NLRA to serve many purposes:
1. the protection of employees’ choice of whether to join together to attempt to improve the terms of their employment
2. the facilitation of employees’ choice of whether to be represented by an exclusive bargaining agent, and
3. the encouragement of bona fide (though not state-controlled) collective bargaining for employees who choose such exclusive representation

CHAPTER 3: THE JURISDICTION, STRUCTURE AND PROCEDURE OF THE NLRB

A. A BRIEF OVERVIEW OF STRUCTURE AND PROCEDURE
1. Unfair Labor Practice and Representation Proceedings

Board has 2 principal functions: 1. to prosecute and remedy unfair labor practices (ULPs) committed by either employers or unions, and 2. to conduct elections to determine whether a majority of employees wish to be represented by a union (representation proceedings)

ULP Proceedings
Start w/ filing of a charge by an individual, union, or employer w/ one of the Board’s Regional offices
Board investigates the charge, Director determines whether to dismiss or issue complaint
Board issues decision
Losing party can file appeal in circuit court where ULP occurred, the D.C. circuit, or any circuit in which that party resides or does business
Board orders not self-enforcing, if no compliance, board has to petition C.O.A. for enforcement
Over 95% of cases resolved at Regional level

Representation proceedings
Board plays lesser role here, large volume
Board grants review only in cases that raise a substantial question of law or policy

3. Rulemaking vs. Adjudication
board can either rulemake or adjudicate
nrb has made policy almost exclusively through adjudication
broad has broad discretion in choosing this substantial evidence test applies to review of board rulings in questions of fact, Chevron for questions of law courts give great deference in both cases

C. JURISDICTION
Board’s statutory jurisdiction is same as Congress’ under the commerce clause
Board has self-limited this in 2 ways:
1. retail concerns have to have $500,000 annual gross volume of business
2. nonretail cos (ex. Manufacturers) $50,000 annual outflow or inflow, direct or indirect

First Amendment imposes some limitations: ex. no jurisdiction over teachers in church-operated schools

Foreign concerns
Jurisdiction does not extend to American citizens who are permanently employed outside the US by American co.
But, if they work for US co. here, and are on temporary assignment abroad, they do not lose protection
B does have J over foreign co doing business in US

Statutory Exclusions:
NLRA excludes several classes of employees from coverage, including: agricultural laborers, domestics, government employees, and railroad and airline employees subject to Railway Labor Act
Gov employees most difficult, b/c of private co under gov contract

Taft-Hartley excluded independent contractors and supervisors

Independent Contractors
   To determine if independent, look at total factual context in light of common-law agency principals, w/ no one factor being decisive
   Look for significant entrepreneurial opportunity for gain and loss, separate identity and significant independence from employer
   Dunlop Comm. says should turn on the underlying economic realities of the relationship (such as if they present themselves to the general public as an established business presence, have a number of clients, bear the economic risk or loss from their work, etc.)
Supervisors—any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances

Also excludes managerial employees—those who formulate and effectuate management policies by expressing and making operative the decisions of their employer

Have no right to organize and wholly unprotected by NLRA, can’t be included in bargaining units w/ covered employees, can’t vote in certification elections, active involvement in union can constitute employer interference w/ the union, violating 8a2

Employees whose discretion is bounded by an established policy that they do not formulate are not managerial

Also excludes confidential employees—those who assist and act in a confidential capacity to persons who exercise managerial functions in the field of labor relations—only applies to those who have access to labor-related confidential materials, not those who have access only to confidential business materials

Full-time faculty are deemed managerial b/c professional interests cannot be separated from those of the institution, however students and TA’s are employees

3 part test: supervisors if,
1. they engage in one of the listed functions
2. their exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment (detailed orders and regulations can preclude this)
3. their authority is held in the interest of the employer

Professionals, defined by 2(12):
Taft-Hartley added to 9b requiring the Board not to include professional w/in bargaining units that encompass nonprofessional employees unless a majority of such professional employees vote for inclusion in such a unit

CHAPTER 4: PROTECTION OF CONCERTED ACTIVITY

VIOLATIONS BASED ON EMPLOYER (OR UNION) MOTIVATION 8a3
an employer may discharge an employee for a good reason, a poor reason or no reason at all so long as provisions of NLRA are not violated
   violation to discharge employee b/c he has engaged in activities on behalf of a union
employer may assert legitimate motives for discharge
   General Counsel generally carries burden of proof of elements of ULP
But, can place burden of proof on employer to demonstrate legitimate reasons for discharge
   8a3 does not include require necessary causation
   can’t reject applicants b/c of union affiliations (when computing damages, applicants do have a duty to mitigate)

