

# Bargaining “in Good Faith”: Legal Obligations and Pitfalls

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## **Staff**

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Here to help with technical issues



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# What We'll Cover

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Bargaining “in good faith”:  
how to avoid (or  
how to set up)  
an unfair labor  
practice charge

# Origins of the Obligation

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## Private sector

- 1935 Wagner Act (NLRA): obligation of employers to bargain at the request of a union
- 1947 Taft-Hartley amendments to NLRA: obligation extended to unions

## Public sector

- State and local laws all mandate “good faith”
- But different degrees of specificity, and varying interpretations by courts and labor boards



## Section 8(d) of the NLRA

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“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession...”

# Two Categories of Violations

## ***Per se* violations:**

- the fact that an act has occurred suffices to establish an unfair labor practice (ULP)
- no need to prove motivation, or any other aspect of the context in which the act occurred

## **Violations based on general course of conduct:**

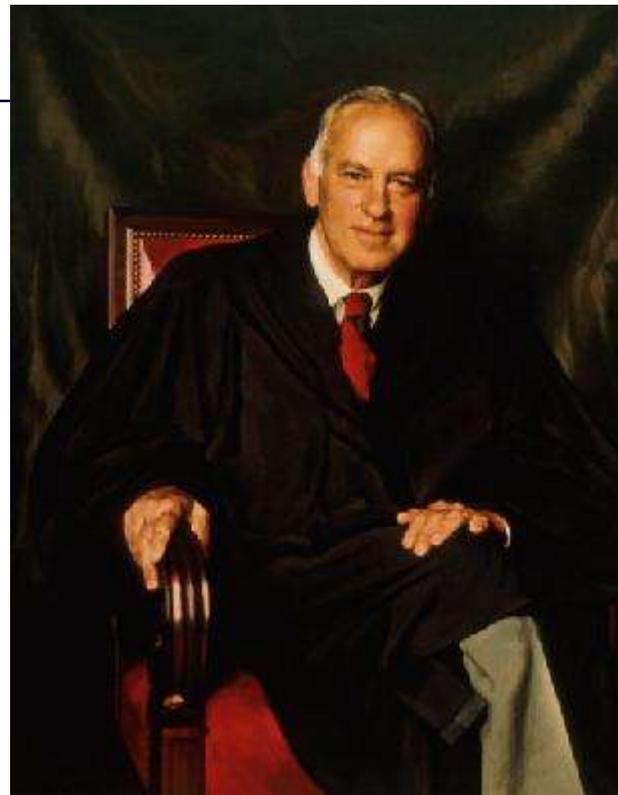
- examines the “totality of the conduct”
- inquiry: did a party approach bargaining with “a sincere resolve” to reach agreement?

# Potter Stewart

## 1915 - 1985

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“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it...”



Concurring opinion,  
*Jacobellis v. Ohio*, 378 U.S. 184  
(1964)

# *Per se* Violations

Refusal to meet  
(at all)

Refusal to  
furnish relevant  
information

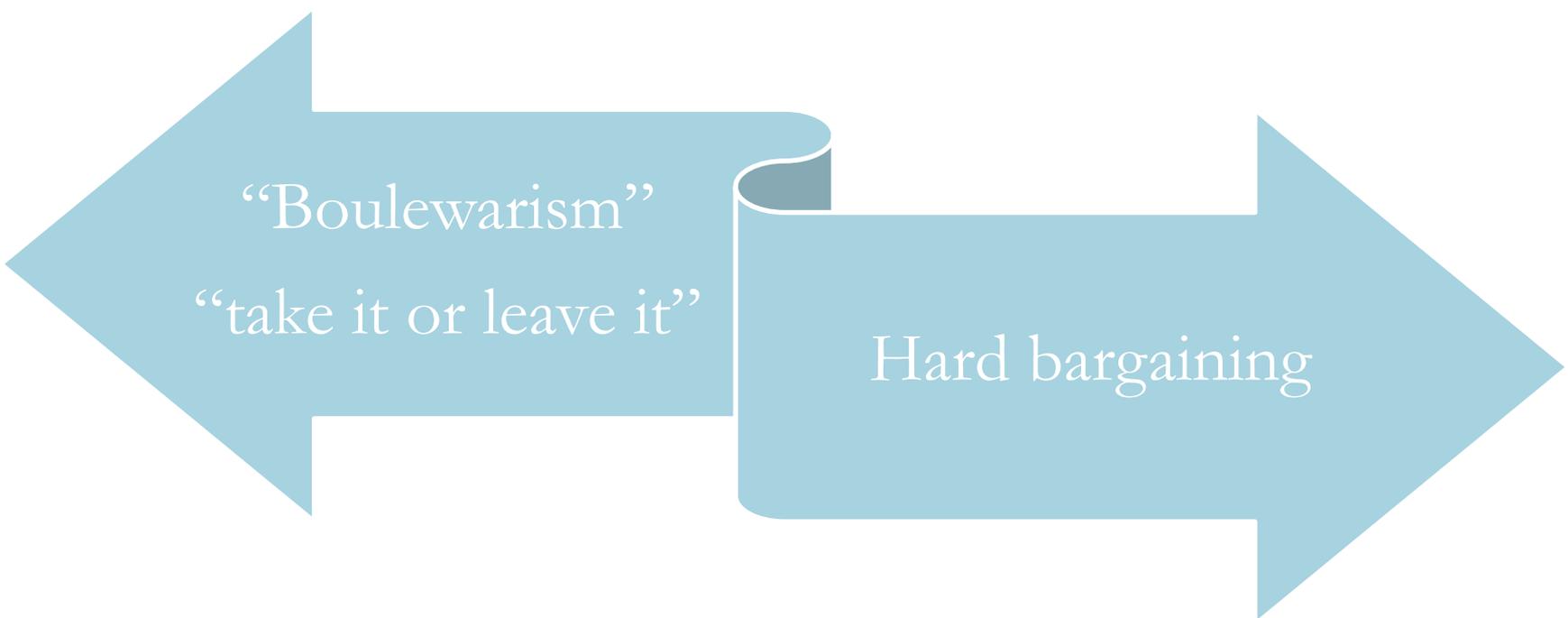
Refusal to  
execute a written  
agreement

