date the employee was denied leave and the reason or reasons that the employee was denied such leave.

26. CHEMICALS AND COMPOUNDS

The employees are concerned about the chemicals or compounds which are used at their work location or to which they may be exposed. The union is concerned that those chemicals be safe and that the employees know how to use them safely. In order for the union to negotiate over these issues the union is asking that the union provide the following the information:

1. A list of all chemicals or compounds which are used, stored or sold at the facility including a description of the ingredients of that chemical or compound, as well as the generic name of all such chemicals or compounds.

2. The location in the facility where that chemical or compound is stored for either sale or use.

3. A copy of any company emergency response plan or program including a copy of any contract with any outside vendor or supplier who provides emergency response in case of any chemical or toxic spill or accident.

4. Results of all clinical and laboratory studies of any employee undertaken by the employer including the results of toxicological investigations concerning chemicals or compounds to which the employees may have been exposed during last five years.

5. Copies of all Material Safety Data Sheets.

6. A list of all chemicals or compounds to which the employees may become exposed or which they may handle other than those listed above including a description of the ingredients of that chemical or compound, as well as the generic name of all such chemicals or compounds.

27. RESTRUCTURING, SALE OF THE BUSINESS OR TAKE-OVER

The employees are concerned about the impact upon their wages, hours and working conditions should the company be restructured, sold or taken over. In order to bargain over such issues we need the following information:

1. A copy of the bylaws and articles of incorporation.

2. A list of the current shareholders showing the amount of shares and class of shares owned.

3. Financial statements.

4. Copies of any reports from consultants, investment advisors, certified public accountants or others concerning the value of the company or any possible restructuring.

5. Copies of all correspondence which concerns the possibility of restructuring, sale and/or takeover of the company.

6. Copies of the minutes of the board of directors.

7. Minutes of all shareholders meetings including any tape recordings or transcriptions of those meetings.

8. Copies of all filings with the Securities and Exchange Commission. Copies of all filings with any state agency which regulates corporate affairs.

28. CASH TRANSACTIONS

The employees are concerned to the extent that they may be disciplined with respect to the handling of cash or non-cash sales. In order for the union to determine how they are to handle cash or non-cash sales and to effectively bargain over issues such as work rules or discipline the union needs the following information:

1. A copy of all company policies with respect to the handling of cash or non-cash transactions.

2. A statement of all company policies with respect to the handling of cash or non-cash transactions.

3. A list of all non-cash items which are accepted in lieu of cash (coupons, etc.). With respect to each such item a copy of all agreements or documents which reflect the manner in which those documents are be handled or the transactions with respect to those items conducted.

4. A list of all employees who have disciplined either orally or in writing with respect to the handling of cash or non-cash transactions. For each person we need to know the date of the discipline, the nature of the discipline, or the nature of the conduct which gave rise to the discipline.

5. Provide copies of all forms which the company utilizes to account for sales.

29. CAFETERIA AND VENDING MACHINES

To the extent that there is either an employee cafeteria or vending machines, the price of food does impact the employees. The union is asking that the employer provide the following:

1. A complete list of all items which are available for sale to employees from vending machines or an employee cafeteria. That list should include all items which have been sold in the last year as well as the price.

2. Please provide a copy of any agreement with the vending machine or cafeteria operator.

30. USE OF PROPRIETARY INFORMATION

The union is also concerned that the employees are trained to recognize proprietary information, use it properly and preserve its confidentiality. The union is concerned with respect to possible discipline which may be imposed for misuse of such proprietary information. In order to bargain over the questions and to represent the employees with respect to the use of proprietary information the union will need the following information:

1. A description and list of all proprietary information.

2. A list of individuals to whom such proprietary information is normally distributed.

3. A description of the location where such information is kept including access codes, if any, if the information is electronically maintained.

4. A statement of company policy with respect to use of proprietary information.

5. Copies of all proprietary information to which bargaining unit members have access.

6. A statement of all proprietary information to which bargaining unit members have access to which is not contained in written form and/or was not provided in response to ¶ 5.

