

Negotiating a Labor Contract in the Global Economy

BY

Commissioner Fulton Miklos

Commissioner Jacques Wood

Commissioner Jack Yoedt



FMCS

- Created as part of the Labor-Management Act, 1947 (Taft-Hartley)
- Primary mission: To provide mediation assistance to minimize the effect of strikes and lock outs; Promote sound and stable labor management relations
- Provides service pursuant to the Federal Service Labor Management Statute

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Other FMCS Services

- Assistance in Labor/Management relationship building
- Labor/Management grants program
- ADR consultation and service delivery
- Training /Mentoring
- FMCS is located in over 75 field offices

Agenda

- Introduction to Traditional Collective Bargaining
- Legal Framework for Collective Bargaining
- Preparations for Collective Bargaining
- Joint Bargaining Sessions
- Closing Meetings/Settlement
- Ethics/Bargaining

Definition of Collective Bargaining

... the continuous relationship between an employer and a designated labor organization representing a specific unit of employees for the purpose of negotiating written terms of employment.

Labor Relations & Collective Bargaining (8th ed), Carrell & Heavrin

Traditional Bargaining:



Dynamics & Dimensions

What is Collective Bargaining?

- Collective Bargaining consists of interaction between Unions and Employers
- It takes place within limits set by law, formal rules and accepted practices
- It has the purpose of regulating relations between an Employer, its Workers and a Union
- It usually results in a Labor Contract

The Five Variables

- 1. Information
- 2. Timing
- 3. Attitude
- 4. Skill
- 5. Bargaining Power/Leverage

Bargaining Dynamics

Power Structures

- Age and efficiency of the plant?
- Competition faced?
- Financial resources?
- Cost of lost production?
- Strength of local union/membership?
- Past bargaining history?

Dimensions of Collective Bargaining

- **Internal:** Within bargaining committee
- **External:** Between committee and constituents
- **Vertical:** Between various levels of bargaining committee
- **Horizontal:** Across the table with the other committee

