Introduction

The Clean Slate Company has gone through a tough patch. At the end of its collective bargaining agreement with a union representing 300 of its employees, the parties were unable to reach a successor agreement. The employees struck the company, filed numerous unfair labor practice charges, left outstanding grievances unresolved, lodged complaints with OSHA about safety conditions on the shop floor, and filed various criminal charges against the company and its security personnel after a confrontation on the picket line.

The company persevered, however, and at midnight last week, the parties reached an agreement in principle on terms for a labor contract covering the next two years. Notwithstanding this accomplishment, there remain various ULPs, OSHA complaints, and problems with the authorities. The company wants to put this difficult time behind it. How can this be done?

What Clean Slate wants, of course, is a “clean slate.” Unfortunately, experience teaches that getting there could prove difficult. The union is not obligated to settle the outstanding ULPs, and because settlement of ULPs is a “permissive” subject of bargaining, Clean Slate cannot make settlement a condition of ending the strike. Further, regardless of the strike

\[1 \text{ See, e.g., Caribe Staple Co., Inc., 313 N.L.R.B. 877, 890 (1994).} \]
settlement, OSHA is not obligated to respect any strike settlement agreement and may still
decide to investigate whatever workplace safety issues allegedly exist. And, private parties
cannot waive criminal complaints -- the people of the state alone have standing to bring criminal
charges, and if there was serious violence on the picket line, prosecutions of the offenders are
possible no matter what the parties to the labor dispute may decide.

The issues confronting Clean Slate can arise in other labor disputes, and with the advent
of unions’ corporate campaigns, employers face new and greater challenges. Moreover, even
when contract negotiations do not result in a strike or a lock out, an employer may still want to
“wrap up” outstanding grievances and/or ULPs from the previous contract. This paper explores
the issues employers face in their efforts to obtain clean slates.

I. The Strike/Lockout Situation

A. Settlements Of ULPs.

Consider the following scenario:2 The union had represented the bargaining unit for
nearly thirteen years. The parties’ collective bargaining agreement contained a reopener
provision that preserved the union’s right to strike. Upon reopening the agreement, the union
determined that no agreement with the employer was forthcoming, and called a strike. Upon
commencement of the strike, the company stopped paying sickness and accident benefits to eight
employees, prompting the union to file an unfair labor practice (alleging that cessation of the
payments violated Section 8(a)(3) because it discriminated against the employees for their
participation in the strike).

After nearly three months of negotiations, the parties settled the strike. The strike
settlement agreement provided that the employees would receive a one-time lump sum payment

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as a subsidy for insurance premiums they paid during the strike; in exchange, the union agreed to drop its unfair labor practice charge. As much sense as this settlement made to the company and the union, it did not satisfy the eight employees. So, after the union withdrew its ULP charge, the employees filed individually.

On these facts, the NLRB dismissed the individual charges. Notwithstanding a long line of cases holding that a strike settlement agreement will not devoid the NLRB of jurisdiction over individual employees’ charges, the NLRB will defer to a strike settlement where the union clearly and unmistakably waives the rights of the employees. In this case, because the lump sum settlement was not repugnant to the purposes of the Act, and provided a means to amicably end the labor dispute, the Board found that the parties’ agreement waived the individual employees’ rights.

The foregoing case example illustrates that the Board generally will give the parties some room to settle a strike in a manner that waives some rights of individual employees. However, if a union’s actions in settling the strike are not reasonable and amount to a breach of its duty of fair representation, then the employer’s settlement can be disrupted.5

The bottom line: When settling ULPs at the end of a labor dispute, go for the best possible deal you can get. But remember the union cannot enter into a deal that is irrational or

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3 See, e.g., Emerson Electric v. N.L.R.B., 650 F.2d 463 (3rd Cir. 1981).


5 The clearest example of such a breach is where a union settles a strike in a manner that discriminates against a group of employees on racial or other invidious grounds. See O’Neill, 499 U.S. at 81.
arbitrary. Such deals ultimately represent a “lose-lose” proposition for both the company and the union.

B. Settlements of Grievances and Section 301 Claims.

Consider a second scenario: A group of employees has an outstanding grievance under a collective bargaining agreement. During the pendency of the grievance, a new collective bargaining agreement is negotiated, and the union and the employer agree as part of the new agreement not to arbitrate the dispute. Smooth move? Not necessarily.

In this scenario, the employees will be able to take their contract dispute to federal court rather than being forced to exhaust their contractual remedies. While a breach of duty of fair representation claim is an unfair labor practice against the union, it can be (and often is) coupled with a claim under Section 301 of the Labor Management Relations Act as a “hybrid” claim. The employees will be required to prove not only a breach of the collective bargaining agreement by the employer, but also that they have “been prevented from exhausting [their] contractual remedies by the union’s wrongful refusal to process the grievance.”

This situation puts an employer in a difficult position. It will attempt to negotiate the best possible deal, but it must ensure that a court will not find the union’s actions to be arbitrary, discriminatory, or in bad faith. Obviously, if the union’s refusal to process the grievance is done for racially discriminatory reasons, the union will be found to have breached its duty of fair

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6 *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953); *Air Line Pilots Ass’n*, supra.