31. REFERRAL RULES AND HIRING HALLS

Employees in this industry have traditionally worked from employer to employer. Traditionally employers have also called this Union for additional help both on a casual basis as well as a long term basis. For that reason the union has maintained a referral procedure or hiring hall. In order to bargain over such a procedure, the union is asking that you provide the following information:

1. A list of all employees hired within the last five years including their names, date of hire, classification, rates of pay, last known employment immediately before working for this company, the source of their hiring (employment agency, walk-in, advertisement etc.) and manner in which they were interviewed and/or hired.

32. LAYOFFS AND RECALL

For purposes of bargaining the union is concerned about the employer's practices with respect to layoffs and recall. The union is requesting that with respect to any employee who has been laid off and brought back to work the following information:

1. The date the person was initially employed, the date or dates the employee was laid off, the name of the employee and the manner in which the employee was recalled on each occasion.

2. A list of qualifications for all job classifications.

3. A copy of all policies or procedures with respect to the employment of employees.

4. A copy of all tests which are given to applicants or employees including application forms. If there is no written test given, a description of the test should be given.

5. A statement of any employer policies or procedures with respect to recalls or layoffs.

6. With respect to each employed who was laid off or recalled a statement of the reason why that person was chosen for layoff or recall, the name of the person who made the decision to layoff or recall that person.

7. If skill, ability or any other factor was used in determining that any person was to be laid off or recalled, please describe the skill, ability and or any other factor for each person who was recalled or laid off.

8. When decisions were made to layoff and any person was not chosen for layoff please describe the skill, ability or any other factor used in making the decision to layoff for each person not chosen for layoff.

9. If skill, ability or any other factor was used in determining that someone who had been laid off was not to be recalled, please provide a description of such factor for each such person not recalled.

33. PRIZES, BONUSES, ETC.

The employees are interested in any bonuses, prizes, or special benefits which are awarded to individuals during the course of their employment. In order to bargain over such items the union is asking that the employer provide the following information:

1. A list and description of all bonuses, prizes, spiffs or rewards or other unusual cash or other gifts given to employees. This list should also include those that were available but were not given to employees.

2. If there are any such programs, a copy of the program should be provided.

3. A statement of any company policy regarding bonuses, prizes, spiffs, rewards or unusual cash or other gifts.

34. HOLIDAY GIFTS

If the employer gives gifts to its employees including at any holiday season the union is interested in bargaining over such gifts. For that reason the union is asking that you provide the following information:

1. A list and/or description of all gifts given to any employee.

2. If the employer maintains any policy or procedure with respect to the giving of gifts to its employees please provide a copy of that policy or procedure.

3. A statement of any company policies or procedures with respect to holiday gifts.

35. SEPARATE ORAL AND WRITTEN AGREEMENTS

The union is concerned whether there are any oral agreements or written agreements with any employees in the bargaining unit. The union is also concerned about any agreements with non-bargaining unit members which may affect bargaining unit members such as agreements to return supervisors to the bargaining unit. For purposes of bargaining over that issue please provide the following information:

1. Please identify any employee with whom the company has any oral agreement or written agreement. For each such employee provide a copy of the agreement if in writing or, if oral, please describe the agreement including all of its terms and conditions.

36. DISCRIMINATION AND HARASSMENT

As part of bargaining the union needs to consider whether there has been discrimination and harassment with respect to hiring, promotions, wage rates, job assignments and all aspects of the employment relationship against any person. In order to bargain over these issues the union is asking that you provide the following information concerning race, national origin, sex, sexual preference and age discrimination or harassment:

1. A list of all employees who have been hired showing their race, national origin, sex, sexual preference, age, disability and religion.

2. A list of all employees who applied for work but were turned down showing their race, national origin, sex, sexual preference, age, disability or religion.

3. A list of all employees who were promoted, transferred, disciplined or demoted showing their race, national origin, sex, sexual preference, age or religion.

4. A list of all employees who were denied either promotions or transfers showing their race, national origin, sex, sexual preference, age, disability or religion.

5. Copies of all charges or complaints received from any State or Federal administrative agency or any court suit concerning discrimination or harassment based upon race, national origin, sex, sexual preference, age, disability or religion. With respect to any such complaint, charge or lawsuit please provide not only a copy of the complaint, charge or lawsuit but a copy of any document showing the resolution or conclusion of that litigation, complaint or charge.

