IAM
EDUCATOR
Update for Stewards
Vol. 7, No. 5
The Hazards of Doing Nothing

# The Hazards of Doing Nothing

To grieve or not to grieve; that is the question that union representatives are faced with almost daily.

Sometimes the answer is simple. A member's rights have clearly been violated, and he or she is enthusiastic about grieving. In other cases, though, the situation is more complicated. Some workers are reluctant to file grievances out of worry that the employer will be angry, or they may not be used to standing up for themselves. Then there are cases where no worker has actually been affected, even though a clause in the collective bargaining agreement has been violated.

**Sometimes it's a matter of use the grievance process or lose it.**

So what's the problem? You might think that *not* filing a grievance is one of the safer things to do. After all, most union representatives are busy people, and no one is interested in creating unnecessary work or disputes.

### Consequences of Inaction

Unfortunately, arbitrators have found in a number of cases that not filing grievances where a contract has been violated can have serious consequences. Sometimes, it's a matter of use it or lose it.

Let's take an example where an employer fails to post several jobs. According to the collective bargaining agreement these jobs should have been posted so that workers could apply for them. The first jobs are low level and no current workers want them, so no grievances are filed. But then along comes a job that everyone wants, one that has fascinating work, good hours and an intelligent supervisor. The employer decides not to post this job either, and this time the union responds by filing a grievance. The case ends up going to arbitration.

At the arbitration, the employer may argue two things. First, that the collective agreement is unclear, and that the arbitrator should look at *past practice* to figure out what the contract means. "Past practice" is essentially what it sounds like: what the union and the employer have done in the past in similar situations. The union's failure to grieve when the previous jobs were not posted might be used to interpret the collective bargaining agreement against the union.

Second, the employer may argue that even if the job should have been posted according to the agreement, the union is *estopped* from relying on its legal rights. "Estopped" is the kind of archaic legal word that lawyers adore, but what it really means is that the union cannot rely or insist on its strict legal rights.

### Establishing a Pattern

Why not? Because by doing nothing when the first few jobs weren't posted, the union led the employer to believe that postings for other jobs wouldn't be required either. As a result, the argument goes, the union shouldn't be able to turn around and insist on this particular job being posted.

Of course, there are a number of limitations on when these arguments can be used successfully. But, they illustrate some of the dangers of not grieving.

**If you let sleeping dogs lie, they can wake up and bite you.**

What can the union do? Depending on the contract, you may be able to file a grievance on behalf of the union as a whole, even if a particular worker does not want to grieve. If it's not possible to file a grievance, it may be wise to at least notify the employer in writing that the union objects to its conduct, and that you are reserving your right to take action in the future. Similarly, it may be a good idea in some cases to notify the employer that not filing a grievance is "non-precedental" or "without prejudice" to the union's rights. These are handy phrases which in plain English mean "you can't hold it against us later." This is definitely not foolproof, but it may be better than doing nothing. The problem is that if you let sleeping dogs lie, they can sometimes wake up down the road and bite you.

*— Judith McCormack. The writer is the former Chair of the Ontario Labour Relations Board. At the time this was written, she was a labour lawyer with the Toronto firm of Sack Goldblatt Mitchell.*

# Dealing with Promotion Issues

There are two basic security needs that workers want to see protected. First, their right to a job; second, some sort of system by which they can look forward to a promotion when the time comes. It is the second that we will discuss here.

It's the rare steward who won't find him- or herself dealing at some point with an irate worker complaining, "I should have had that job and they gave it to someone else!" Because this is an issue that frequently comes up, and you'll be expected to respond to the conflict, the first thing you should do is look at the union contract. You'll need to know exactly what the contract says regarding seniority and promotions. You'll most likely find that there is a fairly specific procedure to be followed.

**"I should have had that job and they gave it to someone else!"**

The following are the main determinants in promotions:

### Strict Seniority

Seniority is the sole basis for who gets the job. Under some contracts, the most senior person — the person on the payroll the longest — is entitled to a trial period to prove he or she can handle the duties of the position. Usually management retains the right to remove the person from the job if their performance is not up to an expected level.

### Seniority governs if possessing "relative" ability

Under this language, the senior employee gets the job if he or she has equal fitness and ability compared to the other junior bidder. This type of clause requires that both ability and seniority be taken into account. Ability doesn't have to be exactly the same, but approximately or nearly equal. But if the junior employee has markedly better qualifications, he or she can get the job. If you have this kind of language, to win the position for the more senior worker you have to be able to show that the employer overvalued some aspect of the junior employee's qualifications or undervalued some aspect of the senior worker's qualifications.

