

Bargaining “in Good Faith”: Legal Obligations and Pitfalls





Staff

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Here to help with technical issues



Presenter

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What We'll Cover



Bargaining “in good faith”:
how to avoid (or
how to set up)
an unfair labor
practice charge


Origins of the Obligation

Private sector

- 1935 Wagner Act (NLRA): obligation of employers to bargain at the request of a union
- 1947 Taft-Hartley amendments to NLRA: obligation extended to unions

Public sector

- State and local laws all mandate “good faith”
- But different degrees of specificity, and varying interpretations by courts and labor boards



Section 8(d) of the NLRA

“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees 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 require the making of a concession...”

Two Categories of Violations

***Per se* violations:**

- the fact that an act has occurred suffices to establish an unfair labor practice (ULP)
- no need to prove motivation, or any other aspect of the context in which the act occurred

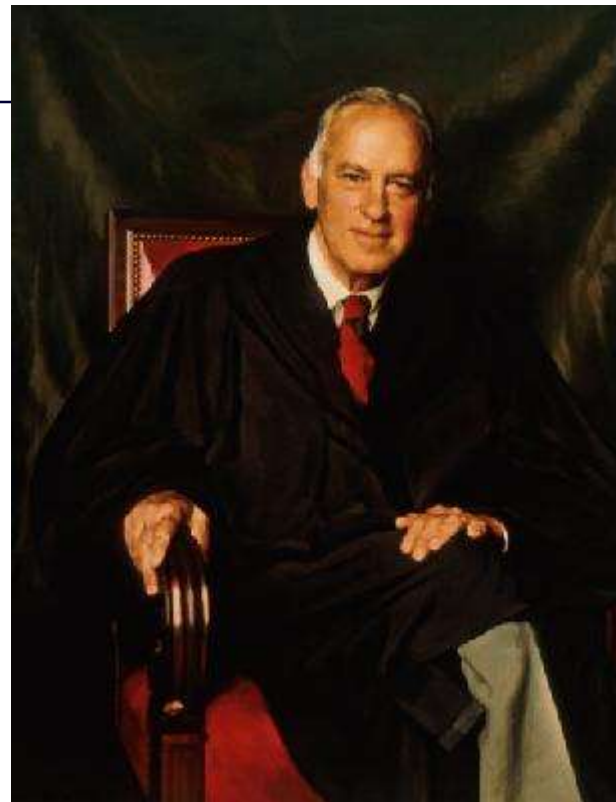
Violations based on general course of conduct:

- examines the “totality of the conduct”
- inquiry: did a party approach bargaining with “a sincere resolve” to reach agreement?

Potter Stewart

1915 - 1985

“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it...”



Concurring opinion,
Jacobellis v. Ohio, 378 U.S. 184
(1964)

Per se Violations

Refusal to meet
(at all)

