

## CHAPTER 15

### INVITED PAPER: ARBITRATOR AS CONSENSUS BUILDER: OPPORTUNITIES AND CHALLENGES IN THE CHANGING LABOR RELATIONS ENVIRONMENT

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At the National Academy of Arbitrators' (NAA's) 2011 Fall Education Conference in Miami, Florida, the Federal Mediation and Conciliation Service (FMCS) offered a one-day pre-conference training for NAA members interested in qualifying for an education reform panel that the FMCS created as a result of the agency's experience in a Central Falls, Rhode Island, school district dispute. That dispute arose when the superintendent of schools, in February 2010, notified all Central Falls teachers that they would be dismissed at the end of the school year. Over the course of 60 days, FMCS Director George Cohen and one of the agency's senior managers, Jack Buettner, worked with the parties to find a mutually satisfactory solution. In a paper that he subsequently presented at a conference in New York, Cohen opined that the importance of the agreement that the Central Falls parties ultimately reached was that it "set the predicate for the dawning of a new era at the school district by upgrading student achievement and teacher development within a framework of labor-management cooperation."<sup>3</sup>

Describing his Central Falls experience as a defining moment, Cohen said that he and his colleagues "decided to scour the waterfront in search of materials explaining the pros and cons of whether, as a general proposition, meaningful education reform

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<sup>3</sup>George H. Cohen, *Advancing Student Achievement in the United States Public Schools Through Labor-Management Collaboration: The FMCS's Evolving Role in Education Reform*, paper presented at Worlds of Work: Employment Dispute Resolution Systems Across the Globe, Fitzwilliam College, University of Cambridge, Cambridge, England, July 20–22, 2011, at 5, available at [http://fmcs.gov/assets/files/speeches/A\\_paper\\_on\\_Education\\_Reform\\_public.pdf](http://fmcs.gov/assets/files/speeches/A_paper_on_Education_Reform_public.pdf).

was achievable through collective bargaining.”<sup>4</sup> Their research led them to conclude that meaningful education reform could be achieved through collective bargaining and that the FMCS should be poised to help the reform cause to any extent possible. Recognizing that the FMCS staff was not large enough to cover all the education reform initiatives that conceivably might be generated by thousands of school districts across the country, Director Cohen decided to afford the more than 1,000 NAA members the opportunity to supplement the FMCS activities by “offering to provide facilitation and/or mediation services in connection with the anticipated uptick in public sector teacher education reform negotiations.”<sup>5</sup>

It is not surprising that the FMCS turned to the Academy as a source of qualified practitioners who could supplement its ranks. As a group, labor arbitrators have a deep understanding of the collective bargaining process and years of experience working with labor and management representatives in education as well as other public and private sectors of the economy. Moreover, while Academy members presumably have deep experience in the arbitration of labor disputes, most, if not all, also have served as mediators, fact finders, and trainers. It is the authors’ contention, however, that although the experience Academy members bring to education reform negotiations is necessary and valuable, it is not sufficient. What the parties require of us are new ways of thinking about their relationships and new ways of supporting their efforts to work collaboratively.

### **Evolving Models of Collective Bargaining and Labor-Management Relations**

The traditional model of collective bargaining (proposal, counter proposal, and incremental compromise leading to settlement) has been the standard in labor-management relations since World War II. Although the traditional, adversarial model has resulted in thousands of agreements, the process by which these agreements were achieved often led to less than optimal outcomes and, on occasion, undermined the working relationship between labor and management. Moreover, newly emerging issues such as rapidly changing technology, workplace diversity, family-work life

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<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at 13.

balance, teacher accountability, and student achievement are not effectively addressed by a process of offer and counter offer. Experience and research have demonstrated that these complex issues are better addressed by a more collaborative collective bargaining process that considers the vast array of stakeholders whose interests will be impacted by the parties' collective bargaining agreement, fully explores stakeholders' interests with respect to the matters being negotiated and the many options for meeting those interests, and strengthens the parties' relationship.

