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Making Friends of Foes: Bringing Labor and Management Together through Integrative Bargaining

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I. INTRODUCTION

Collective bargaining's unique history and structure make it an ideal setting for integrative bargaining ("IB").[1] First, most collective bargaining agreements have a set expiration date,[2] which causes the parties to constantly return to the bargaining table to negotiate new terms. Second, collective bargaining in the labor-management setting has a long history in the United States, and unions and management tend to form long-lasting relationships.[3] Finally, collective bargaining agreements address complex interests and are designed to meet the needs of a variety of constituents. These factors combine to produce a relationship involving several individuals, going back multiple generations, who are sure to negotiate with each other in the future. This differs from a distant negotiating relationship, such as the sale of a car, where the parties' interactions are not likely to be ongoing. "Overall, collective bargaining negotiations are often situated amid a long acrimonious history between labor and management, and involve multiple constituents who represent a wide range of interests."[4]

Because of this long-standing relationship and the likelihood that it will continue indefinitely, "an integrative approach to bargaining will be more appropriate than the purely self-interested stance of the distributive bargainer."[5] Collective bargaining is truly "a process of accommodation between two institutions—the managerial organization and the union organization—which have both common and conflicting interests."[6] IB seeks to unearth these interests, develop the common ground between the two institutions, and use those interests to maximize the value of the collective bargaining agreement.

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1. Generally speaking, collective bargaining is colloquially known as the process used by unions and company officials to negotiate a contract or agreement encompassing issues such as pay, benefits and grievance procedures. IB, though less well-known, is an approach to negotiation that focuses on collaboration and problem-solving, rather than confrontational negotiation. This process is defined in-depth in Section II.

2. Collective bargaining agreements under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-63, 181-88 (2006), are the exception to this general rule. "Contracts under the RLA do not have fixed expiration dates; rather, they are amendable dates, and remain in effect until a new agreement is reached." Charles J. Hunt, Jr., *Mediator Tactics: Strategies and Behaviors Utilized in Labor-Management Negotiations*, 6 APPALACHIAN J.L. 263, 268 (2007).

3. Hunt, Jr., *supra* note 2, at 266."The nature of labor-management relations is such that the parties can deal with each other for years, or even decades." *Id.*

4. Nils O. Fonstad et al., *Interest-Based Negotiations in a Transformed Labor-Management Setting*, 20 NEGOTIATION J. 5, 9 (2004). "[T]he continuous nature of labor relations produces strong links that carry over and ingrain attitudes and trust levels from prior negotiations, and day-to-day interactions that occur between rounds of formal talks." *Id.*

5. MELISSA L. NELKEN, UNDERSTANDING NEGOTIATION 121, 124 (Anderson Pub. Co. 2001).

6. FREDERICK H. HARBISON & JOHN R. COLEMAN, GOALS AND STRATEGY IN COLLECTIVE BARGAINING 118 (Harper & Brothers 1951).

II. WHAT IS INTEGRATIVE BARGAINING AND HOW DOES IT DIFFER FROM ADVERSARIAL BARGAINING?

There are two basic approaches to negotiation: the traditional adversarial model and the newer tactic, IB.[7] The adversarial model views negotiations as a "zero-sum game in which anything won by one side is a loss by the other."[8] In the collective bargaining context, what the union gains, the management loses.[9] This approach is also known as "positional bargaining," because parties in adversarial negotiations advocate for positions; once those positions are declared, they find it difficult to retreat. Positional bargaining resembles a power struggle with each side declaring and asserting their positions without collaborating and cooperating to reach a mutually agreed upon point.[10] The difficulty with this type of negotiating style is that it leads to heated exchanges, which distract the parties from reaching a mutually advantageous solution.[11]

Rather than fight over positions, the goal of IB is "to create solutions that satisfy needs of the parties."[12] Whereas adversarial bargaining creates a situation where one side's loss is another's gain, IB is used to create a win-win situation.[13] A key difference between the two approaches is that IB promotes disclosure of information and interests to maximize the advantages achieved through cooperation between the parties.[14] Also, the adversarial approach is linear, meaning the negotiation moves back and forth, as though tied to a line; one party makes an offer, and the opposing party makes a counter-offer. In adversarial bargaining, the negotiation never broadens to bring in outside parties or perspectives. IB, however, is more of a creative process which "requires an imaginative search for solutions guided by a process based on negotiation theory."[15] Rather than move back and forth from offer to counter-offer, IB involves the parties working together simultaneously.

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7. Hunt, Jr., *supra* note 2, at 270. IB goes by a variety of titles and has been referred to as principled, integrative or problem-solving negotiation. NELKEN, *supra* note 5, at 121-22. "The problem-solving approach has also been called 'integrative,' because it integrates the complementary interests of the negotiating parties in order to create new value. It has been called 'principled,' because it seeks solutions based on principle rather than on positions staked out by the parties." Alex J. Hurder, *The Lawyer's Dilemma: To Be or not To Be a Problem-Solving Negotiator*, 14 CLINICAL L. REV. 253, 255 (2007). Though some argue that there are slight differences between these styles, for purposes of this discussion, the author will use them interchangeably to refer to a cooperative approach focused on uncovering interests in a negotiation.

