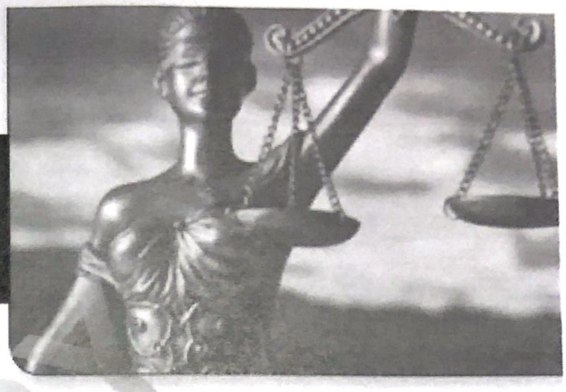

CHAPTER 15

Collective Bargaining

collective bargaining process by which a union and employer meet and confer with respect to wages, hours, and other terms and conditions of employment

Employees join unions to gain some influence over their working conditions and wages; that influence is achieved through the process called **collective bargaining**. Section 8(d) of the National Labor Relations Act (NLRA) defines collective bargaining as

> [t]he 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. . . .

This process of meeting and discussing working conditions is actually a highly stylized and heavily regulated form of economic conflict. Within the limits of conduct spelled out by the National Labor Relations Board (NLRB) under the NLRA, the parties exert pressure on each other to force some concession or agreement. The union's economic pressure comes from its ability to withhold the services of its members—a strike. The employer's bargaining pressure comes from its potential to lock out the employees or to permanently replace striking workers. The NLRB and the courts, through their interpretation and administration of the NLRA, have limited the kinds of pressure either side may exert and how such pressure may be applied. This chapter examines the collective bargaining process and the legal limits placed on that process.

15-1 The Duty to Bargain

An employer is required to recognize a union as the exclusive bargaining representative of its employees when a majority of those employees support the union. The union may demonstrate its majority support either through signed authorization cards or by winning a representation election. Once aware of the union's majority support, the employer must recognize and bargain with the union according to the process spelled out in Section 8(d). Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain with the representative of its employees, and Section 8(b)(3) makes it an unfair practice for a union representing a group of employees to refuse to bargain with their employer.

Although the NLRA imposes an obligation to bargain collectively upon both employer and union, it does not control the results of the bargaining process. Section 8(d) makes it clear that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." The act thus reflects an ambivalence regarding the duty to bargain in good faith. The parties, to promote industrial relations harmony, are required to come together and negotiate, but in deference to the principle of freedom of contract, they are not required to reach an agreement. This tension between the goal of promoting industrial peace and the principle of freedom of contract underlies the various NLRB and court decisions dealing with the duty to bargain. The accommodation of these conflicting ideas makes the area a difficult and interesting aspect of labor relations law.

If the parties are required to negotiate, yet are not required to reach an agreement or even to make a concession, how can the Board determine whether either side is bargaining in good faith? Section 8(d) requires that the parties meet at reasonable times to discuss wages, hours, and terms and conditions of employment. It also requires that any agreement reached must be put in writing if either party so requests. But Section 8(d) does not speak to bargaining tactics. Is either side free to insist upon its proposal as a "take-it-or-leave-it" proposition? Can either side refuse to make any proposal? These questions must be addressed in determining what constitutes bargaining in good faith.

15-1a Bargaining in Good Faith

Section 8(a)(5) requires that the employer bargain with a union that is the representative of its employees according to Section 9(a). Section 9(a) states that a union that has the support of a majority of employees in a bargaining unit becomes the exclusive bargaining representative of all employees in the unit. That section also states that the employer may address the grievances of individual employees as long as it is done in a manner consistent with the collective agreement and the union has been given an opportunity to be present at such adjustment. That provision raises the question of how far the employer can go in dealing with individuals rather than the union. In *J. I. Case Co. v. NLRB*,[1] the Supreme Court held that contracts of employment made with individual employees were not impediments to negotiating a collective agreement with the union. J. I. Case had made it a practice to sign yearly individual contracts of employment with its employees. When the union, which won a representation election, requested bargaining over working conditions, the company refused. The employer argued that the individual contracts covered those issues and no bargaining could take place until those individual contracts had expired. The Supreme Court held that the individual contracts must give way to allow the negotiation of a collective agreement. Once the union is certified as the exclusive bargaining representative of the employees, the employer cannot deal with the individual employees in a manner inconsistent with the union's status as exclusive representative. To allow individual contracts of employment to prevent collective bargaining would undercut the union's position.

What about the situation in which individual employees attempt to discuss their grievances with the employer in a manner inconsistent with the union's role as exclusive representative? How far does the Section 9(a) proviso go to allow such discussion? That question is addressed in the following Supreme Court decision.

[1] 321 U.S. 332 (1944).

. . . The policy of industrial self-determination as expressed in Section 7 does not require fragmentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered. . . .