VIOLATIONS BASED ON IMPACT OF EMPLOYER (OR UNION) ACTIONS
2 elements to 8a3 violation:
1. discrimination in regard to hiring or tenures or some term or condition of employment, and
2. a resulting encouragement or discouragement of union membership
Only such discrimination as encourages or discourages membership in a labor organization is proscribed
Specific evidence of intent to encourage or discourage is not required to prove a violation of 8a3
Where a natural consequence of an employer’s actions is such encouragement or discouragement, it is presumed that the employer intended such consequence
The one discriminated against doesn’t have to be the ones encouraged or discouraged for it to be a violation
The quantum of desire does not have to have immediate manifestations

The Board’s orders on complaints of ULPs must be based upon evidence which is placed before the Board by witnesses who are subject to cross-examination by opposing parties

Solicitation
   If a rule against solicitation is invalid as to union solicitation on the employer’s premises during the employee’s own time, a
discharge b/c of violation of that rule discriminates w/in the meaning of 8a3

Peyton Packing presumption—a neutral rule prohibiting solicitation during working hours can be applied against employee union solicitation in the absence of proof that it was adopted for the purpose of discouraging §7 protected activity. Enforcement against union solicitation of even a neutral rule prohibiting all solicitation outside of working hours on company property is illegal, unless the company demonstrates special circumstances that make the rule necessary in order to maintain production or discipline

Handing out of union solicitation cards, as distinguished from handbilling, is deemed a form of solicitation

Restrictions on the wearing of union buttons or insignia at any time are presumptively unlawful in the absence of special circumstances showing the rule is necessary to maintain production, discipline, or customer relations (but contact w/ employees is not a per se justification for banning buttons)

Rules banning employee solicitation even during nonworking time in selling areas are generally considered valid

In hospitals, bans in immediate patient care areas are valid

An otherwise valid no solicitation rule is unlawful if it was adopted for immediate discriminatory purpose

Discriminatory enforcement or application of a facially valid rule is generally an ULP (but, employer can usually allow a small amount of charitable solicitation only)

B. THE ACCOMMODATION OF §7 RIGHTS AND EMPLOYER INTERESTS

Whether an employer interferes w/ a §7 right in violation of 8a1 is thought to require some consideration and accommodation of legally valid employer interests

Interest in excluding outsiders: employer property rights

b/c employees are already rightfully on employer premises, property laws do not come into play

state-law property rights are implicated whenever outsiders, including nonemployee union organizers, seek access to employer’s premises
If other means of contacting employees are available, the employer does not have to permit the use of its facilities for union organization. However, if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property.

Union’s burden of proving this is great.

3 factor balancing test:
1. the degree of impairment of the §7 right if access should be denied, against
2. the degree of impairment of the private property right if access should be granted, against
3. the availability of reasonably effective alternative means (most important)

access to employees, not success in winning them over is the critical issue (although success may be relevant in determining whether reasonable access exists).

these standards also apply to nonemployee appeals to customers

salts-workers who are also paid union organizers, are employees under 2(3)

anti-moonlighting policies are okay, though, as long as they weren’t adopted for antiunion purpose or applied in discriminatory manner.

covert salts are allowed to lie on their employment apps about their union status as long as they do not misrepresent facts relevant to their job qualifications.

Interest in Entrepreneurial Discretion

A change in operations motivated by financial or economic reasons is not an ULP. Have to allow businesses to make decisions based on reasonably anticipated increased costs, can’t make them wait until such increased costs actually materialize.

Look for anti-union animus, though.

Shutdown or transfer of facilities does not, w/out more, violate 8a3. Employer has absolute right to terminate entire business for any reason.

However, a partial closing is an ULP if motivated by purpose to chill unionism in any of the remaining plants of the single employer and if
the employer may reasonably have foreseen that such closing would likely have that effect

Look for 3 factors: ULP if the persons exercising control over the closing plant:

1. have an interest in another business, whether or not affiliated with or not engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business

2. act to close the plant with the purpose of producing such a result

3. occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities

THE SCOPE OF PROTECTED EMPLOYEE ACTIVITY

§7 grants employees not only the right to self-organization, to form, join or assist labor orgs and to bargain through reps of their own choosing, but also the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

Protected Concerted activity: means test

Employees don’t necessarily have to present a specific demand upon their employer to engage in protected concerted activity

Labor dispute—2(9), includes any controversy concerning terms, tenure, or conditions of work (random walkout to protest lack of heat in factory found to be protected)

The reasonableness of workers’ decision to engage in concerted activity is irrelevant to determining whether a labor dispute exists

Unprotected concerted activities—those that are: unlawful, violent, or in breach of contract

Refusing to accept the terms of employment set by the employer w/out engaging in stoppage, but rather working on own terms not protected concerted activity (carloading slowdown case)

Board has declined to find partial or intermittent strikes or work slowdowns protected under the Act

Board does protect isolated spontaneous protests
Can’t hand out handbills that do not attack labor practices of the company, but just the company itself
  Discharge of employees for detrimental disloyalty is allowed