8. Hurder, *supra* note 7, at 255.

9. Hunt, Jr., *supra* note 2, at 270.

10. *Id.* at 270.

11. *Id.*

12. Hurder, *supra* note 7, at 273. Principled negotiation is similar to IB in that both methods focus on the underlying interests of the parties. However, principled negotiation follows a different process focusing on deciding "issues on their merits rather than through a haggling process focused on what each side says it will and won't do." ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN, xviii (Bruce Patton ed., Houghton Mifflin Co., 2d ed. 1991).

13. Hunt, Jr., *supra* note 2, at 270 (emphasis added). IB "bases the search for solutions on the needs, interests, and values of the client and other parties to the negotiation, and thus the scope of the negotiation might expand . . ." Hurder, *supra* note 7, at 266.

14. Hurder, *supra* note 7, at 266.

15. *Id.*

Traditionally, labor-management negotiations have been conducted using the adversarial method.[16] Labor-management negotiations generally involve a union representative making an initial offer, followed by management's counter-offer. The parties continue in this manner until an agreement has been reached in the form of the collective bargaining agreement. Additionally, the parties use power, rather than creative solutions, to reach a desired solution.[17] This exercise of power can be seen in management's use of lock-outs and labor's use of strikes to encourage the other side to bargain.

While there is a history and tradition of adversarial negotiations in the labor-management context, this is not to say that interested parties in the labor workforce could not incorporate elements of IB into their negotiation process. Both labor and management share common interests; therefore, IB can be well-suited to the labor-management negotiation process.

III. INTERESTS IN COLLECTIVE BARGAINING NEGOTIATIONS

A. Using IB to Discover Parties' Goals, and Thereby Unearth Their Underlying Interests

IB involves understanding each party's interests and focusing on solutions that maximize those interests. In order for IB to be successful, the parties must first know and understand what interests they bring to the bargaining table. In the context of a collective bargaining agreement, IB can help the parties realize which concerns led to their dispute and help them prioritize the issues.[18]

In developing a list of interests they wish to explore, parties should remember that these interests are the motivations behind their goals, not simply a restatement of those goals.[19] A goal is an end result; in labor-management relations, a labor goal could be to provide more vacation days for employees under the collective bargaining agreement. Their interests underlying this goal may be to make their union and workplace more attractive to prospective employees, to attract more potential union members, or simply to meet a demand of their constituents. Looking into the interests underlying goals—a hallmark of IB—can run counter to the norm in traditional labor-management negotiations where the union's request is really just a wish-list created at a union meeting, as opposed to a thoughtful collection of interests that recognize the needs and desires of the union members.[20]

16. Hunt, Jr., *supra* note 2, at 271.

17. Hurder, *supra* note 7, at 262.

18. Sylvia Skratek, *Conflictive Partnerships Under Collective Bargaining: A Neutral's Perspective*, *in* WORKPLACE DISPUTE RESOLUTION: DIRECTIONS FOR THE TWENTY-FIRST CENTURY 57, 61 (Sandra E. Gleason ed., Mich. State Univ. Press 1997).

19. IB's use of the word "goal" is very similar to the "positions" stated in positional bargaining. The difference is that in IB, a goal is determined only by examining the underlying interests supporting that goal. In positional bargaining a position is stated without determining if that position supports the parties' interests or not. In some situations parties' positions can actually be counter-productive to their overarching interests.

20. Jerome T. Barrett, *A Win-Win Approach to Collective Bargaining: The Past Model*, 41 LAB. L.J. 41, 42-43 (1990).

Conversely, IB requires that parties invest more effort, time, and research in developing the issues for negotiation.[21]

In determining what interests underlie their goals, the parties should begin by recognizing that there are some interests they both share. Through joint brainstorming sessions, they can create mutually beneficial solutions.[22]

B. Difficulties in Unearthing Common Interests in Collective Bargaining Negotiations

Though each collective bargaining unit will have its own interests unique to the organization and industry, there are some consistent interests represented throughout collective bargaining in general. Typically, management's concern is with the business as an institution, including the organizational health of the business, teamwork, morale, and profit.[23] Management is also known to advocate for wage and benefit reductions and work-rule flexibility.[24] Conversely, the union's interests include expanding union membership and strengthening the union as a whole.[25] Additionally, unions frequently request wage increases and an expansion of employment benefits.[26] While some of these interests are obviously opposed to one another (i.e., wage increases versus wage concessions), IB can uncover how each party's interests may actually be met by working together to achieve a mutually agreeable solution. Though several of these interests are economic in nature (i.e., wage increases), needs can focus on legal, psychological, and moral aspects as well.[27]

Collective bargaining seeks to represent several different constituents at once—all union members and all of management as a whole, for example—therefore, interests in labor-management negotiations "can involve a wide spectrum of issues, including wages, hours, job security, safety, health, employee benefits and work design."[28] Issues such as safety and health are particularly integrative or interested-based in nature, and they can be explored in great depth in the negotiation process.[29]

There can also be several different constituencies within the labor union alone. For example, one union may be comprised of older workers with needs and interests focused on their impending retirement, like increased pensions, while the same union may also contain younger workers who are much more interested in

21. After a joint brainstorming session consensus building can help the parties consolidate and agree on the issues presented before moving on to determining appropriate solutions. *Id.* at 43. *See* Section V, *infra*, for a discussion of this process.

