

TABLE OF CONTENTS

Introduction.....	1
Negotiations for Unionists.....	7
Table Tactics.....	21
Law of Labor Negotiations.....	38
Financial Information for Collective Bargaining.....	63
Concessions and the Problems of Combatting Them.....	70
Public Sector.....	89
Costing.....	106
Why Do They Settle.....	127
Mobilizing the Members.....	132
Two Dozen Rules.....	141
Suggestions for Ratification Meeting.....	144
Quiz.....	146
Labor Board Investigators Checklist.....	148
Unemployment Compensation.....	151
Labor Relations Process.....	153

INTRODUCTION

This book is the outgrowth of a series of Negotiations Workshops that the authors have conducted over the course of the past eight years for hundreds of international union staffers, local union officers, stewards, and members. Most of the students attending the workshops have been members of a local union negotiating team that was about to begin negotiations for a new contract and many, perhaps most, had never been in negotiations before. Workshop students have come from more than thirty international and independent unions and most left the workshop convinced that their level of skill and confidence had been significantly raised. Many have called the workshop the most valuable educational experience of their union careers.

Our aim is to incorporate into this volume enough of the workshop material - facts, ideas, procedures, strategies, tactics - to provide a guide for the leaders and negotiating team members of a local union confronting the task of negotiating a new contract. Most of the material is simple. It may even seem simplistic and naive. Our basic premise is that the most effective preparation for negotiations is "to organize the unionized." This premise is one to which lip service is frequently paid. Indeed, it has been said so often that it has become trite. But many who regularly pay homage to the proposition fail to act as if it really was "the most important thing to do."

The idea that gave birth to the labor movement could hardly be simpler: in the typical workplace with scores, hundreds, or even thousand of workers, "a single

employee was helpless," as the Supreme Court said, to negotiate or even meaningfully discuss his or her wages, hours, and conditions of employment. The most that a single worker could do would be to threaten to quit, a form of feeble coercion to which no intelligent employer would dare submit. A single worker's threat to quit is, at most, a minor irritation; it may take a little time to recruit and train a replacement. More important, by giving in the employer would risk inspiring similar insubordination in others and thus jeopardize the discipline of the workforce and his own authority. But when employees band together into a union and threaten to quit, then the employer may have no acceptable option but to submit to meaningful negotiations. As the famous labor ballad "Talking Union" puts it, "Be mighty lonely in there if everybody decided to walk out on him."

Now it so happens that in those circumstances (where a majority of the employees form a union) the law requires the employer to negotiate in good faith. But this legal requirement obscures, and too often causes unionists to entirely lose sight of, an important and profound truth. If the employer negotiates in response to the legal requirement rather than to real or perceived union power, the negotiations, except in the rarest of circumstances, will be meaningless.

Consider the phrase "real or perceived" union power because part of the problem of the labor movement and individual unions at the moment is that employers' perceptions are changing. Unions that for years negotiated acceptable contracts because the employer perceived them as being powerful are finding today that they don't have power, either real or

perceived, and are left with nothing to rely upon but the totally meaningless legal requirement that the employer bargain with them in good faith.

The truth is that the only real power that any union has is the sum of the tiny bits of power contributed by each member. To a large extent, this book is not only about how to use the individual members to strengthen the union's hand in the bargaining process, but also how to use the necessity for membership support in negotiations as an opportunity to educate and involve the rank-and-file. In short, negotiations can also be used as a tool to rebuild the labor movement by reorganizing the membership.

Given the institutionalization of national and international unions, their size, complexity, and sophistication, it has become increasingly difficult for both individual members and union leaders to avoid losing sight of the importance of the loyalty and support of the individual member.

Most unions have succeeded in negotiating union security provisions that require new employees to join and pay dues as a condition of employment. New employees thus have no choice but to support the union, at least financially. There is, then, no obvious necessity to educate them, to explain to them the union idea, to organize them, to make them understand that the strength of the union is totally dependent on their support. Most of today's union members have never been organized; they have merely signed a card, all too often presented to them by the employer's personnel manager.

As union strength and employer perceptions of union strength grew, more and more employers responded to strikes by locking the doors and making no attempt to operate. When strikes occurred, the individual member - who may have been only involuntarily and unthinkingly supporting the union financially through a dues check-off - had no real choice but to support the union physically. The worker sometimes joined the picket line because the only available options were to do picket duty and collect strike benefits or to stay home and lose strike benefits. Going to work was not an option to even consider since the employer was making no attempt to operate. Even were the worker willing and available to go to work, he or she would not be eligible for unemployment benefits because of being involved, however involuntarily, in a labor dispute.

Such circumstances naturally add to the alienation and resentment. Union efforts to cope with the problem have generally taken the form of educational programs designed to show the members how much the union has done for them: what conditions were like in the "bad old days" and how much they "owe" the union. A common feature in union publications and a common theme of inspirational speeches to union members is a compilation and summation of the value of union-negotiated benefits. Even modest increases in a three-year contract add up to many additional thousands of dollars in the pocket of each member over the life of the contract, while the union dues for the same period will be measured in the hundreds of dollars. Unfortunately, such investment-oriented arguments, however correct or logical, usually succeed in convincing only those

who make them and the already committed. They have generally been spectacularly unsuccessful in changing minds.

If members should support a union because it is successful, because union dues represent a "sound" financial investment, what then should they be expected to do when it fails to deliver increases or even makes concessions? Why should a member pay a union to cut his wages?

The problem with arguments about "what the union has done for you" is that they attempt to buy the support of the members - with the boss's money. They miss the point that the "union", however tall its buildings, talented its staff, and wealthy its welfare fund, is not an actual, material thing. It cannot do anything for its members. The "union" is simply an idea, a concept, a tool that members can use to do things for themselves. The fact that one of the things that they have wisely chosen to do is to build buildings and create a necessary and useful institution and bureaucracy tends to obscure this essential truth.

This argument is regularly challenged by local union officers and stewards. They point to the years of union accomplishments at the bargaining table and in the grievance procedure without apparent membership support or involvement. Our answer has usually been to challenge them to imagine a situation where the members of their local would have the opportunity to choose between a continuation of the present contract with no increases or improvements or to work without a contract, without a union, and receive a \$2 an hour pay increase. Few have doubted that their members could be wooed from the union with a \$2 bill.

Where that is the case we suggest that the union itself is in peril; when and if the boss chooses he will have relatively little difficulty in destroying the union. The first job of union leaders is to set about the task of organizing the membership, of winning their commitment to the union by making them understand the union idea and philosophy.

The need for this kind of revitalization of a labor movement that has been in accelerating decline for more than a decade has recently gained general acceptance. The AFL-CIO has recognized it in its historic publication, "The Changing Situation of Workers and Their Unions." But there are two very different interpretations of the crisis of the labor movement. Some of labor's "friends" and unsolicited advisors, including some within the movement, have come to question the relevance of "old fashioned" unionism. Somehow, it is repeatedly suggested, the union movement needs to find new ways to win the allegiance of a "new breed" of worker born after the traumatic Great Depression that fueled the spectacular growth of unionism.

We disagree. What is needed is a return to some old ideas that are as relevant and sound as ever but that in practice have been all but forgotten. The very success of the movement has caused this curious amnesia. In the quarter century following Franklin D. Roosevelt's election in 1932, a motley crew of organizers and agitators transformed unorganized and helpless single employees into one of the great and powerful institutions of American life. The labor movement has provided security and a surprising degree of affluence, power, and

even respectability to ordinary workers and to the army of labor bureaucrats who staff union offices across the land.

"Labor leaders" and "union staffers" should not take offense at being called bureaucrats because that is what they are. Both of the authors have held positions as "Regional Director" or "Director of Organization." In reality, there are few real labor "leaders" above the level of shop steward and local union officers. Some business agents and organizers who work with the rank-and-file on a daily basis can lay legitimate claim to the title "labor leader." The rest of us must recognize that size and strength, efficiency and effectiveness, require bureaucracy. We must, therefore, consider how a large, strong, far-flung organization can continue to involve, educate, and excite the individual member. Some of us will continue to be representatives, experts, bureaucrats performing all kinds of useful and necessary services that workers cannot do directly for themselves. But as we provide these services, we must remember where we and the resources we expend come from and, insofar as humanly possible, make of our activities a source of education and mobilization.

The period of negotiations is an ideal time to do the education and mobilization job that is so desperately needed. In the first place it is easy to get the attention of the membership at that time because everyone is interested in the upcoming contract. There are few other occasions when it is so easy to demonstrate that the attitudes and actions of the membership, even the shop floor gossip, have such a direct and important bearing on the immediate financial welfare of every

member.

Management negotiators have always responded more to their perceptions of the needs, desires and expectations of "their employees" than to the demands of union negotiators. When every union member confidently expected wage hikes and increases in benefits, management negotiators respond to those expectations. The period of concessions turned that situation on its head. On shop floors across the country, the attitude frequently was: "We don't want to give up too much." Management negotiators are certain to exploit that attitude and it will almost guarantee some concessions. When union members understand how their attitudes and expectations affect negotiations, they will, in our experience, respond by acting in their own immediate self-interests with heightened expectations and with dramatically increased involvement with, and loyalty to, their union.

Frequently the first reaction of local union leaders to the suggestion that membership expectations of the union should be raised has been: "Hey, we can't afford to stir up the troops to demand too much because if we don't get it they're going to vote us out of office." Not to worry. If union members have been taught just a few of the elementary principles of the negotiation process they will understand that no union negotiation team ever got everything it asked for - if it did the negotiators should be court martialed because they didn't ask for enough. In addition, they will understand an important fact that many of us, for obvious but mistaken reasons, have taken some care to conceal in the past: the outcome at the

negotiations table is far more dependent on membership unity, strength, and determination than on the skill of the negotiator.

As the wave of concessionary bargaining - coupled with and in part derived from the anti-union attitudes of the government and the public - developed in the '80s, many unions sought to stem the tide by developing what the AFL-CIO has variously called "in-plant", "internal organizing" and "one-on-one" strategies. There are many routes to the same goal and while the closely linked bargaining and organizing strategies that we will be proposing in this book are hardly unique, they are in some respects different. Most unions talk of the "bargaining committee". For reasons that we trust have become obvious we insist that it be called the bargaining or negotiating "Team" and that the term "Committee" be reserved for another group. The distinction is more than semantic. To spell out the difference in the names as we will be using them:

The important suggestions that we want to make can be summed up briefly:

(1) The local union should select a small representative Negotiations Team and give the Team members some time to develop and practice the communication skills that will permit them to function effectively as a single team representing not the diverse constituencies of the individual team members but the membership as a whole. The Team should become thoroughly familiar with the present contract, grievances, arbitrations and other problems with its interpretation, the bargaining history and negotiating

techniques.

