VII. FIRST CONTRACTS: CURRENT RESEARCH

Union-Free Bargaining Strategies and First Contract Failures

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"I'll never do any goddamn business with a union." This was the reaction of Reed Welch, owner of S&S Screw in Sparta, Tennessee, after the IAM won an NLRB election among 75 employees at his small factory on March 18, 1992. Welch then hired a new plant manager who negotiated with the IAM, reaching agreement on everything except economics. This was apparently too much for the owner, who fired the plant manager and disavowed the entire package. S&S Screw was ultimately held accountable by the NLRB for various ULP violations, including bad faith bargaining and discrimination against union members. But an order to bargain proved meaningless because support for the union had dissolved in the face of Welch's fury. With only nine supporters remaining, the IAM withdrew in December 1994. Cases like S&S Screw certainly seem to lend credence to those who attribute the high rate of first contract failures to illegal activity by employers. Unions, several academic studies, and the Dunlop Commission have traced the problem to bad faith surface bargaining. While admitting that "mistakes get made," employers and their allies have challenged this conclusion, arguing that unrealistic union demands contribute to the difficulty of first contract negotiations and noting that hard bargaining by management is not a violation of the law. The objective of this paper is to investigate what happens during first contract negotiations, especially the unproductive ones that do not result in an agreement. Complete files were reviewed of 54 first contract cases collected by the AFL-CIO Industrial Union Department in 1993. Nineteen of these cases were updated during

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1995 with follow-up interviews. Interpretation of the case studies was facilitated by a detailed analysis of 195 responses to a 1994 first contract survey conducted by the AFL-CIO Task Force on Labor Law. The original research was supplemented with a review of recent NLRB decisions on surface bargaining and hard bargaining.

Employers' Union-Free Bargaining Strategies

There are a variety of empirically valid explanations for the failure to achieve first contracts: plant closings, extended legal appeals of union election wins, illegal surface bargaining by the employer, legal hard bargaining by the employer, and unproductive bargaining in spite of good faith negotiations. As is documented more completely in a companion article, the root of the problem lies in employers' union avoidance objectives. Following initial certification of a union, approximately one-half of employers continue to look for ways to remain union free. Although not all succeed, the majority of these antiunion employers never sign a first contract. It turns out that the predominant route to union avoidance *after* a union NLRB election win is through carefully crafted negotiating strategies. Most of the rest of this paper relies on representative cases to illustrate different approaches to collective bargaining followed by firms intent on avoiding a first contract.

Technical Refusals to Bargain

Employers who have decided to avoid dealing with the union by pursuing legal appeals will eventually be forced either to negotiate or to refuse to bargain. Because decisions regarding unit determination and election conduct cannot be appealed beyond the NLRB, employers may refuse to bargain in order to force a ULP case. Adverse ULP decisions *can* be appealed to the federal courts, giving the employer the opportunity to raise objections to the election. A 1992 letter from Clean Sweep Janitorial Services in Springfield, Illinois, to the SEIU after the company lost an election challenge describes this option: "Because we do not believe that the election results are a fair indicator of the support for [the union] among our employees, we are not prepared to bargain at this time. . . . We are informed that the only way this decision may be tested in the federal courts is by refusing your request for bargaining."

Cases like New Frontier are referred to as *technical refusals to bargain*, since the objective is to challenge the election. These technical violations serve to delay bargaining indefinitely, creating a burden for the union which must struggle to maintain interest and support; the employer's union-free objectives are thereby enhanced. When the IBEW won a May 1991 election to represent the workers at Tempco Electric Heater's Wood

Dale, Illinois, facility, the company complained that the workers were intimidated, coerced, and misled into voting for representation. After their election challenge was rejected, Tempco refused to bargain, forcing a ULP charge. The NLRB's automatic finding of a violation was appealed to the Seventh Circuit Court. The court's July 1993 decision noted that Tempco "has not even come close" to showing that workers were intimidated or coerced by the union and called the charges "far fetched." Though "far fetched," the company's refusal to bargain for two years while pursuing its appeal had accomplished its purpose. Negotiations never got off the ground, workers lost interest, the union was decertified, and the company's union-free status was preserved.

