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UNIONS 101

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I. INTRODUCTION

This presentation is focussed on people that are relatively new to the Labour movement and want a broad overview of some of the most important principles that apply to Unions and their members. You may be a new Union Representative, you may have recently been elected to the executive or a committee within your Local. You may be a new Shop Steward, or a Shop Steward that has never had the opportunity to attend a seminar of this type.

It is our hope that we can present to you some very fundamental concepts and principles that will help you to have a better understanding of your workplace rights so you might more effectively represent your members.

II. KNOW YOUR UNION

An effective representative must have a good knowledge of his/her Union on many levels. You ought to know the internal structure of your Union and, in the event that you must seek advice quickly in what are often complex situations, you should keep with you a complete list of contact information for all of the other Union Representatives that you may need to contact (including all phone numbers and any other after-hours numbers).

Your Union will typically have a Constitution and By-Laws. In many cases, there will be Local, National, and perhaps even International Constitutions and By-Laws. You should familiarize yourself with those documents as well. In particular, the most common provisions you may need to deal with are those that set out a member's internal right of appeal from Local Union decisions. By way of example, your Local may advise a member that they are not going to take his/her grievance to arbitration. You should be aware of the procedure a member must follow to appeal such a decision, and those procedures are typically contained in Constitutions and By-Laws.

It is recommended that you become aware of the other Collective Agreements your Union has in other bargaining units. The Employer you are dealing with may be unionized in other cities/provinces and you may benefit from knowing:

- how the Employer is interpreting a certain article of the Collective Agreement in other cities/provinces
- is there a provision/benefit from another Collective Agreement that you may wish to ask for in the next round of bargaining

III. KNOW YOUR COLLECTIVE AGREEMENT

1. Clearly, the most important aspect of your role in representing your Union and its members will be a thorough understanding of your Collective Agreement. We recommend that you have a copy of the Agreement with you at all times and review it regularly. What follows is a general review of some of the most common provisions found in a Collective Agreement. We will also try to set out some of the most common mistakes/misconceptions we see regarding these provisions.

NOTE: we will refer to the collective bargaining agreement as the "CBA" throughout this paper.

(a) Union Recognition Clauses

These clauses are typically found at the beginning of a CBA. They will help you to understand:

(i) whether you are governed by federal or provincial legislation. This depends on the nature of the Employer's type of business and there is typically a reference in the Recognition Clause that will indicate whether it is federal or provincial jurisdiction. If it is federal, the ***Canada Labour Code*** and other federal workplace legislation will apply, and the Canada Industrial Relations Board will control such issues as bargaining unit description. If it is provincial, ***The Labour Relations Act*** of Manitoba and other provincial workplace legislation will apply, and the Manitoba Labour Board has jurisdiction to control such issues as bargaining unit description;

(ii) the description of the bargaining unit. There will often be a reference to the "Certificate" which is issued by the provincial or federal board and sets out the description of the bargaining unit i.e. who is in, who is out.

COMMON MISTAKE: Over the course of time, an Employer may add new classifications that did not exist at the time of certification. There will be times that the Employer will unilaterally declare these classifications as being outside the scope of the Certificate. We recommend a regular review of the Recognition Clause and the Certificate because one common mistake is to assume that the Employer has accurately and properly followed the bargaining unit description in determining whether someone is in or out.

(b) Management Rights Clauses

Most CBA's contain a management rights clause. These clauses typically set out the broad general powers that management has to run their operations as they see fit. As a general rule, while the Union may limit management rights by very specific wording, management retains the right to make its own rules and control/direct its workplace as it deems fit. An example would be the scheduling of shifts. Unless there is very clear language in the CBA that limits the shift to starting at 8:00 a.m. and finishing at 4:00 p.m., then management can unilaterally change that shift to run from 7:00 a.m. to 3:00 p.m.

> **COMMON MISTAKE: By far, the most common mistake is an attempt by Unions to try to force management to run their operations in a certain way without clear language in the CBA to support the Union's position.**

(c) Union Security Clauses

Most CBA's contain a Union Security Clause. You should familiarize yourself with the clause. Some CBA's contain a very strong clause that requires an Employer to employ only workers who are members in good standing of the Union. Indeed, some require an Employer to terminate an employee who ceases to be a member in good standing of the Union. This type of clause is frequently used after a strike, when a Union cancels a worker's membership for crossing a picket line and then seeks to have the Employer terminate that person on the grounds that they are no longer a member in good standing.