**Protected Concerted activity: purpose or object test**
Protection over activities seeking to improve terms and conditions of employment through channels outside the immediate employee-employer relationship (ex. asking union members to call their congressmen or vote a certain way)
Look at the purpose or object of the activity, if it is to improve terms or conditions of employment, it should be protected

**Individual employee activity as concerted activity**

Interboro doctrine—an individual’s assertion of a right grounded in a collective-bargaining agreement is recognized as concerted activity (case of man who refused to drive truck w/ faulty brakes)
  Employee doesn’t have to make explicit reference to collective-bargaining agreement when acting to be protected
  Employee may engage in activity in such an abusive manner that he loses §7 protection
  Employee also doesn’t have to be correct that his right was violated, it just has to be an honest and reasonable invocation of the right
  Generally complaints of a sole employee that he is being treated unfairly as an individual are not protected
Usually, employees are required to obey first, file grievance complaint later (except when the work assignment poses a safety threat)
  Concerted activity includes both those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management

Employee has right to union representation in investigatory interviews that employee reasonably believes may result in disciplinary action
  Have to request the rep
  Exercise of this right may not interfere w/ legitimate employer prerogatives
  The employer has no duty to bargain w/ the union rep
§7 rights equally applicable in nonunion setting
so, nonunion employee can request a coworker be present in investigatory interview which may result in disciplinary action

**Union Waivers of employee rights to engage in protected activity**

A union may bargain away its members’ economic rights, but it may not surrender rights that impair the employees’ choice of their bargaining rep

Union can’t contract away right to distribute labor literature, b/c this would also ban right to oppositional literature

Equality of access explanation-the inability to foreclose oppositional literature triggers a countervailing right of union supporters

Employer cannot unilaterally define the actions a union official is required to take to enforce a no-strike clause and penalize him for his failure to comply (can’t suspend union reps longer than other employees for walk-out)

Disciplining union officials discriminatorily may deter others from seeking union office

Courts will not infer that the parties intended to waive a statutorily protected right unless it is explicitly stated

**Employer support or domination of a labor org**

Company unions are prohibited

First have to determine if it is a labor org

2(5) org is a labor org if:

1. employees participate
2. the org exists, at least in part, for the purpose of dealing with the employers
3. these dealing concern conditions of work or other statutory subjects (such as grievances, labor disputes, wages, rates of pay, hours of employment, etc)

Question is whether an org exists to deal w/ employers regarding conditions of work

Employee committees can be okay, communication b/t com. and management does not itself make it a labor org
Look at a number of factors, including rotation of reps, employer hostility towards unions, connection of formation to union organizing effort, how the group is viewed by unions, employees, and employer

Dominated by employer if employer: creates the org, determines structure and function of org, controls its continued existence
The presence of an antiunion motive is not critical to finding a violation
Purpose is a matter of what the org is set up to do, and that may be shown by what the org actually does

CHAPTER 5: REGULATION OF THE REPRESENTATIONAL PROCESS

OBTAINING REPRESENTATIVE STATUS THROUGH THE NLRB’S ELECTION PROCEDURE

Appropriate bargaining units

Before an NLRB-sponsored election can be held, there must be a determination regarding an appropriate electoral unit. This is determined by job classifications rather than by the particular holders of jobs
§9a requires a unit appropriate for the purposes of collective bargaining
doesn’t have to be the most appropriate, just an appropriate unit
each side wants a union that will both: 1. maximize its chances of winning the election, and 2. should the union win the election and bargaining ensue, give it the strongest possible hand in K negotiations and administration

Board has to strike a balance b/t the competing interests of unions, employees, employers, and the broader public
This is a discretionary judgment which is entitled to broad judicial deference

Union win rates are highly correlated w/ the number of employees in the bargaining unit
Union has first opportunity to define the unit in its certification petition, employer usually then asks to broaden the scope of the unit

The union can then either stipulate to the unit requested by the employer (or a compromise unit they work out), or hold out for the unit it originally sought and submit it to a Board hearing

Burden of proof then on employer to show that the Board’s unit is inappropriate

Ask whether employees compromising the unit share a community of interest. Look at several factors, including:
  - Geographic proximity
  - Level of employee interchange
  - Degree of autonomy exercised by local store manager
  - Extent of union organization
  - History of collective bargaining
  - Desires of the affected employees
  - Employer’s organizational framework
  - Similarity in skills, benefits, wages, and hours of work

In context of retail chain operation, one of the most important factors is degree of control vested in local store manager

Jurisdiction

Board shall not decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professionals unless a majority of such professionals vote for inclusion in such a unit

Courts have jurisdiction of suit to prevent deprivation of this right

If the absence of jurisdiction of the federal courts means a sacrifice or obliteration of a right which Congress created, inference is strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control

