

# **BACK TO THE FUTURE: THE HISTORICAL DEVELOPMENT AND CURRENT CHALLENGES OF INTEREST-BASED BARGAINING IN LABOR RELATIONS**

Mark C. Travis, J.D., LL.M.  
President, ADR Specialists, LLC  
[www.adrspecialists.com](http://www.adrspecialists.com)

## **INTRODUCTION**

The purpose and scope of this paper is to analyze the historical development and current utilization of interest-based bargaining<sup>1</sup> in labor relations, and the challenges for its continued use in the future. It will explore the political, economic and legal foundations upon which collective bargaining has developed, and the implications those developments have presented for adoption of interest-based principles. Beyond these environmental factors, the paper will trace the development of interest-based bargaining in the academic arena, followed by an analysis of how those principles came to be more fully realized and adopted in practice by the Federal Mediation and Conciliation Service, as well as the results from its use as revealed in field research. Following that evaluation, the paper will address the challenges encountered in implementing interest-based bargaining, and suggested techniques for future successful utilization.

---

<sup>1</sup> The terms “interest-based bargaining” and “integrative bargaining” are essentially synonymous. They are also known by various other terms, depending upon who is using them. Those parallel terms include “principled negotiations”, “mutual gains bargaining”, “win-win bargaining”, “problem-solving negotiations”, and “collaborative bargaining”. It is fair to say that all terms utilize many of the same negotiation tools and concepts. From an academic perspective, the “integrative” term arose first, followed by the “interest-based” variation, as introduced and developed by the Federal Mediation and Conciliation Service. The terms are used interchangeably in the text of this paper.

## THE HISTORICAL AND LEGAL FOUNDATIONS OF COLLECTIVE BARGAINING

### *The Legal Framework of Collective Bargaining*

The duty to bargain imposed by the NLRA entails a requirement of good faith bargaining. Specifically, Section 8(d) requires that the employer and representative of the employees meet and confer “in good faith with respect to wages, hours, and other terms and conditions of employment...but such obligation does not compel either party to agree to a proposal or require the making of a concession.”<sup>2</sup> In determining whether a party has engaged in good faith bargaining, the National Labor Relations Board (the “Board”) will analyze the totality of the parties’ conduct in bargaining.<sup>3</sup> However, the Board does not judge the substantive terms of collective bargaining agreements or require the making of concessions on particular issues.<sup>4</sup> Rather, the Board’s function is to oversee and monitor the process of collective bargaining, leaving the substantive results to the parties’ relative bargaining strengths.<sup>5</sup>

In 1970, the Supreme Court summarized the purpose of the NLRA as it relates to bargaining:

The object of the Act was not to allow the government regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own view of a desirable settlement.<sup>6</sup>

---

<sup>2</sup> 29 U.S.C. § 158(d).

<sup>3</sup> N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 76 S. Ct. 753, 100 L. Ed. 1027 (1956); N.L.R.B. v. Insurance Agents Intern. Union, AFL-CIO, 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed. 2d 454 (1960); N.L.R.B. v. American Nat. Ins. Co., 343 U.S. 395, 72 S. Ct. 824, 96 L.Ed. 1027 (1952).

<sup>4</sup> N.L.R.B. v. American Nat. Ins. Co., 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952).

<sup>5</sup> H.K. Porter Co. v. N.L.R.B., 397 U.S. 99, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970).

<sup>6</sup> *Id.* at 103-104, 90 S.Ct. at 823.

Above and beyond this general requirement of good faith bargaining, it must be determined what topics are legally appropriate subjects of bargaining between labor and management. Subjects which pertain to “wages, hours, and other terms and conditions of employment” under Section 8(d) are considered mandatory subjects of bargaining about which the parties must bargain, absent waiver, and upon which neither party may be required to yield and either party may insist to the point of impasse.<sup>7</sup> In order to qualify as a mandatory subject of bargaining, the topic must directly concern, regulate, or settle an aspect of the relationship between the employer and its employees.<sup>8</sup> Subjects which are deemed to bear a close relationship to labor’s efforts to improve working conditions or which constitute a subject of immediate and legitimate concern to union members are generally within the scope of Section 8(d).<sup>9</sup>

Subjects not encompassed within the scope of Section 8(d) are considered “permissive” subjects of bargaining, about which the parties are not required to bargain. The parties may bargain about such matters if they so choose, but may not condition their willingness to negotiate or contract about matters which are mandatory subjects of bargaining upon concessions regarding permissive subjects, because such conduct would be tantamount to refusing to bargain over mandatory subjects.<sup>10</sup>

---

<sup>7</sup> 29 U.S.C. § 158(d); *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed. 2d 823 (1958).

<sup>8</sup> *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed. 2d 341 (1971).

<sup>9</sup> *Local 24, Intern. Broth. Of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL-CIO v. Oliver*, 358 U.S. 283, 79 S.Ct. 297, 3 L.Ed. 2d 312 (1959); *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed. 2d 640 (1965).

<sup>10</sup> *N.L.R.B. v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 78 S.Ct. 718, 2 L.Ed. 2d 823 (1958).  
*N.L.R.B. v. Truitt Mfg. Co.*, 351 U.S. 149, 76 S. Ct. 753, 100 L. Ed. 1027 (1956).

An additional legal component of the parties' conduct in bargaining relates to the exchange of information. The duty to bargain in good faith includes the obligation to furnish to the other party pertinent and relevant bargaining information, including any information which is relevant and necessary to the intelligent performance of that party's performance of its collective bargaining duty in negotiating or administering a collective bargaining agreement.<sup>11</sup> In order to meet the relevant and necessary standard, the requesting party needs to show only that the desired information is of probable or potential relevance to the carrying out of its statutory duties and responsibilities.<sup>12</sup> However, the duty to provide information does not extend to an employer's unwillingness to meet a union's financial demand.<sup>13</sup>

Finally with regard to legal implications, it should be noted that if the parties have otherwise bargained in good faith over a mandatory subject to the point of impasse, the duty to bargain is temporarily suspended, and either party may unilaterally institute changes consistent with or reasonably comprehended within its last pre-impasse offer.<sup>14</sup>

Within these legal parameters, it is fair to say that the NLRA and the Board take a rather *laissez faire* approach to the collective bargaining system. There is certainly no legal requirement for the parties to engage in a process which supports interest-based bargaining. While mandatory subjects must be discussed, they may be negotiated to the point of impasse, and indeed unilateral imposition, with little regulatory oversight. Likewise, while relevant information must be disclosed, financial information is protected and may be withheld.

---

<sup>11</sup> N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 76 S. Ct. 753, 100 L. Ed. 1027 (1956).

<sup>12</sup> N.L.R.B. v. Acme Industrial Co., 385 U.S. 432, 87 S.Ct. 565, 17 L.Ed. 2d 495 (1967).

<sup>13</sup> Richmond Recording Corp., 280 NLRB 615, 124 LRRM 1081 (1986).

<sup>14</sup> N.L.R.B. v. Katz, 369 U.S. 736, 82 S.Ct. 1107, 8 L.Ed. 2d 230 (1962); N.L.R.B. v. Crompton-Highland Mills, 337 U.S. 217, 69 S.Ct. 960, 93 L.Ed. 1320 (1949).

## THE ACADEMIC FOUNDATIONS OF INTEGRATIVE BARGAINING

### *Walton and McKersie's "Behavioral Theory of Labor Negotiations" (1965)*

Although the concept of integrative bargaining often traces its roots to Fisher and Ury's *Getting to Yes*,<sup>15</sup> many of the foundations of the concept, particularly in a labor-management context, can be found in the writings and speeches of Mary Parker Follett. Follett was a social worker, consultant, and author of books on democracy, and more specifically, human relations and management. Follett was one of the first to advocate the principle of integration and power-sharing. Her ideas on negotiation, conflict resolution, and employee participation were extremely influential in the development of studies in organizational management and development.<sup>16</sup>

Drawing upon the principles introduced by Follett, and sixteen years before Fisher and Ury published *Getting to Yes*, professors Richard Walton and Robert McKersie penned the first edition of their seminal work on social negotiations in a labor relations setting, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System*.<sup>17</sup> While obviously structured toward how parties interact in labor negotiations, the book provides sound principles for any social interaction wherein the parties are in actual or perceived conflict.<sup>18</sup> The following is a summary of Walton and McKersie's analysis of integrative bargaining in a labor relations context.

---

<sup>15</sup> ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., Penguin Books 2d ed. 1991) (1981).

<sup>16</sup> MARY PARKER FOLLETT, *DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT* (Henry Metcalf & Lionel Urick eds., Harper & Row 1942).

<sup>17</sup> RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* (McGraw Hill 1965).

<sup>18</sup> This treatise also discussed two other concepts which relate to the concept of integrative bargaining, and which contain integrative bargaining tools, "attitudinal structuring" and "intraorganizational bargaining". However, those concepts will not be dealt with herein.

In traditional distributive bargaining, the subject matter of negotiation is referred to as an “issue”. On the other hand, the subject matter of negotiation in integrative bargaining is referred to as a “problem”. The different terminology is reflected more than in the words themselves. “Issues” involve a fixed total objective value to be allocated between the parties; whereas “problems” are viewed as agenda items which have potential value to either or both parties.<sup>19</sup>

Of course, it should be recognized that rarely does an issue involve a pure gain to one side to a negotiation, with a corresponding loss to the other party. Likewise, it is seldom the case where the parties to a negotiation would be equally concerned about a particular problem and assign it the same priority. Accordingly, issues and problems are viewed, realistically, as containing mixed elements of both. In other words, issues can be viewed more appropriately as when gains to one party *tend* to involve corresponding sacrifices to the other. Likewise, the concept of a problem can be applied to situations in which the benefit to each party in resolving the agenda item varies to some degree, and both parties might not share equally in the joint gain. In fact, one may suffer minor inconveniences in order to provide substantial gains to the other. Presumably, this high benefit-low sacrifice discrepancy can be overcome by providing the inconvenienced party some reciprocal treatment in another problem area.<sup>20</sup>

In exploring integrative potential, two types of agenda items may be present. The first is where the agenda item, standing alone, offers both parties an improvement in their respective positions in the status quo. In other words, neither party experiences any loss in the resolution of that problem, and both move to a more favorable position. In the other

---

<sup>19</sup> RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM 127 (2d ed. Cornell University Press 1991) (1965).