Key Issues in Bargaining Today

- Global Competition
- Healthcare
- Pensions
- Other

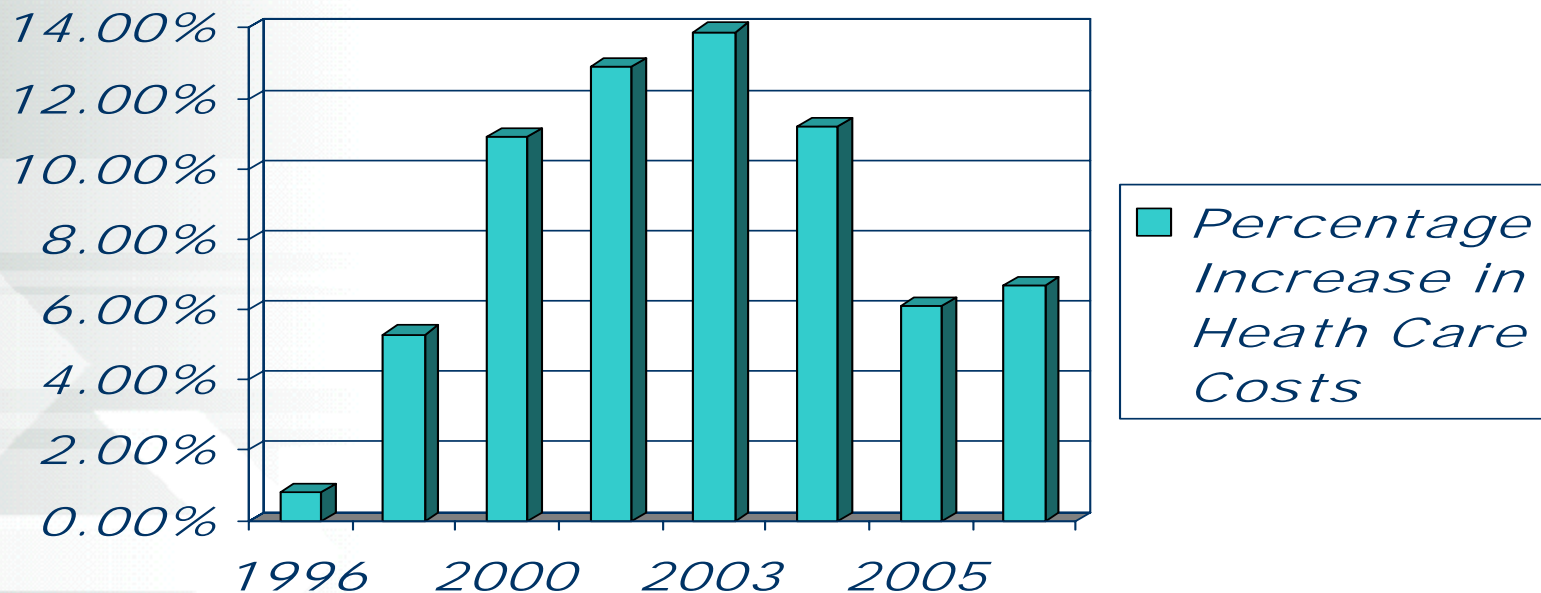
Challenge No. 1: Competition

- There is competition over:
 - “Customers”
 - Technology
 - Labor costs
 - Productivity
 - Quality
- The competitors are:
 - Foreign vs. domestic companies
 - Non-union vs. union companies
 - Union vs. union companies

Challenge No. 2: Difficult Business Climate

- Employers are focusing on reducing costs and increasing productivity
- “There is no money for new benefits”
- There is less money for existing benefits

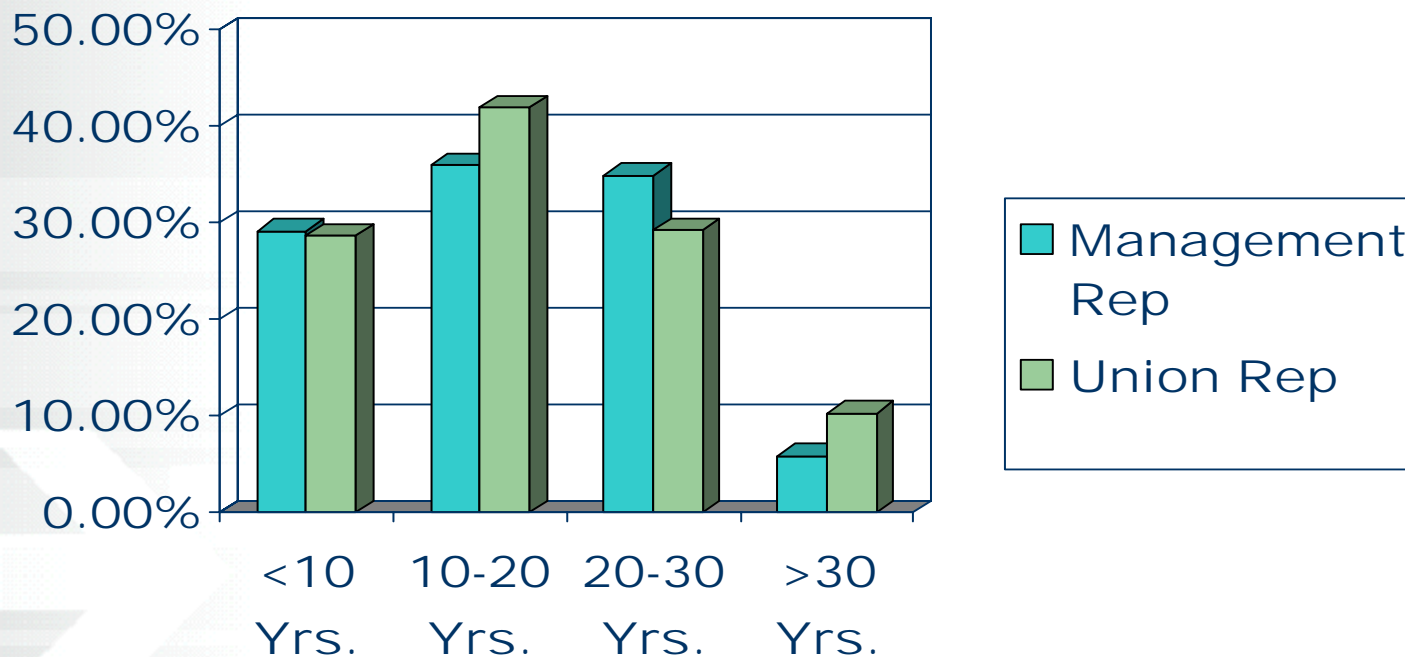
Challenge No. 3: Health Care Cost Inflation