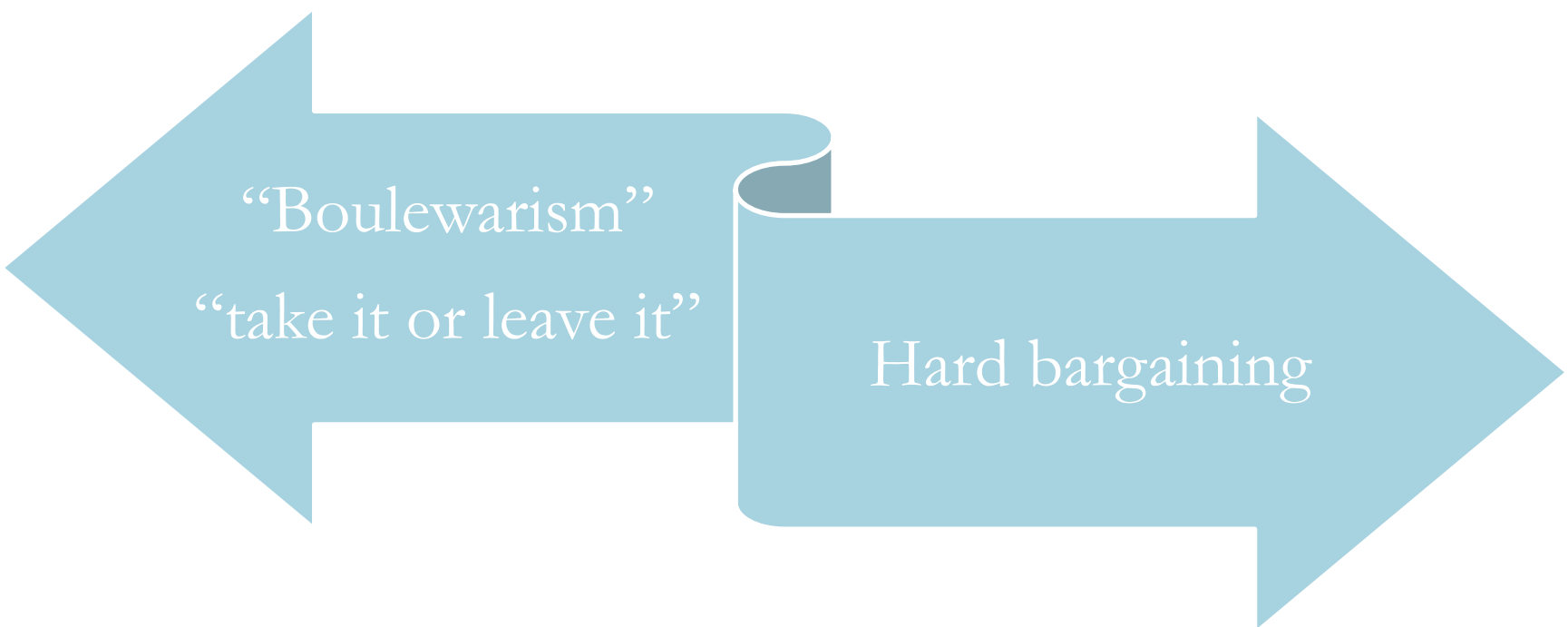
Refusal to
furnish relevant
information

Refusal to
execute a written
agreement

Direct dealing
with unit
employees
(bypassing the
exclusive
representative)

Insisting to
point of impasse
on a permissive
subject of
bargaining

Where to Draw the Line?



“Boulewarism”
“take it or leave it”

Hard bargaining

Appearances vs. Reality



Surface
bargaining

The diagram consists of two light blue arrows pointing in opposite directions, one to the left and one to the right. They are connected at their inner ends by a white, curved, ribbon-like shape that resembles a folded piece of paper or a bridge. The left arrow is labeled 'Surface bargaining' and the right arrow is labeled 'Good faith bargaining'.