(2) A larger Negotiations Committee should be established to provide constant one-on-one communications with each worker and to provide training in the principles of negotiations for the entire membership - or for as much of it as can be enticed to attend a ninety-minute negotiations workshop. All of the local union leaders whom we have persuaded to try the program have pessimistically insisted that "you don't know our members" and have predicted that only a handful would attend. Where the leaders implemented the program they were always pleasantly surprised - participation was never less than 50 percent.

The purpose of this book is to provide practical guidance, suggestions, and instructional material for the implementation of these two goals. This approach has been utilized in scores of local unions with, naturally, varying degrees of success. In some of them it has produced a near miraculous transformation in unity, determination, and loyalty to the union in as little as two weeks.

We owe much of the structure and content of this book to the experiences, insights, and comments of hundreds of union negotiators. We would be grateful to the readers if they would share with us the results and their reactions that follow upon the reading and application of this book.

NEGOTIATIONS FOR UNIONISTS

This chapter is intended to assist the local union in structuring its Negotiations Team and Negotiation Committee in the most effective way and to assist the Team and Committee in organizing themselves and preparing for their tasks. Both the Team and the Committee must be thoroughly familiar with all aspects of the bargaining process. Although certain sections may be of more immediate and practical concern to the Team rather than the Committee, both Team and Committee members should read this entire book. The Chapter dealing with "Table Tactics" will naturally be of more immediate utility to the Team, whereas tactics for demonstrating membership unity and determination will be of more direct concern to the Committee.

The nature and composition of the two teams that meet at the bargaining table are fundamentally different. Because of these differences, the union team must face and deal with problems that do not exist for its employer counterpart. While there will be differences in the opinions and positions of the various members of the employer team, those differences will not normally constitute a fundamental problem for the leader of the employer team since someone in management -- whether the spokesperson at the table, general manager or chief executive officer -- usually has the power and authority to resolve those differences and impose effective unanimity on the team members.

The situation is dramatically different for the union team. Even the most autocratic of unions is, after all, a democratic organization and the final decision of the

union team -- to agree on a given contract -- is usually subject to the vote and ratification of the entire membership. Even apart from ratification, the union team must be democratic in the ultimate sense that it speaks for the membership.

Since every union team must face this ultimate test of ratification, it is quite natural that many unions attempt to prepare for ratification by taking care to see that every major faction and bloc of members with the local have representation at the bargaining table. A necessary and desirable goal, but care must be taken that each team member understands, that he or she, at the table, represents the entire bargaining unit, not just one segment of it.

Let us start with several axioms, propositions so self-evidently true that they require no proof:

The goal of the union team is to negotiate the best possible wages, hours, and working conditions and to assure the continuing unity and health of the union.

The effectiveness of the union team in achieving its goals will be largely determined by the degree to which its positions at the table are supported by a determined, militant and unified membership. Management should have no doubt that the union team is the representative (in fact as well as in theory) of its workers and that if it reaches agreement with the team, it will have peace and productivity. Not necessarily or only a strike; perhaps just discontent, turnover and less productivity.

The ultimate welfare and selfish interest

of every individual member is best served -- a unified, informed, and determined membership is best achieved -- through members who understand that they must sometimes sacrifice personal goals for group goals. (Of course, this might not be true in the case of a union member who thinks that betrayal of the union might be rewarded with a foreman's job...but this and other exceptions only serve to prove the rule: An educated, informed membership is a militant and united membership.)

We think that these three axioms contain the essence of what must be known and understood for the practice of effective trade unionism including the successful negotiation of a contract.

We have somewhat mysteriously described "negotiations" as an "art" and have presumed to write an entire book on the subject. The truth is, however, that the successful negotiation of the labor contract, from the union's point of view, depends far more on the unity and determination of the bargaining unit than on the skill of the negotiator. If the local union is torn by dissension, the skilled craftspeople concerned only with out-of-class work, the older members worry only about retirement, the younger members concentrate only on a wage increase, and the lot of them are suspicious of the union and make it plain that "no union boss is going to tell me to strike," then the most competent and accomplished negotiator in the land is not going to "wheedle" much of a contract out of management, no matter how glib of tongue, impeccable the logic, or persuasive the arguments. If the reverse is true, then even a relatively inexperienced negotiator is apt to look like a hero.

There has been an extraordinary amount of nonsense written lately about the techniques and tricks of negotiation but there is no magical way to persuade management to say "yes." Management will generally act in what it perceives to be its own self-interest. The truth is that the mugger on the street corner knows approximately fifty percent of everything there is to know about negotiations: "Give me your money or I will cut your throat." The prostitute across the street knows the other fifty percent: "Give me your money and it's going to feel good." The job of the union negotiator is to translate these crudities into acceptable bargaining table language: "A fair contract will mean reduced turnover, the attraction and retention of more competent and qualified workers, higher morale and increased productivity and, therefore, lower costs for management". Conversely, failure to agree on a fair contract will mean, if not a strike, at the minimum the reverse of all these things and, thus, higher costs for management.

Therefore, it becomes immediately apparent that when the local union prepares to go to the bargaining table what it needs is not bargaining tricks and tactics but a unified membership with well understood and common goals and a tightly knit bargaining Team that understands and is committed to those goals.

Every local union will have -- either proscribed by constitution, by-laws or established in practice -- a process for the selection of a negotiation committee. Members of the committee might be: elected by department or at large; appointed

by the president; or members by virtue of their union office.

Regardless of the system for the selection of the negotiating committee that exists within a given local, we suggest that what is needed is a "Negotiating Team" and a "Negotiating Committee." The terminology is not important but the functions are. The job of what we call the "Team" is to meet management at the table and engage in the actual negotiations. It should have a "spokesperson" or "chief negotiator" and might in addition also have a "chairperson" or "captain." Other roles played by one or more of the Team include note taker, researcher, communicator, etc. The spokesperson/chief negotiator speaks for the Team at the table or, on occasion, directs other Team members to speak on specific topics. The captain/chairperson handles the administration of the Team's business and speaks for the team -- or perhaps directs the spokesperson or other Team members to speak -- when it meets with the membership.

The spokesperson should be chosen on the basis of skill and experience in negotiations. He or she may or may not be a paid professional and is not always a member of the bargaining unit. There are advantages and disadvantages to the use of a professional in this role and we will discuss these arguments later. The Team captain should be a political selection, ideally a person who commands great confidence and respect within the membership and among the Team. More about individual Team roles and responsibilities will be discussed in the chapter "Table Tactics."

Every member of the Team should understand that, even though having been elected by a particular department or job

class, a bargaining Team member represents no particular department or group of members but rather represents the entire membership. This is crucial and the entire membership must understand it. The bargaining Team should be constituted so that every member of the local can look at the Team and feel secure that at least one person on that team understands the particular problems or goals of the member's department, job classification, or faction. This condition must be satisfied without making the Team so large as to be unwieldy. It should emphatically be a Team and not a committee. Bear in mind the definition of a camel: "A horse designed by a committee."

While the goal of the Team will be to act always by consensus (indeed that should even be the goal, rarely attainable, of the local union itself; votes are by their nature divisive), reality must be faced and it is therefore a common rule to have the Team composed of an odd number of members. Depending on the diversity of the local, three members might well suffice for most small locals. Five is usually a satisfactory number for locals smaller than 1,000 members and seven or nine is, in practice, about as large as a Team can get and truly be a Team. To some extent the question of size is secondary to the question of whether they can behave with unity.

The Negotiations Committee, as we define it, is essentially a communications link between the Team and the membership and it is essential that communications flow in both directions. The function of the Committee is to determine the priority demands of the membership, to relay that information to the Team and to keep the membership informed on progress and

problems at the table. Whereas the Team must be kept as small as possible, there are no such constraints on the size of the Committee. It may be as large as necessary so that members of the committee can, particularly in emergencies, quickly communicate on a one-to-one basis with every member of the local. One of the jobs of the Committee will be to organize every member of the local into a "communications tree" so that virtually instantaneous communications can be achieved with the entire membership. Ideally, there should be a Committee member for every ten to fifteen members.

In practice this means that for every local union of one hundred members or larger, a Negotiating Committee of ten members should be established under the leadership of a Committee chairperson. The entire membership would then be divided into approximately equal groups and assigned to a Committee member who, in turn, organizes a subcommittee consisting of one member for each ten to fifteen members for which the Committee member was responsible. For larger locals, the number of members on the Negotiating Committee increases.

The initial function of the Negotiations Committee is to explain to the entire membership the negotiations process and the procedure through which the contract goals are to be transmitted to the Team. Its next task is to collect and prioritize -- through a survey of the entire membership -- the contract goals of the membership. Then, throughout the course of negotiations up to and including the ratification process, it serves as the communication link between Team and members. The Team needs to be

kept continually posted on the mood of the membership and developments at the workplace; in turn, the membership, if it is to be kept active and involved, must be kept informed on the progress, or lack of progress, at the table.

Well in advance -- several months in advance is not too early -- the Negotiations Team and the Negotiations Committee should be in place and beginning their work. Some locals, because of by-laws or past practices, will be locked into a system for the selection of Team members. Frequently the Team, usually called the negotiating committee, will be composed of certain elected officers plus some additional members who may be elected from the local at large or by departments or shifts.

Election, lamentably, creates problems in selecting a Team. In the first place, the wrong people are likely to be elected. In a local with twenty percent female membership, for instance, it is entirely possible that the election process would produce a Team composed exclusively of men.

In the second place, the Team needs to be composed of members who understand and are committed to the proposition that the Team and every member on it represents and acts for the entire membership and should not be an advocate for some special interest, whether it be some particular job, age group, department, or shift. A Team member who has been elected, may very naturally feel responsible only to those members who elected him or her.

Perhaps the most practical way for dealing with the problem is to create

(through election and/or appointment) a very large Negotiations Committee. Then, to divide that group into the Team to do the bargaining at the table while the larger Negotiations Committee is charged with the responsibilities of surveying, educating, and informing the membership.

The job of the Team is to:

Spend some time, the equivalent of two full days at the minimum, learning to function cooperatively as a Team.