Since the 1980s, labor-management collaboration that is grounded in interest-based negotiations (IBN) has been promoted as a better alternative to the traditional, adversarial model of labor-management relations. In 1993, President Bill Clinton ordered the establishment of labor-management partnerships and argued that the mandate to reform the federal government was only possible by changing the nature of federal labor-management relations so that labor and management serve as partners. In 2002, even the National Mediation Board's "Iron Lady," the parties' nickname for three-term member Maggie Jacobsen, promoted interest-based bargaining (IBB). Jacobsen was an early proponent of IBB because she viewed it as a process that produces partnerships rather than mutual resentment. The time has come, she said, "for the sides to craft a mutually acceptable solution through joint problem-solving and end the testosterone-fueled debates that often dump the problem into lawmakers' laps."<sup>6</sup>

It must be acknowledged, however, that many parties have been reluctant to abandon traditional collective bargaining despite such enthusiastic endorsements of collaboration or even the promise of better results. When they have adopted a collaborative approach, they more often have been motivated not by the "promise of collaboration," but by their frustration with traditional collective bargaining. Whether disappointed about the impact on their labor-management relationship or the failure to achieve desired outcomes in negotiations, decisions to adopt collaborative bargaining were usually forged from the failure of traditional collective bargaining to meet the parties' needs.

In the authors' experience, the most frequent users of collaborative bargaining processes are teacher unions and school districts because collaboration is the cornerstone of many educational

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<sup>6</sup>Jake Kelly, *NMB Mediator Maggie Jacobsen*, UNITED TRANSP. UNION NEWSLETTER, Jan. 8, 2008.

initiatives from curriculum development to differentiated learning. Already steeped in a culture of inquiry and learning, educators have engaged in various collaborative processes as they have attempted to choreograph the varied demands of federal, state, and local regulation while developing effective teams to deliver quality education. Also spurring an increase in the number of school districts and unions choosing to work collaboratively are education reform efforts, underperforming school mandates, and initiatives to revise teacher evaluation methods. Whether IBN and collaborative labor-management relations will gain a strong foothold in other sectors of the economy remains an open question, but there is no question they will be the preferred methods in a significant number of school districts for the foreseeable future, in part because the U.S. Department of Education and several private foundations, as well as local and national union and management leaders, are persuaded that labor-management collaboration is the most effective avenue for improving student learning outcomes.

The extent to which collaboration in education is taking root nationally was demonstrated at a conference in Cincinnati, Ohio, on May 23 and 24, 2012, sponsored by the U.S. Department of Education, FMCS, and six other sponsoring organizations.<sup>7</sup> With a focus on building collaborative relationships within school districts, this conference brought together three-person teams consisting of the teacher union president, school superintendent, and school board chairperson from 88 city, suburban, and rural school districts, as well as 14 state-level teams composed of elected union leaders and staff, representatives of state school board and superintendents' organizations, and state policy makers. The conference provided opportunities for attendees to showcase their collaborative accomplishments and learn from each other.

In Massachusetts, the two statewide teachers' associations, the superintendents' association, the school committees' association, three universities, and the Rennie Center for Education Research & Policy have come together to form the Massachusetts Educa-

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<sup>7</sup>These organizations sponsored a similar conference in 2011 in Denver, Colorado, that was attended by then-NAA President Gill Vernon. The arbitrator training program offered by FMCS at the NAA Fall Education Conference was an outgrowth of the Colorado conference. The other sponsoring organizations were the American Federation of Teachers, the National Education Association, the American Association of School Administrators, the National School Boards Association, the Council of the Great City Schools, and the Council of State School Officers.

tion Partnership (MEP).<sup>8</sup> The catalyst for this effort was a research project funded by the Boston Foundation that resulted in a 2011 publication entitled, *Toward a New Grand Bargain: Collaborative Approaches to Model Education Reform in Massachusetts*, authored by Barry Bluestone, Dean, School of Public Policy and Urban Affairs, Northeastern University; and NAA member Thomas A. Kochan, George M. Bunker Professor of Management, M.I.T. Sloan School of Management.<sup>9</sup> The authors looked at what was happening in Wisconsin and other states and declared there had to be a better way. They then set about describing their view of that better way: education reform and improved student outcomes within the context of a strong labor-management relationship. With funding from the Bill and Melinda Gates Foundation and the National Education Association Foundation, the MEP will undertake training, research, and the creation of an online learning network. It will focus on enhancing labor-management collaboration in school districts across the state in order to improve student achievement.

