Top Tips for Better Bargaining

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Hands on support.
Do Your Homework

Prior to bargaining, there are a number of steps you should take to ensure that you have obtained and considered the information you need to be ready to bargain and to explain or cost your proposals or to respond to the union’s proposals.

- Collect and review internal data on grievances/arbitrations;
- Collect data with respect to the bargaining unit and relevant cost issues, including:
  - benefits costs and claim rates,
  - sick leave costs,
  - overtime costs by classification, location and shift,
  - total average compensation per worker and breakdown by regular wage, overtime, additional compensation (such as productivity bonuses, shift premiums) and benefits,
  - total number of employees with a breakdown by shift and classification,
  - overall cost of shift differentials, emergency recall and other special pay and breakdown by classification and shift,
  - vacation costs,
  - absenteeism rate,
  - accident rate by classification, location and shift, and
  - demographic data of bargaining unit by sex, age and seniority;
- Obtain a legal review of the existing collective agreement, particularly with respect to changes in applicable legislation such as employment standards and employment insurance, and the effect of recent arbitral/court decisions;
- Gather and review current information on terms of settlement, including wage increase information (B.C. Business Council, Stats Can, Conference Board of Canada), pay and benefit surveys, and the terms of other collective agreements in the industry (B.C. Labour Relations Board website at http://www.lrb.bc.ca/cas/); and
- Review company short and long term business goals to ensure alignment of bargaining positions and goals.

Develop Company Goals and Proposals for Bargaining

Identification of the company’s goals in bargaining is a key part of the planning process. The goals should align with anticipated economic conditions and the company’s long range business plan.

In developing proposals and in bargaining, consider that the union and company usually have a fundamentally different view of the collective agreement. The union’s perspective is that the collective agreement is permissive, in that the employer cannot do something unless it says so in the collective agreement, whereas the employer usually considers the collective agreement to be restrictive, such that it can do something unless the collective agreement says it cannot. In fact, the collective agreement constrains management rights and discretion and does
not “give” the employer anything. Accordingly, the employer’s key goal is to negotiate and maintain a strong and expansive management rights clause.

Develop a Strategic Plan for the Bargaining Process

In advance of starting bargaining, you should develop a strategic plan for the management of the process of bargaining. Your goal, to the extent possible, is to control the process and be ready for any steps which the union takes. To develop a strategic plan, you should consider the following factors:

- **Notice to Bargain:** Determine the earliest date on which notice to commence bargaining may be given, and whether the company wishes to give notice in the event the union does not;

- **Likelihood of a Strike or Lockout:** Consider how likely it is that a strike or lockout will ensue. If there is likely to be a strike or lockout, consider in advance whether the company can continue to operate, and if not the steps and timeline required for an orderly shutdown. A detailed plan for shutdown should be developed and the tasks assigned in advance, so that it can be put into effect as soon as required;

- **Replacement Workers:** Consider the likelihood of a strike or lockout, the complement of non-bargaining unit staff who will be available to work during a strike or lockout (having regard to section 68 of the Labour Relations Code) and whether any additional non-bargaining unit employees should be hired. If so, such employees must be hired prior to the date on which notice to bargain is given. You should also consider whether any specialized training will be required for excluded employees in order to perform bargaining unit work during a strike or lock-out and arrange for this training;

- **Continuing Operations During Strike or Lockout:** If it is intended to continue to operate, assess in advance the impact a strike may have upon deliveries as well as upon any contracted services. If alternate arrangements need to be made, develop a plan in advance;

- **Timing of a Strike or Lockout:** Consider whether the company is better able to withstand a strike or lockout at a particular time, and factor this timing into the strategic plan and the bargaining dates and process; and

- **Labour Board Processes for Dispute Resolution:** The Labour Relations Code contains some processes which may enable an employer to avoid or to delay a strike. These processes are a last offer vote and mediation. The last offer vote provision enables an employer to apply to the Labour Relations Board for the employees to have a secret ballot vote on the employer’s last offer. Only one last offer vote may be made in any collective bargaining dispute. Another alternative is mediation. Either party may apply to the Board for the appointment of a mediator, who will work with the parties to reach a collective agreement. During the period of mediation and for 48 hours after the mediator has “reported”, no strike or lockout may occur.

