LABOR LAW OUTLINE

**Ch. 1: The Evolution of the Contemporary Workplace**

1. Introduction
   1. Employment law: governs individual rights (CL or statutory)
   2. Labor law: collective rights; governs organization
   3. THEMES of the book:
      1. Importance of employment relationship/work [to individuals and society] & why it’s interesting
         1. Divergence: collective interest in mutual success (b/w employer and employees) but there is an individual interest in success at the expense of the other
            1. Q is how we accommodate this divergence—mainly through individual contracts
      2. We need to regulate the employment relationship to try to promote (a) efficiency; (b) equity; and (c) employee voice
         1. Have to have the law as a sub-context to any market
         2. May not want a system based purely on efficiency
         3. Employees should feel like they have a voice in order to feel fulfilled
         4. If democracy is good for the country, maybe it is good in the work place
      3. Importance of collective action on the part of employees in terms of remedying and addressing conflicts with employers
         1. Many conditions of employment are public goods
            1. Can’t be negotiated individually b/c unlikely to get the efficient result [not enough incentive to negotiate for these goods]
            2. Ex: safety of assembly line; air quality [workers share these communally]
         2. Imperfect information
            1. Ex: what is in these cleaning solutions?
         3. Long-term implicit contracts
            1. Individual bargaining opens the door for company’s opportunism (firing older workers when their productivity is down)
            2. Union can protect the life cycle of workers [that you can’t pick on people over 50 w/o cause]
         4. Lack of bargaining power w/ individual employees
         5. \*Deal with the above limitations by:
            1. Government regulation

Ex: OSHA

Benefit: employers won’t know who workers vote for

Employers complain that regs put them at a disadvantage vis a vis Mexico

* + - * 1. Collective bargaining

You may lose your job re: who you vote for even though it’s technically against the law

KDS: this not big gov’t—this is people being directly affected by the bargaining decisions

* + 1. Government regulation of collective action/bargaining can improve CB’s efficiency
       1. Divergence of individual/collective interests b/w employers and employees
          1. Two strategies: intransigence or cooperation
          2. Individually, it pays to be intransigent [but if both act on this, results in a strike- which wastes money]
          3. Goal is to use regulation to get EEs and ERs to cooperate and move from the $3/3 boxes to the $5/5 boxes

1. Brief History of American Labor Law
   1. The Artisanal Period: The Transition from Empl Rts Based on Stats to ‘Free Labor’ [1600-1890]
      1. Production Technology: masters have a lot of bargaining power b/c they have all the production knowledge
         1. No nat’l market—regional markets are much more important
         2. Small intimate shops
      2. Nature of Relationship: familial relationship w/ a contract behind it [apprentices would live with the master]
         1. Can still breach a K, but status is more dominant [court has a list of expectations re: the relationship]
         2. No fundamental divergence of interests that you get under the industrial period [b/c apprentices eventually progress to become a master; later, assembly line workers have a harder time progressing to higher management]
      3. Law of Employment: master/servant
         1. Employee discharged governed by English rule:
            1. Presumption = employee is hired for one year [they are bound to you and you are bound to them]

Discharge only on reasonable notice

Set at one year so the EE or ER can’t take advantage of the agricultural cycle [winter]

* + 1. Law of Collective Bargaining
       1. First—Criminal Conspiracy [***Philadelphia Cordwainers’ Case***]
          1. EEs can individually decide to withhold labor, but if they do it collectively it is CL criminal conspiracy and it and it can be enjoined
          2. People started to disagree with this, so moved to #2
       2. Second—Civil Conspiracy
          1. Unions = not per se unlawful; look to ends/means that they seek to achieve

If either the ends or means violate public policy, can enjoin it and seek civil damages

* + - * 1. ***Vegelahn v. Guntner***

V sought an injunction against workers under this doctrine

Justice Holmes: narrowed the injunction and enjoined threats of violence or mass picketing that blocked the door (allowed two-man patrols to be near the door)🡪 says that competition b/w labor and capital is allowed and union should be able to inflict harm on the business. If capitalists combine on one side, you have to allow combination of labor in the name of equity and bargaining.

But the full court doesn’t buy this and applies the ends/means test

Maj: picketing (the means used here) was considered intimidation/coercion

This court finds labor unions inherently coercive (they will enjoin two man patrols that are only using moral persuasion)

LEGACY: the ends/means test is malleable and is subject to the whims of the court

* 1. The Labor Relations System of the Industrial Era
     1. Early Industrial Period [1890-1932]
        1. Production Technology: larger scale factories; more likely to have one ER and 100s of EEs
           1. Scientific management: broke down steps of production into smaller parts that could be done by lesser skilled EEs; de-skilled the jobs [knowledge of production is in the assembly line], which made production cheaper; changed the employment relationship and bargaining power
           2. This led to personnel management

Large, vertically integrated companies want to retain EEs over their lifetime (pensions and health care systems developed)

Treat EES well so they will stay

Lead to concept of “corporate welfarism”

* + - 1. Nature of Employment Relationship: individual contract dominated
      2. Law of Employment Relationship:
         1. Employment at Will🡪 presumption is that EE can be discharged for any reason and EE can leave for any reason

This is a presumption of K interpretation [but still have to follow the explicit K terms]

If it’s a K for an indefinite term, then it is employment at will

If EE is in a K with a definite term, then the presumption is that you are employed “for cause” and can only be fired/leave for cause

ER can change terms of employment whenever they need/want to [but EEs could contract for job security if they have enough bargaining power]

* + - * 1. Unilateral Offers and Acceptance

ER makes offer of terms and EE accepts by working

“non-contract” EE is an oxy-moron (this is still a contractual relationship even if it’s not written)

USA- opted for flexibility and ER control

* + - * 1. ***Lochner*** Doctrine

Constitutionally enshrines employment at will & unilateral offer and acceptance

Violates substantive DP to pass laws that impinge on this

Substantive DP includes freedom of K [gov’t can only regulate this as a valid exercise of the police power—protect particularly vulnerable people and to protect people from particularly onerous hazards]

KDS: individual K on steroids

* + - 1. Law of Collective Bargaining:
         1. Personnel policies:

Yellow-Dog Contract

Agree as a condition of employment not to join or agree with a labor union

Can use the civil conspiracy doctrine, b/c any union that comes around is interfering w/ ER’s yellow dog Ks w/ their EEs

Blacklisting

If EEs became known for engaging in union activities, ERs would share their names with each other

Company Unions

Part of this was corporate welfarism (not all was ill-intended)

If EEs get invested in the company union and sign a K, they won’t/can’t get involved with outside unions

Company unions used as a bulwark against outside/indep unions

* + - * 1. Governance by Injunction

Made by the courts- they didn’t know what they were doing and were seen as allied with management

Workers would openly ignore what courts would say b/c they thought it was unfair

This undermined the integrity of the courts and was a poor federal policy—it eventually had to go (we had industrial strife) and we got federal legislation

KDS: very unfair process

ERs would hire their own guards who would get in a fight so the strike could be enjoined for violence

Sometimes the proceedings would be ex parte

* + - * 1. Railway Labor Act (1926)

1st nat’l legislation is with RRs—they had powerful companies and powerful unions

Their troubles caused trouble for the entire country

Have to have federal law b/c RRs affect the whole nation

Parties got together and negotiated rules to govern their relationship (more productivity and less strikes)

CB 🡪 mandatory arbitration only if parties agreed 🡪 presidential emergency boards (neutral fact finding for disputes)

Court upheld RLA despite ***Lochner***, even before ***Jones & Laughlin***

Courts knew that governance by injunction had to stop, so they got out of the way (KDS: even though courts probably should have struck RLA down)

* + 1. Late Industrial Period [1932-late 1970s]
       1. Boom time for the American economy & labor movement due to industrial base growing during WWII?
       2. Great Depression
          1. Money supply and aggregate demand contracts; EEs laid off and demand Ks even more
          2. 1st reaction- gov’t has to balance its budget 🡪 contracted money supply, which led to more unemployment
          3. FDR: NLRA/Wagner Act passed during Great Depression
       3. Production Technology: industrial sector
          1. “Best practices”—large vertically integrated firm & long-term employment

Huge plant where it does everything (lots of jobs in hierarchical order)

labor is very valuable, so want to hang on to skilled labor (so have more benefits, pensions, etc.)

Good environment for NLRA system of CB b/c no question of who the ER is or what the appropriate unit is

A lot for unions to do in this system (admin rules, etc.)

* + - 1. Nature of Employment Relationship: individual contract
      2. Law of Employment Relationship:
         1. ***Jones & Laughlin***
         2. Protective legislation (workers comp., social security, FLSA, civil rights act, OSHA, ERISA)
      3. Law of Collective Bargaining
         1. Norris-LaGuardia Act 1933

Got rid of Yellow Dog contracts and governance by injunction

Presumption is that you can’t get an injunction (need specific elements, and even then – only can get an inj for 5 days)

Gov’t is going to be neutral

Still relevant today—but some courts may not know this law and give unlawful injunctions

* + - * 1. New Deal

Organize industries and labor so that wages and prices go up [one good way to do this is to foster CB]

National Industrial Recovery Act

Gives workers a say in the workplace and more bargaining power, which leads to more aggregate demand and drives wages up

Struck down in ***Schechter Poultry***

FDR’s court-packing plan

Didn’t have to do this b/c the court came around and topped being all Lochner-esque

NLRA/Wagner Act

***NLRB v. Jones & Laughlin*** rules that NLRA is constitutional

Says that the regulation in this case is unconstitutional and that the federal gov’t can’t govern labor relations

It is a fundamental right for EEs to be able to organize (substantive DP)—this is the answer to allegations of interference with contract

The Act just changes the terms under which you can negotiate contracts

We allow the federal gov’t to foster CB and this does not violate freedom of K

Commerce clause power: labor relations DO affect ISC

Sec. 1 (purposes) of NLRA

Promote equity/equality in bargaining power b/w ERs and EEs

Promote industrial peace

Industrial strife interferes with ISC

Shows the new, broader view of federal power

Foster industrial democracy

Sec. 2 (Definitions)

Employee

“Employee of any employer,” but does not include public EEs, RR EEs and others (does not include independent contractors)

KDS: this def is very broad

Employer

Excludes governments and religious orgs, etc.

Sec. 7 (statutory right to organize)

1st Am only protects against state action (so the argument for a constitutional right to organize is better for state EEs)

No constitutional argument for private ERs, but may be a right to picket in public places

Statutory right to organize, instead

“Privilege to be a public sector EE, so we can discriminate based on CB”

Sec. 8 (unfair labor practices)

(a) Employer ULPs

Makes section 7 guarantees real (prohibits ULPs that would impinge on sec. 7 rights)

(a)(2) is so broad that it sometimes interferes w/ ERs setting up EE committees (prohibits company unions)

(a)(3)- can’t refuse to hire or discharge someone just b/c they have been affiliated w/ unions in the past

(a)(4) – can’t fire someone for testifying in a board hearing

(a)(5) – obligation on the part of the ER to bargain in “good faith” w/ the EEs

Sec. 9 (election procedure)

Before election procedure was established, EEs would go on recognition strikes

NLRA tried to move toward system of voluntary recognition

Industrial democracy is reflected here

(a) union as exclusive representative

(b) appropriate bargaining unit and defines it

union has to represent people who don’t even pay dues if they are within the unit

Voluntary representation is possible (to avoid an election)

If Board doesn’t think that an election would be fair, ER can be forced to bargain with the union based on past evidence of maj support

* 1. The Rise of the New Information Technology and the Global Economy
     1. Info Tech Period [late 1970s- present]
        1. Production Tech: large horizontally organized firms; decline in length of employment relationship; market regulated employment (benchmarking/outsourcing); international production
        2. Nature of Employment Relationship: individual K; collective bargaining (craft, industrial, and professional); protective legislation
        3. Law of Employment Relationship: erosion of employment at will
     2. Tech changes led to changes in employment relationship. This gave rise to the issues that are important in labor & employment law
        1. Progression from status (master/servant) to (individual) contract, then debatable that we have moved back to status
     3. Tensions b/w efficiency and equity
        1. Property interests v. associational interests
     4. Best practices 🡪 large horizontally organized firm and short term, variable employment
        1. Horizontal organization: one company does the assembly, but gets parts from one country and steel from another, etc.
           1. Retail horizontally organized –info technology helped organize producers all over the world
        2. Trad. NLRA doesn’t work well in this system
           1. Who is an ER and who is an EE? Is the big company or the sub-contractor hired by the big company the EE’s boss?
           2. Increased short-term employment – less room for union input b/c may not have as many benefits, admin rules

Demand for collective action in some ways, b/c devolution to short term employment put EEs at risk:

Risk of being outsourced; pension will be defined contribution and EEs bear the risk that the market will do gown and pension will disappear

Flexible employment means EE risk unemployment

This risk used to be borne by the ER

Provides an opportunity for collective action, which could spread this risk

Want to insure against any risk that you can’t afford to bear

Professional orgs have sprung up to provide pensions and insurance, etc. [EEs may feel more tied to these than to the ERs]

* + 1. Long term trend downward re: NLRA (less people are organized) due to tech changes

**Ch. 2: Boundaries of Collective Representation**

1. Introduction
   1. Problems of Microsoft Permanent Temps
      1. Subcontracted EEs work on same campus as permanent EEs
      2. Current law: perma-temps are not EEs of Microsoft (they are EEs of the subcontractor)
         1. T&Cs of perma-temps’ employment are more similar to the permanent EEs then the other temp EEs of the temp agency (but they may have to organize with these other EEs of the temp agency)
2. Who is an “employee”?
   1. General
      1. NLRA Sec. 2(3)- “any EE and shall not be limited to the EE of a particular ER…” is protected (be mindful of exclusions- agri laborers, indep. Contractors, domestic servants, if covered by RA or employed by spouse)
         1. KDS: when a statute uses the same term to define the term, look to the dictionary, legislative history and purpose
   2. Contingent workforce
      1. Independent contractors
         1. ***NLRB v. Hearst Publications, Inc.***
            1. “Newsboys” who are grown men who buy the papers and sell them

They want to organize and bargain with the paper under the NLRA

* + - * 1. Issue: are the newsboys EEs? No IC exception at this time

They are clearly an IC under the CL, but Q was whether they were under the statute

* + - * 1. SCOTUS: these econ dependent people were covered by the NLRA even though they may be ICs

“Economic Realities” test

Court got this from the purposes of the Act

Initial interpretation of who was an EE under the NLRA was whether the person was econ. dependent

Congress didn’t like this, so it amended the act to expressly exempt ICs

CL test is now applied for ICs under the NLRA (after the amendments)

* + - * 1. Legacy: make sense to have different definitions of “EE” for different statutes?

If purposes of statutes are different, there could be a good reason

CL test v. Statutory test re: who is an EE

NLRB/CL doctrine came from tort liability🡪 **“right to direct & control”**

Purposes of tort law are different than purposes of labor law—this doctrine makes sense under tort law b/c of respondeat superior

Just b/c you get to pick out/control certain aspects doesn’t mean that you are employing the person as an EE, but if you direct the manner in which the work is done, you are the ER. If you don’t control the manner, the worker is an IC.

Indicia:

Who supplies the tools, materials

Are you an integral part of the business

Do you direct how they do the work

Do t hey have an opportunity for indep profit or loss

Are they a skilled person ahead of time

* + - 1. ***Roadway Package System Inc. (NLRB)***
         1. Applies CL test
         2. Company owned trucks at first, then tried to change and make the EEs indep contractors—issue is whether the ER succeeded vis a vis NLRB
         3. Some indicia of IC & some indicia of dependency
         4. ER arguments:

Drivers could use their trucks off the clock; drivers theoretically own their own trucks; granted proprietary interest in their service areas

* + - * 1. Holding: Board says that drivers are EEs

The indicia of being an IC here all have some practical limitations

ER controls the price to customers

* + - * 1. Bruce Lemar: use the sniff test re: owners/operators and whether ERs hardly rearranged relationship/looked for loop hole
      1. ***Home Health Care Workers***
         1. Issue: are state-employed home health care workers ICs or EEs?