22. *Id.*

23. HARBISON & COLEMAN, *supra* note 6, at 8.

24. Joel Cutcher-Gershenfeld et al., *Collective Bargaining in the Twenty-First Century: A Negotiations Institution at Risk*, 23 NEGOTIATION J. 249, 255 (2007).

25. HARBISON & COLEMAN, *supra* note 6, at 13.

26. Cutcher-Gershenfeld et al., *supra* note 24, at 255.

27. Hurder, *supra* note 7, at 268-69. *See also* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794–801 (1984).

28. Leib Leventhal, *Implementing Interest-Based Negotiation: Conditions for Success with Evidence from Kaiser Permanente*, 61 DISP. RESOL. J. 50, 53 (2006).

29. *Id.*

access to immediate income.[30] This problem with representing multiple constituencies is compounded when actors from the national union step in since the national office may have an entirely different set of goals and interests than local union leadership.[31]

There are similar issues with multiple interests on the management side. For instance, corporate officials may have different interests than local management representatives.[32] Even within the local company, production managers may have a different outlook and approach than human resource managers.[33] In any organization and at any bargaining table, "the concern of both labor leaders and company executives over their own personal goals and ambitions may lead to a bitter struggle for personal prestige."[34]

IB represents a change from positional bargaining to bargaining focused on interests; therefore,"[m]anagement needs to be careful not to include with their suggested issues their preferred answer, e.g., not to take a position on exactly how to settle the issue."[35] For example, asserting that the collective bargaining agreement needs to provide a clause allowing management to limit the number of supervisory positions does not state an issue, but instead indicates the preferred answer. To determine what issues or interests underlie this answer, the management representatives advocating this goal should ask themselves *why* they feel this clause is needed. That answer is likely the interest underlying the goal. In this example, the interest supporting this goal could be a concern about allocation of duties, a need to alter the local plant organization to fit with a corporate reorganization, or a concern with costs and benefits associated with higher supervisory pay. IB focuses on interests, not positions, so taking a position on the opposing side's interests is, in essence, reverting back to the traditional system of bargaining. In the example provided, simply demanding the clause which allows management to limit supervisory positions, without explaining their interests in having this provision, does nothing more than revert the negotiation back to the linear model of positional bargaining. If instead, management explained the interests underlying the clause, it is possible that both sides could collaborate and come up with a clause that addresses the union's interests, while still meeting the underlying management interests.

In ascertaining the opposition's interests, parties must remember to really listen to what the other side is saying, rather than operating on assumptions as to what the opposing party would be interested in. For example, research has shown that fear of job loss is actually not an interest for unions negotiating new collective

30. Hunt, Jr., *supra* note 2, at 272-73.

31. *Id.* at 273. "It is not unusual for workers to have higher expectations of gains to be had than their negotiators' expectations, leading to strife during the negotiations if workers are asked to approve what they consider to be an offer inferior to their expectations." *Id.*

32. *Id.* Multi-employer bargaining units also present their own set of difficulties.

> [D]ifferent employers can have different goals in a multi-employer bargaining unit, and these different views within each camp may result in a lack of authority in the actual negotiators, or at the least, confused signals which impair their ability to actually make decisions without constantly checking back with their constituents.

Id.

33. *Id.*

34. HARBISON & COLEMAN, *supra* note 6, at 17.

35. Barrett, *supra* note 20, at 43.

bargaining agreements, though such an interest is often assumed.[36] Similarly, both sides must recognize "that in developing a list of issues, they are dealing with constituents' expectations, and they should not distort them," by straying too far from their constituents' wishes.[37]

IV. THE HISTORICAL DEVELOPMENT OF IB

In uncovering the parties' interests and developing those interests toward a mutual solution, the goal of IB is to treat the dispute as a mutual problem to be resolved by the parties.[38] IB can be a useful tool in formulating collective bargaining agreements that address the interests of both parties (management and union) while fostering positive relationships built on trust and mutual interest for future negotiations.