<sup>20</sup> *Id.* at 127-128.

type of situation, none of the potential resolutions to a problem allow improvement on the status quo for both parties. Rather, the possible solutions present varying benefit-sacrifice ratios, and the parties must determine the best of the partially integrative solutions.<sup>21</sup>

Of course, agenda items which involve strictly economic values are much less likely to have integrative possibilities than items involving rights and obligations of the parties. Nevertheless, in the labor-management context, various agenda items possess a high potential for integrative problem-solving.<sup>22</sup>

The first is in the area of individual job security and management flexibility. Whenever employee job security is enhanced by seniority rights, there is a corresponding loss in management flexibility in managing manpower or operations, typically requiring a compromise between the two values. However, considerable integrative potential exists through imaginative and diligent problem-solving. In order to reach such a solution, it is essential to address the underlying concerns of both parties. In most cases, a balance must be struck between the union's interests in equity and predictability, against management's interests in maintaining requisite skill and ability. In successful cases where a balance is achieved, while there may not be a gain for both over the status quo, it can at least represent a high benefit-low sacrifice solution.<sup>23</sup>

Another area of integrative potential is in job preservation and management efficiency. The union's interest in preserving jobs often entails a corresponding sacrifice to management in operational efficiency. This is never more evident than in the company's consideration of subcontracting. From an issue perspective, the parties' positions are incompatible. The union desires a prohibition of the practice, while

---

<sup>21</sup> *Id.* at 128-129.

<sup>22</sup> *Id.* at 129.

<sup>23</sup> *Id.* at 129.

management desires unfettered discretion. Again, however, by exploring the reasons underlying the parties' positions, an integrative solution can emerge.<sup>24</sup>

From the union's perspective, its reasons may include: (1) protecting and enlarging its members' employment opportunities; (2) preserving the union's jurisdiction; (3) combating management's attempt to escape unionism; and (4) protection against nonunion competition. Management's interests could include: (5) more rapid completion; (6) more adequate skills and equipment; and (7) cost reduction. Absent antiunion objectives on the part of management, there is probably some integrative problem-solving potential. For example, management's rights could be qualified by procedures it must follow prior to a subcontracting decision, or by specifying conditions under which subcontracting could be permitted. In either case, the selection of the most integrative solution rests upon which alternative represents the maximum protection to the union with the minimum sacrifice of flexibility and efficiency on the part of the company.<sup>25</sup>

Whether in labor negotiations or other conflict situations, the process of integrative problem-solving requires a series of three steps: (1) identifying the problem; (2) searching for alternate solutions and their consequences; and (3) preference ordering of solutions and selecting a course of action. The first step requires a maximum exchange of information so that all potential problems can be identified. In other words, integrative possibilities can be fully explored only if mutual problems are disclosed. Defining the problem correctly after a full exchange of information will have great influence on how operational the criteria used to evaluate the solutions are.<sup>26</sup>

---

<sup>24</sup> *Id.* at 133.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 137-138.

The second step involves thorough and accurate gathering of information about alternatives and their consequences. This is important since potential solutions are not immediately apparent and have to be discovered, or invented. The parties have to be imaginative and creative in inventing and exploring the fullest range of alternative solutions.<sup>27</sup>

The third step requires the identification of the net utilities inuring to each of the parties. In order to be successful, the parties should not have a fixed idea as to the “best” solution, nor should they have a fixed idea as to what would be a minimally acceptable solution. Instead, they should engage in successive comparisons between alternatives and potential solutions.<sup>28</sup>

In order to be successful in this process, several psychological and motivational states must be present. First, the parties must have the motivation to solve the problem. The parties must also take the time necessary to discuss the problem. If there are differences in the parties’ respective motivations, difficulties will be encountered. Typically, the party with a higher motivation toward resolution will make a greater effort to disclose relevant information; will search for acceptable solutions for a longer period of time; and will develop higher standards for an acceptable solution.<sup>29</sup>

Additionally, the participants must have access to the necessary information and be authorized to use it. They must also have the language and communication skills adequate to allow for the exchange of information. With respect to the level of information, the problem will be inadequately defined if it is low. Further, with a low exchange of information, fewer alternatives will be generated and potential consequences

---

<sup>27</sup> *Id.* at 139.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 139-140.

will be inadequately explored. As a result, the process will lead to relatively low-grade solutions. With respect to inadequate use of language, the meanings of words are not fully shared and there will typically be resultant problems in compliance and implementation. It is also important for communication patterns to be open between all parties present in a negotiation, as opposed to being confined to single spokesperson.<sup>30</sup>

Finally, trust and a supportive climate are critical to effective problem-solving. If a supportive climate is lacking and a person anticipates a threat, he behaves defensively, diverting energy from problem-solving. That defensive behavior creates the same posture in others, further reducing the ability to solve problems. Additionally, if trust is lacking, the sender of information may deliberately miscommunicate and use the disclosure of information for purposes other than problem-solving. Conversely, trust and support lead to more complete and accurate reception of problem-relevant communications. Further, support allows for more experimentation and testing of ideas and solutions, resulting in more effective and durable solutions.<sup>31</sup>

***Walton, McKersie and Cutcher-Gershenfeld's "Strategic Negotiations" (1994)***

Building upon the theoretical framework in *A Behavioral Theory of Labor Negotiations*, Walton and McKersie, along with Joel Cutcher-Gershenfeld, developed a systematic theory relative to labor negotiations in their work entitled *Strategic Negotiations: A Theory of Change in Labor-Management Negotiations*.<sup>32</sup> This work arose out of the new industrial relations agenda of the 1980's and 1990's which was driven by international competition and domestic deregulation. The following is a

---

<sup>30</sup> *Id.* at 140.

<sup>31</sup> *Id.* at 141-142.

<sup>32</sup> RICHARD E. WALTON, ET AL., *STRATEGIC NEGOTIATIONS: A THEORY OF CHANGE IN LABOR-MANAGEMENT RELATIONS* (Harvard Business School Press 1994).

summary of the authors' more recent approach to integrative bargaining in labor relations.

Contrary to previous eras of labor-management relations where unions took the initiative in pressing for change, this era of competitiveness, they suggest, was marked by management taking the initiative in pressing for change to meet these new challenges.<sup>33</sup> In taking this initiative for change, management focused on three substantive areas: reduced payroll costs, increased flexibility in the assignment of workers, and more sustained contributions from workers in terms of more effective compliance techniques or increased employee motivation.<sup>34</sup> Although the appearance of an agenda by management was somewhat new to this era, labor was not without its own interests. Due to the vast restructuring and decline of the manufacturing sector, labor became increasingly concerned about preserving employment security. Additional initiatives by labor included placing a high priority on enhancing the career interests of their members; programs to improve the competitive position of their respective industries; joint planning with management at the strategic level; and the desire for increased access to business information.<sup>35</sup>

Confronted with these external pressures in this new era, management adopted one or a combination of three approaches: *escape* the existing labor relationship; *force* labor to make substantive changes; or *foster* substantive and social change.<sup>36</sup> As the last of these approaches represents the most integrative approach, that is the one which will be focused upon here.

---

<sup>33</sup> *Id.* at 5.

<sup>34</sup> *Id.* at 7.

<sup>35</sup> *Id.* at 8-9.

<sup>36</sup> *Id.* at 23.

A fostering strategy relies on justification and evidence for the need to change traditional methods of work to meet competition, and seeks to promote voluntary change rather than mere compliance. Fostering is typically used to develop a high level of commitment among employees and a more cooperative relationship between management and the union. In doing so, management attempts to negotiate a new relationship with workers through mutual commitment rather than through mutual compliance, and seeks a change in the traditional arm's length relationship, in the direction of a partnership. These changes are most often directed towards programs that require joint administration, such as training and quality. In this strategy, management seeks increased worker motivation, day-to-day participation in solving problems, improved quality and yield, and better equipment utilization. Additionally, management desires to have more of a problem-solving approach instead of legalistic approaches to issues in the workplace.<sup>37</sup>

Before addressing the keys to a successful fostering strategy, it is important to address under what circumstances such a strategy is desirable, and likewise, when it is feasible. In regard to the first issue, fostering may be desirable when management places low priority on substantive changes in work rules and the economic package, and when there is a high priority placed on moving toward a new social contract with employees based on commitment and cooperation. Such a strategy will be feasible when labor is expected to be relatively receptive to management's substantive agenda and social contract objectives.<sup>38</sup>

---

<sup>37</sup> *Id.* at 28.

<sup>38</sup> *Id.* at 60-61.

In order to achieve a successful fostering strategy, three negotiating processes are required: (1) integrative bargaining; (2) positively shaping the parties' attitudes towards each other; and (3) managing and influencing intraorganizational differences in one's own and the other's organization.<sup>39</sup> Each of the tactics necessary for these processes will be explored in greater depth.

As indicated above, integrative bargaining involves the function of finding common or complimentary interests and solving problems which confront both parties. Tactics center upon the exchange of accurate information, the examination of underlying interests, and the use of ordered problem-solving techniques. It typically requires good communication skills such as paraphrasing, active listening, brainstorming, and disclosure of feelings.<sup>40</sup>

Shaping intergroup attitudes focuses on the way the parties influence attitudes towards each other and the primary norms and tone of their relationship. In order to be truly effective, positive attitudes are essential. Negotiators should attempt to construct positive bonds between their respective organizations to facilitate an open exchange of information. Over time, these positive attitudes can form the basis of a more enduring and fundamental change in the social contract between labor and management; one that is based on commitment and cooperation.<sup>41</sup>

Managing internal differences serves to either build consensus or promote diversity of views within the interacting organizations. With respect to the management of internal differences within the one's own organization, goal consensus is an important

---

<sup>39</sup> *Id.* at 44. The latter two processes are obviously related to the ideas of "attitudinal structuring" and "intraorganizational bargaining introduced in A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM, *supra* note 5.

