Interest Based Bargaining: A New Mediator Tool at FMCS [1]

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Good mediators constantly talk about their tools and techniques, even as they search for new and better ones. Changing circumstances in their conflict field intensifies their search to improve their practice. The decline of the labor movement's status, beginning in the 1980s, stands as a dramatic example of this mediator search. Federal Mediation and Conciliation Service (FMCS) mediators scrambled to find new tools and techniques to deal with this paradigm shift in collective bargaining. Their search settled on Interest Based Bargaining (IBB). This paper discusses the FMCS adoption of and leadership role in promoting IBB in labor-management relations.

The steady growth in IBB use in labor-management relations in the last 20 years stands in sharp contrast with the adversarial collective bargaining that preceded it. To appreciate this remarkable growth, an understanding of the history of labor-management relations and collective bargaining is necessary.

Brief History of Collective Bargaining

Prior to the First World War, courts labelled trade unions as conspiracies in restraint of trade, routinely issued injunctions prohibiting strikes; neither custom nor legislation recognized any rights of workers or unions. Since property rights were supreme, the police or the army violently enforced injunctions against unions and workers in the interest of protecting property. Where strikes occurred, they were frequently violent. The two industries most related to industrialization, coal mining and railroading, provided dramatic evidence of hostility between industry and unionization.

The war effort between 1917 and 1919 witnessed a major change in the fortunes of trade unions and collective bargaining. The tremendous growth in war related production and the need for uninterrupted war production required co-operation between labor and management. With the government acting as the enforcer, trade unions were allowed to form and to negotiate collective

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bargaining agreements. Government mediation services and wartime agencies responsible for production helped diminish strikes to near zero while union membership soared to unheard of levels, and collective bargaining agreements became commonplace in the war industry. One million union members in 1900 grew to 5 million during the war.

When the war ended, employers successfully returned labor management relations to prewar conditions. The slowdown of the economy as it adjusted to peacetime allowed employers to cut wages and refuse to renew collective bargaining agreements. Ironically, the enormous number of strikes that followed played well with an employer strategy of depicting unions as foreign, socialistic and anti-American. Union membership declined throughout the 1920s, never reaching the wartime high until the New Deal legislation in the 1930s.

New Deal Labor Law: Legislative and administrative actions in the 1930s ushered in a growth in union membership and collective bargaining that dwarfed the earlier wartime boom. New legislation limited the use of injunctions against unions, allowed employee elections to select union representation for collective bargaining, and limited management activities that interfered with union activities and collective bargaining. The resulting growth in union membership was remarkable. By 1935 membership stood at 3.5 million, or 13% of the work force and by 1940 membership reached 9 million, or 27%. The use of mediation grew with the expansion of collective bargaining. The primary source of mediation was the United States Conciliation Service (USCS) the predecessor to FMCS.

During World War II, membership and collective bargaining continued to expand with production requirements greatly exceeding the demands of the earlier war. By the war's end, union membership reached an all time high of 40 million or 35% of the work force. The growth of collective bargaining, accompanied by amazingly few strikes, was aided by an expanded mediation service and a 'no strike pledge' by trade unions.

When the war ended, the transition to a peacetime economy was difficult. The year following the war saw more major strikes than any time before or since in U.S. history. During the winter and spring of 1945-46, five major industries were on strike at the same time. With five million workers idled in steel, auto, meat-packing, coal mining and electrical manufacturing, 120,000 man-days were lost to work-stoppages. President Truman, like Wilson had in 1920, called a White House conference of top labor and management representatives to seek some accommodation in the public interest. Truman's conference produced only slightly better results than President Wilson's with an agreement recommending improvements to the government's mediation service.

Labor Law Amendment: In Spring 1947, a newly elected Republican Congress enacted a major amendment to the labor management relations act. The amendment created FMCS, prohibited some union activities, and provided a process for dealing with national emergency disputes.

The new labor law promised to oversee collective bargaining even-handedly between labor and management. The calm, good times of the 1950s provided a period for labor and management to work out relationships and useful practices to implement the new law in ways that served their separate interests. The collective bargaining practices and patterns evolved in the 1950s would hold reasonably well through the 1970s. A major practice, based on the ever rising U.S. economy, allowed unions to demand improvements in working conditions, wages and benefits. As the practice evolved, management resisted union demands, but ultimately, over a thirty-year period, management gave in to many improvements demanded by unions. These included benefits unheard of earlier: vacation, holiday, sick leave, health and life insurance, premium pay for night and weekend work, rest breaks and paid lunch periods, to name just a few that raised the standard of living and helped create the middle class. The rising economy allowed management to pass the employment costs on to their customers, just as their competition was able to do.