(d) Union Representation Clause

These types of clauses are very important in protecting your members' rights, especially at very critical points in their employment. Some CBA's have very strong clauses that require Union Representation in all meetings, whether they are preliminary investigation meetings, or meetings where discipline is being issued to the member. It is important to read and understand the type of Union Representation Clause in your CBA thoroughly.

The weaker clauses may only set out that the member has a right to a Union Representative when discipline is being handed out. Because there are so many types of clauses, it is important for you to know:

(i) is our clause strong, or should we try to negotiate a better one in the next round of bargaining?

(ii) does the member have a right to a Union Representative at all meetings, including investigatory meetings?

(iii) is the Employer required to tell the member that he/she has the right to have a Union Representative present?

(iv) does the member have the right to choose a Chief Shop Steward, or just a regular Shop Steward, or can the member ask for a Union Representative such as a Union Business Agent?

(v) what happens if no Union Representative is available?

(vi) is the discipline null and void if there was a failure to provide a Union Representative?

Regardless of the wording in the CBA, the Employer and the Union may have developed a past practice for these types of meetings, and you should familiarize yourself with that practice. It is not uncommon for an Employer to allow a Union Representative into an investigatory meeting, even if the CBA doesn't require it. We would recommend that you continue such a past practice. On the other hand, you may become aware of a past practice whereby there are no Union Representatives at investigatory meetings, even though it is specifically required by clear language in the CBA. In such circumstances, we recommend that you put the Employer on notice in writing that from now on, you want to assert the rights provided for in the CBA.

> **COMMON MISTAKE: One of the most common mistakes is assuming that your Union Representation Clause includes investigatory meetings despite no clear language in the CBA to that effect. Based on recent arbitration awards, we recommend a review of your CBA, and if you want the right to Union Representation at all meetings, including investigatory meetings, be sure to negotiate such language in very clear terms.**

(e) Grievance Clauses

On both the federal and provincial levels, there is a requirement that your CBA contain language to resolve all disputes by the grievance/arbitration process.

We recommend that you read and understand the grievance process thoroughly. The most important aspect of this clause is the time limits for the various steps. One of the most crucial timelines is the amount of time you will have to file a grievance. You should ensure that you meet this deadline in all instances. There may be cases where you are unsure of the strength of your grievance because of a difficulty in obtaining all of the

information/documents and contacting witnesses. In such circumstances, we recommend that you file the grievance to protect the timelines. If you later obtain information, or receive a legal opinion that the grievance is too weak to justify arbitration, you can always withdraw it.

In our experience, you will undoubtedly find past practices whereby your Union and your Employer often don't follow timelines. Indeed, we have seen instances where Employers never even respond to a grievance. Out of an abundance of caution, we recommend that you try to follow the grievance timelines closely, even if the Employer is not respecting them. You should know that Arbitrators have the jurisdiction to relieve against breaches of grievance timelines, but it is risky and if the Arbitrator refuses, your grievance will be rejected and you may then face a complaint from your member.

(f) Arbitration Clauses

Your CBA will no doubt contain an Arbitration Clause. There may be a timeline for referral of a grievance to arbitration. We recommend you review your CBA to understand this requirement fully, as it may also affect your ability to proceed forward with the grievance.

Some CBA's provide a List of Arbitrators. In such instances, you simply choose the next one on the List. If there is no list, you must get mutual agreement from the Employer as to the choice of Arbitrator. In the event you are unable to agree, in both the federal and provincial jurisdiction, there is a mechanism for breaking the deadlock and appointing an Arbitrator.

Some CBA's provide that the grievance be heard by a three (3) member panel, with a Union nominee, an Employer nominee, and a mutually agreeable choice of a Chairperson. Often there is a clause that allows the parties, by agreement, to use a single Arbitrator. The advantages of the sole Arbitrator are costs, and the increased flexibility of trying to schedule based on one (1) diary versus the diaries of three (3) panel members.

(g) Seniority Clauses

Virtually every CBA contains a Seniority Clause. Given the importance of seniority to your members, we recommend that you review and understand this clause in your CBA very carefully.

In most CBA's, seniority increases on a calendar basis, and with the simple passage of time. Some CBA's provide for an increase in seniority based on number of hours worked, although these types of clauses are more frequently used for part-time workers.