NOT governed by NLRA

* + - * 1. State would bid out work

They would be ICs under CL/NLRB test

* + - * 1. Became recognized as EEs under their public employment labor relations act through political initiatives

Set up public authorities to be their ER of record so they can now organize and be EEs

* + 1. Leased Employees
       1. ***Oakwood Care Center***
          1. Staffed some EEs directly and looked to employment agency to staff the rest
          2. Issue: whether the consent to organize was needed from both ERs

Can the EEs who are jointly employed be in the same unit as the EEs that are the sole EEs of the center? No- not w/o ER consent

* + - * 1. Holding: bargaining unit would be a multi-ER unit and consent was needed from both ERs

Board: cites 9(b)- looks at definition of a unit

ER unit, etc. means that the ER unit is the largest unit you can bargain in, so you have to have the same ER. Board won’t force the two ERs to allow the EEs to bargain together.

* + - * 1. ***Sturgis*** decision (are in the same unit); ***Greenhoot*** decision (are not in the same unit)

Shows that board’s opinion have fluctuated

* 1. Union organizers
     1. Who?
        1. Business agents (specifically employed by the union)
        2. Union apprentices (after training engage in organizing)
        3. EEs working for a related ER
           1. EEs of Marsh help EEs of Kroger during a strike
        4. EE working for the target ER
     2. ***Lechmere, Inc. v. NLRB***
        1. Professional organizers want to put pamphlets on EEs’ cars w/ goal of organizing a union
           1. Cars are parked on private company property
        2. SCOTUS does not consider non-Lechmere EEs to be EEs under NLRA
           1. Seems contrary to NLRA definition
           2. Unsure how the court would find if instead of professional organizers, the EEs of a competitor tried to help organize the store

Seems that Congress would want them to be considered EEs under NLRA b/c they knew that fellow EEs at competing business help each other organize

* + - * 1. BUT, professional organizers may go onto private property if the EEs work and are housed in a remote location
      1. Competing rights
         1. ER property rights v. EE interest in association/organizing

EEs are allowed to organize in non-work areas during non-work time

ER property rights dominate in work areas during work time

* + 1. ***Town & Country (1995)***
       1. Issue: does an ER have to hire skilled tradesmen who can do a job, but apply for the job w/ goal of organizing the EEs?
       2. Held: ERs are not allowed to discriminate on the basis of union affiliation
          1. Once EEs are hired, they have the protection of the Act
          2. Court rejects argument that a union supporter or organizer is disloyal to an ER
          3. Court gives deference to Board’s interpretations
       3. Theoretically, cannot refuse to hire an EE whose objective is to form a union or are employed by a union
       4. Non-Moonlighting rule?
          1. Accomplishes the goal of not hiring a worker for a union, but the ER can say that it is non-discriminatory
    2. ***Chevron***
       1. Test:
          1. Look for ambiguity

If no ambiguity, look for Congress’ intent

If ambiguity, defer to the agency if its interpretation is reasonable

* + - 1. Test applies generally to all admin agencies b/c they have expertise in the area
         1. Congress has charged them with enforcement and would want the court to defer to them
  1. Apprentices, graduate students, trainees, and house staff
     1. ***Brown University***
        1. Overturned in NYU 2 case (in supplement)
           1. NYU I case

Grad students are EEs

***Brown*** overturned this case

* + - * 1. NYU II case

Grad students are EEs

Noted changes in “unit placement” since NYU I—univ’s reclassification of graduate teaching assistants as ‘adjunct faculty’ (for whom there was already a separate bargaining unit) rather than TAs

Union raised “compelling reasons for reconsideration” of ***Brown***

* + - 1. Held: grad students are not EEs; they are students
         1. Not able to bargain collectively
         2. Under CL, they would have been EEs

This decision changes with the political party in power

* + - 1. Univ claims that is CB was allowed, it would be disruptive to education
         1. Teaching is a degree requirement; payment is scholarship, not salary
      2. KDS: academic “production” is like artisanal production
         1. Professors = masters
         2. TAs= apprentices
         3. There is no sign that masters & apprentices weren’t supposed to be covered by the NLRA
  1. Transborder workers
     1. Undocumented workers
        1. ***Hoffman Plastic Compounds, Inc. v. NLRB***
           1. Issue: illegal immigrant (Castro) is fired b/c he was a union supporter

Contrary to NLRA

* + - * 1. Remedy for this ULP: reinstatement of EE and back-pay; ER posting to current EEs that discriminatory behavior will stop; prohibition against further discriminatory practices
        2. Held: Court determined that the NLRA applies to undocumented workers

Fits definition of EE

But court says that Castro could only get reinstatement and backpay if he gets the proper legal status to work in the US

Tried to balance NLRA and IRCA

Since Castro had no right to work, he got nothing as a remedy

* + - * 1. Effect: this ruling puts illegal immigrants in a tough situation

Complaining about ULP results in deportation

* + - * 1. Many CoAs have distinguished this case b/c they don’t like that the ERs violating labor law are not punished via the remedy
    1. Foreign & Multi-country workers
       1. Many conventions that give workers rights
          1. Human right to organize and engage in CB
          2. US sometimes ignores these conventions

But trade agreements have made the world smaller & we want other countries to abide by standards

* + - * 1. Int’l agreements will become a larger part of American legal practice

1. Who (or what) is an “employer”?
   1. Supervisors
      1. Are excluded from NLRA b/c ER cannot do anything w/o using someone who is an EE
      2. ***NLRB V. KY River*** [SCOTUS]
         1. Issue: the Board didn’t explain what “independent judgment” means
         2. Oakwood case resulted b/c wanted clarification
      3. ***Oakwood Healthcare, Inc.***
         1. Facts
            1. Most RNs are charge nurses who oversee patient care unit, assign RNs to patients, etc.

12 are permanent charge nurses and the rest rotate on a flexible schedule

* + - 1. Two issues: How often do you have to be a charge nurse in order to be a supervisor? Covered professional EEs v. excluded supervisors
         1. ER has the burden of showing that these people are supervisors here

But union would have the burden if it was trying to exclude supervisors from the bargaining unit

* + - 1. Court: supervisor is defined as holding authority to do any one of 12 supervisory functions (not clerical)
         1. “Assign” has to be more than telling RN to give meds to a patient
         2. “Responsibility to direct”- accountability
         3. “Independent judgment” required

Can’t be about the kind of discretion- has to be about the degree of discretion used

Standard: more than routine/clerical; has to be based on your own thoughts (not just following EE handbook)

* + - * 1. Authority held in the interest of the ER
        2. Part-time supervisors: regular and substantial portion of work performing supervisory functions (10-15% is enough)
      1. Rationale: charge nurses aren’t accountable (no evidence they can take corrective action against lower RNs); do a certain aspect of assigning, but emergency room nurses do not use indep. Judgment. Other RNs do use discretion to match RNs with certain skill sets to certain tasks.
         1. This shows the tensions of the Act with the modern work place (Act envisioned a more hierarchical, industrial workplace)
         2. KDS: court could have argued that these professionals were not true supervisors
      2. Held: permanent charge nurses are supervisors; didn’t establish that non-permanent charge nurses spend a substantial amount of time in this capacity, so NOT a supervisor
      3. Dissent: this case adds too many people into the ER/supervisor group (who do minor supervisory tasks all the time)
         1. Focuses on professionals

Act envisions that some professionals can be covered even though they act on professional judgment

* + - * 1. Want NONE of the charge nurses to be supervisors under the Act
  1. Managerial and confidential employees
     1. Managerial Employees
        1. ***NLRB v. Yeshiva***
           1. Faculty wanted to organize 🡪 Court sided with the univ—faculty were managers b/c they had discretion

Faculty helps make hiring, tenure, and curriculum decisions (exercised authority in the interest of the ER)

KDS: this is expansive definition of who is a manager

* + - * 1. Professors at a smaller school, where President does all the hiring and firing, would not be managers

The variance is based on how much the administration defers to faculty in the decision-making process

Traditional faculty governance v. faculty collective bargaining

* + - * 1. Dissent

Universities today are must different now- they are more like big business

If faculty felt like managers, they wouldn’t have wanted to organize

They are just exercising professional skills

Takes away incentive for the admin to negotiate with the faculty

* + - 1. Managerial EEs are a CL creation
         1. Someone who is so closely aligned with management that they are part of the ER; “those who formulate or effectuate management policies by expressing and making operative the decisions of their ER”
         2. Managers and supervisors are not entirely the same

Neither are prohibited from organizing, just have to use econ power

The Act just gives protection for certain classes

* + - * 1. Excluded from the Act per CL, not explicitly per the statute
    1. Confidential Employees
       1. Someone who “assists or acts in a confidential capacity to persons who exercise managerial functions in the field of labor relations”
       2. Court-made law: excluded from the bargaining unit b/c they are so closely aligned with an EE who is aligned with management that they need to be excluded
          1. Ie. HR manager’s secretary who has access to labor files, etc.
  1. Public sector employees
     1. Expressly excluded from Act
        1. Left to the laws of their own jurisdiction
        2. Issue: when there is ambiguity re: whether someone is a state actor
     2. ***NLRB v. Natural Gas Utility District of Hawkins County***
        1. Facts: public utility wanted to unionize
        2. Issue: was this district in the public sector?
           1. The district was set up by a judge. Could call this a private corporation set up by local citizens; but it does exercise some arguable state functions
        3. TN SC: district was an instrument of the state
        4. SCOTUS: district is a political subdivision, so NLRA does not apply
           1. Federal law governs the “political subdivision” determination
        5. Federal law: public EEs are excluded from NLRA & generally don’t have right to strike
           1. Exemption for “political subdivisions”

Created directly by the state, so as to constitute departments or admin arms of the government

\*\*Administered by individuals who are responsible to public officials or to the general electorate

* 1. Multiple-entities as a single employer: the “single employer” doctrine
     1. Double-Breasting
        1. ER sets up a union workshop and a non-union workshop
        2. Bid out different entities for union/non-union wages
           1. This is troubling to unions b/c when the union is elected for a unit, they represent all EEs

If the ER sets up a separate entity to do similar work, those people are included in the union

To deal with this, developed the “single employee doctrine”

* + 1. ***South Prairie Construction***
       1. CoA said that the two entities’ EEs should be in one bargaining unit (entities were a single ER)
       2. SC said that this should have gone back to the Board
          1. Q to the Board of whether the people belong in one bargaining unit even though it is a one ER entity
  1. Transborder employers
     1. ***Labor Union of Pico Korea LTD. v. Pico Products, Inc.***
        1. Facts: factory goes out of business and Korean EEs who live and work in Korea sue Macom under the Act for breach of K or tortious interference with advantageous contractual relationships
           1. Company did not shut down the factory in accordance with the CBK
           2. KDS: EEs have a fairly strong case
        2. Held: Korean EEs can’t sue under Section 301 of the Labor Management Relations Act
           1. Court didn’t follow the express language of the Act, but there is a strong presumption against extra-territorial application of the law
        3. KDS: this affects commerce

**Ch. 4: Establishing Collective Representation**

1. Introduction
   1. ER can prohibit EEs from talking about the union during work time, but cannot prohibit it in the break room [unless can show a significant interference with business interest]
      1. ER has a property right
   2. ER’s private property interest v. EE’s statutory right to associate under NLRA
      1. CL - you can limit people’s access; you can invite them, but limit the purpose of their visit (could even do this with EEs)
      2. NLRA – EEs got a statutory right to associate & ERs can’t interfere with this right
2. Regulation of access
   1. EE access to coworkers
      1. ***New York New York Hotel***
         1. Facts: NY NY runs the hotel, but they have a subcontractor (Ark) that runs restaurants within the hotel; Ark union organizers were trying to handbill inside the portcochere of the hotel, which is outside of the casino area [but on NY NY property- this is ok b/c it is a non-work area during non-work time]
            1. NY NY mgmt. saw these Ark EEs as trespassers
            2. NY NY’s EEs are already organized by this union
            3. Union wants to organize Ark’s EEs

Ark EEs are more similar to NY NY EEs than to union organizers

* + - * 1. The handbills solicit EEs and customers

Telling customers that Ark doesn’t pay union wages

* + - 1. Issue: how do we accommodate NY NY’s property rights with the sub contractor (Ark)’s EEs’ association rights?
      2. Contrast with Lechmere
         1. Non-EE union organizers were excluded to the grassy area outside of the parking lot
         2. Argument that if these people were EEs of Lechmere’s competitor, they would be able to come into the parking lot b/c they are EEs of someone [this would be an argument to limit Lechmere]
      3. Held: NY NY cited with ULP; banning hand-billing was not necessary to maintain ER productivity or discipline
         1. Organizers can stand in the port cochere [non-work area] to hand out their handbills

If off-duty EEs were denied this, EEs would effectively be denied the right to distribute literature anywhere at the facility

* + - * 1. The handbilling didn’t hinder customers entering or leaving the building
        2. ARK EEs work regularly and exclusively at the hotel🡪 This decision does not mean that NY NY would have had to allow limo/taxi drivers to handbill on hotel property
      1. NOTE: Labor Law I vis a vis IU is like Ark vis a vis NY NY
    1. ***New York New York II***
       1. Issue: Ark EEs want to stand inside the hotel right in front of the restaurants
          1. NLRB cited hotel with ULP, but hotel defended on grounds that the areas inside the casino, but outside the two restaurants were work areas subject to regulation (the board disagreed)
       2. Held: sided with EEs; this area was not a work area (to hold that it is would effectively deny EEs the right to engage in protected distribution anywhere on the ER’s property)
          1. This area is a passageway

DISSENT argues that these passageways are “EE work stations”

* + - 1. Ask Lechmere Q: are these EEs for the purposes of the Act? They are current Ark EEs
    1. ***New York New York III***
       1. Issue: are these EEs for the purposes and protection under the NLRA?
          1. NY NY argues that it doesn’t want Ark EEs standing in the hallway & that they are not hotel EEs [argue that they are more like Lechmere]
          2. Union argues that these people are Ark EEs, but they ARE EEs and are thus protected under NLRA [NY NY has a contractual relationship w/ Ark and NY NY can have some control over the Ark EEs’ behavior]
       2. Board Holding: they are EEs under NLRA even though they are not hotel EEs
          1. Balanced in favor of EEs’ associational rights

This is the most effective place for them to picket, & hotel would have to allow hotel EEs to do so

Ark EEs have equal rights to what hotel EEs have

* + - 1. What is the appropriate accommodation of ER’s property rights and EE’s association rights under NLRA?
         1. Hotel would argue that littering is a bigger problem inside the hotel and that there are other places they could stand
         2. Union would argue that they have the right to be right by the casino b/c they could do so if they were hotel EEs (and Ark has a beneficial K with the hotel); the best place to picket is right next to where the ER is
         3. 🡪 must balance these rights/interests
      2. Consistent w/ Lechmere?
         1. EEs of unions v. EEs of Ark?
         2. SCOTUS probably wouldn’t balance these interests the same way

Would look at ER’s property interests and probably limit EEs to outside

* + - * 1. Purpose is to fulfill what Congress said and the purposes under NLRA
    1. ***Republic Aviation*** [SCOTUS 1945]
       1. This is the bedrock decision that says that EEs are free to solicit in non work areas during non work time unless ER can show “special circumstances”
    2. ***Register Guard***
       1. Facts: one EE sent out 3 emails- one was a correction re: anarchists at a union rally (she was disciplined for this); then two emails from union’s computer asking for support for the union (she was disciplined for this, too)
          1. She is clearly an EE under NLRA
          2. Have to balance her associational rights w/ ER’s property interests [ER controls the use of the email server & the work time of the EEs)
       2. Discrimination—b/c ER allows personal emails for certain purposes
          1. Allows some private solicitation, and allowed another EE to comment on the rally email w/o discipline
          2. Sec. 8(a)(3): ER cannot discriminate based on union affiliation
       3. Board Holding: ER can prohibit union solicitation from the email b/c of its property interest in the servers & the possibility that it could be opened during work time
          1. It is NOT discrimination- ER can decide that solicitations aren’t allowed and can distinguish b/w non-profit and for profit

It is only discrimination is you discriminate along the axis of unions (unequal treatment amount equals)