Direct dealing  
with unit  
employees  
(bypassing the  
exclusive  
representative)

Insisting to  
point of impasse  
on a permissive  
subject of  
bargaining

# Where to Draw the Line?

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“Boulewarism”  
“take it or leave it”

Hard bargaining

# Appearances vs. Reality

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Surface  
bargaining

The diagram consists of two light blue arrows pointing in opposite directions. The left arrow points left and contains the text 'Surface bargaining'. The right arrow points right and contains the text 'Good faith bargaining'. The two arrows are connected at their inner ends by a white, curved, ribbon-like shape that resembles a folded piece of paper or a bridge between the two concepts.

Good faith  
bargaining

# Logistics

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Availability to meet

Delaying tactics

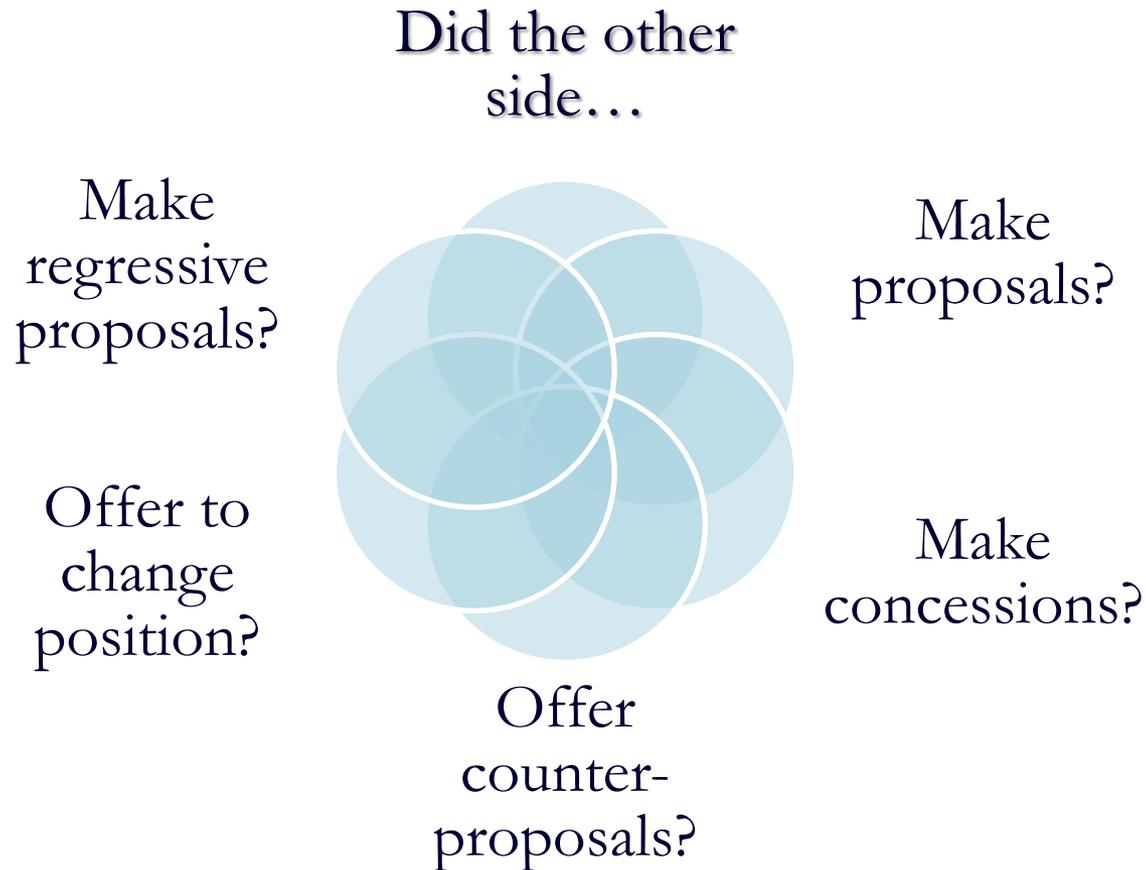
Identity of negotiators

Authority of negotiators

Ground rules

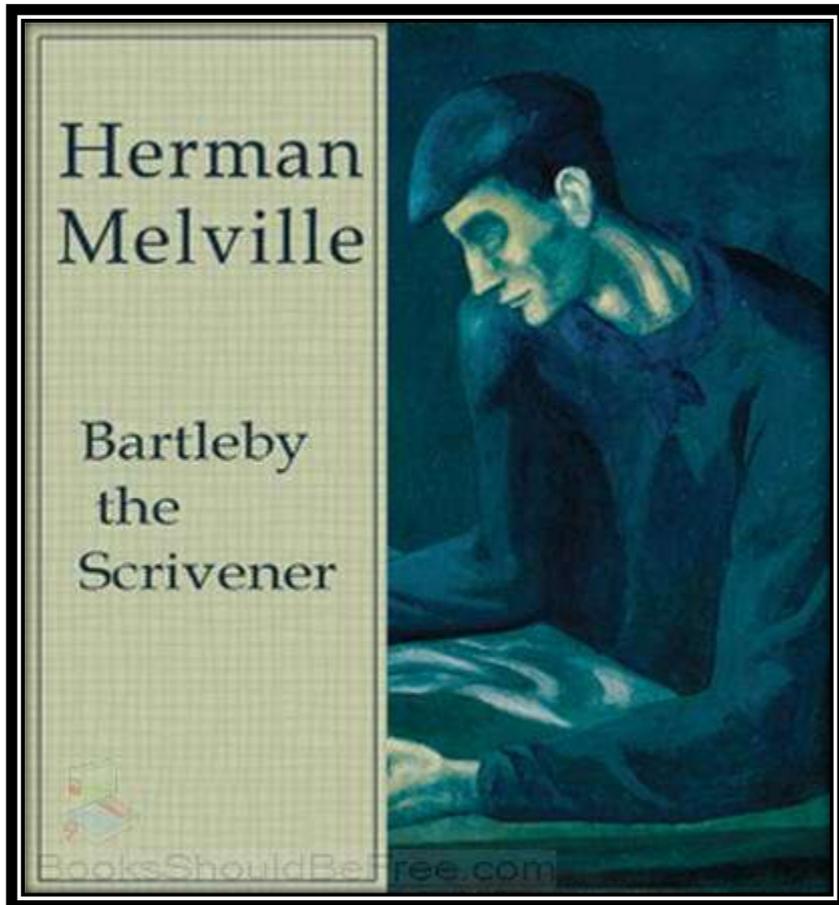