A good knowledge of seniority, including a careful review of an Employer's published seniority list is important, especially since seniority impacts your members in a number of ways, such as:

- choice of jobs
- promotions/transfers
- training
- choice of shifts
- vacation length and choice of vacation dates
- acting in a higher rank or classification

Most CBA's also contain provisions which describe how your members can lose their seniority. You must pay strict attention to these provisions, as the loss of seniority is a drastic result for an individual.

> **COMMON MISTAKE: It is common for people to misunderstand provisions that provide for loss of seniority and termination of employment if a member is absent from work for a period of time (usually three (3) consecutive days) without notifying management. It is also common to hear Union Representatives state that they believe such terminations are winnable on the basis of the employee's good work record, or on the basis that termination of the employment is too harsh a penalty. The simple fact is that according to Arbitrators, this is a non-disciplinary termination that has been agreed to by the Union. As such, these cases are difficult to win.**

(h) Disciplinary Measures

Many CBA's contain a clause that deals with discipline. It is rare that a Union will agree to "set penalties" for certain infractions, but you should review your CBA carefully to see if it contains such provisions.

Often, your CBA will provide that the Union must be served with a copy of each form of discipline, and in rare cases, a CBA will provide that failure to do so will result in the nullification of the discipline.

You should also be aware of any CBA timelines an Employer may be required to follow for the issuing of discipline. As a further note, even without set timelines for issuing discipline, it is still possible to challenge the validity of discipline if there has been a delay that an Employer cannot reasonably explain, although such delays are usually in months and not days or weeks.

Finally, your CBA may contain what we refer to as a "sunset clause", which requires an Employer to remove certain types of discipline from an employee's record after the passage of time (often after 12 or 24 months). Frequently these clauses provide an exception where the employee is involved in other discipline (or sometimes similar discipline) during the 12 or 24 month period.

> **COMMON MISTAKE: Some Union Representatives believe that they can defend a member at arbitration, and in so doing, argue that he/she has a 30 year clear record. Because of the "sunset clause", the most you can tell an Arbitrator is that there is no discipline on the member's record. This limit applies, whether your 30 year member ever benefited from the "sunset clause" to wipe the record clean, or your 30 year member has never been disciplined.**

(i) Job Postings

These types of clauses are very important to your members. The typical clause will require that an Employer post a job vacancy rather than fill it as they see fit.

> **COMMON MISTAKE: Some Union Representatives believe that this type of clause forces an Employer to fill a vacancy. That is not correct. The types of clauses that force an Employer to fill a vacancy are quite rare. Usually, job posting clauses simply provide that if an Employer is going to fill a vacancy, they must follow the job posting procedures. As a result, in most instances an Employer can leave a position vacant for as long as they wish.**

Very few CBA's contain specific language forcing an Employer to follow a certain type of interview, or scoring system, in selecting the candidate for the vacancy. In such cases, the only limit is that the Employer must act fairly.

> **Common Mistake: It is often thought that an employee should get the job because he/she is senior and could do the job with a certain amount of training. Most Arbitrators have rejected this concept, and the person must be able to do the job without any training, or perhaps just a few hours of familiarization. If you want to have training, it should be clearly specified, including the length thereof, in the CBA.**

These clauses will usually set out the test for choosing the successful candidate. In a few CBA's, the test is pure seniority, although such clauses are becoming less common.

The most common clause is usually what is known as a hybrid clause i.e. using a combination of seniority and skill, ability etc. An example is:

> "Promotions shall be based on seniority, skill, ability and qualifications. Where skill, ability and qualifications are relatively equal, seniority shall be the determining factor."

It is important for you to become aware of all the job postings, and how the selection process works in your particular workplace. You should examine the job postings carefully to ensure that the Employer is not asking for excessive or irrelevant qualifications.

> **COMMON MISTAKE: We frequently see situations where Employers will temporarily assign their favourite employee (often a junior employee) to a certain position, and then when the job is posted, the Employer will claim that their favourite employee was the most qualified because he/she has experience actually performing the work. The common mistake is to allow that to happen without objecting.**

(j) Hours of Work

Usually, the CBA will set out the number of hours in a regular work day. Rarely will a CBA lock an Employer in to certain shifts. More frequently, a CBA will describe certain shifts without specifying that the shifts can only be changed by mutual agreement.

