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Collective Bargaining: A Management View

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As an experienced negotiator for management, Mr. Abelow considers the various provisions which often cause the most trouble in negotiating labor settlement agreements, and he offers suggestions for management concerning the successful resolution of issues arising in these negotiations. The rejection by union membership of the settlement agreement is an increasingly frequent occurrence which Mr. Abelow sees as a primary obstacle to successful negotiation.

I. Introduction

In the unpredictable area of labor negotiations, it is difficult to anticipate the course that will be taken by unions in their quest for higher wages, greater benefits and more favorable working conditions. What has happened over the last few years, however, may furnish some clues. While future negotiations may not seem to be very different from those in the past, there will be a variety of challenging issues and new problems that management will have to face. No longer are unions content to bargain merely for more wages, shorter hours, more numerous holidays, greater vacations, and other conventional fringe benefits. These things they now expect as a matter of course. Indeed, industry itself has recognized the need for improvements in these areas as the cost of living rises, as patterns emerge from industry to industry, and as competition for labor, especially skilled labor, makes it necessary to meet prevailing conditions.

There is little to suggest that unions will become more moderate in their demands or that industry will be able to meet the ever increasing costs of doing business without increases in productivity and without advances in operating efficiency. Unions today are concentrating on a variety of issues which, for want of a better term, may be called "job protection" issues. These are really not new issues, but refinements of those that have been placed on the bargaining table in the past. Indicative of some of the job protection provisions which unions seek are: (1) improved seniority clauses; (2) on-the-job training for higher rated positions; (3) obligatory trial periods when job openings occur; (4) clauses which require all bargaining unit work to be done exclusively by employees covered by the contract; (5) additional restrictions against subcontracting; (6) protection against plant closures, sales, mergers, moving the

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plant or relocating any of its departments; (7) assurances that contracts, jobs and job opportunities will survive sales and mergers; and (8) other "tailored" provisions designed to insure job tenure, maintenance of standards and union security.

Unions have come to the conclusion that money is not everything, and they are now seeking a voice in the decision making process which management has always regarded as being within its exclusive domain. There is a persistent attempt to invade management rights by requiring prior consultation and consent, or at least prior arbitration, before changes may be made which affect employees. Despite protests to the contrary, unions have come to regard themselves as partners in the running of the enterprise and are seeking a voice in the conduct of the business. They seek the type of clauses indicated above, claiming that they are "non-money" issues which are needed to protect the jobs and the job security of the employees and which cost the employer nothing. Realistically, most of these provisions *are* cost items—sometimes hidden, but sometimes quite visible. They are further restrictions on an employer's right to manage his enterprise efficiently and economically. Frequently, they are more expensive in the long run than the so-called "money items" upon which fixed costs can be ascertained.

In the area of grievance and arbitration machinery, unions are demanding protection against damage claims and court actions and insisting that arbitration be the sole and exclusive remedy for all disputes. Not only are unions insisting upon arbitration of grievances arising under the contract, but they are also insisting upon arbitration of other types of disputes growing out of the relationship between the parties, whether covered by the contract or not. Unions also seek immunity from damage claims in the event of so-called "wildcat strikes" and fiercely resist provisions which would enable management to obtain relief from courts when "no-strike" clauses are violated.

Management is faced with the problem of finding an accommodation between its objectives of operating efficiently, remaining competitive, paying fair wages, granting reasonable fringe benefits, remaining strike-free, and the objectives of the union in getting more pay for employees, protecting jobs and job opportunities, making the union more secure, and obtaining a voice in the running of the business. In a recent negotiation in which the writer was involved, it took two months to settle the so-called "non-money" issues and only two days to agree upon "money" matters.

It will be the purpose of this article to discuss some of the changes that unions are now seeking and will continue to seek in forthcoming contract negotiations and to suggest some approaches which management may take.

II. Negotiation

A. *Welfare and Pension Programs*

Hardly a negotiation takes place today without a union proposal for increased welfare and pension benefits. By this time, most unionized employers provide some measure of welfare benefits such as Blue Cross, Blue Shield, hospitalization plans, life insurance, and disability payments. There is a steady drive by unions to improve this type of employee benefit which is not included in the employees' gross income for income tax purposes. It is, however, regarded as an expense item for the employer and is deductible from the employer's gross income for tax purposes. Employers have usually agreed to devote some of the available settlement money for these welfare improvements not only because they are worthwhile and beneficial, but also because they do not increase the cost of doing business quite so much as do wage rate increases. For example, it is less costly to pay a premium to a medical plan or an insurance company than it is to pay the equivalent amount in wages, because higher wage rates bring in their wake greater overtime costs, holiday pay, vacation pay, sick pay, and other items which are based upon wage rates. There is a growing trend on the part of unions to push for these improved welfare benefits and to exclude their costs from the so-called "money package." This trend is likely to continue.