Collective bargaining from the 1950s to the 80s was unapologetically traditional and adversarial, since both sides possessed nearly equal skills and the strength to push their point-of-view. They were well-matched adversaries. During earlier periods, they bargained adversarialily, but not as equals. During the two world wars and following the new labor law in the 30s, unions experience greater power with government assistance. During other periods, management benefited from the court's strong commitment to private property rights and the enforcement power of police.

New Collectve Bargaining Paradigm

New circumstances arriving in the 1980s significantly altered the balance of power. Foreign competition and globilization started to pinch the U.S. economy as its technological and productivity advantages were eroded by foreign advancements. As management lost the ability to pass labor costs on to customers, labor costs were identified as the villain. When the pro-business Reagan Administration came to power in the early 1980s, a paradigm shift occurred.

The Administration began with a tough period of economic recession that drove up unemployment and created uncertainty. Next an ill-advised strike by air traffic controllers provided Reagan the opportunity to fire and replace thousands of strikers. This dramatic and unprecedented move by Reagan, a former head of the actors union, won praise from the travelling public and the business community. But more importantly, it depicted unions as a selfish interest group that had become too strong, as the problem and not part of the solution to regaining the nation's competitive edge. Practices that had been outside the norm for forty years became legitimate. If the President could replace strikers, why shouldn't corporations aggressively take on unions in their drive to restore the nations competitive advantage.

Thus the 1980s brought an attack on hard-won union gains and a significant decline in union membership. Unionized plants were closed, labor agreements saw wage and benefit reductions, strikes were lost before starting, and bargaining featured union concessions in a hope of achieving job security in the face of massive lay-offs. Adding to union troubles, Reagan appointees to the National Labor Relations Board (NLRB) shifted collective bargaining rules to significantly favor management in a rush to support free enterprise. During the 1980s, union membership declined from 23% to 16% of the work force, from 20 to 16 million. As this decline continued during the 1990s, union staff reductions and membership services declined as well, forcing union mergers and a defensive union mentality.

By the late 1980s, IBB came slowly onto the collective bargaining scene.

U.S. IBB History

The use of IBB in labor-management relations, under a variety of names, began to appear in the late 1980s after being introduced only as a textbook theory in the late 1960s. As concerns about the impact of foreign competition began to emerge, private sector organizations began to follow two distinct approaches to labor-management relations. One approach sought to operate in a 'union free environment' by aggressively negotiating deep reductions in wages and benefits, closing unionized plants and opening new plants in anti-union locations. The other approach sought to establish more co-operation with unionized workers, even to the extent of limited partnerships. (Stepp and Barrett)

During the late 1980s, trade unions could not resist wage and benefit cuts or layoffs, as their membership and finances declined. These new circumstances challenged union's traditional approach to labor-management relations, and forced them to respond, at first reluctantly, but gradually more willingly, to the co-operative initiatives proposed by some employers.

It seems unlikely that unions would have shifted to IBB if traditional bargaining had continued to produce the results it had from the end of WWII until the end of the 1970s. That period of phenomenal growth in wages and an expanding list of new benefits resulted from a traditional negotiation process that had served unions and their members very well. But for foreign competition that ended those golden years, traditional bargaining might still be king.

Certainly, it can be argued that IBB should be used simply because it is a more enlightened way to negotiate. The fact is that for most unions IBB is not their first choice. Given different circumstances, most unions would be pleased to be fighting the good fight for their members using traditional bargaining.

While labor management-relations has long been adversarial, there also have been co-operative exceptions. Co-operation occurred during both world wars and the Korean War. Joint committees supporting safety had been widely used for many years. More recently, many cooperative relationships were developed during the 80s and beyond as a strategy for dealing with globalization. (Stepp and Barrett, Auerbach and Barrett, Barrett. 1985)

The 1980s movement toward greater co-operation drew assistance from the Labor Department's creation of a Bureau of Labor-Management and Co-operative Program. The Bureau advised labor and management on ways to establish co-operative efforts. The Bureau's work included training and orientation programs, publications, studies, videos and consulting. Also the Bureau's two-day organizational development program called Partners in Change (PIC) was widely used as a joint experience for labor and management in moving their relationship to a co-operative future. The development of PIC was a joint effort of the Bureau and FMCS. (Barrett, 1989)

Recognizing that collective bargaining, with over a half century of history, constituted the most adversarial and least co-operative segment of labor-management relations, the Bureau initially focused its efforts outside of the parties' collective bargaining. As a result, a bifurcated relationship was encouraged between the parties' co-operative, day-to-day relationship and their periodic, adversarial collective bargaining negotiations.

The 1981 book *Getting to Yes* (Fisher and Ury) popularized an interest-based approach to problem solving and negotiations. In doing so, the book provided a useful alternative to power-based, adversarial negotiations, an alternative that had remained largely theoretical since 1965 when *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System* (Walton and McKersie) was published. While the impact of *Getting to Yes* began to catch on in other conflict arenas, it held little to no sway in collective bargaining during most of the 1980s.