In some CBA's, Unions have succeeded in setting out the hours for part-time workers, and in certain instances a requirement that an employee become a fulltime worker in the event that he/she works a certain number of hours over a certain period of time (often two to three months). This type of clause is significant because in many instances, part-time workers enjoy less benefits. These clauses help prevent a situation where the Employer takes advantage of the cheaper part-timers and gives them what are virtually fulltime hours.

We recommend that any Union that has such a clause monitor it closely and ask for weekly or monthly reports showing the number of hours worked by part-timers.

(k) Overtime Clause

Virtually every CBA contains overtime language. These clauses can be quite detailed. The most common clauses differentiate between overtime at the end of a shift, and

overtime when an employee is "called out" after leaving work or is asked to work on a day off.

You should read and understand the overtime provisions of your CBA carefully. Some of the more common issues are:

- does overtime start at time and one-half and increase to double time after a certain number of hours
- is there a different method of paying overtime for days off, weekends and/or statutory holidays
- is overtime over and above the shift premium
- is there a method of distribution of overtime, such as:

(i) senior person gets first pick, or
(ii) overtime is distributed equally, or
(iii) full-timers get to choose overtime before it is offered to part-timers

It is not uncommon for a CBA to provide that employees get first right of refusal of overtime by seniority, and that the most junior employees are forced to work overtime if the senior employees refuse.

(l) Bargaining Unit Work and Contracting Out

Most CBA's contain a Bargaining Unit Work clause, which is usually designed to prevent supervisors and others, who are excluded from the bargaining unit, from doing your work.

> **COMMON MISTAKE: It is an error to think that supervisors and others can never perform bargaining unit work. The most frequent example is an emergency. You should review the wording of the clause to see if there are such exceptions. Even without such exceptions, Arbitrators will usually rule in favour of the Employer if the work performed was necessary to deal with an emergency and/or a safety issue.**

Very few CBA's contain a clause that prevents management from contracting out. It is now well-accepted that absent very clear language in the CBA, management usually has the right to contract out certain work.

> **COMMON MISTAKE: Over and above the frequent misconception that management generally can't contract out without a Union's**

permission, Unions often misinterpret the Bargaining Unit Work clause as standing for the proposition that the Employer can't contract out. It would be more accurate to view the typical Bargaining Unit Work clause as a limit on the internal distribution of your work to its excluded employees, such as supervisors or managers.

(m) Lay-offs

Lay-off clauses provide very important rights to employees at a time when there is imminent job loss. There are many different types of clauses. You should examine your CBA clause carefully to see:

- is lay-off by seniority (they usually are)
- is it departmental seniority, or date of hire
- is it classification seniority
- are part-timers laid off first
- is there a right of recall, and if so, for how long
- is the recall by seniority
- are there benefits during lay-off
- are there bumping rights, and if so, are there any limits to those bumping rights

It is not uncommon for disputes to arise regarding the interpretation of lay-off/recall clauses. This is true of bumping rights as well. Frequently the Employer will look for the easiest way to downsize and will resist a system that results in a never-ending string of "bumps".

COMMON MISTAKE: Often Unions will assume that their members enjoy certain bumping rights even if they are not specifically set out in the CBA. We recommend you inquire as to the past practice regarding such issues before they surface and become problematic. Ultimately, we recommend that such clauses be as detailed as possible, and this often means revising them through collective bargaining.

(n) Job Classifications

In most CBA's, there are job classifications. Typically, over a series of negotiations, the wages for each classification are set, most often based on the complexities, difficulties and the skills required.

Frequently, classifications will have a series of increments and language to explain how the person increases within a classification. In some instances, the worker may advance based on pure time (i.e. on a calendar basis) or based on number of hours worked. Your CBA may allow an Employer to deny an advancement based on such issues as work performance or attendance.

There may also be a clause to determine the rate of pay for a new classification, or if there are significant changes to an existing classification. In the event of a new classification, an Arbitrator will be influenced by the wage rate being paid to people who perform the same or similar work for other Employers, especially in the same market area.

> **COMMON MISTAKE: It is often thought that very slight additions of duties and responsibilities will justify an increase in wages. The fact is that it requires a fairly significant increase to the core duties i.e. the duties that a member performs for a large portion of every work day.**

(o) Holiday Pay and Vacation Pay

Whether you are in a federally or provincially regulated workplace, there is legislation to provide for statutory minimums that an Employer is required to pay. CBA's frequently provide for benefits in excess of those minimums. In the event that you have any questions regarding the statutory minimums, we recommend you consult with the appropriate government department.