Pension arrangements, however, are not so common, and many industries and employers have not negotiated pension plans. It can be anticipated that unions will strive for creation of pension programs and for improvement of existing pension plans where they are already in effect. Here, again, employers find advantages to themselves in meeting demands of this nature, not only for the same reasons that motivate them in making welfare contributions, but also because pension programs facilitate retirement and replacement of older employees.

In the pension area there is a growing union demand for vested rights, for early retirement provisions and, more recently, for pension portability. The reserves in existing retirement plans set up by private employers and by state and local governments to date have reached astronomical figures and the National Bureau of Economic Research estimates that these huge amounts will be doubled and perhaps tripled within the next ten or fifteen years. All of this does not include the funds accumulated under the Social Security program and other federal programs. The movement toward more and larger pensions will continue unabated, and employers would be well advised to prepare for proposals of this nature.

It is unlikely that the unions in private industry will achieve the

very liberal pensions that have been obtained for government employees, because most pension plans provided by government are contributory plans where an employee shares part of the cost. Most pension programs in the private sector are fully paid for by the employer.

B. *Job Protection Clauses*

Job protection clauses come in all sizes and shapes. The simplest and most common clause sought by the unions provides, in effect, that all work that can be done by employees in the bargaining unit must be given to them exclusively. The objectives of these clauses are to eliminate subcontracting, create more job opportunities, provide overtime work, preserve the existing work force and protect it against diminution by the transfer of work to outside sources, even though it may be more economical and more efficient from the employer's point of view to have the work done elsewhere.

The drive for work preservation clauses has been given impetus by recent court decisions which have upheld their legality if their objective is to preserve or recapture the work for bargaining unit employees that has traditionally been done by them. If the purpose of the work preservation clauses is to bring pressure upon another employer for organizational purposes or to affect the labor policies of another employer with whom the union has a relationship, such clauses are deemed unlawful product boycotts.[1]

C. *Plant Removals, Sales, Mergers*

When a plant is sold, relocated, or merged into another corporation, employees can be affected. These are areas where unions are seeking contract provisions which insure not only job tenure for employees, but also the continuance and assumption of union contracts by successors. Management today must deal with union proposals under which employers are required to remain in the same location and maintain existing facilities for the life of the contract, to take the contract with them if they move, to offer jobs at other locations to present employees on a priority basis, to pay substantial amounts in severance pay to employees whose jobs are lost by plant closures or who refuse to take employment at new locations, and to guarantee that the obligations of the contract will be assumed by new owners no matter what form the sale or transfer of the business takes. Unions have found support for these proposals in court and

1. *See, e.g.*, National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); Houston Insulation Contractors Ass'n v. NLRB, 385 U.S. 811 (1967); NLRB v. Local 28, Sheet Metal Workers, 380 F.2d 827 (2d Cir. 1967); Local 455, Pipe Fitters, 167 N.L.R.B. 79 (1967); Local 8, Asbestos Workers, 163 N.L.R.B. 68 (1967).

Labor Board decisions, which have required new owners to arbitrate disputes between the union and the old owners and to recognize the union and the union contract which they never anticipated.[2]

Clauses of this nature impose unforeseen obligations upon an employer and sometimes prevent a sale or merger even when all else is agreeable. This type of union proposal is characterized by unions as a "non-cost" proposal, and frequently this is so—provided that nothing happens which makes a plant closure, sale, relocation or merger necessary or desirable. These proposals go much further than is presently called for by Labor Board and court decisions, which require advance discussion and bargaining with the union when the employer-employee relationship under the contract is affected.[3] Provisions of this nature are designed to ensure union security, job protection and work preservation. They appear with increasing frequency in union proposals and present difficult and perplexing problems to which there are no ready answers.