Communications Strategy

The company communications strategy and protocol should be planned in advance of starting bargaining. There are four aspects of communications during bargaining:

- internal amongst the management team;
- during bargaining between the employer’s negotiating committee and the Union bargaining committee;
- between the employer and bargaining unit employees; and
- by the employer to third parties, such as customers, clients, suppliers and the media.
Each of these types of communication should be controlled, in order to prevent unauthorized persons from making statements which may be detrimental to the bargaining process or to the company’s interests. While responsibilities for communication to various parties may be delegated to different persons, it is important that one person review and vet all communications to ensure consistency, accuracy and the appropriate degree of disclosure.

If the company intends to communicate directly with employees to keep them notified of the status of bargaining, a pattern of communication should be established early in the process.

The company negotiating team should establish a protocol of who will be the key spokesman and whether any other members of the negotiating team will have authority to engage in “off-line” discussions or to make proposals.

Prepare for the Bargaining Process

To the extent possible, in advance of, or at the start of bargaining reach agreement with the Union on procedural matters. These procedural matters include:

- the place of bargaining, and if off-site, the responsibility for cost;
- how many people will be on the negotiating teams;
- process for release of employees on the union negotiating team;
- payment of employees on the union negotiating team (it is recommended that the company not agree to pay employees on the union negotiating team in advance, as an agreement to pay can be useful leverage at the end of the bargaining process);
- identifying who will take minutes for the company negotiating team and consider whether “joint” minutes will be kept which the union will be asked to approve;
- determining dates for bargaining, providing adequate time between sessions to review and respond to proposals; and
- considering whether to have a “black-out” on the status and content of negotiations by the employer and union.

Control of Documentation

Control of paperwork is a key factor in bargaining and good organization of paper makes the whole process much easier:

- Keep detailed minutes of bargaining, including identification of proposals which are tendered and the discussion or response around them. These minutes can prove very valuable in an arbitration if they demonstrate that one party provided an explanation of the intended effect of the proposal to the other party, and the proposal was accepted based on that understanding, as it demonstrates mutual understanding of the effect or application;
- Use a footer for all company proposals which includes both the number of the proposal and its date;
Consider using a different colour of paper for each of company and union proposals so they can be clearly identified;

Keep track of all accepted proposals. Some ways to do so are by having sign off of both parties on an accepted proposal, printing them on a different colour of paper and placing them in a binder with a number tab which corresponds to each article of the collective agreement; and

Remember that “he who drafts, prevails” and take control of the drafting process to the extent possible.

Bargaining Process

The usual process is to bargain non-monetary matters first, as once monetary issues have been bargained the union has little, if any interest in the non-monetary matters and the company will have little leverage in bargaining. Accordingly, the union and company proposals should be broken into monetary and non-monetary and the company should not table any monetary proposals until the final stages of bargaining.

Monetary proposals should be tendered and negotiated as a package and not piecemeal.

Throughout the process the company should continue to consider the likelihood of a strike or lockout and negotiate to its own time preferences.

Ratification can become a sticky issue, so it is often adviseable to negotiate at the outset with the union what will constitute “ratification” by the bargaining unit members.

Final “Housekeeping” Review of Collective Agreement

Provisions in a collective agreement often inter-relate such that changes to one article may necessitate changes to other articles in order to ensure consistency in language and effect. Accordingly, prior to finalizing the collective agreement, it is important that the entire document be reviewed for consistency to avoid unintended interpretations.

If a word or phrase is defined to carry a particular meaning, then the defined term must be used throughout the collective agreement when that particular meaning is intended. For example, if “Probationary Period” is defined as meaning a 90 day period at the commencement of employment during which suitability for continued employment is assessed, it should be used throughout the collective agreement every time that period is referred to;

If a different meaning is intended, use different words. Arbitrators assume that a word has the same meaning throughout the agreement, and different words are assumed to mean different things (for example, “sick leave” from “sick day”, or “work week” from “week”);

It is key to avoid conflicting provisions, such as where overtime is defined in one article as meaning all hours over 8 in a day, but it carries a different meaning in a section on compressed work week; and

Try to identify and flag housekeeping issues in the bargaining process to minimize conflict with the union when these housekeeping changes are made.

The “find” function on computers makes this housekeeping task much easier.
The Memorandum of Agreement

The final step in bargaining is usually drafting the Memorandum of Agreement. It can take one of two forms: a memorandum which outlines the additions or changes to the existing agreement, or a “covering” agreement to which the final version of the collective agreement is attached. The latter form is preferred as it minimizes the likelihood of issues arising in the preparation of the final copy.

A number of terms should be in the Memorandum of Agreement, including:

- the term of the collective agreement;
- what constitutes ratification of the collective agreement;
- the triggering events by which the collective agreement takes effect; and
- the date the collective agreement takes effect and whether any portion is retroactive.