<sup>40</sup> *Id.* at 45.

<sup>41</sup> *Id.* at 45-46.

attribute. However, in an integrative context, some degree of internal diversity as to the optimum proposal to achieve that goal is beneficial, as it leads to the highest-quality solutions. Likewise, regarding the management of internal differences in the other party's organization, negotiators in an integrative setting desire to promote internal goal consensus in both parties, and recognize internal diversity regarding proposed solutions. Not only does this ensure the highest-quality problem solving, it minimizes the disruption caused by factional battles and avoids resistance during implementation.<sup>42</sup>

## **INTEGRATIVE BARGAINING PUT INTO PRACTICE**

### ***Enter the Federal Mediation and Conciliation Service***

Due to a record number of strikes following the end of World War II, Congress created, as part of the Taft-Hartley Act, the Federal Mediation and Conciliation Service ("FMCS"). The agency was organized as an independent agency of the federal government, "in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle disputes through conciliation and mediation".<sup>43</sup>

The agency's charter was enlarged by the 1978 Labor-Management Cooperation Act which authorized and directed the FMCS to encourage and support the establishment of plant and industry-wide joint labor-management committees "which are established for the purpose of improving labor-management relationships, job security, organizational effectiveness, enhancing economic development or involving workers in decisions

---

<sup>42</sup> *Id.* at 46-47.

<sup>43</sup> 29 U.S.C. § 173.

affecting their jobs including improving communication with respect to subjects of mutual interest and concern”.<sup>44</sup>

The traditional model of dispute resolution conducted by the FMCS consisted of crisis-intervention; third party assistance in the days and hours before contract expiration in an effort to avert a strike. However, as referenced above, the 1970’s began to witness substantial economic changes which have continued to the present, i.e. an internationalized economy, rapid technological advances, and deregulation of major industries. While these changes caused many labor-management relationships to assume a more adversarial posture, other labor and management leaders were persuaded to reconsider their traditional approach to negotiations and sought ways to work more collaboratively; respecting their institutional differences but attempting to discover mutual self-interest and common ground.<sup>45</sup> Concurrent with these changes and the revisions to its charter, the FMCS sought to utilize “preventive mediation” techniques to address the competitive pressures and improve economic performance necessitated by the new economic environment.<sup>46</sup>

Many of the changes witnessed by the FMCS included high-performance strategies to increase competitiveness, consisting of reorganization of work processes, transformation of how work is performed, and realignment of the labor-management relationship through mechanisms for increased employee involvement. Nevertheless, while acceptance of these methods extended widely across certain industry segments, it was still considered thinly-rooted, as most of American industry conducted its labor-

---

<sup>44</sup> 29 U.S.C. § 175a

<sup>45</sup> John Calhoun Wells & Wilma Liebman, *New Models of Negotiation, Dispute Resolution, and Joint Problem Solving*, 12 NEGOTIATION JOURNAL 119, 120 (1996).

<sup>46</sup> *Id.* at 122.

management relationship in the “old-fashioned” adversarial fashion. Notwithstanding this scarcity of acceptance, the emerging success stories were significant in that they occurred within strategic industries and powerful organizations.<sup>47</sup>

FMCS statistics compiled in 1995 began to reveal some of those success stories based on utilization of preventive mediation. From 1985-1994, the number of preventive mediation cases processed by the FMCS had increased 123 percent, from 960 in 1985 to 2140 in 1994. By policy directive of the current director in 1995, preventive mediation was to be recognized and treated as comparable in value to traditional dispute mediation. That same year, preventive mediation comprised 38 percent of the total caseload of the FMCS. In that era, under the then-leadership of Director John Calhoun Wells, the FMCS began offering services to adjust to the changing environment, including experimentation with new models of negotiation such as interest-based bargaining, joint-problem solving techniques, greater sharing of information and data, and the formation of joint labor-management committees.<sup>48</sup>

### ***Barrett’s “PAST” Model for Collective Bargaining***

FMCS’s emphasis on preventive mediation had begun to gain greater acceptance in 1989, when Jerome Barrett developed the “PAST” model (an acronym for defining a model of steps in the bargaining process: Principles, Assumptions, Steps and Techniques).<sup>49</sup> The following is a summary of how the PAST model is designed to work, as originally proposed by Barrett.

---

<sup>47</sup> *Id.* at 122-123.

<sup>48</sup> *Id.* at 124.

<sup>49</sup> Jerome T. Barrett, *A Win-Win Approach to Collective Bargaining: The Past Model*, 41 LABOR LAW JOURNAL 41 (1990); *see also* JEROME T. BARRETT, PAST IS THE FUTURE: A MODEL FOR INTEREST-BASED COLLECTIVE BARGAINING THAT WORKS (Jerome Barrett & Sons Publishing 1998); JEROME T. BARRETT & JOHN O’DOWD, INTEREST-BASED BARGAINING (Trafford Publishing 2005).

According to Barrett's model, the four underlying "Principles" which are critical to successful integrative bargaining are: focus on interests, not on personalities; focus on interests, not on positions; create options to satisfy mutual and separate interests; and evaluate options with objective standards, not power and leverage.<sup>50</sup>

Barrett's "Assumptions" flow directly from the Principles. These Assumptions influence the parties' underlying attitudes and behaviors about bargaining. Those Assumptions are: bargaining enhances the parties' relationship; both parties can win in bargaining; both parties should help each other win; open and frank discussion and information sharing expands the area of mutual interests, which in turn expands the options available to the parties; and mutually developed standards for evaluating options can move the decision-making process away from reliance on power.<sup>51</sup>

With these Principles and Assumptions guiding the process and the parties' approach to bargaining, Barrett's model moves to the "Steps" and "Techniques" necessary implement successful bargaining. The Steps are the "how to" of the process. The Steps in the pre-bargaining process are: preparation for bargaining and an effective opening statement. The Steps in the bargaining process itself are: agree on a list of issues; identify interests on one issue; develop options on one issue; create acceptable standards; and test the options with standards to achieve a solution or settlement.<sup>52</sup>

Regarding the preparation phase, Barrett acknowledged that the decision to engage in "win-win" bargaining necessitated a fundamental change in the way the parties prepare for bargaining. Accordingly, he felt that collaboration should begin in the preparation phase itself. For example, he concluded that the parties should jointly

---

<sup>50</sup> *Id.* at 42.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

examine their need for training in the process, as well as the amount of information and resources which would be necessary to assist them in the process. He also indicated that collaboration between the bargaining teams and their respective constituencies should begin during preparation.<sup>53</sup>

Also with respect to the pre-bargaining preparation step, Barrett's model calls for an effective opening statement which sets the tone for successful bargaining by indicating the parties' intentions of how they hope to engage in bargaining and suggesting ground rules for the process. Certainly, the ideas put forth in the opening statement should be developed in caucuses within each party, as well as with their respective constituencies, so that all shareholders are as informed as possible, surprises are minimized, and expectations from prior adversarial bargaining are adjusted.<sup>54</sup>

The Step involving the preparation of a list of issues requires an agreement on the issues or topics to be discussed, as early as possible in the negotiations. While other items can be added later, Barrett cautioned that it was important to obtain as comprehensive a list as possible, so that all parties are aware of the task ahead. Barrett also warned against the temptation, gained from prior bargaining, to turn the list of issues into a list of positions or demands or which otherwise indicated a preferred method of resolution of the issue. One method of guarding against this temptation, according to Barrett, was for the parties to develop the list of issues together, utilizing the techniques of brainstorming and consensus-building, discussed below.<sup>55</sup>

Regarding the Step of identifying interests, Barrett recommended starting with one issue, identifying each party's interest on that issue, sharing information, and

---

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 42-43.

identifying mutual interests. Barrett proposed that at least with respect to the first issue, the parties would likely be more comfortable identifying their interests in caucus before moving to a joint session to discuss and seek mutual interests. However, once the parties became more comfortable with the process, most of this work could subsequently be conducted in joint session.<sup>56</sup>

The process of developing options, according to Barrett's model, simply involves creating options which address those interests. In this Step, the use of brainstorming is essential. The next process involves creating acceptable standards. Here, the parties are trying to reduce the impact of power on the relationship and shift the basis of decision-making to standards that are fair and mutually agreed upon. Again, brainstorming is essential as the parties invent their own standards for judging the options related to a particular issue. After a sufficient number of standards have been created, a consensus can hopefully be reached on which ones provide the most effective basis for evaluating the options. Typical standards may include fairness, simplicity, or industry practice.<sup>57</sup>

In the Step involving the testing of options, the parties test the options they have developed against the standards which have been agreed upon in order to determine which options best address their interests on an issue. In this process, the technique of consensus decision-making is essential. Once the parties have worked through the process by these steps, the next issue is taken up in the same manner, and so on.<sup>58</sup>

The Techniques of the model include: idea charting; brainstorming; and consensus decision making. Idea charting involves writing ideas on a flip chart to focus the group's attention, to externalize individual and group ideas, and to provide a record of

---

<sup>56</sup> *Id.* at 43.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

the group's deliberations. The Technique of brainstorming, mentioned above in the option step, is a group process for generating ideas with an emphasis on quantity and not quality. The key to effective brainstorming is that ideas are not to be judged, either verbally or nonverbally, during the process. Any judging or evaluating is more appropriately conducted in the consensus decision-building technique. Consensus decision-making occurs when each party can honestly say that they have "been heard" and while they may not prefer a particular solution, they support it because it was arrived at openly and fairly, and is the best solution possible under the circumstances. It does not involve compromising or "horse-trading", nor does it involve voting majorities, but a solution that represents the best possible course of action that represents an attempt to meet the maximum number of everyone's interests and concerns.<sup>59</sup>