There are usually certain minimum days an employee is required to work in order to qualify for payment for a statutory holiday that falls on a day off. In addition, CBA's usually provide for the amount to be paid if an employee actually works on a statutory holiday.

Vacation pay clauses can be quite complex and may deal with:

- the amount of vacation entitlement
- the method and timing of vacation pay
- the carry forward of unused vacation time
- the choice of vacation days (often by seniority, often by department)
- cash out of vacation time entitlements

It is not uncommon in a CBA to find language that limits the number of people that can be away on vacation at any given time, especially if the Employer's business is seasonal or has "peak times".

(p) Sick Leave and Medical Notes

It is common for a Union to negotiate a certain number of sick days that a person can use for more random non-work related illness such as a flu or a cold. The days are typically accumulated with every month of service. Some CBA's provide that unused sick days can be carried over into the next calendar year, and rarely a CBA will provide that these sick days can be cashed out at retirement.

One of the areas that results in frequent controversy involves medical notes. It is common to see a clause in a CBA that requires a medical note after a three (3) consecutive day absence due to illness.

> **COMMON MISTAKE: It is an error to believe that an Employer can always require a medical note for each absence, and it is equally an error to believe that an Employer can never do so. The more accurate position is that, depending on the facts (such as a poor attendance record, or a reasonable suspicion that the employee is not sick), an Employer may be able to require a medical note with every absence.**

We recommend that you familiarize yourself with the types of Medical Releases your Employer expects each employee to sign. You may find that the Releases are extremely intrusive and allow the Employer (or in some cases, a third party company) to communicate directly with the employee's doctor.

> **COMMON MISTAKE: Often, people will think that they must sign the Medical Release because the Employer says so, and that once they sign the release and give it to the employer, it is too late to change your mind. In most cases, an employee need only provide the following information:**
>
> - **that they are unable to work**
> - **the date they are expected to be able to return to work**
> - **what, if any special conditions will apply to their return to work, such as light duties or reduced hours (and for how long)**
>
> **It is also not true that having signed a Release, an employee cannot retract it. The truth is that the medical information belongs to them, and to no one else. It is as simple as writing to your doctor and advising him/her that you are cancelling/retracting your release and your doctor must immediately comply with your wishes and stop giving information to your Employer.**

We recommend you scrutinize carefully the use and storage of sensitive medical information, and that you insist that the Employer limit the number of managers/supervisors who can access such information. The "flip side of the coin" is that, as a Union Representative, you may also receive sensitive medical information about your members. You must at all times respect the confidentiality of your members and we recommend that such records be kept under lock and key.

(q) Benefits

A typical CBA will list numerous types of benefits over and above the ones we have reviewed earlier in this paper. They may include Maternity and Parental Leave, Extended Medical such as Dental, Vision, Short Term Disability, Long Term Disability and Pensions.

Your members will no doubt ask you, at some point, to explain one or several of these benefits. We recommend that you familiarize yourself with these provisions, and develop a solid understanding of each one.

> **COMMON MISTAKE: It is a common mistake to believe that because some benefits such as long term disability are mentioned in the CBA, you can grieve the denial of a claim by the insurer. As a general rule, most types of third party insurance are not considered to be part of the CBA, even though they are listed in the CBA. As a result, a member only has recourse to the courts if he/she feels that a claim has been unreasonably denied, and cannot file a grievance.**

We recommend that you familiarize yourself with your Union's policies regarding representation of members at hearings other than regular arbitrations of disputes under the CBA. There are some large Unions that have been chosen to represent members at Workers Compensation hearings, but this is fairly rare. In our experience, Workers Compensation hearings can be very time consuming, and if legal counsel is used, they can be quite expensive.

It is extremely rare that a Union will represent a member who wants to challenge the denial of an LTD claim in the Courts. This usually requires legal counsel, and is also quite expensive.

It is strongly advisable to be informed of your Union's policies with regard to such representation, legal or otherwise, so you don't find yourself in the embarrassing position of promising representation when your Union policy specifically excludes the provision of such services.

IV. DAY-TO-DAY REPRESENTATION ISSUES

You will soon find out that the issues you will encounter in your role as a Union Representative can cover a wide range. You may have to deal with:

- irate members and/or Employers
- sensitive confidential information
- member vs member conflicts
- criminal accusation against your members
- injuries, disabilities, illness and accommodation issues
- meetings to investigate wrongdoing that are held without any prior notice
- grievors, witnesses and Employers who hide or exaggerate facts
- embarrassing moments
- difficult and complex issues

The above list is by no means exhaustive, and just when you think you've seen it all, something new occurs and you are left wondering how to handle it.