Draft contract demands reflecting the needs of the local as revealed through the judgment of the leadership, the survey of the membership, the grievance file, the advice of the international or regional union office, and recent contract settlements in the area and in the industry.

Utilize all available resources to learn as much as possible about the financial condition and plans of the employer.

Assign specific jobs to all members of the Team. Chief negotiator, Team captain, note taker, and bargaining book custodian are some obvious jobs and, in addition, subcommittees may be created to research and develop expertise in specific areas such as the incentive system, health care, safety, and pensions. The note taker keeps, for the union's exclusive use, a summary of dialogue at the table while the bargaining book custodian keeps and organizes in a large loose-leaf bargaining binder. This book should have each clause of the contract reproduced on a separate page or pages together with any related information (grievances, arbitrations, needed changes, etc.). As management responds to union

proposals or advances its own demands a copy, together with notes on the discussion, should be kept in the appropriate section of the book. This is in addition to the chronological record of negotiation minutes kept by the note taker.

Meet with management and negotiate the best possible contract.

Carefully plan the membership meeting to ratify or reject the final contract. It is the Team's responsibility to make a unanimous recommendation to the membership. The Team's preparation for ratification is discussed later.

The responsibilities of the Negotiating Committee are somewhat harder to define and, without question, harder to accomplish. Methods will have to be adapted to fit the needs of a given local union but, in general, the job of the Negotiating Committee is to:

Meet together as a group and spend some time, not as much as the Negotiating Team, learning and practicing communication skills. The exercise described later for use by the Team will also be appropriate and useful for the Committee.

Select a Committee chairperson who convenes and presides at meetings of the Committee. In addition, there should be some single person, not necessarily the chairperson, to serve as liaison with the Team.

Spend at least eight hours, in a single session if possible but shorter sessions if necessary, familiarizing every member of the Committee with the Negotiations Workshop material found in the chapter on

"Mobilizing the Members". As many Committee members as possible should be given the opportunity to serve as workshop leader in dry run practice sessions.

A membership survey form should be developed, in consultation with local officers and the Negotiating Team.

Survey forms should be distributed by Committee members, personally if possible, to all members of the local union. Every member must be encouraged to complete the form, by repeated contact from a Committee member if necessary.

A subcommittee should be appointed to revise and adapt, in consultation with local officers and the Negotiating Team, all of the material in the Negotiations Workshop which is detailed in the chapter "Mobilizing the Members".

Committee members should schedule as many ninety-minute negotiations workshops as needed and to accommodate all members who are willing to attend. It is reasonable to expect at least fifty percent of the membership to attend a workshop if it is properly advertised and promoted and if it is conducted at a convenient time and place. In most cases, immediately after work is the ideal time and a comfortable place near the work site is ideal. Attendance at any single workshop should be limited to about twenty. The workshop is designed to be conducted by a single committee member but it can also be conducted by a Team of two-to-four members with the advantage that they lend each other support.

A communications tree should be established for the local so that a message

can be transmitted to every member of the local by each Committee member calling four-to-seven members who in turn pass the message on to four-to-seven other members.

One of the first uses of the completed tree should be to poll the entire membership to find out which members have not returned their contract survey forms and to urge them to do so. Where members have lost the forms, they should be supplied another form and a commitment obtained for the return of the form at a specified time. Both the existence of the communications tree and the emphasis of the importance of every member completing the survey form will give the membership a valuable sense of involvement and will let them know that their opinion counts.

Throughout negotiation, the telephone tree should be used as a communications safety net to make certain that every member is kept informed about the progress of negotiations and is aware of meeting times and places, as well as such activities as "Button Day" or "T-Shirt Day" designed to demonstrate the unity and strength of the local. However, Committee members should not rely exclusively on the tree but should make an effort to speak personally with each member as often as possible. During these personal contacts the operations of the tree should be checked and malfunctions corrected. In a local of six hundred members, for instance, there might be a Negotiations Committee of twenty with each Committee member passing messages to five people who in turn pass it on to five people. This would mean that each Committee member's "branch" would number thirty people. The first five should stay in personal contact with the five people

to whom they pass messages. Friendly rivalries, for highest participation in attending meetings, returning survey forms, wearing buttons, etc. can be helpful.

Membership on the Team, because of the mystique and drama associated with "negotiating", is apt to be more sought after than membership on the Committee. The work of a Team member is however, somewhat paradoxically, both stressful and frequently boring and not too many people are temperamentally suited to the job. The Negotiations Committee members, however are far freer to work at their own pace and in their own style and to make a contribution that is far likelier to be more personally rewarding.

Once the composition of the Team and the Committee has been determined, the very first job is for each to undergo the needed training and practice in teamwork and communications. An outside facilitator to guide and assist the groups at this point is highly recommended. The facilitator should be someone not only skilled in communications but also someone knowledgeable about and sympathetic to unions.

If, for whatever reason, it is not possible or deemed advisable to obtain the help of a facilitator, the members of the Team should pick one of their own members to act as facilitator. The facilitator should follow, exactly, the instructions for the exercises described in the remainder of this chapter.

By the time the communications and teamwork training is completed, all members of the Team should be able to agree on the following ground rules:

It is the responsibility of the Team and of each member to represent the entire membership, to accomplish the greatest good for the greatest number.

The Team will attempt to reach all decisions by consensus and will be careful to give every member the opportunity to be heard but, when consensus is impossible, decisions will be made by majority vote and each member will support the decision of the majority as if it were reached by consensus.

All discussions within the Team and at the negotiations table will be held confidential and released only by decision of the Team through a designated spokesperson.

All members will publicly support the recommendation of the Team to the membership and will refrain from criticizing specific elements of the agreement.

Each member will accept personal responsibility for the success of the Team and will refrain from divisive criticism of the Team or any of his fellow members.

Following the Team training in communications and teamwork, these ground rules should be reviewed and fully discussed. The Team should not attempt to move ahead in its work until real consensus on these rules is achieved. In cases where a true consensus on these rules is not possible, additional Team training is evidently required.

When the Team first assembles, the need for training will quickly become glaringly obvious, particularly to the extent that many of its members

are without prior bargaining experience. Frequently, the members who served on the last Negotiations Team will be conspicuous by their absence because they will have found that the pressure of the negotiations was far worse than they had ever imagined and that they did not end up the kind of heroes they may have fantasized. The contract they negotiated was not everything that anyone had wanted and most members quickly accept and forget the good points and blame them personally for the bad points. Worse yet, the members tended to assume that the negotiations had been an exciting lark away from work with most of the time spent washing down rich food with good liquor -- all paid for with members' dues money. Certainly no one ever said "thank you." Almost always there will have been someone, frequently at the public ratification meeting, who accused them of having been in bed with management. It's not surprising that few come back for a second dose. This illustrates once again the essential differences in bargaining between management and unions. Management can order people to serve because they hire them. The union's army is composed, for the most part, of volunteers.

At or before its first training session, which should be no shorter than two hours, a temporary chairperson should have been designated by the president of the local or chosen by the members of the Team. Should it become apparent that a divisive struggle for the chairpersonship is developing it might be wise to agree that the temporary chairperson is ineligible to become the permanent chairperson. This is one of the many devices for avoiding divisions which the Team (and the Committee) need to practice and learn. The temporary chairperson should be a member who likes to read (there will be much reading to be done in preparation for subsequent training sessions) and who

enjoys the trust of all the members of the Team.

After making certain that all of the Team members know each other, the chairperson should open the first training session with the following statement:

"I am as uncertain about the task we are beginning -- preparing to work together as the Negotiating Team -- as anyone else. We are beginning a training process that has worked for other locals . . . has helped other Negotiating Teams do a better job for their members . . . and I think we owe it to our members to give it a chance to work for us. If it works, we will all benefit. If it doesn't, we will have lost nothing but a little time.

"Personally, I'm more interested in what kind of pay increase we're going to get than in playing what may look like a lot of silly games. I'm as eager as anyone else to start talking about the kind of demands we're going to make when we sit down with management. But I hope that we can all agree to stick to our agenda, postpone many of the other things we'd like to talk about, and give this process a fair chance to work.

"The training exercises that we are beginning are designed to help us come together as a Team. We've all watched enough Sunday afternoon football to know what a Team is, to understand that if we are truly going to function as a Team then we have to know each other, have to trust each other and have to be able to talk to each other freely and easily. Management, of course, is going to try to divide us, to play one job classification off against another, one department against another, one of us personally against the other. If we're really a

Team, they won't be able to do that. It makes sense.

"Don't misunderstand. I'm not saying that we all have to like each other. That might be nice and it might happen, but it's not necessary. For the time being, and only temporarily, I'm asking only that we all agree to abide by the following ground rules:

Assume that everyone on this Team is sincerely interested in negotiating the best possible contract for the entire membership.

Keep our discussions confidential within the Team.

Forget all of the ancient, personal and political history of the local and concentrate only on the job and business of this Team.

Try to talk as honestly and openly as we can.

Refrain from judging or accusing other members. Talk about our own feelings, fears and hopes. There's a world of difference in 'You're trying to put me down!' and 'I feel put down.' They may look the same, but the first is accusatory, judgmental, and divisive; whereas the second is more objective, conciliatory, and helpful.

We must avoid the formation of cliques within the Team. Naturally we're all going to feel more friendly and comfortable with some Team members than with others, so be super careful to avoid arousing the suspicion in any member that you are gossiping about him or her with another member.

Accept personal responsibility for making this teamwork. If the Team is not

working, don't waste time trying to figure out whose fault it is. Figure out how to make it work.

"So much for the ground rules. Later on we're going to need to come to agreement on a lot of other rules or procedures for the Team, or the real work of the Team, but for the time being it will be helpful if we all stick to these rules.

"In a few minutes we're going to spend about half an hour on a simple communications exercise that will, if we give it a chance, quickly help us to know and talk to each other better, but before we do, let's focus on three statements. The book calls them 'axioms' or 'self-evident truths' about unions and negotiations.

The goal of the Team is to negotiate the best possible contract and to assure the continuing strength of the union.

The effectiveness of the Team will be largely determined by the support of the membership.

The ultimate interest of all members is best served if they understand that they must sometimes sacrifice personal goals for group goals."

"Now for the communications exercise. We're going to divide the Team into groups of three (depending on the size of the Team, there may be one group with two or four members). Each group is to find as private a spot as possible -- in the corner of the room, in another room, or even outside -- and spend approximately thirty minutes taking turns in the following roles:

"Role 'A': Talker. Try as hard as you can, as openly and honestly as possible, to tell the listener in the group who you really are. Your job is to let the listener know you, perhaps as well or better than people who may have been acquainted with you for years. Be as personal as you comfortably can. Tell about one or two things not related to work -- children, fishing, gardening or whatever you care about deeply.