D. *Crisis Bargaining*

The complexity and multiplicity of today's union proposals require management to take a look at its own bargaining techniques in order to avoid last minute decisions which frequently must be made as the strike deadline approaches. It is frequently impossible to deal intelligently and objectively with some of the complex problems presented within the 30 or 60 day negotiation period before the contract expires. Many of the so-called "non-money" proposals require long-range thinking and planning. Other proposals are simply the outgrowth of unsettled in-plant grievances which might well have been discussed and disposed of through the grievance procedure or by arbitration prior to negotiations. Still other proposals, such as pension proposals, require actuarial advice or call for exhaustive studies which are impossible to obtain in a limited period of time.

Some techniques which management has found helpful in dealing with these problems include the more effective use of grievance procedures, advance studies of proposals which management knows will be on the bargaining table, pre-negotiation conferences with union officials and employee committees before demands are formulated by the membership and positions are hardened, and the

2. *See, e.g.*, John Wiley & Sons v. Livingston, 376 U.S. 543 (1964); Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964); Monroe Sander Corp. v. Livingston, 262 F. Supp. 129 (S.D.N.Y. 1966); McGuire v. Humble Oil & Ref. Co., 247 F. Supp. 113 (S.D.N.Y. 1965).

3. *See, e.g.*, Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); Town & Country Mfg. Co. v. NLRB, 136 N.L.R.B. 1002 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

establishment of human relations or labor-management committees to discuss problems (not grievances) during the life of the contract. Post-negotiation discussions on issues that cannot readily be solved before the contract expires and which call for arbitration as the terminal point in the event of continued disagreement are also effective. Furthermore, the entire removal from negotiations of certain issues, which the parties foresee cannot be solved quickly by mutual agreement, may be accomplished under an arrangement whereby such issues will be arbitrated and the award will be incorporated in the contract.

It may also be desirable to arrange for key management and labor officials to participate in the closing hours of negotiations when deadlocks or strikes appear likely. It is not customary for top management officials to be part of the negotiating team. In fact, it is generally unwise to have them sit at the bargaining table at all. Their presence, however, at crucial times lends emphasis to positions taken and often proves helpful in reaching decisions or compromises. There is, of course, no substitute for mutual agreement reached across the table, but frequently troublesome issues can be resolved and strikes can be avoided by the selective and ingenious use of some of the methods indicated.

E. *Grievances and Arbitration*

Management often makes a mistake by failing to take the initiative in bringing unsettled grievances to arbitration. Traditionally it is the union that grieves, not management, and often the grievance procedure is written to afford only unions the right to bring matters to arbitration. Grievances, however, sometimes "hang fire" and remain as irritants despite attempts to resolve them during the life of the contract. When they are unresolved, they invariably appear as union proposals during negotiations for a renewal contract. At that time, they usually are inflated out of proportion to their true importance.

Whether an employer has the right to invoke the grievance and arbitration procedure depends upon the wording of the contract. Courts, however, have been inclined to afford the employer access to the grievance procedure even though the contract does not expressly so provide.[4] Sometimes management *should* take the initiative under the contract, especially where strikes take place in violation of the agreement—wildcat or otherwise. In those instances, even where union officials claim that the strike occurred without their sanction or approval, arbitration proceedings requesting damages and cease

4. *See, e.g.*, Franchi Constr. Co. v. Local 560, Hod Carriers, 248 F. Supp. 134 (D. Mass. 1965).

and desist orders might well be instituted by employers. Arbitrating the claim against the union provides the advantage of obtaining a prompt disposition of the underlying dispute, offers the best opportunity for bringing illegal work stoppages to an end, and avoids lengthy and extensive court proceedings. There have been many instances where arbitrators have awarded damages for such breaches of the no-strike clause.[5]

In at least one oft-quoted case, an arbitrator's cease and desist order (in effect an injunction) directing the union to cease slowdowns, which he found to be in violation of the contract, was upheld by the Court of Appeals of New York.[6] More recently, the Fifth Circuit came to the same conclusion. This court pointed out that the enforcement of the arbitrator's award, although injunctive in nature, would be doing no more than enforcing the agreement of the parties to the contract and that once the arbitration is completed, the matter becomes ripe for specific performance and falls outside the scope of the anti-injunction provisions of the Norris-LaGuardia Act.[7]

The disciplining of strikers or union leaders participating in the strike is a remedy that is always available, but not always practical, and such action frequently fosters additional strife. However, even in those cases where the proof is insufficient to implicate the union in the breach of the no-strike clause by employees, or where the union has an "immunity" clause against damage claims, the institution of the proceeding has a salutary effect. It subjects the union to the expense of proceeding, compels union officials and shop stewards to justify or, at least, to explain what was done, and acts as a deterrent to future violations of the same nature. This is but one specific instance where employers may use the grievance and arbitration machinery to their advantage.