6. A copy of any affirmative action plan which is or has been in existence during the last five years.

7. A copy of any contracts which have any equal employment clauses or guarantees as well as any contracts which have any affirmative action clauses or guarantees.

8. Copies of any internal investigative reports with respect to any complaints, charges or allegations concerning discrimination or harassment based on race, national origin, sex, sexual preference, age, disability or religion.

9. Copies of all internal policies or procedures concerning affirmative action or discrimination or harassment with respect to race, national origin, sex, sexual preference, age or religion.

10. Copies of all EEO-1 reports.

11. Copies of all sexual harassment, anti- discrimination or discrimination policies.

This union is dedicated to eliminating discrimination in the workplace. The union expects to negotiate an effective policy to avoid discrimination and this information is necessary to evaluate the extent to which there may have been discrimination in the past by this employer. It is also necessary to evaluate the necessity of affirmative action programs to ensure that if there has been past discrimination it will be remedied effectively in the future.

37. GROOMING

The employees are concerned about whether clothes, grooming, height or weight or any other personal factors will affect their employment. For purposes of bargaining over these issues please provide the following information:

1. A statement of any policies or procedures with respect to grooming, clothes, weight or height or any other personal affects.

2. A copy of any company personnel policies or procedures with respect to grooming, clothes, weight or height or any other personal affects.

3. A list of all employees who have been disciplined, discharged, warned or otherwise counseled regarding grooming, clothes, weight or height or any other personal appearance. For each such person please give the date of the occurrence, the reason for the occurrence and any company action which was taken with respect to grooming, clothes, weight or height or any other personal appearance.

4. With respect to all employees please provide their height, weight and, if they are men, whether they have or had beards or other facial hair.

38. DRUG AND ALCOHOL ABUSE

This union is committed to eliminating drug or alcohol abuse. As the employer is aware, the development of an effective policy is a very difficult and sensitive issue which will require extensive bargaining. For purposes of bargaining over these issues the union requests that the employer provide the following information:

1. A copy of any company policy or procedure with respect to drug or alcohol abuse.

2. A statement of any company policies or procedures with respect to drug or alcohol abuse.

3. The names of all employees who have had any drug or alcohol problem. For each such employee give the employee's name, classification, work location, describe the nature of the drug or alcohol problem and action taken by the company.

4. If the company believes that there is any impact upon the workplace by drug or alcohol abuse please describe that impact including describing each incident of such abuse and its impact upon the workplace..

5. If the company believes that there is any equipment for which the use or operation of which may be affected by drug or alcohol abuse please list that equipment, describe the classifications of employees who operate that equipment and please provide any information with respect to the use of drugs or alcohol by employees who have operated or maintained that equipment.

6. Please provide copies of any reports or studies with respect to use or abuse of drugs or alcohol with respect to this employer.

7. If the employer has tested any employees for drug or alcohol use please provide copies of those tests.

8. If the employer has required any employee to take a drug or alcohol test please provide the names of the employees who were tested, a copy of the test result and the action taken with respect to such employee.

9. If the employer has requested any employee to take a drug or alcohol test and that employee has declined or refused, please give the name of the employee, describe the circumstances under which the test was requested and the action taken.

39. CLOTHES AND UNIFORMS

The employees would like to know the kind of clothes or uniforms which they are required to wear. For purposes of bargaining over those issues the union asks for the following information:

1. A list of all company uniforms or special clothes which the employees are required to wear including a description of the uniforms or special clothes, the classifications of employees which are required to wear those uniforms or special clothes as well as a description of the circumstances under which they are to be worn.

2. All company policies or procedures with respect to uniforms.

3. A statement of all company policies or procedures with respect to the wearing of uniforms.

4. Please provide for inspection a sample of all uniforms which are to be worn.

5. Please provide a statement of the costs to the company and/or the employees of all company uniforms.

40. DISCIPLINE

Discipline is an important topic of negotiations. Whether the union eventually agrees to a clause which prohibits discharge except for just cause or some similar standard or whether the union will need to bargain over the circumstances under which discipline will occur in individual circumstances depends upon a number of factors. In order for the union to evaluate the kinds of proposals which are appropriate and currently represent the employees the union needs the following information:

1. A copy of all company policies or procedures with respect to discipline.

2. A copy of all company work rules, house rules or similar kinds of rules.

3. A statement of all company policies or procedures with respect to discipline as well as a statement of all company policies or procedures with respect to work rules, house rules and similar rules.