***"Interest-Based Bargaining" Arises at the FMCS***

The experience of FMCS with the PAST model over its first five years in practice revealed both positive and negative effects. From the positive perspective, results showed that PAST bargaining almost inevitably resulted in an agreement, an improved relationship between the parties, and a favorable outlook for future use. On the negative side, the process consumed an enormous amount of time and energy, required almost constant third party facilitation, and created massive amount of information on flip charts which burdened the process. Additionally, the PAST model required delayed handling of economic issues, which resulted in difficulties even among the most collaborative of negotiators, who were surprised by the economic obstacles at the end of the process. Although the FMCS was pleased with the promise offered by the PAST model as a

---

<sup>59</sup> JEROME T. BARRETT, PAST IS THE FUTURE: A MODEL FOR INTEREST-BASED COLLECTIVE BARGAINING THAT WORKS, *supra* note 71, at 85-91.

means of providing an integrative process in labor negotiations, it looked for ways to improve the process. Accordingly, the FMCS attempted to systematically analyze the negative aspects of the PAST model and seek to formulate methods to deal with those issues.<sup>60</sup>

The first issue related to the vagueness and lack of specificity with which issues were placed on the agenda. Simply placing an issue such as “holidays” or “vacations” on the agenda left open the question as to what component of that issue was important to the party placing it on the agenda, and left an overly generalized list of issues without proper focus. The next related issue dealt with the concept of developing interests without first holding a group discussion about the issue. Moving into the interest-generating phase of the PAST model without a more focused discussion of the issue also led to a lack of focus as the parties moved forward. Without a clear understanding of the issue, the relevant interests became clouded.<sup>61</sup>

Another concern with the PAST model involved the bargainers’ tendency to think in terms of solutions, or options, rather than interests. Even with training in the PAST model, it proved difficult for bargainers to fully explore all interests underlying the issues before attempting to find solutions. This fact, coupled with the inadequate issue definition mentioned above, generally resulted in a proliferation of extraneous issues that slowed the process in a frustrating fashion.<sup>62</sup>

Many FMCS mediators also felt that the PAST model caused some confusion over how to develop a list of standards in order to ensure that options which were

---

<sup>60</sup> Carolyn Brommer, et al., *Cooperative Bargaining Styles at FMCS: A Movement Toward Choices*, 2 PEPP. DISP. RESOL. L.J. 465, 469-470 (2002).

<sup>61</sup> *Id.* at 470.

<sup>62</sup> *Id.* at 471.

generated satisfied the parties' interests. While early trials of the PAST model attempted to have the parties use joint consensus-building tools to arrive at these standards, this process was likewise extremely time-consuming. Consequently, the model was revised to provide a standardized list of criteria that could be employed in every bargaining session, including: acceptable to constituents, fair and equitable, understandable and simple, workable and manageable, affordable and cost-effective, flexible, and mutually beneficial. This boilerplate system was likewise problematic due to the fact that the participants did not participate in the development of the criteria. As a result, the groups were not encouraged to ensure whether the options indeed satisfied their respective interests.<sup>63</sup>

The final area of concern, economic issues, proved to be the most problematic. The PAST model was set up to deal with non-economic issues first, then move to the economic issues. While the PAST worked fairly efficiently and as intended in the non-economic areas, the parties would become increasingly hesitant and guarded in their approach as the negotiations marched toward a discussion of the economic terms. As a result, the parties tended to become more traditional, or adversarial, in their bargaining as the time for dealing with economic issues approached.<sup>64</sup>

Thus, by the mid-1990's the FMCS had analyzed and practiced the PAST model sufficiently to arrive at a "new and improved" version, which it termed "Interest-Based Bargaining" ("IBB"). The FMCS system was careful not to use the term "mutual gains", as it implied to some potential users that negotiations would result in a gain on every issue that was at least equal to the amount of gain they perceived the other party had

---

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

achieved. Falling short of that ideal expectation lead to the conclusion that the other party has not bargained cooperatively, potentially dooming the prospect of a successful IBB negotiation. It was imperative, in the eyes of the FMCS, for the mediator to spend sufficient time in making sure that the parties understand that in IBB, success is not measured by gains on individual issues, but that it is intended to provide the best solution available which meets the interests that arise during the process.<sup>65</sup>

Additionally, the FMCS readily acknowledged that IBB would not be appropriate to every bargaining relationship. FMCS mediators were encouraged to assess several indicators for the potential use of IBB:

- Evidence of successful labor-management cooperation during the term of the past contract.
- The willingness of the parties to fully share bargaining information.
- Sufficient time remaining prior to contract expiration to complete the necessary sequence of assessment/decision-making, training, and application of the IBB process.
- A willingness to forego the use of power to secure outcomes.
- The absence of clearly divisive, critical issues and/or fixed positions on important issues.
- An understanding and acceptance of the process by key decision-makers, bargaining teams and constituents.

---

<sup>65</sup> *Id.* at 472-473.

- Significant motivation by the parties to change their existing traditional bargaining styles.<sup>66</sup>

Once it is determined that IBB is appropriate to the parties' bargaining relationship, the revised FMCS process requires pre-bargaining training in order for team members to learn the steps and techniques of IBB, and also how to extinguish traditional bargaining behaviors which would be fatal to a successful IBB relationship. The training involves a general presentation of IBB principles versus traditional bargaining; an evaluation and discussion of the concept of "interests" versus "positions"; and skills building in brainstorming, consensus decision-making and effective communication. The training is concluded by conducting a separate caucus with each party in order to obtain feedback on the feasibility of using IBB.<sup>67</sup>

Following the pre-bargaining training, the FMCS mediator conducts a pre-negotiation meeting to address certain critical tasks. The first is to develop ground rules under which the bargaining will be conducted, including team composition, questions of quorum, timing and scheduling of meetings, communications both inside and outside bargaining sessions, and methods of documenting tentative agreements. The next task involves the development of rules for the smooth transition to traditional bargaining without litigation in the event the IBB process breaks down. This includes answering contingency questions such as notice to the other side, handling of tentative agreements already reached, and the ability to add agenda items in subsequent traditional bargaining sessions.<sup>68</sup>

---

<sup>66</sup> *Id.* at 473.

<sup>67</sup> *Id.* at 473-474.

<sup>68</sup> *Id.* at 474-475.

In order to avoid some of the pitfalls of the PAST model discussed above, the next task is to provide focus on the exchange of issues. The IBB model suggests that each issue be put in the form of a question which cannot be answered with a single word and which does not contain an implication of a proposed solution, and if there is any existing contract language on the issue, it should include the relevant citation.<sup>69</sup>

The next task is to focus each issue by having the party who raised that issue, provide detailed reasons and background for its introduction into the process. This provides focus for the particular issue and frames its boundaries in context. This process is designed to shorten the time necessary to process the issues, avoids discussion of irrelevant matters, and aids in reducing the number of interests expressed that are unrelated to the underlying problem. Following this task, the mediator assists the parties in developing a list of interests that accompany each issue.<sup>70</sup>

The process then turns to the development of standards to measure the efficacy and acceptability of options which are generated through brainstorming. The current FMCS model employs a three-step “Factor Analysis System” as a best practice. The three factors employed are feasibility, benefit, and acceptability. The feasibility factor addresses whether the option is capable of being carried out, and includes considerations such as legality, affordability or cost effectiveness, workability, practicality or manageability, understanding or simplicity, and flexibility.<sup>71</sup>

The benefit factor involves an investigation of the extent to which the option under consideration contributes to an improvement in the condition underlying the issue presented. It links the interests with the option proposed, by addressing whether the

---

<sup>69</sup> *Id.* at 475.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 476.

option satisfies an important interest listed and/or whether the option harms any of the listed interests.<sup>72</sup>

The acceptability factor simply addresses whether the option generated will be able to achieve formal approval. This factor attempts to answer whether one or both parties' constituents will approve the option, and if not, why not; and whether the option can be revised to make it acceptable.<sup>73</sup>

Finally, as mentioned above, one of the fundamental flaws in the PAST model was the difficulty in encountering economic issues in an interest-based process. The FMCS attempted to develop a strategy to deal with this shortcoming through a device known as an "ABC filter". This process is designed to be introduced as late as possible in the process to avoid early positioning on topics which truly have more integrative potential, and also to build further support for the IBB process before commencing to negotiate economic issues. The ABC filter employs the following sequential steps:

1. Place in order the final set of issues that need discussion and resolution, with direct compensation always last.
2. Take the first issue and follow the IBB steps of focusing on the issue, developing interests, and brainstorming options.
3. Categorize the options into one of three categories by group consensus:
  - "A" – Tentative agreement, regardless of what the rest of the economic package might be.
  - "B" – Eliminate regardless of what the rest of the economic package might be.

---

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

“C” – Hold for later consideration.

4. Work the remaining issues through the “ABC” filter.

5. Those options remaining in the C category are all that is left to be processed to obtain a final contract.<sup>74</sup>

The FMCS procedure emphasizes that a short intervention by the mediator on this process is needed before commencing discussion of economic issues to reaffirm the parties commitment to IBB principles, and that the mediator should be prepared to more actively involved at this stage to counteract any tendency of the parties to revert to traditional styles at this stage.<sup>75</sup>

### ***The Results***

Of course, the question arises as to whether “the proof is in the pudding” on the effectiveness of IBB for the FMCS. From 1995 to 2001, 8% of the dispute mediations handled by FMCS mediators resulted in a work stoppage or lockout. Of course, it requires no empirical data to state that FMCS mediators are generally only involved in traditional negotiations where there are difficulties, so that percentage should not be surprising. However, it should also be noted that for the same period in which FMCS mediators conducted 1500 IBB negotiations, only 3, or less than one-half of one percent, resulted in a work stoppage or lockout.<sup>76</sup>

On the other hand, data from selected private sector negotiations obtained from the FMCS covering the period 1997-1999, revealed that while approximately 80 percent of union leaders were familiar with the concept, only 47 percent of those had ever employed it in their negotiations. As a percentage of the total sample of those who were

---

<sup>74</sup> *Id.* at 477.