Craft employees may be able to sever themselves from broader unit—analyze all relevant factors

Contingent workers (temps)

Accretion—when a unionized employer adds employees w/ new skills or a new facility, Board must decide whether new employees should be incorporated into existing bargaining unit through accretion or whether an election should be held to determine the new employees’ preferences
Multiemployer units
Entities are joint employers if they share or codetermine essential terms and conditions of employment, such as hiring, firing, discipline, supervision and direction
If each controls part, each employer is obligated to bargain w/ the union over the terms and conditions it controls
Multiemployer principles apply where a union seeks a unit of employees who are supplied by a common supplier employer, but work for different user employers
   In this case, consent of separate user employers must be obtained, unless union sought only to bargain over the terms and conditions the supplier employer controls

Question of Equality of Access

Coercive antiunion solicitation and other similar conduct not allowed
Unions not protected in every possible means of reaching the minds of individual workers, nor are they entitled to use a medium of communication simply b/c an employer is using it

Board will set aside an election b/c an employer or union has delivered a speech on company time to massed assemblies of employees w/in 24 hours before the scheduled election
   Talking to individuals okay
   Making speeches in nonworking time if attendance is voluntary also okay

Employers have to provide unions w/ names and addresses of all employees eligible to vote in a representation election

Regulation of Restraint and Coercion in the election process

Threatening speech
Threats of reprisal/retaliation unlawful coercion
   These are threats that employee will be deliberately harmed for union support, not merely a prediction that adverse consequences may develop
Later cases say assessment must be made in the context of its labor relation setting
Conveyance of an employer’s belief in adverse consequences is not a lawful statement of fact unless the eventuality of its occurrence is capable of proof.

Employer only to tell that which he reasonably believes will be the likely economic consequences of unionization that are outside his control.

Threats of economic reprisal to be taken solely on his own volition prohibited.

Board should ask, “what did the speaker intend and the listener understand?”

Gissel Test: permissible employer predictions must include:
1. careful phrasing on the basis of objective fact
2. to convey an employer’s belief
3. as to demonstrably probable consequences
4. that are beyond the employer’s control

an employer’s assertions that it would not fulfill its statutory obligations to bargain in good faith w/ an elected rep is unlawful.

Procedures governing campaign tactics
2 different procedural routes by which alleged campaign violations can be challenged: 1. filing of objections under the Board’s representational procedure, and 2. the filing of a charge under 8a1 pursuant to the ULP procedure

Board’s function to provide a laboratory environment in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.

When a record reveals conduct so glaring as to have impaired employees’ freedom of choice, election should be set aside and a new one ordered, even if the conduct is not an ULP.

Factual Misrepresentations
Board doesn’t probe into truth or falsity of campaign propaganda, except where deceptive practices improperly involve the Board and its processes, or the use of forged documents which render the voters unable to recognize the propaganda for what it is.

Racially Inflammatory Speech
This isn’t allowed, can’t taint campaign w/ racial passion as to make a fair election impossible.
But can stress black racial pride, past history of discrimination or present disadvantaged status of blacks as a class
2 step determination:
   1. were the remarks racially inflammatory? If so, then test for truth and relevancy
   2. If the remarks were not inflammatory, then the statements should be reviewed under standard governing any other type of alleged material misrepresentation
      look at effect of the speech

Promises and Grants of Benefits
By Employer:
8a1 prohibits not only intrusive threats and promises, but also conduct immediately favorable to employees which is undertaken w/ the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect (fist inside the velvet glove)
   an employer’s offer of some benefit to employees conditioned on their opposition to or rejection of a union should be treated the same as threats against their support of a union
   Board will set aside elections, as well as find ULPs b/c of this.
Board looks to:
   1. the size of the benefit conferred in relation to the stated purpose for granting it
   2. the number of employees receiving it
   3. how employees reasonably would view the purpose of the benefit
   4. the timing of the benefit

By the union:
Can’t waive initiation fee for employees signing recognition slips prior to the election, this would allow the union to buy endorsements and paint a false portrait of employee support during campaign
Employee who signs a recognition slip indicates to other workers he supports the union
   A union’s promise to negotiate better employee benefits if it is elected is not unlawful and will not be considered to taint election.
   However, an employer may not even make unconditional promises of a benefit during the union campaign

Interrogation, Polling, and Surveillance
Some interrogation is coercive
The Board should consider:
   1. the background, i.e. is there a history of employer hostility and discrimination?
   2. the nature of the information sought
   3. the identity of the questioner, i.e. how high was he in the company hierarchy?
   4. place and method of interrogation
   5. truthfulness of the reply
repeated questioning can be found coercive even if any single exchange, taken out of context, could not by itself support a finding of coercion