F. *Management Proposals*

Employers should review their contracts carefully before going into negotiations. Clauses become outmoded or, in actual operation, do not always serve the purposes for which they were intended.

5. *See, e.g.*, Sidney Wanzer & Sons v. Teamsters Local 753, 249 F. Supp. 664 (N.D. Ill. 1966); Publishers' Ass'n v. Stereotypers Union, 8 N.Y.2d 414, 171 N.E.2d 323, 208 N.Y.S.2d 981 (1960); Publishers Ass'n of New York, 37 Lab. Arb. 509 (1961), 39 Lab. Arb. 565 (1962), 42 Lab. Arb. 95 (1964); Oregonian Publishing Co., 33 Lab. Arb. 575 (1959); Regent Quality Furniture, Inc., 32 Lab. Arb. 553 (1959).

6. Ruppert v. Egelhoter, 3 N.Y.2d 576, 148 N.E.2d 129, 785 N.Y.S.2d 148 (1958). *See also* Marine Transp. Lines v. Curran, 65 L.R.R.M. 2095 (S.D.N.Y. 1967); Gulf & So. Am. S.S. Co. v. National Maritime Union, 360 F.2d 63 (5th Cir. 1966); Philadelphia Marine Trade Ass'n v. International Longshoreman's Ass'n, 365 F.2d 295 (3d Cir. 1966).

7. New Orleans S.S. Ass'n v. Longshoremen (ILA) Local 1418, 67 L.R.R.M. 2430 (Jan. 26, 1968).

Conflicts and ambiguities come to light during the administration of the contract, and differing interpretations of clauses that seem clear breed grievances.

Management should never hesitate to put its own proposals for contract changes on the table. Negotiations are a two-way street and the opportunity to improve the contract should not be missed. Unions traditionally resist changes sought by employers and are loathe to give up any advantage they have, or think they have. Nevertheless, management proposals should be advanced and pursued just as vigorously as are union proposals. They serve a dual purpose in that they provide the platform for serious discussion of company problems, and they can be withdrawn or modified in order to reach compromises.

III. SETTLEMENT REJECTIONS

Finally, we come to the newest development in bargaining—the frequent rejection by union employees of settlements agreed upon with the union. While settlements reached in negotiations are generally subject to the approval of the membership, such approvals in the past have followed almost as a matter of course. Lately, however, these settlements are being rejected with alarming frequency, and the possibility of rejection by the membership can no longer be disregarded by management negotiators.

While union representatives may be dismayed by these developments, and while mediators may point to these rejections with growing concern, the problems resulting from a rejected settlement fall squarely upon the employer, who has strained to meet the demands of the union and has, in good faith, made or agreed to a final proposal with the expectation that it would be recommended and approved. The number of rejections is much higher than the figures indicated by governmental agencies.[8] More often than not, federal and state meditators do not participate in negotiations and have no record of the many rejections that take place after settlements have been agreed upon with the union negotiating committee. The problem is a vexing one, and neither management nor union negotiators have been able to find effective solutions.

A variety of reasons has been offered for these rank and file rejections. These include: the increasing militancy of the union membership; the frequent failure of negotiators to settle local or in-plant grievances and issues which members feel are important or in which

8. Address by Walter A. Maggiolo, Disputes Director, Federal Mediation and Conciliation Service, at Vanderbilt University, Oct. 3, 1967, reported in BNA, 66 LAB. REL. REP. 94; address by William E. Simkin, Director, Federal Mediation and Conciliation Service, at University of Chicago, Nov. 7, 1967, reported in BNA, 66 LAB. REL. REP. 219.

they are emotionally involved; the failure to expose the membership to the give and take processes inherent in collective bargaining; the failure of union leadership to explain adequately the reasons for the settlement and the compromises reached; and, most important, the failure to achieve the gains and improvements which the membership expected.