Defiant Bargaining

Some employers practice *defiant bargaining*; they openly violate the legal requirement to bargain in good faith, apparently based on their assessment that the benefits of remaining union free clearly outweigh the costs of noncompliance. The S&S Screw case described in the introduction is an example of this approach. Defiant bargaining is a viable option because the penalty for violating the duty to bargain in good faith is so weak. In most cases all the NLRB can do is order the company to resume negotiations, which may be futile. In December 1989 AFSCME won an election in a unit of blue-collar, clerical, and technical employees at Neumann Medical Center in Philadelphia. Bargaining commenced on February 15, 1990, and over the next six months ten sessions were scheduled, but five were canceled by the hospital's attorney, Martin Sobol. He then informed the union that the hospital would not negotiate any further. Charges were filed, and eventually a settlement was accepted requiring Neumann to post a cease-and-desist notice and to resume negotiations. In direct violation of the settlement, the hospital continued to refuse to bargain. The penalty was a second settlement reached March 31, 1991, which was identical to the first. One month later, Sobol notified AFSCME that the hospital was "in possession of objective considerations indicating that the union no longer represents a majority of employees" and that it was withdrawing recognition. The union filed charges, a trial was scheduled, and just prior to the hearing date the hospital entered into another settlement agreement requiring it to bargain in good faith. In December 1995, six years after certification, there is still no contract.

Evasive Bargaining

Many employers and attorneys have eschewed blatant violations and have avoided reaching agreement on a first contract more artfully. One

common approach is to endeavor to comply with the law's requirement for good faith bargaining while evading resolution of essential issues. If successful, *evasive bargaining* drags out the negotiating process, frustrates the union representative and the workers, and eventually results in decertification. An example of an attorney who pushed this approach too far will help establish its outer bounds.

Broad Reach Management in Falmouth, Massachusetts, retained the services of attorney Patrick Egan to represent the company in negotiations with SEIU Local 767, which had won a January 1992 election at Freedom Crest Nursing Home. Negotiations commenced in March, and the first six sessions held over four months were devoted to Egan's questioning about the meaning of virtually every word in the union's proposed contract. For example, Egan took issue with the term "workers," arguing that "employees" should be used. For a finding of surface bargaining, NLRB precedent requires scrutiny of the overall conduct of the employer. In this case, Broad Reach's administrator openly discussed with supervisors the plan to frustrate the bargaining process, solicited employees to circulate a decertification petition, and engaged in discriminatory actions against union supporters. A finding of bad faith bargaining was based on Egan's conduct *and* the other violations.

Two cases involving another lawyer help distinguish between acceptable and marginally unacceptable evasive bargaining. Kelvin Berens (of Omaha, Nebraska) was retained by Shanefelter Industries in Uniontown, Pennsylvania, to represent the company in first contract negotiations with the UMWA, which had won an April 1991 election. Berens set an antagonistic tone, disparaging the union and leveling insults and personal attacks at union representatives. He also refused to meet frequently, and when bargaining sessions were held, he would read the newspaper while the union presented its proposals. The UMWA filed its first bad faith bargaining charge in July 1991, but it was rejected. Berens continued to belittle the process, engaging in idle banter about cattle ranching, skiing, amusement parks—anything to kill time and prolong negotiations. Finally in May 1992, the NLRB issued a complaint and scheduled a hearing. Shortly before the hearing date Shanefelter reached a settlement agreement; the company agreed to bargain in good faith and to refrain from "reading newspapers during collective bargaining meetings" and from "disparaging and belittling union representatives."