Big break from precedent

* + - * 1. But 1st email should have been ok b/c other discussion of the memo was allowed and ER just picked out and prohibited the union communication
      1. Legacy: Board adopts a fairly narrow view of what it means to discriminate against unions. Under this case, section 8(a)(3) only kicks in when ERs discriminate b/w unions and things that are otherwise the same
  1. Access by nonemployee organizers
     1. ***Lechmere***
        1. Non-EE union organizers are not EEs under NLRA and do not have associational rights directly in this dispute (they thus don’t have a right to go onto ER’s property)
           1. Company can exclude the union organizers if their purpose is to place the leaflets, but the organizers CAN come there to shop
           2. Could go on ER’s property if that were the only way the EEs could gain info/access (ie. isolated logging camp, etc.)
           3. State trespass law is important

If organizers are not breaking state law, then ER rights don’t have to be accommodated

* + - 1. KDS: this case plays pretty loose with the language
         1. NLRA doesn’t say anything about ERs private property rights (even though they have them)

They are defined by the state (some are narrower than others)

But federal law also recognizes a eight to engage in collective activity

Have to balance

If it affects ISC and associational rights, there is an argument that FG can modify these private property rights via NLRA

* + - 1. NOTE: Public sector
         1. Public employment takes place on public land, where the public has a right to be

🡪 Lechmere has much less, if any, application to the public sector

* + - 1. NOTE: Exceptions
         1. EEs are physically removed/dispersed?
    1. ***Technology Service Solutions***
       1. Facts: EEs (CSRs) are spread out over 9 states & are trying to organize in CO
          1. Union asks ER for EEs’ email addresses b/c it lacked access to the CSRs—company said no
       2. Board: CO is not an appropriate bargaining unit; all CSRs are in a bargaining unit (even though they don’t work in the same place an they don’t know who each other are)
          1. Union has to organize over the whole 8-state region

Union then asks company for the addresses—ER has no obligation to give info just for convenience in pre-election stage (except Excelsior list once election has been set)

Board resolves this w/ “no reasonable alternative means” standard

Union should use the same methods to organize the rest of the region that it used to organize the CO CSRs

* + - * 1. KDS: it is not clear why the entire region has to be the appropriate unit
        2. This is very different from the old trad situation
      1. Private property interest of ER in emails, addresses, etc. v. EEs association rights
         1. Union argues accessibility issues; ER tries to analogize to Lechmere re: property interests in the lists
         2. KDS: different from Lechmere, b/c these people ARE EEs, not union organizers

Board ignores the fact that the only solution is through technology (can’t be in the line of vision of EEs like in Lechmere)

* + 1. ***NLRA in Cyberspace***
       1. NLRA was made for the trad workplace- the modern workplace is much more complex
          1. Email, EEs dispersed over wider area
       2. Malin & Perritt: ER genera ban on solicitation should be presumptively unlawful unless ER can show a business reason for it
          1. Company servers: this is trespass to chattel and ERs have to show damages to collect on this

This is an acknowledgment of protection of ER property rights

* + - * 1. Trying to fulfill the purposes of the Act in the modern environment
  1. Access & laboratory conditions
     1. Elections
        1. Board’s new election rules
           1. Some relate to new technology

Updated Excelsior List

ERs have to give email address and phone numbers as well as physical addresses

Controversial

* + - * 1. Board says it is trying to fulfill the purposes of NLRA as the founds would have had they known about technology
      1. The value of an election can be destroyed well short of committing an ULP
         1. Lab conditions = accepted SCOTUS doctrine
         2. ER coercive behavior or speech can destroy lab conditions and give the union a right to re-run the election later
         3. Under current doctrine, ERs can require EEs to attend a meeting re: union and not take questions or dissent from audience

If ER makes captive audience speech within the last 24 hours before election, though, it can violate lab conditions (b/c have to give the union a chance to respond)

* + - 1. Excelsior List
         1. Not expressly in NLRA
         2. Once an election is petitioned for and it is set, ER has to give the union a list of all EEs they think are in the bargaining unit and their addresses

This gives union access to and notice of who the ER thinks should be included in the union (union can then object to the ER’s definition of the unit)

Union specifies the unit in their petition for election (this can be litigated)

ER then tells who they think meets that definition

* + - 1. Manual v. Mail Voting
         1. Board has gone more toward mail voting

Problems re: mail voting: not necessarily a secret ballot, so could be abuse present

Benefits re: mail voting: higher % of voters b/c it makes it easier to vote

* + - * 1. E-mail voting?

Trying to update election process, including voting

* + 1. ***Trustees of Columbia University***
       1. Issue & Holding: does Excelsior list requirement extend to EE e-mail addresses? NO, ERs don’t have to give up e-mail addresses
          1. Modern board would disagree
       2. Facts: EEs were on a vessel at sea for months at a time
          1. Petition trying to organize the workers on the vessel

Trying to set an election date and wants the email addresses

Workers have limited email access on vessel (but they have access for personal reasons)

Limited server capacity on the ship

* + - 1. Rationale: Board says that petitioner should have organized the election date to be at a time when the crew wouldn’t be at sea
         1. Cost to ER re: emails; absent full amicus briefing, board is not prepared to grant access to email addresses
         2. KDS: the board is at least considering these email issues

1. Regulating speech
   1. NLRA
      1. Sec. 8(a)(1)
         1. Prohibits an employer from interfering or restraining or coercing an EE re: section 7 rights
      2. Sec. 8(c)(1) “free speech” clause
         1. ER can put out things that say “I think it would be a bad idea to join the union…” [ie. dissemination of opinions, views, arguments]
            1. Proviso: this ER statement cannot contain a threat of reprisal, force, or promise of benefit

It is a legal Q re: whether this line is crossed [threat v. opinion]

* 1. ***NLRB v. Gissel Packaging Co.*** [SCOTUS]
     1. Facts: upon threat of unionization, ER told his EEs that the last time there was a unionization, it resulted in a strike that almost put him out of business
        1. ER expressed views that the EEs would be hard to employ if they lost their jobs b/c they were specialized and older
     2. Held: this unprotected coercive speech b/c ER can’t prove that it was fact [needs some factual basis]
        1. Standard re: speech is coercive:
           1. ER can express general views re: unionism/specific views re: a particular union as long as there is no threat

ER may even make a prediction re: effect of unionization, BUT the prediction must be phrased based on objective fact re: demonstrable consequences outside of the ER’s control (can’t reflect what an ER’s response would be]

Prediction CAN express a decision already arrived on re: the close the plan upon unionization, but can’t reflect a threat of retaliation

* + - 1. Court: it is ok that we are chilling ER speech b/c they can come up to the line
    1. KDS: this is a marginal case re: ER speech
       1. This is a violation, so can be used as a data point
       2. Have to look at what the listener understood
          1. Take into account the asymmetry b/w the ER and EE

1. Other types of coercion
   1. Grant or withdrawal of benefits [bribery]
      1. ***Exchange Parts*** [SCOTUS]
         1. Held: ER use of benefits [carrots & sticks] in response to union organizing campaigns is prohibited
            1. ER must maintain status quo during a union organizing campaign

But can offer benefits that were previously scheduled

* + - 1. Policy
         1. “Fist inside the velvet glove”

An offer of a benefit is like a threat, in that anything that is offered now can be taken away (illusory benefit)

Calculated good will in response to union activity (once organizing campaign is over, ER can pull benefits)

Organizing is a collective action problem (free riders- some people are vulnerable b/c they do the organizing work)

ER shouldn’t be able to interfere with threats or benefits, b/c it would make this free rider problem worse

* + - 1. Under NLRA, unions ARE allowed to offer benefits
         1. But can’t make personal bribes for people to join a union
         2. This gives unions a chance to overcome the collective action problem
  1. Interrogation & polling
     1. Interrogation = just asking a few people [this is how differs from polling]
        1. Interrogation of EEs as to their affiliation with or participation in union activity is unlawful only if, considered in light of all the circumstances, it would reasonably tend to coerce them [***Rossmore House***]
        2. Best way to ask questions to avoid a charge:
           1. Have EE’s immediate supervisor as what’s going on in a place that is in the middle b/w completely private and completely public
           2. Public can be worse in some ways b/c ER can use the questions to coerce other people
           3. Private office can be worse in some ways b/c it could be more intimidating
           4. Asking EEs who the troublemakers are is a suspect Q

Could be better to ask why EEs are disgruntled

* + 1. ***Charlotte Union Bus Station, Inc.***
       1. Coercive interrogation is prohibited
       2. Board examines at least 4 factors to determine coercion:
          1. Time & place of the interrogation
          2. Personnel involved in the interrogation
          3. Nature of information sought
          4. ER’s known preferences about unionization
    2. Polling
       1. Polling to determine the extent of support for union representation is permissible if the following conditions are satisfied: [***Struksnes Constr. Co.***]
          1. Polling must be conducted by secret ballot;
          2. Purpose of polling is to determine the union’s claim of majority support;
          3. EEs must have been given notice of such purpose;
          4. Adequate assurances against reprisals have been given; and
          5. ER has not created a coercive atmosphere or committed ULPs
    3. Potential for Coercion
       1. Questioning workers about their union sympathies can pose a serious problem for an ER who is gathering evidence from EEs in order to prepare for proceedings before the NLRB or other tribunals
       2. NLRB has established that these conditions must be satisfied: [***Johnnie’s Poultry Co.***]
          1. Purpose of the questioning must be communicated to the EEs being questioned;
          2. Assurances against reprisals must be given;
          3. EE participation must be voluntary;
          4. Questioning must be free from anti-union animus;
          5. Questioning must not be coercive in nature;
          6. Questions must be relevant to the issues in litigation;
          7. Subjective state of mind of the EES questioned must not be probed; and
          8. Questions must not otherwise interfere with Section 7 rights
  1. Surveillance
     1. Surveillance of EEs who are engaged in protected activities in the open and on or near the ER’s premises is lawful [***Roadway Packaging System***]
        1. BUT conspicuous surveillance that causes intimidation of EEs, or otherwise interferes with their protected activities, may be unlawful
           1. Surveillance may also be unlawful if EEs attempt to conceal their activities?
     2. Videorecording & photographing EEs
        1. Special—NLRB has set a “lower threshold” for finding such surveillance unlawful under Section 8(a)(1).
           1. ER has the right to maintain security measures necessary to further legitimate business interests during union activity, videorecording and photographing such activity can be justified only if the surveillance serves a legitimate security objective [***National Steel & Shipbuilding***] or if the ER can demonstrate a reasonable basis to believe that misconduct would occur [***Colonial Haven Nursing Home***]
        2. ER may choose to solicit EEs to participate in recorded interviews as a response to a union organizing campaign [they may be asked to express anti-union views in these interviews]
           1. See case below
     3. ***Allegheny Ludlum Corp. v. NLRB***
        1. Facts: ER wanted to use a video in its anti-union campaign to sway its EEs to vote against the union
        2. Issue: ER wanted the EEs to be in the video- some were given written notice that they could opt out and some were given no notice until after they were filmed
        3. Held: ER has right of free speech under 8(c), but this was a violation of 8(a)(1) b/c ER approached individual EEs and asked to film the for anti-union campaign
           1. This was reminiscent of polling or interrogation b/c the EE has to make a stated choice re: the union when they say yes/no to the anti-union video
        4. 5 Requirements
           1. Voluntary
           2. No reprisals
           3. General announcement
           4. No pressure under presence of supervisor
           5. No coercive atmosphere created
           6. ER does not exceed legitimate purposes by soliciting union matters
        5. Hypo: if ER films a pro-company video and then used the same footage to craft an anti-union video w/o consent, this would probably violate NLRA b/c EEs can be pro company AND pro union at the same time
           1. But this would be an extension of this case
  2. Use of Social Media
     1. NLRB has yet to decide any cases testing the potential Section 7 rights of EEs who post on social media content that is critical of their ERs
     2. Division of Advice: ERs who fired EEs for posting job-related complaints online did not violate Section 8(a)(1)
        1. In each case pending, conclude that the online comments were individual gripes rather than “concerted activities” and thus they fell outside the protection of the statute
        2. Generally, an action is “concerted” if it involves the participation of at least two EEs, or if a single EE acts on behalf of other EEs

1. Protection against discrimination
   1. General
      1. It is unlawful to discriminate against people who are either in favor or against unionization
      2. “Nothing in this Act shall preclude ERs from making an agreement with a union…”
         1. Proviso: but unions and ERs can come to agreements and CAN make it a condition of employment that an EE be a member and that you have to join within 30 days (union security agreements) b/c union has to represent everyone whether they are members/dues paying or not
      3. Union Security Agreements
         1. Can enforce these w/o discriminating
            1. But a “union” and “closed” shop are unenforceable
            2. “Agency” shop is allowed

ER can hire whoever it wants, but within a certain period of time, they have to pay an agency fee that goes to pay for representation [close to union membership dues]

Some states don’t allow these

* + - * 1. “Maintenance of membership agreements”

Union and ER agree that anyone who ever joins the union has to remain a union member as a condition of employment (don’t want people ducking out when the going gets tough)

These are enforceable in some places

* + 1. Proof of intent re: discrimination
       1. Sec. 8(a)(3) requires intent
          1. Can be proven by circumstantial evidence
          2. ER is seen to intend the foreseeable consequences of his conduct
       2. BUT some old cases say that intent is not required if the EEs could have interpreted ER actions in a certain way [these are still out there, but haven’t been followed very well]
       3. Board has initial burden to show substantial discriminatory intent; ER then can bring the affirmative defense that it would have hired who they did anyway
  1. **Mixed Motive** Cases
     1. One of the two evidentiary frameworks used to prove Section 8(a)(3) violations [the other is the “pretext” single motivation framework]
        1. With **pretext/single motivation** framework, GC makes out a prima facie case of ER discrimination against EE section 7 activities, and the burden then shifts to the ER to show that either the GC’s case is flawed, rebutting evidence, or showing that the real reason for ER’s action is a legitimate one. Credibility is attacked as each side tries to show that their version is the true account of what happened.
     2. This is the most commonly used b/c these are the stronger cases & GC will proceed with these
     3. ER essentially concedes, based on the strength of the evidence against it, that an unlawful motivation played a part in the action against the EE, but the ER seeks to show, by a preponderance of the evidence, that the action would have been taken despite the unlawful motivation for legitimate reasons
  2. ***NLRB v. Transportation Management Corp.***
     1. Facts: bus driver for ER attempted to organize drivers and distribute authorization cards. ER found out about union activity and fired the driver for leaving his keys in the bus and taking unauthorized breaks
     2. ALJ: found that anti-union animus played a part in the discharge [supervisor didn’t know about the keys, etc. until after the firing]
     3. Board: affirmed ALJ; ER didn’t persuade the Board that the driver would have been fired despite his union activity
        1. Proves that anti-union animus was a substantial motivating factor
        2. Issue was whether ER had legitimate reasons to fire EE anyway
     4. CoA: Wrightline test
        1. Under 10(c)- burden on respondent is wrong; GC of Board has the burden of proving that discrimination was a substantial and motivating factor and that the ER would NOT have fired EE anyway
     5. SCOTUS: reversed CoA and said that attributing burden to respondent was proper
        1. Deferred to Board; Board met all of the elements b/c it showed that anti-union animus/discrimination was a substantial motivating factor; ER has the burden to prove the affirmative defense that EE would have been fired anyway
        2. Proving discrimination & intent is hard and ER has access to all of the evidence on these tough questions
        3. ER couldn’t prove that EE would have been fired anyway [ER arguments were pre-textual]
  3. ***Town & Country Electric v. NLRB***
     1. Facts: ER looking for electricians to fill a job in MN; ER tried to hire a licensed MN electricians to fulfill MN law requirements; ER went to temp agency & advertised it as a non-union job
        1. Only one non-union person showed up for the interview, but many union people showed up
           1. ER interviewed two people and hired one [later fired him]
        2. EE alleged that he was fired b/c of his union sentiments and his attempt to unionize the other EEs; his activities became a problem on the job [bothered other EEs]
           1. ER didn’t have a reason to fire him other than his pushing of the union on the other EEs on non work time in non work areas [this is protected even though he irritated other EEs]

Different story if he caused fist fights or interfered w/ work time in work areas

