

Last--Best--and-Final-Offers

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SPEAKERS

Dan Peterson, Amy Spiegel, Emily Martin, Scott Clifthorne, Matt Greer

Matt Greer 00:09

In bargaining, there are many ways parties can indicate that they don't have any more room to move. One way is through the use of a last best and final offer. In this episode of the PERColator Podcast, joining co host Emily Martin of PERC, Amy Spiegel with Pierce County Labor Relations, Scott Clifthorne with Teamsters, Local 117. And Dan Peterson, with the Public School Employees of Washington as they discuss what last best and final offers are, their implications in the bargaining process, and practical considerations to think of when deciding whether or not to make a last best and final offer and how to respond to them. We really appreciate Amy, Scott, and Dan joining us to share their experience and wisdom. Enjoy the episode.

Emily Martin 01:03

Good afternoon. Hi, Amy. Hi, Scott. Hi, Dan, how you doing today?

Amy Spiegel 01:07

Great. Hello.

Scott Clifthorne 01:09

Pretty good. Thanks for having us.

Emily Martin 01:11

I invited you hear to the podcast to talk about last best and finals. We had a conversation at the end of February, at our Negotiation Project's monthly zoom, we talked about last best and finals then. So if anybody was there, then this might sound familiar, but I thought we would do it over

with a recording and add it to the podcast. So thanks for coming. Thanks for being there. I thought we had a really great conversation and I am really glad we did that. Getting into it today. Amy, why don't you start us out. What's the last best and final?

A

Amy Spiegel 01:42

Oh, what is the last best and final? Okay, well, it's basically a tool used in negotiations to communicate that a party has reached the end of the road, meaning the end of their authority and the components of what that end of the road offer looks like. They're typically made by an employer. And they're made when there's really nothing left to offer. When a party is communicating all they have to resolve whatever matters being negotiated. And while it's an option in a demand a bargain or interim bargaining, most often you see it during contract negotiations.

E

Emily Martin 02:18

So, should a union make the last best and final? Why or why not? Scott, what do you think?

S

Scott Clifthorne 02:25

Well, I think that one of the things that's true about the term last best and final is that there's a there's a legal term of art that's last best and final. And there's sort of colloquial, we don't have any room left to move. And so I think that it's fair game for a union to do something like indicate that a given offer or a given potential deal, like wouldn't have the unanimous support of the committee, for example, or that, you know, that if we were if the union was to compromise any further that it's going to threaten a potential ratification vote. So I think that those are fair things for a union to signal. You know, if I give away more than this, I can promise you it'll go down. But I don't think that a last best and final from a union per se, really has a specific meaning other than those things like in planet 117, you know, will tell employers, if we can get this, this and this and a deal, that would be a fully recommended settlement offer. And in our local union, that means a unanimous recommendation for a yes vote from the bargaining committee. And we can then say, and we know we can vote an employer offer, but it's not going to be a fully recommended settlement offer.

E

Emily Martin 03:45

So you might be trying to signal something similar. But you might not specifically try to use the specific term or to talk about the specific legal context, especially maybe if you don't want to signal an impasse. I'm guessing if that might be significant to.

S

Scott Clifthorne 04:02

Absolutely.

E

Emily Martin 04:03

When an employer does it, what are you saying? What are you, what are you signifying Amy when the employer is giving the last best and final?

A

Amy Spiegel 04:10

Well, I don't view last best and final as a signal so much as a megaphone. I mean, if you, if you use that term, it should communicate that you're putting it all on the table. I think, as negotiators on either side of the table, your credibility is key. And it's going to belong to you no matter where you go. So I also think last best and final can be overused, they should be your tool of last resort, really, just to communicate your last best and final when you're actually there to Scott's point of having two meanings. And when other communication efforts have failed to make that point clear. It shouldn't be the only way that you're expressing that you're at the end of the road.

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Emily Martin 04:53

So it shouldn't be a surprise.

A

Amy Spiegel 04:55

Not at all.

