

Determining-Bargaining-Intent

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SPEAKERS

Chris Casillas, Emily Martin, Matt Greer, Bob Oberstein

- C** Chris Casillas 00:09
A longtime labor negotiator once remarked that contract negotiations can sometimes seem easy in comparison to trying to determine what the things we wrote down actually mean. Inevitably, at some point in your labor-management relationship, there will be a dispute over what something in the contract means, or how it should be applied to a particular situation. These disagreements can lead to grievances and grievances to arbitration hearings, where the parties may have to commit significant resources to offering their respective views on what something that was written into the contract, perhaps years or decades earlier, actually means in a specific situation. In this episode of the PERColator, Matt, Emily and Chris will be joined by our inaugural guest, Bob Oberstein to discuss some of the theoretical issues in determining the intent of labor contracts, and to offer some practical tools that parties may utilize to answer the seemingly simple but often contentious question, what does this section of our contract mean?
- E** Emily Martin 01:26
Hey, everybody, today's pretty exciting. Hi, Matt. Hi, Chris. Are you as excited as I am? We have our first guest on the podcast today.
- C** Chris Casillas 01:34
Big day for the PERColator.
- M** Matt Greer 01:36
Yeah, exciting. Welcome Bob.
- B** Bob Oberstein 01:40

Hello, everybody.

E Emily Martin 01:42

Hi, Bob. Welcome to the podcast with the PERColator. You're our inaugural guest, we're so excited to have you. Our first question for you is, could you tell us about yourself? Who are you? Tell us a little bit about your background.

B Bob Oberstein 01:55

Okay, so, um, fair question. I have over 50 years worth of experience on both sides of the table. So I started when I was 55, from when I was five years old, rather. And let's see, I've been also a mediator and an arbitrator, which is now that I'm retired, currently, what I'm doing, and for a while there, I was director of the labor management relations program at Ottawa University in Phoenix, Arizona. So that's it in a nutshell.

E Emily Martin 02:30

Excellent, excellent. You know, I thought today, we could talk about the importance of memorializing the intent that happens at our bargaining table and bargaining history. I think that's a really critical aspect of bargaining, and if we could focus on that today, I think there could be some great ideas, we'd love to like pick your brain, Bob, on what you've seen work in different places. But before we get into that, why is it important to memorialize intent? Does anybody have an opinion about why we care about this?

B Bob Oberstein 03:02

Oh, there's lots of opinions about that, and, and who should and why should why they should. But basically, you've only got to sit through a contract interpretation grievance, even at the first step, to realize how important this is. And of course, if you go on to a ULP, or even an arbitration, being able to show and that show not know, what the contract, the intent of the language was, is extremely important. Basically, parties are, by memorializing what happened at the table, people are creating evidence, which they may never have to use, but future generations may be relying on it very heavily, because memories fade, people come and go. And so it's important to have this memorialized in some way.

E Emily Martin 04:00

Yeah, I feel like thinking about in terms of what would happen if you have a dispute, and it gets to arbitration is really important. But also, I think in terms of negotiation, I think there's some value there to Chris and Matt, have you ever been to bargaining tables where the the history of what's happened before comes into play? Seems like seems like it that sometimes happens when I'm in a mediation. What, what was what was the old language all about?

C**Chris Casillas 04:27**

Oh, sure. I think that's a, I don't know, if I'd say a common occurrence, but I think that happens a lot. Particularly in situations where the parties have had a grievance, you know, coming into the negotiation about what provision means. And, you know, I know in my kind of former life as an advocate, one of the things I always did in the preparation process before I sat down to negotiate, was to meet with my team and say, Hey, what's what's come up in the last two or three years in terms of disputes, and you know, not all of those have gone to arbitration, but there may have been some disagreements about what things mean or how to apply them in certain situations. And that was always a part of our process to come to the table was to think through what's happened and where is that ambiguity? Or where was that misinterpretation, and to determine whether we need to do something about a negotiation, so this is kind of, we always think of this, the negotiation processes as this cyclical process, it's not really ever ending. And so you negotiate a contract, then you have to enforce it and interpret it. And then you have to come back and determine if you know, you need to make some changes to it or not. And it just kind of, it's constantly kind of going around that wheel.

M**Matt Greer 05:46**

I agree. Another way it comes up is, I'll come into a bargain or mediation kind of after partisan bargaining for a while, and they will have forgotten why a proposal is even out there. And it's like, well, we know that somebody wants to make a change of some language. But when you ask why, no one really knows for sure, it may have been language that was bargained many cycles ago, and no one who's at the current table was there. And so you get to kind of go back to figure out where that came from. And I find that I went one place to mediation where the union rep brought out a huge binder of all the bargaining notes and memorialization going back several cycles to figure out okay, what was going on back then? Or maybe I forgot, or maybe somebody who was there took some notes that kind of gave us some context for that, and kind of helps us today, when we're trying to figure out what our problem is and how we got here. So I find that a memorialization in terms of both going forward but also kind of looking backwards could be helpful as well. So, so you know, works kind of both ways to have a good documentation system in place.