Respondent objects that reliance on the remedies provided by Title VII is inadequate effectively to secure the rights conferred by Title VII. . . .

Whatever its factual merit, this argument is properly addressed to the Congress and not to this Court or the NLRB. In order to hold that employer conduct violates Section 8(a)(1) of the NLRA because it violates Section 704(a) of Title VII, we would have to override a host of consciously made decisions well within the exclusive competence of the Legislature. This obviously, we cannot do.

Reversed.

Case Questions

1. What were the complaints of the minority employees against the company? How did the union respond to their complaints?
2. Why did the employees reject using the procedures under the collective bargaining agreement? What happened to them when they insisted on picketing the store to publicize their complaints?
3. Did the NLRB hold that their conduct was protected under Section 7? Why? Did the Supreme Court protect their conduct? Why?

Although the employer in *J. I. Case* and the employees in *Emporium Capwell* were held to have acted improperly, there is some room for individual discussions of working conditions and grievances. Where the collective agreement permits individual negotiation, an employer may discuss such matters with individual employees. Examples of such agreements are the collective agreements covering professional baseball and football players; the collective agreement sets minimum levels of conditions and compensation, while allowing the athletes to negotiate salary and other compensation on an individual basis.

Procedural Requirements of the Duty to Bargain in Good Faith

A union or employer seeking to bargain with the other party must notify that other party of its desire to bargain at least 60 days prior to the expiration of the existing collective agreement or, if no agreement is in effect, 60 days prior to the date it proposes the agreement to go into effect. Section 8(d) requires that such notice must be given at the proper time; failure to do so may make any strike by the union or lockout by the employer an unfair labor practice. Section 8(d) also requires that the parties must continue in effect any existing collective agreement for 60 days from the giving of the notice to bargain or until the agreement expires, whichever occurs later. Strikes or lockouts are prohibited during this 60-day "cooling-off" period. Employees who go on an economic strike during this period lose their status as "employees" and the protections of the act. Therefore, if the parties have given the notice to bargain later than 60 days prior to the expiration of the contract, they must wait the full 60 days to go on strike or lockout, even if the old agreement has already expired.

When negotiations result in matters in dispute, the party seeking contract termination must notify the Federal Mediation and Conciliation Service (FMCS) and the appropriate state mediation agency within 30 days from giving the notice to bargain. Neither side may resort to a strike or lockout until 30 days after the FMCS and state agency have been notified.

The NLRA provides for longer notice periods when the collective bargaining involves the employees of a health-care institution. In that case, the parties must give notice to bargain at least 90 days prior to the expiration of the agreement. No strike or lockout can take place for at least 90 days from the giving of the notice or the expiration of the agreement, whichever is later. Furthermore, the FMCS and state agency must be notified 60 days prior to the termination of the agreement. Finally, Section 8(g) requires that a labor organization seeking to picket or strike against a health-care institution must give both the employer and the FMCS written notice of its intention to strike or picket at least 10 days prior to taking such action. Why should a labor organization be required to give health-care institutions advance notice of any strike or picketing?

As noted, Section 8(d) prohibits any strike or lockout during the notice period. Employees who go on strike during that period are deprived of the protection of the act. In *Mastro Plastics Co. v. NLRB*,[2] the Supreme Court held that the prohibition applied only to economic strikes—strikes designed to pressure the employer to "terminate or modify" the collective agreement. Unfair labor practice strikes, which are called to protest the employer's violation of the NLRA, are not covered by the Section 8(d) prohibition. Therefore, the employees in *Mastro Plastics* who went on strike during the 60-day cooling-off period to protest the illegal firing of an employee were not in violation of Section 8(d) and were not deprived of the protection of the act.

Concept *Summary* 15.1

The Duty to Bargain in Good Faith

Procedural Requirements: Section 8(d)

- The party seeking to begin negotiations must give notice of desire to bargain at least 60 days prior to the expiration of the collective agreement, or 60 days prior to the date the agreement will go into effect
- Any existing agreement must be kept in effect for 60 days from giving notice, or until its expiry date (whichever occurs later)
- Strikes and lockouts are prohibited during the 60-day notice period
- If the negotiations result in a dispute, the party seeking contract termination must notify the FMCS and state mediation agency within 30 days from giving the notice to bargain; no strike or lockout can occur until after 30 days from giving notice to the FMCS and state agency

Creation of the Duty to Bargain

As has been discussed, the duty to bargain arises when the union gets the support of a majority of the employees in a bargaining unit. When a union is certified as the winner of a representation election, the employer is required by Section 8(a)(5) to bargain with it. (An employer with knowledge of a union's majority support, independent of the union's claim of such support, must also recognize and bargain with the union without resort to an election.) Because the NLRA does not provide a means of having a court review

[2] 350 U.S. 270 (1956).