The history of IB, as a specific negotiating technique, can be traced back to sociologist Mary Parker Follett.[39] Parker Follett introduced IB in the 1920s "as a justification for promoting collective bargaining between management and labor."[40] Parker Follett showed that companies who needed workers and employees who needed income could trade resources to create benefits for both.[41] "The resulting agreements had the additional advantages of securing industrial peace, reducing conflict, and increasing the wealth of society."[42] Parker Follett's ideas and research were later applied to new theories of negotiation, such as IB.[43]

IB is the product of the movement for collective bargaining in labor-management relations.[44] Collective bargaining in labor relations led to an expansion of dispute-resolution procedures like negotiation, arbitration, and mediation.[45] The ideas and support for non-adversarial approaches in labor-management relations that Follett advocated were eventually transformed into legislation in the National Labor Relations Act of 1935 ("NLRA").[46] The NLRA, for the first time,

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36. Joel Cutcher-Gershenfeld & Thomas Kochan, *Taking Stock: Collective Bargaining at the Turn of the Century*, 58 INDUS. & LAB. REL. REV. 3, 16 (2004). The authors predicted that this was because of a tightening labor market and high unemployment rates during the study. *Id.*

37. Barrett, *supra* note 20, at 43.

38. Skratek, *supra* note 18, at 60.

39. Hurder, *supra* note 7, at 279.

40. *Id.*

41. *Id.*

42. *Id.*

43. Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills & Selves* 33 LAW & SOC. INQUIRY 503, 520-22 (2008). *See, e.g.*, Richard E. Walton & Robert B. McKersie A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM (McGraw Hill 1965); FISHER ET AL., *supra* note 12.

44. Hurder, *supra* note 7, at 278.

> For many years, dispute-resolution professionals from the field of labor-management relations reached out to their counterparts in other fields in search of a common agenda. They found allies in the movement for court reform. The court reform movement that emerged in the 1970's adopted Alternative Dispute Resolution (ADR) as a solution to problems in the administration of justice.

Id. at 279.

45. *Id.* at 280.

46. *Id.* The NLRA was amended in 1947; provisions were added that supported "voluntary mediation and conciliation of labor disputes and establishing the Federal Mediation and Conciliation Service [FMCS]." *Id.*

legally required management and unions to bargain in "good faith" and imposed penalties for refusing to do so.[47] The NLRA also expanded alternative dispute resolution by creating a federal system of dispute resolution procedures.[48]

Though the NLRA supported alternative dispute resolution procedures, collective bargaining units largely used adversarial negotiation tactics to develop collective bargaining agreements. Still, the labor negotiation climate has changed, as IB is currently growing in popularity among collective bargaining units. A recent survey of companies with collective bargaining agreements determined that "a remarkably high percentage of union and management negotiators are familiar with the process — between 65 percent and 80 percent of the respondents[, and a] large and growing proportion of respondents report having used this approach at some point in time."[49]

The concept of integrative negotiation is not entirely new to collective bargaining. In 1951, union-management cooperation was described as "a relationship in which the parties through joint action attempt to reduce unit costs of production, increase efficiency, and improve the competitive position of the firm."[50] Though this cooperative relationship was rare at the time, it "usually develop[ed] out of some kind of economic crisis and [was] limited to small companies which bargain with small local unions."[51]

Despite the fact that IB is growing in popularity, the adversarial mindset is still largely entrenched. The historical tension in labor-management relations, combined with the parties' reliance on adversarial bargaining, has produced a management-union relationship based on minimal trust.[52] As one commentator has stated, "[t]he foremost consideration [when approaching a labor-management negotiation] is likely the historical antipathy of management to unions, as well as the perception of union members that management will never treat them fairly, nor compensate them reasonably, for their endeavors."[53] This distrust between the parties can further entrench positional bargaining between the parties because "[t]hese feelings frequently result in extreme bargaining positions with aggressive and antagonist bargaining tactics when a party feels that he, she, or it needs to exhibit strength at the negotiation table."[54]

IB's ability to build trust and strengthen parties' relationships makes it an ideal fit for collective bargaining because it provides an opportunity to overcome

47. *Id.*

48. *Id.* at 280 n.120. This includes "mandatory bargaining enforced by the NLRB and federal courts, voluntary mediation and conciliation, and provisions for submission of disputes to third party binding arbitration." *Id.*

49. Joel Cutcher-Gershenfeld et al., *supra* note 24, at 258.

> However, [u]nion and management responses showed great disparity when respondents were asked if they used this approach in their most recent negotiations. Nearly one-third of managers reported using it, but only about half as many union negotiators did. This may reflect different views of what constitutes interest-based bargaining; it may also reflect unilateral efforts to use interest-based methods by managers without the concurrence of their union counterparts.

Id. at 258-59.