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Emily Martin 04:57

So how could they be interpreted, Dan what do you think, what what might a union think when they hear the last best and final is being made?

D

Dan Peterson 05:06

Sure. So as Scott and Amy have alluded to already, there can be a bit of a delta between how to get the proper definition of last best and final and how they can actually be used. So at my tables, when I've received a last best and final from an employer, my usual interpretation is that we've reached the limit of what the employers agents have been authorized to offer by their proper governing authorities. And that may or may not be the actual responsible limit of what they can actually offer in the negotiation. So at that point, you know, I may have some next steps to proceed with, I can check the offer against my own research. And what that suggests they should be able to put forward against, you know, what their own disclosures, you know, publicly suggest they should be able to put forward and then have a talk with my team about, you know, what the best strategy would be to proceed, you know, whether we think the employer is really at their limit, and we need to talk about preparing our members for what that means, or if we think they can and should be moved further, and what strategies that might be adopted to prompt them to further negotiation.

E

Emily Martin 06:23

Yeah, it sounds like you're reading it as they're at the end of the parameters. And then you to think clearly, does that really mean that's the end? I mean, it could or is there, are there more moves that can be made?

D

Dan Peterson 06:35

Exactly. I tend to read it more as the signal, at least in my experience, that's how it tends to be used.

E

Emily Martin 06:41

So are they useful in bargaining? Scott, what do you think?

S

Scott Clifthorne 06:44

I think especially No, is the short answer. And, you know, I think that the bottom line is that collective bargaining is functioning at its best, I think, from both a union perspective and an employer perspective, when we are reaching negotiated settlements, where there are wins in there for both sides, no one walks away completely happy, but that whatever the composition, whatever the balance is, of those wins and compromises, that it's something that is agreed. That's, that's a deal. And I think that the problem with an lbf last best and final, I can start using that abbreviation, problem with an lbf is that we're talking about employer's signaling the possibility of imposing and, and especially in the public sector, I think that that's not a helpful threat. Because I think that many of us have the experience that Dan's talking about, which is that we hear the phrase last best and final from a negotiator, and it doesn't mean that it's the employer's last best and final offer, it means that they've reached the end of the authority that they've been delegated by their respective appointing authority. And that, by definition, is not what a last best and final is in a lot of our experiences. So I don't know, I don't I don't think it's helpful. I think that it raises the specter of a threat, an end of the road, a sort of unilateral declaration of impasse. And I don't think that's helpful to the process.

E

Emily Martin 08:23

So behind every last best and final the, the question is, what happens next, you know, is is an implementation coming? I've seen a lot of last best and finals that have led to a negotiated settlement, not a implementation, but but I think that that specter is there, as you're, as you're bringing up. I think sometimes, sometimes, as a mediator I've seen last best and finals open up a conversation within a union caucus on, "are we there," and sometimes it it does help the union caucus realize where we're closer to the end than we thought. So as a mediator, sometimes I've seen at least the conversation about last best and final as a signal, have some value in reaching agreement, but that's different than actually what happens if it is interpreted as a threat. And then I guess there was a time, you know, where I think I saw some last best and finals actually get implemented. And it was when we weren't seeing wage increases, but

we were seeing more contributions on medical, and they were just, contracts were going backwards. And it was really hard for a union to say yes, we agree to take these cuts. And so I think in those those particular circumstances, that led to some implementation, that was the best decision for those dynamics, when normally that's not the best way to reach the end of bargaining. Guess those are some of the contexts that I've seen last best and final but I don't like to talk about I don't like to bring them up. I don't like to talk about implementation, I want to get a deal. So that's, that's where I am with those things. Alright, so what happens after our last best and final is made? Dan, what does that look like? I think he gives a little bit before but walk us through that a little bit.