<sup>75</sup> *Id.* at 478.

<sup>76</sup> *Id.* at 480.

familiar with the process, only 22% of union leaders preferred integrative bargaining. By the same token, for that same time period, approximately 67 percent of management personnel surveyed were familiar with the concept, yet only about 36 percent of those had ever employed it in their negotiations. Of that percentage, only 25 percent of the management respondents indicated that they preferred integrative bargaining. Each of these percentages represented an increase over prior studies from the FMCS. However, a disparity is seen in labor and management's rating of the process. Whereas only about 54 percent of union negotiators who had some experience with the process rated it as good, very good or excellent; over 70 percent of management personnel who were familiar with the process rated it in those favorable terms. It is further interesting to note that these numbers regarding satisfaction with the process represented a decline from previous studies.<sup>77</sup>

Perhaps the failure of integrative bargaining to achieve its full utilization lies in the challenges it presents to labor and management. Make no mistake about it; integrative bargaining is a complex proposition. Collective bargaining issues cover a wide spectrum, from highly distributive issues such as wages and employment security, to highly integrative topics such as health and safety, and work organization. One of the other complicating factors is the divergent internal interests within labor and management which require significant investment in intraorganizational bargaining, especially when the bargaining covers multiple locations and/or unions with leaders accountable to different constituencies. An additional challenge rests in the continuous nature of labor

---

<sup>77</sup> Joel Cutcher-Gershenfeld & Thomas Kochan, *Taking Stock: Collective Bargaining at the Turn of the Century*, 58 *INDUSTRIAL AND LABOR RELATIONS REVIEW* 3, 13-14 (2004-2005); *see also*, Joel Cutcher-Gershenfeld, et al., *How Do Labor and Management View Collective Bargaining?* 121 *MONTHLY LAB. REV.*, October 1998 at 23, 23-29.

relations, which produces strong emotional links that carry over and ingrain attitudes and trust levels from prior negotiations, as well as the day-to-day interactions which occur and impact the parties' relationship. The historical tensions between labor and management, coupled with adversarial negotiation styles, have historically produced a low-trust relationship between the parties.<sup>78</sup>

Despite these challenges, if implemented effectively, integrative bargaining has been shown to improve organizational performance (quality and productivity), and employee outcomes (job security, wages, and job satisfaction). Additionally, a number of success stories have emerged, primarily in the airline, automotive, glass and ceramics, and steel industries. However, only a handful of in-depth case studies are available which fully address how it has impacted the parties' ongoing relationship and business performance.<sup>79</sup>

One such study was performed in Canada in the late 1990's, which addressed the impact of integrative bargaining on collective bargaining outcomes. The study sought to identify what types of changes were engendered by agreements reached through integrative bargaining, who benefited from those changes, and what innovations were accomplished through the process.<sup>80</sup>

With respect to the types of changes produced through integrative bargaining, the study revealed that agreements which were the product of that process contained changes dealing with grievances and disciplinary measures (new and simplified processes), work organization (teamwork, new shifts, job flexibility), and labor relations (joint committees,

---

<sup>78</sup> Nils O. Fonstad, et al., *Interest-Based Bargaining in a Transformed Labor-Management Setting*, 20 NEGOTIATION JOURNAL 5, 9 (2004).

<sup>79</sup> *Id.* at 9-10.

<sup>80</sup> Renaud Paquet, et al., *Does Interest-Based Bargaining (IBB) Really Make a Difference in Collective Bargaining Outcomes?* 16 NEGOTIATION JOURNAL 281 (2000).

partnership initiatives, and business policy). As to which party benefited most from integrative bargaining, the study revealed that integrative agreements actually involved more union concessions than agreements reached through traditional bargaining. This applied not only in monetary terms, but also in work hours and scheduling. Nevertheless, the study concluded in this respect that the agreements produced a far greater number of mutual gains in other areas, than observed in traditional bargaining.<sup>81</sup>

Regarding the types of innovations produced through integrative bargaining, the study indicated that innovations are present more often and their character is more diversified than in traditional bargaining. Innovations included changes in: (1) union-management cooperation (joint committees, quality of work life, sharing financial data, continuous bargaining, participation in strategic management); (2) functional flexibility and teamwork (job rotation and consolidation, self-managed work teams, job enrichment); (3) organization of work time (work schedule sharing, job sharing, compressed workweek); (4) remuneration system (productivity gain-sharing, profit-sharing, pay-for-knowledge, ownership incentives); (5) training (re-skilling policy, ongoing training, cross-training); and (6) social contract/job security (extended contract period, guaranteed number of jobs, new dispute resolution mechanisms, union participation in organizational structure). Perhaps the most significant conclusion of the study rests in these innovations resulting from integrative bargaining, which helps the firm adapt to a changing environment.<sup>82</sup>

---

<sup>81</sup> *Id.* at 292.

<sup>82</sup> *Id.* at 291.

## **THE IMPORTANCE AND CHALLENGES OF SKILLS TRAINING IN INTEREST-BASED COLLECTIVE BARGAINING**

As indicated above, despite the interest in and efforts toward integrative bargaining, it has proven difficult to implement. While the ideas behind the process are powerful and interesting to negotiators, how they are applied in practice is difficult to capture. One very practical hurdle to the implementation of integrative bargaining is the financial cost. The training necessary to implement the process is more than many bargaining units can afford, and management may be reluctant to bear the burden. Even if management does pay all the cost, or a larger portion of the training than does the union, the neutrality of the trainers may be called into question. An additional constraint on the process is the structure of labor negotiations in general. Constituents are highly mobilized; experienced, professional negotiators have an established way of negotiating; and the manner in which the labor laws are structured, encourage negotiators to conduct their activities in a manner inconsistent with the foundations of integrative bargaining.<sup>83</sup>

In 1998, the Program on Negotiation at Harvard Law School, in conjunction with the U.S. Department of Labor, performed a study on three contract negotiations where training on integrative bargaining was conducted. As a result of that study, three alternative approaches to integrative bargaining skills training were advanced. First, it was recommended that involvement in the process be expanded. This study concluded that trainers in the process could not simply enter a bargaining situation, spend a few days with the parties, and then leave the parties to negotiate their agreement. Rather, the trainers need to become involved with more participants in the process, and over longer periods of time, throughout the entire course of negotiations. After the actual negotiations

---

<sup>83</sup> Raymond A. Friedman, *From Theory to Practice: Critical Choices for 'Mutual Gains' Training*, 8 NEGOTIATION JOURNAL 91 (1992).

conclude, the trainers should continue the relationship, helping the parties implement the changes that were agreed upon. Of course, the drawback to this model is that it requires a substantial financial investment in continued facilitation.<sup>84</sup>

As an alternative to this limitation, it was suggested that the trainer could expand the behavioral clarity of the training. In other words, if it is not financially possible to be extensively involved as would otherwise be optimal, the trainer can provide negotiators with a very clear and detailed set of guidelines for conducting negotiations in the trainer's absence. This approach could be attractive to parties who perhaps do not wish to jointly examine their broader relationship.<sup>85</sup>

Finally, the trainers can expand their control of the process. The study suggested that trainers can both expand their involvement and the behavioral clarity of their recommendations, by injecting themselves into the process and instructing negotiators before and during the process, and remaining available to negotiators throughout the process. This alternative gives trainers a high degree of control by determining what happens before, during, and after the negotiations. This type of control enables the trainers to drive the process, ensure that the objectives of the process are satisfied, and constituent relations are managed appropriately.<sup>86</sup>

In the concluding comments from this study, it was noted that simulations of real bargaining issues (with role reversals) are an essential ingredient of training, and some outside facilitation is required after the actual training is concluded. It was also pointed out that the training should include constituents. The study's results indicated that the challenges presented by this training could make it likely that only large bargaining units

---

<sup>84</sup> *Id.* at 94.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 94-95.

will take the initiative, and that the limited, discreet training initiatives are less likely to have a sustained impact on the parties' long-term relationship. The chosen approach, the study concluded, will depend on the size and wealth of the bargaining unit, the degree of risk to constituent relations that is acceptable, and the availability of qualified trainers with the requisite skills and credibility.<sup>87</sup>

Based upon that same study, Hunter and McKersie also assessed the need for training in integrative bargaining, and that it should be broad in scope. In doing so, they pointed out that labor negotiations exist on two levels, the negotiation process and the underlying structure of collective bargaining. The first level, the negotiation process, consists of the bargaining agenda, bargaining characteristics, and parties to the negotiation. The second level, the bargaining structure, includes the contract language, the locus of dispute resolution mechanisms, and the representatives in the process. Their argument was that changes in the negotiation process are unlikely to be durable unless they are accompanied by changes in the fundamental structure of collective bargaining.<sup>88</sup>

More specifically, with respect to level one, in traditional bargaining, the agenda consists of narrow subjects which are legally considered mandatory for discussion. In integrative bargaining, the agenda must include a broad range of topics, including all topics of interest to the parties. The negotiation characteristics in traditional bargaining are short, intense, and positional. However, in integrative bargaining, the negotiation process is long, exploratory, and interest-based. In traditional bargaining, there is a small

---

<sup>87</sup> *Id.* at 97-98.