* + 1. ULP: ER refused to consider the other ten applicants who showed up for the interview b/c they were union [discriminatory intent b/c ER asked about union affiliation, etc.]
       1. ER was held responsible for the reasonably foreseeable consequences of actions
       2. Sec. 8(a)(3) applies to job applicants, too [can’t discriminate against them based on union affiliation]
    2. This is a case of salting [union electricians showed up b/c the union was trying to get them to organize this non-union shop]
  1. ***Textile Workers Union of America v. Darlington Manufacturing, Co.***
     1. Facts: owner of plant was advised that union won election. Owner then told the board of directors that the plant would no longer be profitable
        1. Board voted to liquidate the corporation before attempting to bargain with the union & closed the plant
        2. Union alleged violation of 8(a)(1), (3) & (5)
           1. ER didn’t close other, similar plants
     2. Held:
        1. Board: all of the plants were a single ER, so the closing was a violation
        2. CoA: disagreed with Board; owner COULD close plant
        3. SCOTUS: remanded to determining if the purpose was to intimidate the people at the other plants
           1. On remand, Board finds that ER violated the law
     3. Single ER test:
        1. If the ER has in interest in other business, affiliated, see more
     4. Single ERs:
        1. If ERs try to organize, Board says that ER can’t close the plant for that reason
           1. SCOTUS said that when the ER closes his entire business, even if it is motivated by vindictiveness toward union, it is NOT a violation (no one requires a person to continue to be an EE or ER)

But if the ER moves to another place and restarts production, or if closed plant is part of multiple entities, look at the purpose of the closure

If one entity is shut down to send a message to the other plants re: the union, it is illegal

If there is no intent and no reason to believe it would cause this fear, then ER can close the plant

* + 1. Legacy: Good for ERs, b/c they have a right to go out of business for union reasons as long as there is no possibility of future benefit from it. Good for EEs b/c broad definition of interconnectedness (not solely based on business organization)

1. Routes to union recognition
   1. Appropriate bargaining units
      1. General
         1. Look for sufficient community of interest
            1. Duties, desires of EEs, wages/hours/conditions/benefits
            2. Among plants

Geography, other plants, interchange of EEs among plants, organization of the ER (autonomy of local manager vis a vis labor/management relations)

If local manager can made decisions re: hiring/firing; wages, hours & conditions 🡪 then the one store can be an appropriate single unit

* + - 1. Purpose of determining units under NLRA is to get the fullest freedom for EEs in exercising CB rights
         1. Presumption against one-person units (but it is not dispositive)
      2. Doesn’t have to be THE most appropriate unit, it just has to be AN appropriate unit (not a science)
         1. Some deference to EEs who have organized themselves and petitioned [unions have an advantage re: picking an appropriate unit]
         2. Strategy: ER wants supervisory EEs included in the union b/c they are likely to side with management
      3. Having a smaller, homogenous unit with more common interests makes the bargaining problem smaller and bargaining more simple
      4. Board can promulgate rules through case law [Excelsior Underwear] AND through its section 6 right [American Hosp.]
         1. Rule making is prospective; rules are more clear

Can also solicit comments re: rules and then amend them

* + - * 1. Cases decide one specific fact situation

Adjudication can surprise opponents (ie. Congress)

Fear that use of rule making will raise the ire of Congress

* + - * 1. KDS: Board should have done more rule making in the past
    1. Multi-ER bargaining units
       1. Have to have union and ER consent to do this
          1. ERs like that is equalizes competition re: wages, etc.
          2. Multi-union units are possible, too
       2. “Whip Sawing”
          1. Go to one ER 1st and then go to another w/ request for $1 raise, etc. to but them up [use raise from other ERs to threaten remaining ERs]
          2. ERs use this among unions, too, to bid them down
       3. Taking wages out of competition
          1. Unions may want to use multi-ER bargaining to do this
       4. Not expressly in NLRA (so not required)
          1. Board can’t force this, but can be agreed to voluntarily
       5. ***Manano***
          1. Once you agree to a multi-ER unit and begin negotiations, you can’t withdraw absent unusual circumstances
          2. Don’t want some individuals holding out b/c it ends up with strike/free during on collective cooperation
    2. Process
       1. Union petitions for election; the union specifies the unit that they want to have the election over in the petition; if the employer agrees, that’s it. If the employer objects, the board has a hearing where they will take testimony from people on what kind of work they do. The regional director then determines which people are in and out. If the union doesn’t win, that’s it. If the union wins and the employer still objects to the bargaining unit, they can refuse to bargain and force the union to file an unfair labor charge against them. Then they can argue the bargaining order in court that the unit was never appropriate. The burden is on the employer.
    3. ***American Hospital Assn v. NLRB***
       1. NLRB expanded to include non-profit health care institutions
          1. Board came up with own set of regs re: appropriate units in a hospital (with some exceptions)

Presume 8 appropriate units

RNs, Drs, skilled maintenance, guards/all other non-professional EEs; secretaries, etc.

* + - * 1. Board gets its rule-making authority from NLRA Sec. 6 [but doesn’t use it very much]
      1. ERs are sure this Board regulation is kosher b/c sec. 9(b) says that the board will determine the appropriate unit in EACH case, so this normal doctrine should be applied to health care
      2. Held: ERs are wrong- Board can promulgate rules re: bargaining units; “in each case” can be used with the old legal doctrine OR promulgated rules
         1. Upholds regulations
      3. Legacy: Board has used its regulatory power more since this case
         1. Ie. regulating elections – Excelsior Underwear

This was done in a case even though it sounds like an admin/promulgated rule

* + 1. ***Friendly Ice Cream Corp. v. NLRB***
       1. Issue: Can union petition for a unit of EEs at just one plant of an ER w/ multiple plants?
       2. Held: yes- single plant unit is ok
          1. Sufficient evidence to enforce Board’s bargaining order
          2. Criteria:

Individual autonomy of store manager

EE interchange (moving among stores)

* + 1. ***Virginia Manufacturing Co., Inc. (VAMCO***)
       1. Facts: ERs wanted both EEs at issue in the case to be IN the unit b/c they had ties to management
          1. ER challenged two ballots
       2. Issue: what is an appropriate unit within a plant?
          1. Could have a unit containing a few skilled EEs and a bunch of laborers who would be easy to replace

Machinist in this case was very crucial to production

* + - 1. Strategy: unions tend to pick the largest unit that they think they can organize but exclude people they think are pro-management
         1. ER has incentive to argue that people they think are pro management should be included
      2. Holding:
         1. Ridings = office/clerical EE who did not have sufficient community of interest to be included in the unit

Maybe could have included him if they wanted to, but didn’t have to

* + - * 1. Noe = should be included in the unit

He is skilled, but he interacts with the other EEs more and his machine shop is next to production floor

He wants to be included, but he could insist on being excluded

But if they didn’t include him, he would be a unit of 1

* + 1. Statutory provisions re: appropriate unit
       1. Sec. 9(b)- professional EEs may not be combined with non-professionals unless professionals consent
          1. Guards cannot be combined with non-guards b/c ER needs someone to guard the plant if EEs go on strike
  1. Representation elections
     1. General
        1. Have to petition for election; have to have a substantial showing of interest to go forward (cards signed by at least 30%; but unions don’t usually rush in with only 30%)
        2. If you have a tie, no one wins
        3. Parties can raise objections at the election re: ULPs during election/unfair units, etc.
        4. Possibility of judicial review
           1. Courts can only review final orders of the board

Preliminary board orders are not directly appealable

ER has to refuse to bargain and then appeal the bargaining order [union doesn’t have this same opportunity—can’t appeal after union objects to a prelim board decision]

Board realized this and gave unions a limited opportunity to appeal in ***Leedom v. Kyne***

Unions can potentially appeal if the board clearly violates NLRA

* + - 1. Union can be certified after:
         1. An election, a bargaining order, or per authorization cards
    1. Potential bars to an election
       1. Voluntary recognition
          1. Group of EEs got enough cards and petitioned for election; ER may say in GF that it has already recognized that another union represents a maj

ER then has to bargain with this union for a GF period and can’t allow other petitions for election during that time

* + - 1. Election bar
         1. Expressly in Sec. 9(c)(3) of NLRA

One year assuming no ULPs [has to be a valid election]

* + - * 1. If union loses, can’t petition for another election until that year is up
        2. If union gets elected/certified and then EEs want to de-certify it, ER still has to bargain with the union for one year [can’t have a de-certification election for one year period]
      1. Certification bar
         1. If union is certified by the Board as the exclusive representative, there is a bar for future elections for one year absent unusual circumstances
      2. Contract bar
         1. For life of CBK up to a period of 3 years
         2. Can combine this bar w/ the election or the voluntary recognition bars
         3. Give the election solemnity and once parties get a K, the union has to get a chance to enforce the K for the life of the K up to 3 years [if the K is only for 2 years, then the bar is only 2 years]
         4. After 3 years, EEs can petition for re-certification of the union or for a new union if they want to
    1. Voluntary Election Agreements
       1. When parties get together and agree on the conduct of the election (stipulation to election agreement)
       2. If parties can’t agree on these determinations re: nuts and bolts of the election, the board will decide
    2. Election campaigns
       1. Criticism is that this procedure has become long and drawn out
          1. ER can drag it out and perhaps commit some ULPs
       2. Alternatives?
          1. Shorten election periods
          2. Mandate union membership automatically
          3. Card check procedure

Employee Free Choice Act [potential additions]:

Allows certification based on maj of cards signed in an appropriate unit

Increased penalties for ERs to try to give ERs less incentive to violate the law

Mediation and arbitration of 1st Ks

B/c even when unions win elections, often doesn’t end up with CBKs [so election ends up being for nothing]

This addresses an identified problem

This would be an extraordinary remedy

* + - * 1. Labor law reform

Maybe we should move from a confrontational model to a more cooperative system

Political deadlock is worse now than it was 20 years ago

Deadlock re: EE/ER relationship

Similar problems when we had governance by injunction

It changed b/c it became unproductive for the country—maybe this will happen now

* + - 1. Election procedure is born of the doctrine of exclusive representation
         1. Appropriate bargaining unit 🡪 election (maj representation)

We’ve made this similar to a political election

All or nothing

In Japan, if only 2 EEs want to be represented by a union, the union will only represent those 2

* + - 1. In some ways, card check is an intermediate solution b/w non-exclusive representation (Japan) and exclusive rep (our procedure)
      2. Pros/Cons
         1. Non-exclusive

Pros

Easier to have high union density

Cons

Too many different unions could create chaos

Workers wouldn’t have as much econ bargaining power

Strike to show power to an ER that won’t bargain

* + - * 1. Exclusive

People who don’t like the union don’t like exclusive representation

It is possible to have fractious bargaining under our system

W/i the EE cohort, there will be people who are pissed that they are represented by the union

* 1. Bargaining orders
     1. ***NLRB v. Gissel Packing Co.***
        1. Summary: court approved of NLRB bargaining orders in cases in which the nion has achieved majority support by authorization cards and in which the ER has committed substantial ULPs
           1. Much of the case law since this case has focused on defining the nature of the ULPs that can result in a bargaining order
        2. Facts & Holding: ERs have to bargain with a voluntary recognized/card-created union; bargaining order can be a valid remedy to overcome compromised election conditions
           1. ERs wanted to reject the use of cards and union wanted to rely on the use of cards more to limit ERs right to insist on an election
           2. Held that ER can insist on an election unless he engages in ULPs that threaten to impede the election
        3. Sec. 9(a) doesn’t require every representative to be elected
        4. If there is evidence that the cards were gained with coercion, the cards can be thrown out and the ER can enter this evidence of union coercion
           1. ER GF doubt
           2. But we won’t ignore cards when election atmosphere is tainted and a fair election won’t be able to be held

Cards and bargaining order can be an appropriate method when it represents the maj view [what EEs want is important]

Elections are still the preferred route, but we will recognize cards

* + - * 1. NLRA is remedial, not punitive in nature

But this doesn’t discourage bad behavior of ERs

Under our system- bargaining orders are a fairly radical solution/remedy

Effective? Union will probably have very little bargaining power if it is so weak that it doesn’t think it can win an election

Not much of a deterrent b/c the ER is still probably not going to reach a CB agreement with the union

* + - 1. Doesn’t address bargaining orders absent ULPs
         1. Here, ER committed ULPs independent from refusing to bargain (which impeded a fair election)
      2. A Gissel bargaining order is an extraordinary remedy—have to be fairly major violations
    1. Non-majority bargaining orders
       1. These were allowed in the early cases
       2. In later cases- ***Gourmet Foods***
          1. Refused even to consider issuing a bargaining order
          2. Board overruled ***Conair***
          3. No bargaining order if the union never held a majority no matter how egregious the ULPs
    2. ***Linden Lumber v. NLRB***
       1. No ULP charge, but when the authorization cards were received, the ER rejected them as unfairly tied to management
       2. Issue: can a bargaining order be ordered re: cards absent an ULP?
       3. The burden is on the union to petition for an election when cards aren’t recognized, absent an ULP
          1. Even if ER has no reason to disbelief the cards, ER can demand that union petition for an election and not take the cards on their face

ERs don’t need a GF reason to ignore the cards

* + - 1. Held: ER can force union to an election absent ULPs
  1. Voluntary recognition and other methods outside the NLRA processes
     1. Neutrality Agreements
        1. ERs can agree to remain neutral; to be governed by the results of a card check; to the framework of the 1st K
           1. ER may do this due to political pressure; relationships w/ unions elsewhere; desire to be seen as a progressive ER that doesn’t exploit workers
        2. No obligation for ERs to ever agree to this
        3. Criticism is that these interfere with an EE’s right not to choose a union
           1. EE has a right to hear from the ERs re: why they might not want to have a union
           2. Argument that a neutrality agreement means that the union is representing the EEs before they garner maj support
        4. ERs can voluntarily recognize a union if they have a GF belief that the union has maj support (if this is rigged, there is an ULP)
     2. Recognitional Picketing
        1. ER can recognize EEs after they picket and interfere with ER’s business
        2. Recognitional strikes are also possible
        3. Limits to these under the NLRA
           1. Sec. 8(b)(7)

ULP to engage in recognitional picketing:

(a) where there is a lawfully recognized union;

(b) where there was an election within the last 12 months;

\*(c) where a union pickets w/o a petition for an election that is filed within a reasonable period not to exceed 30 days

(1) union can engage in recognitional picketing for up to 30 days, if union’s petition is not resolved within 30 days, it can continue for more than 30 days; but the ER can then petition for an expedited election due to the ULP of the union

This prohibition does not apply to informational or area standards picketing

Informational Picketing: this ER doesn’t pay union wages; way for unions to advertise to the public

Area standards picketing: ER doesn’t meet area standards wages

\*Info & area standards picketing are expressly allowed and can be done forever

* + - * 1. Expedited election if ER files an ULP

Even absent maj showing

Recognitional picketing is not the preferred method of deciding representation, so we control it

* + 1. ***Blinne Construction*** 
       1. Recognitional picketing case
       2. Facts: 3 people in unit who want to be represented by union
          1. This small # can work if there is coordination b/w two or more unions [the other union represents the picket line so replacing the picketing EEs would be ineffective]

But EEs can be permanently replaced for recognizing picket lines unless EEs negotiate otherwise into their K

* + - * 1. ER commits some ULPs in resisting them
      1. Holding: enjoined the picketing b/c petition was not filed within 30 days, so the union committed an ULP when it continued to recognitionally picket
         1. But union clearly had a maj

Colorable argument that ER should be forced to bargain? But Act says that union has to petition for an election even when it appears that it is going to win it

* + - * 1. EEs alleged that ER has already committed ULPs and Board agreed, but this was not enough
    1. ***New Otani Hotel & Garden***
       1. Issue: what constitutes recognitional picketing?
       2. Facts: 4 years of picketing; ER wants to petition for an election (and can do so if it is recognitional picketing)
          1. ER says that the cards are good enough recognition to get the election process underway even though the EEs weren’t ready yet
          2. EEs want ER to agree to a card check procedure

Want to organize and are advertising that ER doesn’t pay area standard wages [but this is not enough for ER to force an election under 9(c)(1)(b)

ER needs an express claim from EE that they want to be recognized b/c they represent a maj of EEs

Union gets to decide when to be put to the test re: whether they represent a maj

* + - 1. Held: just because EEs had cards didn’t mean that they were claiming maj. representation [when the union makes a claim for representation and bargaining is when ER can petition for an election]
         1. The picketing was information-based/they weren’t trying to picket for recognition
      2. 8(b)(7)- recognitional picketing is limited to 30 days
         1. Wants CB to be efficient and to encourage cooperation b/w the parties
         2. Rather have elections to determine representation than picketing
    1. Lawful voluntary recognition
       1. As long as ER has a reasonable GF belief that the union represents a maj
       2. Brudney, *Neutrality Agreements*
          1. Get ER to agree to remain neutral during the organizing campaign and maybe agree that the ER will accept the results of a neutral card check

Hard to get one w/o an existing relationship?

