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STEWARDS CORNER

Monthly Newsletter for Union Stewards

"To Express One Thing Is to Exclude Another"

Learning to interpret contract language through the lenses of an arbitrator gives stewards the ability to support contract interpretation that is favorable to the Union and to persuade management to settle the grievance.

Union grievances fall into two categories: a disciplinary (just cause) grievance or a contractual grievance. When an arbitrator is tasked with determining whether management violated the terms of the collective bargaining agreement, they can be asked to address a variety of issues: what the contract language means, what the facts of the case are, and what remedy should be applied.

Often, arbitrators will first ask if a "*meeting of the minds*" exists between the parties. Simply put — **do both parties agree to the meaning and intent of the language**? If a "meeting of the minds" is not established, an arbitrator will be asked to determine the meaning of the contract language or its correct application vis-à-vis the events giving rise to the dispute. In this case, an arbitrator must understand the intent of the language and will look to "extrinsic evidence" to establish the spirit and intent of the language. Extrinsic evidence can include bargaining history and notes, prior memorandums of understanding (MOU), previous grievances lost or won involving the language, previous arbitrations lost or won involving the language, past practice, and other sources.

If the meaning of the language is not in dispute, the parties may have differing opinions on what actually occurred. In this case, the arbitrator must determine **the facts of the case** or the Five W's. If the parties dispute neither the language's meaning and application nor the facts that gave rise to the grievance, they may be asking the arbitrator to determine an appropriate remedy.

If there is no meeting of the minds and the arbitrator can't easily determine the language's true intent, they will often apply **rules of contract interpretation** as derived from established contract law. There are several "rules" an arbitrator may refer to in determining the spirit and application of the language. In this article, we will focus on the principle of "*Expressio unius est exclusion alterius,*" aka: "*to express one thing is to exclude another.*" This is a pretty easy principle to understand and apply. In essence, if the parties went out of their way to specify or include a term in their respective language, any term not specified (expressed) was intentionally omitted.

For example, if the language states: "*Seniority shall govern in all cases of layoff, recall, promotion, and transfer,*" the Union cannot argue that seniority applies to overtime assignments, as overtime was not expressed and therefore is excluded.

If the language states: "*The Employer shall pay for an employee's time lost due to an injury sustained in an industrial accident at the Employer's place of business. The Employer will pay the injured employee's standard hourly rate plus any overtime and applicable shift differential. To qualify, the employee must provide evidence of receiving medical attention,*" the employer cannot start conditioning the paid lost time on whether the employee was found responsible for the accident occurring. The only expressed condition is that the employee provide evidence of receiving medical attention.

If the language states: "*Management has the right to subcontract work at the discretion of the company. However, maintenance and production work will not be subcontracted if there is sufficient qualified manpower available for such work.*" The union cannot prohibit management from subcontracting clerical work in the bargaining unit, as it was not expressly prohibited from subcontracting such as maintenance and production work.

If the parties want flexibility as to who or what the language applies to, a common workaround to the "to express one thing is to exclude another principle" is to condition the agreement with language such as: "to include, but not limited to…" This allows the parties to potentially capture other terms or conditions not definitively expressed in the existing language.

Stewards should look for this language in determining whether the employer is truly limited to the expressed terms, or if broader language exists (i.e.: "including but not limited to," or "to the extent practicable," or "may take into account other considerations," etc.). Likewise, when reading contract language, the steward should read the contract as a whole in case the language is qualified elsewhere or is in conflict with another provision in the contract.

In future issues, we will cover other standards of contract interpretation, including but not limited to the meanings of particular words. (See what we did there!)

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To Unite All Doesn't Allow for Workplace Harassment!

When the Steelworkers Organizing Committee was founded in 1936, its first founding principle was: **To unite in one organization, regardless of creed, color, or nationality, all workmen and working women eligible for membership.** They knew then what we know now, that we are strongest when we are all in.

Harassment undermines our solidarity and other fundamental principles of unionism. As a steward, you are the front line in our defense against this solidarity-killing action. Workplace harassment is a serious issue, but you can make a real difference in addressing and resolving it!

What is Harassment?

The Equal Employment Opportunity Commission (EEOC) defines harassment as

> *any unwelcome conduct that is based on race, color, religion, sex (including sexual orientation, gender identity, or pregnancy), national origin, older age (beginning at age 40), disability, or genetic information (including family medical history).*

Your collective bargaining agreement (CBA) might also have language on harassment, and your employer likely has a policy on this topic as well.

Harassment takes many forms. It can be verbal, written, or physical conduct, including but not limited to jokes, slurs, name-calling, physical assaults, threats, intimidation, ridicule, insults, put-downs, and offensive objects or pictures.

For example, comments about a co-worker's nationality – "*You're from that country? I hope you're not a terrorist.*" – can constitute harassment. The harasser can be an immediate supervisor, a supervisor in another area, a coworker, a customer, or a vendor. The person being victimized does not have to be the person being harassed but can be anyone affected by the offensive conduct.

A supervisor who gives an employee constructive criticism or coaching to improve their performance is not engaging in harassment – management's job is to direct the workforce. But, if their criticism is ongoing and degrades an employee, it could meet the EEOC definition of harassment.

How to Represent Your Members:

Keep in mind – something doesn't have to rise to the level of being unlawful for you to speak up. We need to work with our Union leadership, members, and employer to ensure that all workers feel safe and free from harassing and hostile behavior at work. This makes their work life better and our Union stronger.

1. Speak up if you see inappropriate behavior. Just as you would make sure the contract is enforced and the workplace is physically safe, make sure that members are safe from harassment. Be more than a bystander; speak up!
2. Support the person making the complaint: ensure they feel heard, provide a safe and confidential space to discuss the issue; ask the complainant what they want out of the situation; and do your best to honor their request.
3. A member may ask that you accompany them to human resources to file an official complaint, or they may go directly to the employer, and you become involved afterward.

What if it is Member-on-Member?

If the harassing behavior is coming from another Union member, it might be that the complainant just wants the behavior to stop. The member might be OK with you having a serious and frank conversation with the other member, advising them what they are being accused of and that if it is happening, it must stop immediately. If this can satisfactorily resolve the issue, great. If it doesn't, then there are additional steps to take.

As a steward, we owe all bargaining unit members the duty of fair representation. If the harasser is a non-bargaining unit member, then we represent the bargaining unit member. If the alleged harasser is a bargaining unit member, and the issue leads to discipline, both (or all involved) are entitled to fair representation. A different steward should represent each member, and the investigations ought to remain separate from one another. You can also engage your Civil and Human Rights Committee and Staff Representative in a case like this.

Remember, if a bargaining unit member comes to you and says they are being harassed, the allegation must be taken seriously and investigated properly and promptly. Document all your communications with the complainant, witnesses, and anyone else pertinent to the investigation.

Based upon the merits of the case, it should be determined what actions will be taken and the affected member(s) should be communicated with and represented fairly throughout the entire process.

TEACHING TUESDAYS

http://usw.to/teachingtuesdays

- 1/9: **Roles of Union Stewards** (11 AM — 8 PM)
- 1/16: **Crossing Language Boundaries: How to Bring Immigrant Co-Workers into the Union** (11 AM — 8 PM)
- 1/23: **Talking with Local Schools about Unions & Work** (11 AM — 8 PM)
- 2/6: **Legal Right & Responsibilities of Union Stewards** (11AM — 8 PM)

All classes are held at **11 AM (EST)** and **8 PM (EST)**