50. HARBISON & COLEMAN, *supra* note 6, at 89.

51. *Id.*

52. HARBISON & COLEMAN, *supra* note 6, at 9.

53. Hunt, Jr., *supra* note 2, at 266.

54. *Id.*

these years of distrust and acrimonious dealings.[55] Though suggesting IB to parties with a mutual low-trust relationship may seem risky, its use can produce better outcomes than the adversarial bargaining that reinforces the distrust that has historically been present in labor-management negotiations. As such, labor and management negotiators alike are concluding that the adversarial model does not fit with the complex nature of collective bargaining.[56] In contrast, an IB approach may counteract this cyclical low-trust relationship by "foster[ing] a freedom from fear that goes beyond that provided by law, contract, or economic rationality."[57] Furthermore, trust is critical to the future of collective bargaining. Though the process has survived for decades, "[a] supposedly long-term relationship that is not based on some foundation of trust, however hard earned, is not likely to endure."[58]

Some detractors may fear that IB's incorporation of problem-solving techniques may expand the time companies and unions spend negotiating new contracts, resulting in higher costs for both companies and unions. However, it may assuage their fears to know that focusing on interests rather than positions actually produces higher satisfaction with settlement outcomes, fosters better working relationships, and can result in lower transaction costs.[59]

V. IMPLEMENTING INTEGRATIVE BARGAINING IN THE COLLECTIVE BARGAINING PROCESS

A. Impediments to IB in the Collective Bargaining Process

Though IB may work well in the labor negotiation setting, as with any major business change, its implementation does come with some difficulties. The first of such impediments is combating the years of adversarial negotiating that have been the main strategy in collective bargaining. This is such a challenge because negotiators who are used to positional bargaining may feel as though they are losing control over the negotiation by switching to IB, which necessarily requires collaboration to be successful.[60]

The second of theses impediments is encompassed in the fear that switching to IB may be more pronounced among union negotiators as research indicates that IB may have more negative effects on unions than adversarial bargaining, produc-

55. *But see* Hunt, Jr., *supra* note 2, at 271, asserting that "it is difficult to apply interest-based bargaining in labor-management negotiations because of constituency pressures and the lack of trust."

56. Fonstad et al., *supra* note 4, at 9.

57. Kirk Blackard, *How to Make the Most of the Employment ADR Process*, 54 DISP. RESOL. J. 71, 76 (May 1999): "Within the employment relationship [trust] is an unwritten, usually unspoken, contract among parties who have influence over things that are important to each other, that allows each of the parties to believe in the honesty, integrity, justice and reliability of the other." *Id.*

58. NELKEN, *supra* note 5, at 124-125. Management can increase trust within the relationship on a day-to-day basis by demonstrating "its trustworthiness through its management process. These processes must convince employees that management will deal with them honestly and with integrity, seek justice for them as well as the company, and deliver on all its representations." Blackard, *supra* note 57, at 76.

59. W.L. URY ET AL., GETTING DISPUTES RESOLVED 14 (Jossey-Bass 1988). *See id.* at 10-15 for a discussion on various costs associated with different approaches to resolving disputes.

60. Leventhal, *supra* note 28, at 53.

ing more union concessions and fewer union gains.[61] It is possible this occurs because management typically has a power advantage over unions in the collective bargaining process because there are generally more available workers than open jobs. This power differential leads union negotiators to be particularly wary of the IB process, which they could view as giving management even more power and leverage.[62] This fear is compounded by the parties' tradition of adversarial bargaining—"[a] negotiator used to positional bargaining is likely to react with suspicion if the other negotiator suddenly switches to interest-based negotiations."[63]

A third difficulty in implementing IB is that distributive and integrative issues are both present in labor-management negotiations, and it can be difficult to effectively use adversarial and integrative techniques at the same time.[64] Other commentators have theorized that one of the reasons IB has not worked in the collective bargaining context is that a respectful and good working relationship between the negotiating parties is necessary to ensure its success. Unfortunately, this foundation is lacking in many companies,[65] as demonstrated by their low-trust relationship. Without this basis of trust between the parties, they are less likely to try IB; and those who do are less likely to see positive results because the low-trust relationship can result in a lack of cooperation at the bargaining table.

B. How to Overcome These Impediments by Implementing IB into the Collective Bargaining Process

To combat many of these fears and risks, parties should recognize that IB is a major change to their approach to negotiations. As such, they should be prepared to learn about the process prior to bargaining with the style. To ensure IB's success in the collective bargaining context, both parties should research IB and seek out training in the IB concepts.[66] Training and simulated negotiations in IB can help combat the initial feeling of vulnerability that might result from the switch to a new and unfamiliar method of bargaining. Education about the process is also essential because negotiators unfamiliar with IB will likely be confused about the difference between interests and positions—a central component which lays the foundation for a successful negotiation.[67]

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61. Reaud Paquet et al., *Does Interest-Based Bargaining (IBB) Really Make a Difference in Collective Bargaining Outcomes?*, 16 NEGOTIATION J. 281, 293 (2000). In this study, the authors focused on IB in Canada. The authors compared 19 collective bargaining agreements negotiated by the IB approach and the 19 collective bargaining agreements negotiated by the traditional approach. *Id.* at 281.