* + - * 1. Political pressure and fear of recognitional picketing could help get a neutrality agreement

30 days of work stoppage would be horrible for business

* + - * 1. May get a NA if union makes concessions that save the ER (GM/UAW relationship)
      1. ***Dana Corp.***
         1. Now overruled by Board
         2. Issues: 2 ERs voluntarily recognized unions at their orgs; EEs at each org then filed a petition for a de-certification election

Does voluntary recognition impose the election bar for a reasonable period and/or block a petition from another union during this time?

* + - * 1. Held: elections are the preferred method under the law, so no real deference to GF voluntary recognition

If someone petitions for de-certification after this, board has to conduct an election (don’t have to wait for the bar period)

* + - * 1. Dissent (now the maj. view)

Legitimate voluntary recognition should be given solemnity

Union can’t function if it is subject to de-certification or a new election (give union a chance to organize the EEs)

Maj makes it hard for unions to do their job

* + - * 1. Legacy: this case changed the fact that voluntary recognition gave rise to a bar for a reasonable period not to exceed a year
        2. **RULE** from this case: imposes a post-recognition 45 day window period for filing an election petition before insulating recognized union from challenge

30% required card showing is in the Act

KDS: this is adjudicative rule making here

**Ch. 3: Collective Action and Representation**

1. Introduction
2. Concerted activity for mutual aid and protection
   1. Concerted activity
      1. Social Media
         1. “Break room” in cyber space
         2. ERs’ social media policies
            1. Generally: Board will say that if EE makes a comment on Facebook about employment and other EEs comment on it, it counts as “concerted activity” that is protected
            2. BUT if EE makes comment and non-EEs respond or it is an individual gripe—not concerted and not protected (can be fired)
         3. “Overbroad EE handbook policy”
            1. ER violates NLRA if work rule chills EEs’ exercise of section 7 rights

EEs are protected when they talk about the work place and solicit input from other EEs online

* + - * 1. Board’s two-step process:

If the policy is unlawful b/c it expressly restricts section 7 activities; or

If the EEs could reasonably construe the rule to limit section 7 activities

* + - * 1. Opprobrious [scornful and abusive] activity is not protected

Disparagement of the product or managers

In general, you are not allowed to disparage the product b/c this is not core to T&Cs of employment

EX: If EE is on strike from Goodyear and the ER replaces EE w/ people you don’t think are skilled enough, you go online and warn people form buying those tires

This would relate to a labor dispute- stronger if you have evidence

If the disparagement is true, it is not quite the same as an attack (it is just information)

* + - 1. “Fans of Dau-Schmidt” Page—doesn’t want anything disloyal or damaging on page?
  1. Mutual aid and protection
  2. Unprotected conduct

1. Defining labor organizations and labor unions
   1. Employer domination, support, and interference
   2. Exclusive representation and majority rule

**Ch. 5: Collective Bargaining**

1. Introduction
   1. Negotiations: have to have some leverage
      1. You get taken in any agreement that you can’t walk away from
      2. Strategy re: when you ask for things
      3. NLRB: have to have someone who has authority to make a deal IN the room
2. Models of collective bargaining process
   1. The National Labor Relations Act
      1. Less intrusive by gov’t
      2. Meet and negotiate in GF on wages, etc. and reduce it to writing; subjective intent to reach agreement
      3. Private, voluntary negotiation w/ possibility of a strike
         1. Argument that access to mediation and arbitration undermines this
         2. Poss of strike gives CB teeth here
      4. Failure of GF if there is a refusal to meet, etc.
      5. Regulates process, NOT substance
         1. Doesn’t require agreements or concessions
            1. But sometimes substantive offers can be evidence of bad faith
         2. Parties bound by the K decide what the terms are- don’t bring in a 3rd party neutral
      6. Possibility of unilateral changes after impasse
         1. Unilateral change to K when one of the terms becomes illegal
         2. Can claim financial exigency
      7. ***NLRB v. Insurance Agents’ International Union***
         1. Facts: Insurance co was negotiating with the union; agents worked a slow down during this period in part just b/c it was effective (not a full walk out, so not protected)
            1. Agents refused to comply with certain company policies; first stopped going to sales mtgs; then stopped soliciting new business
            2. Insurance agents are licensed by the state- they can’t quit work altogether
            3. ER filed an 8(b)(3) complaint saying that the union was refusing to bargain in GF

ER said that the EEs COULD strike, but that they were instead harassing the ER while they are trying to bargain collectively [board agrees]

* + - 1. Held [SCOTUS]: overturned Board; union’s economic pressure does not mean that it is failing to bargain in GF; even though union activities were unprotected, it was still trying to negotiate for a common ground
         1. Not an ULP b/c applying unprotected econ pressure is part of private CB under NLRA as long as there is subjective intent to reach an agreement [which ER conceded that EEs did negotiate in the mtgs]
      2. KDS: if board regulated econ weapons, it is regulating substance
      3. Protected v. unprotected activity
         1. Partial slowdown is unprotected

EEs can be fired

* + - * 1. Full work stoppage is protected

EEs can't be fired

Aren’t as effective as they used to be, b/c unskilled workers are easier to replace and more people will cross picket lines

Sec. 7—EEs have a statutory right to engage in collective activity

Sec. 8—can’t discriminate against EEs from engaging in their Sec. 7 rights

Firing someone for work stoppage would violate Sec. 8

* + 1. ***NLRB v. Katz***
       1. Issue: whether it is a violation of the GF bargaining requirement for ER to institute changes re: matters that were mandatory matters for bargaining under NLRA
       2. Fact: ER tried to institute raises and change company’s sick leave unilaterally during negotiations
          1. Union filed ULP charge based on ER unilateral changes
       3. Held:
          1. Lower courts sided with ER

Showing of bad faith by ER was necessary to make it an unfair ULP

* + - * 1. SCOTUS: unilateral change in conditions of employment was a violation of the NLRA/ULP b/c it circumvented the duties of the parties to negotiate

Brennan: ER actions amounted to a refusal to bargain

Qualitatively different than ***American Insurance*** b/c here there is a refusal to bargain over the terms [bargaining around the union is different than economic pressure]

* + - 1. ER argued that court was taking away its econ weapons
         1. But ER was making changes that were more generous than what was being discussed at negotiations
      2. Can an ER make unilateral changes during negotiations?
         1. If they were part of the status quo, then yes

ER must maintain the status quo, but it can be a dynamic status quo

* + - * 1. Impasse – obligation to bargain in GF until impasse, then can impose unilateral changes as long as ER has already made those offers to the union [ER has to make its best offers to the union]

Can’t make offers and then retract them unless there is a changed circumstance [moving away from agreement would be evidence of failure to bargain in GF]

* + 1. Impasse
       1. Factors test re: what constitutes impasse:
          1. Bargaining history of GF b/w parties
          2. Length of negotiations
          3. Importance of issue that led to impasse
          4. Contemporaneous understanding of the parties as to the state of negotiations
       2. Both parties have subjective intent to reach agreement on an important issue
          1. Bad example would be if parties hadn’t been bargaining for very long and there has been recent movement and/or the issue isn’t really important so it could be ignored in the end
  1. Railway Labor Act
     1. More intrusive into the bargaining process—don’t just bring the union to the ER
     2. If one party wants mediation, you get it w/o the other party having to agree
        1. Mediator decides when there is impasse and when unilateral changes can be made
     3. Pressure on ER to be reasonable in bargaining demands and pressure on unions re: their striking
        1. RLA doesn’t explicitly mention “GF,” but parties have an obligation to exert every reasonable effort to reach an agreement
        2. Strikes are more serious under RLA
     4. ***American Train Dispatcher Dept. Brotherhood v. Fort Smith Ry. Co.***
        1. Shows mediator’s power [needling the party to move]
        2. Facts: Union requests mediation during negotiations
           1. ER refuses to comply w/ what mediator wants them to do
        3. Main Issue: whether ER’s refusal to go to DC a 2nd time to negotiate is a refusal to negotiate and whether the mediator can force them to go to DC [ER wanted to go to a neutral location]
           1. Mediatory wanted to make the location inconvenient so parties will take it seriously
           2. Entirely up to mediator’s discretion—ER has to abide until mediator says there is an impasse

ER clearly wants an impasse [they are done w/ negotiations]

* + - 1. Held: CoA affirmed injunction to force ER to go DC to negotiate
  1. The Public Sector
     1. Fed EEs/Fed statutes
     2. State EEs/state statutes
     3. Even more intrusive than RLA
        1. Only 8 states allow strikes
           1. Even in these, there is a process of mediation and arbitration before get the right to strike
        2. Uses much more mediation, fact finding and arbitration
           1. Get a neutral to come in to get the parties to move
           2. Rather than striking to determine the T&Cs of employment, use other techniques

Cons: parties don’t actually determine the T&Cs- a neutral does

Availability of arbitration and mediation may hurt negotiations

* + - * 1. Mediator determines when there is an impasse

Mediation can put pressure on ER

* + 1. Gov’t intrudes most when there will be costly work stoppage (is. RRs, police officers, etc.)
    2. ***Philadelphia Housing Auth. v. Pennsylvania Labor Relations Board***
       1. Facts: there was impasse, but then ER unilaterally enforced its final offer
       2. Held:
          1. Board: there has to be impasse AND a cessation of work for the ER to be able to use the econ weapon of unilateral change
          2. ALJ: found no ULP

Apply ***Katz*** principles of NLRB [ER actions would have been allowed under NLRA]; but the right to strike is more guarded in the public sector

* + - 1. Compared to ***Ins. Agents***, in the public sector it is more of a discussion of what’s fair [econ weapons are used less]—can the state afford a raise; comparability w/ private sector?
      2. This is different from ***Katz***🡪 where unilateral change is not an econ weapon
  1. Mediation
     1. Parties invite a 3rd party neutral to help them discuss issues and get over possible impasse/disagreements
     2. Communicate info b/w parties, but have a duty of confidentiality
  2. Fact Finding
     1. Used in public or private sector
     2. Determine who should “win”
     3. Not binding; only persuasive
        1. But once neutral looks at all the facts and decides, this puts political pressure on school board, etc., so they voluntarily agree
  3. Interest Arbitration
     1. To determine what the K says
     2. Binding
     3. Two different kinds:
        1. Ordinary Interest Arbitration
           1. Arbitrator can decide anything—can decide that both parties are wrong and come to his own conclusion
           2. Incentivizes parties to be unreasonable b/c the arbitrator usually splits the difference
        2. Last Best Offer
           1. Can only pick b/w the last offers of the two parties
           2. Becoming much more popular b/c parties have an incentive to move closer together
  4. Arbitration of Contract
     1. Private neutral
     2. Parties can’t agree on how the language that they have already agreed to applies to a certain set of facts

1. Determining good faith: the problem of surface bargaining
   1. Surface Bargaining: going through the motions making small concessions, but don’t want to reach an agreement
      1. Can be proved with direct evidence or circumstantial evidence
      2. Usually happens to weak unions
         1. ER wouldn’t be able to get away with this with a union that has more bargaining power
   2. ***NRLB v. American National Insurance Co.***
      1. Facts: Union objected to management function clause, asserting the NLRA
         1. Management function clause gave ER right to select, promote, discharge EEs [gives ERs discretion and they don’t want it arbitrated]
            1. ER maintains complete control over all of these statutory subject and will put it in writing 🡪 but the parties have a duty to bargain over these subjects and reduce it to a writing
         2. Union filed an ULP when ER kept trying to include this clause
         3. Parties agreed to a K while the board was considering the charge & the K contained a clause very similar to the one in the dispute
      2. Held: Court overturned Board- agreeing to flexibility can be a term that the parties can agree on and the Board can’t reach it [flexible clause is NOT an ULP in and of itself]
         1. Board: this type of clause is per se invalid b/c it is flexible and the ER was acting in bad faith by trying to insert it
            1. ER engaged in surface bargaining here b/c the ER maintained complete control over mandatory subjects of bargaining
      3. Circumstantial evidence of surface bargaining
         1. Substantive proposal was evidence of surface bargaining
         2. Union had to either accept ER’s proposal or exert economic pressure on the ER to force it to modify its demands
   3. ***Hardesty Co., Inc. DBA Mid-Continent Concrete***
      1. No explanation for why ER’s proposal was so bad—worse proposed conditions than before negotiations
         1. Regressive bargaining🡪 ER reduced vacation and overtime (took EE’s old conditions and than offered less; also offered things and then back-tracked from them)
            1. ER could do this as long as it explained why/changed circumstances, but ER had no explanation here
            2. ER orchestrated concessions that had no trade-off (unexplained)
            3. Conduct away from bargaining table: management said that the negotiations would last longer than a year and then the union would get voted out
      2. Test: look to the totality of the circumstances/party’s conduct in order to determine whether there is a subjective intent to reach agreement
         1. Factors: unreasonable bargaining demands; delaying tactics; efforts to bypass the bargaining rep; failure to provide relevant info; unlawful conduct away from the bargaining table
      3. KDS: this case is much broader than the facts (this is a laundry list of what not to do b/c the ER acted so badly)
   4. ***NRLB v. A-1 King Size Sandwiches, Inc.***
      1. Substance can be evidence of failure to bargain in this case—where ER asked EEs to give up all statutory rights (including right to strike) and broad management rights clause
         1. ULP—lack of GF
   5. RLA
      1. Mediator can delay ER unilateral changes indefinitely
      2. Has not dealt with surface bargaining problem in some ways
   6. Public Sector
      1. Usually don’t have the right to strike
      2. Most now move to final offer arbitration, which leads to surface bargaining
         1. Arbitrator will pick the most reasonable offer
2. Interpreting “good faith” as objective rules of conduct
   1. Duty to supply Info: Inferred ER obligation to supply information that is relevant and useful to unions in performing its responsibilities as exclusive representative [***Acme***]
      1. (1) Financial data on health of ER only where ER pleads poverty
         1. ***NLRB v. Truitt Mfg.***
            1. Facts: ER refused to pay higher rate b/c it said it would go out of business—had to open books to prove it
            2. Claims should be honest

Actual fraud or misleading the other side is an ULP

But ER is allowed to puff a little bit and hold in reserve

No general obligation to give up profitability of the firm, etc. unless the ER puts this info at issue and makes it “relevant”

“we will not be econ. competitive” v. “we will go out of business”—fine line

* + 1. (2) Wage data
       1. Always an obligation to give up this data b/c it is always “relevant and useful”
       2. Anything the union needs to cost out a K proposal (the union can then compare things)
    2. (3) Info needed to enforce the CBK
       1. ***Detroit Edison Co. v. NLRB*** [also delineates exceptions]
          1. Facts: union wanted info re: enforcing CBK; wanted access to aptitude test b/c its CBK said that people should be promoted based on seniority

But people with seniority were not getting promoted b/c they didn’t get high enough test scores [union wanted to show that the test accurately reflected ability to do the work]

* + - * 1. If the exam is useless, ER violated CBK
        2. EXCEPTIONS to duty to provide info:

ER/EE privacy/confidentiality

Threat of/actual cost to ER

ER spent $$ to develop the test

* + - * 1. Held: ER doesn’t have to give up the test instrument itself or the answers b/c of cost; doesn’t have to give up the names and scores unless the test takers agree, b/c otherwise would impinge on EE privacy
    1. RLA 🡪 court declined to apply the duty to provide info [***Pacific Fruit Express***]
  1. Other Per Se Violations under NLRA
     1. Direct Dealing 🡪 ***Alan Ritchey, Inc.*** 
        1. Facts: CBK was scheduled to expire soon; ER’s mistaken belief that LaValley could not represent the EEs b/c he was no longer employed by the ER
        2. Issue: whether the polling by the ER re: who the EEs wanted as their union rep constitutes direct dealing w/ EEs & thus a violation of the Act
           1. Direct dealing is a failure to bargain in good faith b/c this means that the ER is not addressing the questions to the union
           2. Here the ER’s question was “pick who represents you”
        3. Held: ER’s poll did not amount to direct dealing and was not a violation
           1. Recognizes the general rule, but there was an exception here b/c there was a short timeline & ER had to figure out who the bargaining rep is

