

## CHAPTER 14

### NEGOTIATIONS

Negotiations is another tool the union uses to achieve its major goals. This chapter outlines how negotiations fits into NTEU's efforts, the legal rights associated with bargaining, and the strategic aspects of bargaining.

I. Why Do We Negotiate

II. When Can We Negotiate

III. Drafting Negotiable Problems

IV. Drafting Contract Language

V. Strategy and Tactics

## I. WHY DO WE NEGOTIATE?

The answer to this is not, "To represent employee interests." That is too vague a goal to help us plan in advance of the actual negotiations or to assess the effect after we negotiate. Adopting this as a goal of negotiations also hides the many, many things you should be able to accomplish in negotiations if you plan for them. Listed below are some of the legitimate goals the chapter could have when it goes to a bargaining table.

- 1) To improve employee rights.
- 2) To protect employees from adverse management decisions.
- 3) To build the steward system.
- 4) To increase employee participation in workplace discussions.
- 5) To build membership.
- 6) To pressure and expose bad managers.
- 7) To respond to employee problems.
- 8) To build NTEU as a union.
- 9) To monitor and evaluate marginal or new programs.
- 10) To build relationships.

### A CHECKLIST OF NEGOTIATING GOALS

When you assess the proposals and plans of your negotiating team, check to see if they have taken at least the following items into account:

- \_\_\_\_\_ will employee rights be improved or will employees be protected from the most significant adverse effects of a management change?
- \_\_\_\_\_ will employees be given an opportunity to participate in making key workplace

- decisions?
- \_\_\_\_\_ will pressure be put on managers to implement a workable system and to change it if it does not work as planned, e.g. re-openers and evaluation mechanisms?
  - \_\_\_\_\_ will the proposals respond to the problems employees have that are associated with the basic issue you are negotiating?
  - \_\_\_\_\_ will the union be helped in its effort to get more members, e.g. will we get visibility, credit, access?
  - \_\_\_\_\_ will the negotiations give the steward system what it needs to enforce the agreement and grow?

(add any others you believe your chapter should adopt)

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

## **II. WHEN CAN WE NEGOTIATE?**

The union and/or its chapters have a right to bargain at many opportunities. We have listed those situations below, along with some key characteristics of each.

### **TERM NEGOTIATIONS**

- \* The exclusive representative can ask to negotiate in the absence of a term agreement or when an existing one is about to terminate. This is a statutory right.
- \* The union can demand to negotiate over any negotiable employment condition item so long as a waiver of that right does not exist.

### **MID-TERM CONTRACT REOPENERS**

- \* The exclusive representative or its chapters can create this right only by negotiating a clause in an agreement that specifically provides the right to renegotiate a portion of the contract or that permits additional items to be negotiated.

## **LOCAL SUPPLEMENTAL BARGAINING**

- \* The exclusive representative, or a negotiating chapter, must assign the lower level body a right or obligation to bargain as part of the negotiations over the term contract or some other contract.
- \* You can only negotiate over the issues assigned you from the higher level contract.
- \* You may not change the terms of the higher level contract or otherwise violate it.

## **MANAGEMENT-INITIATED MID-TERM BARGAINING**

- \* When management makes a change in employment conditions, the union has the statutory right to negotiate over the substance, impact or implementation. The impact of the change need only be reasonably foreseeable versus immediate and actual for the obligation to arise. (29 FLRA 891)
- \* The fact that a contract permits management to make a change in an area using its discretion does not undo the obligation to negotiate with the union. (19 FLRA 454)
- \* This right may be waived by existing contract language covering the issue, or by the union clearly & unmistakably manifesting an intent to waive the right (during negotiations or otherwise).
- \* You are limited to bargaining proposals that deal with the change management made.
- \* If the issue is bargainable in substance, the impact of the change is irrelevant to whether management must bargain. If it is not substantively bargainable, i.e., the union can only bargain impact and implementation, the impact of the change on unit employees is relevant to whether there is an obligation to bargain. The change must be more than de minimis or of minimal impact (19 FLRA 290 and 29 FLRA 307).

## **IDENTIFYING WORKPLACE CHANGES**

In order to have a right to bargain over an employer-initiated change, the change must do several things.