"Role 'B': Listener. Ever wonder why there are certain rare people you find it easy to talk to? It's because they listen. Most people don't. They use the time to think about what they're going to say. Try really listening. Don't be afraid to interrupt with the kind of interruptions that show interest and encourage the talker: 'Wait, I don't understand,' 'That's fascinating,' etc. Don't interrupt to talk about yourself. You'll get your turn.

"Role 'C': Observer. Watch and listen. How good a job is the talker doing in communicating? Is he or she being honest? How well did the listener do in encouraging the talker?"

Members of each group should rotate the roles until every member has played each role. In a group of two, the observer role is eliminated. In a group of four there are two observers.

After all groups have completed the exercise, the Team reconvenes and each member should, in turn, tell the group as much as possible about what happened in the exercise. This description should not be merely a repetition of the words spoken but rather the reaction of the participants to what was said.

The exercise can either be ended at this point or can be considerably extended by asking the talkers to describe their listeners. How well did they do their job? What could they have done to make the talker more comfortable? The observers can also report their observations and then, perhaps, every member can attempt to point to examples that may have surfaced during the reports of how talker, listener, and observer all perceived the same piece of information in a slightly different way.

By the end of the first session, the Team members will normally have made rather dramatic progress toward their goal of learning to work together as a Team. Indeed, the great danger frequently is that the progress will be over-estimated and the members will conclude that the job is finished. It is not. The pressure that the Team will face -- from management, from the membership and from economic and budgetary realities -- are greater than any of the Team members are likely to fully appreciate and the Team needs much, much more practice in functioning as a Team in order to withstand those pressures.

Of course, there is the possibility that there will not have been dramatic progress during the first session. Encouraging people to communicate openly and freely will normally have salutary effects but it can also open some very troublesome cans of worms. Some members of the Team may have had smouldering between them angers and jealousies that are easily unleashed by any effort at honest communication and the situation may appear hopeless.

All is not necessarily lost, however.

Indeed, if they can be dealt with, it is far better for the animosities to have surfaced rather than having been swept under the carpet -- because in the heat of negotiations they will come out anyway. The thing to do is to say, "Okay, we've got problems. Boy do we have problems. All of us want to negotiate the best contract possible for ourselves and for the membership. We can only do that if we can work together as a Team, if we can somehow learn to trust and support one another. Let's go around the group and see if together we can come up with some solutions to the problems."

It has been the experience of the authors that most such problems can be solved and more than once we have seen bitter enemies call a truce in order to work together, on a limited front, toward a common goal.

Ordinarily a Team should have met together to develop and practice its Team skills for the equivalent of several days before it begins to cope with its real job, negotiations. By this point it will be useful if the Team has selected or agreed to the appointment of a Team chairperson and spokesperson and agreed to some ground rules that ideally should include the following:

An effort will be made to reach all Team decisions by consensus. Should a vote become necessary, every Team member will support the decision of the Team.

No statements about negotiations will be made or released until they have been discussed and approved by the Team or, when this may not be practical, by the chairperson and spokesperson.

As the Team begins the job of preparing for actual negotiations, the chairperson should take care that each Team member has meaningful assignments. Some members may, for instance, be assigned the responsibility of becoming the Team's expert on a particular contract area -- wages, fringes, retirement, health, grievance machinery, etc.

The training of the Negotiations Committee will be somewhat different from that of the Team since the committee members will be doing most of their work individually and not as part of a Team or Committee. The Committee will not need to spend as much time on team building skills, but the union negotiating principles that the Team follows also apply to the Committee.

If the members of a local union truly understand that the effectiveness of their bargaining Team depends on their own unity and support for the Team's position, they will almost always respond by behaving in their own self-interest. And if they understand the bargaining process itself, they will understand that they must set their contract negotiations goals high (but not unrealistically or absurdly high) but in the end, probably have to accept something less.

Hence, it is the first task of the Negotiating Committee members to understand the simple principles embodied in the axioms on page. Their next job should be to impart that same information and understanding to every member of the local union. Union-busting management consultants have found that the most effective way to do their job is to have it done by first level supervisors on a one-to-one basis. Oral communications on a one-

to-one basis, they have found, is far more effective than newspapers, letters, or meetings.

The job of communicating with every member of a local on a one-to-one basis may, at first, seem an impossible task but it's really easy enough if it is divided among enough people. A telephone or communications tree is an ideal way to make the division because the tree can be used for almost instantaneous and inexpensive communication with every member throughout negotiations and, particularly, during a strike (should there be one).

One of the early tasks of the Negotiating Committee will be to survey the entire membership to find out which contract issues are most important to most members. Participation in the survey will raise the consciousness of the membership and involve them actively in the bargaining process. A request that they prioritize their contract demands will subtly prepare them for the certainty that the bargaining Team is not going to be able to get everything on everybody's list. The major value of the survey is not that the leadership learns so much that is new but that the membership learns that the leadership cares.

During the actual negotiations, the primary functions of the Negotiations Committee are to: keep the Team constantly informed of morale and developments in the workplace (Are supervisors spreading rumors? What are they?); constantly remind the membership to give management evidence of their support for their Team (through the wearing of buttons, attendance at meetings, recruitment of new members, writing letters, etc.); and keeping the

membership informed on progress at the table. The Committee, of course, will be limited in the news that it can give the membership by what information it gets from the Team.

In addition to passing on available information, it must repeatedly explain to the membership that there can be no secrets among several hundred people and that it is crucial that the Team not release information that might tip off management regarding tactics or strategy.

One of the chapters in this book is "Two Dozen Rules for Union Negotiators". Participants in both Team training and Committee training should be divided into groups of 3 to 7 persons and given the assignment of picking out the six most important rules. After the groups have had a half hour or so for the task, the selections of each group should be listed and they should be challenged to defend their choices. There are not six that are the most important in all situations but the assignment will motivate them to read the rules more carefully.

Each group should also be asked to explain how it came to its six choices -- whether by consensus or vote. The point should be made that consensus should always be the goal but that in cases where it is not possible there may be no alternative but to vote.

There is a short Quiz located in this book. The person conducting the Training should review this Quiz and follow its instructions.

One final brief but vital consideration. For the union negotiation there is no

contract until it is ratified. Therefore, even at this early stage of planning to negotiate we call attention to "Suggestions for the Ratification Meeting" as follows:

Carefully plan all details of the ratification meeting. This important first step should be taken before negotiations begin: Obtain a commitment from all Team members that each member will support the decision of the Team in recommending ratification or rejection.

Allow sufficient time between final negotiations session and ratification meeting to prepare for meeting.

Give all members at the ratification meeting a written summary of the agreement. Wages will normally be the most important item to most members. Make certain that increases are: included in tabular form so that every member can look at the table; identify their present wage rate and then see how much each increase will be after each increase; how much their total increase will be after each increase; and how much the agreement will be worth to them in total dollars over the life of the agreement.

The Team member who presents the agreement need not necessarily be the chief negotiator or Team captain. You want an effective speaker who is popular with the membership. There are some advantages in not having the chief negotiator do the job. Someone else can more effectively tout the fantastic job he or she did.

Begin the presentation by requesting that all questions be held until after the end of the presentation.

Disarm critics by admitting up front that the agreement is not everything you wanted, not everything the Team wanted and certainly not everything that the membership wants, needs and deserves...but that it is, in your judgment and the Team's judgment, the best that could be obtained under current circumstances. If it's true--and it frequently will be--you can point out that the agreement is far better than you feared you were going to have to settle for. Give credit for the victory to the unity, determination and hard work of the Team, the skill and experience of the chief negotiator and, above all, to the unity, determination and support of the membership. Point, if possible, to specific examples of membership support--100% turnout of the second shift with union T-shirts, large attendance at meetings, etc. Next time we'll do better...and get better.

Avoid specifics of the negotiations. Never reveal that you traded away an extra week's vacation for 15 year people for a dental plan...the 15 year people all have false teeth and will never forgive you.

Conclude your presentation with a strong, positive recommendation for ratification. Then have every member of the Team come to the microphone and make a strong, positive recommendation. Or, if your recommendation is to reject, explain in detail the reasons and implications and next steps.

There can be times when you may not want to make a recommendation but they are few and far between. [For instance, I personally agree with the stance of the PSSU leadership in not making a recommendation in the recently concluded state negotiations]. You know more about the matter than the

membership. You are a leader and you have a moral obligation to give the membership the benefit of your knowledge and judgment.

Don't waste time talking about how hard it was, how long the sessions were and the sacrifices you made. You may want to talk about how tough and unreasonable management was, or perhaps talk about one particular bastard. But this can be dangerous in the long run for the future relationship.

Leave nothing to chance. Have supporters ready to move and second a motion to accept and--if it becomes necessary--move the question.

Permit a reasonable amount of time for questions and discussion before the vote but do not let the questions--particularly when they begin to reflect personal gripes and grievances--drag on too long. If this threatens the final outcome, suggest that it would be better to have the vote before anyone has to leave. Offer to have the Team stay on for as long as necessary to answer personal questions after the vote.

Begin planning the next negotiations.

TABLE TACTICS

While the bulk and most important work of negotiations -- the organization, involvement and mobilization of the membership -- takes place away from the negotiations table both before and during negotiations, the "glamour" job is that of chief negotiator or, as it is increasingly (and, in our opinion, lamentably) being called, "spokesperson." While the unity and determination of the union membership is far and away more important than the skill of the chief negotiator in shaping and determining the contents of the final package, the union's chief negotiator is without question the most important single individual in the negotiation process.

It is the importance and prominence of the position that sometimes excites the political jealousies and egos of elected local union leaders, leading them to downgrade the title to that of "spokesperson." A mistake, we think. It is important that management understand that they are dealing with the knowledgeable representative of the entire membership with the authority to make meaningful commitments, promises and, sometimes, even threats on behalf of that membership. Unions insist, legally and rightly, that management send to the table a negotiator "cloaked with sufficient authority" to negotiate. The union's representative must at least equally command management's respect and must be seen by them as an authority figure. The title of "Chief Negotiator" conveys that message more effectively than that of mere "spokesperson."