4. A list of all employees who have been disciplined (discipline to include oral or written warnings, suspensions or terminations) including the date of the discipline, the nature of the discipline and the reason that the discipline was given.

5. Please list all employees who have engaged in conduct for which the company has considered discipline but has not actually given discipline including the name of the employee, the date of the incident, the nature of the discipline considered and the reason the discipline was not imposed.

6. Please provide copies of all employee evaluations.

41. STEWARDS

The union is interested in developing a strong system of stewards or other on-site representatives. The union believes that such representatives must be completely loyal to the union. For purposes of bargaining over this issue, the union asks that the employer provide the following information:

1. A list of all employees who have expressed any interest in any supervisory or management position in the company if they are currently in the bargaining unit.

2. A copy of any applications or requests for promotion outside of the bargaining unit by any current bargaining unit member.

42. PIECE RATES

Although the union does not believe that piece rates or incentive programs are a particularly viable means of paying employees in this industry, it is something that the union needs to take a look at in bargaining. For purposes of determining possible piece rates or incentive plan, the union is asking that the employer provide the following information:

1. The amount of product and/or goods sold [or manufactured] by type on a daily, weekly and yearly basis. Please provide this information by describing the amount in terms of weight, numbers, cost, price and description.

2. A copy of any piece rate studies, incentive plan studies or similar studies performed by the employer.

3. We are also requesting the right to make a study on the employer's premises using our own expert. Please advise us of when our expert can begin his study at the company's location.

4. A copy of any piece rate, incentive or similar plan.

5. A statement and description of any piece rate incentive or similar plan.

43. NO-SMOKING

The union believes that a fair and equitable no-smoking policy should be adopted. Please provide the following information:

1. Copies of all company policies regarding smoking.

2. A statement of all company policies regarding smoking.

3. A list of smokers and a list of non-smokers.

44. ALTER EGO

The union is concerned that an alter ego relationship may exist between this company and_____company. The union has received reliable information that would suggest the existence of such a relationship. In order for the union to verify this relationship, the union needs the following information:

1. The office address and employment history (including job titles and responsibilities), for the last five years of (a) each present company officer and/or director and (b) each company officer and/or director who was employed at any time during that period for each company.

2. The name and employment history (including job titles and responsibilities) of each current or former director, officer, supervisor, and/or employee of either of the companies who at any time within the last five years has been or was employed by either of the companies in any capacity.

3. The state or states in which each company has been and/or is qualified or registered to do business.

4. The names and address of all person, corporations , or other entities owning stock and the percentage of their stock ownership in each company as of January 1 for each year from five years ago to date.

5. The nature of the business of each company, including the products, services, customers and locations of distribution warehousing, and/or sales facilities and/manufacturing facilities and/ or office facilities.

6. The date, terms and parties to each contract, commitment or understanding whether oral or written under which the companies have been and/or are jointly obligated to engage in business activity.

7. The date terms, and parties to each contract, commitment or understanding, whether oral or written, under which either company may have been and/or is required or authorized to use the services, facilities, personnel, or equipment of the other company.

8. The date, terms, parties and persons entering into each contract, commitment or understanding whether oral or written between the other company or any other company.

9. The date, terms, and parties to and persons entering into each contract, commitment, or understanding, whether oral or written, under which one of the companies agreed to loan, sell and/or contribute equipment, services, money and/or any other things of value to the other company or any other company.

10. The date and substance of each bid submitted by one company for work to be performed in whole or in part to the other company or any other company.

11. The date and substance of each contract entered into by one company for work which was, or is, being performed in whole or in part by any other company.

12. The identity of each person or entity that guaranteed the performance of each contract entered into by either company, and the parties to the contract.

13. The name, effective dates, terms and class of eligible employees, supervisors, officer and/or directors of each health, life insurance, pension, incentive, stock option, retirement and/or benefit plan offered by each company.

14. The nature and terms of any lines of credit, revolving credit, or other credit arrangements offered by either company to any other companies, the dates on which such credit was extended, the amount of the credit extended and the parties to each extension of credit.