Once the rep was determined, the ER would bargain w/ that person

* + - 1. KDS: this is a narrow exception to the general rule based on these facts, but could be expanded in the future
    1. Boulwarism
       1. Committing to a 3rd party (EEs or the general public) about issues that an ER has to negotiate with the union about is evidence of failure to bargain in GF
       2. EX: GE would publicize the fair and firm offer it made to the union to the public, saying that it wouldn’t back down
          1. Boulwar wanted to bargain around the union and offer benefits directly to the EEs (not GF)
  1. KDS’ CB Bargaining Excerpt
     1. Two strategies:
        1. Identity & punish failure to cooperate/intransigence
           1. Used in NLRA
           2. Hard b/ GF is ephemeral
        2. \*Formulate the bargaining game in a way that promotes the parties’ ability to see the cooperative solution and act on it
           1. Limit the # of parties; promote repeat play and homogeneity on each side; **supply info**
           2. Parties should be aware of the matrix—they will be more likely to cooperate
     2. Full sharing of relevant info is the best way to avoid strategic behavior

1. The effect of a strike on the duty to bargain
   1. Strike in and of itself does not do away with the obligation to bargain
      1. Strike does not necessarily mean there is an impasse, either-- it is just econ pressure
2. The duty to bargain during the term of a contract
   1. Zipper Clause
      1. There is an obligation to bargain even after the K is signed, but ERs don’t like this
      2. A zipper clause overcomes this problem by saying that the union had the opportunity to bargain over everything and that it waives the right to bargain over the life of the K [no obligation to bargain mid-term]
      3. Means that all mandatory subjects of bargaining are considered “contained in” CBK
         1. Permissive subjects aren’t included b/c ERs aren’t compelled to bargain over them
   2. ***Milwaukee Spring [UAW v. NLRB]***
      1. Facts: Negotiating during the life of an existing CBK (mid-term, company asks for concessions); ER decided to move production to a non-union plant after no agreement with union could be reached [unilaterally relocated work after union rejected midterm modification of K]
         1. Union brought ULP charge
      2. Held: ER did not commit violation
         1. Milwaukee Spring I held that ER violated 8(a)(1), (3) & (5)
         2. On remand, court found for ER and dismissed ULP complaint b/c before a violation can be found, the specific term has to be in the K [& work preservation clause was not in the K]
            1. NLRA 8(d)- provisions on bargaining during life of K
      3. ER’s argument
         1. If the term is not in the K, the ER can modify it w/o union agreement (otherwise, ER cannot unilaterally change w/o agreement)
            1. 1st holding: ER committed a violation b/c it was a midterm K modification under 8(d) and moving the work was a unilateral decision that needed agreement from the union
            2. 2nd holding (CoA): 1st reasoning was wrong b/c can’t assume that work relocation was a term of the CBK. 8(d) applies only to terms actually in the CBK

Issue: whether the work location is in the K or not

Could be in the management rights clause, could be implied in the rest of the K, or could be in the zipper clause

* + 1. CBK had a zipper clause
       1. Could infer that the work relocation issue is here, which would mean that the ER had a contractual obligation not to move the work unilaterally
    2. Broad management rights clause allowed management to make relocation decision unilaterally
    3. KDS: if ER wants the right to move work and has a zipper clause, ER better have an explicit clause maintaining the right to move work

1. Subjects of bargaining
   1. Types:
      1. Mandatory
         1. Can insist to impasse; duty to provide info; no unilateral changes w/o impasse; can’t deal directly with EEs
      2. Permissive
         1. None of the above limitations
         2. Can’t strike/walk out over permissive subjects
      3. Prohibited
         1. Closed shops; union shops
   2. Decision to close a business
      1. Mandatory or permissive? Depends on the reason for closing
         1. Mandatory is labor costs are the reason
         2. Permissive if other reasons
            1. Certain managerial decisions are only permissible subjects even though EEs would lose their jobs
            2. Not all permissive subjects have frivolous impact on EEs
   3. Mandatory Subjects of Bargaining
      1. ***Fibreboard Paper Products Corp. v. NLRB***
         1. Facts: ER wants to contract out maintenance duties; ER met with union after it had already sub-contracted the work out
            1. Union files ULP for the unilateral decision
            2. ER argues that this is a discretionary managerial decision
         2. Held: Subcontracting is mandatory subject
            1. It has an impact on EEs even though it is not literally wages & hours
            2. ER has to negotiate over this issue b/c T&Cs of employment includes sub contracting
            3. The issues the ER is addressing by subcontracting out are tradition subjects of bargaining [overtime & fringe benefits]
         3. Rationale: merely replacing existing EEs with independent contractors to save money is NOT deciding the scope of the business, etc.
            1. Same work with cheaper EEs, so it boils down to wages, hours & benefits
            2. ER has to give the union a chance to resolve the issue

But EEs would basically have to cost the same as the sub contractors

* + - * 1. After impasse, ER can unilaterally change and sub contract the work [but have to bargain in GF with an intent to reach an agreement]
    1. ***NLRB v. Borg-Warner***
       1. Court: parties could bargain over certain things, but they were not mandatory
       2. Legacy: created the distinction b/w mandatory and permissive subjects of bargaining
          1. Unions technically won this case, but they have regretted this decision ever since b/c when you make this distinction it limits the power of the NLRA & unions
    2. ***First National Maintenance Corp. v. NLRB***
       1. Facts: ER ran a cleaning service & a client [Green Park] lowered its pay rate to ER, so ER discontinued its service
          1. EEs for ER who worked at Green Park formed a union and wanted to bargain with ER; ER didn’t answer request of union rep and terminated the Green Park K w/o bargaining at all. EEs at Green Park were terminated
          2. Union filed ULP for not bargaining and discontinuing the work at Greek Park
       2. Held: for ER b/c this decision was within its management powers
          1. Congress didn’t intend for the union rep to be an equal business partner in making these types of decisions
          2. Rationale: the management fee was not amenable to resolution via CB, so burden on management outweighs benefit to labor
       3. KDS: this is different than ***Fibreboard***, b/c union in this case couldn’t impact the problem (the issue is the size of the management fee & union can’t bargain to lower this)
          1. The problem here is with the 3rd party (Green Park)

Should we require Green Park to come to the table and negotiate?

* + - 1. Test re: when a managerial decision is a mandatory subject 🡪
         1. CB is required when: (1) the subject is amenable to a fix through the bargaining process; (2) then a *balancing test* of whether the benefit to labor outweighs the burden on the conduct of business/cost on management
    1. ***Dubuque Packing Co.***
       1. ***First National*** doesn’t give much guidance re: the balancing test
       2. Facts: owners of plant had $ issues w/ financing and lines of credit, so discussed moving plant from IA to IL
          1. Union and ER negotiated over concessions; goes to impasse re: benefit losses

Union votes against this, then ER closes IA plant and moves to IL (but this plant is later closed)

* + - * 1. Union filed ULP saying ER failed to negotiate
      1. Held: this was a mandatory subject of bargaining b/c it goes to wages, conditions and hours
         1. ER was moving the exact jobs to the new location, so union should have a say
         2. This is more like ***Fibreboard*** b/c not discontinuing a portion of its business [this turns on labor costs, which is a historic subject of bargaining]
      2. **Test** for determining whether ER decision to relocate is mandatory subject of bargaining:
         1. Initial burden is on the Board GC to establish that ER’s decision involved a relocation of unit work unaccompanied by a basic change in the nature of the ER’s operation

If GC successfully carries this burden, he has established a prima facie case that the ER’s relocation decision is a mandatory subject of bargaining

Then, ER may produce evidence rebutting the prima facie case by: (1) establishing that the work performed at the new location varies significantly from the work performed at the former plant, (2) establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or (3) establishing that the ER’s decision involves a change in the scope or direction of the enterprise

Alternatively, ER may proffer a defense to show by a preponderance of the evidence:

That labor costs (direct and/or indirect) were not a factor in the decision; or

That even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the ER’s decision to relocate

ER WOULD have a duty to bargain if the union could and would offer concessions that approximate, meet, or exceed the anticipated costs or benefits that prompted the relocation decision

* + - * 1. Burden of adducing evidence as to ER motivation for relocation decision is properly placed on the ER b/c the ER alone, more often than not, is the party in possession of the relevant information
      1. There is still an obligation to bargain over the effects on the EEs (even if no obligation over the decision)
         1. Ie. severance, relocation fees, etc.
    1. ***Allied Chemical & Alkali Workers Local I v. Pittsburgh Plate Glass Division***
       1. Issue: whether retired EEs are EEs under NLRA
       2. Facts: ER unilaterally cancelled retirees’ health plan b/c of Medicare
          1. Part of this change went beyond/against what parties agreed to in CBK [was a unilateral modification]
       3. Held: SCOTUS says not an ULP b/c 8(d) only applies to mandatory subjects of bargaining; not required to bargain over retirees
          1. ER does not have to negotiate over retirees’ benefits b/c they can’t be members of the bargaining unit even though this subject matter is wages & conditions [not a mandatory subject]

Retirees don’t have sufficient community of interest to be members of the unit

Health care benefits for current EEs would be mandatory, but retirees’ benefits are permissive subject of bargaining [ER can make unilateral changes even parties had already negotiated an agreement on this topic]

* + - 1. Remedy [not explicitly stated in case]: breach of K/use of grievance procedure under K even though there is no remedy under NRLA
         1. Can go to court to get the grievance procedure/CBK enforced
      2. Test: more simple
      3. KDS: this case kind of ignores the interrelationship among EEs here; plausible that current EEs have an interest in current retirees’ benefits
    1. RLA
       1. Very similar to ***Alkali*** re: what is a mandatory subject of bargaining
    2. Public Sector
       1. Statutes themselves are much more likely to delineate what is a mandatory subject of bargaining
       2. Either parties are required to bargain or they are prohibited
          1. Less likely to have permissive subjects
       3. Limited laundry list of subjects
          1. but COULD borrow some ideas from NLRA

1. Bargaining remedies
   1. Procedure
      1. If ER doesn’t give union the info it wants, go to the board and allege failure to bargain in GF (ask to bring an ULP)
      2. If ER still refuses, go to CoA to get bargaining order enforced
      3. If ER still refused, get a contempt citation
      4. Grievance Procedure
         1. Regional board- 3 general union reps and company reps from other similar companies [have to win one from the other side to win]
         2. National board
            1. If no agreement at national board, can strike

Proponents say that this is CB at its best

Detractors say that there is no adjudication b/c there is no neutral—these people bargain/trade over disputes (which is not individual adjudication)

* 1. Private Sector Remedies
     1. Trad [not in 1st K]: order parties to bargain in GF, and if union complains, go to court and court orders GF bargaining, then court can hit parties with contempt
        1. Not a very effective remedy
     2. First K cases: specify specific schedules for bargaining; give reports to the Board; extend certification year; reimbursement of bargaining expenses
        1. Extension of certification year: all bars are for a period of GF bargaining; period is tolled for the time ER does not bargain in GF [union gets time until a year of GF bargaining]
  2. ***HK Porter Co. v. NLRB***
     1. Facts: union wanted dues to be deducted from paychecks, but ER didn’t want to allow it
        1. ER allowed other fees to be deducted
           1. ER refused to agree this just so a K wouldn’t be reached/acted in bad faith
        2. This was a mandatory subject of bargaining [otherwise no violation]
           1. At the outer reaches of what is a T or C of employment

Union security has been a strong concern from the beginning

* + 1. Held: Board required ER to deduce the union fees as a remedy, BUT court reversed and remanded, saying that this was not the point of the Act and that Board should not force agreement upon the parties
       1. Board should not regulate substance
       2. Court: remanded for remedy consistent with their interpretation of the NLRA
  1. ***Ex-Cell-O Corp.***
     1. Facts: union was negotiating a certain K with all ERs in the area; were successful with all Ers but Ex-Cell-O
     2. Held: Board found that Ex-Cell-O failed to bargain in GF; court reversed Board’s remedy
        1. ER didn’t agree just to frustrate agreement
        2. Board had a K figure that union was getting from other Ers and its remedy was for the ER to pay the union the amount it cost union in wages
        3. Court🡪 board was not allowed to order this remedy b/c it was determining substance by assuming that this wage amount would have been reached by CB
  2. Public Sector Remedies
     1. ***Municipality of Metro Seattle v. Public Employment Relations Comm.***
        1. Facts: Seattle Metro was taking over city’s metro program
           1. 5 clerical EEs transferred were represented by a union

ER had a duty to bargain w/ the union per statute

ER refused to bargain & court ordered it to; still refused to bargain

Union filed ULP

ER filed a request to terminate the bargaining obligation

* + - 1. Hearing examiner ordered ER to return to the status quo and to make the EEs whole
         1. Bargaining🡪 mediation 🡪 arbitration if at impasse
         2. Interest arbitration

Infers that to effectuate the purposes of WA statute, PERC can order this

* + - * 1. \*remedies that go well beyond the private sector

remedies come from the WA statute

no econ weapons here, so to get an effective remedy we have to borrow from another section of the WA act that applies to firefighters

* + - 1. Argue that ***HK Porter***does not apply in the public sector b/c the rationale is not the same
         1. Econ weapons are not available in the public sector

**Ch. 6: Economic Weapons**

1. Introduction
   1. ***Citizens United***
      1. Corporations have 1st Am rights
      2. KDS: So labor unions have 1st am rights, too?
         1. This is an expansive definition of 1st Am
         2. This could have implications that unions could use dues to support political campaigns like corporations, too
   2. ***Westboro Baptist Church***
      1. 8-1 decision that picketing private funerals in a public place has 1st Am protection [even though the strike was intended to incite pain and upset]
      2. KDS: expansive definition of 1st Am
   3. Reconcile these cases with current labor law picketing cases?
   4. Ralph’s Example
      1. Ralphs’ locked out striking EEs and still tried to operate; hired back old EEs under false names and SSNs b/c they are not allowed to use a partial lock-out [it would violate Ralph’s agreement with other ERs]
   5. General: strikes, lock-outs, boycotts
      1. Can’t do away with strikes/lock-outs, b/c then we would have to resort to interest arbitration and this is not the parties deciding for themselves
         1. Private voluntary resolution necessitates economic warfare
         2. But we try to regulate to try to minimize strike and make the level efficient
      2. Strikes were initially illegal under criminal/civil conspiracy doctrine
         1. Taft Hartley Act tried to limit EE strike behavior
      3. More recently, striking is very limited strategy
         1. Can’t discriminate based on a strike, but can permanently replace
         2. Competition and international trade have depressed wages and made EEs afraid of job loss
      4. Alternative to strike—Boycott
         1. If you leaflet, you can’t be permanently replaced but still puts pressure on ER
         2. But secondary boycotts are illegal
2. Constitutional protections for strikes and protests
   1. Due process protections for employers
   2. First amendment protections for workers
      1. Picketing
         1. Ex. on page 555
            1. Union picketer has the least rights of the group b/c this secondary boycott is an ULP

This picketer is an EE somewhere else

* + - * 1. EE that works for that ER has 1st Am protections [but sign on a stick picketing back and forth has less protection that handing out handbills]
        2. Student has core 1st Am protection

Person who has the least interest in the dispute has the most protection (kind of perverse)

* + - 1. ***Thornhill v. Alabama***
         1. Facts: AFL conducted 24-hour picket; a worker approached the picket line and talked to a picketer who asks him not to go to work; worker then goes home

Broad AL statute bans picketing

Picketer goes to jail for speaking to the worker non-violently

* + - * 1. Held: court overturns statute b/c it curtails 1st Am speech b/c it covers peaceful picketing

The speech covers wages & hours, which are matters of public concern

Not excluded from core 1st Am protection

Could restrain the picketing if it were violent or interfered with other people’s rights (not the case here)

* + - 1. ***Int’l Brotherhood of Teamsters v. Vogt***
         1. Facts: Teamsters were picketing b/c not everyone was affiliated with the union

WI statute said that union couldn’t picket for this reason b/c it is not an actual labor dispute

More than 1st am speech—this was based on econ pressure [so not protected conduct]

“Speech plus,” so it can be regulated [econ pressure]

* + - * 1. Held: upholds statute; picketing is a signal that doesn’t necessarily convey information

Does not get the strict scrutiny of 1st Am protection

SCOTUS makes this distinction here & limits ***Thornhill***

KDS: maybe picketing is not as strong a signal as it used to be; peculiar basis on which to make a constitutional distinction

* + - 1. ***Mosley***
         1. Political picketing is protected but labor picketing is not

So in some ways, it is based in subject matter

* + - 1. Identifying Labor Picketing
         1. For distributing leaflets to be labor picketing, it has to be about a labor dispute
         2. Hand billing is treated more leniently than walking back and forth/picketing

Picketing = patrolling back and forth with signs on sticks

* + - * 1. Banners are fully protected by the 1st Am
        2. Inflatable rat to draw attention to non-union shop?