First, it must be a change in personnel policies, practices, or working conditions.

Second, it must involve bargaining unit work or positions.

Third, it must be a change from past practice. To be a past practice, something must be consistently exercised over an extended period of time and followed by both parties, or followed by one party and not challenged by the other.

Fourth, the change must not be "de minimis." That involves a consideration of the following factors:

- \* the nature and extent of the change
- \* the duration and frequency of the change
- \* the number of employees affected
- \* the extent of bargaining over analogous changes.

### **UNION-INITIATED MID-TERM BARGAINING**

Irrespective of whether management makes a change in employment conditions, the union as the exclusive representative can demand to bargain over any subject that has not been specifically addressed in an existing contract or which has not otherwise been waived by the clear and unmistakable actions of the union.

### **CHANGES MANAGEMENT MUST BARGAIN**

Below are some examples of changes management can make, but must bargain over with the union in advance of making the change.

1. There is a reorganization of an office that affects employees, e.g. promotion opportunities are limited (13 FLRA 203 or 22 FLRA 91), an office is relocated (25 FLRA 843), or the location of a break area is changed (24 FLRA 714).
2. There is a freeze on promotions (25 FLRA 541).
3. A work operation is discontinued causing some employees to work less time (19 FLRA 136) or employees are put on forced annual leave due to a shutdown (21 FLRA 814).
4. New duties are added to a position or duties are changed (11 FLRA 419 and 8 FLRA

- 623). employees are suddenly rotated through the duties of the position description (24 FLRA 743) or their supervisor has changed resulting in tougher or new working conditions (30 FLRA 346).
5. Employees are required to use new forms as part of their job (10 FLRA 235, 16 FLRA 56) or the process used to review their work, even their travel vouchers, is changed (4 FLRA 488, 5 FLRA 173, 21 FLRA 1015).
  6. The way work is counted to do a performance appraisal is changed (7 FLRA 42).
  7. There is a change in working hours/shifts (8 FLRA 605), there is an increase in overtime (14 FLRA 499, 19 FLRA 136) or there is an increase in travel required for a job (16 FLRA 845).
  8. There is a change in a qualification for an assignment (17 FLRA 254) or there is a change in critical elements and performance standards (16 FLRA 1135).
  9. There is a change in safety equipment or procedures (25 FLRA 914, 26 FLRA 704).
  10. An employee is required to participate in a study or a pilot (26 FLRA 344). However, negotiations over the pilot do not waive the union's right to negotiate again when the pilot project is fully implemented or expanded (10 FLRA 182).

### **THE MID-TERM MANAGEMENT- INITIATED BARGAINING PROCESS**

#### **1) PROPOSED CHANGE**

If no change from past practice, the employer (ER) implements without union notice.

If decision constitutes change,  
union files unilateral implementation ULP.

If union has waived right to bargain over change, implement.

If there is no waiver, union  
files unilateral implementation ULP.

#### **2) NOTIFY UNION**

If no request to bargain, implement as notified.  
If no notice, ULP-  
Unilateral implementation  
or bypassing the union.

TIP: Notice must describe what the policy or change will be (17 FLRA #40);  
specific implementation date not required (15 FLRA #6).

TIP: Five days notice is too little (11 FLRA 3 68).

### 3) **UNION REQUESTS TO BARGAIN**

Brief the union; the union submits timely and specific proposals.

If management refuses to bargain, ULP.

TIP: Union entitled to reasonably available and necessary information  
(17 FLRA #92); information must be furnished timely (11 FLRA 111).

TIP: Just opposing implementation or demanding continuation of status quo not enough  
where substance not bargainable (18 FLRA #77)

### 4) **NEGOTIATIONS**

Bargain, reach agreement, execute.

If bargaining conduct is bad,  
union files bad faith ULP.  
If reasonable and necessary information  
is denied, the union, files ULP.

### 5) **IMPASSE**

If change implemented before bargaining complete, union files ULP.

### 6) **NOTIFY UNION OF INTENT TO IMPLEMENT**

If no response from union, ER implements last best offer.