15. The nature and amount of indebtedness owed by each company to the other company or to anyone else on January 1 of each year from years before to date.

16. Identify the banking institution, branch location, and account number of each company's bank account and payroll amounts.

17. Identify the law firm or firms and the accounting firm or firms, the advertising firms and/or firms for each company for the last five years.

18. The name, title, employer and job duties of any persons who are, or who have been, responsible in any way for labor relations and/or personnel relations for each company, the period of time during which each of these persons was assigned these responsibilities, and each person's employer during each such period of time.

19. The name, title and employer of each person who had, or has, responsibility for hiring, firing, and/or supervising employees in each company, the period of time during which each of these persons was assigned these responsibilities, and each person's employer during each such period of time.

20. The name and title of each person responsible for new business for each company and the period or periods of time during which each of these persons was assigned these responsibilities.

21. The dates, participants and substance of each meeting, conference and/or discussions (including telephone discussions) attended by one or more shareholders, directors, officers, supervisors and/or employees or agents of either of the companies at which any business of either company was discussed.

22. Copies of all those documents including but not limited to correspondence, memoranda, notes, and minutes which refer directly or indirectly to the formation, dissolution and /or function of any of the companies.

23. Please provide copies of each state license for each company.

45. AMERICANS WITH DISABILITIES ACT

With the implementation of the Americans With Disabilities Act, obligations are imposed on the employer to accommodate disabilities. Obligations are likewise placed on the union with respect to accommodating those disabilities where there is a collective bargaining agreement or collective bargaining relationship. For purpose of bargaining over the implementation of any procedures or policies with respect to the ADA, the union is requesting the following information:

1. Copies of all employment applications currently used.

2. Copies of all job descriptions.

3. A description of all medical tests required of all applicants and employees.

4. A list of all employees who have been accommodated for any physical or mental disability or handicap. For each such person please give the employee's name, a description of the disability, a description of the accommodation and a statement of the estimated cost to the company of accommodating that individual.

5. A list of all employees who have not been accommodated for any physical or mental disability or handicap. For each such person please give the employee's name, a description of the disability, a description of the reason why no accommodation was made for the disability and a statement of the estimated cost to the company had it accommodated the disability.

6. A list of all jobs that have been restructured describing each restructuring that has occurred and the reasons for the restructuring.

7. A copy of any company policies or procedures regarding implementation or administration of any program concerning the Americans With Disabilities Act or any similar state law.

8. A copy of any charges filed with any state or federal agency alleging handicap or physical or mental disability discrimination.

46. PRODUCTS

The union is concerned that the employees make no errors which might subject them to discipline in the manufacture [processing] of products in the facility. Although the union does not intend to bargain about the process by which products are made [processed] (except that such may affect mandatory subjects like health and safety) or the ingredients or components, the union wants to know exactly what process is used and the ingredients in each product so that the employees will have a clear understanding of their responsibilities to avoid any possible discipline. The union also wants this information to

assess whether there are any health or safety risks in the manufacturing process. Additionally the union wants this information to develop training programs so that the employees may upgrade their skills, avoid making mistakes and otherwise make them better employees. For that purpose please provide the following information:

1. For each product manufactured or processed or sold, give the ingredients or components and describe the manufacturing process.

2. For each product provide a copy of any document which described the process by which the product is made and or describes the ingredients or components.

3. If there have been any manufacturing errors in the last five years please provide the following information: (1) The date of the error; (2) The nature of the error and (3) What steps were taken to correct the error or insure that the error would not reoccur.

46. CONCLUSION

The union believes that these information requests are valid and demand relevant information under the Labor Board standards. Should the employer have any concerns the union stands ready to negotiate over the employer's concerns to work out a mutually agreeable resolution. Please respond within one week.

EXHIBIT B: UNILATERAL CHANGE LETTER

Dear Employer:

Under current Board law you may not make unilateral changes after the date of the election without affording the union an opportunity to bargain. Any such unilateral changes would become unfair labor practices subject to the issuance of the Board's certification.

We recognize that many employers attempt to delay bargaining with the union by filing frivolous objections and other legal maneuvers. We intend to make it as expensive for you as possible and to impose the greatest risk upon you if you choose that unreasonable course.