1st Am protection, but does it convey info?

* + - * 1. KDS: there has been must 1st Am protection for speech that doesn’t convey very much information
    1. Boycotts
       1. ***NAACP v. Clairborne Hardware***
          1. Issue: whether NAACP could be liable for losses caused by their boycott
          2. Facts: NAACP announced in public that people who violated the boycotts were disloyal

The protests were peaceful and orderly so that NAACP

* + - * 1. Held: speech was protected under 1st am; NAACP was not liable for the losses
        2. KDS: there is signaling going on here w/ the picketing

Social stigmatization🡪 speech plus

This was protected activity (short of violating the law/trespass) even though it was meant to be coercive (NAACP wanted people to follow this boycott and if they didn’t, they would be cast out of the community in some way)

* + - * 1. Purpose of the boycott was to influence lawmakers (this is part of what saves it)

It goes to a political purpose and not a narrow econ purpose

* + - 1. ***International Longhoremen’s Assoc. v. Allied International, Inc.***
         1. Facts: union members boycotted cargoes arriving from or destined for the Soviet Union to protest Soviet invasion of Afghanistan [work slowdown, not a strike]

As a result, Allied, an importing company, was forced to renegotiate its Russian Ks- disrupted its shipments and reduced it ability to supply its own customers

* + - * 1. Held: unions can’t prevent the handling of goods if their main purpose is to cease doing business with any other person (secondary boycott ban)
        2. This boycott was politically motivated—the unions were arguing for the civil liberties/politics re: Russia

This was NOT about the workers’ wages/conditions; they were just trying to sanction Russia

* + - * 1. Compared with ***NAACP***

Less coercive than NAACP

Longshoremen were signaling, if anything, that union members shouldn’t do business with these people

🡪 The implication is that labor unions are the only orgs that can’t engage in political protests/have less rights under the 1st am

NAACP involved failure to purchase; Intl Longshoremen involved a refusal to perform duties/withholding of labor

Both: trying to put pressure on neutral parties so a 3rd party will change

* + - * 1. This case doesn’t turn on interference with K [so this is not the reason the court uses for lack of 1st Am protection]
    1. Other Regulations of Labor Protest
       1. ***Marsh v. Alabama***
          1. Facts: Jehovah’s witness convicted of criminal trespass for distributing literature on a sidewalk in a town in AL that was wholly owned by the Gulf Shipbuilding Corp. (company town)
          2. Held: SCOTUS overturned conviction b/c if the town had belonged not to a private but to a municipal corporation, the First Am would have protected the speech
          3. Company town principle
       2. ***Amalgamated Food Employees Union v. Logan Valley Plaza, inc.***
          1. Facts: union picketing immediately outside one store in a large shopping mall
          2. Company town principle in ***Marsh***was extended to shopping centers

Held: the shopping center here is “clearly the functional equivalent of the business district in the AL town in ***Marsh***. 1st Am protected the picketing

* + - * 1. Later OVERRULED in ***Hudgens v. NLRB***, which said that a large shopping center is not the “functional equivalent of a municipality,” and thus it has the rights of a private property owner to exclude anyone it deems as a trespasser (rights and obligations of EEs and ERs and unions in the picketing context are thus subject ONLY to the NLRA)

1. Statutory protections for employee protest
   1. Strikes
      1. Why?
         1. Political & social reasons
         2. Simple economic analysis
            1. Strikes are a puzzle—irrational
            2. In a world with perfect information and zero transaction costs, strikes never make sense b/c whatever deal you arrive at after the strike, the deal should have been arrived at before the strike [assuming that the parties are acting in their collective interests]
         3. Econ reasons for strikes:
            1. Strikes convey information

There is really imperfect information and a willingness to strike conveys information

Either that the ER is serious that is can’t afford a raise or that the union is really serious and wants to test the ER’s seriousness

“Rusty weapon strike”

Sometimes a union has to exercise the weapon [strike] to demonstrate that they can do it and keep the weapon oiled and working

* + - * 1. Divergence of individual v. collective interests

Strike to assert yourself

* + 1. Unprotected strikes/Exceptions to Section 7 protections for strikes
       1. Not all strikes are protected; some are not completely protected
          1. See types below
       2. Activity inconsistent with exclusivity
          1. “Wild-cat”strike

Strike not authorized by the union

***Emporium Capwell***

ER discrimination violated the CBK

EEs involved were upset & picketed even though the union was already processing the issue through the established grievance procedure

SCOTUS held: this strike was unprotected b/c EEs were bound to their CBK, which said no strikes

* + - 1. Sit-down strikes & slow-downs
         1. Sit-down: EEs occupy their workplace so they cannot be replaced

Unprotected b/c it is a trespass

* + - * 1. Slow downs: unlawful b/c ER gets to set the terms of employment until ER collectively bargains them away

With a slow down, EEs are trying to set the terms of employment

But these haven’t disappeared completely—EEs have had some success if they have public support and attention

* + - * 1. ***Elk Lumber***

Facts: slowdown; union had a deal with ER but then ER sped up the production for the same pay

Union said that EEs would not speed up for no add’tl $$, so slowed to original rate

Union said EEs were then fired illegally

Held: firing was legal b/c no “law or logic” gives EEs right to work upon terms prescribed solely by them

Union’s argument: Sec. 7 protected this concerted activity; interpreted this section to include not speeding up when ER wants it

Court didn’t buy this

We already interpret sec. 7 to include strikes

No written CBK here, so ER can unilaterally change terms

Legacy: under this interpretation of Sec. 7, “Day Without Immigrants” was not protected concerted activity

KDS: but this type of union activity is historic [picking a national issue of concern and calling for a general strike]. Allowing this would be less of a stretch than including a slow down in sec. 7’s protections.

EEs risk losing their jobs if they participate

But they risk losing their jobs even if it is protected b/c they could be permanently replaced

* + - * 1. ***NLRB v. Fansteel Metallurgical Corp.***

Great facts for the union

Workers maintained the plant during a sit-down, BUT

Held: sit down was unprotected b/c it was a trespass

* + - 1. Indefensible conduct
         1. Inflicting too much damage on the ER- how much is too much?

Ex: walking off the ICU

Unions are allowed to choose opportune times to strike, but they are not allowed to pick times that would destroy ER property or would too seriously inflict damage on ER interest [despite the fact that we don’t regulate econ weapons]

* + - * 1. ***Elk Lumber***

Re: whether union’s activity is indefensible: look for unlawful objective or improper means

* + - * 1. ***International Protective Services, Inc.***
        2. ***Insurance Agents***

“harassing tactics”

* + - 1. Disloyalty
         1. General disparagement is unprotected
         2. If the info is true, query whether it is unprotected
         3. ***Jefferson Standard Broadcasting***
      2. Picket line misconduct
         1. Violence/trespass
         2. Torts are unprotected
         3. Breaking the law is unprotected

State law applies

* + - 1. Effect of a no-strike clause [strikes that violate CBK]
         1. Our class CBK has a no-strike clause, so KDS can sue union for damages if we strike
         2. Labor law rights: some are individual and some are collective

Unions cannot waive some individual rights, but it can waive some collective rights in a CBK

Right to strike is a right that CAN be waived by the union [if EEs strike anyway, they can be fired for misconduct]

Union CAN’T waive individual EEs’ rights to advocate for other unions on an ER forum (like a bulletin board)🡪 these are individual section 7 rights

KDS: this makes sense—you don’t want unions to be able to waive individual rights to dissent

* + - * 1. ULP strikes

General no-strike clauses have been interpreted to NOT include a ULP strike

ULP strike ensues when EEs strike to protect that an ER has committed a ULP [failure to bargain in good faith, discriminatory firing of union reps. etc.]

Different from an economic strike, which is when EEs strike re: benefits, wages, conditions, etc.

The ULP/Econ categorization is important b/c of the difference re: permanent replacements

The difference can be ambiguous and savvy union leaders can get around it

A smart union would raise ULP issues in the last CBK negotiation mtg before a strike

Indicia

ULP strikes respond to an ER’s actions

Look at the issues written on the picket signs

But, a CBK can waive the right to engage in an ULP strike

***Mastro Plastics***

* + - 1. Strikes over non-mandatory subjects of bargaining
         1. Permissive subjects- cannot bargain to impasse, strike, or lock out over them. If you do, it is unprotected and ER can fire EE

Would also be a violation of the duty to bargain under 8(a)(5) and 8(b)(3)

KDS: but if you have enough bargaining power, you can do whatever you want. If you are a valuable EE, sometimes your econ rights are stronger than your legal rights

Easy to get around this exception by using a mandatory subject as a cover for the strike

* + - 1. Sympathy strikes
         1. Traditional rule: sympathy strikers are treated the same way as the strikers/picketers they are honoring
         2. EEs can negotiate for contractual rights to engage in sympathy strikes and recognize picket lines in their CBK

Current rule: a general no strike clause does NOT include an EE right to recognize picket lines w/o getting permanently replaced [but ER can waive this right]

* + - * 1. ***Electronic Data Systems Corp.***

Facts:

EE (Eaton) sent out emails to other EEs warning them that a strike of another ER they work with was imminent; encouraged other EEs not to field calls from that ER (Respondent)

EE was terminated

Held:

EE’s actions were not concerted

But if EEs are working on behalf of the protected activity of EEs of another ER, then it is protected

Eaton went over the line when she engaged in a partial work stoppage; thus, her termination was not an NLRA violation

KDS:

Eaton is acting by herself at her ER, but it is concerted b/c she is doing it on behalf of the protected concerted activities of other EEs (sec. 7)

Distinguish: court held that Eaton engaged in a work stoppage, NOT honoring a picket line [because she stayed at her cyber work place]

Physical difference from honoring a picket line in a physical place

* + - * 1. ***IPL I & II***

Facts

CBK had a no-strike clause

IPL EE (Mary) went to read a meter and honored that business’s EEs’ picket line

IPL disciplined Mary, who then filed an ULP charge arguing that IPL violated sec. 8(a)(1) and 8(a)(3)

IPL defended on the ground that the CBK waived Mary’s sec. 7 right to honor the picket line

Held

IPL I: a no strike clause waives right to engage in sympathy strikes unless the CBK or extrinsic evidence demonstrates that parties intended clause not to waive the right

IPL II: where there is conflicting evidence as to whether parties intended for the no strike clause to waive right to engage in sympathy strikes, union did not clearly and unmistakably waive right to engage in sympathy strikes

* + 1. Special statutory limitations on strikes
       1. NLRA: General
          1. Sec. 8(d)- requires 60 day notice to the other side before modification or termination of a CBK

Point is to try to ensure that parties have at least 60 days to negotiate before a strike and at least 30 days of mediation before a strike

Strike can be illegal if parties don’t give notice

This only applies to modification or termination of Ks—NOT ULP strikes

* + - * 1. Sec. 8(g)- health care institutions have an addt’l ten days added to the notice requirement

b/c strikes in these situations can be potentially hazardous to patients

* + - 1. RLA
         1. Major v. minor disputes

Minor

Arising out of grievances or out of the interpretation or application of agreements

Resolved through negotiation and grievance processes

If this fails, dispute is committed to the exclusive jurisdiction of the appropriate system board for final and binding arbitration

***Railroad Trainmen v. Chicago River & Indiana RR***

Minor disputes are subject to the compulsory dispute resolution procedures of the RLA, so courts are empowered to enjoin strikes that are designed to evade those procedures

Major

Concerning an intended change in agreements affecting rates of pay, rules, or working conditions

Parties must give notice of the dispute and then submit to the negotiation process

During negotiations, either party may request the National Mediation Board to mediate

If negotiation fails, and mediation is either not requested, not offered, or unsuccessful, the parties are allowed to resort to self help, including econ weapons

* + - 1. National Emergency Provisions [under NLRA]
         1. If President thinks that a strike would cause a national emergency, alternative provisions would kick in

Process: appoint a board if inquiry into the strike; produce a report; during that time they seek an injunction, conciliation and mediation

* + - * 1. Slows down the process and gives greater consideration and public input into strikes and lockouts where it is felt that either would create a national emergency
      1. ***US v. Pacific Maritime Assoc.***
         1. Most recent use of the national emergency provisions
         2. Facts

Lock out of 29 west coast ports

ER decided that it didn’t want to exist under the current CBK and wanted concessions (and didn’t want to bargain to impasse)

* + - * 1. Gives evidence re: what is a national emergency

Devastating effect on agricultural exports

Affect on military supplies and global war on terror

* + - * 1. Held

West coast lockout was a national emergency and the president could invoke the emergency process

* + - * 1. KDS: do ERs have too much power to lock EEs out? Should there be limitations (limitations have been kind of done away with)

More lockouts than strikes these days

* + 1. Work stoppages in the public sector
       1. General
          1. Less states allow strikes now
          2. ER doesn’t lose tax revenues when EEs engage in a strike

So strikes are more like political activity than econ weapons

* + - 1. Types
         1. “Blue Flu”: Wisco teachers all took sick days at the same time

This can be held to be an unlawful work stoppage if done in concert

* + - * 1. “Work to Rule”: EEs do everything exactly as they are supposed to, which slows down work

***Transport Workers Union***

In NY, this was found to be an unlawful work stoppage

* + - * 1. Refusal to work overtime

Found to be a strike in some cases if in concert

* + - * 1. Refusal to engage in voluntary activities

In some cases, it was found to be a strike

More fact sensitive-requires as part of the job even though theoretically unpaid?

* + 1. Remedies for unlawful strikes
       1. ER can seek injunctions/damages from individual members/union
          1. Can seek to decertify the union
       2. Power of the ER’s remedy depends on the econ bargaining power of the EE (how hard they will be to replace)
    2. Alternative to strike
       1. Mediation, fact finding and interest arbitration
  1. The battle for solidarity
     1. Management tactics: replacing striking workers
        1. ***NLRB v. Mackay Radio & Telegraph Co.***
           1. Facts

EEs on econ strike

ER brought in EEs from other offices to replace them- the strikers realized that the strike was ending, so they attempted to return to work

The 5 most active people in the striking process were the only ones not allowed to return (they were required to reapply)

* + - * 1. Held (NLRB)

ULP to discriminate against these 5 people re: reinstatement

They COULD have been discriminated against based on their abilities, etc.