TIP: Give employer immediate notice of impasse petition or lose right to oppose  
implementation (5 FLRA #39)

### 7) **UNION SEEKS FMCS ASSISTANCE TIMELY**

Delay implementation until bargaining complete.

8) **MEDIATION**

If agreement reached, execute.

9) **NOTIFY UNION OF INTENT TO IMPLEMENT**

If no response from union, implement last best offer.

10) **UNION SEEKS FSIP ASSISTANCE TIMELY**

FSIP mediation produces agreement, execute.

Negotiability issues appealed or dropped.

FSIP imposes final and binding decision, execute.

*If change implemented before FSIP finished union files a ULP.*

11) **AGREEMENT EXECUTED**

This follows ratification of agreement by union members, if union demands. Failure to ratify, requires renegotiation of agreement.

*If management implements without ratification, ULP filed.*

12) **AGREEMENT SUBJECT TO APPROVAL PROCESS**

If portion of or all disapproved, union renegotiates or appeals

TIP: Employer has 30 days to approve or contract implemented (14 FLRA #32)

13) **AGREEMENT IMPLEMENTED; TERM BEGINS**

14) **RESOLUTION OF ULP'S AND NEGOTIABILITY ISSUES**

If bargaining ordered, process begins anew; remedies must be implemented.

To:

Re: Grievance

NTEU hereby charges you with unilateral implementation of a change in working conditions as well as a refusal to bargain in connection with the following matter:

“[Insert Description]

This constitutes a violation of Title 5 USC Section 7116(a) (1) and (5).

As a remedy we request the following along with all other appropriate remedies:

1. A rollback of the change to the status quo;
2. Retroactive effect to any agreement reached;
3. Agreement to bargain over the change;
4. The posting of a cease and desist notice similar to that used by FLRA in these matters; and
5. Attorney fees.

Our designated representative in this matter is \_\_\_\_\_.

To:

Re: Grievance

NTEU charges you with violating the following portion of the contract: “[Describe]”

This is due to the following actions: “[Describe]”

In the event you allege that the contract gives you the right to do this, we charge you in the alternative with unilateral implementation of a change as well as a refusal to bargain. This would be in violation of Title 5 USC Section 7116(a) (1) and (5).

In addition to any appropriate remedy we specifically request the following should a ULP be found: A rollback of the change to the status quo; Retroactive effect to any agreement reached; Agreement to bargain over the change; The posting of a cease and desist notice similar to that used by FLRA in these matters; and Attorney fees.

To:

Re: Request to Negotiate

NTEU wishes to exercise its right to negotiate all legally negotiable matters, i.e., substance, impact, and implementation, associated with the following matter:

In order to “[Describe]” draft proposals, we request a briefing on this matter. If a briefing is to be denied, please inform us timely so that we can submit proposals based on what we know at this time. (However, if a briefing is denied, we reserve our right to add new proposals to the negotiations at that time that we become aware of currently unknown portions of the change.) Until negotiations and any related impasse procedures are complete, we ask that you delay any and all implementation of this change. If any implementation has already happened, we request that you undo it until agreement is reached. (By entering into these negotiations, we do not waive any of our rights to charge you for premature implementation and other violations of the statute.) Our Chief Spokesperson in this matter is \_\_\_\_\_ who can be reached at telephone number \_\_\_\_\_.

Sincerely,

To:

Re: Impasse Resolution

We consider the Union and the agency to be at a negotiations impasse of the following matter:

[Describe]”

We are petitioning for outside assistance to resolve this impasse. Until the impasse is resolved, we request that you not implement any aspect of the proposed changes.

Sincerely,

cc: National Field Representative

To:

Re: Information Request Associated With Negotiations; FOIA Request

Because we must consider whether or not to negotiate or negotiate further in a certain matter, I request the following information, in accordance with 5 USC 7114(B)(4):

“[Describe]”

If this information is not made available to us under 5 USC 7114 by (date), I ask that you immediately consider this request under the Freedom of Information Act, as well, in order to expedite disclosure. Please inform me of the reason for the denial, its statutory, regulatory or contractual basis, and the name and title of the official denying each part.