We are, therefore, putting you on notice. We insist that from henceforth you make no unilateral changes with respect to the terms and conditions of employment of any employee in the bargaining unit without affording an opportunity to this union to bargain over the decision and effects of such change. The following is a list of those changes which we insist not be made without bargaining over the decision and the effects. The list is not inclusive but is simply illustrative of all those changes.

(1) No promotional position should be filled without bargaining; (2) No employee should have his/her hours changed without bargaining; (3) No employee should be warned, counseled, disciplined or terminated without bargaining; (4) No one should be hired without bargaining over the person who should fill the position; (5) No employee should be laid off without bargaining; (6) No health and welfare, pension or other fringe benefits should be denied without bargaining; (7) No positions outside the bargaining unit should be filled without bargaining over the question of transfer or promotion; (8) No work location, assignment, classification or any other aspect of employment should be changed without bargaining; (9) No discipline should be imposed without affording the employee the *Weingarten* rights which we hereby demand. (10) No changes in the method and manner by which work is being performed may be made without bargaining; (11) No introduction of any new work techniques without bargaining; (12) No subcontracting, closures, relocation or any changes in the workplace should be made without bargaining.

In considering this list you should consider the risk which you bear if you choose to make those changes without bargaining. If positions open in this unit or some other unit and you do not bargain over the filling of those positions we will argue that someone is entitled to back pay and you may end up paying back pay for a lengthy period of time. If you choose to promote one individual and refuse to bargain over the person who should be promoted, we will take the position that someone else is entitled to the additional pay. If you terminate someone without bargaining over the decision and the effects of that termination (or other discipline), we will take the position that you should reinstate the

person and/or owe back pay. If you lay off any individuals we will take the position that you should have bargained over the decision as well as about the effects and you will owe back pay over those layoffs. It should be apparent that the economic penalty for refusing to bargain with the union forthwith may be severe.

Although we are reluctant to begin our relationship with these kinds of threats, it is sometimes necessary to make employers understand that there is a substantial economic penalty for delaying bargaining. We are hoping that you will not file objections and, rather, that you will sit down and bargain with the chosen representative of the employees.

We, of course, demand that if there are any wage increases or benefit increases which would have normally occurred without the union, those should be implemented in the normal course of business. We insist, however, that we be notified in advance of any such changes so that we can bargain over those changes. We expect any such increases will be much too little as they have been in the past. Included in the bargaining will be most likely a demand that the wage increases or other benefit changes be better than otherwise proposed. Nonetheless, Board law requires these changes be put into place and furthermore requires that you afford the union a chance to bargain over those decisions as well as the effects of those decisions.

Please consider this letter to be a continuing demand.

* With respect to Weingarten rights, a separate paragraph should state:

We are demanding that you afford employees *Weingarten* rights. If you choose not to recognize the union, we will take the position that requesting such Weingarten rights by the individual employees would be futile and, therefore, unnecessary. Until we are able to sit down and bargain over having a union representative at the location such as a steward, we designate _____, who is a union business representative, to be the union representative. We understand that this may be sometimes inconvenient because he is not at the work location but, on the other hand, that is your choice if you refuse to bargain over the establishment of stewards or other on-site union representatives.

EXHIBIT C: HEALTH PLAN LETTER

Dear Health Care Plan:

This union represents employees of an employer which has proposed your health care plan. In order for us to determine whether we will agree to your plan in collective bargaining we need the following information from you. Although you may believe that some of this information is proprietary or confidential you cannot expect us to agree to have our members covered without investigating, in depth and carefully, your proposed plan and its administration. In this regard we believe that we want not only a good plan for our members but we want the employer's dollar to be spent in the most efficient way possible:

1. A list of all of the management officials of the company including their names, positions and a list of their job positions within the last ten years.

2. A list of all employers, customer or group subscribers of your health care plan(s) including the name, phone number and address of the principal contact person or the purchaser or sponsor of that health care plan.

3. Copies of all lawsuits or complaints with any administrative agency with respect to the operation of your company during the last ten years. Please include not only a copy of the complaint but also a copy of any document showing the disposition of said complaint.

