Using a Simulation to Test Court-Developed Theories on Resolving Impasses

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This paper fits within Theme 1 (Assessing different representation systems: their construction, their core principles, and their evolution) and Theme 4 (Identifying and assessing alternatives: exploring possible solutions to problems and issues identified; research agenda and methodologies on representation, rights, voice, performance and power at work).

In 1935, the National Labor Relations Act (NLRA), also referred to as the Wagner Act, created a regime of legalized collective bargaining. Its declared policies included promoting equality of bargaining power between employers and employees and promoting the practice and procedure of collective bargaining as the method of setting workplace terms and conditions of employment. (NLRA § 1) It also declared: “Nothing in this Act shall be construed so as to either interfere with or impede or diminish in any way the right to strike.” (NLRA § 13.)

Despite this clear policy, the courts quickly created what we now commonly refer to as impasse or bargaining weapons – permanent replacement of strikers and implementation of the employers’ final offer at impasse. In 1938, the Supreme Court declared that when employees strike their employer could hire strike replacements to fill their job and refuse to reinstate the striker. (Mackay Radio) Within five years of the NLRA’s enactment, the National Labor Relations Board and courts had created a doctrine that allowed employers to impose the terms they proposed in bargaining when the parties reached an impasse, a doctrine that seemed at odds with the law’s express intent. The two doctrines of permanent striker replacement and implementation upon impasse appear to have the capacity to destroy the right to strike, unbalance bargaining power, and divert parties from the process of bargaining collectively.

The success of collective bargaining affects unionization and is the vehicle for effecting worker rights. We, therefore, wanted to test whether – and how – these doctrines affect bargaining power and strategies and, ultimately, whether these doctrines promote NLRA policies that expressly promote equality of employee and employer bargaining power.

Empirical research in this area is fraught with difficulty as a result of factors such as access to data, strongly held partisan views by knowledgeable participants, and complex law embedded in complex factual contexts. In addition, these two complex legal doctrines is difficult, because they are deeply embedded in complex and nuanced factual contexts. In addition, the highly contested nature of labor relations makes it difficult to get objective responses from practitioners.
We attempted to overcome these problems by constructing a negotiation simulation that limited the legal issues to whether the legal regime allowed permanent or temporary striker replacement and/or implementation upon impasse. We used naive participants to mitigate the problem of bias; however, this then meant we needed to educate them as to how the law operated. To do this, we created a simple factual context and process to educate participants about the law’s operation. Among other features, we had the participants switch temporarily to formulating the strategy of the other side. Thus, although not the real world, we tried to create sufficient conditions that the results would track reality. We cannot say that we fully succeeded, but one participant said: “When we switched completely to the other side, it provided a completely new outlook on the problem – much more than just looking at the other side’s perspective ‘through the lens’ of our side. It helped to illuminate the strongest/weakest areas of our proposal.” At the simulation’s conclusion, we administered a survey and followed the survey with an open-ended debriefing session.

The study has created a rich data set of six bargaining regimes (with one, two, or no bargaining weapons of implementation upon impasse, permanent striker replacement, or temporary striker replacement). This presentation will present results drawing on data from our survey, augmented by comments during the debriefing session or from the surveys. The survey includes questions on bargaining power, motivations for the formulation of bargaining strategies, and views of the regime’s law on issues such as promoting actual bargaining and achieving a negotiated agreement.