Challenge No. 4: Retirement Benefits

- Volatility of the Stock Market
- Changes in the Pension Laws and Accounting Rules
- Fear of Potential Withdrawal Liability for Employers

Challenge No. 5: Inexperienced Chief Bargainers



Leadership Defined

“ Leadership is the capacity and will to rally men and women to a common purpose and the character which inspires confidence”

Bernard Montgomery,
British Field Marshall

Behavior No. 1: Competent Negotiator

- A leader prepares for negotiations
- A leader develops a game plan
- A leader has acquired the basic skills

Behavior No.2: A leader in collective bargaining

- Knows herself
- Knows her people
- Knows their people
- **Understands the role of multi-stakeholders**

Behavior No.3: Effective Communicator

- A leader's message is clear and concise
- A leader listens for explicit and implicit responses

Behavior No.4: A leader in collective bargaining negotiates in a trustworthy and ethical manner



Behavior No.5: A leader in collective bargaining understands the use and misuse of bargaining power

Behavior No. 6: A leader in collective bargaining is willing to own up to choices



Collective Bargaining under the National Labor Relations Act

- The Basics: The Statute and What it Means
- Elements of the Duty to Bargain
- Procedural Prerequisites to Bargaining
- Subjects of Bargaining
- Enforcement Process and Remedies

The Basics: The Statute and What it Means

- NLRA
 - the NLRB
- Sections 8(a)(5) and 8(b)(3)
- Section 8(d)
- Applying the Statutory Language

Section 8(a)(5)

- It shall be an unfair labor practice for an employer . . .
- “(5) to refuse to bargain collectively with the representative of his employees. . . .”

NLRA Section 8(b)(3)

- It shall be an unfair labor practice for a labor organization or its agents
- “(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees”

NLRA Section 8(d)

- “(d) For the purposes of this section, to bargain collectively is
- the performance of the mutual obligation of the employer and the representative of the employees
 - to meet at reasonable times
 - and confer in good faith with respect to . . .
 - wages, hours, and other terms and conditions of employment

NLRA Section 8(d) (cont.)

- . . . But such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .”

Subjects of Bargaining

- Mandatory Subjects
- Permissive Subjects
- Illegal Subjects

Mandatory Subjects

- Subjects over which the parties must bargain if requested and can be insisted upon to the point of impasse

Categories of Mandatory Subjects

- Wages for services
- Wage compensation for non-worked time
- Non-wage benefits
- Working conditions on the job
- Union-Management issues
- Management rights

Permissive Subjects

- Subjects over which the parties may bargain if both so desire but, can not be insisted upon to the point of impasse

Permissive Subjects

- Examples of Permissive Subjects are:
 - Definition of bargaining unit
 - Conditions affecting supervisors
 - Identity of either party's representative
 - Internal union/management procedures
 - Recording negotiations
 - Settlement of unfair labor practices

Illegal Subjects

- Subjects over which the parties may not bargain even if both so desire to do so

Illegal Subjects

- Examples of Illegal Subjects are:
 - Closed shops or union shops in “right to work” states
 - Contract provisions that condition representation on full union membership
 - Clauses which discriminate illegally on the basis of races, sex, or some other protected category

Elements of the Duty to Bargain

- Per Se Violations
- “Bad Faith” Violations

Per Se Violations

- Unilateral Changes
- Direct Dealing with Employees
- Insisting on nonmandatory subjects of bargaining
- Refusal to Execute a Written Contract
- Refusal to Furnish Relevant Information

Duty to Furnish Information

- Request or Demand
- Relevance or Necessity
- Financial Information (the “magic words”)
- The Duty also applies to Employer Requests
- The Duty is ongoing during the Term of the Contract