What follows is a list of some typical situations that may arise while you are representing members:

(a) Paperwork

You will undoubtedly gather paperwork and create paperwork while doing your job. We recommend that you familiarize yourself with your Union's system for dealing with paperwork/records. We also recommend that you open a file for each member you deal with. If the member is involved in a disciplinary situation, we recommend:

(i) Take good notes and always place them in chronological order on your member's file. These notes should be dated, and if they involve a meeting, you should indicate the names of those in attendance, the time of the meeting, and who is speaking;

(ii) Place copies of any paperwork, e-mails, or other documents on the employee's file;

(iii) Ensure that you receive copies of all documents to which you are entitled (usually the CBA sets out that the Employer must give you a copy of all disciplinary notices) and that you place them on the member's file;

(iv) Open a file entitled "Master Discipline File" and place a duplicate copy of every disciplinary notice on that file. It is very helpful to be able to quickly review all of the past discipline for all members, especially if you want to show your Employer that they are treating your member differently than in the past for a similar offence;

(v) Don't write on any documents you receive because they may be needed at a later date as exhibits at an arbitration. We recommend instead that you write on a "sticky note" and place it on the document. By way of example, if you place a duplicate copy of a disciplinary notice in the Discipline File, you may wish to write a brief explanation of the facts/reason for discipline on the "sticky note". This will help if you are arguing that your member is being treated more harshly than another member, if you know what that "other member" actually did to attract discipline;

(vi) Over and above member files and a Discipline File, you may need to open files for:

- negotiations
- labour/management meetings
- health and safety meetings

(vii) Keep you files under lock and key.

(b) Which of your Conversations are Admissible at a Hearing

It is critical that you understand that as a general rule, all of the discussions that you have with management prior to the filing of the grievance are admissible at an arbitration. The discussions that follow the filing of the grievance generally are inadmissible. For this reason, we recommend you exercise caution in what is said prior to the filing of a grievance and that you take good notes. We will have more to say about this later in this paper.

(c) Disciplinary or Investigative Meetings

You will likely find that your first disciplinary or investigative meetings will be highly stressful. Often they will occur without any notice, and you won't have much, if any, time to speak to your member beforehand. These meetings can become quite tense and heated. The stakes are often high, indeed your member may be facing termination. Your member may become angry because of the allegations, and your Employer may be equally angry at your member for his/her alleged actions.

You need to have a plan that you stick to as closely as possible, for such meetings. We recommend you consider the following:

- always bring a pen and paper and take good notes
- try to control the process as best you can by firstly asking for time to find out what the meeting is about. This may mean asking for time to speak to the member alone or time to speak to the management representative. You may find that your member may not know what the meeting is about, and you may need to ask the Employer for a pre-meeting briefing. If the Employer provides you with such a pre-meeting briefing, we recommend you then ask for time to go speak to the member before the formal meeting starts
- in many cases, the Employer will want to start the meeting without any preliminary discussions. If that is the case, we recommend that you go into the meeting, listen to what the Employer has to say and then ask for time to speak to the member alone prior to providing a response to the allegations
- in the case of investigatory meetings, Employers often don't want to reveal anything on a preliminary basis. Frequently they want to start the meeting by asking questions of your member to catch him/her off guard. In such instances, absent a pre-meeting briefing, it is fair to ask the reason for the questions. Once you receive reasons, it is also fair to ask for time to speak alone to your member
- there are some Employers that will tell you that you have no right to speak at a meeting. You should strongly object to such comments. If you have the right to represent, this must surely include the right to speak at the meeting, without of course unduly interfering. In any event, we recommend that if you are told you cannot speak, write that down and ask the offending manager to initial that part of your notes. If he/she refuses to initial that entry in your notes, make a notation to that effect. It is important that in any subsequent hearing, you be perceived as a reasonable participant in the meeting, even if the Employer wasn't.

(d) Apologies and Admissions

You will, of course, already know that your members are not always innocent. To begin with, your member may admit in private to you that he/she is guilty of a workplace infraction prior to meeting with the Employer. The member will often ask you what to do.