### Sufficient Ability

This wording implies that the senior employee gets the job if possessing "sufficient ability" to perform the job in question given his or her level of experience or training. Compared to "relative ability" clauses, this one gives the senior employee a slight advantage. In this case, the employer must be able to show that the junior worker is "head and shoulders" more superior than the senior bidder.

### Multiple Considerations

Here, the contract may state that the employer can take into account length of service, aptitude and ability, or something else. This is the most complicated and difficult type of contract clause to challenge, since it gives the employer great latitude to decide who is promoted. The senior worker is given the least advantage where this approach is used.

## ASSESSING ABILITY

The employer always has first right to assess ability, but must use some consistent set of benchmarks when doing so. They cannot simply assert, "Charlie is better than Joe," and get away with it. Their judgment can be challenged by the union, and the employer is obligated to offer some factual evidence (or opinion) as to why Charlie is better than Joe. Some of these considerations are categorized here:

*Experience or education.* The employer must be able to show that the experience or education used to support their decision is related to the job being disputed.

*Job Tests.* Tests are acceptable to help determine ability, but must be specifically related to the requirements of the job; must be fair and reasonable; must be administered in good faith to all employees without discrimination, and must be properly applied. The union must make sure that tests accurately assess the abilities called for in the job, and that may require some digging. A standardized IQ test may be insufficiently related to determine ability alone, especially if the senior person is an ethnic minority

*Trial period.* Some contracts or established past practices provide a trial period to show fitness for the job. Employers prefer to promote workers who are ready to do the work, with no need of further training. Workers who have previously worked the job in question without problems have an obvious advantage.

*Supervisors' ratings and performance reviews.* If they are regularly used and made available to the employees, these may be used to decide for or against a bidder. However, they can also support a claim that the senior employee should get the job.

*Production and attendance records.* These may be used provided they have some relevancy and don't reach too far back in time. In other words, they should not be dredged up just to keep someone off a job.

*Physical strength or capacity.* These considerations can be used provided they are related to the job requirements, but if the job could be modified to fit a particular person's disability, that person may still have a shot at the promotion.

### The Bottom Line?

Each promotion case is in a sense unique, so an understanding of the contract language and past promotion practices is of utmost importance.

*— George Hagglund. The writer is professor emeritus at the School for Workers, University of Wisconsin-Extension.*

# Change in the Workplace

As the expression goes, "The only thing that stays the same is everything keeps changing!" That may be true, but it doesn't make it any easier when you are the person who has to deal with the changes. How can stewards deal with changes in the workplace — and help their members as well?

*Change* is a word that has almost become cliché. It became a slogan in the last U.S. presidential campaign, and in these unsettled economic times more and more people are experiencing changes to their world. While we seem to hear about "change" more and more these days, the fact is that change has always been with us.

Understanding the underlying psychology of change can be a big help to stewards. It's when the changes we experience *are not initiated by us* that problems arise. As a general rule, people fear the unknown — which is another key aspect to understanding resistance to change. People don't resist change. They resist *being* changed. Given this fact, we can use our skills that serve us well as stewards to also aid us in situations where our members face change.

Let's take a look at some of those skills.

## Listening

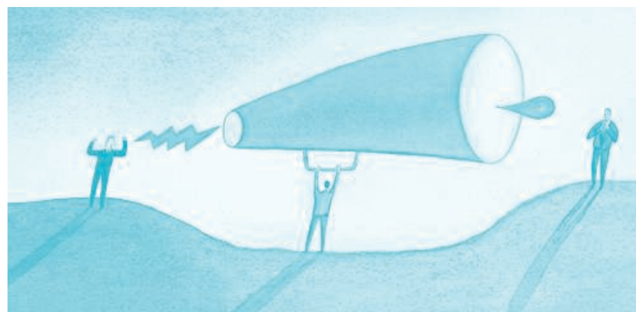
Many times in steward work, our members simply need someone to talk things out with. Often, simply letting folks vent helps them to sort through what is bothering them about the change, and allows you as their steward to both de-escalate the situation and gather information that may be relevant to helping them. While 'talking them down' is important, the details you gather from them are key to seeing what can be done to help them.

In order to do this you must pay attention to the other person very carefully. One way to become a better listener is to practice "active listening." This involves making a conscious effort to hear not only the words that another person is saying, but seeking to understand the total message being sent. You cannot allow yourself to become distracted by what may be going on around you, and you can't allow yourself to lose focus on what the other person is saying (for example, by already starting to form a response that you'll make when the other person stops speaking).