Presumably Relevant Information

- A Union is presumably entitled to certain information, such as:
 - Wage rates
 - Seniority lists
 - Names and addresses of employees
 - Benefit cost information

Access to Financial Information

- The duty to disclose financial information, such as profits & losses, is less comprehensive
- An Employer is required to provide access to financial data only if it pleads “poverty”, claiming an inability to pay for the demands of the Union
- An Employer can claim it is operating at a competitive disadvantage without having to provide financial information

Some Conditions

- The request for information must be “reasonably precise”
- There may be confidentiality restrictions for some information
- The requesting party can not dictate format
- The requesting party may have to pay reasonable costs for reproduction
- The furnishing party does not have a “duty” to interpret the information

Good Faith

- Surface Bargaining
- Concessions, Proposals and Demands

Surface Bargaining

- In determining whether a party has bargained in bad faith, the Board looks to the totality of the circumstances in which the bargaining took place. The Board examines not only the parties' behavior at the bargaining table, but also conduct away from the table that may affect negotiations. Among other indicia that a party has bargained in bad faith, the Board also considers whether a party has engaged in delaying tactics and whether a party has made unilateral changes in mandatory subjects of bargaining.

Concessions, Proposals and Demands

- NLRA Section 8(d)
 - But such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .”
- “. . . While the absence of concessions would not prove bad faith, their presence would raise a strong inference of good faith” NLRB v. General Electric 789 F.2d 121 (2d Cir. 1986)

When is Bargaining Over?

- Agreement
- Impasse

Impasse - who cares?

- “. . . After bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.”
 - *Taft Broadcasting Company*, 163 NLRB 475 (1967)

Impasse - Can you know it when you see it?

- Whether a bargaining impasse exists is a matter of judgment.
 - Bargaining history
 - good faith of the parties
 - length of negotiations
 - importance of the issues
 - contemporaneous understanding of the parties

NLRB Enforcement Process

- UFLP Charge and Investigation
- Trial before ALJ
- Appeal to NLRB
- Appeal to Federal Appellate Court
- Petition to US Supreme Court

NLRB Remedies for Failure to Bargain

- “Cease and Desist”
- Order to Bargain
- Restoration of Improper Unilateral Changes
- Order to Supply Relevant Information



Preparation for Collective Bargaining

Preparation for Collective Bargaining

Topics

- Gathering information and developing proposals
- Preparing a schedule
- Establishing team and their roles
- Communications

Questions

- Why is preparation important?
- What goes wrong when you don't prepare?
- What benefit is there for being prepared?

The Elements

- The Bargaining Team
- The History Review
- Collection of Information
- Developments of Goals and Proposals
- Development of Strategy and Tactics
- Giving the Proper Notices

The Bargaining Team

- Committee Size: Cost, Conflict & Contact
- Constituencies
- Committee Members' Roles: Chief Spokesperson, International Rep, Note Taker and Number Crunchier
- Legal Counsel
- Internal Operating Procedures

Negotiations Process: Role of Chief Spokesperson

- Speaks for the team at the table
- Understand proposals sufficiently to explain them or delegate to someone who does
- Solicit input from team away from table
- Call caucuses
- Participates in sidebars

The History Review

- Assess Previous Contract Negotiations
 - Substantive Issues
 - Strategy & Tactics
- Analysis of Developments under Expiring Contracts
 - Grievances/Arbitrations
 - Problems not covered by contract
 - Operational changes
 - Internal and external business conditions

Collect Information

- Collect Wage & Benefit Information
- Collect Information about the Employer/Union
- Collect (*ask for*) internal work force data

Development of Goals and Proposals

- Process:
 - International Union Goals
 - Local Union's Needs & Interests
 - Benchmarks
- Draft Proposals
 - Contract language
 - Wage & Benefits
- Secure Approval?