These are but a few examples of the many efforts that are underway, both in education and in other sectors of our economy, to preserve the institution of collective bargaining while enabling it to be more responsive to contemporary societal needs. Undergirding all of these efforts is the conviction that the parties must focus more on their shared interests and goals, while continuing to recognize that each party has its own constituent responsibilities, and that there will be times when the interests of the different constituent groups will conflict. The parties' desire to work collaboratively presents both opportunities and challenges for members of this partnership. If we, as arbitrators, are to do this work, it is critical that we understand the theory and practice of interest-based processes such as collaborative bargaining.

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<sup>8</sup>The full names of the member organizations are the Massachusetts Teachers Association; the American Federation of Teachers Massachusetts; the Massachusetts Association of School Superintendents; the Massachusetts Association of School Committees; the Massachusetts Institute of Technology; Northeastern University; University of Massachusetts, Boston; and the Rennie Center for Education Research & Policy. The MEP Web site can be found at [www.massedpartnership.org](http://www.massedpartnership.org).

<sup>9</sup>BARRY BLUESTONE & THOMAS A. KOCHAN, *TOWARD A NEW GRAND BARGAIN: COLLABORATIVE APPROACHES TO LABOR-MANAGEMENT REFORM IN MASSACHUSETTS* (2011).

### Interest-Based Bargaining Theory

Collaborative approaches to collective bargaining have been described as collaborative bargaining, IBB, IBN, mutual gains bargaining, and principled bargaining. Whatever the nomenclature, the process is based on several specific principles and employs particular techniques. A core principle is that the parties begin their negotiations by focusing on their respective interests, some of which will be shared and some of which likely will be competing. An initial focus on interests rather than positions leads to a fuller understanding of the issues to be negotiated and the needs and concerns of each party with respect to each issue. This fuller understanding provides a more effective basis for developing agreements that address each party's true needs. A basic tenet of IBB is that outcomes do not need to be "win-lose" or a zero sum, where success for one side must always come at a loss for the other. Rather, it assumes that, in many instances, by working together the parties can arrive at outcomes that effectively address most of the needs of each party.<sup>10</sup>

Other principles of IBB include:

- *Voluntary Participation*: Collaboration is not possible if one party insists that the other engage in a collaborative approach to negotiation.
- *Commitment to Process*: The process is more likely to succeed when both parties make a commitment to engage in collaborative bargaining for a specified period of time. To avoid disputes about the next steps, the parties are encouraged to agree upon an "exit strategy" at the start of bargaining in the event they do not complete the process.
- *Joint Training*: The process is more likely to succeed when the participants have undergone training together.
- *Full Participation*: The collaborative bargaining process works best with participation from all team members; chief negotiators or spokespersons are not used.

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<sup>10</sup>The potential for attaining mutually satisfactory outcomes is described in Robert Mnookin, with Gary Friedman & Joel Cutcher-Gershenfeld, *A New Direction: Transforming Relations within the San Francisco Symphony*, HARMONY: FORUM OF THE SYMPHONY ORCHESTRA INST. 13 (Oct. 2001), at 13–36. For a description of IBB on large scale, see Robert B. McKersie, Susan C. Eaton, & Thomas A. Kochan, *Kaiser Permanente: Using Interest-based Negotiations to Craft a New Collective Bargaining Agreement*, NEGOTIATION J. (Jan. 2004), at 13–35.