## Investigating

As always, it's best to start with the Five W's. What happened? When did it happen? Where did it happen? Who was there? Why did it happen? Having a piece of paper in hand that prompts you to ask these questions and on which you can document the answers is a useful aid for even the most experienced steward.

Once you have an idea of the situation from the member, you are then prepared to go to management to continue your investigation about the change and get the boss's version of things. Confirm facts (dates, people, locations) and get them to explain the events from their perspective. Ask questions, and if needed request documentation that provides you data to verify claims of both the member and management.



## Evaluating

Once your thorough investigation is complete, your first step is to look at the information you collected through the lens of your contract to see what makes sense. Running through a set of questions such as these can help clarify the situation:

1. Do any sections of our contract apply? Look at the whole contract.
2. Is there a violation we could cite specifically in a grievance?
3. Do union records show a similar situation from the past? Can I learn from it?
4. Is past practice involved?
5. Have standards of fair treatment been violated?
6. Should I look at the job, materials, working conditions?
7. Should I ask the worker to keep notes (production, down time, delays, times late, time spent in washroom, what management said, etc.)?
8. Should I check with other workers (same shift, other shifts, other departments)?

In general, it makes sense to check with other stewards or officers to consider how to proceed — multiple sets of eyes are better than one.

## Informing

After deciding your next step and planning your course of action, good communication is essential. While members might not always agree with your conclusions, they always appreciate being kept up to date on what is going on. Trying to assist members, even when there isn't necessarily a grievance, is key to building union power. Members coming to the union for help first is a good sign: if a worker feels that a union leader will listen to their problems and try to help them, they will tend to put more trust in that leadership. Building trust, in turn, will help create loyal union members and a stronger union.

Having clear union goals and a coordinated strategy that all of our members understand strengthens the solidarity of the union and is critical to making sure that everything we do helps us achieve our goals.

*— Michael Childers. The writer is an assistant professor at the School for Workers, University of Wisconsin-Extension.*

# Layoffs in Hard Times

All of the routines that a steward knows so well are being disrupted by the Great Recession. Stewards are being forced to adapt to new conditions, to learn new skills and attitudes and to suffer the front-line pressures arising from this economic collapse. Nowhere is the challenge greater than in the area of layoffs.

In the past, a layoff was generally temporary, so processing the paperwork under the contract was routine, almost drudgery. In many cases, members were glad to get some time off, especially if the union contract provided Supplemental Unemployment Benefits. In the public sector, historically there have been virtually no layoffs. Public agencies simply decreased the workforce gradually by not filling jobs that became vacant due to retirements or quits, or by hiring "temps" who could be dismissed without cause. Now stewards and officers in public-sector unions are dealing with new situations, as agencies propose — and execute — layoffs.

### A Layoff Check List

Let's look at how the union steward can try to help the union protect itself and the workers it represents. Here's a check list for some of the areas of steward activity if layoffs start to ripple through the workplace.

**For any boss who wants to eliminate the union's power, here is his chance.**

- A steward should first understand that — now more than ever — the boss regards the union contract, with its protections and procedures, as a major obstacle. The union is the only organization strong enough — in fact, the only organization at all — that can challenge the authority of management to wreak havoc. For any boss who wants to eliminate the union's power, here is their chance. And, unfortunately, as workers become more desperate, union members may help by squabbling among themselves.
- Try to persuade your members that through the union there are collective actions, and solutions, for the casualties of the economic collapse. The worst thing — almost inevitable, unfortunately — is that a desperate member thinks "every man for himself" and tries any trick to hang on to his job. Low-seniority workers, for example, may demand that "ability" replace "seniority" in contract language as the basis for a layoff, frantically hoping to find some way, as individuals, to keep their places.
- Immediately create a communications network for the workers you represent, considering all the old ways and new ones too, including e-mail, websites, Twitter and other new technologies. A steward must understand that rumors about layoffs and other job-threatening developments are an enemy of unionism. Finding out the facts and getting them to your members is critical. Plan regular meetings — daily, if necessary — to report back on negotiations or grievances generated by the economic situation. Even in locals where getting a quorum at a membership meeting has been difficult, you will be surprised — or not — at how eager members are to have accurate information about their situation.