Late in that decade, the author of this paper developed a two-day IBB training program and tested it with labor-management pairs identified by FMCS. (See FMCS Deputy Director Wood's Foreword in Barrett, 2002). Following the training, parties willing to try IBB in their negotiations were given help in getting started. Large numbers of FMCS mediators received the IBB training, but very few initially saw much merit in the process. Their long experience mediating traditional bargaining challenged their coMfort zone and cast doubt on whether labor and management could be open to IBB. At best FMCS mediators saw IBB as compatible with school teachers and other public employees, and possibly with parties lacking a long history in traditional bargaining. By the mid-1990s, as a growing number of private-sector employers began using IBB, FMCS caught the wave and became the leading promoter of IBB in labor management relations. Soon, IBB training and use exceeded everyone's expectations.

A large boost to IBB use came in 1993 when President Clinton issued an Executive Order directing federal agencies to create partnerships with unions of their employees and to engage them in IBB. The use of both increased throughout the 1990s, and by the advent of the Bush administration, the use of IBB in federal government was significant. President Bush, following his anti-union inclinations, cancelled the Clinton E.O. While that cancellation did not make partnering or using IBB illegal, Bush appointees who headed agencies discouraged their use.

FMCS and IBB

In the past ten years, IBB became a mainstay of the FMCS mediators' workload, encompassing joint IBB training and facilitation of IBB negotiations. Later as IBB had taken hold in FMCS, mediators began using it to help resolve grievances and to break impasses in collective bargaining negotiations. Even more recently, FMCS mediators began to struggle with the difficulties in using IBB on distributive issues -- those issues involve costs. (FMCS, 2004)

IBB Training: The FMCS training in IBB is typically two days in length and is conducted jointly with labor and management. The training uses interactive exercises that engage participants in experiencing IBB in contrast with their adversarial bargaining experience. An IBB model is presented and an opportunity to get a feel for the process is provided. By the conclusion of the training, the labor-management participants have the capacity to determine if they are willing to undertake IBB with the other side,

At that point, the participants are told about facilitation and the sound reasons for using it in their negotiation to avoid slipping back into traditional behaviors and jinxing the effort. Many participants agree to try IBB and at least start their bargaining with FMCS facilitation assistance.

IBB Facilitation: While mediation and facilitation have similarities, they have differences as well. FMCS mediators are trained to do both. They have the know-how and skill to switch to whichever third party process is appropriate in the circumstance they face. Typically when IBB is being used, facilitation is the preferred third-party assistance needed.

Here is a real life experience that contrasts the two. In the early 1990s before many FMCS mediators were conversant with IBB, the author of this paper had trained union and management representative at a plant in the midwest. The local FMCS mediator asked if he could attend the bargaining that the author was facilitating. At the lunch break on the second day, the mediator was observed talking first with the lead representative of one side and then the other. Before bargaining resumed following lunch, the mediator told the author that he had talked with the two representatives about a settlement he had mediated recently on the same issue the parties were now bargaining. He was now confident that he could persuade them to agree to that settlement. The author told him that since the parties had settled several issues already using IBB and were making good progress on the current issue, the mediator should not circumvent the IBB process for a quicker settlement. The mediator agreed to sit back and watch the IBB process deal with the issue. But he wasn't able to sit back. After the mid-afternoon break, the mediator told the author the two representatives had agreed to the settlement he suggested. The author told him to leave immediately and if he refused his boss would be called. Thankfully, he left. The author caucused briefly with the two representatives and explained what had happened and they agreed to continue with the IBB process.

Since mediators are settlers, when they sense a settlement is possible, they act to achieve it. That highly developed skill is what makes a good mediator. For a mediator to facilitate IBB, restraint is required, so the IBB process can play out. Chinese thinker Lao-Tsu (604-531BC) best described a facilitator when he wrote: "When the best leader's work is done, the people say: 'We did it ourselves.'"

Grievance Mediation and IBB: In recent years, FMCS has been emphasizing its grievance mediation services. At least 95% of U.S. labor agreements contain a grievance procedure, which is a series of steps up through higher levels of authority representing both labor and management. Typically, the process terminates in final and binding arbitration. Because of complaints of arbitration's slowness, cost, adversarial nature and win/lose outcome, some parties have inserted a mediation step in their grievance procedure just prior to arbitration.

In recent years, FMCS mediators have been mediating grievances under such a provision. Since the parties view grievances as matters to dispose of so they can get on with their work, grievance mediation is primarily a problem-solving process. Mediators frequently introduce the parties to IBB as a convenient and efficient problem-solving process. If the parties are acquatnted with IBB, the process is easiest. If they are not, the mediator engages them in an on-the-spot tutorial on IBB and asks them to try the process. Typically the parties see using IBB as a low risk exercise on an issue that they have failed to resolve in negotiation during prior steps of the grievance procedure.