Good faith
bargaining



Logistics

Availability to meet

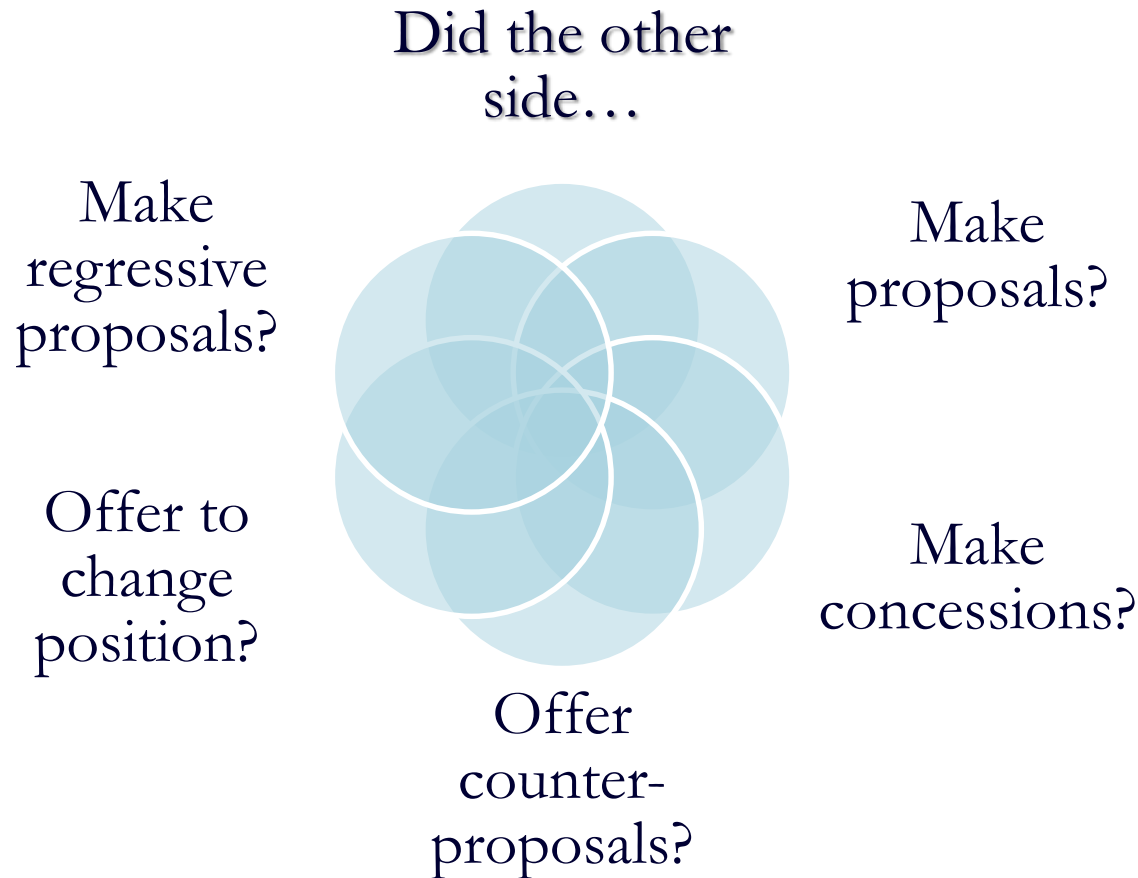
Delaying tactics

Identity of negotiators

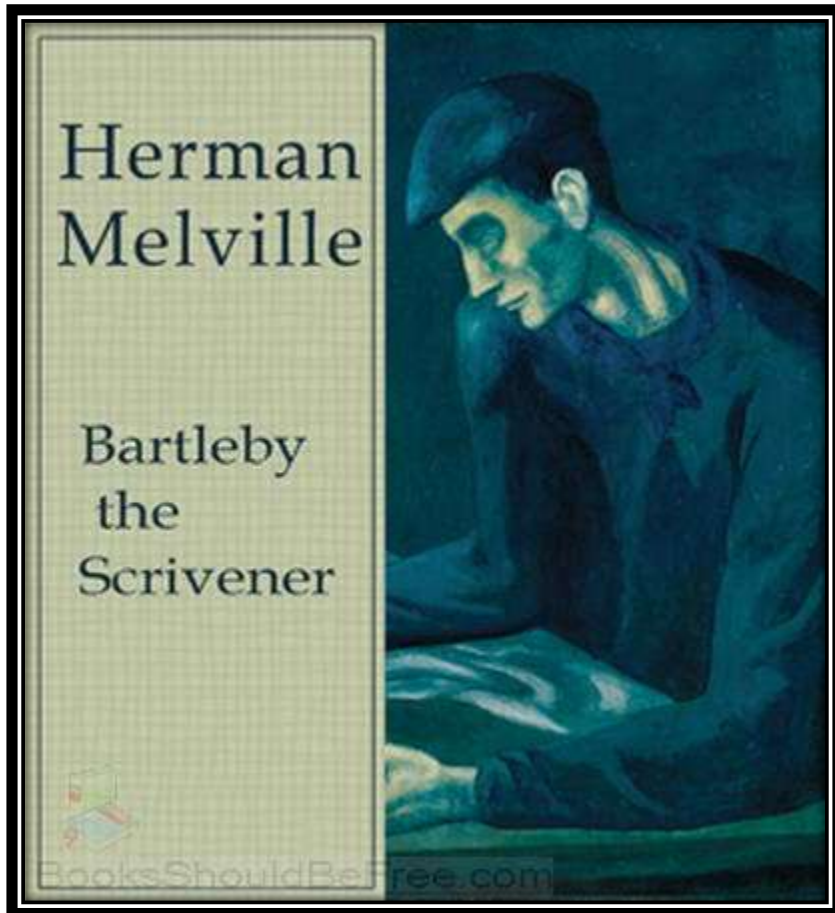
Authority of negotiators

Ground rules

Table Dynamics



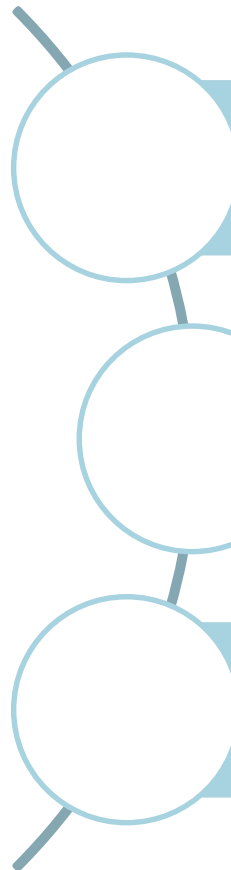
ULP? You Decide...



“I would prefer not to.”



Timing Issues

- 
- Timing of proposals
 - Timing of counterproposals
 - Deadlines for acceptance

Content of Proposals

*“No self respecting union
could accept that proposal.”*



Enforcement

Relief may lie through ULP or grievance procedures

At table: threat of enforcement

Away from table: fodder for campaign

Other strategic implications, including setting up a strike

Offensive + defensive considerations

Bad Faith During Life of Contract

Unilateral changes to terms and conditions of employment

Repudiation or noncompliance?

-- Degree?

-- Frequency?



Thank you!

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