The Choice of Chief Negotiator

There are four distinct possibilities (and some combinations of these) in the choice of a chief negotiator and there are sound arguments to be made for and against each of the possibilities. (It should also be noted that in some cases the designation of chief negotiator is mandated by the union constitution or by-laws and a choice is thus not available -- unless or until a constitutional change is made.) The four major alternatives are:

Local Union President

Local union president who is an employee in the bargaining unit. This is an obvious choice and it is one with important, sometimes compelling, advantages. In many unions the president will be the individual who enjoys the greatest support and trust among the membership and who is most knowledgeable as to the strengths and weaknesses of the present contract and workplace problems. The president is usually the preeminent leader and spokesperson for the union.

The disadvantages however, while not so obvious, will sometimes outweigh the advantages. Communications to and from the members and orchestration of membership support of the Team is also a job for which the president may be the one person uniquely qualified and a job which he or she may not be able to completely delegate. These special responsibilities during negotiations, coupled with the other time-consuming tasks of the presidency, sometimes make it doubtful whether he or she can take the time to serve as both president and

chief negotiator.

In addition, there are occasions when it may be wise for the president to be somewhat politically insulated from what are certain to be perceived as defects of even the best contract. In addition, a president may be more effective in urging and orchestrating support for the Team and for a negotiated contract -- or conversely support for a recommended strike -- if he or she is not the chief negotiator or even a formal member of the Team.

Negotiation Team Leader (Chairperson)

The chairperson of the Team or some other elected or appointed officer of the local union. Like the local union president, this person may be assumed to have the support of the membership and to be knowledgeable on the contract and about workplace problems. Such a choice enhances local union democracy and contributes to the highly desirable goal of maximum membership involvement in the negotiations process. The disadvantages -- all of which may apply also to the local union president as chief negotiator -- are that this person may often have little or no experience in negotiations and even if experienced may tend to be viewed by the members as just a "worker" who "doesn't know any more about negotiations than I do."

While a member of the bargaining unit as chief negotiator will obviously have a very real desire to negotiate the best contract possible, it may be difficult for him or her to place personal workplace problems and goals in proper perspective and act in the interests of the entire membership. An excellent, Canadian-made, training film

about the negotiations process shows a local union president with such a compelling concern for pension benefit increases as to override other bargaining issues.

On the other hand we have seen chief negotiators so careful to avoid seeming to show undue care for their own department (or job or classification) that they bent over too far backward to avoid any appearance of self-interest. This is a problem which sometimes seems to be without solution. In a recent actual negotiations for a nurses' bargaining unit, it became possible to secure premium pay for psychiatric nurses. A decision for or against such premium pay, whether made by a psychiatric nurse or non-psychiatric nurse as chief negotiator, was certain to be perceived by important segments of the membership as either a betrayal and "sell out" or an act of personal greed.

Staff Representative

International representative or other union staffer. Even new reps or other union staffers are likely to have more experience and confidence in negotiations than a member of the bargaining unit. Perhaps more important, their vested interest is in the continuing success of the union as a whole, rather than in any one single department or job classification, so they cannot reasonably be suspected of favoring one group of members at the expense of another.

The chief negotiator and other members of the bargaining team meet with the employer as legal equals, the representatives of the bargaining unit. Despite this legal distinction, the fact is

that a member of the bargaining unit who serves as chief negotiator is confronting people who are his or her "bosses" and who will usually, or at least frequently, have the power to reward or punish them through job assignments or the granting or withholding of promotions. This is not true of the union staffer. He or she works not for the employer but rather for the union and generally can be expected to be more successful in maintaining a semblance of impartiality and dispassionately weighing the sometimes conflicting demands and expectations of various interest groups within the bargaining unit.

Another advantage is that in most cases the services of a union rep or other union staffer will be "free." The local union will not have to make up for lost wages, as it might with a bargaining unit member, nor pay a fee as it would with an outside consultant. Some of the disadvantages of using a union rep are that he or she may not be thoroughly familiar with workplace problems (but will probably be more familiar with relevant industry, regional and national settlements and conditions), and the press of other duties may distract attention and limit time, possibly leading to a lesser settlement than could be obtained with greater attention and patience.

Hired Gun

Outside lawyer or consultant. Assuming careful selection (not always an easy task) the outside lawyer or consultant can be expected to bring much experience and skill to the table and will generally have most of the advantages of the union staffer. In

addition he or she may be under more direct control of the local union than in the case of an international rep. Disadvantages may be lack of familiarity with workplace problems and certainly will be cost. Fees and expenses will have to be paid by the local union. This will certainly be the most expensive of the four options. The cost per member for small locals may be prohibitive. For large bargaining units it may be trifling.

Lawyers should always be consulted about contract language but there is no reason that the language cannot be drafted by the team. It must, after all, be read and understood by the membership. Contrary to what many people seem to believe or fear, clear, simple English is just as legal and binding as convoluted legalese.

Which emphatically does not mean that every contract will, or even should, end up as a model of clarity possible of no disagreement as to meaning and intent. The fact is that much contract language is consciously and deliberately drafted more to camouflage differences than to reflect agreement. Union negotiators may not be able to get agreement on language saying that overtime will be voluntary. Their only real choice in practice may be between very clear language that "overtime is mandatory" or language such as "overtime is voluntary except in cases of emergency." The first is clear while the second is vague and subject to interpretation but it is clearly the union's better choice.

Assuming a reasonably strong local union and healthy relationships among members, local union leaders and international, the authors feel that the

international rep assigned to the local union will generally represent the best choice for chief negotiator. While, except in dire circumstances, the decision should not be made on the basis of cost alone, the services of the international rep, including expenses, will generally come at no cost to the local union. It is a benefit of membership in the international that is paid for by per capita to the international and it is a benefit that is lost if not used.

Elected, Full-Time Leader

We could indicate a fifth possibility but it is really a combination of two of the others. That is the local union president who is a full time union officer, from the bargaining unit, chosen by the membership and whose future employment (career, profession) is likely to be with the union rather than with the employer. Of course, this is far from a perfect situation and still depends on many other factors for its success.

Chief Negotiator as Director of Table Tactics

However chosen, the chief negotiator will learn the tricks of the trade primarily through observation of and interaction with other negotiators. Most chief negotiators in time tend to share certain common talents and skills. If there is a single most important trait in a negotiator it is flexibility (which does not mean lack of conviction or weakness). Tactics effective in one situation may fail totally in another very similar situation and no negotiator should attempt to blindly follow any simple set of "rules" such as the one at the conclusion of this chapter. In addition, each negotiator will inevitably

develop his or her own "style" and no one should attempt to adopt any suggestion or follow any rule with which they cannot feel comfortable.

Perhaps the main job of the negotiator before beginning negotiations is to assess the unity, strength, expectations, and determination of the membership. Next in importance is the degree of support and trust that he or she can expect from other leaders of the local and, most importantly, from the other members of the Team. It is the chief negotiator's assessment of the understanding and loyalty of the Team that will have a major impact on the negotiator's style and tactics at the table. Except in the rarest of circumstances, the assessment will reveal problems and many will be problems about which the negotiator can do nothing. But they must be taken into account.

Chief Negotiator Role in Forcing Equality

An early and continuing task of the chief negotiator will be to assert and maintain the equality of the union side of the table. Toward this end, we have noted that meetings should normally be held on neutral turf rather than in the employer's conference room (where the management is clearly in charge of nearly everything, including the room temperature, coffee and copier.)

One common problem that may prevent even the semblance of equality is the quite natural tendency for the management negotiators, ordinarily the "bosses," to call the union Team members by their first names while the union negotiators, ordinarily the "employees," just as naturally tend to

call the management negotiators "Mister" or "Ms." It may be almost impossible, and in any event is both unnecessary and undesirable, for the chief negotiator to get his or her fellow Team members to defiantly respond with first names. They may be uncomfortable in doing so with the result that the management team is more amused than impressed.

A better solution is for the union's chief negotiator to early on suggest: "We're going to be spending a lot of time together during the next few weeks and I'm sure that we all want to be as comfortable and relaxed as possible. It's certainly a very minor point but what form of address would you prefer using? First names? Or would you prefer to be more formal?"

There may be times when all of the members of the two teams are relative strangers to each other and on a formal basis while the two chief negotiators are old friends, or adversaries, and on a first name basis. Such a situation represents no problem -- and may somewhat enhance the status of the chief negotiator -- so long as there is equality between the two sides.

The chief negotiator should also politely but firmly insist that all questions be directed to him or her and no one on the union side of the table should speak except by direction of the chief negotiator. The importance of this rule, which is indeed not merely a tactic but rather a fundamental of union strategy, cannot be overstated. Between the natural inclination of many Team members to "speak their piece" and the temptations with which management will bait Team members, this discipline

is more than smart table manners, it is constant evidence to the management that it is dealing with a union, not with a crowd or mob of individuals.

The Shape of the Table, Size of the Team, and Seating Arrangements

One of the reasons that Team members break discipline and speak out of turn is that they get bored. This explains, in part, why so many union members who serve on a Negotiating Team never return for a second bout.

The physical configuration at the bargaining table contributes to this boredom. When teams are "too big", members on the ends of the table often feel left out. The typical seating arrangement at the negotiating table is for the two chief negotiators -- flanked on either side by the members of their teams -- to face each other from opposite sides of a large rectangular table. Since the two chief negotiators will normally be no more than a few feet apart, it is natural for them to pitch their voices in low, conversational tones with the result that members at the ends of the table have trouble following the discussion. Placing the two chief negotiators at opposite ends of the table with members in front of them at the sides of the table will assure that they speak loudly enough for everyone at the table to hear and see the speakers. Psychologically, the Team members will tend to feel included rather than excluded from the discussion.

Value of Trustworthiness

The negotiation's table is much like a poker table -- only far more complicated, with the astronomical

combinations and permutations of the poker deck seemingly simple by comparison. As at the poker table, there is concealment and posturing but despite the posturing the effective negotiator will normally develop -- and should certainly strive for -- a surprising degree of trust with his or her counterpart on the other side of the table. The negotiator's word when given should be honored and there is seldom anything to be gained through dishonesty.

The negotiation's table having been compared to the poker table, it may, at first blush, seem as incongruous and inherently contradictory to talk about a truthful negotiator as about an "honest" poker player. But however much he or she may bluff or dissimulate in the play of the cards, there are rules of play and some i.o.u.'s that the professional poker player must scrupulously honor or be banned from the game. There are also some rules and i.o.u.'s that the negotiator must honor to be continually effective.