Sincerely,

cc: National Field Representative

### III. DRAFTING NEGOTIABLE PROPOSALS

**Law empowers us to negotiate over 7103(a)** - personnel policies, practices, and working conditions. However, the union may not negotiate:

- o 7103(a) - political activities, classification, matters provided by law.
- o 7106(a) - mission, budget, organization, number of employees, internal security.
- o 7106(a) - to hire, assign, direct, layoff and retain, suspend, remove, reduce in pay or take other disciplinary action, to assign work, to contract out, to determine personnel, to make selections, to act in emergencies.
- o 7106(b) – at the election of the agency to determine numbers, types, grades, employees and positions assigned to organizational subdivisions, work projects, tours of duty; to determine technology, methods, and means of doing work.
- o 7117 - government-wide regulations.
- o 7117 - a compelling need for a regulation.

#### **SUBSTANCE VERSUS IMPACT AND IMPLEMENTATION BARGAINING**

The **SUBSTANCE** of a decision is negotiable so long as it does not "directly interfere" with a management right (2 FLRA 604). When a matter is **SUBSTANTIVELY** nonnegotiable, the **IMPACT** of the decision is negotiable so long as you do not "excessively interfere" with a management right. The following criteria are applied to determine excessive interference:

1. The nature and extent of impact on employees from change.
2. Degree of employee control over adverse impact.
3. The effect on management.
4. Disproportionate impact on management.
5. The effect on government efficiency.

When a matter is **SUBSTANTIVELY** nonnegotiable, the procedures management uses to **IMPLEMENT** a decision are also negotiable.

## MODEL IMPACT AND IMPLEMENTATION PROPOSALS

When something is not negotiable in substance, you have to write your proposals dealing with the adverse impact of the decision and the implementation procedures. Examples of how to do that are provided below. Your proposals can:

- o Provide employees' reinstatement preference to jobs they were forced out of (29 FLRA 380).
- o Prohibit any management right from being implemented punitively (31 FLRA 241).
- o Bar management from violating law and regulation when implementing its decision (31 FLRA 37) as well as write the law into the contract to inform employees (31 FLRA 566).
- o Reasonably delay the implementation of a right (33 FLRA 147).
- o Force management to give the union the data it relied on to make a policy decision (31 FLRA 322); Force management to conduct a study of its implemented decision to gather facts (31 FLRA 566); Label the early days of a newly implemented decision a study period and preserve the right to renegotiate once the study is complete (33 FLRA 454).
- o Require management to give employees advance notice of a decision (31 FLRA 360); Require management to solicit employee wishes prior to making a decision (25 FLRA No. 26); Require management to give employees written notice of the fact it has made a decision (33 FLRA 711); Permit employees an opportunity to respond to and rebut management's decision (31 FLRA 566); and Require management to give employees in writing the reasons it made a nonnegotiable decision (32 FLRA 982; 33 FLRA 711).
- o Require management to take all reasonable steps to avoid adverse impact on employees from a decision (32 FLRA 1023, 31 FLRA 566) as well as to provide reasonable accommodations to adversely effected employees (31 FLRA 117).
- o Determine where employees assigned to a particular position will be located, if management has already decided their work will be done in several locations (31 FLRA 1110).
- o Force management to define a term and provide examples, e.g. what is a timely act (31 FLRA 566).

- o Give the union representation on management committees that engage in review and fact-finding, but not on ones that make decisions or recommendations on nonnegotiable matters (30 FLRA 1236).
- o Require implementation of a management decision be done in a fair and equitable manner (32 FLRA 380).
- o Give employees administrative time to do certain tasks (26 FLRA 76).
- o Offer management an option of using a nonnegotiable system such as selection by seniority, or a negotiable one (2 FLRA No. 77).
- o Ask that employees be assigned to light duty (29 FLRA 1491).
- o Negotiate that certain events be defined as evidence of a change in working conditions, e.g. a change in the performance standard (29 FLRA 1389).
- o Negotiate for extra training when employees are transferred to a new job through no fault of their own (29 FLRA 73 and 29 FLRA 348).
- o Give employees the right to refuse to do certain tasks because of their belief that there is a reasonable risk of death or serious bodily harm (29 FLRA 726).
- o Give displaced employees the right to written, persuasive reasons for their nonselection when applying for reselection to a previously held job (27 FLRA 191).
- o Provide employees unmeasured (unevaluated) work time when moving to a new job (26 FLRA 612 and 25 FLRA 384).
- o Call for the waiver of qualification requirements to assist placing employees in new jobs when they are adversely affected (25 FLRA 1041).
- o Obligate the employer to pursue cost-saving methods in response to budgetary shortfalls other than the ones it proposes to the union (25 FLRA 306).