62. Cutcher-Gershenfeld & Kochan, *supra* note 36, at 260.

> In labor management relationships the question of who is more powerful is determined by who is less dependent on the other. If the employer needs the employees' work more than the employees need the employer's pay, then the company is more dependent and therefore less powerful. Conversely, if the employees need the pay, then the employees are more dependent and less powerful.

Skratek, *supra* note 18, at 59.

63. Leventhal, *supra* note 28, at 53.

64. Hunt, Jr., *supra* note 2, at 270-71.

65. Leventhal, *supra* note 28, at 54-55.

66. *Id.* at 55.

67. *Id.* at 53.

Once parties are educated on the topic, the IB approach is incredibly flexible and can be tailored to each industry's needs. Generally, most IB styles progress from open discussion to workable solutions. Prior to negotiating with the other side, the parties should each work within their own organization to determine their goals. After each side fully understands their individual interests, they should participate in "wide-ranging discussion of the problems at hand" with the other side.[68] The goal with this discussion is not to generate possible solutions or answers, but rather to simply analyze the issues before them. The more the parties can honestly and openly discuss these problems and their interests, the more likely they are to find solutions that meet their interests.

During this discussion, the parties should feel free to disclose the interests they have uncovered during their individual sessions. Though there may be hesitation about disclosure to a recognized adversary, disclosing one's interest can actually be a sign of strength and confidence in one's interests, and the reasons for seeking those interests.[69]

After fully discussing the problem, the parties can jointly generate unanticipated, inventive solutions that address each party's interests.[70] For example, if the union's interests concern providing a better work-life balance for their employees, the union might simply demand that management increase the number of vacation days allotted to every employee. Such a request, without more, is likely to result in resistance from management. A creative solution to this interest, however, could be instituting a "floating holiday" system, where employees could elect which of a handful of non-traditional holidays they would like to have off from work. Even if the parties do find a creative solution, they should continue brainstorming before committing to any specific outcome.[71]

It is imperative that the parties understand that being open to discussion about proposals is not the same as agreeing to those suggestions.[72] Also, discussing the opposing side's proposals can actually improve one's own ideas, thus resulting in a better outcome.[73]

There will also be variations in how well the process works. Factors that may influence the success of the IB negotiation include the parties' relationship, including their collective bargaining history, and the amount of trust inherent in their relationship.[74] In addition to training in IB, relationship-building discussions and the parties' commitment to the negotiation style can all positively impact the likelihood of success.[75]

68. NELKEN, *supra* note 5, at 123.
69. *Id.* at 122-23.
70. *Id.* at 123.
71. *Id.*
72. *Id.*
73. *Id.*
74. Leventhal, *supra* note 28, at 55. If parties can move past their initial reservations about the process it can bring about long lasting rewards—a survey of labor negotiators found that after IB was implemented only twenty percent reported a negative experience of the process. Cutcher-Gershenfeld & Kochan, *supra* note 36, at 15.
75. Leventhal, *supra* note 28, at 55.

VI. EFFECTS OF INTEGRATIVE BARGAINING ON THE COLLECTIVE BARGAINING PROCESS

A. IB in the Kaiser-Permanente Bargaining Agreements

Though IB is a new approach to labor-management negotiations, studies have documented its use and effectiveness.[76] While multiple bargaining units have tried IB in their negotiations, the renegotiation of the Kaiser-Permanente collective bargaining agreement is likely the largest and most well-documented use of the approach. Kaiser-Permanent is the third largest integrated health organization system in the United States.[77] As of 2000, the company employed 130,000 individuals, 80,000 of whom were unionized.[78]

Prior to the current national agreement, Kaiser and a coalition of unions adopted a partnership agreement in 1997 that provided the foundation for implementation of IB in collective bargaining in the 2000 national agreement.[79] In 2000, the parties negotiated their first national agreement using IB.[80] That negotiation involved eight national and international unions, as well as twenty-six local unions, all of which bargained individually with Kaiser–Permanente, creating a total of thirty-three separate agreements.[81] By 2005, the negotiations included ten unions representing forty-four bargaining units and 86,000 union members.[82] Management during the 2005 negotiation was separated into two groups: the Kaiser Health Plan and Hospitals and the Permanente Medical Groups.[83]

Using IB during the bargaining process in both 2000 and 2005 reinforced the importance of trust in negotiations. Researchers found that a high level of trust enabled and supported the use of IB in Kaiser-Permanente's negotiations.[84] Initially, the parties had to overcome the low-trust relationship resultant from years of adversarial bargaining. Once trust was established throughout the negotiations, the parties were able to incorporate the tactics and processes encompassing IB.[85]

The 2005 negotiation addressed six overarching issues: (1) accountability; (2) the need for an adequate number of employees to carry out every day work; (3) a need to develop skills to carry out the organization's goals; (4) diffusion of leadership ideas from the top down to lower-level employees; (5) a desire to focus on the operational task of delivering health care; and (6) a need to develop a means of

76. *See, e.g.*, Cutcher-Gershenfeld & Kochan, *supra* note 36; Reaud Paquet et al., *supra* note 61; Fonstad et al., *supra* note 4.

