A Transit Employer's Duty to Bargain Over Automation: Potential Subjects of Bargaining

Insights
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This is the third post in a five-part weekly series reviewing the legal landscape for transit employers considering automation. Please click here to see the prior post in this series.

Last week, we introduced the duty of transit systems to bargain with labor unions over the decision to implement automation, robotics or artificial intelligence and over the effects of such a decision. That post discussed three statutory and contractual sources of the duty to bargain and the transit employers to whom the duty applies. Today, we discuss potential subjects for which an employer and union must bargain and steps an employer can take now to better position itself to automate.

Where affected employees are represented by unions, an employer may not take unilateral action or make individual agreements with employees concerning mandatory subjects of bargaining unless the union has waived its right to preempt unilateral action or individual bargaining. A union can waive that right in work preservation, subcontracting or management rights clauses in collective bargaining agreements. But if the agreement is silent on automation, the statutory duty to bargain comes into play.

Converting to advanced driver assistance and autonomous vehicles is such a new subject that the administrative agencies and courts that enforce the statutory duty to bargain have yet to rule on whether the decision to convert is a mandatory or permissive subject of bargaining. However, other industries such as the newspaper and airline industries have dealt with different forms of automation in the past and their experiences are instructive. Decisions on related topics such as subcontracting, partial shutdown, layoffs, reassignment, and changes to the bargaining unit provide guidance.

As discussed below, even if there is no duty to bargain over a decision to automate, there exists a duty to bargain over the effects of such decisions on the terms and conditions of employment of bargaining unit employees. Effects bargaining is required because there may be alternatives an employer and union could implement to avoid or mitigate the change.

Subcontracting.

Because automation may cause the removal of work from the bargaining unit or the substitution of robotics for employees, it may be analogous to subcontracting. The U.S. Supreme Court has held

that the decision to subcontract is a mandatory subject of bargaining under the National Labor Relations Act (NLRA) where subcontracting does not alter the basic operation or scope of the business, a significant capital investment was not contemplated, and the subcontractor's employees would engage in the same or similar work under similar conditions of employment. Conversely, management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security are not mandatory subjects of bargaining. The determination is very dependent upon the facts. Further, the courts have found a duty to bargain over the effects of subcontracting decisions.

Partial Shutdown

Automation might also be analogized to a decision to shut down part of a business, if, for example, new technologies are to be moved to or consolidated in a different location or simply added in a current location, requiring a partial shutdown. Partial shutdowns can trigger a duty to bargain over the decision as well as the effects.

Under the NLRA, the Supreme Court has applied a balancing test to shutdown decisions that directly impact employment but focus on economic profitability. The court weighed the employer's need to manage business interests against the potential benefit to the union of collective bargaining and concluded that a duty to bargain exists only "if the benefit, for labor-management relations and the collective-bargaining process outweighs the burden placed on the conduct of the business." Consideration of labor costs may tip the balance in favor of requiring bargaining unless it can be shown that labor cost concessions would not change the employer's decision so that there would be little potential benefit from bargaining.

Under the Railway Labor Act (RLA), the Supreme Court has found that an employer had no duty to bargain over a decision to sell all of its assets to a third party but did have a duty to bargain over the effects of that decision. Subsequently, lower courts have held that under the RLA there is no duty to bargain over a decision to sell part of the assets of a business.

Layoffs and Reassignments

Automation is likely to displace employees: fewer employees may be needed or different skills may be needed. Employers have a duty to bargain in good faith with unions over resulting layoffs. Layoffs may already be addressed in a collective bargaining agreement, and changes to such provisions would have to be bargained in good faith.

Generally, loss of bargaining-unit work due to reassignment of unit members is a mandatory subject of bargaining under the NLRA. However, the National Labor Relations Board (NLRB) has held that an employer does not violate the NLRA by unilaterally removing employees from the bargaining unit where, as a result of automation or other technological change, employees acquire the skills and job duties of a classification excluded from the unit, provided the new duties are "sufficiently dissimilar" from those of the remaining bargaining-unit members.

One case under the RLA concluded that an employer was required to bargain over the decision to close certain rail stations (a partial shutdown with concomitant layoffs).

Changes to the Bargaining Unit

As a result of automation, new employees may be hired into new or modified positions. Whether an employer has an obligation to bargain over changes to the composition of a bargaining unit depends upon the terms of the collective bargaining agreement or a determination by the National Labor Relations Board (NLRB) of whether or not the new composition of work and employees is an "accretion" to the existing bargaining unit. The collective bargaining agreement's definition of covered employees could direct whether the employees are part of the bargaining unit. In other instances, an employer or union can file with the NLRB a unit clarification petition (UC petition). The effect of automation on the bargaining unit is a mandatory subject of bargaining.

Evaluating the Duty to Bargain and Planning for the Future

The duty to bargain requires a complex analysis. Whether to bargain over the decision to automate or the effects of automation should be determined based upon the unique facts of each case with the assistance of experienced legal counsel.

Because the assessment begins with an evaluation of whether the collective bargaining agreement addresses automation, an employer contemplating automation changes would be wise to negotiate provisions reserving such decisions to management when first negotiating or renegotiating its collective bargaining agreements. These matters might be addressed in management rights or work preservation clauses. In a management rights clause, an employer will want to reserve the right to make operational changes and include a "no-strike" clause that prohibits striking over changes during the agreement's term. Clauses that allow the employer to adopt technological or automated solutions without bargaining with the union may constitute a waiver by the union of its right to bargain.

Transit employers will want to consider in advance how existing collective bargaining agreement provisions may limit management's ability to make workforce adjustments such as layoffs and reassignments and address any impediments in new or upcoming negotiations. Unions will be keenly interested in preserving unit work and some may object to new requirements such as education and training, though often unions are amenable to education and training when it maintains the work force.

Our next installment in this series coming out next Monday will highlight the labor obligations of employers receiving grants or loans under the Federal Transit Act.

For a more in-depth analysis and overview of the labor law issues discussed in this series, please refer to our white paper, *Labor Law Issues in Deciding to Automate Mass Transit Operations*.

Related People

Todd A. Lyon
Partner and Labor Relations Group Co-Chair
503.205.8095
Email

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