4. A list of all criminal convictions of all management employees of the company during the last ten years.

5. A list of all employers, customer or group subscribers to your health care plans which utilized your plan during the last ten years which no longer utilize your plan(s) including the name of the contact person of the sponsor of that plan including his/her address and phone number.

6. Copies of all administrative manuals, rules or regulations with respect to their proposed health care plan.

7. Please provide copies of all claims, working documents and any documents showing the final disposition of those claims for the health care plan during the last year.

8. As part of our review process we will need to interview the principal administrators/managers responsible for the employer's plan. Please advise us of the names of those individuals who are principally responsible for its administration and dates when they would be available for interviews.

9. Please provide a current list of all medical providers including doctors, hospitals, clinics, nursing homes, group homes, etc.

10. Please provide a list of all medical providers (as defined above) who have provided services to the plan during the last five years who are no longer providing services. Please give the provider's address, the name of a contact person, the providers name and the reason why the provider is no long providing services to the plan(s).

11. Your plan has a number of exclusions. For example experimental procedures are not covered. Please list all procedures which you have determined not to be covered because they are experimental during the last 10 years. For each such procedure without providing any identification of the patient involved, provide copies of relevant medical reports showing the nature of the procedure as well as your documents showing why you determined that it was experimental. Please do this for each exclusion you have listed in your plan and/or summary plan description.

The information concerning the background of the management officials is relevant to determine the competency of your company to manage a health care plan. The names of current employers, customer or group subscribers which sponsor or utilize your plan(s) would be relevant as references to determine whether those clients are satisfied. Similarly, the names of similar entities which no longer utilize your plan would be relevant to determine why they left your plan. The claims would have to be monitored in order to determine whether the plan liberally or strictly construed the plan.

The information on former providers is very critical to our evaluation. If you have terminated providers because of poor medical service that speaks well of your plan. If you terminated them or they quit because they disputed the quality of <u>your</u> plan, that is especially critical to our evaluation.

The information on exclusions is very important. It will show us how broadly or narrowly you interpret the plan.

Please respond within one week.

Sincerely

EXHIBIT D: COMPETITIVENESS REQUEST

Dear Employer:

During negotiations you have claimed that you are not pleading poverty so that you can try to avoid providing financial information under the *Truitt* decision. We think you are really claiming an inability to pay and we reserve the right to file NLRB charges for your refusal to provide us with financial information to back up your claim.

We think that it is inconsistent to claim that you are profitable and yet to demand substantial concessions from us without lowering your prices. We will test your assertions. If you are correct that you are not competitive, we will carefully consider your demands for concessions. In order to evaluate your claim that you are not competitive, we need some information. If you substantiate this claim through this information we can more easily explain to our members the need for pay cuts. Provide us the following:

1. A complete list of your customers so that we can check with them to see if your prices are too high. We can check with them to see if it is prices, service, management arrogance etc.

2. A list of all those companies which you consider to be your competitors. We will check with them to compare their prices, service etc.

3. A list of all your prices for goods and or services. We need this to compare to the prices of these from your competitors.

4. A list of all customers which were lost during the last five years. We will check with them to see why you lost the business. If it is due to "competitiveness" or service or some other factor, it is important for us to know that.

5. A list of the customers you think you may lose in the next year if we do not grant concessions. These are the customers who can pinpoint whether you are presently competitive. They may have been shopping around and can tell both of us where the problem lies, if any.

6. A list of all new equipment bought in the last five years to improve the efficiency of the plant. If you have not reinvested in the business, our members will be less interested in accepting concessions.

7. A list of all actions taken in the last five years to be more competitive.

8. Copies of all your price lists for the last three years to see if you have reduced them to be more competitive.

As you can see this information will be extremely useful to determine whether you are competitive or not. Please provide it as soon as possible. Any failure to provide all of this information will be considered an unfair labor practice.

EXHIBIT E: ZIPPER CLAUSE

You have proposed a zipper clause which would foreclose bargaining over any item or issue during the life of the agreement. The union is willing to consider such a proposal because we think generally there should be no need to bargain during the life of the agreement.