Firstly, you may place yourself in an uncomfortable position by preaching to your member about what is right and what is wrong. Rather than telling your member what to do, we have found that the preferable approach is to advise the member that if they don't admit immediately and fully, and if found culpable by the Employer, this may increase the penalty. Indeed, it is a factor that is considered by Arbitrators in deciding whether to lessen a penalty. If you take our suggested approach, you place the onus on the member to decide for himself/herself whether to freely admit the infraction. Be sure to tell them that you can't guarantee a lesser penalty for an early admission, but you can almost certainly guarantee a harsher penalty if they allow an investigation to drag on and fail to come clean.

If the member admits the offence to you but tells you they don't want to admit it to the Employer, that is their choice in the end. However, you must now protect your credibility for the future with your Employer. You ought to tell the member that if he/she intends to go into the meeting and proclaim innocence, given their admission, you will not represent them at such a meeting. Once again, you let the member make his/her own decision.

You should be aware that an early and full confession and apology are critical elements when an Arbitrator is determining whether to lessen a penalty. Arbitrators feel that this shows remorse and an acceptance of responsibility. On the other hand, if a member waits too long to admit and/or apologize, it may be viewed as insincere or "too little, too late".

(e) Obey Now, Grieve Later

It is critical that you understand this rule in order to properly advise your members. By way of example, a supervisor gives an order to one of your members, the member wants to refuse, and goes to you for advice. You must advise them to perform the work as ordered by the supervisor, and that you will address it at a later meeting with management, and if necessary, through the grievance/arbitration process.

Arbitrators have recognized a few exceptions to this rule:

(i) Situations where no adequate redress can be secured through the grievance/arbitration process;

(ii) Situations where the member reasonably believes the work is dangerous;

(iii) Management's refusal to allow your member to seek medical attention.

Fear of personal health and safety is perhaps the most common reason why employees may refuse to obey instructions. Arbitrators look at the following:

(a) Did the employee honestly believe that his/her health or well-being was endangered?

(b) Did the employee advise the supervisor of this belief in a reasonable and sufficient manner;

(c) Was the employee's belief reasonable in the circumstances?

(d) Was the danger sufficiently serious to justify the refusal to perform the work?

This is a fairly rigorous test for refusal of unsafe work, and we recommend it not be made lightly. Once again, you ought to avoid telling your members what to do in most cases, and rather just warn them that if they don't win in their argument regarding unsafe work, they will likely be found to be insubordinate.

(f) What Protection do you have as a Union Representative

This issue is focused on Union Representatives or Shop Stewards who also work for the Employer alongside the members they represent.

During the course of time, you will no doubt have numerous conversations with management. Some of those discussions may get heated and, as they say "words will be exchanged". As a general rule, Arbitrators will allow you greater leeway before finding that you have crossed the line and are now insubordinate.

Typically, we recommend that you try to maintain relative civility when dealing with the Employer, even when the Employer is being rude or uncivil. In addition, there is a greater danger of crossing the line if your comments are made in front of the grievor, and even more so if they are made in front of numerous co-workers.

Finally, you should be aware that there are certain instances where your title as Union Representative may actually cause you to receive greater discipline than your co-workers. In one case, employees walked of the job in protest. Amongst those that walked off the job was a Union Representative that also worked on the shop floor. The

Arbitrator found that this was an unlawful walkout and issued greater discipline to the Union Representative, who "should have known better".

(g) Employer Rules

It is well accepted that your Employer can create and enforce workplace rules. They are usually called "unilateral" rules, because they are put in place without the consent of the Union.

You should familiarize yourself with these rules. In the event that your members receive discipline for a breach of these rules, Arbitrators generally look at the following factors:

(i) the rule must not be inconsistent with the CBA;

(ii) the rule must not be unreasonable;

(iii) the rule must be clear and unequivocal;

(iv) the rule must be brought to the attention of the employees before an Employer can act on it;

(v) the employee concerned must be notified that the breach of a certain rule could result in his/her discharge if the rule is used as a foundation of discharge;

(vi) the rule must be consistently enforced by the company from the time it is introduced.

If you have a good understanding of your workplace and the Employer Rules, you will be better able to address the above factors, such as whether the rule has been consistently enforced.

When an Employer introduces a new rule, or revises the existing rules, they will often circulate the rules and ask employees to sign for them. We recommend that you review the acknowledgment that your members are being asked to sign carefully. Employers will often draft it in such a way that they are asking the employees to "agree" to the rules. We recommend that you insist that the wording be changed so that your members simply agree that they have received a copy of the new rules.