## **NEGOTIABILITY STRATEGY**

Not only is it necessary to know how to write negotiable proposals, it is also very helpful to know how to strategically respond to management's assertion of nonnegotiability.

### **Under the law, the negotiability process goes as follows:**

1. Management asserts nonnegotiability.
2. The union requests the assertion in writing; bargaining over the proposal ends.
3. Management puts its assertion in writing.
4. The union files a petition with FLRA.
5. Management files its arguments with FLRA in 30 days.
6. The union has 15 days to respond with arguments.
7. The FLRA decides the case.

### **Here is how NTEU handles these problems:**

1. Management asserts nonnegotiability.
2. NTEU ignores management and keeps bargaining.
3. We look for ways to fix the problem language.
4. We explore packages and unilateral management actions around the issue.
5. We search for acceptable language that the FLRA has already held negotiable.
6. We consider dropping the substantive proposal for I and I language and an appeal.
7. We ask for management's written assertion at the last moment, e.g. at FMCS or FSIP; once this is done, the process is the same as above (beginning with step #3).

## **IV. DRAFTING CONTRACT LANGUAGE**

The process of drafting language, or evaluating proposed language, is filled with opportunities as well as hazards. You can accept language that is unclear or that simply is not an accurate reflection of what your agreement was, or you can build in certain safeguards which will actually enhance the clarity of your agreement.

To understand this aspect of negotiations you need to know the rules of contract writing, as well as the various tactics that can enhance an agreement's clarity:

## **I. Contract Interpretation**

- A. Clear and unambiguous language overrides all other interpretation considerations, e.g. bargaining history and the intent of the parties.
- B. Words will be given their normal dictionary meaning (or special federal sector meaning) unless the parties specifically agree in the contract to another meaning.
- C. Words will not be considered excess or surplus in an agreement unless there is no obvious meaning.
- D. Words and phrases will be interpreted consistent with the use of these same words and phrases elsewhere in the agreement. Agreements are interpreted as a whole.
- E. When you list a series of items, it is assumed that all others items are to be excluded from the list.
- F. General terms following specific terms draw their meaning from the specific terms.
- G. Specific language overrides general language.
- H. Clear past practices continue as long as they are not repudiated by an agreement.
- I. Language must be interpreted to be consistent with law and regulation.
- J. Language must be clear, (i.e., capable of no other interpretation) before a waiver, forfeiture or absurd result will be found in its meaning.

## **II. Tips On How to Avoid Or Get Around The Problem of Negotiating Clear Language**

Often in negotiations the problem is not getting conceptual agreement but rather trying to agree on the words to be used to describe that agreement. Professional negotiators use a variety

of tactics to get over this hurdle. Some are described below.

- A. When you can't agree on clear, unambiguous language, a purposefully ambiguous word or phrase helps get agreement, e.g., "reasonable," "fair and objective," etc.
- B. Where you are asked to trust management's good intentions to properly interpret a vague word or clause, build in a safety valve that requires management to trust you, e.g., an early reopener clause.
- C. When management asks you to accept a vague word or clause, but assures you it means "X", don't be reluctant to write a note on the bargaining proposal that you accept management's language because they assure you it means "X".
- D. When you have a clear past practice on an issue, (e.g., reassignment) don't feel you have to go out and negotiate for it every time the issue arises. Suggest to management that the union sees no need to request negotiations if the past practice is going to be followed.
- E. When management sends you a letter proposing a change and describes the procedure to be used, consider merely accepting that letter as the terms of employment to be followed.

## V. STRATEGY AND TACTICS

**There are three different strategies to use in bargaining. You can view bargaining as:**

- o A simple "persuasion" problem
- o A "power" problem
- o A nonadversarial situation

Often, bargaining is a mix of all three perspectives. This chapter highlights the major components of each.