77. Leventhal, *supra* note 28, at 55.

78. *Id.*

79. *Id.* The 2000 agreement was the parties' first national agreement. Robert B. McKersie et al., *Bargaining Theory Meets Interest Based Negotiations: A Case Study*, 47 INDUS. REL. 66, 70 (2008).

80. McKersie et al., *supra* note 79, at 70.

81. Leventhal, *supra* note 28, at 55. *Contra* Harbison & Coleman, *supra* note 6 (asserting cooperative approaches in 1951 were limited to small unions and small companies).

82. McKersie et al., *supra* note 79, at 68.

83. *Id.* McKersie's study focused on the 2005 national contract negotiations between Kaiser Permanente and the Coalition of Kaiser Permanente Unions. *Id.* at 69. The Kaiser Health Plan and Hospitals is the non-profit branch of the corporation: they provide insurance and hospital services. *Id.* The Permanente Medical Groups is a for-profit entity that works with clinics and medical providers. *Id.*

84. *Id.* at 66.

85. *Id.* at 66-67.

measuring achievement.[86] While the labor and management groups did not necessarily view each of these issues as having the same amount of importance, there were some issues both groups agreed should be addressed and resolved. For example, while there was great divergence in the groups' views on wage disparities between the eight regions that compose the company (sixteen percent of management viewed it as a priority for the negotiation; eighty-six percent of labor negotiators viewed it as a high priority), both groups agreed that building trust was an important goal (ninety percent of union respondents and eighty-nine percent of management negotiators).[87]

The Kaiser-Permanente process was broken down into two distinct phases.[88] The first phase involved breaking down the negotiators into eight Bargaining Task Groups ("BTGs").[89] Each BTG met and negotiated a set of written recommendations that would be used to begin the next phase of bargaining.[90] Each BTG was comprised of both management and labor representatives.[91] Post-negotiation surveys revealed that members of the BTGs viewed their negotiations as predominantly interest-based on most issues, especially those related to employee attendance and service quality.[92] Only the BTGs' discussions of benefits were significantly influenced by traditional negotiating styles.[93]

In phase two of the negotiations, a Common Interest Committee ("CIC"), made up of forty union and management representatives, met and used recommendations presented by leaders of the BTGs to negotiate the new collective bargaining agreements.[94] While the Kaiser-Permanente bargaining process demonstrated that IB has potential to work in large-scale negotiations, it also illustrated how—when all issues could not be resolved through IB—the parties could successfully merge the traditional adversarial negotiating approach with IB and produce a favorable outcome. The overall result was that IB strategies "were used extensively and successfully to reach mutually satisfying agreements when the parties shared interests. When interests were in greater conflict, the parties resorted to more traditional, positional tactics to reach resolution."[95] This combo IB-traditional bargaining approach is referred to as a "mixed" approach.[96]

Some commentators note that falling back into the traditional adversarial approach may have been an effective tactic in the Kaiser-Permanente negotiations. This research determined that adversarial bargaining and positional tactics worked best when the parties were most in conflict about the basic issues underlying their goals.[97] Switching from IB to an adversarial method may have been effective

86. *Id.* at 71 Fig. 1.
87. *Id.* at 72 T.1.
88. *Id.* at 73.
89. *Id.*
90. *Id.* The BTGs met fifteen times over four months. *Id.*
91. *Id.*
92. *Id.* at 74 T.2.
93. *Id.*
94. *Id.* at 78.
95. *Id.* at 66.
96. "[F]ew scholars would presume that many negotiations are wholly integrative. Rather, most negotiations are 'mixed motive;' they include both opportunities for joint gain, and opportunities for grabbing more from the other side." Raymond A. Friedman & Debra L. Shapiro, *Deception and Mutual Gains Bargaining: Are They Mutually Exclusive?*, 11 NEGOTIATION J. 243 (2007).
97. McKersie et al., *supra* note 79, at 94.

because parties were faced with a need to resolve the disagreement before the bargaining period ended. Adversarial bargaining is what the parties were most accustomed to, so this method may have been faster and easier to implement when the negotiators were pressed for time. Also, the parties may have switched to adversarial bargaining in an effort to resolve their most entrenched, and most difficult to resolve, positions.[98]

Ultimately, researchers concluded that IB was most effective when used to address issues on which the parties shared mutual interests.[99] For example, researchers discovered that the parties shared the most agreement on the issue of "backfill"—ensuring that there was a sufficient number of replacement employees ready to step in when other workers took time off from work.[100] Here, both parties agreed that resources should be devoted to this issue, the only question was *how* those resources should be allocated and which solutions should be used to address the backfill concern.[101] The parties then used problem-solving techniques to formulate a response that satisfied both management and labor.[102] In a sense, the parties to the Kaiser-Permanente negotiation merely applied IB concepts to the negotiations, rather than completely reworking their method of bargaining.[103] The negotiators incorporated IB tools such as joint research and information-sharing in the BTGs, and brainstorming during the CIC negotiations.[104] Through these collaborative sessions, they were able to develop more options and consensus-based solutions.[105] As Kaiser-Permanente demonstrates, when IB is implemented in the proper manner, it can produce positive changes—including increases in mutual gains and more innovations in collective bargaining agreements.[106]