We also believe that during the life of the agreement there should be no need for the employer to make any changes. Before we agree we think all matters which might require bargaining should be resolved. This might require extensive bargaining over a number of matters which would otherwise be left to bargaining if the rare circumstances occurred requiring such bargaining. We also recognize that such bargaining may result in bargaining over excessive detail. Nonetheless that is the result of your request for such a zipper clause. We will need to bargain over some of the following issues. This list is not exhaustive but only illustrative:

1. The effects of any earthquake upon the employees.
2. The effects of any war upon employees.
3. The decision and effects of any relocation.
4. The effects of any sale of any portion or the whole business.
5. The effects of any fire upon the employees.
6. The effects upon the employees of any partial or full closure caused by snow or ice.
7. The effects upon the employees of any state, local or national declaration of emergency.
8. The effects upon the employees of the creation of any national, state or local holidays.
9. The effects of the passage of any national health care legislation or other legislation affecting health care.
10. The effects of any possible change in ERISA.
11. The effects of any possible changes in union security law during the term of the agreement.
12. The decision and effect of any subcontracting of any bargaining unit work.
13. The effects of the introduction of any new process, products, procedures etc., upon the employees.
14. The effects of plague upon the employees.

We will also need to negotiate over much more detailed language than otherwise might be necessary. For example without a zipper clause, we might be able to work out general language reflecting the circumstances under which employees could be discharged. With a zipper clause we will want to negotiate over every conceivable circumstance where discipline might be imposed and the penalty, if any, to be attached.

We will want to define with particularity the dress and grooming code; the timing of lunch, rest breaks and bathroom breaks; the kind of language which can be used in all possible circumstances whether in public or not; the wages to be paid for each employee rather than by classification and so on. This is not designed to be an impediment to a contract but rather is designed to give our members full protection from the possible assertion of the zipper clause.

Unfortunately the list is extensive of issues which we will have to agree upon if we are to be able to incorporate a zipper clause in the contract. Management may want to reconsider its position in order to avoid the exhaustive and lengthy bargaining which will be necessary to fill our responsibilities before we can agree to foreclose bargaining during the agreement.

EXHIBIT F: NO IMPASSE LETTER

Dear Employer:

After many months of bargaining, we realize that you have made some proposals which were unacceptable to the union but which now may be acceptable to us. Although we still dislike your proposals we now indicate that we are willing to accept many of them in principle. This means that there is not an impasse. Before we finally accept these proposals, we need to do several things.

First, we need to work out all the details of your proposals. Since we haven't indicated before our willingness to accept them in principle, we haven't discussed the details of how they will work, their implementation, relationship to other sections of the contract and so on. We need to get to that tasks immediately.

Second we need to work out the remainder of the contract in all of its detail. This means we have to talk about the rest of the contract and work out those sections and issues.

Third, we have some other issues which we have not had the chance to discuss. Some of these relate to and are caused by our willingness to now accept your position. Others are matters which we want to raise independently. We will be raising these issues in the near future.

That is, our willingness to accept your proposals which we have resisted up to this point depends upon getting a satisfactory agreement on all points of the contract. Both sides reserved the right to add to, delete or modify proposals. Additionally our change in position by indicating a willingness to accept your proposals, means we now need to look at these other matters. We propose to look at developing the following provisions of a contract. As we go along we will provide proposals in these areas. Before doing so, we will want to understand management's current policy if any:

1. Training program for all jobs.
2. Job descriptions for all jobs in the bargaining unit.
3. Fully developed attendance program.
4. Employee assistance program.
5. Work rules on all subjects.
6. Drug and alcohol policy.
7. Discounts on company purchases.

8. Safety rules including temperature, noise, light, chemicals, etc.

9. Merit pay increase for each employee during the life of the agreement to be negotiated for each employee.

10. Guidelines for discipline for any anticipated disciplinable offense.

11. Transfers to other facilities.

We recognize that it will take some time to work these issues out. We will need much additional information. But since we have now acceded to your demands in certain areas that you claimed were important, we think it is worth trying to reach agreement on these other areas however significant.

We look forward to reaching an early agreement. Please remember that there is no impasse particularly in light of our change in position and any unilateral change will be an unfair labor practice.

About the Author

David Rosenfeld is a 1973 graduate of Boalt Hall School of Law, University California at Berkeley. He has represented unions since his graduation from law school. He currently practices with the law firm of Van Bourg, Weinberg, Roger and Rosenfeld in Oakland, California.