7 *Vaca v. Sipes*, 386 U.S. 171, 186 (1967)

8 *Id.*

representation. On the other hand, it is well established that courts tend to give unions deference in deciding how to handle grievances under the collective bargaining agreement. In this regard, courts do not look at the settlement and consider whether a better result might have been possible; rather, they consider whether the end result is rational and in the absence of bad faith.

The bottom line: Make an objective assessment of any settlement of pending grievances, and make your best judgment as to whether the union is breaching its duty of fair representation by settling the grievance on the terms proposed.

It certainly is possible that a union will not settle some grievances as part of a strike settlement agreement. Much like the settlement of an unfair labor practice, neither an employer nor a union can insist to impasse during collective bargaining on the settlement of an individual grievance. Accordingly, the settlement of pending grievances should be raised fairly early in the course of negotiations for a better chance of resolution.

Additionally, if the parties enter into a separate strike settlement which is not subject to a grievance and arbitration procedure, the employees can sue the employer directly under Section 301. It is therefore important that company managers understand the terms of the strike settlement agreement and be prepared to implement any changes in working conditions

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10 O’Neill, 499 U.S. at 81.

11 Vaca, 386 U.S. at 857.

12 O’Neill, 499 U.S. at 78.

consistent with the terms of the agreement. A breach of a strike settlement can also be grounds for a charge under Sections 8(a)(3) and 8(a)(1).\textsuperscript{14}

\textbf{C. Negotiating Strikers’ Return Rights.}

Often, employers and unions must consider how best to reinstate striking employees when the employer has employed cross-over employees or permanent replacement workers. It is widely known that the employer must reinstate striking workers if there are job vacancies, but need not displace cross-over employees or permanent replacement workers at the conclusion of an economic strike to make room for strikers.\textsuperscript{15}

Generally, the parties will agree on an orderly process for reinstating striking employees. This is especially important when economic realities have decreased the number of open positions since the beginning of a strike. In most cases, the parties agree to a process that recalls the most senior qualified employees for open positions, and continues recalling employees on that basis.

An additional consideration for employers is whether to agree to recall strikers who engaged in illegal conduct during the strike, especially picket-line violence. Employees who engaged in serious strike misconduct do not have the right to reinstatement.\textsuperscript{16} However, to justify denying an employee reinstatement based on conduct during the strike, the employer must

\textsuperscript{14} \textit{Teamsters Local Unions Nos. 822 and 592 v. N.L.R.B.}, 956 F.2d 317, 320 (D.C. Cir. 1992).


\textsuperscript{16} See, e.g., \textit{Clear Pine Mouldings}, 268 N.L.R.B. 1044 (1984), \textit{enf’d} 765 F.2d 148 (9\textsuperscript{th} Cir. 1985).
demonstrate that the individual employee engaged in “serious” strike misconduct, such as violence against nonstrikers or destruction of company property.\textsuperscript{17}

**The bottom line:** Make sure that some process for recall is included in the settlement, and if you are going to refuse to reinstate certain individuals, make sure you have strong evidence of “serious” misconduct. Otherwise, be prepared for a ULP claim.

**D. Complaints to Other Governmental Agencies.**

Increasingly, during the course of strikes or lock outs, unions and/or individual members file administrative charges with governmental entities like OSHA or the EEOC. If the labor dispute comes to an end during the pendency of these charges, the charges cannot simply be bargained away. Under the Occupational Safety and Health Act, the Secretary of Labor is charged with enforcing the statute, and “must vindicate the public rights embodied in the Act.”\textsuperscript{18} Indeed, the Secretary is the sole prosecutor of OSHA violations.\textsuperscript{19} Because the power to enforce the Act rests solely with the Secretary, the Department of Labor alone has broad discretion as to how it will handle settlements.\textsuperscript{20} Accordingly, when OSHA becomes involved with an administrative charge, settlement with a union will not necessarily end the matter.

Similarly, the EEOC has made clear that private settlements do not divest it from the power to investigate and prosecute charges of discrimination.\textsuperscript{21} Courts have consistently

\textsuperscript{17} *General Tel. Co.*, 251 N.L.R.B. 737 (1980), *enf’d* 672 F.2d 895 (D.C. Cir. 1981); *Clear Pine Mouldings*, supra.

\textsuperscript{18} *United Steelworkers of America v. Herman*, 216 F.3d 1095, 1097 (D.C. Cir. 2000).

\textsuperscript{19} *Oil, Chem. And Atomic Workers v. OSHRC*, 671 F.2d 643, 649 (D.C. Cir. 1982).