E**Emily Martin 06:52**

Hey, so I'm hearing binder, hearing a binder showed up at a table filled with notes, what, what are ways that that intent can be memorialized? Is it that bargaining notes are the only way to do it?

B**Bob Oberstein 07:04**

Well, whether you like it or not, if you don't do it, someone else is going to. And by that, I mean, there was a jurist many, many centuries ago, who said, I think back in merry old England, who said, Show me what the parties did under the contract. And I'll show you what it means. Well, so you know, you're into the world of past practice, which can be very fluid. So if you really want the contract and the action under the contract to be 'a' and not 'f', then you darn well better spell it out as 'a' so that I think that gets to your point, Emily, about, you know, does a

binder need to be there. You know, there's an expression we have in contract interpretation, which is, "oral agreements are worth exactly the amount of paper they're written on." So you need to be serious about it, and commit to paper, what your ideas are.

E

Emily Martin 08:10

That's true that the contract itself should show the intent, that's the best place to put the intent, right, how you draft the language, what you write in there, have it mean what you want it to mean. That's not as easy as it sounds, sometimes. But, but that's probably going to be the first place anyone looks at to try to figure out what is, or it should be the first place anybody looks at to try to figure out what the contract means.

B

Bob Oberstein 08:31

Right? That gets you into clear and unambiguous language versus ambiguous language. Sometimes people are very, very clear. Pay days will be every Monday, and there will be 52 of them every year. That's pretty clear language. But if you start getting into things like well, pay days are going to be on Mondays. Is that as clear as the previous sense? And is that going to create problems when holidays are on Mondays? And that sort of thing? So specificity is what's going to save the day in terms of the relationship. Because if things are clear, and people have the clear playbook, and all the players on the field, know what the rules are, there's less of a chance that there's going to be conflict.

C

Chris Casillas 09:24

I will say to that as well, Bob, and then I'd be curious if we could kind of talk about some different methods that maybe you use to memorialize this, but you know, yeah, as Emily mentioned, the contract is the best place for this intent to be articulated or stated, but there's, there's a concept here or just a reality, that in kind of its technical terms we refer to as latent ambiguities, but in kind of everyday speak, is the reality that you know, even when we craft language in a collective bargaining agreement with the utmost care. And there seems to be some understanding between the parties about what it means, you know, when we go to apply that language in a particular situation or a particular circumstance, you know, suddenly that can become less clear. It's not, it's not, it's not anybody's fault. It's just the situation was one that wasn't necessarily contemplated by the language or, or maybe it wasn't fleshed out as much at the time, because people didn't think there was a dispute around it. But it turns out, you know, as we try and apply it to the situation that we really don't know what to do. And so I think that also really emphasizes the need to finding different ways of capturing this intent beyond just what you may put into the agreement itself.

B

Bob Oberstein 10:49

Exactly Chris. And the problem sometimes is that minutes will be have a variety of opinions in them, and sometimes the actual intent, the final intent of the language, you have to go through all of those opinions to find it. And that makes it even more subject to interpretation.

E

Emily Martin 11:11

So you could have your intent shown up in the language of the contract, you can have bargaining notes, you can have minutes, I think I've seen lots and lots of tables use redline versions of bargaining language to try to capture the history of what's going on there. So those are things I often see. Bob, have you seen that other ways to capture intent? Or what are your favorite ways to capture intent?

B

Bob Oberstein 11:33

Well, my favorite way is to have a form that starts off as a internal form. So the union would use this form to go to all of its members and say, so fill out the form and tell us what you think. And, you know, then it obviously goes through a process before it hits the table. And that management does the same. And the benefit of that is in terms of intent, you can literally go back to the creation, because the form that I'm talking about, and it's fairly simple, and there's not necessarily any right way to do it. But it's you start off with, what is the problem or the issue? If it's something that's in the contract, you can actually have the citation there. And you can have the, what's the current language. And it's all there. And then underneath that, you have the proposed language. And the proposed language should generally be, unless you're going to take out all the current language, legislative format. So you'd like you say you're redlining. But then there's an area for if it's not addressed in the problem and the issue, then is there a cost attached to it? And if so, what's that cost that or what is it based on? And that gives people a target to go after. What exactly are we talking about? But the last part is probably the most important. It says what it is, and what it ain't. And that's where you put in the examples of how this is going to work. And it's sometimes it's a bit of a challenge for the parties, because it's another thing they have to agree to, but if they can get to it, that makes things very clear. So nobody can misunderstand. Or there's less likely of a chance of people misunderstanding the language or the intent of the language. And the other thing I've seen done, what I like to do with this, this form, can start out as internal. If it makes it to the table, then it's a proposal, and then you make it you designate it with a code, generally up at the top that this is proposal one, proposal two, and you might make it union one, management one, I like to put in whether or not it's substantive. So I use an S, meaning it's got some weight to it, or it's a housekeeper, which means we're talking about moving a few commas or capitals around here, or putting in a period in that sentence, so that it's easier to understand or we we had a typo in the contract. So that would be kind of a housekeeper. Or maybe it's a cost item. So I'd put 'U' with \$ sign or 'M' with \$ sign. And of course, if there happens to be something that's joint that both parties agree on, and they just said when we get to bargaining, we'll just throw that into the contract. We've already agreed on it. Then it started with a 'J' and make it any of those. So that's, that goes on there but there's also the watermark. And in the watermark, you know, initially, it's proposed within the organization, then it's a proposal at the table. Once it becomes agreed to, then you can change that watermark, to say it's a tentative agreement. And at that point at the bottom, there are signatures for both. And generally, there's a some kind of a caveat that says, it's understood that by signing this temporary agreement, we understand that all agreements are tentative, until there's agreement on the whole. And then once you get to the point where you're ready for ratification, you could change that watermark again, and say, Okay, now the watermark is that now this document is ready for ratification, it's 'TA' per ratification. It's it's not very difficult to do. But somebody can then