Professional negotiators on opposing sides of the table frequently develop a rather surprising level of trust with the word of one to the other as binding as a signed agreement. It is difficult to precisely define the boundary that separates permissible posturing (really "lying," isn't it?) from unacceptable dishonesty. Perhaps some examples will best illuminate that boundary.

"Listen to me, please. I don't like to make threats and I'm certainly not threatening now. But believe me when I tell you that this contract will never be settled as long as you insist on compulsory overtime and until you

move off that position we're wasting each other's time no matter what else we may agree on. You've got my word on that." What happens if the union negotiator some time subsequently agrees to compulsory overtime? Has credibility with his management counterpart been destroyed? Not at all. What the union negotiator was trying to do, and what the management negotiator would probably have clearly understood, was that eliminating compulsory overtime was very important to the union and that it would, at minimum, require a major tradeoff to shift the union's position. A bigger risk to the union negotiator in retreating from such a strong stand would be to destroy his or her credibility with Team members -- particularly if those team members were inexperienced and less than completely trusting to begin with. Which illustrates the need to give the entire Team adequate training in advance and to be careful to brief and prepare them for what may develop at the table.

"Look! For a dozen reasons -- internal union reasons that are neither important nor interesting to you -- we simply cannot agree to compulsory overtime. Go along with our language on voluntary overtime and I'll guarantee you that you won't have a problem in getting people to work overtime. You have my word on it." A different kettle of fish entirely. The management negotiator would quite properly expect the union negotiator to honor such a commitment. There might be some legitimate questions as to the propriety of such a commitment (and certainly, in some situations, questions as to the union negotiator's ability to deliver) but such a commitment should never be made unless the negotiator was sure of

the ability to deliver and in fact intended to honor the commitment. Obviously the promise of such a commitment would be meaningless to management unless the union negotiator was perceived as having the ability to honor it -- which underscores the need to clothe the chief negotiator with authority.

The union negotiator surveys the wage rates being paid by a dozen comparable employers but presents at the table only the three highest rates. Dishonest? Well, certainly not the whole truth. Permissible? Absolutely.

In presenting the figures from other contracts the union negotiator alters some of the figures. Permissible? Absolutely not.

It is well to remember that "bargaining" is simply a euphemism for the earthier and better understood "haggling" and "horse trading." The concept of "fixed prices" had its origin with the Quaker shopkeepers of Philadelphia, persons of such stringent integrity that they held it a "lie" to ask more for a product than they were willing to accept and thus felt morally compelled to break with the ancient and almost universal practice of asking more than expected and then haggling about the final price. Shoppers found the concept of fixed prices such a relief and convenience that they flocked to the Quaker shopkeepers who found their morality financially rewarding and went on to establish the predecessors of the great department stores of today.

Perhaps some equally moral union negotiator may some day find some bold and innovative way to apply the same or

comparable concept to the process of collective bargaining, but certainly that day is not yet. In the meanwhile, it may be that there are some union members and officers of such stringent integrity that they are simply not fitted for the real world of posturing and game playing at the negotiations table. They must leave that playing field to others.

Tentative Agreements

An example of the sometimes thin but extremely important line between advocacy and integrity in negotiations is illustrated by the issue of tentative agreements. During the course of every negotiations there will normally be language initialed or signed, frequently late at night, that does not accurately reflect agreements reached. The gleeful reaction of novices and the inexperienced, where the inaccuracy seems to be to the union's benefit, is frequently to "hold them to it." Nonsense. In the first place, it is impossible since such agreements are almost always clearly tentative. And even were it not impossible, it would be unwise. The suspicions and bitterness engendered would hamper further progress, perhaps permanently sour the relationship, and can be of equal danger to the union (which is not immune from such late night mistakes).

Solo Negotiating

There is an equally important distinction -- between secrecy and privacy -- which is critical in the chief negotiator's relation to the Negotiating Team. Sometimes the use of a one person negotiating team is a matter of union practice and policy, usually in circumstances where one local deals

with many small employers. In these cases the business agent is not so much "negotiating" as "enforcing." A pattern contract has been set by a previous negotiation with one large employer or employer association and the union official is not really bargaining but rather getting additional employers to "sign up." There are also some unions in which it is regular practice and policy of the local to give a full-time officer, usually elected (often designated as "Business Manager"), full authority to negotiate a contract on their behalf, sometimes with and sometimes without a requirement for membership ratification.

Secret Negotiations

There are also instances where a union officer or staff person has sufficient authority (in fact, if not legally) to negotiate privately and secretly with management and then go through the motions of negotiations in the presence of a worker committee once an agreement has been reached. While it is by no means always the case that the result is a "sweetheart" contract -- a sell out of the membership's rights -- such negotiations charades are obviously to be deplored. We assert this despite the fact that we are well aware of situations in which the union official "hangs tougher" than the committee might. (There has been at least one instance in recent years in which members have been elected to a negotiating team on a platform of going easy on management, obviously in an atmosphere in which management has advertised threats of plant closure, bankruptcy, etc.) We object to this means of negotiating not only because its ends are undesirable but for two stronger reasons: It surrenders

an opportunity for membership education and involvement -- for union building -- and it is unnecessary. Private, or sidebar, negotiations, as discussed hereafter, are often useful and sometimes necessary and can always (in our experience) be conducted with the advice and consent of the committee.

The trend toward more meaningful rank-and file participation in bargaining at the local level may be explained partially by suspicions bred by contracts secretly negotiated, partially by the sometimes naive approach to the bargaining process of the newly unionized public employees, and largely by the era of concession bargaining. A union official who is able and willing to negotiate and "sell" to the membership a contract providing sizeable (or even modest) increases in wages and benefits may not be willing to accept responsibility for or "sell" a package of give-backs and may thus be eager to have a local union officer serve as chief negotiator with rank and file representatives on the bargaining committee to take the heat.

By their nature agreements are usually reached between two people. What normally happens at the table is that two people on opposite sides of the table -- usually, but certainly not always, the two chief negotiators -- reach a meeting of the minds and then each persuades fellow team members to accept that agreement. This being the case it is frequently useful and sometimes spectacularly productive to have the two chief negotiators meet privately in sidebar negotiations to explore compromises.

It is a reality of negotiations that once

an offer is made at the table, even if it is labeled "tentative," it effectively represents a new "bottom line" for the side making the offer. If the management negotiator Y says, for instance, that "we might be willing to consider a 10% pay increase if we can get these other issues settled," it is unlikely that the union will ever settle for less than 10% even though no firm offer was ever made. The same principle operates equally in the opposite direction and it is the big reason that progress is sometimes frustratingly slow at the table. Both sides are quite rightly reluctant to explore possible compromises. In an off the record meeting they don't feel as vulnerable and are likely to be less guarded and thus better able to search for and discover mutually acceptable compromises.

Such private meetings -- if conducted in secret as they sometimes are -- are certain to arouse suspicions and distrust. But there is seldom any need for them to be kept secret. If the union negotiator levels with his or her fellow Team members and asks them if such a meeting should be sought or agreed to they will almost always agree -- particularly if the suggestion comes at a difficult point in negotiations, which is precisely when such meetings are apt to be needed and productive.

Initial Sparring

The management negotiator will often make an opening statement -- or have some popular employer official make such a statement -- outlining the bleak financial outlook for the company and frequently warning that any increases in costs may send the company and all of the jobs down the tubes. It is

probably just as well to sympathize with and profess understanding of management's plight and suggest that under the circumstances it is even more urgent that the parties move quickly to reach agreement on a fair and equitable contract since the tensions and uncertainties engendered by drawn-out and unproductive negotiation sessions are destructive of morale and disruptive to productivity.

The union's own opening statement may even suggest that because of the urgency of the company's predicament the union has trimmed its demands to the bare minimum so as not to waste everyone's time in haggling and horse trading.

At the opening of negotiations it costs nothing for the union negotiator to request that management make some suggestions about needed wage increases and improvements in the benefit package. It costs nothing and is usually about worth the price. Management, particularly in the private sector, will normally make no offers (unless it is seeking take-backs) but will insist that the union put its demands on the table and there is no point in wasting much time refusing to do so since no bargaining can get underway until there is something on the table.

One of the reasons for trying to learn as much as possible about management's position in advance of setting forth all the union demands is that in a surprising number of cases management will be willing to grant more in some isolated area than the union had contemplated asking. It is possible, for example, that management is having difficulty in hiring people with some particular

essential skill at existing wage levels and is eager to increase those wage levels. Better in that case for the union to be in the position of agreeing to management proposals for the increases rather than demanding them. The agreement can always be clothed with rhetoric of reluctance since such disparate increases are apt to create friction among the members of the bargaining unit. And the increases themselves can sometimes be used as levers to pry a little more out of management for related skills.

Stating Union Demands

It is not always the case that it is necessary or desirable to place on the table a full set of detailed demands. It is possible to go to the table with nothing in writing but a set of "problems" which management is invited to discuss.

Whenever the union's demands are made management will normally seek assurances that the proposals represent the union's entire package and a commitment that no additional demands will subsequently be made. The proper response, we think, is: "Sure. That's everything. Sign it and we'll all go celebrate with a bottle of champagne. Of course if you are unable to agree fully with any of our proposals we naturally reserve the right to search for agreement in every way possible -- including the offering of substitute proposals."

The same technique can be used to reopen proposals already tentatively agreed to. Ordinarily each contract item is initialed or signed as it is agreed to with the understanding that such agreements are "tentative agreements." Should the union wish to reopen such a tentative agreement that may have been

too hastily agreed to, it is sometimes possible to do so by suggesting that the union could agree to Y the management position on a subsequent proposal by linking it to a modification of an already tentatively agreed-to item.

Such a tactic borders on bad faith (in a factual and real sense rather than a legal one) and it should not be used lightly and always with the clear emphasis that it is in no sense a demand but rather a suggestion offered in the hope of speeding up bargaining. Remember that you would be angry, and with good cause, if you thought management was reneging on agreements that you thought had been nailed down.

Management is not likely to take your original proposals very seriously. They will assume with abundant reason that you do not expect to get as much as you ask and their first task will be to attempt to read --through words, body language, past history, and, particularly, shop gossip -- what your real position is. Hours will be spent in management caucus in an effort to determine with reasonable precision what you really expect to get ... and, more important, what you will really settle for.

Put another way, demands are meaningless unless they are credible. Does this mean that your demands should be your bottom line and that you should not ask for more than you expect to get? Not at all. But it does mean that ridiculously inflated demands serve no useful purpose and that early on you should be attempting to signal management that whereas you demanded a 15 percent pay increase you are really serious about at least 10 percent.