**Look for collective solutions; try to avoid the "every man for himself" mentality.**

- Stewards in the U.S. should learn the details of the Worker Adjustment and Retraining Notification Act (WARN) (http://www.doleta.gov/programs/factsht/warn.htm), the law which requires that a 60-day notice be given in case of "mass layoffs." If your employer is determined to lay off, your coworkers should get as much notice, or payment, as possible. The calculations for coverage and for the definition of "mass layoff" can be a little tricky, so union officers and staff need to be alert and knowledgeable. As we saw in Chicago's Republic Window sit-in, however, workers will respond with determination and imagination to protect their legal rights, if properly organized.
- While the WARN Act does not cover public workers, there is a real need for state legislation to extend the same protections to public workers. In the past, public-sector unions — never contemplating such an economic collapse — have been negligent about pushing for such laws, but now's the time. The Maurice and Jane Sugar Law Center for Economic and Social Justice (sugarlaw.org) provides great information on pending state legislation on advance notification and has drafted model legislation for unions to propose.
- As public agencies look at either mass layoffs or major subcontracting, public sector workers need the same guarantees on advance notification as their neighbors who work in the private sector. Unions should gear up politically to support the expansion of the private sector laws, hopefully before the crisis hits.

Finally, efforts should be made to sign up non-members in situations where membership is not a condition of employment. Obviously every worker is affected by contractual interpretations and need the information that will be provided at union meetings, so these free riders may finally — if belatedly — see the light. Odd as it may sound, these tough times can be an opportunity to build unionism and increase membership, and signing up the free riders is simply one part of a union's proactive plan.

*— Bill Barry. The writer is director of labor studies at the Community College of Baltimore County and author of* Union Strategies for Hard Times: Helping Your Members and Building Your Union in the Great Recession, *from which this article is excerpted.*

### Contract protects job of disabled worker

A worker who had been injured when struck by a car and was unable to keep up with production standards was fired, even though he was ruled capable of performing his job. The union grieved and an arbitrator returned him to the job, noting a contract clause that said a worker could not be discharged for failing to meet production standards if the failure was due to lack of mental or physical skill or ability. A doctor concluded the worker was "impaired," but not disabled and was able to handle the duties of his job. The arbitrator further said the company's action amounted to "constructive discharge" since it told him to take a disability leave, but then when he did so it refused to permit him to return him to work later. The arbitrator ruled the company should reinstate the worker and provide him a lump sum disability insurance payment based on the weeks dating from his request to return to work until his actual reinstatement. *(Teamsters Local 229 and HarperCollins Publishers, David Weinstein, arbitrator, August 21, 2008.)*

### 'Net cost reimbursement found to be past practice

For more than ten years an employer paid monthly Internet expenses for employees, a practice that had been recognized by both the union and the employer. Thus, an arbitrator ruled the employer must continue reimbursing workers for the monthly charges as the practice constituted a condition of employment. The employer argued that it could discontinue the payments since it had established in 2007 a comprehensive communications reimbursement system to cover travel expenses. The arbitrator found the new payment system covered such expenses while workers were in the field, but not the monthly charges. The workers were required to have Internet access for their work. *(American Federation of Teachers Staff Union and the American Federation of Teachers [DC], Richard I. Bloch, arbitrator, September 19, 2008.)*

### Contract stops company from shutting down plant

A company plan to shut down a plant in the summer of 2009, idling 750 workers, was nixed, thanks to an arbitrator's ruling. Due to the recession, the company stated it needed to shift the work to a sister plant that was able to run efficiently at a lesser volume; also the company said the plant would be unable to produce one of the products on order. The union suggested the company could subcontract the production of that product. The arbitrator agreed with the union that its contract required the company to keep the plant open as long as there was customer demand for its products. He noted that the company made an "explicit promise" in the 2005 contract to keep the plant running while there were demands for the product. *(United Steelworkers Local 1865 at AK Steel (Ashland, KY), as reported in* USW@Work, *Summer 2009, and* The Daily Independent *(Ashland KY), August 3, and August 22, 2009.*

*— Ken Germanson. The writer is a veteran labor journalist.*

*Note: Keep in mind that decisions cited here flow from interpretations of language in specific contracts. Every grievance must be weighed on its own merits and in its own context. The Editor.*

The IAM Educator Update for Stewards is published six times a year by Union Communication Services, Inc. (UCS), Annapolis, Md., in partnership with the IAM's William W. Winpisinger Education and Technology Center, 24494 Placid Harbor Way, Hollywood, MD 20636. For information on obtaining additional copies call 301-373-3300. Contents copyright © 2009 by Union Communication Services, Inc. Reproduction outside IAM in whole or part, electronically, by photocopy, or any other means without written consent of UCS is prohibited. David Prosten, editor and publisher.