Cos. Should Consider Virtual Bargaining To Show Good Faith

By **Brandon Shemtob** (June 14, 2023)

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When you envision union negotiations, what do you see?

If television has taught us anything, we would imagine a room with a long table. On one side sits management officials, often in suits, and on the other side are the union representatives and the workers they represent. The parties are sliding written proposals across the table to one another in a tense environment.

Prior to the pandemic, this scene was fairly accurate. However, the COVID-19 pandemic changed a lot about our everyday lives — from how we get our groceries to whether we telecommute for work.

It is, therefore, no surprise that such fundamental changes also affected labor negotiations. A recent decision from a regional office of the National Labor Relations Board in a case involving Starbucks Corp. highlights this point.

During the pandemic, the board made clear that unions and companies needed to continue to meet and bargain over the terms and conditions of employment. Because government restrictions on gatherings were in effect, this meant that bargaining needed to occur via telephone or video conference. Companies and unions obliged, as it was the only safe way to conduct these required meetings.

Now that COVID-19 restrictions have been lifted, there is no longer an impediment to in-person bargaining. However, some unions and companies have found that remote or virtual bargaining is more time- and cost-effective, and often allows for increased participation among bargaining unit members.

Clearly, if the union and company agree to conduct bargaining sessions virtually, the board will not object. However, the rubber meets the road when one party prefers in-person and the other demands virtual bargaining. Questions then arise, such as: Can either party mandate the other to concede to their demand on virtual or in-person bargaining? And if so, which is correct — in-person or virtual?

The board is currently struggling to answer these questions. However, there are some helpful guideposts to consider.

The first is the text of the National Labor Relations Act. The act requires employers and unions to bargain collectively and makes it an unfair labor practice to refuse to do so. Section 8(d) of the act explicitly states, in part:

> 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.

Therefore, the text of the act simply requires that the parties meet at reasonable times, but is silent on where those meetings must take place.

Notwithstanding this, prior decisions from the board have interpreted Section 8(d)'s obligation to meet and confer in good faith as requiring the parties to do so in person. These prior decisions reasoned that collective bargaining is generally most effective when parties meet at the table.[1]

However, the board has also recognized that the parties to a collective bargaining relationship have some leeway to structure their bargaining process without violating their statutory duty to bargain in good faith.

A look at a recent decision from an NLRB regional director illustrates this point.

The Starbucks Dismissal

In a March case involving Starbucks, the union scheduled and attended bargaining sessions in-person, but also had part of their bargaining team attend virtually. Starbucks — whose entire bargaining team was in-person — objected to the union having a hybrid approach to bargaining and insisted that the union's entire bargaining committee also appear in-person. When the union refused to do so, both sides complained to the board that the other had violated the law.

Starbucks claimed that the union, by failing to have its full bargaining team attend in-person, had violated its duty to bargain in good faith. Similarly, the union asserted that Starbucks violated the act by refusing to bargain through this hybrid approach.

In siding with the union on March 27 and dismissing Starbucks' allegations of bad faith bargaining, the NLRB's director of Region 27 explained that the dispute must be viewed through a lens that considered the totality of the circumstances. In doing so, the regional director held, in part:

> The totality of the circumstances establishes that the Union's insistence on hybrid bargaining was not unreasonable, burdensome, or in bad faith. Initially, no evidence suggests that the Union stood to benefit from delaying or frustrating negotiations. Indeed, the Union demonstrated willingness to compromise over the bargaining format by abandoning its earlier efforts to conduct negotiations entirely virtually. Instead, the Union committed to having a bargaining team comprised of both in-person and virtual members. Because members of the bargaining team appeared in person, the benefits that in-person interactions confer remained present, while the purported disadvantages of virtual negotiations were mitigated.

Takeaways from the Determination

In the Starbucks case, the union was permitted to insist on hybrid negotiations because the NLRB regional director opined that during hybrid negotiations "the benefits that in-person interactions confer remained present, while the purported disadvantages of virtual negotiations were mitigated."

Moreover, the regional director determined that the analysis must consider the totality of the circumstances and should be applied to determine whether the party refusing to meet in-person is doing so to frustrate bargaining.

The regional director then determined that the union had no reason to delay bargaining and that it was in its interest for bargaining to progress. Because the unions' intentions were deemed pure, the regional director found no merit to the allegations of bad faith bargaining.

This provides very practical guidance for employers. It is easy to imagine the shoe being on the other foot and the company insisting on virtual or hybrid negotiations. If this is the case, it is likely, based on the Starbucks determination, that regional directors and the board will look to the totality of the circumstances to determine if the company's insistence on virtual or hybrid bargaining is for a legitimate reason, or is simply intended to stall or frustrate bargaining.

Employers planning to insist on virtual negotiations would be wise to offer multiple dates and times to conduct bargaining, as well as offer a hybrid option if possible. This will help demonstrate to the board that the company is taking its bargaining obligation seriously and is not trying to stall or otherwise delay the process.

However, because the board has not directly weighed in on these issues, only time and future cases will tell how the board will treat these technological changes to collective bargaining.

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[1] See, e.g., Fountain Lodge Inc., 269 NLRB 674, 674 (1984).