Polling:
Absent unusual circumstances, the polling of employees by an employer will be violative of 8(a)1 unless the following safeguards are observed:
   1. the purpose of the poll is to determine the truth of a union’s claim of majority
   2. this purpose is communicated to the employees
   3. assurances of no reprisal are given
   4. the employees are polled by secret ballot
   5. the employer has not engaged in ULPs or otherwise created a coercive atmosphere

Surveillance:
An employer’s surveillance of its employees’ union activities is unlawful regardless of whether the employees are aware of the surveillance
   Employer photographing and/or videotaping of employees engaged in peaceful picketing or other protected activities such as handbilling is generally considered coercive, absent a showing of proper justification

OBTAINING RECOGNITION W/O AN ELECTION

The Preference for Elections

Majority of authorization cards can certify union when employer conduct has disrupted the election process
Employer has duty to bargain whenever the union rep presents convincing evidence of majority support.

Cards must be unambiguous (i.e., states on its face that the signer authorizes the union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used solely for the purpose of obtaining an election.

However, employer can insist on secret ballot election, unless he engages in contemporaneous ULPs likely to destroy the union’s majority and seriously impede the election.

If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election by the use of traditional remedies is slight, and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

An employer, otherwise guiltless of ULPs, does not violate 8a(5) merely by refusing to recognize a union even though the employer has independent knowledge of union’s valid card majority. The union seeking recognition has the burden of filing an election petition.

If employer agrees to be bound by method other than elections, they are held to the results, even if not to their liking.

An employer who unilaterally attempts to determine majority status (such as through a poll) must extend recognition if the union receives majority support.

A union is not similarly bound by a loss in a poll, it can still seek certification via a Board election.

Hallmark violations—violations of the Act that are thought to be particularly coercive and likely to have a lasting effect—are especially likely to lead to the issuance of a bargaining order.

Restraints on the Recognition of Minority Unions
Labor laws do not permit the employer to bargain w/ a nonmajority union as the rep of employees who have not given their individual authorizations.
Company didn’t check authorization cards against employee roll—
turns out that the union didn’t actually have a majority

When the company bargained w/ that union, it violated the
employees’ §7 rights, and gave unlawful support to the union

No defense that the union later gained majority status, instead
probably evidence that the union engaged in ULP

Taft-Hartley added 8b1a-prohibiting the unions from invading the
rights of employees under §7 in a fashion comparable to the activities
of employers prohibited under 8a1

Employer should have checked to be sure, but only a remedial order,
no damages or anything

Elections are the best means

Employers presented w/ rival claims from competing unions should
follow a course of strict neutrality from filing of petition of election until
after election

No 8a2 violations from employer who recognizes a labor org which
represents an uncoerced, unassisted majority before a valid petition
for election has been filed. However, once petition has been filed,
employer can’t recognize one competing union over another

Regulation of Organizational and Recognitional Picketing

Landrum Griffin Act added 8b7 made organizational and recognitional
picketing an ULP in 3 situations:

1. where another union has been lawfully recognized and a
question concerning representation cannot appropriately be raised

2. where a valid election has been held in the previous 12
months

3. recognition picketing only allowed for 30 days, after that the
union must file an election petition. Once the petition is filed, can
continue to picket pending the processing of the petition (but if there is
picketing, the Board can expedite the election)

no time limit if picket is merely to inform the public the
employer is not a union shop (but picketing cannot halt pickups or
deliveries, or the performance of services)

But, a currently certified union may picket for recognition or
organization of employees for whom it is certified

Doesn’t matter if there is a ULP, if union not recognized, only have 30
days, follow normal ULP proceedings (but can picket to protest the
ULP)
A union that has been recognized may picket over particular economic demands that have been topics of bargaining. As long as the union makes only particular remedial demands on an employer that can be satisfied without recognition of the union, picketing not prohibited by 8(b)(7).

Area standards picketing—picketing aimed at causing the picketed employer to adopt employment terms commensurate with those prevailing in his locale is not held to be for recognitional purposes.

**OUSTING AN INCUMBANT UNION**

**Bars to an Election**

A certification must be honored for one year.

Taft Hartley allowed employees to petition the Board for a decertification election (after a year) if they no longer want the union, employers can petition (after a year) if they doubted the union’s majority status.

Period runs from date of certification, not election.

**The Contract Bar**

Bars election among employees covered by a valid and operative collective bargaining agreement of reasonable duration.

The agreement must be in writing and properly executed, and contain substantial terms and conditions of employment sufficient to stabilize the bargaining relationship, including a termination date.

The bar only lasts 3 years, even if the K is longer.

However, the contracted employer and union are still barred from filing petition during entire length of K.

Petition can only be filed during open, or window period of 60-90 days prior to the expiration of the K.

Premature extensions (extension prior to beginning of insulated period) does not bar election if petition filed during insulated period.

K bar may be lifted in cases of schism, union is defunct, or union disclaims interest in representing.