## PERSUASION TIPS

There is still some significant disagreement about what it takes to persuade someone to change a position. Below are listed some of the more commonly accepted tactics. Review the list to identify the most significant ones for a negotiator. Try to add to the list if you can.

1. Because people naturally try to avoid internal conflict by changing their behaviors or beliefs, a good persuader will try to induce this in an opponent. Therefore, you must always know the basis of your opponent's beliefs before building a counter-argument, especially those beliefs rooted outside the room.
2. New information which conflicts with one's views is a cause of dissonance or internal conflict and discomfort.
3. The use of evidence can overcome one's low image when trying to persuade.
4. Testimony from outsiders has a high persuasion impact on small groups.
5. The more one is perceived as similar in values, status, and even argument styles, the more persuasive one is.
6. Arranging for an opponent to face conflicting information through questions rather than assertions is more persuasive.
7. The use of stories and examples is better in persuasion efforts than detailed technical information about processes.
8. Asking an opponent to publicly state or write the portions of your proposals it agrees with helps reduce its opposition to other portions of your proposal.
9. Moving an opponent off of its territory, to neutral territory, or your territory, improves persuasion efforts.
10. Persuasion occurs most often through small steps, addressing single issues.
11. When facing a naturally resistant opponent, it is best to deal with their arguments in opposition before going to your arguments in support of a proposal.
12. Opponents are always better prepared for bad or disappointing news if it suggested or explored in advance.
13. Inducing fear in an opponent only works if the proposal you are advancing removes all its fears.

## **BARGAINING POWER**

Unions have a variety of ways to create power when bargaining with management. Perhaps the best way to recognize these power sources is to break the bargaining process into its various components, i.e., Time Before the Bargaining Begins, Time at the Bargaining Table, Time Away from the Table, and Time After Bargaining. Some of the power sources that are available at each of these stages is listed below:

### **Time Before Bargaining Begins**

- o Use your relationship with management to get involved in a problem early or to get information.
- o Use the LMRC process to build a record for the need for a negotiated change because management did not voluntarily change.
- o Use surveys and other fact gathering techniques within the unit to build a case for change. These could be public or private.
- o Use your media skills among employees to create support for a change.

### **Time at the Bargaining Table**

- o Use your legal rights to force management to deal with you in good faith.
- o Use your right to get information through Section 7114 to probe a change.
- o Use the ULP process, either through a grievance or FLRA, to remedy a wrong or create a chip.
- o Use the negotiability process to create a "second bite at the apple." Use it to force management to work to sustain this defense. Use it to protect a proposal from compromise.
- o Use the issue of delay or speed-up to your advantage, depending on the value of the change being negotiated.
- o Use the FMCS and FSIP to force a binding decision on management.
- o Create a process to evaluate the effects and effectiveness of the agreement and change.
- o Negotiate reopener clauses.

## **Time Away from the Bargaining Table**

- o Collect information through other sources, e.g., FOIA, Privacy Act, internal surveys, bargaining councils, etc.
- o Use your public relations skills to build support in the chapter for your efforts, to inform local congressional public of adverse changes, inform the press of adverse changes, inform local congressional staff of adverse changes.
- o Call the National Office of NTEU to solicit help.
- o File formal complaints with other governmental bodies, such as:
  - MSPB under Section 1205(e)
  - The Special Counsel under Section 1206
  - The Inspector General
  - The General Accounting Office
  - The Comptroller General
- o Engage in concerted activity, e.g. picket, demonstrate, create a media event, leaflet, etc.

Below is outlined a model of how a problem-solving process should play out between negotiating parties. Go through it, making sure you understand how it works.

### **1. IDENTIFY THE PROBLEM**

Focus on what happened, why there is a need to make a change, and/or what is causing the dilemma.

### **2. ESTABLISH THE CRITERIA FOR THE SOLUTION (STATE INTERESTS)**

Focus on "why" the final solution must meet a need, get all your needs down and question the other guy's stated needs or criteria until it can be tied to a legitimate personal or organizational need that "must" be met here.