D

Dan Peterson 10:16

Yeah. So I mean, in some cases, that's going to be in some tables I've had with that's been pretty much it, we've rejected it, we've declared impasse, and we went to mediation with PERC. And in some cases, we were able to reach a settlement actually, in my experience, we've always been able to reach a settlement. But if you can't, of course, you've got your in under Washington State law, after a full year, the employer can impose, impose their last best and final, that's, that's their right under the law, in other cases, like we've been talking about, it can be the start of a further negotiation. And that's, again, in these instances where it can be where the employer is signaling, they're running out of space, really more than anything else, when that's what they're using the term for, rather than actually, you know, saying, you know, they're completely out of any further room to negotiate. I mean, I've had a number of negotiations where we receive a last best and final offer that is significantly short of our bargaining parameters from our membership, we have, if we have a good and Frank relationship with the employer, we can get permission to have some further discussion with our membership about that offer. And, you know, take that out and see if we can get permission to go beyond what our existing parameters were, and continue negotiations on, you know, at least some slightly broader terms, you know, just something that is at least not as ambitious as what our initial negotiating parameters were. And the employer may be able to continue negotiating on parameters that maybe were more generous than what they were originally willing to offer, and maybe, you know, come to some settlement. But you know, basically, you have that as the signal to maybe have both sides loosened up a little bit further. But that's one possible outcome that you could see with that as well.

E

Emily Martin 12:31

So you mentioned that's the law, the implementation after a year, and I just want to put out there that's 41.56 and 41.56.123. Talks about that year, we call it the 123 year inside of PERC, I've heard people outside of PERC call it the PERC year. We call it 123. Not every bargaining unit in PERC's jurisdiction is covered by 41.56. And some groups have interest in arbitration, putting out there that we have the most collective bargaining statutes of any state in the country. There are some slight differences.

D

Dan Peterson 12:31

Of course. That's right, there is some variation there. Right.

E

Emily Martin 13:13

But that's our major statute. And so a lot of times we think about 41.56. That's the context because it covers so many of our our groups. I guess one other thing I was thinking about, and I don't know if we talked about it during the Zoom is implementation. Is implementation easy? Is When an employee decides to implement, is that the end of the story? I don't know if anybody has thoughts on that? But I've seen some ULP filings after an implementation.

D

Dan Peterson 13:41

I don't know if I've ever gotten there. But, I mean, certainly, you know, I've done everything, you know, at my tables, I've done everything in my power to avoid getting there in the first place. Anyone else got any experience with, you know, seeing that or at least gotten to that final step?

A

Amy Spiegel 13:59

Yeah. So I've worked on both sides of the table. Most of my career has been spent on the union side of the table. So this was from from that time period. There was a particularly, this is kind of to Emily's earlier point, there was a particularly contentious issue. It was an interim bargaining issue. And there was just absolutely no way the union was going to put their name on it. In order to ensure credit was given where credit was due. We, we refused to reach agreement and invited impasse and implementation, frankly, because it was just not something we could agree to. And so, been on the receiving end of implementation, but I didn't, there was no basis to challenge it in any way it was impasse was reached, simply because we couldn't be a party to it. And that happens, I think, I don't know that's probably the most frequent scenario I've seen. Other than that. I've not been in a situation where find the path forward.

S

Scott Clifthorne 15:00

Yeah, and I have I've never walked that path. But to explore the hypothetical a little bit. I mean, to the extent that there are like technical issues, or even issues of principle with implementing an lbf, like, let's say it's in the context of like a Oh, wait, financial crisis, you're going backwards. There are takeaways, there's layoffs. You know, we've seen plenty of issues about things like interpretation of seniority language, disputes over dovetailing versus endtailing and who's come into the unit over time. So the the extent that you're filing ULPs, or grievances about the implementation of an lbf that are based on like, real things, for winning for our members, then. Okay, to the extent that it's throwing up more sand to show that like, we're doing something when there's no there there. I mean, I hear about stuff like that. I don't think it helps unions look strong and effective?