Subsequently, Berens demeanor improved and he made concessions on a few noncontroversial items, but he offered no constructive proposals on economics, the grievance procedure, seniority, union security, dues checkoff, or other fundamental issues. He scheduled negotiations only when

pressed and then would meet two days in a month or three days in two months. Progress was delayed by his need to consult about union proposals with Shanefelter officials (they did not participate in negotiations). The union filed a series of bad faith bargaining charges between November 1992 and the end of 1993 but in each case withdrew the charge under pressure from the NLRB regional office: "Always orally, [they] told us that meeting a couple of times every couple of months is not a refusal to bargain . . . and the employer is not required to make any movement."

A second case involving Berens reveals a slightly different tack. The UFCW won an election at Long Prairie Packing's St. Paul, Minnesota, plant in June 1991. The company took two months to decide on Berens as chief negotiator, and as at Shanefelter he sat at the table alone. This time he was cordial and cooperative, the epitome of politeness. He never refused to meet, but he would postpone meetings. Negotiations centered around the union's proposals. Berens asked detailed questions about the union's intentions for each item. Progress was excruciatingly slow, and clauses were accepted only after "we dotted every i." Berens did not present many proposals from the company. Whenever a matter came up related to plant operations he would defer agreement in order to check with the plant manager. As the months wore on, bargaining committee members became impatient and quit the team one by one. After a year with no substantive progress in sight, the UFCW lost a decertification vote by a two-to-one margin.

Peremptory Bargaining

The fourth union-free bargaining strategy is best described as *peremptory bargaining*. As with evasive bargaining, negotiating sessions are infrequent and there is no apparent interest in reaching agreement. Unlike evasive bargaining, the employer presents unambiguous proposals. The objective is to adopt a non-negotiable position which is likely to be unacceptable to the workers and/or the union. The rigidity often relates to something either essential to workers if independent representation is going to be meaningful or fundamental to the union's institutional objectives. Three cases will illustrate the dominant form of peremptory bargaining.

At Dawn Frozen Foods in Crown Point, Indiana, the workers voted for representation by the BCTW in March 1991. The company retained attorney Robert Bellamy to handle negotiations. Bargaining commenced in late June with sessions held only about once a month because of Bellamy's full calendar. On some issues the two sides reached accommodation, even agreeing to a wage increase which was implemented about six months into the talks. The company's position was unyielding on three clauses: Bellamy

absolutely refused to consider dues checkoff, union security, or plant visitation rights for union representatives.

After the union rejected the company's final offer in June 1992, the company implemented a strong antiunion campaign in the week preceding a decertification vote. On the day before the vote, Bellamy sent a letter to the BCTW, which was copied and distributed by supervisors to every worker. The conclusion was blunt: "If you do not believe me when I say that something is FINAL, go ask the UAW in Cambellsville, Kentucky. After I gave a final offer, they went on strike over an *open shop clause* . . . permanent replacements were hired, the union is now gone" (emphasis added). By narrowing the dispute to union security, dues checkoff, and access, Bellamy backed the union into a corner. Although of primary importance to unions, the centrality of these issues to effective representation is likely to be understood only by the most involved members. The BCTW was decertified.

Two other cases involve employers' contract proposals which would effectively renounce any legitimate protection for workers on the job. Bethea Baptist Home in Darlington, South Carolina, retained attorney Julian Gignilliat to bargain with the UFCW after an August 1989 election. Gignilliat adopted an antagonistic stance, rejecting information requests and refusing to include provisions in the contract after agreeing to them verbally. More relevant to the current discussion, he was unyielding on several proposals: employment-at-will language with no "just cause" provision; a two-step grievance procedure ending with the nursing home administrator; an insistence on the employer's right to discipline employees for off-work activities; and an "integrity clause" allowing the employer to install hidden cameras, dyes, and powders to detect employee theft. Dues checkoff would be accepted only as a package with the employer's proposals for employment-at-will and the grievance process.