<sup>88</sup> Larry W. Hunter & Robert B. McKersie, *Can 'Mutual Gains' Training Change Labor-Management Relationships?* 8 NEGOTIATION JOURNAL 319, 325-326 (1992).

number of parties at the table. In integrative bargaining, anyone with an interest in the process is allowed to participate.<sup>89</sup>

With respect to the more fundamental changes which are necessary, the negotiations on contract language must move from specific, detailed language which is characteristic of traditional bargaining, to contract language which is more focused on broad principles, viewing the contract as a “living document”. With respect to the locus of dispute resolution arising between the parties, the parties must shift from dealing with grievances on an episodic basis grounded in formal negotiations, to a continuous and informal, joint problem-solving process. Regarding the representatives involved in the process, the parties should move away from reliance on national representatives who are professional negotiators, to individuals who are locally chosen and sensitive to local concerns.<sup>90</sup> Hunter and McKersie concluded that only when the parties agree that training will address not only negotiating skills, but the fundamental underlying relationship will the full potential of integrative bargaining be fully realized.<sup>91</sup>

Given the fundamental change in the parties’ relationship which is essential to integrative bargaining, it is clear that the parties must invest a substantial amount of time and resources toward training in the skills which are necessary for productive integrative bargaining. Susskind and Landry proposed a six-step process toward that end<sup>92</sup>:

- *Step 1: Pre-training private meetings with each side.* The trainer meets privately with a substantial segment of the leadership of each side to develop rapport and begin the process of familiarizing each party with what will be required in the

---

<sup>89</sup> *Id.* at 326.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 328.

<sup>92</sup> Lawrence E. Susskind & Elaine M. Landry, *Implementing a Mutual Gains Approach to Collective Bargaining*, 7 NEGOTIATION JOURNAL 5 (1991).

upcoming negotiations. At these sessions, questions can be raised which would otherwise be inappropriate in joint sessions at this early stage.

- *Step 2: Initial joint training session emphasizing individual skill building.* Union and management are encouraged to send all interested persons to a one-day training session. This allows both parties to hear about the process before making a commitment to apply the concept to the upcoming negotiations. The trainer introduces integrative bargaining in a way that applies to all forms of conflict, not just collective bargaining.
- *Step 3: Initial joint training session for members of both bargaining teams.* An off-site session for all members of both bargaining teams is conducted, for a minimum of two days. At this stage, the parties use negotiation simulations based on the agendas likely to arise in the upcoming negotiations. However, the participants should reverse their normal roles. During debriefing, time should be allotted for joint review of the results of the simulation, as well as for private sessions that allow each side to speak freely about their responses to the simulations.
- *Step 4: A second joint training session for members of both bargaining teams.* At least several months before the expiration of the current contract, a joint two-day session is conducted. The first day is to review the key elements of the process, and the second day is utilized to arrive at an agreement regarding the ground rules for the upcoming negotiations.
- *Step 5: Coaching during contract bargaining.* Face-to-face meetings with both bargaining teams are conducted, to assist both sides in living up to the

commitments they made regarding the desired changes in the bargaining process. The role of the trainer is not as a mediator offering potential solutions, but as a coach on the bargaining process.

- *Step 6: Post-contract follow-up aimed at institutionalizing the process.* At the conclusion of bargaining, a joint debriefing and training session is held, aimed at future problem-solving during implementation. The focus is away from contract bargaining, towards a mutual gains approach to dealing with employment issues. At least two training sessions per year are recommended.<sup>93</sup>

Susskind and Landry offer other suggestions regarding the design of joint training sessions for integrative bargaining. In the context of bargaining simulations, they suggest that they should be realistic in the sense that they should deal with the same issues that the parties will face in their negotiations. While some can learn cross-contextually, individuals can gain more from concepts which are introduced in a familiar context, dealing with real problems the parties face. Additionally, role-reversal can be an excellent learning strategy, as it helps both sides understand the other party's problems and issues. This strategy also helps ensure that neither party will be placed in the position of disclosing their true position in a simulation.<sup>94</sup>

It is also suggested that debriefing time should be divided. The first debriefing session should be performed jointly, with the different results produced by simulations compared. The relationship between the negotiation strategies adopted and the resultant outcomes should be carefully reviewed. Following the joint session, time should be set aside for private debriefing sessions wherein team members can discuss what negotiating

---

<sup>93</sup> *Id.* at 7-8.

<sup>94</sup> *Id.* at 8-9.

moves were successful and which were not, and the possible reasons. Finally, the trainers should reconvene the joint session and discuss in general terms about what the training was designed to teach the parties about the process, and whether those objectives were accomplished.<sup>95</sup>

Susskind and Landry also point out that in order to enhance the possibility of success, the training process should begin at least six months before the contract expiration date. They propose that joint training is most likely to succeed where both sides have been unhappy with previous bargaining and/or both sides have relatively inexperienced bargaining teams. In the latter case, there is less resistance to implementing a new initiative. Finally, it is critical not to raise expectations unreasonably when beginning to implement integrative bargaining. The parties should realize that the process will require a sustained commitment, and the option of returning to traditional bargaining is not compromised by exploring this new approach.<sup>96</sup>

The use of simulations in training is not without its challenges. Oftentimes, in negotiation skills training, the parties will tend to look for hidden agendas in the other party's expression of its interests, assuming that the other side is hiding their true interests. As a result, each party attempts to strategize around the other's expressed interests. At the risk of over-simplification, trainers must point out this shortcoming to the parties and force them to recognize the limitations it imposes on the effectiveness of the process.<sup>97</sup> Additionally, the parties may encounter difficulty in inventing options and making room for creativity. In order to avoid this dilemma, the parties must understand

---

<sup>95</sup> *Id.* at 9.

<sup>96</sup> *Id.*

<sup>97</sup> CHARLES C. HECKSCHER, *Searching for Mutual Gains in Labor Relations in* NEGOTIATION: STRATEGIES FOR MUTUAL GAIN: THE BASIC SEMINAR OF THE HARVARD PROGRAM ON NEGOTIATION, 86, 100 (Lavinia Hall, ed., Sage 1993)

that the options invented by the parties are not binding, and should also strive to include more participants in the process.<sup>98</sup>

Finally, the parties' constituents may present an obstacle to the process. Both sides are typically aware of the potential gap between their own intentions and approaches to the negotiations, as opposed to those which hold the final authority. In response, trainers must work hard to promote effective communications between the negotiators and their constituents.<sup>99</sup>

The issue of trust is another critical component in approaches to interest-based bargaining. Union negotiators, in particular, typically feel more vulnerable in the process and therefore subject to regret if the process fails. This reticence is based upon the fact that interest-based techniques require much more research and analysis of information than is seen in traditional bargaining. Negotiators are required to objectively review large amounts of information in order to sufficiently explore options. The union, however, has far fewer resources with which to conduct this research and is dependent on management for obtaining and analyzing the information. Accordingly, some degree of vulnerability may attach.<sup>100</sup>

Additionally, an interest-based approach to bargaining requires that each side should not come to the table with specific positions and not overly committed to specific outcomes. On the other hand, commitment from the union's constituents is an important source of the union's power. Failure of the process without having the commitment of constituents may lead to regret. Finally, management may have a basic lack of acceptance

---

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 101.

<sup>100</sup> Raymond A. Friedman, *Missing Ingredients in Mutual Gains Bargaining Theory*, 10 NEGOTIATION JOURNAL 265, 272-273 (1994).

of the union, and the use of interest-based bargaining may either be seen as, or have the real objective of weakening the union. Some union officials and their constituents may feel that interest-based bargaining will give management more authority than it already has, weaken the autonomy of the union, and create the impression that the union is not necessary. All of these issues create some risk for the union, which can be mitigated by mutual trust in the parties and the process.<sup>101</sup>

In order to address these concerns, Friedman suggested three directions for change in the process. First, he suggested that barriers of mistrust could be removed so that the union is willing to take actions which have some inherent risk. Second, he proposed that the structure of the negotiations should be reshaped so that traditional behaviors are not reinforced. Third, he suggested that the parties take steps to lessen any current power imbalances inherent in the present relationship.<sup>102</sup>

With respect to the first suggestion, Friedman suggested that the bargaining teams should find ways to spend time together in a setting which is not antagonistic, with general conversation about such things family, social activities, and the like. He also suggested that trust could be enhanced by having the parties attempt to identify common superordinate goals concerning the business and their relationship. If the two sides can recognize some mutual core interests, it can become easier to trust the other side.<sup>103</sup>

Friedman also indicated that trust could be enhanced by avoiding actions that are feared by the other side. For example, the source of mistrust may be due to worry that the other side is contemplating some specific action; such as if the union constituency has threatened a work stoppage or management is committed to a new subcontracting

---

<sup>101</sup> *Id.* at 273.

<sup>102</sup> *Id.* at 274.

<sup>103</sup> *Id.* at 274-275.

initiative. By making the statement that those actions are not planned, trust can be enhanced. Additionally, if mistrust is present due to prior wrongs committed in past bargaining or in the relationship in general, real or perceived, it can be important to discuss and reexamine the source of those events and what triggered the mistrust. Along that same line, if particular individuals are associated with those past unpleasanties, it may be advisable to make sure those individuals are not assigned to the bargaining teams. Finally, with respect to the improvement of the trust factor, in order for both teams to trust the claims made by the others, they must share information, and be convinced that there is no additional data which would reveal a different conclusion. Accordingly, books should be open and shared.<sup>104</sup>

With respect to changing the structure of the negotiations, Friedman offered several suggestions. First, he proposed that new individuals should be added to the bargaining teams who are not professional negotiators and who would not be so predisposed to engage in the rituals of traditional bargaining. It is also suggested that the leadership expectations should be reshaped, by assigning several people to be co-leaders, assigning no leaders, or assigning a leadership role to an individual who does not have a controlling personality.