### **3. IDENTIFY AND COLLECT NEEDED INFORMATION**

Identify the facts you will need to find the appropriate solution, highlight those facts on which you disagree, and then list the information you need to settle the uncertainty.

### **4. DEVELOP ALTERNATIVE SOLUTIONS**

Brainstorm all possible solutions to the problem. Let in ideas that may not seem to meet the criteria you have identified and listen for the revelation of new interests - yours and theirs.

**5. SELECT THE BEST SOLUTION(S)**

Apply the criteria you identified earlier to the possible solutions and select the one that meets all the criteria. If there is not one that meets them all, then try to create one that does. If none do, then try to massage the criteria or rank them in importance. If you have several solutions that meet all the criteria, see if there is one that is better than others or consider testing several approaches.

**6. TEST THE CHOSEN SOLUTION(S)**

Discuss the need to test before you implement; if there is a need, or it is simply wise to do so, then create the rules for a fair test. Know what you are going to measure and how.

**7. IMPLEMENT THE SOLUTION(S)**

Put together a fact gathering process.

**8. EVALUATE THE SOLUTION**

Determine whether the solution did what it was supposed to. See if all the interests are met. Look for the creation of any new interests that may have created new problems.

## INTEREST BARGAINING

Fisher and Ury brought this approach to bargaining into the spotlight with their book *GETTING TO YES*. It is a problem-solving technique that is built around several rules rather than steps in a model.

1. Look at the fact that parties differ on an issue as good news, i.e., it is an opportunity to create an agreement around interdependent needs. This process assumes that you create "power through" people, not "power over" them.
2. Start the bargaining process as early as possible, ideally, before anyone has come up with a preferred solution to a problem. Start as soon as a problem is identified and deal face-to-face, not through paper.
3. Use as many principals, i.e., those directly affected by the problem and solution, on your team as possible. Minimize the use of representatives.
4. Never start bargaining from a position or proposed solution to a problem. Always begin working from your interests or needs associated with the problem. Indeed, break your interests into their smallest component to make the solution process easier. This helps root out false interests.
5. Put yourself in the position of others associated with the problem, e.g. your opponent as well as others in the interested community. Engage in joint fact-finding, if possible.
6. Separate the people (and their personalities) from the problem. This is called objectifying the problem.
7. Once the problem and its component interests are known, generate several options to resolve the problem. Brainstorm; energize the discussion by creating new ideas. Never try to divide a limited pie before you try to expand the pie to be divided.
8. Always know your Best Alternative To a Negotiated Agreement, your "BATNA." Only let your opponent know it if it is clear the opponent assumes it is less than you do.
9. Reliance on trust is unnecessary. Write a thorough agreement or the process has not worked.
10. Be willing to experiment with several solutions and learn from the results.
11. Realize that as soon as you implement a new agreement, many things begin to change and new needs begin to grow that will force a modification or updating of the agreement.

## IN SEARCH OF AN INTEREST

What follows is a typical conversation that occurs at a bargaining table when a union rep is trying to get a manager to get off his position or solution and state the real interest.

**Manager** - As our notice said, we want to send the three most Senior Grade 11's out of the downtown office to the new post-of duty.

**Union** - We know that, but what we don't know is why. Can you tell us?

**Manager** - We have studied this for several weeks and in our opinion it is the best solution.

**Union** - The best solution to what?

**Manager** - To the problems management believes exist.

**Union** - Can you describe them for us?

**Manager** - Well it has to do with the fact that we need experienced people in these new offices which otherwise will only have trainees.

**Union** - You are still only telling me what you are doing. We want to know what is behind this proposal. What experience do they have that you are referring to?

**Manager** - These three people have experience dealing with seizing tax protestors' property.

**Union** - How much experience and what kind specifically?

**Manager** - I don't know and isn't this taking us away for the real issue, i.e., our proposal.

**Union** - I guess I have two responses to that. First, we can't decide how to react to your proposal unless we know what problem it is aimed at solving. If it is a legitimate problem, we will try to see that it is solved. If it is just a figment of someone's imagination or there are questionable motives involved, NTEU will oppose this move. Second, if you can't tell us what experience it is that these people are bringing to the job, it does not sound like it is a problem. It would look real foolish to disturb the lives of three people if management can't even tell them what it is that they have that you need.