B. Other IB Case Studies

Research has demonstrated that IB has helped parties find more creative solutions in collective bargaining agreements. From 1999 to 2004, the implementation of IB resulted in contractual changes such as increased worker input, more job security for workers, different pay systems, work-rule flexibility, and the creation of joint management-labor committees to handle various concerns with the workplace.[107] Furthermore, union representatives who participated in joint brains-

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 94.
104. *Id.*
105. *Id.*
106. Paquet et al., *supra* note 61, at 293.
107. Cutcher-Gershenfeld & Kochan, *supra* note 36, at 15. Authors used data from the Federal Mediation and Conciliation Service ("FMCS") National Performance Review Customer Survey to compare randomly collective bargaining agreements produced in 1999 and again in 2004. The FMCS was "created in 1947, [and] is an independent agency whose mission is to preserve and promote labor-management peace and cooperation." FMCS, *Who We Are*, *available at* http://www.fmcs.gov/internet/categoryList.asp?categoryID=13 (last visited Apr. 14, 2009).

torming and task forces with management were less likely to report reductions in benefits and were, in fact, more likely to report benefit increases.[108]

Once implemented, IB can remain effective for parties after initial use: two-thirds of managers and nearly forty percent of union representatives stated that they continued to use IB processes after their initial foray into the approach.[109]

VII. CONCLUSION

The Kaiser-Permanente studies demonstrate that not only can IB work, but it can work with a very large company that must address the interests of several thousand people. The Kaiser-Permanente example also demonstrates that although IB can make some headway into altering the parties' adherence to adversarial bargaining, "a mixed process that [draws] on the best features of both conventional positional and newer [IB] approaches to negotiations"[110] may be a more realistic approach for initial implementation of IB in collective bargaining.

Although research has shown there was some decline from 1999 to 2004 in the number of labor negotiators, particularly union negotiators, who describe IB as "good, very good, or excellent,"[111] labor organizations and companies who have attempted IB are trying it again, rather than abandoning their efforts. Not coincidentally, perhaps, the decline in use of IB also indicated an increase in "adversarial relationships, greater divergence in the views of labor and management, a decline in workplace innovation, and a decline in preference for interest-based bargaining."[112]

When implementing IB, it is important to remember that each labor-management relationship is different, each made up of different people with different viewpoints. Each person brings his or her own approach to the bargaining process, which can explain the variance in collective bargaining relationships.[113] IB can be a good fit for the collective bargaining context, but that does not mean that it would be effective for every relationship. Parties with a good history of bargaining, mutual leverage, and a positive working relationship may benefit greatly from IB. However, where the relative power of each side is skewed, IB risks exaggerating the balance of power and resulting in greater concessions from one side rather than the other. Because of this, parties should examine their collective bargaining history and relative leverage to determine if IB is a proper fit.

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108. Cutcher-Gershenfeld et al., *supra* note 24, at 260. "[W]hile the counterpart managers also reported benefit increases, they did report some benefit reductions taking place." *Id.* The authors proposed three reasons for the different results: "(1) the parties . . . found different and mutually satisfactory ways to frame the same agreement . . .; (2) the union negotiators who took the risk of using interest-based bargaining were disposed . . . to view whatever outcome they reached as favorable; or (3) the two sides are headed for difficulties when they implement the contract." *Id.* at 260-61.

109. Cutcher-Gershenfeld & Kochan, *supra* note 36, at 15.

110. McKersie et al., *supra* note 79, at 95.

111. Cutcher-Gershenfeld & Kochan, *supra* note 36, at 14. This result is not that alarming, as "[t]here was also some fall-off in managers' rating of the value of traditional approaches." *Id.* Given that managers are rating traditional approaches less favorably may be a good opportunity to persuade them to use IB as an alternative to the traditional adversarial process.

112. Cutcher-Gershenfeld et al., *supra* note 24, at 253.

113. HARBISON & COLEMAN, *supra* note 6, at 18-19.

Parties should also remain realistic about IB. Using IB does not necessarily ensure positive results, but it is one method that parties can employ to increase their chances of negotiating for terms that best benefit their interests. In sum, IB is an important tool in collective bargaining negotiations; however, it is not being used to its full potential now.[114] To build on IB's role in collective bargaining in the future, education about the process, as well as dissemination of information about successful IB negotiations (such as Kaiser-Permanente's), are essential to demonstrating that IB is a viable method of negotiation for some collective bargaining units.

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114. Cutcher-Gershenfeld et al., *supra* note 24, at 259.