Friedman also proposed that bargaining teams should be given the time to form early, in order that trust and acceptance can begin to form prior to actual negotiations. Additionally, constituents should have a seat at the table; those who work at the site and know its inner workings. For management this would mean line managers, and for the union this means rank-and-file members. Along that same line, constituents should be explicitly informed about what information will be shared and when it will be shared. For

---

<sup>104</sup> *Id.* at 275.

constituents who will be at the table, they should receive some training in managing constituent expectations. Additionally, selected constituents themselves, even those who will not be on the bargaining teams, should receive some training about the process.<sup>105</sup>

As to the challenge of changing possible power imbalances, Friedman suggested that this may well be the most challenging area to address. The first proposal is to ensure that the union does not feel out-staffed or disadvantaged since one of the most important sources of power imbalance is the difference in the ability to gather and process information. Negotiators should set up a joint process of gathering data and agree to share all relevant information. Additionally, it is suggested that an early deadline be set. The rationale is that since the union's primary concern is that they might run the risk of foregoing efforts to mobilize members when an interest-based approach is going to be attempted, that concern can be lessened by setting an early deadline prior to contract expiration within which the new approach should be completed. Finally, management should guarantee acceptance of the union by making it clear that it will not use the effort to destroy the union.<sup>106</sup>

Additionally, in order for integrative bargaining to be successful, it is important that the parties develop a collegial atmosphere, working in an environment of openness, trust, and respect. They must learn how to focus on substantive issues rather than issues of personality. In accomplishing this objective, management holds the key. Such a relationship cannot be developed on the eve of negotiations, but must be initiated and maintained over time, throughout the workforce, and in daily interactions as well as in formal bargaining. Managers must maintain the highest personal credibility and

---

<sup>105</sup> *Id.* at 276-277.

<sup>106</sup> *Id.* at 277-278.

demonstrate respect for union leaders as individuals and for the union as an institution. When credibility and respect are demonstrated, reciprocal behavior leading to a collegial relationship is likely to follow. While a close personal relationship is not necessary (and could likely lead to a compromise of objectivity) a balance of friendship and objectivity can help the parties deal with the uncertainty and vulnerability required in integrative bargaining. It is equally important to note that a collegial relationship among labor and management leaders sets an example for others across the organization that can foster a transformation of attitudes across the entire organization.<sup>107</sup>

Blackard offers a few of the tools necessary to foster a collegial relationship, which are listed as follows:

- Learn more about each other's personal lives: personal interests, families, hobbies, etc.
- Look for community, political, or charitable activities the parties may have in common and can work together on.
- Find occasions to have meals and/or breaks together.
- Support the union on its community activities whenever possible.
- Include union leaders in meetings with important visitors when possible.
- Jointly communicate on issues of mutual interest.<sup>108</sup>

Moving closer to the bargaining process itself, planning and preparation are important in either traditional or integrative bargaining. However, in integrative bargaining, this process should not be carried out independently of the other party. Rather, there should be joint processes for gathering information, analyzing data, and

---

<sup>107</sup> KIRK BLACKARD, *MANAGING CHANGE IN A UNIONIZED WORKPLACE: COUNTERVAILING COLLABORATION* 199 (Quorum Books 2000).

<sup>108</sup> *Id.*

deciding on which issues are to be addressed. Blackard suggests these tasks would typically be accomplished through the following mechanisms:

- A joint steering committee to oversee the entire process.
- Joint workshops for identifying issues and making joint decisions.
- Procedures for involving a broad group of represented employees, supervisors, and managers.
- Joint teams to research and analyze issues.<sup>109</sup>

The above studies reveal that in order for interest-based bargaining to be successful, training of the parties in the process is essential. Effective training must be expansive, addressing not only the bargaining process itself, but also the fundamental nature of parties' underlying relationship. It should be given an adequate amount of time and be participatory in the sense that some degree of constituent involvement be included. Finally, it is essential that the training address any areas of mistrust between the parties if it is going to have any chance of success, either in the process itself or implementation of the resulting agreement.

### **USING INTEREST-BASED BARGAINING PRINCIPLES IN THE BARGAINING PROCESS**

Turning to the actual bargaining, it should be recognized that adopting an integrative process after a history of adversarial bargaining represents a major change in the parties' relationship, even if the previous bargaining was generally cordial. The process introduces uncertainty where there was previously predictability, freedom where there was constraint, and messiness where there was neatness. Additionally, it is very

---

<sup>109</sup> *Id.* at 201.

hard work.<sup>110</sup> In order to bring some level of structure to the process, Blackard suggests the following steps:

- The bargaining should be structured in a workshop setting, around groups of tables, with representatives of both parties interspersed.
- A facilitator leads a discussion of the issues the parties had previously agreed upon as subjects of negotiation. The parties agree on the order the issues will be discussed, and all exchanges will be off the record unless agreed otherwise.
- The parties problem-solve each issue, trying to determine what is right rather than who is right. Flip charts are utilized to facilitate discussion and capture progress, but not to create a record which could be used to interpret the future agreement.

The problem-solving steps include:

- Clarifying the issues and problems.
- Identifying the needs and interests of all parties connected to the issues being addressed.
- Reviewing the results of joint data gathering and analysis which relate to the issues being addressed.
- Brainstorming possible solutions.
- Assessing the options identified in brainstorming against the needs and interests of the parties.
- Deciding on which option(s) best meet the needs of the parties.

---

<sup>110</sup> *Id.* at 204.

- If an option is acceptable to both parties, a draftsman develops a written proposal that can be formally accepted by each party. All agreements are considered tentative until confirmed by the respective constituencies.
- If the parties cannot develop options for an issue that are mutually acceptable, they discuss tradeoffs and compromises. This can be facilitated by “supposals” or non-binding “what ifs”, to allow a better understanding of what tradeoffs may be possible. Of course, this give-and-take is akin to positional bargaining, but based on the previous dialogue, it is more likely to result in an agreement which is acceptable to all parties.<sup>111</sup>

The role of the spokesperson and the bargaining team in integrative bargaining is also important to note. As opposed to traditional bargaining where the spokesperson controls input into the bargaining process, in integrative bargaining the spokesperson cannot be a “talking head”, since there are no pre-decided arguments or positions. Blackard proposes that the role of the management spokesperson in integrative bargaining includes the following:

- Coordinating with the union spokesperson on the process of mutual pre-negotiation planning and preparation.
- Understanding the company’s interests, constraints, and general objectives.
- Working with executive management to ensure continuing involvement in the process and quick turnaround of needed management decisions in bargaining.
- Facilitating dialogue during the process by inviting comments from both bargaining teams.

---

<sup>111</sup> *Id.*

- Insuring that the union bargaining team understands the company's interests, to the extent possible, and also that the company bargaining team works to understand the union's interests.<sup>112</sup>

With respect to the bargaining teams, both teams should include all those individuals who can reasonably make a contribution to solving the issues presented, as well as staff with relevant expertise in the substantive areas being discussed. Team members should be active participants and personally contribute to the problem-solving process.<sup>113</sup>

More recently, from an academic perspective, Cutcher-Gershenfeld proposed an alternative five-phase process for integrative bargaining: (1) prepare; (2) open; (3) explore; (4) focus; and (5) agree.<sup>114</sup> The primary task of Phase One, preparation, calls for two internal negotiations. First, it requires advance discussion with constituents about the idea of bargaining in a new way and obtaining a commitment to utilize a nontraditional process. Second, it requires converting the positional demands of constituents into interests. The lack of such internal negotiations is one of the most common failures of integrative bargaining.<sup>115</sup>

The primary task in Phase Two, opening, is to avoid presenting an initial position. The opening dialogue in bargaining serves as a powerful framing device. When the parties avoid opening positions, there is the possibility for a high degree of brainstorming for solutions. Of course, positively framing the opening discussion of the parties will

---

<sup>112</sup> *Id.* at 206-207.

<sup>113</sup> *Id.* at 207.

<sup>114</sup> JOEL CUTCHER-GERSHENFELD, *How Process Matters: A Five-Phase Model for Examining Interest-Based Bargaining*, in NEGOTIATIONS AND CHANGE: FROM THE WORKPLACE TO SOCIETY, 141, 147 (Thomas A. Kochan & David B. Lipsky, eds., Cornell University Press 2003).

<sup>115</sup> *Id.* at 148-149.

depend a great deal upon how successful the initial internal negotiations were with constituents. Where the constituents are supportive of the process and a full discussion of interests was conducted, the scope of bargaining can be magnified in a positive manner.<sup>116</sup>

Phase Three, exploring, is the essence of integrative bargaining. This is where the brainstorming truly takes place. The objective of exploring options is not merely a way of reaching compromise between two positions, but to add value by expanding the parties' understandings of an issue beyond that which either side could generate acting alone.<sup>117</sup>

With regard to Phase Four, focusing, it should be noted that there is no easy way to convert a list of brainstormed options into an agreement. The risk is that the parties may, in their rush to an agreement, seize the first set of acceptable options, thereby leaving a great deal of potential value in an alternative not chosen by the parties. As a result, the parties may have reached a suboptimal bargaining solution. Alternatively, the parties should seek to make linkages between issues, identify potential ranges for settlement on a given issue, specify the criteria by which to evaluate alternate options, and assess the consequences of each possible alternative considered.<sup>118</sup>

Phase Five, agreement, poses its own special set of challenges, which are primarily two-fold. First, the agreement itself must be constructed. In integrative bargaining, although different than in an agreement reached through traditional bargaining, the ability to codify the agreement is somewhat enhanced by the processes employed in the earlier phases. The more challenging objective is found in persuading constituents that the agreement is, in fact, the best possible one. In integrative bargaining,

---

<sup>116</sup> *Id.* at 150-151.

<sup>117</sup> *Id.* at 152.

<sup>118</sup> *Id.* at 154-155.

due to the highly collaborative nature of the process, it is often hard to convince constituents that the best possible agreement has been obtained from the other side. At the risk of over-simplification, this dilemma is best dealt with by reference to Phases One and Two. Appropriate preparation of constituents as to the interests of the other party, as well as communication as to how the parties' interests are framed in opening discussions, can go a long way toward gaining consensus on the most appropriate agreement.<sup>119</sup>

These phases are certainly not isolated in their application, but are extremely interdependent. After agreement, implementation of the agreement casts a shadow back to each of the earlier phases, and the more effectively and complete those steps were undertaken will bear a direct relationship to the quality and sustainability of the agreement going forward.<sup>120</sup>

Notwithstanding the clear academic and theoretical distinctions between traditional and integrative bargaining, applying the concepts of integrative bargaining in practice can be challenging, and the distinctions often become blurred. In conducting integrative bargaining, it is important to understand the differences in philosophy and assumptions between the traditional and integrative processes. With respect to the underlying approach to traditional bargaining, the parties consider the process as akin to a chess game, with opening moves, a middle game, and an end game. In integrative bargaining, the process is viewed as a set of problems to be mutually defined, explored and resolved. With respect to the interests of the parties, in traditional bargaining, the fundamental interests of labor and management are assumed to be in conflict with one another. In integrative bargaining, the parties understand that while disagreements may

---

<sup>119</sup> *Id.* at 155.