**The Means of Ousting a Union**
Employees may seek to oust their union via a decertification petition under 9c1Aii. Petition must be supported by a 30% showing of interest (30% don’t want union)
Unions have strong incentive to file ULP charges that will stave off these elections

Loss of majority in fact is only valid defense to Er withdrawal of recognition
    No good faith doubt defense anymore
More lenient standards for obtaining DeCert elections—reasonable uncertainty standard

CHAPTER 6: REGULATION OF THE PROCESS OF COLLECTIVE BARGAINING

Employer has duty to bargain
w/out the designated rep’s consent, the Er may not deal w/ any other agency and presumably may not negotiate terms w/ Ees on an individual basis
employer has to act in a way that suggests a serious regard for the workers’ preference for collective bargaining
    has to make itself available for meeting to discuss terms and have reps at that meeting w/ authority to bargain on its behalf once agreement is reached, Er must not delay unreasonably its execution
T-H amendments also impose good faith bargaining obligations on the union

T-H 8d indicates that parties do not have to make concessions or even reach agreement to bargain in good faith

The individual hiring K is subsidiary to the terms of the collective bargaining agreement and may not waive any of its benefits
    Also can’t except individual K’s from the operation of collective ones b/c they are individually more advantageous

Individual Ks, no matter what their terms or what circumstances justify their existence, may not be availed of to defeat or delay the procedures prescribed by the NLRA looking to collective bargaining, nor to exclude the K EE from a duly ascertained bargaining unit, nor
to forestall bargaining or to limit or condition the terms of the collective agreement

THE REQUIREMENT OF GOOD FAITH: BARGAINING POSITIONS AND PRACTICES

Models of the Bargaining Process

Don’t inquire into what goes on during bargaining process
Congress intended to impose a mutual duty upon the parties to confer in good faith w/ a desire to reach agreement
   But they should have wide latitude in their negotiations, unrestricted by any gov power to regulate the substantive solution of their differences
The use of economic pressure is not of itself inconsistent w/ the duty of bargaining in good faith
   A union activity that is not protected against disciplinary action (such as work slowdowns) does not mean that it constitutes a refusal to bargain in good faith

Problem of Surface Bargaining
Management functions clause okay

Can infer from the clauses offered that Er entered into bargaining w/ no real intention of coming to agreement
   Look for unusually harsh and unreasonable proposals that are predictably unworkable

Remedies for Bad Faith Bargaining

While the Board does have the power to require employers and Ees to negotiate, it is w/out the power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement
   Fundamental premise on which act is based—private bargaining under governmental supervision of the procedure alone, w/out any official compulsion over the actual terms of the K

No make-whole relief available, b/c impossible to determine what the parties would have agreed to had they bargained in good faith
Generally can’t award litigation expenses except when Board litigates and can’t show his position was substantially justified under EAJA except when party has raised frivolous defenses (application of bad faith exception to American rule)

Disclosure Obligations
Board has a right to consider an Er’s refusal to give information about its financial status when Er claims inability to pay increased wages
If makes claim, but won’t substantiate, evidence of bad faith
Good-faith bargaining requires that claims made by either side must be honest claims

When asking for test scores, have to allow for need for secrecy and consent

The Concept of Impasse
A refusal to negotiate in fact as to any subject which is w/in 8d and about which the other party seeks to negotiate, violates 8a5 even though the 1st party has every desire to reach general agreement
An employer’s unilateral change in employment conditions under negotiation is a violation of 8a5
Board can order cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement
Unilateral action by an Er w/out prior discussion w/ the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation is such an obstruction

An Er may, however, lawfully implement after an impasse proposals reasonably comprehended w/in those it offered before impasse
Use of the alternative proposal as a means of pressuring the union to agree to the primary proposal did not render its unilateral implementation an ULP

SUBJECTS OF MANDATORY BARGAINING
Have to bargain in good faith w/ respect to wages, hours, and other terms and conditions of employment

As to other matters, each party is free to bargain or not to bargain, and to agree or not to agree

Good faith does not allow the employer to summarily refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining

Just b/c an Er is allowed to propose something, doesn’t mean it can lawfully insist upon them as a condition to any agreement

Mandatory terms issues:
1. the party who would control the topic unilaterally absent bargaining obligations must bargain about decisions concerning the topic w/ a sincere desire to reach an agreement
2. the noncontrolling party may use economic leverage to attempt to compel the controlling party to compromise
3. if Ees strike over the Er’s failure to bargain over a mandatory subject, they will be treated as ULP strikers free to regain their jobs at strike’s end
4. midterm modifications of aspects of CBAs dealing w/ mandatory subjects are unlawful w/out the consent of the other party
5. the controlling party must bargain in good faith to impasse before implementing changes concerning a mandatory subject

retiree benefits are nonmandatory subjects, and, as such, can be modified midterm w/out violating 8a5 (but still can be K violation)