E

Emily Martin 16:05

Well, I think, I think sometimes employer's here about implementation and think it's an easy path. So I always try to stress that when you get to impasse, it really means there's no point in continuing. Impasse is used differently in our different statutes. So there's, there's a statute

that triggers you use impasse, to say whether or not you get to mediation or not, but, but in general, when you're talking about implementation and the impasse that's existing there, sometimes employers don't realize that that you might be an impasse, but impasse might break, there might be a reason to get back together, there might be new topics to talk about, there might be more things that are going on so so they it kind of seems like a simpler answer, then there can be a lot of complexities to it. That's what I want to just put out there that it can get can get complicated and can get confusing. And we do have some case law on that point. So it's a great, great point to be talking to your legal counsel, if you're ever in a situation where you think this is going on or what might happen next. Alright, so advice for employers. Do you have any any advice for employers Amy when it comes to last best and finals?

A

Amy Spiegel 17:07

Yeah, I mentioned earlier, just other communication efforts, right. And then, while it's true that a last best and final communicates, you have no place to move, it is not the only way to do that. And negotiators should be really realistic in sending the right signals to their counterpart, kind of all along the way, so that their counterpart can plan and proceed accordingly and have clear expectations for themselves and their team about what you know what's next, what's possible. But consider the relationship. I mean, to your point, Emily, it's not an easy path, to go through impasse and implementation. The incidence I mentioned, it was easy because it was invited. But that is not the norm. And you're going to be working with your labor partners, or your employer partners long after this. And so consider the relationship really understand the impact of the decision you're making. And don't overuse it. There are just there are so many great tools in the negotiations toolbox that can create a much smoother path to settlement. And that said, you know, last best and final does have its technical place in the process, and can be used when truly necessary. But again, it's not something you want to overuse or use just to send a signal that you could communicate in other ways, in my opinion.

E

Emily Martin 18:31

So what advice do you have for a union receiving last best and finals? Scott, do you have any more advice for a union?

S

Scott Clifthorne 18:38

Yeah, I mean, I, there's a few different things that we think work strategically. The first is key bargaining, right? I mean, again, to the extent that we as labor experience, the articulation of an lbf, as a unilateral declaration of impasse by the employer, that doesn't mean that we might not still have room to move, or that there's exogenous circumstances that change, like you were just pointing to, that open up new vectors for the bargain, you know, and so and I guess there's a couple of things to think about there. Right. I mean, I think, to the extent that we think that things are changing, or that there's some vector of the bargain to explore, you know, the information request is always labor's best friend, especially, and I would say, to the extent that a union feels like an lbf is coming prior to it coming is the best time to be continuing to keep up your information requests, and exploring new avenues for where you've got room to move. I think the other piece of the puzzle is within our own membership, right. Sometimes when we start to hear that an employer is getting really close to the end of the line, what's incumbent on

us is going back to our constituents, whether that's our member leaders on a bargaining committee, or a group of workers within a bargaining unit or the entire bargaining unit to re-survey or to re-ask a question or figure out, you know, is there is there some other way to get at the win we're looking for here other than what we've sort of narrowed down to in terms of our focus in the context of the bargain? If it's not divisible by money anymore? Is it divisible by time? Is it divisible by which component of the bargaining unit it will apply to this time around? You know, where are the where the ways in which we can pick this apart to find the deal?

E

Emily Martin 20:33

So Dan, do you have any advice? For unions receiving it for employers? What do you wish they knew? Is there any other thoughts you would add to the mix?

D

Dan Peterson 20:42

Yeah, yeah, I would say, I think what's been said so far is all is all very constructive. I think, in terms of what I would take a lot of what Amy's said very much to heart in terms of advice to employers that this is a signal that very much says things that could be said in other ways, and a lot of the times tends to rattle the management and union relationship more than anything else. So if you're looking for ways to signal to the other side of the bargaining table, that you're running out of, running out of space, there's probably another way to do that. And it tends to be received on the other side of the bargaining table in a less than constructive way. So yeah, I think I would take that very much, at least as far as from a union negotiators perspective.

E

Emily Martin 21:39

So final question. What do you wish more people understood about last best and final offers? Amy, why don't you go first?