ER used union affiliation to decide which EE strikers would be permanently replaced

ER can’t fire EEs for striking, but it CAN hire people to permanently take strikers’ positions and ER doesn’t have to displace those replacements when strikers want to come back to work

ER has to use neutral basis for allowing strikers to come back to work

* + - * 1. A replacement is permanent if he is promised he can stay after the strike if they wanted to

Here, only 5 of the PRs wanted to stay (but they were all promised that they could)

PRs don’t have a job for life, they could be EEs at will depending on how the strike comes out

They aren’t actually “permanent EEs”

PRs in general are members of the bargaining unit once they start doing bargaining unit work

EEs who have been permanently replaced are still members of the bargaining unit for one year after they have been replaced

Union still has a duty to fairly represent these PRs

BUT union could negotiate to have the PRs lose their jobs once a strike is over

This is a mandatory subject of bargaining

The union would still be fairly representing the PRs b/c fair representation doesn’t mean protecting individual rights

Some individual rights can be sacrificed for the collective rights of others

The PRs wouldn’t have to choose to be union members, but the union would still represent them

* + - * 1. If replacements haven’t been promised they can stay after strike, they are temporary
        2. Rights of EEs who have been permanently replaced

Discharged = you lose your right to a job and you are no longer a member of the bargaining unit

Permanently replaced = you are still in the bargaining unit and you have a right to first recall for a period of one year (if you can do the job)

Even absent an agreement, union can make an unconditional offer to return to work, which would trigger recall rights, which means that when openings come up, ERs have to offer these EEs the jobs first

Replacements don’t often work out for ERs, so they may want to recall EEs after the strike is over (for their skill sets)

But if EE is low-skilled, can be replaced with anyone so the recall may not be very high

Ex: warehousemen would not have a right to recall to a machinist job

After one year, the replaced EEs are SOL

It would be legal for an ER to prompt a strike, replace all EEs, wait a year and then get the replacements to decertify the union

* + - 1. ***Mastro Plastics***
         1. Facts

Strikers protested ULP

Strike was during the term of a CBK

But has been interpreted to prohibited perm replacement of EEs engaged in an ULP strike even if the CBK has expired

* + - * 1. Held

This case established that ULP strikers cannot be permanently replaced

Note: ER can’t fire econ OR ULP strikers

Upon cessation of the strike and the strikers’ unconditional offer to return to work, ER must take the strikers back regardless of the existence of replacement workers or of subcontracting out the work the striker formerly performed

ER can then decide whether to fire the replacements or find other work for them

* + - * 1. ***Belknap v. Hale:*** Fired PRs who were promised longer employment would then have remedies under state law (but NOT under federal labor law)

Probably not very effective, though

Esp. if they are at-will EEs

* + - * 1. Fired temp. replacements who were fired to make room for returning strikers would have no remedies
      1. ***Trans World Airlines, Inc. v. Independent Federation of Flight Attendants***
         1. Under RLA
         2. Facts

TWA stewardesses went on strike

Crossover EEs come back to work during the strike

ER also hired perm replacements

After the strike, ER recalled striking EEs when positions come open, but doesn’t give the recalled worker their seniority back

* + - * 1. Issue

Whether ER has to give EEs their seniority back

* + - * 1. Held

No ULP

ER does not have to give EEs their seniority back after the strike b/c this is not the same as ***Erie***

The ***Mackay*** rule applies to ER use of crossover EEs as replacements

Junior crossovers cannot be forced to be replaced by returning strikers with more seniority

* + - * 1. Rationale

Crossovers should not be punished fore not taking a gamble on a strike

ER pressure on EEs is not inherently destructive b/c it is inevitable

Legacy: this case says that ER can put a LOT of pressure on people and it is NOT inherently destructive

This is NOT a continuing diminution of seniority upon reinstatement at the end of the strike

* + - * 1. KDS: the right to a particular route (benefit v. a job)

Union/EEs see particular routes as benefits & that the ER action was inherently destructive

So they think that this is like the super-seniority case (ER giving picket crossers potentially permanent benefit even after the strike is over)

Court/ER say that the route is not a benefit, it is an actual job/position that can be filled by permanent replacements

Crossovers and PRs can hold these positions and it is not a permanent benefit

* + - * 1. KDS: This puts pressure on people to cross the picket line, though

If you have a house/spouse in one city, it is an inducement to cross in order to keep your current route

* + - 1. History
         1. Attitude changed re: PRs for political and econ reasons

Use became popular in the ‘80s and ‘90s

Reagan’s firing of air traffic controllers and the recent international competition and excess of labor (diff from the ‘40s-‘60s)

Reagan signaled that the government would fight the unions

* + 1. Union tactics in the battle for solidarity
       1. History
          1. Unions used to maintain solidarity just through ideology
          2. Now, there is weaker class identification in the USA
       2. Options
          1. Unions can fine or otherwise discipline union members who cross the picket line

***Allis Chalmers***

Union preserves the right to discipline and completely expel members

***Pattern Makers’***

Unions cannot restrict union members from quitting union membership during a strike

* + - * 1. Corporate campaigns

Striking has become a less effective weapon (expensive and risky), so unions have resorted to leverage through external pressure from consumers along with workforce activism to use legal tactics within the workplace to exert leverage

Basic idea: identify political and economic vulnerabilities of the target ER and apply pressure at those points

Used in the context of organizing campaigns and to discourage ER resistance to union bargaining demands

1. Employer weapons
   1. ***Erie Resistor*** 
      1. Facts
         1. ER offered super seniority to strike breakers
      2. Held
         1. Inherently destructive: ER can’t break down solidarity and bring people into work by offering a permanent inducement for crossing a picket line (regardless of ER intent/motivation)
            1. One indicia of ID is the creation of a permanent cleave within the bargaining unit
         2. This inducement undermines sec. 7 rights and causes a permanent fracture in the bargaining unit (some EEs will always have 20 more years of seniority than others b/c they crossed the picket line)
         3. ER intent is not important here/proof is not needed
   2. ***Great Dane Trailers***
      1. Facts
         1. EEs had already earned accrued vacation pay and wanted ER to pay this money out to them during the strike
         2. ER refused, but paid it to the EEs who crossed the picket line
      2. Held (SCOTUS)
         1. ULP by ER- its discriminatory treatment of strikers violated 8(a)(3)
            1. You can’t pay an earned benefit (that is owed) to the non-strikers and not pay it to the strikers
         2. Two-part test re: whether evidence of discriminatory intent is necessary
            1. (1) If the discriminatory conduct was inherently destructive of important EE rights, no proof of anti-union motivation is needed

Board can find ULP even if ER introduces evidence that the conduct was motivated by business considerations

KDS: intent is inferred

* + - * 1. (2) If the adverse effect of the discriminatory conduct is comparatively slight, an anti-union motivation must be proved to sustain the charge IF the ER has come forward with evidence of “legitimate and substantial” business justifications for the conduct

KDS: direct evidence is enough

* + 1. Rationale
       1. ER didn’t show any legitimate motive for discrimination
          1. So Court didn’t reach the issue of whether the effect was “ID” or “CS”
       2. All ER actions fit within “inherently destructive” or “comparatively slight”
  1. Lockouts
     1. Offensive
        1. Was an ULP
           1. Trad. was seen as inherently destructive of sec. 7 CB rights
        2. Initiated w/o ER having any reason to believe that a strike was likely
        3. Used by ER to put pressure on union in bargaining
     2. Defensive
        1. Used to only be permissible when strike was imminent 🡪 like in the context of “whipsaw” & quickie strike situations; and when a strike was planned to inflict peak harm on ER
           1. ER could preempt strike and lock out EEs during a slow season so they wouldn’t strike during the peak season
     3. ***American Ship Building Co. v. NLRB***
        1. SCOTUS eroded the distinction b/w defensive and offensive lock-outs
           1. Rejects the idea that lockouts violate sec. 8(a)(3) and says that they are not inherently destructive of sec. 7 rights
        2. Legacy: EEs used to be able to pick whether to shut down the workplace with a strike; now we have seen that ERs can aggressively lock out EEs
  2. Partial lockouts
     1. ***Midwest Generation [NLRB]***
        1. Facts:
           1. Union goes on econ strike

Some EEs cross the picket line

* + - * 1. When parties don’t reach an agreement, more EEs cross the picket line
        2. Union offered to return to work, but ER rejected the offer

Anyone who had returned to work before this point could stay, but anyone who hadn’t would still be locked out

* + - 1. Held (NLRB): P
         1. Partial lockout was not a ULP b/c the purpose of the lockout was to put pressure on the EEs and the effect of the partial lockout was relatively slight under ***Great Dane*** analysis

Partial lock-out was unrelated to union affiliation

ER sought to continue operations during the lock out (used supervisors, etc.)

* + - * 1. There IS a division b/w the strikers and the picket line crossers, but this is not “ID,” b/c it is not a permanent division and is no greater than the division we have when we have some people on strike and some not (this is “CS”)

The legit and substantial business reason here is that the ER wanted to run the company and this partial lockout helped (and this finding was enough)

* + - 1. KDS: doesn’t this cleave the bargaining unit and thus is “ID”?
    1. ***Midwest Generation II [COA]***
       1. Held (7th Cir. COA)
          1. ULP

ER must have a reasonable reason for finding some EEs necessary and others unnecessary

* + - * 1. Court accepts that this is “CS”

But ER could operate the business without these crossovers, so they have not shown a substantial and legit business reason for the partial lockout

This is why COA overturns NLRB

* + - 1. Rationale
         1. Not participating in the strike does not mean that the EE doesn’t support union demands
         2. The only distinction b/w the two groups of EEs at the time of the lockout was their participation in union activities
         3. Retribution to discourage EEs from exercising sec. 7 rights is a violation

Court disagrees that this was not ID (ER shows anti union animus)

KDS: Court may have found that this partial lockout was direct evidence of anti union animus or that the partial lockout was ID

* + - 1. KDS: does this case make sense?
         1. The board is kind of regulating econ weapons here
         2. Can analogize partial lockouts to the ban on partial work stoppages

Board has held partial work stoppages to be “ID” because are too effective and not inductive to GF bargaining

* + - * 1. Could argue that ERs have too many weapons?

Do these precedents go against the purposes of the Act (fostering CB)?

* + - 1. Legacy: we don’t have a clear statement that partial lock-outs are allowed
         1. They are NOT allowed in 7th circuit

But the Board precedent here is still good precedent in other circuits

* 1. Replacement workers during lockouts
     1. Old doctrine: ER could only use temp replacements (and only during defensive lockouts)
        1. Once the difference b/w offense and defensive was eroded, courts initially adhered to the idea that use of perm replacements was an ULP under the theory that ER couldn’t show a business reason for it
     2. ***Harter Equipment***
        1. Allowed temp replacements during an offensive lockout and COA approved this
     3. ***International Paper Co. v. NLRB***
        1. Facts
           1. ER and union were at impasse and ER locked out the production and maintenance workers at one of their mills

Continued operations with sub contractors

While the lockout was in progress, ER pursued a permanent subcontract b/c it was cheaper

* + - * 1. ER had a perm contract with the sub contractor, and changed it to temp when ER feared an ULP charge (shows the bargaining power ER had with sub contractor); then changed back to permanent

This raises the question of “permanent”

Maybe this case means that ER simply has to designate that the replacements are “permanent”

The econ realities behind it don’t really seem to matter

* + - 1. Held
         1. Board

ULP (violation of sec. 8(a)(3))

Inherently destructive analysis

* + - * 1. COA

Not an ULP

Not appropriate to use the “ID” analysis

Will not cleave the union b/c sub contractors will not be in the bargaining unit b/c they are not EEs of this ER

This was a “CS” analysis under ***Great Dane***

Use of permanent sub contractors was ok

Rationale

This is more like the ***Mackay*** case

B/c an ER could legally propose perm sub contact in bargaining and once parties bargained to impasse ER could remove the lockout and unilaterally impose the perm sub contract, the ER can do the similar thing here

KDS: but these situations are not analogous

Futility of CB? Anytime you are engaged in CB, EEs risk permanent replacement, so this holding doesn’t make CB any more futile than it already is

* + - 1. Now, ER just has to show a legit business reason
         1. Which is that it saves ER money

KDS: this is something ER could have bargained over

* + - 1. KDS:
         1. This is about decreasing the size of the bargaining unit on the basis of cost (which would be a mandatory subject of bargaining, you would think)
         2. Doesn’t this cleave the union?
         3. We are a fair way down the road from ***Mackay*** here
         4. This is good precedent of ER power in taking aggressive action against unions
    1. What does it mean to be a PR?
       1. They can be gotten rid of
          1. Don’t necessary have job security (could be “at-will”)
    2. KDS: there may be important reasons for treating strikes differently from lockouts
       1. You don’t want to incentivize ERs to pressure strikes so they can permanently replace the union members

1. Statutory protections for employers: secondary activity
   1. Primary/Secondary distinction
      1. Common work sites
         1. The construction site industry rule
            1. ***NLRB v. Denver Building & Construction Trades Council***

**Bruce LeMar Information**

1. *RLA Summary* 
   1. Union wins election under RLA 🡪 get system-wide/national company-wide bargaining rights (craft wide)
      1. This group is determined at the time the union submits its petition
      2. Mediator is assigned when the petition is filed, and they determine the appropriate class and craft
   2. If another union is interested in representing the same EE group, the existing union K does not expire until a strike or a lockout
      1. The K is just amendable; the K is deemed to be with the EEs, not the union
         1. The new union can step into the position of the old union
   3. Damages
      1. RLA is strong in keeping operations going, so strong that you don’t have to have a no strike policy
      2. Non-interruption of ISC is a basis for issuing an injunction
      3. Specific Ks don’t have to have a no strike clause, usually (the Act covers it)
   4. Act emphasizes dispute resolution
   5. If there is impasse, one or both parties can request an assigned mediator
      1. If the parties do not make this request, the Board can act on its own (but has never had to do it and LeMar says NO)
   6. Rare provision: ADR procedure to having mediator convene a formal proceeding to interpret the disputed language
      1. If conferences are not held or scheduled for 10 days, you have no further obligation to bargain (so you better request mediation or get ready for what the other side is going to do)
   7. No process for de-certification
      1. Straw man runs
   8. Current events: have to take BK into account when thinking about RLA
2. ***Northwest Airlines Corp. v. Assoc. of Flight Attendants***
   1. Facts
   2. Holding
   3. Purpose of RLA
      1. Assure the flow of goods and commerce (and that it wasn’t interrupted by labor disputes)
         1. Designed to get past the violence of the Haymarket Strike, etc.
      2. Allows unions the opportunity to organize and have their disputes heard and have Ks enforced
      3. Gave companies freedom from wild cat strikes and econ strikes unless and until the processes of the act had been exhausted
   4. National Aviation Board
      1. Conduct representation elections
      2. Functioned in a mediation capacity if one of the parties requested it
      3. Would pass a conflict on to the presidential emergency board if absolutely necessary
   5. Legacy: this case is a good way to understand how convoluted the processes of the Act are
      1. BKs of the early 1980s were so distasteful to all parties that they have been avoided
   6. Under RLA, any union can raid any other union so long as it has been 12 months from the previous election [if this falls in the middle of a current CBK, you don’t renegotiate, the new union just takes over the K and starts dealing with management]
      1. Here, the flight attendants at Northwest got rid of the Teamsters in favor of another union
         1. AFL-CIO prohibits member unions from raiding other member unions [but it kicked the Teamsters out]
            1. Teamsters then started raiding EEs on union-represented properties
            2. Teamsters were invited back in the ‘90s due to their raiding success
      2. Actions that precipitated this case came about with the previous union
         1. AFA [Assoc of Flight Attendants] raised this previous union
            1. Never had much money- borrowed money from the pilots’ union
            2. AFL-CIO forced AFA to merge with CWA [communications workers] even though they had nothing in common, b/c CWA was more stable

This case was not appealed, probably b/c CWA didn’t want to pay for it

1. Changed Election Procedures under RLA
   1. 1935-2010: wanted to encourage people not to vote in union elections
      1. had to have a % of workers vote?
   2. 2010: have to vote yes or no- can’t abstain
      1. similar to NLRA – majority of those voting

MISC

* -Do supervisors have standing to file an NLRA complaint on behalf of employees?
  + If supervisor testified at a hearing re: an unfair labor practice charge, employer can’t discriminate on supervisor based on this
  + Sec 8(a)(2) employer cannot dominate or interfere with administration of a labor organization
    - Thus, supervisors arguably can’t help employees organize a union [arguably it would be domination and assistance]
      * Fear is that supervisors would lean on employees to join the company or more favorable union [so employer can ban supervisors from helping due to worry about 8(a)(2) liability]
* -The suggestion box unfair labor practice charge is valid, but the novel idea is that it came from a supervisor
  + the suggestion box started with the union organizing campaign [unfair benefits]
* -Rep can tell employer that union has a maj and then have the cards checked by a neutral [don’t give originals to hostile party; may not want to disclose the names of union supporters]
  + if the majority is verified, the employer can force an election