Status of Major Entrepreneurial Decisions
Contracting out of work is a mandatory subject b/c it affects terms of employment

When trying to determine what is in the scope of mandatory bargaining, look to industrial bargaining practices

Should require the Er to bargain about a matter if it would significantly abridge his freedom to manage the business

Examples of decisions that don’t affect employment relationship
Advertising and promotion, product type and design, and financing arrangements

Examples that DO count
Order of succession of layoffs and recalls, production quotas, and work rules

3rd type of decision—one that affects the relationship but has its focus only on the economic profitability—closing part of business
Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business
Bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the CBA process, outweighs the burden placed on the conduct of the business
Union should be given opportunity to discuss partial closings, but labeling it a mandatory subject goes too far
Union protected by 8a3, which prohibits partial closings motivated by anti-union animus, when done to gain an unfair advantage

Note: WARN requires firms w/ at least 100 employees to give 60 days advance notice of shutdown that will lay off at least 50 employees w/in a 30 day period

MULTIEMPLOYER AND MULTIUNION BARGAINING

Congress rejected proposal to limit or outlaw multiemployer bargaining
Guidelines to withdraw from multiemployer units:
Any party can withdraw prior to the date set for negotiation of a new K or the date on which negotiations actually begin, provided that adequate notice is given
Once negotiations for a new K have commenced, withdrawal is only permitted if there is mutual consent or unusual circumstances
An impasse is not such an unusual circumstance
If there’s an impasse, can have individual temporary interim agreements

MIDTERM BARGAINING
Midterm modifications of clauses in a labor agreement dealing w/ permissive subjects do not violate the statutory duty to bargain (but can be breach of K)
If mandatory and not covered in original K, have to discuss it midterm if other party requests

   Can agree in writing in the K not to discuss it midterm, but has to be explicit

   Also, parties can include zipper clause, which precludes midterm discussion of any item not contained in the agreement

Midterm strikes
Strike during the term of an agreement may constitute a breach of the agreement’s no-strike clause even if the strike is over a subject requiring bargaining

   Also, strikes during the notice and cooling-off periods of 8d are unprotected
But, where the K provides for a reopener period on one or more terms, the union may strike during that period on those items

If term not contained in CBA, simple good-faith requirements apply

CHAPTER 7: WEAPONS OF ECONOMIC CONFLICT: STRIKES, BOYCOTTS AND PICKETING

STRIKES AND EMPLOYER COUNTERMEASURES

Economic Pressures and the Duty to Bargain

Labor’s principal economic weapon is the strike—a collective withdrawal of the services of represented employees

Management’s principal weapons include maintaining operations in the face of a strike and, occasionally, the lockout—a preemptive refusal to allow represented employees to work pending the resolution of the dispute

Use of economic weapons generally not inconsistent w/ good faith bargaining

Method of regulation of these weapons is 8a3 and 8b2, the antidiscrimination principle
A conventional peaceful strike does not suspend an Er’s duty to bargain

Er can replace striking workers during the strike
It is an ULP if when Er reinstates striking Ees he keeps some out for union activities
Er can hire permanent replacements
Replaced strikers remain employees and retrain preferential rights to reinstatement (if replacements leave, they should get jobs back)
They can continue to vote for up to one year after beginning of strike
Ers do not have to make showing that they need replacements to maintain operations, they can just hire the replacements

ULP strikes
If the strike is caused both by a bargaining impasse and an ULP, it deemed an ULP strike as long as it was motivated in part by the ULP
An Er IS required to displace replacements to reinstate ULP strikers
If the Er fails to do so, the strikers are entitled to back pay
ULP strikers can continue to vote even if the strike goes on for more than 12 months
ULP strikes do not violate no-strike clauses in CBAs unless the strike was in protest of a nonserious ULP

Honoring Picket Lines
Even a single employee’s decision to refuse to cross a picket line is concerted activity for mutual aid and protection
Exceptions: not if picket line is illegal, or if Ee has waived this right in the CBA w/ a conventional no-strike clause (such a clause is presumed to cover sympathy strikes unless the K as a whole or extrinsic evidence demonstrates otherwise)

Impact Analysis
Er gave 20 years seniority credit to replacements and returned strikers who crossed line, giving them great advantage in future layoffs. This was a ULP since would have impact of continual cleavage
Legitimate business purpose absent illegal intent not always defense to ULP, impact can show the intent
Some conduct is so inherently destructive of employee interests that it may be deemed violative w/out need for proof of intent
Er has burden of proving otherwise
Er can give replacements certain benefits if it does not cause continual cleavage after strike ends

Replacements’ effect on union’s majority status
Permanent replacements are considered members of the bargaining unit and are entitled to vote in Board elections
No presumption about replacements’ union sentiments, but should determine their views on a case-by-case basis