A

Amy Spiegel 21:46

Well, I think I covered a lot of it earlier, when I was talking about you know, don't overuse it, consider the relationship that is going to far out last whatever, round or issue you're bargaining in that moment. But I guess the other piece of advice I would offer is, take a moment to get to know your counterpart, and maybe a little bit about their background and experience so that you can gauge where you land on the spectrum between having a signal and just having to outright make a phone call and say it, because I think people with different experience levels and bargaining are going to have you know, they're going to be prepared at a different level to handle some of the signals that you'll be sending. So just just take a moment to, to know your counterpart.

E

Emily Martin 22:29

That's really key. And you mentioned that phone call, that can be a very important tool as well to, to not have a surprise. So Dan, how about you?

D

Dan Peterson 22:37

So on the union side of the table, right now, it's, it's a tool, it's a tool that's being used, probably more than it should be, but it's one that has ways to be worked with. So there's a process to be followed. If it results in impasse, there is a process to work with that. And whether that means mediation, or whether that requires responsive mobilization or something else. But it's one to work with. And it's not something to freak out about. And so it's something to be responded to. And then on the employer side of things, Amy's absolutely right. It's something that can be overused. And yeah, there's other ways to signal that same signal. That's what I would say.

E

Emily Martin 23:24

Final thought Scott, what do you wish more people understood about last best and final?

S

Scott Clifthorne 23:28

So Local 117 represents about 17,000 workers in the state. And it's a almost even blend of public sector and private sector employees. In the private sector, the last best and final offer happens in a very different playing field, where I mean we do our best, frankly, never to vote, the last best and final offer. But if we're voting a company offer, that the union's not recommending the ballot that we typically vote that with, is going to ask one of a couple questions alongside and whether or not people say yes or no to the deal. And it's going to make it very clear that a no vote is either strike authorization vote, or or a final strike vote. And from in the private sector, that's the balance of an lbf. Right, the employer has all this power, upon declaration of impasse, to implement a deal and the mirror image of that power and authority by the employer, is the union's right to strike if our membership really is looking at the deal, but there's there's balance to that power by the employer, and that and that's worker power that we don't have in the public sector in Washington State at this time. And I think that that's what I'd like folks to understand about last best and final offers is that to the extent that we're starting to hear about and see, see more of them in the public sector, that that, to me is a sign. And I think it's a signal more broadly that that people are saying, well, we're not we can't get a deal. Right. There's no deal inside the bargaining box. And if that's true, then then that's it's incumbent on us as unions to start to say, Okay, well, how do we need to change the bucks? Do we need to re approach these questions about public employees right to strike to balance, this threat of implementing contracts? Is it time to explore legislative changes that make interest arbitration more accessible to more groups of workers outside of public safety? Right? Because that at least creates a process where instead of the boss determines at the end of the process, what the deal is, there is a neutral third party that evaluates the claims of both sides at the end of the process, and makes decisions. So I think that those are the big picture questions that arise and last best and finals in the public sector asks.


E

Emily Martin 26:05

Some great points. I think trying to think about how does this fit and then how should it fit? It's all part of the conversation about last best and finals. Thank you so much. Thank you, Scott.

Thank you, Amy. Thank you, Dan. Thanks for coming today. Thanks for talking about this really important issue. Thanks for giving us a big picture perspective and the nitty gritty, boots on the ground. What happens when you see it at a table? What do you do? What can you expect? What what expectations might be happening? Even if you didn't intend that to happen? And and where can you go from that? I think these are all really good thoughts for negotiators to to have some thought about before they actually see the last best and final or make the last best and final. Because that's the worst time to try to think through some of the big implications and and strategies. Thank you so much for coming today and being part of this conversation and being on our zoom and this was fantastic. Thank you so much.

 Amy Spiegel 27:02
Thanks for having us.

 Scott Clifthorne 27:03
Thanks so much, Emily. Nice to see you, Dan.

 Dan Peterson 27:06
Thank you. Good to see you all again.