# Table Dynamics

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# ULP? You Decide...

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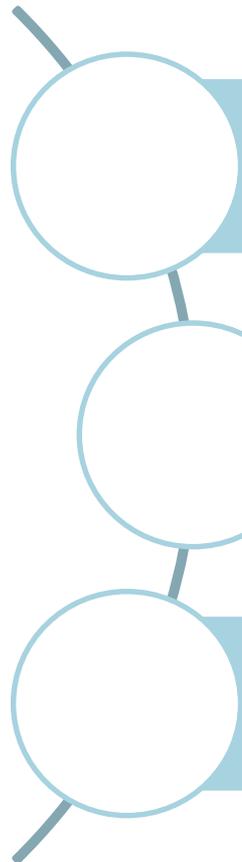


“I would prefer not to.”



# Timing Issues

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- Timing of proposals
  - Timing of counterproposals
  - Deadlines for acceptance

# Content of Proposals

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*“No self respecting union  
could accept that proposal.”*



# Enforcement

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Relief may lie through ULP or grievance procedures

At table: threat of enforcement

Away from table: fodder for campaign

Other strategic implications, including setting up a strike

Offensive + defensive considerations

# Bad Faith During Life of Contract

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Unilateral changes to terms and conditions of employment

Repudiation or noncompliance?

-- Degree?

-- Frequency?



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# Thank you!

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