- *Consensus-Based Decision Making:* The collaborative bargaining process leads to consensus decisions. This ensures full participation and requires the parties to attend even to the concerns of a “minority.” As a result, decisions are broadly supported and the negotiated agreements are more durable.
- *Shared Information:* The process is best served when the parties share, rather than withhold, information or data that inform their decision making.

### **How Interest-Based Bargaining Differs From Traditional Bargaining**

Whether a traditional or a collaborative approach to bargaining is adopted, the parties have the same goal: to reach agreement. The interest-based approach to achieving this core goal, however, is quite different from the familiar, traditional approach. The different approach is intended to produce qualitatively different results, including a better bargaining experience, a more durable agreement, and an improved labor-management relationship. We will now highlight the differences between the traditional and collaborative models at different phases of the bargaining process.

Before traditional bargaining begins, the labor and management teams each meet privately to draft the proposals that they will bring to the table and to prepare their negotiation strategy. The teams’ lists of proposals represent each side’s preferred solution to a particular problem or concern. During these private meetings, each team also develops its negotiation strategy. The strategy may include forwarding proposals that overstate their actual goal or proposals that will be “withdrawn” either to appear willing to compromise or simply to mislead. The teams decide the incremental compromises they will make and the point at which they will refuse further compromise—their “bottom line.” Bargaining teams also decide what can be discussed during joint bargaining sessions, what must be discussed in a separate caucus, and who will speak for the team during the joint session.

Preparation for collaborative bargaining is very different. Once the parties agree to use a collaborative approach to their collective bargaining, meeting separately is replaced by joint preparation. The parties first undergo joint training, usually within 6–8 weeks before the bargaining begins. Even if the parties have used an interest-based process in prior negotiations, a joint training is commonly conducted, and the parties are encouraged to

include certain stakeholders who are not part of the bargaining teams but who play roles in the implementation of any negotiated agreement.

Upon completion of the joint training, the parties' first task is to jointly agree on ground rules, which are different from those found in a traditional negotiation. The parties determine which contract issues will be resolved using the interest-based approach, schedule their meetings in advance, set a target completion date, and agree on an exit strategy if they do not reach agreement. They also decide whether they will engage an external facilitator or use internal facilitators. There are various models of internal facilitation, including having union and management labor counsel alternate facilitating and using a trusted district or union staff person who is not directly engaged in the negotiating process.

Once the parties agree on the ground rules and schedule, the next step is to begin meeting together. Collaborative bargaining sessions are distinguished by the absence of features always present in traditional bargaining. Rather than a list of opening positions, the parties come prepared to simply list the problems or concerns they have encountered since their last negotiation. They then engage in a dialogue to explore and share their concerns in order to fully understand each party's interests with respect to each issue.

Bargaining sessions are conducted face-to-face with limited or no use of separate caucus sessions. There are no chief negotiators or spokespersons, and every member of the bargaining teams participates and, therefore, is responsible for being prepared to fully participate in each session. Attorneys and union representatives provide support for their clients but do not typically lead the discussions.

Once a problem or issue is fully explored and understood, the parties brainstorm possible solutions or options. The parties are encouraged to be creative and not to be concerned (at this point) whether an option is "right" or "best." The goal is to identify all possible solutions or options. Once they have fully explored the options, the parties focus on identifying the best option that is mutually acceptable, rather than the traditional approach of chipping away at the only (two) options "on the table" (union's and management's). By applying mutually acceptable criteria and standards (for example, effectiveness, practicality, and financial feasibility) to the various options, the parties narrow the list and



move toward consensus on which option presents the best solution to the issue at hand.

The process of diagnosing problems and sharing concerns and interests does not invite the parties to argue “positions.” First, the parties have not taken positions as there are no specific proposals. Second, because the process encourages data collection (such as analyzing the problem/issue), information sharing (about their respective interests and concerns), and using mutually acceptable standards or criteria, the parties reach agreements that are based on objective data and principles rather than the result of pressure.