take this document before it's been or after it's been ratified, and trace it all the way back to creation. And that's going to help. There's also a little bit of a numbering system, but I'll wait, because I've talked a lot.

E Emily Martin 16:11

It sounds like system is a key word, this isn't just a single document is the idea of having a system that tracks an idea from, from the very beginning, all the way through until either it makes it into the contract change or it doesn't. But it's a way of trying to systematically record what's going on at the bargaining table in a way that you can go back and see, at what phase did it come in? Or did it get dropped off? Or did it get amended? Is that what you're describing do you think, Bob?

B Bob Oberstein 16:43

Exactly, and I like your use of the term system. That's first time anyone suggested it to me, but I think it's a good description of what happens. I'd also add that the because we talked about the minutes earlier, and the minutes need to coordinate. So I have very often been given copies of minutes as evidence in an arbitration case. And they talk about the minutes are categorized by who's talking not by what the proposal is that they're talking about. So who's ever taking minutes, there should be the name or number of the proposal, the section of the contract first, and then under that all the conversation that takes place, so that it makes it very easy to track. Otherwise, all you have is a lot of dialogue, which may or may not be specific to the issue at hand. And that makes it very difficult. And so you've got to keep one eye on how this information is going to be used down the road. As well as there may be confusion as to what occurred at the ratification meeting. And so the union can use this to go back and to clarify, no, this is what was meant that that's very helpful. And of course management can do the same. And when the parties are educating everybody as to the changes in the contract. So

E Emily Martin 18:13

Do you think this is a system that has to have both sides agree, this is what we're gonna do? Or can one negotiators start using this internally? And then either the other side joins them or, or doesn't? Does it, does it work even if you're not agreeing on every little thing?

B Bob Oberstein 18:31

Great question. And I've seen it work both ways. It's easy enough to agree to put it in the ground rules. But the most efficient way I've seen it used or be accepted is we just started to use it regardless of which side of the table I was on. And the other side saw the merit of it and they started to adapt it, you know that it can work either way. And the important thing is that nobody's objecting to it, which I've never seen happen.

C Chris Casillas 19:05

Bob, I'm wondering as well as an arbitrator now, which you mentioned is kind of this where

Bob, I'm wondering as well as an arbitrator now, which you mentioned is kind of this where you're at in your phase of your career now. Have you seen something like this presented to you in a contract interpretation case? Or, or, or maybe, you know, meeting minutes or bargaining notes and how has that all kind of helped you in kind of determining the intent of the parties about around a dispute that's gone to arbitration?

B

Bob Oberstein 19:35

Actually, Chris, I haven't seen something to the depth that we are talking about from others. It's something that I started to use. And the union's agree that yeah, this is a good thing, we should use it. After I stopped arbitrating for a while and went back into the field at the bargaining table, because I had been suffering as an arbitrator, under what other people thought was clear and convincing evidence, and it had all of the problems that we're talking about now. So that the system as Emily puts it, was developed based on observation of all of the things that were driving me crazy as an arbitrator.

E

Emily Martin 20:21

Well, I love the idea of seeing a problem and coming up with a system that can try to address that and to fix that. And it seems like it's really, it's really useful when people see the merit of it and see that it's working. And that way it's easier to adopt and to customize and create part of the bargaining table culture or the norms that go on a particular agreement or a particular table.

B

Bob Oberstein 20:46

Oh absolutely. It helped us a great deal, because there were times when there was some confusion. And if those discussions didn't go on for very long, because we were able to go back to this system that we put in place. I do want to say something about the numbering of the proposals. I mean, obviously, you know, you put things in numerical order, but giving it a point one, every time it's modified. And if there's going to be a counter to it, stating that this is a counter, this is a management counter 1 to Union proposal 16 and then you date it, so that it's very clear as to what was passing back and forth across the table. How and why. And of course, you folks working for PERC know, sometimes you get a ULP charge for a failure to bargain in good faith. And the key to that is showing that there was at least an exchange that went back and forth of opinions and ideas. And having a document like this makes it a whole lot easier for the agency or any agency to determine whether or not in fact, that good faith bargaining went on.

E

Emily Martin 22:16

I think this has been a wonderful conversation. Thank you so much.