Development of Strategy and Tactics

- Strategy:
 - 1. Develop Supporting Reasons & Arguments
 - 2. Anticipate Counterarguments
 - 3. Determine Potential for Compromise
 - 4. Assess Bargaining Leverage & Consequences of using It

Giving Proper Notices

- Under the Contract
- Under the Union Constitution & By-laws
- Under State & Federal Statutes
- 60-day notice to Employer, FMCS & State Mediation Service

Traditional Bargaining:



Basic Costing

The Cost Estimator

- Financial Type
- Staff Rep
- Chief Spokesperson
- Specialists
 - Insurance
 - Retirement Plans
 - Health Insurance

Key Concepts

- ASTHE: Average Straight Time Hourly Earnings - \$ _____
- AHLC: Average Hourly Labor Costs - \$ _____
- “ROLLUP”: Cost effect upon certain fringe benefits caused automatically by increase in wages
- “Spillover” ?
- “New Money” v. “Old Money” ?

Information Needed

- Work Force Analysis
 - No. Ees by job
 - Length of service
 - By Age
 - FT's & PT's
 - Married/Single/Other
- Hours Information
 - Total Hours Worked
 - Overtime Hours
 - Compensated Hours
 - Shift Hours
- Fringe Benefit Information

Joint Sessions



STRUCTURE OF BARGAINING

→ Joint sessions

→ Separate caucus

→ Other types of interactions

Other Interactions

- Side bar meetings
- Sub-group meetings
- Telephone/electronic discussions

The Stages of Traditional Negotiations

- **Pre-Bargaining – GROUND RULES**
- **The Early Stages – EXCHANGE**
- **The Middle States – DISCUSSION**
- **The Final Stages – REACHING CONCLUSIONS**

Pre-Bargaining

- “Ground rules” meeting
 - schedule meetings (locations, dates, times)
 - release time/pay for bargaining team
 - confidentiality (“gag rules”) during bargaining
 - keeping minutes
 - procedural ground rules

Agenda for Opening Bargaining Session

- Set a Tone
- Present a Theme
- Establish Ground Rules
- Exchange Agendas/Proposals

Set a Tone

- Tone is “Attitude”
- Clear on definition of Needs/Problems
- Firm on interests, flexible on solutions
- Acknowledge other’s interests
- Clear about power realities
- Express a willingness to work hard and with candor

Present a Theme: Elements

- Describe your “Ethos” as Chief-Spokesperson
- Present an overview of the “big picture” in the context of the needs and interests of the membership/company
- Signal your overall strategy for negotiations and on pivotal specific issues
- Highlight your understanding of core issues
- Above all answer the question: “Why?”

Exchange Agendas/Proposals

- At the Opening Bargaining Session
- Make the Proposal and:
 - Explain Why?
 - Answer What !
 - Provide supporting information!!
- Leave Opening for other Solutions

Communications are the Core of Bargaining

- You can not bargain successfully if you can not effectively send and receive information
- Sending communications should be:
 - Rationale
 - Respectful
 - Humorous
 - Consistent
 - Careful
- Receiving: Be “An Active Listener”

The Early Stages

- Parties present their opening proposals – usually a “Laundry List”
- Some proposals may be critical to the parties; others may be withdrawn at various stages of negotiation
- Uncertainty may exist as to what the priorities of each side are at this point as they are obscured within the laundry lists
- Initial exchange may or may not include economics

The Middle Stages

- The middle stages involve more serious considerations and discussions
- Both sides estimate the relative priorities
- Parties estimate if an agreement can be reached without strife
- Signal issues of possible compromise
- Issues of low importance fall away exposing priorities

Assessing Demands/Proposals/Issues

- Yes
- No
- Yes, if
- Maybe, if & when ...

Probing Demands

- Don't Expand the Demand
- Avoid Unwarranted Interest
- Ask Useful Questions

Clarifying Interests

- You want this because ...
- Tell us more about this demand ...
- What are you trying to accomplish
- What do have to have and why?

Responding to Demands

- Agree
 - As is
 - In principle
 - If modified
- Just Say ...
 - Not interested ...
 - Unwilling to agree ...
 - Reject your proposal to
 - No!

Presenting Offers

- Usually put it in writing
- Read the key provisions
- Explain it
- Stress the “positives”
- Hope/expect acceptance
- Invite questions

Before Making a Concession ...

- Is it still an issue?
- Is the to make a trade ... ?
- Is there something less that will resolve the issue ?
- Have we caucused?
- Is now the right time to agree?