Once the parties have reached agreement (or come close) on individual issues, the remainder of the process is similar to the traditional approach. The parties work on packaging the various issues that they have resolved to reach a final and complete agreement. A memorandum of agreement is drafted and signed. At this point, the collaborative bargaining process is completed and the traditional ratification process begins.

The authors have facilitated the collaborative bargaining process described here hundreds of times. The problem-solving method entails longer and more detailed discussions of the issues than typically occurs in traditional bargaining; however, these discussions always lead to greater understanding between the parties. Both labor and management teams report a high degree of satisfaction with the dialogue that occurs in collaborative bargaining. Unlike traditional bargaining, the collaborative approach focuses attention on problem solving, information collection, and information sharing rather than challenging or attacking the others’ proposals.

To effectively engage in collaborative bargaining, the participants must be vigilant in order to avoid familiar behaviors more suited to traditional bargaining, such as adversarial tactics and argumentative responses. We each have facilitated negotiations for parties that have had prior experience using an interest-based approach, and even these experienced teams need skilled facilitation to overcome ingrained habits.

### **Interest-Based Negotiations Training**

How do labor-management teams get the training they need to engage in IBB? Many organizations provide IBN training. There are training programs by organizational consultants, community

mediators, and business trainers who understand the general theory of IBN, but most do not have trainers with extensive experience in collective bargaining. These trainers may assume that collective bargaining experience is not a prerequisite for training a joint labor-management team. We contend, however, that effective training programs for labor-management parties are those that employ experienced labor-management neutrals (such as Academy members) and provide consistent, realistic, and industry-specific training based on the principles and techniques discussed earlier.

Training that prepares the parties to undertake collaborative negotiations is conducted jointly and with the voluntary participation of both management and labor. The training often includes not only the members of the respective bargaining teams but also the full school committee, school administrative officers, union leaders, town administrators, and, sometimes, constituents. For negotiations between Harvard University and the Harvard Technical and Clerical Union in 2006, approximately 300 negotiators and constituents received a half-day training in interest-based collective bargaining so that the constituents would understand the process that the parties were using to arrive at the new contract.<sup>11</sup> Building constituent understanding and support has proven to be an essential element to a successful ratification and to sustained relationship building.

It is critical that trainers not create unreasonable expectations or suggest that the parties will stroll into the sunset hand-in-hand if only they adopt a collaborative approach in their negotiations or their day-to-day relationships. Rather, the parties must be advised that, although IBB is often a more effective process than traditional bargaining and the experience is likely to be a more pleasant one, they should not assume that it is a way to avoid conflict—an appropriate and inherent aspect of labor-management negotiations. IBN will, however, enable them to manage that conflict more effectively.

If the parties want to use an interest-based approach for their contract negotiations, they should be encouraged to complete the training well before successor negotiations are initiated. The training techniques used in these programs are generally experiential, alternating presentations of theory with interactive discus-

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<sup>11</sup>This training was designed and conducted by NAA members Robert B. McKersie and Nancy E. Peace.

sion and exercises. Training exercises are typically designed for the particular labor-management group, using industry-specific and, where possible, actual experiences. Exercises where participants are directed, for example, to negotiate the price of a car or where to go for dinner may illustrate an IBN, but union and management participants often find it difficult to transfer this learning to their labor-management experience. By the conclusion of a well-designed joint training program, the parties will have a good understanding of the various techniques for engaging in collaborative negotiations and will have practiced applying those techniques to issues or concerns that are real and familiar to them. They will understand the need to agree on a joint plan of action and comprehensive ground rules for their collaborative bargaining process.

Once the parties complete their training and their bargaining is scheduled to commence, the challenging work begins. Without the assistance of a skilled neutral facilitator with extensive collective bargaining experience and familiarity with the specific issues on the table, even the best-intentioned and best-trained negotiators will quickly revert to what is familiar: the traditional, positional, and usually adversarial model of bargaining.