Neither side knows its real bottom line until negotiations are well advanced and the reality therapy of an impasse often leads to reassessment by each side of their own and their adversary's tolerance limits.

In many negotiations the local union membership will have been -- certainly should have been -- solicited for contract proposal suggestions and the suggestions can sometimes be both voluminous and bizarre. (The most ridiculous one we remember was a demand that the state of New York pay its employees in gold bullion rather than dollars; the most curious one was that the employer, a Tennessee textile and clothing manufacturer, agree to pay for three days off before a death in the family.) Many negotiators -- in an effort to make their original proposals credible -- will weed out the more hopeless demands. Certainly a reasonable decision.

There is another way, however, that the problem can be dealt with. All of the demands can be taken to the table and then at the first perusal the union negotiator can quickly agree, even suggest, that certain of the more outlandish proposals (that would otherwise have been discarded) be temporarily put aside or "tabled." Management will likely insist that the tabled demands be withdrawn. The union negotiator can counter thusly: "No, we're not withdrawing them. I do want to discuss them but let's not let them hold us up in getting to the discussion of more important issues. I do want to get briefly back to them later but you have my word that these issues are not going to stand in the way of agreement."

Once the substantive contract issues have been resolved and in the glow of satisfaction and accomplishment on both sides the union negotiator can suggest: "Look, I've got a problem. I've bent to the breaking point in order to compromise and reach agreement and we've still got this pile of tabled demands that I've got to do something on. It's late and we're all tired. I promised you that these demands will not hold up agreement and they won't. But it will help us get the contract ratified and maybe keep me and the other team members from being lynched if you'll go through them tonight and see what you can do on them."

It's a difficult position to argue with and sometimes a few crumbs will be picked up. And they will be picked up at no cost (since otherwise they would have been discarded) and some additional members will see their concerns attended to in the bargaining process.

Patience

The chief negotiator should strive to be perceived by the opposite side of the table as a reasonable and patient person who understands their problems and whose chief interest is in reaching a fair and equitable settlement. Pressure and threats should come from a determined membership, not from the chief negotiator. And if threats do become necessary they should be delivered in sadness rather than anger: "We've tried and are still trying to do everything we can to avert a strike. But the truth is that, given the bonuses granted to management and the increases that have been granted in much of the rest of the industry, less than ten percent is obviously not fair and is certainly not

acceptable to the membership. We don't think a strike makes any sense for us or for you but unless we can get things off dead center and be able to report some progress at tonight's membership meeting you may simply leave us no alternative."

The Art Of Timing

Negotiations is at least as much an art as a science. While there are facts to learn and skills to practice, there is a portion of the negotiations trade that seems to come to some naturally and to escape others indefinitely. We refer to the art of timing.

Everyone knows it when they see it -- possibly most vividly in watching a great comic. The same words -- sometimes even the same gestures -- delivered by the competent comedian which evoke a belly laugh from the audience, when delivered by someone less sensitive to the nuances of timing may be responded to by a groan or snicker. This aspect of the art of timing is so personal a talent that its characteristics and processes are difficult to describe and define.

But there is another element of timing that can be developed as a conscious part of strategy. First, it needs to be noted that no major concession would ever be made if there were not some terminal point to the negotiations. Frequently, of course, this is the contract termination or strike deadline time, which is why so many negotiations are settled shortly before the "final hour." That "hour" may be a given but the negotiator can and must create other deadlines to keep things moving. The calling of a meeting to which one must report is one such self imposed deadline.

There are strikes when negotiations end in impasse but there may be other pressure tactics during the course of bargaining. The timing of such action is a basic part of negotiations strategy. For this reason even though someone in the union must be designated as the strike captain or leader, the timing of calling (and calling off) of membership mobilization activities must be ultimately the responsibility of the chief negotiator.

But the union negotiator need not wait for nor rely on this outside factor to stir up or slow down the process. In one major negotiation the union leader needed to slow down the pace of bargaining; management seemed too eager to get to impasse and impose contract cuts. He had his doctor check him into the hospital for extensive tests of his heart. It was impossible for management to insist on the union continuing to meet until its chief negotiator's fate was known.

Another local union scheduled a date on which its national president would join the bargaining -- a president whose reputation for abusive tactics was so well known that management had an incentive to settle with the more moderate local leaders. This tactic in negotiations is known, as it is in police work, as good cop/bad cop.

The negotiator must search the calendar for public events which may be used as bargaining (and timing) levers. Is there a stockholders meeting scheduled? Is a legislative session about to begin or end? Has the chief negotiator scheduled a delayed vacation trip for a time when the negotiations

were presumed to have been completed?

There is another aspect of timing that merits the negotiators attention. That is the use (and abuse) of all night, round-the-clock, or other marathon meetings. Part of the publicly perceived romance surrounding the negotiations process is the product of the newspaper story about the "36-hour, non-stop bargaining" which led to the settlement. Some very sophisticated union negotiators enjoy telling war stories (which are, somehow, never at their own expense) about how they put something over on management in the middle of the night.

Without question the dynamics of the negotiation process do sometimes lead to extended sessions -- particularly as an expiration deadline nears and long and dearly held positions are amended or abandoned in the drive for settlement. And we do know some union negotiators who go to great lengths to work out so as to get in shape for the smoke filled, caffeine saturated, non-stop session to see who caves in first and most. And some union negotiators are damn good at it.

But the magic of the marathon session is mostly myth and there are dangers. Frequently the members of the bargaining team are required to keep up with their regular work (except when at negotiation meetings) throughout the negotiations process. Even were this not the case, they seldom are used to the pressures of the bargaining table and are, as both employees and union members simultaneously, subject to great stress. The potential advantages to the union of putting management's negotiators through a wringer must be weighed against the cost of wearing out the union

Team. Management may grant -- before, during or after the bargaining -- its negotiators time for rest and recreation. The only "rest" the union Team member may get is time off without pay -- particularly if the outcome is a strike.

The union negotiator's counterpart may be the owner of the company, the president or vice president, or, more likely, a professional negotiator; frequently the personnel director. Given a choice (which one never is) it would be better to deal with a paternalistic, egotistic, and pragmatic owner of a very profitable business. Last choice would be an ideologue with strong anti-union convictions, types who sometimes take long strikes rather than agree to "compulsory" unionism.

Increasingly, one meets professional negotiators who are usually difficult but seldom impossible. Their assignment is usually to reach an agreement and they will come into negotiations with instructions to make a settlement within predetermined parameters. Unfortunately those parameters are established within the comfortable confines of the president's office or the board room rather than under the pressures of the negotiations table. One can only hope that the company negotiator will be a person with some confidence and flexibility or with sufficient stature or persuasive ability to have the parameters modified. Otherwise a strike may be inevitable. The realistic danger of a strike the professional management representative's major lever in inducing a change in top management's "parameters" -- that is their realistic consideration of how far they will really go to avoid or settle a strike.

There is a natural -- though unspoken and informal -- quid pro quo principle in constant operation at the negotiations table: "I'll give you this if you give me that" or "I gave you that and now you owe me this." Because of this fact it may be something of an advantage to attempt to portray every agreement as a concession to management. Rather than offer a union counter-proposal to an unacceptable management proposal it is sometimes better to say that you will accept, reluctantly of course, management's proposal with some minor modifications. Like most other tactics this one can be abused to the point of ineffectiveness. "We'll accept the management proposal on wages if the 5% increase is changed to a 15% increase" is obviously so totally transparent as to be worthless. But a response that, "We'll live with the 5% raise with a minimum of \$.50 for the low wage workers" may be salable.

Every union demand should, to the maximum extent possible, be supported by logical, rational argument but bear in mind that negotiation is not debate and winning debating points counts for nothing, indeed may be counterproductive. The goal is not to win debating points but to persuade management to agree to your position and your arguments should be meaningful to management.

Management is interested in unit production cost and an effort should normally be made to convince management that a specific union demand will either actually reduce costs or minimally increase them. A wage increase will improve morale and increase efficiency. An improved

pension plan will increase the job attachment of highly trained and skilled employees and thus reduce the costs of turnover. A better medical plan will attract already trained and skilled new employees. Longer vacations and additional holidays will reduce absenteeism and the concomittant adverse impacts on production.

It is frequently wise to attempt to tie several items together and attempt to dispose of all of them together. The union will accept management's position on overtime if management will meet the union halfway on speeding up the grievance process. The union will accept the company's offer on pension contributions if management will agree to an additional holiday, etc. Such "packaging" may not always be logical but is often useful.

Avoid too hasty agreement. Once it is clear that agreement is close it is frequently possible to "squeeze" just a trifle more: "Okay. Let's try to get on with it. We'll buy the 8 percent if you'll agree to round all wage rates to the next highest quarter."

On the other side of the same coin, excessive reluctance to agree is the certain mark of the insecure and inexperienced negotiator. There comes a time when additional delay serves no purpose. Sometimes a skilled negotiator can challenge and jolt a management negotiator into movement with sudden, dramatic concessions: "It may cost me my head but if we're ever going to get this contract finished somebody has to start some movement. You want your language on overtime. You've got it. You want your language on discipline. You've got it. Now look at our language

on arbitration. Look at the proposal on union security. Give us a little movement on your part and we'll have done a good morning's work."

If the negotiator is to be able to effectively employ such a tactic it is best done as if by sudden inspiration and desperation and not immediately after a union caucus. It is therefore important that the chief negotiator go into each session armed with sufficient latitude to effect compromise and movement -- which means careful briefing and discussion among the members of the union Team in advance.

Caucuses

Caucuses are usually abused. Flurries of note passing and frequent caucuses by the union Team signal management that no one is really in charge and that they are dealing with a collection of individuals rather than an organized Team. Note passing is best kept to a minimum and each member of the Team should have a private signal by which to alert, when absolutely necessary, the chief negotiator that a caucus is needed. Every union caucus can then appear to be called by the chief negotiator and the impression not given that there is dissension or faulty communications among the members of the Team. The excessive use of the caucus by the union is often a symptom of lack of trust, poor communications, or other weakness.

Every request for a caucus as well as the length of the caucus will send a message to management and thought and care should be taken to make certain that the message received is the one you intended to send. If management, for

instance, should make an unexpected and rather attractive offer to agree to an 8% across-the-board increase but only in trade for a group of union proposals -- shift differential, holiday and longevity pay -- might well require a caucus but the way it is requested might be critical.