A successful resolution of a grievance using IBB provides the mediator with the opportunity to suggest joint training for grievance handlers. If the parties' collective bargaining is on the horizon, the mediator might use their successful use of IBB to suggest using it in their up-coming negotiations.

Breaking Collective Bargaining Impasses: Mediators' most typical role involves collective bargaining negotiations when the parties have reached an impasse and are unable to move ahead. For a mediator, this is an exciting and challenging juncture in their work. It is a point when the parties are feeling disappointed and frustrated, and probably, angry with each other. Therefore, the parties are looking to the mediator to work his/her magic, to lead them to a resolution that has eluded them. Mediators' traditional tools and techniques for assisting the parties are persuading, challenging, suggesting, proposing, caucusing, etc. --- all of which are linked to and compatible with traditional bargaining. With the advent of IBB, mediators have a new tool.

If the parties at impasse have not been exposed to IBB, the mediator might: 1) tell the parties he does not want to know their positions on the unresolved issues; 2) explain that he wants to help them work on the first issue using an approach different from what they have been using; 3) if they express any reservations, he will explain that he has had success using this process to resolve impasses, and he wants them to at least give it a try; 4) explain the difference between a position and an interest; 5) use a flip chart to help them through the IBB steps, beginning with their interests on the first issue.

When IBB succeeds in helping the parties overcome their impasse and achieve settlement, the mediator will discuss the process they have just used and suggest that some training would enhance their skill in grievance handling and in their next collective bargaining.

Using IBB on Distributive Issues: A distinction between integrative collective bargaining issues and distributive bargaining issues needs to be made here. The latter involves costs and resources, and generally appears to be an issue in which one party succeeds at the other's expense. Or said another way: what one party gains, the other must give up. Wages and benefits are typical distributive issues. Integrative bargaining issues are those in which the parties' interests overlap or have great commonality, and therefore, suggest solutions in which both parties see benefit. These issues frequently involve contract language which solve a problem that both parties want solved.

Typically, distributive issues are more difficult in any type of bargaining. It is for that reason, even in traditional bargaining, that the parties almost always deal with distributive issues last, after completing the integrative issues. The advantage of integrative issues is they allow the parties to find an integration of their interests on the issue, and thus identify solutions that address their mutual interests.

While all parties have found distributive bargaining difficult, many have found ways to make IBB work even on these issues. However, some parties have used IBB for all their integrative issues, and then shifted to traditional bargaining to address their distributive issues, believing that IBB cannot achieve resolution.

Because of these difficulties with IBB and distributive issues, FMCS asked its mediators, who have discovered ways of helping IBB deal with distributive issues, to share their ideas in writing. Forty FMCS mediators wrote short papers on their experience. The following is an effort to glean key ideas from their writings. (FMCS, 2004)

Most of their writings reflect how significantly collective bargaining has been impacted by the paradigm shift of the 1980s. Bargaining is now focused on the limits or parameters that the product or service market of the employer imposes. This shift to the state of profitability of product or service market is in contrast with earlier bargaining in which the employer could pass collective bargaining cost increases on to their customers.

How precise those limits or parameters need to be identified ---- from just a sense of the limits to precision beyond a reasonable doubt --- is determined by the parties' preference and the availability and reliability of information.

Suggested methods for gathering parameter-focused information varies from extensive research by joint labor-management committees to a mere presentation by the employer on the financial status of the business or industry. Falling between those extremes are arrangements for the employer to provide information on any question raised by the union, to jointly gathering information on several agreed-upon comparable employers.

Once information has been gathered, shared, understood and acknowledged, the negotiators turn to how the available funds will be allocated -- how much for wages versus health care, for example. Some attention also might be devoted to ways to increase the amount of money available --- productivity improvements or cost-savings ideas, for example.

Most mediator/writers acknowledge the usefulness of the parties' successful experience during the integrative phase of IBB. Carrying those positive feelings into the distributive phase of IBB is extremely important, even though the exact same process and steps may not be used. Some mediators wrote of carrying forward the IBB spirit and attitude by helping parties assess their earlier experience, and discussing the need to carry them forward with some adjustments into distributive bargaining.

A few mediators wrote of the need for additional ground rules to cover distributive IBB, including a process for gathering information, early listing of distributive issues, early discussion of those issues while staying focused on interests not positions, the relationship of trust building to sharing honest data, the steps to be used, and the continuing need for facilitation.

Summary

The growth of globilization and foreign competition, beginning in the 1980s, impacted the U.S. economy and the labor movement so dramatically that a thirty-year pattern of collective bargaining imploded. The FMCS, faced with the continuing role of maintaining peace between labor and management, sought new ways of assisting the parties in their altered relationship. By adopting and promoting IBB, FMCS has found a new way to aid labor-management and collective bargaining.

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