\textsuperscript{20} *Id.* at 650.

recognized that the EEOC’s enforcement powers are intended to vindicate the public’s interest in ridding discrimination from the workplace. In this regard, the United States Supreme Court has explained that the EEOC is not “merely a proxy for the victims of discrimination....[but is] guided by ‘the overriding public interest in equal employment opportunity …asserted through direct Federal enforcement.”22 In fact, settlements of EEOC charges should include terms that make clear that the employee has the right to cooperate in the investigation of charges. Any attempt to include a term that limits an employee’s ability to file a charge or cooperate in the investigation of a charge is itself a violation of law for which the EEOC will issue a cause determination.23

Finally, employees should beware that criminal charges stemming from labor disputes cannot simply be “brushed away” through a settlement agreement. Once a criminal complaint is filed, the matter rests with the police and prosecutorial authorities for investigation and resolution. Attorneys advising clients in labor disputes must remain mindful that the Model Code of Professional Responsibility makes clear that it is unethical for an attorney to interfere with the administration of justice.24 As such, an attorney who advises his client that he is under no obligation to assist authorities in investigating an administrative or criminal complaint may be violating ethical rules.

22 General Telephone Co. v EEOC, 446 U.S. 318 (1980).

23 EEOC Guidance; see also, EEOC v. Astra USA, Inc., 94 F.3d 738, 744 (1st Cir. 1996) (EEOC seeks injunction to prohibit non-participation in investigation clause).

24 ABA Model Rules of Professional Conduct, Rule 8.4(d).
II. The Corporate Campaign.

As many employees know all too well, today’s unions are mounting new organizing strategies. One of the more common new tactics is the “corporate campaign” against the employer. Such campaigns include:

• filing lawsuits on behalf of employees;
• filing charges with governmental entities (OSHA, EPA, EEOC);
• engaging in consumer boycotts, picketing, and handbilling;
• encouraging the disruption of production;
• conducting media campaigns;
• picketing homes of upper level management;
• letter-writing drives;
• challenging company filings with the SEC; and
• obtaining support for unionization from local religious and political leaders.

Some of these tactics are designed to expose a company’s vulnerabilities. Often, the goal of a corporate campaign is to secure employer consent to a “neutrality agreement” and/or a “voluntary recognition” agreement (agreements by which the employer agrees to recognize the union based on a card-check majority, without an NLRB secret ballot election, or, in the event of an election, an agreement that all communications to employees about the union will be “informative” and will not be attempts to influence the employees against the union).

The Board has held that a union’s request for neutrality and card-check agreement is not equivalent to a demand for recognition which would allow an employer to file an RM petition
and seek an election. Accordingly, employers must consider other alternatives in trying to resolve the union’s corporate campaign. For example, the employer could consider filing a charge with the NLRB if it can show that the union has engaged in a secondary boycott. Or, the employer can seek injunctive relief, if it can show that the union is blocking traffic or stalking employees or officers of the corporation. There also are non-legal strategies, such as undertaking an aggressive public relations response to the union’s actions to strengthen its relationship with vendors, clients, suppliers, and the community.

Alternatively, the employer may agree to the union’s demands for neutrality or voluntary recognition. Recent studies show that the rate of union success in organizing campaigns governed by voluntary card check recognition agreements containing neutrality provisions is about 78%, compared to 52-56% in secret ballot elections. So, agreeing to the union’s demand is not without cost. On the other hand, corporate campaigns can have severe economic and psychological consequences for the employer and thus involve different costs.

An employer looking for a clean slate might be willing to agree to the union’s demands to avoid damage to the good will and brand equity of its products. Such an employer should be mindful, however, that agreeing to the union’s demands may not necessarily guarantee a clean slate. As previously discussed, administrative charges or criminal allegations filed as part of the corporate campaign cannot always be waived. Further, damage to the company’s reputation or to its standing in the public eye may not be undone simply by virtue of a “clean slate” agreement.


Conclusion

Employers’ desire to “wipe away” ancillary issues that arise during labor disputes once the dispute ends is, of course, a natural desire. Practically speaking, however, there are many impediments to obtaining a truly “clean slate.” Even where a clean slate can be obtained, getting there is a long and arduous process. The following is a “checklist” of considerations for employers deciding whether to enter into a clean slate agreement:

√ Make it known that settlement of outstanding lawsuits, administrative charges, and arbitrations is an important consideration of the negotiations -- raise this early in the negotiations, because these subjects are only permissive subjects of bargaining;

√ If governmental complaints have been filed, discuss the possible settlement with the appropriate agencies to gauge how they will respond if a settlement is reached -- this increases the likelihood of the agencies agreeing to stop any investigation or processing of the charges once a settlement is in place;

√ Consider whether those striking employees who engaged in misconduct can be returned to the workplace or whether their actions were so disruptive as to preclude that possibility -- make sure there is solid evidence of “serious” misconduct as to any employee who will not be reinstated;

√ Train managerial employees who will be responsible for implementing any settlement as to the terms so they are prepared to implement the agreement;

√ Consider the settlement from an objective viewpoint -- has the union responsibly represented its employees so as to be head off any hybrid duty of fair representation/Section 301 claims.
√ When faced with a corporate campaign, consider whether the corporation can handle the adverse publicity -- do the circumstances warrant “giving in” to a neutrality agreement or a card check agreement.

Is a clean slate attainable? Sure. But it requires patience, a clear strategy, cooperation from internal and external stakeholders (management, employees, the union, government agencies, to name a few), and a fair dose of luck. Recognition of these realities, and adherence to the practical suggestions outlined herein should put employers on the right path to successful resolution of labor disputes that involve ancillary issues.