In the Bethea case, ULP charges against the employer were eventually upheld by the NLRB in a January 1993 decision. A surface bargaining finding was based on the "conduct in its totality," including not only the rigid positions but also Gignilliat's other actions and the employer's discriminatory behavior away from the table. The parties resumed negotiations under the NLRB's order in March 1993, and Gignilliat withdrew some of the more onerous proposals, such as the integrity clause, but retained his insistence on strong employment-at-will language and his opposition to just cause and grievance arbitration. Another year of negotiations produced no movement, and as of December 1995, negotiations were at a standstill.

A similar case also involving Gignilliat helps to clarify acceptable peremptory bargaining. The IBEW won representation rights for a small

unit of workers at Coastal Electric Cooperative in Walterboro, South Carolina, in January 1990. This case was free of violations away from the table, and the only contested behavior was the employer's inflexible position on key issues. Bargaining did not begin until July, and there were only ten sessions over the next eighteen months. The employer's position on employment-at-will was clearly stated by Gignilliat in a letter to the IBEW negotiator: "The co-op does not require the union's agreement to have employment-at-will. As far as this issue is concerned, the union's 'non-agreement' is as good as its agreement." The other items in dispute were the employer's insistence on merit pay and its refusal to consider either just cause or grievance arbitration.

Although an ALJ found that Coastal's inflexibility was evidence of surface bargaining, the NLRB overturned with specific reference to differences between this and the Bethea case. A June 1993 decision concluded that "the Respondent's various positions, although indicative of hard bargaining, are not inherently unlawful, and its failure to make concessions, in the absence of other indicia of bad faith, is not a sufficient manifestation of bargaining with intent to avoid agreement." In reaching its decision, the NLRB noted explicitly that "management's reservation of authority was limited by whatever the parties agreed to elsewhere in their contract." Gignilliat's implementation of the peremptory bargaining strategy at Coastal Electric clearly depicts the employer's union-free objective. A contract that preserves management-at-will, subject only to limitations elsewhere in the agreement, which omits just cause, codifies merit pay, and is subject to interpretation under a grievance procedure where the employer is the last step, creates a situation where (to rephrase Gignilliat) "the union's agreement is as good as its nonagreement." The question for workers becomes, "Why have a union?"

Analysis

Although precise estimates of the extent of various union-free bargaining strategies are not available, approximations are possible based on the first contract survey mentioned earlier. Nearly three-quarters of all first contract failures involve employer practices which fit into these categories. Technical refusals to bargain and defiant bargaining are present more than one-quarter of the time, while evasive bargaining and peremptory bargaining are associated with nearly one-half of the failures. However, approximately one in three employers who initially attempt to avoid unionization after certification eventually sign a contract, often because the union has implemented countervailing strategies which force abandonment of union-free objectives.

The unlawful surface bargaining often blamed for first contract failures seldom occurs independent of other violations. This can be traced to NLRB precedent which requires consideration of the totality of the employer's conduct rather than only the behavior leading to a surface bargaining charge. Thus most violations of the surface bargaining prohibition will be committed by employers who follow the defiant bargaining strategy. Any case of "pure" surface bargaining would be associated with evasive bargaining and/or peremptory bargaining strategies which cross the line into unlawful conduct. Reports from unions of surface bargaining in one-third or more of first contract negotiations probably reflect a lay interpretation of the term and include lawful evasive and/or peremptory bargaining.

The argument by some that first contract failures associated with bargaining conduct are simply "mistakes" is not convincing. The bargaining patterns reported here are widespread, many cases involve experienced legal counsel, and the evidence points to deliberate attempts to avoid unionization rather than an unfortunate lack of familiarity with labor negotiations. However, the other defense offered by employers for first contract failures, that lawful hard bargaining may be involved, is consistent with the evidence. Most of the employers who engage in peremptory bargaining are unlikely to experience adverse ULP decisions absent other violations. However, the implication that such a strategy is neutral is not convincing; more likely, employers engage in peremptory bargaining as part of a carefully crafted union avoidance policy.

References

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