Union proposals are usually formulated at union membership meetings, and the sky is generally the limit when asking an employer for changes and improvements. When the expectations of the membership are not realized, disappointment and resentment follow. Not being exposed directly to the bargaining process, the membership frequently cannot understand why concessions and compromises have to be made if there is to be an agreement.

Settlements are always disappointing. The employer finds that he must make concessions and do things that he never expected to do, and the union negotiators find that they cannot get what they expected. Both sides feel that they gave too much and got too little. Union members frequently believe that there is everything to gain and nothing to lose by sending their negotiators back for a new try and are encouraged in this belief by the frequency with which employers materially improve their so-called final offer after a rejection. Faced with this very real problem, management must devise new approaches to cope with the situation.

Experience has shown that some of the following methods have proved helpful. First, the problem of possible rejection should be discussed openly with the union negotiating committee. The committee should be pledged to give a detailed account to the membership of how and why the settlement was reached and what compromises were needed. Second, the settlement agreement should be reduced to writing, and union spokesmen should be asked to read and explain the settlement to the membership. It should incorporate a commitment from the negotiating committee not only to recommend acceptance, but also to speak out strongly in favor of the settlement at the membership meeting. Frequently, at the first sign of opposition from the floor, members of the negotiating committee become passive and silent, fearing criticism and disapproval. Third, any final offer made by the employer should be contingent upon acceptance and approval of every member of the union negotiating team. Offers presented to the rank and file by a split committee or without recommendation are usually rejected. Wherever possible, the settlement should be the result of an acceptance by management of the union's final offer, rather than vice versa. Fourth, management should carefully evaluate the in-plant problems of the rank and file members and, so far as possible, settle these issues. It is unwise to disregard them or to

believe that they will be forgotten if the economic package is big enough.

Furthermore, the union should be persuaded to keep the membership informed of the progress of the bargaining sessions in order to prepare the rank and file for the compromises that must inevitably follow. Sometimes a rejection is *needed* before a final agreement can be reached. Employee expectations may be so high that no management proposal will be acceptable the first time around. Management negotiations, as far as possible, should appraise this type of situation and hold something back if they come to the realization that a second round of negotiations may have to follow. In this connection, it is sometimes helpful to discuss the problem candidly with the international representative or the business agent who may offer valuable guidance. Sincere union representatives, who, like management negotiators, hope to achieve a fair settlement without a strike, often will respond to a good faith approach by management and frankly state whether or not a first settlement will be approved, or whether they need advance authority from the membership to conclude a deal without further ado. If there is a rejection, there should be a cooling off period, and no meeting should be scheduled for a short time, even if there is a strike in progress. Nothing sets the pattern for rejections in future negotiations as does a quick and greatly improved offer from the employer following a rank and file rejection. More important, while the final settlement following a rejection will usually require some change or improvement, if there has to be a "sweetener," it should be insubstantial whenever possible. This is necessary, even though a strike may be in progress, to insure that the rejection and the resultant delay are not made worthwhile to the union. Sometimes only the passage of time and the continued loss of earnings will bring an end to the dispute. Finally, contract expiration dates should be established, if possible, long before or long after local union elections. This will avoid being caught in a political atmosphere, with aspirants for office who are on the union negotiating team vying with each other to produce a settlement upon which they can capitalize.

Management has survived a great deal of bargaining and will survive much more. However, it must develop new methods and new techniques to meet the challenges of the union. Bargaining is becoming more complex and should be planned for and conducted with the same preparation and care that would be used in entering any other important and far-reaching business deal. Most union negotiators are supported by the expertise and help of union research departments and have the additional advantage of knowing what has been obtained from other unionized companies in the area and

throughout the country. There is a spirit of "me too-ism" pervading labor negotiations today, which disregards local problems, plant problems and competitive problems. Unions range far afield in making comparisons. Every effort should be made to conduct negotiations so as to meet the problems of the company, the union, and the employees involved in the enterprise covered by the contract in order to engage in realistic collective bargaining rather than in collective duplication of what some other company and union have done.

Satisfactory relationships between management and labor can be built up and preserved only through mutual understanding, cooperation and respect. The task of maintaining proper labor relations is a continuing one and depends as much upon the day-to-day administration of the contract as upon the wording of the contract itself. Employer rights and prerogatives incorporated in the contract and agreed to by the union should not be relinquished by careless administration. To the extent that these considerations are understood, management and labor will continue to move forward toward their mutual goal of a satisfactory relationship for the benefit of all.