<sup>120</sup> *Id.* at 156.

surface, the fundamental interests of the parties are assumed to complement one another.<sup>121</sup>

It is also important to understand the behavioral aspects of the differences between the two processes. With respect to the preparations for bargaining, in traditional bargaining, each party prepares a target and resistance point on each issue anticipated to be raised. In integrative bargaining, preparation involves the identification of core interests for each party; and the development of potential solutions which may be satisfactory. As for the opening negotiations, in traditional bargaining, each party takes high and low positions which allow the maximum amount of bargaining room; and emphasizes the factors that make it difficult for one to move from their position. In integrative bargaining, the parties avoid taking initial positions in their openings, and seek to clarify their own core interests and better understand the other's interests.<sup>122</sup>

There are also behavioral differences between the two strategies in the movement on issues during negotiations. In traditional bargaining, there is gradual movement based on reciprocity and delay tactics; whereas in integrative bargaining, movement occurs as the result of a gradual building of shared interests based on logic, research and analysis of information. The form of interpersonal communication is also different between the two forms. In traditional bargaining, careful notes are taken, restatement only occurs when one agrees with the other side, and confrontation is utilized to press key points and destabilize the other side. In integrative bargaining, each party uses paraphrasing and

---

<sup>121</sup> Joel E. Cutcher-Gershenfeld, *Bargaining Over How to Bargain in Labor-Management Negotiations*, 10 NEGOTIATION JOURNAL 323 (1994).

<sup>122</sup> *Id.* at 325.

active listening skills to insure accurate interpretation of the other's interests, and confrontation is only utilized to cause true underlying interests to emerge.<sup>123</sup>

In coming to agreement, in traditional bargaining, problem-solving and increased openness only occurs as the negotiations are facing a deadline, and final tradeoffs are attempted to avoid an impasse. In integrative bargaining, the agreement phase is not necessarily impacted by an imposed deadline, and problem-solving may continue until the process is completely exhausted. The ratification process also raises differences between the two styles. In traditional bargaining, ratification is a measure of which side "won", with a high vote signifying a vote for labor, and a low vote meaning a victory for management. In integrative bargaining, ratification is a vote of confidence for both sides, with a high vote signifying smoother implementation.<sup>124</sup>

Beyond the assumptions and behavioral differences between the two methods, there are also distinct differences in the structure of negotiations which must be addressed. In traditional bargaining, the flow of information is channeled through the lead negotiator; whereas in integrative bargaining, everyone is an equal member of the process and input is sought from all participants. In traditional bargaining, off-line communications are conducted between the lead negotiators, which are the primary vehicle for the generation of alternatives and the exchange of information. In integrative bargaining, subcommittees and task forces are used to gather and exchange information, and to report back to the entire team for discussion. Regarding the parties "at the table", in traditional bargaining, only official members of the bargaining committees are allowed to participate. In integrative bargaining, the participants at the table are fluid and

---

<sup>123</sup> *Id.* at 326.

<sup>124</sup> *Id.*

determined by the need for particular information, knowledge, or expertise. With respect to the management of internal differences, in traditional bargaining, the strategy is to present a united front, call for a caucus only when internal differences arise, and seek to exploit any disagreements appearing in the other's negotiating team. In integrative bargaining, the goal is to seek a diversity of views on each issue, and not only build internal consensus but seek to assist the other side in achieving a parallel internal consensus.<sup>125</sup>

The point of this discussion on assumptions, behavior, and bargaining structure is not simply for the sake of establishing the differences between the two styles, but to begin the process of addressing ways in which negotiators can address the challenges presented to integrative bargaining. In reality, the parties have to be attentive to the power and relational challenges of their particular situation, and arrive at a synthesis of both approaches which best fits that state of circumstances. Cutcher-Gershenfeld proposes the following list of strategies which can potentially provide realistic solutions to these challenges:

- In preparations for bargaining, when target and resistance points create artificial boundaries to discussion in traditional bargaining, but a focus solely on interests is considered irresponsible from an intraorganizational perspective, do both. In other words, the parties can set target and resistance points but also engage in a full exploration of interests.
- In opening negotiations, extreme initial positions generate positional dialogue in traditional bargaining, but interest-based statements create constituent anxiety. As

---

<sup>125</sup> *Id.* at 327.

a potential solution, the parties can open with interest-based statements, but be explicit about possible constituent limitations.

- In the movement on issues, where there is a risk of rapid escalation of conflict in traditional bargaining, yet there is a risk of glossing over conflicts to achieve consensus in integrative bargaining, the parties may choose to conduct advance dialogue on the risks of both processes.
- With respect to the flow of communication, the channeling of information through a lead negotiator in traditional bargaining constrains creativity, whereas the multiple channels in integrative bargaining increases a party's vulnerability to divisive tactics from the other side. As a potential solution, the parties could begin with a restricted flow of information from a lead negotiator and move toward a more open exchange on "safer" issues.
- In coming to agreement, traditional bargaining may cause a rush to conclusion, resulting in a low quality agreement, and the trade-offs which are often required in integrative bargaining may appear as a failure of the concept. On this issue, the parties could utilize integrative principles to develop the best agreement possible, but recognize and anticipate that one or both sides may depart from the process at the end.<sup>126</sup>

This analysis simply recognizes that despite the best efforts of the parties to develop a truly integrative approach to their collective bargaining, those efforts often go astray due to the practical realities in the parties' environment and/or relationship. In that

---

<sup>126</sup> *Id.* at 332-333.

event, these alternative tactics provide a contingency approach where the essentials of integrative bargaining can be preserved to the extent possible.<sup>127</sup>

The issues raised by this analysis were further developed by John Stepp and Gary Bergel, who recently advanced an alternative process termed “Results-Focused Bargaining”.<sup>128</sup> The process is based upon the premise that a true interest-based approach removes certain concepts of traditional bargaining which would be useful in many collective bargaining settings, and that many practitioners in the interest-based process elevate adherence to process over function. They also posit that many practitioners and theorists give inadequate attention to the propriety of utilizing interest-based principles in all collective bargaining settings. With respect to this point, they suggest that an interest-based approach works best when the following conditions are present: (1) general dissatisfaction by both parties with past results utilizing traditional bargaining; (2) a modest level of trust between the parties; (3) the principal negotiators are relatively secure in their positions to the extent that they are willing to relax control and explore creative alternatives; and (4) the process has sufficient support from both parties’ leadership and constituency. Additionally, they suggested that if true transformational change is desired, there must be a genuine acceptance of the union by management, and a corresponding willingness to involve the union in nonmandatory subjects of bargaining.<sup>129</sup>

With respect to the other components of this process which Stepp and Bergel suggested should be modified, they pointed to the misuse of brainstorming. Instead of

---

<sup>127</sup> *Id.* at 334.

<sup>128</sup> John R. Stepp & Gary I. Bergel, *Moving from Interest-Based to Results-Focused Bargaining*, 11 PERSPECTIVES ON WORK No. 2, p.31. (Winter 2008).

<sup>129</sup> *Id.* at 35.

extensive use of joint brainstorming sessions, they recommended that the parties caucus during the option development and evaluation phase, since parties typically have arrived at a basic sense of the alternatives which are likely to lead to an agreement. They also pointed to the difficulties in jointly agreeing on a set of objective standards for evaluating options. According to their analysis, parties often attempt to manipulate the criteria in order to be assured of having standards which best satisfy their bargaining objectives, resulting in agreement on a diluted set of criteria. This process, they suggested, often leads to a frustrating and exhausting process. As an alternative, they suggested that the parties individually prioritize in caucus the critical or vital interests that must be satisfied, which are then revealed in joint session as the de facto criteria for that party. Along that same line, they indicated that although the interest-based process attempts to reduce the effect of power through the use of objective criteria, they suggested that relative power is always present in labor negotiations, and should play a role in how each party evaluates the importance of the critical interests of the other side.<sup>130</sup>

Another area of concern for Stepp and Bergel was the emphasis interest-based principles place on consensus-building among all participants. They observed that collective bargaining occurs between organizations, not individuals, and over-emphasis on this premise can obstruct the likelihood of an agreement. Alternatively, they suggested that the focus should be on the institutions involved in the process, with emphasis on decision-making within caucuses. Finally, they observed that total transparency on economic issues is highly unlikely, and as a result some distributive negotiations on such issues is likely. Considering all of these issues, they proposed that

---

<sup>130</sup> *Id.* at 36-37.

an orthodox interest-based approach be liberated from an overemphasis on form, allowing some utilization of the positive attributes of traditional bargaining principles.<sup>131</sup>

## **CONCLUSION**

In an era of increasing challenges for both labor and management, integrative bargaining provides an excellent opportunity for the parties to work collaboratively in meeting those challenges. However, despite the promise it has offered for many years, integrative bargaining has not been fully employed by either side of the equation. Perhaps this is due to the cost involved, resistance of constituents, the adversarial climate and mistrust produced by years of contentious negotiations, or the lack of skilled facilitators. Nevertheless, if those challenges can be met satisfactorily, the parties can truly achieve a relationship which serves the interests of both, better enabling them to meet the challenges of today's economic environment. Some of the keys involve managing constituent expectations, promoting the free exchange of information, comprehensive training, and the promotion of a climate of trust. Further, recognizing that a pure integrative model is at least initially, extremely difficult to achieve, the parties should be prepared to accept a model which provides for some elements of both traditional and integrative bargaining, as the first step toward a more enduring relationship in the long run.

---

<sup>131</sup> *Id.* at 37.