**Manager** - Well, as I remember our staff meeting, each of them has experience dealing with the local law enforcement authorities as back ups in a seizure.

**Union** - O.K. So you need someone who knows how to deal with the local authorities. Can I also assume that you need them to transfer this knowledge to the rookies?

**Manager** - Yes.

**Union** - How long do you think it will take to do that?

**Manager** - Who knows?

**Union** - Guess. A month, a week, a year, two seizures?

**Manager** - Probably two seizures per rookie.

**Union** - So we can also say that these people are not needed permanently out there. They are only needed to transfer a skill.

**Manager** - Probably, but we will find work for them to do after THAT.

**Union** - Now, why did you pick the three most senior 11's in this office?

**Manager** - The staff analyst who worked on this problem knew they had this experience from when he was their manager.

**Union** - Do you have a business related reason for limiting this transfer to these three.

**Manager** - Only that we have to do this fast.

**Union** - Why?

**Manager** - We need to make some seizures in the next two weeks.

**Union** - O.K., so let me recap. You have a need for people with experience dealing with the local police, to train our new employees until they have at least two seizures under their belt. These people must be on the job in two weeks as well. Are they your needs?

**Manager** - Yes.

**Union** - Are there any other parts to this problem?

**Manager** - I guess not.

**Union** - Well, it is my guess that we can support you in trying to solve this problem, but we have needs as well. Let me cover them and see if we can come up with a solution to our problem. It sounds like there are lot of other ways to solve this problem than picking these three senior 11's to go out there forever.

## **A STEP BEYOND**

The natural outgrowth of using interest bargaining tactics is to experiment with cooperative efforts. A cooperative effort differs from interest bargaining in that both sides recognize up front that they are going to use problem-solving techniques; the union gives up the tactics it has available to it to power a solution through, and management gives up the legal defenses it has under the law to keep the union and employees out of certain decisions.

The benefits to the union of such an approach are obvious. First, it will get the union as an institution, as well as its members, a bigger say in decisions affecting their work lives. Second, it will give the union another tool to use in bringing about change. Third, it helps us get over the artificial restrictions of the law and actually solve problems jointly with management. Fourth, it can expand our ability to build the power of the union.

Below are listed some tips on how to get a cooperative effort started.

1. Identify some workplace problem that is **nonnegotiable** in substance, but on which the union can substantially **undermine management plans** to implement a unilaterally developed solution. (Don't try this with substantively negotiable issues.)
2. **Approach the top level managers** with the idea of working cooperatively, if possible. Generally, going through the chain of command to announce this idea only puts a lot of opposition in your path, e.g. labor relations not knowing how to operate outside the labor laws. Moreover, the message that you are **willing to toss aside traditional adversarial tactics** is one that is particularly appealing to top managers, who least understand them and are most frustrated. However, this is not always true about top managers. If that is the case, look for any manager who will listen.
3. Begin your approach by telling management that even though you know the union can substantially block management plans if forced to, you do not want to do that. Indeed, you are willing to promise that traditional power and other **adversarial techniques will not be used**.
4. Make it clear that in return for the union's promise to leave its weapons outside the door, when the union enters the cooperative effort room, it will be **treated as the equal of any manager**. It will be given access to all necessary information, its concerns will be accepted as legitimate, and nothing will be implemented until there is agreement.
5. Another part of the union offer is to decide all matters by **consensus**. This way you are telling management nothing will be forced on it. "Everyone" on management's team must agree before anything is implemented. This should be a very attractive offer. Of course, it works in reverse, with nothing being implemented until the union agrees, as well.

6. Get management to hire a **facilitator** to be present during all discussions. This is necessary not only to minimize problems with parties inexperienced in cooperative efforts, but also to make management commit heavily to the decision to work cooperatively.
7. Offer to have some unit members on your team who are not union officers or stewards so as to increase the emphasis on employee and work site issues rather than institutional issues. Management can reciprocate by placing some first line managers on their team, along with high level principals, who also bring a desire to focus on the problem, to the table.
8. **Enforce the rules** of this new approach on your team.