### **Collaborative Bargaining and the Role of the Arbitrator**

For those of us who have spent many years as labor arbitrators and mediators, a shift in mental frame is necessary if we are to be effective as facilitators of IBN or other collaborative processes such as joint problem solving, peer evaluation, and strategic planning. When engaged as arbitrators or mediators, we are responsible for managing the process in addition to deciding issues, mediating conflict, or providing advice on the content of specific issues. It is essential that arbitrators who accept work as facilitators guard against the tendency to themselves fall back to what is familiar but more suited to traditional, positional bargaining. In traditional labor mediation, for example, the parties usually meet in separate rooms while the mediator shuttles back and forth. This technique is inconsistent with the goal of working collaboratively. Successful collaboration occurs when the parties meet face to face in the same room and communicate directly with each other and not through an intermediary.

An effective facilitator uses skills and techniques that may be unfamiliar to arbitrators with mediation experience. In labor

mediation we often focus our attention on and work with the principal representative from each party. Mediators monitor the dynamics between the two teams and even within each team, with an eye to identifying and resolving conflicts. In an interest-based process, the parties, not the facilitator, are responsible for resolving conflicts that arise. The facilitator's primary task is to ensure that the parties remain engaged in the collaborative process. This includes strategies to encourage the participation of all team members even when their participation reveals conflict with the prevailing view. The facilitator's role is not to carry messages to ease a difficult conversation but to guide the process in ways that support the parties' ability to maintain direct communication, even when the issue is controversial or difficult. Interest-based collaborative processes can be powerful precisely because they call on the experience and wisdom of all members of both negotiating teams.

### Conclusion

Although Academy members readily understand, accept, and adapt to the parties' preferences when arranging and conducting an arbitration, the evolution of collective bargaining now demands even greater flexibility. Over the past 30 years, collaborative initiatives that encourage joint problem solving have steadily reduced the parties' reliance on grievance and arbitration procedures.<sup>12</sup> In a 1986 presentation to the Academy, Professor Thomas A. Kochan documented developing changes in approaches to collective bargaining and predicted how future changes would impact labor arbitrators:

... the needs of the parties for flexibility and adaptability will most likely produce a varied set of processes for solving problems and resolving differences. ... One can easily envision and predict an expansion in the demand for equally flexible third parties with multiple skills in problem solving, negotiations, mediation, strategic planning, and arbitration. Under this scenario, the eventual demand for arbitrators will depend on whether current and future members of the arbitration profession define their roles broadly enough to fill these multiple roles or leave the non-arbitration roles to the growing number of

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<sup>12</sup>Thomas A. Kochan, *The Future of Collective Bargaining and Its Implications for Labor Arbitration*, Part I of *Labor Arbitration and Collective Bargaining in the 1990s: An Economic Analysis*, in ARBITRATION 1986: CURRENT AND EXPANDING ROLES, PROCEEDINGS OF THE 39TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 58-59 (Walter J. Gershenfeld, ed., 1987).

consultants and third parties trained in alternative dispute resolution methods.<sup>13</sup>

Labor arbitrators may be uncomfortable with some of the language and concepts of IBN because this approach to bargaining derives from organizational development theory, sometimes viewed as “touchy-feely” or as having little value in the real world of labor relations. As the Central Falls, Rhode Island, negotiations, the U.S. Department of Education conference in Cincinnati, and the new partnership in Massachusetts demonstrate, however, workplace collaboration has taken hold, and the trend toward interest-based collective bargaining is underway and seems likely to continue, especially in school districts. This means that the parties’ demand for facilitators who are knowledgeable and skilled in IBN and other collaborative processes and who also have collective bargaining experience will likely continue to grow.

Whether the parties choose to engage a labor arbitrator to serve as the facilitator of their collaborative process will depend on whether members of our profession are willing to define their roles more broadly and are able to adapt their skills to meet the new demands of the parties. As the theme of this conference makes explicit, the external environment is continuing to shape both arbitration practice and the practices of arbitrators. The question for those of us who have made our careers in the field of labor arbitration is: Which changes will we embrace and which will we leave to other colleagues?

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<sup>13</sup> *Id.*