**Lockouts**

Lockouts are permissible to safeguard against loss where there is reasonable ground for believing that a strike was threatened or imminent. Examples:
- Lockouts designed to prevent seizure of a plan by a sitdown strike
- To forestall repetitive disruptions of an integrated operation by quickie strikes
- To avoid spoilage of materials which would result from a sudden work stoppage
- To avert the immobilization of automobiles brought in for repair
- By multiemployer bargaining unit as a response to a whipsaw strike against one of its members
Can use a lockout as an economic weapon after an impasse has been reached

**Subcontracting Struck Work**

Can’t permanently K out all bargaining unit work during strike as it would destroy the unit
- May be able to do so if b/c of pressing business necessity, or to avoid violence

**Secondary Pressures**

8b4b prohibits a union from pressuring secondary employers to cease doing business with the primary Er those hurt by violations of this can sue directly in federal courts to recover damages (unlike every other ULP where have to go through Board)
to establish a violation, a union must be shown to have used improper means in support of an improper objective. 2 types:
- pressures directed at employees of any person to induce a work stoppage, and
- pressures directed at any person that amount to threats, coercion, or restraint of such a person

3 provisos to this:
1. applicable only to 8b4b-preserves otherwise lawful primary strikes or primary picketing
2. not unlawful to honor a picket line maintained at the premises of another Er
3. certain nonpicketing publicity still protected

can’t exert pressure at the premises of the secondary employer when the primary Er’s workers are not present at the secondary site

Ally doctrine
If the picketing takes place at the premises of another firm that is deemed to be an ally of the struck Er, the prohibition against secondary-situs picketing does not apply
Ally is someone the primary employer uses to do his work/avoid economic impact of strike
If does work which would otherwise be done by the striking Ee’s of the primary Er, and the work is paid for by the primary Er to enable him to meet his K obligations

Common Situs problems
Can strike other places if situs is ambulatory as long as primary situs is there
Has to meet certain conditions:
1. picketing is strictly limited to times when the situs of dispute is located on the secondary Er’s premises
2. at the time of the picketing, the primary Er is engaged in its normal business at the situs
3. the picketing is limited to places reasonably close to the location of the situs
4. the picketing clearly discloses that the dispute is w/ the primary Er
one of the objects of the strike can’t be to get secondary Er to stop
doing business w/ the primary Er
can picket independent contractors if their work is necessary to the
normal operations of the primary Er

appeals to secondary Ees at construction sites are illegal w/out
regard to whether those Ees are doing work that is related to work
being done by Ees of the primary Er

can appeal to consumers as long as employed only to persuade
customers not to buy the struck product b/c appeal is closely confined
to the primary dispute
  this is true even if this led to lower sales or for the product to be dropped
  however, this is not true if this leaves the secondary Er no choice but to drop all ties w/ the primary Er (they only sell the primary Er’s products, so the picketing encourages consumers to boycott secondary Er entirely)

picketing is mixture of conduct and communication, so different rules
than handbilling
handbilling is usually okay

Hot Cargo Clauses
Agreement not to handle nonunion material is unlawful
But, can pressure Er’s to preserve work traditionally done by them (if always finished doors, can add clause to continue finishing all doors), b/c it is a term and condition of employment
  Has to be neutral to whether product was produced by a union or not

Exceptions:
Garment industry can enter into agreement not to K w/ nonunion shops
Construction industry can have hot cargo clauses that apply only to work done on-site

WORK-ASSIGNMENT DISPUTES
When two unions dispute over who gets work, it’s an ULP to coerce Er to assign work to one group or another unless the Er is refusing to honor a representation order of the Board
Board should determine who gets the work
A union can picket to enforce a 10k award

FEATHERBEDDING
Make-work rules not allowed
Unions can’t force Ers to pay for services which are not performed or not to be performed
Can seek actual employment for its members as long as they do actual work

VIOLENCE
Union violates 8b1 when its agents use physical violence or threats of violence to coerce Ees in the exercise of their §7 rights

EXTRA SECTIONS ON ARBITRATION

ARBITRATION AND THE COURTS

Arbitration often last step in grievance procedure
Courts should apply federal law
If arb agreement, cts will not look into merits of the case, will just order arb if in K
Doubts should be resolved in favor of coverage
Questions of whether the procedural prereqs are met for arb should be settled by the arb
Considerations of public policy do not require courts to refuse to enforce an arb award unless they are explicit, well defined and dominant
Generally do not

No Strike Obligations

If strike is over grievance to be bound by arb, cts can order injunction to stop strike
Union not liable for violation of no-strike agreement if undertaken by individual members and not instigated, supported, ratified, or encouraged by the union

ARBITRATION AND THE NLRB
Should defer to arb if arb clause where proceedings have been fair and regular, all parties agreed to be bound, and the decision is not clearly repugnant to the purposes and policies of the ACT

If arb consider ULP issue, Board doesn’t