The Final Stages

- The final stages begin as the deadline approaches, or as both sides approach “bottom line”
- Off-the record discussions may take place between two individuals or small groups from both sides
 - Sometimes with the assistance of a mediator
 - Each party is trying to convince the other of the credibility of its threats
 - They try to get the other side to adjust their bottom line
 - Parties’ continue to assess the other’s “real” positions and narrow the differences

Final Stages (continued)

- Final Wrap-up
 - Wrap-up loose ends (language sign-offs, dates)
 - Announce settlement at table (TA or final offer)
 - Consider whether committee to recommend or just take back for vote
 - Address getting summary to union members & supervisors
 - Address schedule for ratification

Negotiations Process: Effective Tactics

- Good communication
- Credible justification/explanation of proposals
- “Language first, money last”
- Creative counterproposals addressing other party’s interests
- Sign off each provision as agreement is reached ...
- Emphasize positive movement
- Be patient
- Caucus wisely
- Be prepared

Negotiations Process: Strategies to Avoid

- Name calling or demeaning/condescending behavior
- Losing your temper
- Accepting/rejecting proposals w/o explanation (explain your struggles & concerns)
- Appearing unprepared/unorganized
- Not understanding your proposals

Closing the Deal



Timing is Everything

- Deadlines May Matter
 - Contract Expiration
 - Self-imposed
 - Imposed
- Consider the Status of Open Issues
- Read the “Bones”

Methods for Closing the Deal

- Package Approach
 - Linkage
 - Process
- Optional Offers
- Final Offer
- Nothing is Final Until Agreed

“Off-the-Record” Meetings

- Ethics of Private Meetings
- Trust is Critical
- Oral Agreements v. Oral Understandings

Creativity: Vary the Variables

- Shift Numbers
- Shift Time
- Shift From Wages to Fringes(or viceversas)

Nail It Done

- Buy-in and Commitment
- Put It in Writing





Post Bargaining

Ratification With a Recommendation

- Timing
- How much information should be given to ratifying body?
- Has agreement been rejected previously?
- Standing of Negotiating Committee
- The quality of Agreement Endorsement of Negotiating Committee

Completion w/o Recommended Offer

- Last Best and Final Offer (LBFO)
- Schedule another meeting
- Mediation or other 3rd party involvement
- Continue working under the existing CBA with a contract extension
- Some form of job action

ETHICS IN LABOR CONTRACT NEGOTIATIONS

The Unwritten “Code”

Minimum Standard

- Follow the law
 - No knowing misrepresentations of material fact (avoid fraud)
 - Duty to bargain in good faith (comply with NLRA)
 - Intent to reach agreement
 - Provide information as requested

Techniques for Coping with Unethical Tactics

- Probe, probe, probe—ask questions
- Assertive & persistent
- Maintain your standards, not theirs
- Pause or defer—you don't have to answer every question
- Don't lie—use truth to your advantage

Useful Blocking Techniques (To Avoid Lying)

- Declare the question out of bounds
- Answer a different question
- Dodge the question
- Ask a question of your own
- Change the subject

The Unwritten “Code”:

- Do not intentionally mislead the the other party’s chief spokesperson
- Do not *needlessly* embarrass the other negotiators
- Do not thoughtlessly disclose off-the-record discussions
- Do not give your word lightly, but when you do keep it!
- Do not forget: “What goes around, comes around”

IBB DEFINED:

- An Alternative Style of Negotiating
- A Problem Solving Process Conducted in a Principled Way that Creates Effective Solutions while Improving the Relationship

IBB PRINCIPLES

- Focus on issues, not on personalities or the past
- Focus on interests underlying the issues, not on positions
- Focus on mutual interests
- Focus on satisfying the other party's interests as well as your own
- Judge options with objective criteria/standards, not power
- Information sharing is critical for effective solutions

“Real World” Collective Bargaining Model Strategies

- Concentrate on the issues, not the personalities
- Use positions, but look for the underlying interests
- Gather information and share it
- Develop the options and jointly explore them
- Get the other to change his/her resistance point/bottom line or change your own

CONCLUSION

“ Collective bargaining must be preserved and strengthened as the bulwark of industrial relations in a democracy.”

George W. Taylor