(h) Absenteeism

We now see that more and more workplaces have introduced Absenteeism Programs. They are usually designed to deal with what we refer to as "non-culpable absenteeism". By "non-culpable", we mean that there is no suggestion that your member is lying about his/her illness. The programs refer more to employees who are missing relatively high numbers of days of work on a consistent basis.

> **COMMON MISTAKE: We still see some Employers that discipline or threaten discipline for non-culpable absences. It should be clearly understood that you cannot discipline for such absences. Discipline is only appropriate for "culpable absences" such as faking illness.**

However, while an Employer cannot discipline for non-culpable absences, once an employee has had a high number of absences for a lengthy period of time, they can be subject to non-disciplinary termination. As a result, we recommend that you learn about the absenteeism program in your workplace. In particular, there are several details that become important and may change depending on the Employer, such as:

- are there some absences that don't count, such as:
    - STD claims
    - LTD claims
    - WCB claims
    - major injuries (like a motor vehicle accident)
    - approved leaves of absence
- how does the Employer determine if the absences are excessive
    - is it based on plant average
    - is it based on department average
    - are all employees counted together
        - example: is it fair to expect members that work in and out of a cooler to have the same attendance as office workers
- how does an employee get placed on an attendance program
- what steps are there in the program
- what type of warning letter does the employee receive
- how does an employee get off the attendance program if their attendance improves

In order to impose a non-disciplinary termination, the Employer must be able to prove:

(i) that your member's attendance was clearly excessive over a significant period of time; and

(ii) that there is no reasonable likelihood of improvement.

We recommend you exercise caution in dealing with attendance programs. These are complex and difficult issues, such as whether the absences are due to a "disability". If they are, then the issue is made even more complex because of Human Rights legislation, which provides an additional area of protection for your members.

(i) Harassment/Bullying

This is an area of particular difficulty for Union Representatives. Firstly, the harassment/bullying may be a dispute between co-workers. In such instances, we recommend the involvement of a second Union Representative rather than trying to represent both members yourself.

Your Employer is required to establish a harassment policy. We recommend that you read it carefully. Most often, such a policy will establish a procedure for dealing with these types of complaints. Harassment/bullying can involve either co-workers or supervisors.

Your member can file a complaint, and you can file a grievance at the same time. There have been some extreme cases where Unions have successfully obtained money (damages) from an Employer for failing to prevent/stop bullying. It is an issue that Arbitrators take very seriously.

(j) Duty of Fair Representation

It is well established that a Union may decide to file a grievance to protect timelines, but does not have to proceed to arbitration in all instances. Your Union can decide not to file a grievance, withdraw a previously filed grievance at any time, and/or settle a grievance at any time. In addition, your Union can do all of that without the consent of the grievor. In most cases, Unions will refuse to file a grievance or to proceed further with a grievance on the basis that there is no reasonable likelihood of success. When a Union settles a grievance, it is often because there is no reasonable likelihood of achieving a better result at arbitration.

It should be clearly understood that the grievance belongs to the Union, not the grievor. As such, a member cannot unilaterally file a grievance, and if one is filed and the Union wants to withdraw or settle it, the grievor cannot unilaterally decide to proceed to

arbitration. Only the Union can do that.

If a member disagrees with your Union, they can:

(i) use the internal appeal process which is usually found in the Union's Constitution/By-Laws;

(ii) once those internal appeals have been exhausted, your member's only recourse is to file a complaint (Provincially - the Manitoba Labour Board, and Federally - the Canada Industrial Relations Board) alleging that the Union has failed to fairly represent them. We call those "DFR's", or Duty to Fair Representation complaints.

The test for a DFR usually involves a consideration of:

(i) did the Union take reasonable care in dealing with the member's concerns;
(ii) did the Union act in an arbitrary manner;
(iii) did the Union act in a discriminatory manner;
(iv) did the Union act in bad faith.

V. CONCLUSION

As a new, or relatively new Union Representative, or even as a Shop Steward, you are embarking on a journey of many challenges. You will be expected to have answers, and to have them quickly. However, you are not alone. You have a network of Union Representatives to assist you and we recommend you not be afraid to call on them. We also recommend that you not be afraid to say "I don't know", as long as you follow it up with "but I'll find out".

Your members will be far better served by a Union Representative who is open to the challenges of learning the complexities of the CBA, Labour Laws, and dealing with the Employer.