If the union's chief negotiator simply said, "Give us a few minutes," management would likely and logically conclude that the union found the proposal attractive and that the union was not irrevocably wedded to the notions of shift differentials and longevity pay.

A different and usually preferable message would be sent if the response of the union negotiator was: "No, that's not acceptable but it does represent some movement. Give us a few minutes and let me see if we can come up with a suggestion that might meet both our needs."

Before accepting or rejecting and management proposal, except "in principle," the union should make certain that it understands the proposal. It is seldom wise to explain management's proposal to management before it has been explained in detail by management. A sometimes useful gambit to use before accepting a proposal is to rather sorrowfully explain that you have no recourse but to reject the proposal but that before you do you want to make absolutely certain that you understand it. Ask direct but neutral questions. Management will then tend to explain the proposal in the most attractive possible terms and they can do so at no risk since you've already announced that it is being rejected. If,

on the other hand, an explanation is asked after suggesting acceptance, management will instinctively fear that they offered "too much" and will try to minimize the proposal in explanation

For example, suppose management proposed that a worker who did not work the day before and the day after a holiday would not be paid. You might ask, "Do you mean if someone is out sick on July 3 you would deprive them of holiday pay for the fourth?" Very possibly management might start explaining that in that instance and other similar ones they would pay the person, that they only mean it to apply to those few persons who, "take advantage, abuse the holiday," etc. Already the management has restricted its demand and has opened up the possibility of your asking other questions such as, "Do you really want to use the holiday pay to deal with issues of discipline?" You are at no risk since you said in the first instance that their proposal was unacceptable. But the unacceptable proposal which is left on the table is not as bad as the one they proposed and you have made no concession nor even a counterproposal.

A common mistake of union teams is the failure to take advantage of management caucuses. If management is putting together a new proposal, the union should be busy anticipating the proposal and deciding in advance the proper responses to the various proposals considered most likely.

It is during the final hours of settlement that the chief negotiator needs all the imagination, calculation, and Team support possible. To wrap up the deal he or she may need to quickly --

usually without a caucus -- "adjust the package." Management is, of course, concerned with all the economic elements of the contract but frequently they are more concerned with the total cost over the life of the contract of all wage and benefit increases. By delaying increases to a later time in the contract it is possible to reduce the total cost of the package but at the same time establish wage levels or new benefits (such as dental insurance or holidays) that will, presumably, continue indefinitely in future contracts. Increases which are effective in the final months of the contract may cost the employer little but may represent an important "foot in the door" for the union.

The best that might be done is some cases with particularly thorny problems is to establish some sort of continuing forum for their discussion and possible resolution. A common device is a labor-management committee (often referred to as "meet and discuss" in the public sector).

Where major issues remain unsettled and unseizable at the deadline they may be dealt with through "reopeners." A common reopener is for the purpose of determining the wage increase in the second or third year. Such a provision has the advantage of postponing the problem and in some cases -- particularly where inflation is feared and it is not possible to get cost-of-living language -- may actually be preferable to a settlement. Better however not to make it a "wage reopener," where the employer may demand a decrease, but rather, if possible, a "reopener for a wage increase."

However, thought must be given to providing for impasse resolution in such reopeners where you have a no-strike clause. While it is logical and arguable that wages are so central to the collective bargaining agreement that in cases where they are not settled there is no collective bargaining agreement and thus no no-strike clause, given the current political climate coloring the decisions of both courts and administrative agencies, it is unwise to leave yourself in that position. Better to write a clear exception to the no-strike clause or -- perhaps better given the difficulty of mounting and winning a one-issue strike -- provide for binding interest arbitration.

The Other Guy's (or Gal's) Tactics

Our suggestions have been directed to the union's chief negotiator and his or her planning and approach. But part of planning is imagining what we would do if we were on the other side. One example of the value of contemplating your opponent's possible ploys is to consider how to deal with and offset the following classic management stratagem:

Many management negotiators try to portray themselves as generous souls whose generosity is restrained by directions from their bosses. If such a negotiator intends to increase a wage offer, say, from four to five percent, he or she is likely to confide to the union negotiator that more than four percent is "simply not in the cards" or that a maximum of four percent has been mandated from the top. . .but he or she is willing to talk to whoever may be making policy and try to get a little more. Then, returning with the jubilant

news that while, "It wasn't easy but I've managed to get you five percent," it is easy to make your refusal of such a "boon" appear to be the act of an ingrate.

While this tactic may not move the experienced union negotiator (except, perhaps, to laughter), it is often amazingly effective with the bargaining team. The way to protect the union from such blatant manipulation of the naivete of members of your team is to overcome the naivete with information. If you have explained this (and the many other things you know by experience or from research about this type of negotiator) you will have inoculated your team against the temptation to be taken in by "Mr. Nice Guy."

THE LAW OF LABOR NEGOTIATIONS

A union has many purposes and faces many problems but its principal purpose and the vehicle through which it deals with most of its problems is the negotiation of a collective bargaining agreement. The labor relations laws recognize the centrality of the negotiated labor contract in labor-management relations. The principle is set forth in the National Labor Relations Act: "It is hereby declared to be the policy of the United States to . . . encourag[e] the practice and procedure of collective bargaining . . . [and the negotiation of] the terms and conditions of employment . . . " While the official name of this law is the National Labor Relations Act, we will call it by its more familiar name, "Taft-Hartley", because reference to the very conservative Republican sponsors of the 1947 revisions of the original Wagner Act serves to underline the essential anti-union bias in the law.

Newly Unionized

While this book is intended primarily for use in established union situations, there are several special considerations for the newly organized union which must be considered because it is in this first negotiation that management is most likely to continue its efforts to defeat the union. A work group is not "organized" in any meaningful sense until its first contract is won. Therefore note well:

1. When negotiations are the result of Labor Board certification an employer must negotiate in "good faith" for a full year. If it is found by the Board not to have bargained in good faith and is then

ordered to do so, it must bargain for a full year from date of that order.

2. If the employer has voluntarily recognized the union (based, for example, on a card check), then the one-year requirement for good faith bargaining is a guide but may not automatically be the standard.
3. Regardless of Board certification or voluntary recognition, not only must the employer bargain in good faith but it cannot break off bargaining and withdraw recognition except when it has a good faith doubt, based on objective evidence, that the union no longer represents the majority of its employees.

All of the above and all that follows must be considered in the context of the reality (to paraphrase the old labor song): "If you wait for the NLRB to get you a contract with a raise in pay; you'll all be waiting 'til judgment day."

Good Faith Bargaining

The National Labor Relations Act requires union and employer to bargain in "good faith" over wages, hours, and other terms and conditions of employment and be willing to incorporate any agreement reached in a signed contract. The law, however, specifically does not require either party to make any concession or grant any benefit in order to reach agreement. This essential contradiction in the Taft-Hartley Act is found in Section 8(d):

For the purpose of this section, to bargain collectively is the performance of the mutual obligations of the employer and representative of the employees to meet at

reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiations of an agreement, or any question arising there under, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

What must the employer do to comply with the requirement to bargain in good faith? He must meet with the union at reasonable times and places, consider union proposals and advance proposals of his own. Should he fail to comply with even these minimal legal requirements, the union's legal recourse is to file unfair labor practice charges with the National Labor Relations Board (NLRB) alleging a failure to bargain in good faith.

Limitations in the Law

The law, in its even-handed majesty, imposes these requirements equally on union and employer, but since it is our intention to discuss reality and practicality rather than legal theory, it might be well to state at the outset that with few exceptions every union wants an agreement and no employer wants an agreement.

Even in the thousands of cases where the employer does consent to an agreement, sometimes speedily and fairly, it is because agreement is perceived as the lesser evil of available alternatives. After hundreds of negotiations in the private and public sectors we have yet to meet an employer who would not really prefer a loyal, docile and productive work force that would gratefully

accept whatever wages, hours and working conditions that might be offered.

This being the case, we are in reality concerned here only with the practical impact of the legal requirement on the employer to bargain in "good faith." To fully understand the meaning of "good faith" bargaining, consider first what it does not mean. It emphatically does not mean, as the uninitiated are likely to assume, that the employer must be "reasonable" or "fair." An employer acting with reasonably competent legal advice could come to the table proposing a reduction in wages and benefits, an increase in hours and an erosion of working conditions, adamantly stick to that position, and never agree to any increase in wages or improvement in benefits or working conditions -- and not be guilty of a failure to bargain in good faith. The fact that the employer's profits might be at record levels would be totally irrelevant.

Weakness Of Remedy

In the ordinary course of events a decision on unfair labor practice charges takes many months -- unless the employer chooses the route of delay in which case appeals to the Board and the courts could delay a decision for years. Even in the case of a total union victory before the Board and the courts, the "remedy" that the union would end up with would only be an order to the employer to bargain in good faith -- to start over and do it (procedurally) correctly.

In considering charges of failure to bargain in good faith the Board and the courts attempt to examine the "totality" of the employer's conduct to determine if he really "intended" to reach an agreement or was simply going through the motions of

bargaining in order to comply with the law. "Intent" is obviously difficult to prove and the courts and the Board, have, to our partisan eyes, been extraordinarily lenient in granting employers the benefit of every conceivable doubt. While every employer would no doubt be delighted to reach an agreement that would reduce wages and increase production, can there in truth be any "intent" to reach agreement when the employer takes positions at the table guaranteed or even calculated to prevent agreement? It is a nice question that the courts, again in our opinion, refuse to even consider on the grounds that to do so would run them aground on the statutory prohibition against the requiring of any concession in bargaining.

There is a list prepared in the chapter entitled "Labor Board Investigators Checklist on Refusal to Bargain Charges" in this book by the Board for its staff investigators of evidence of behaviors to look for, any one of which might contribute to a finding of bad faith and some combinations of which might constitute that "totality" which would sustain such a charge. As of this writing (1990) the list has not been revoked or replaced but, the Labor Board, in the view of many unionists, does not rigorously pursue failure to bargain charges. In fact, in the current era of increased anti-union actions by employers, the Board's case load is down and its staff reduced. The explanation, in large part, is that union attorneys advise their clients to avoid getting entangled in the law and some unions have made a policy decision not to go to the Board even to conduct representation elections, instead going back to the confrontation method of organizing -- strikes and threats of strikes.

Considering the reality of how little the law requires of an employer in bargaining and the absence of any meaningful remedies for enforcing even those minimal requirements, there is a strong temptation to advise the union negotiator to forget that the law exists and to rely on the only two useful tools at his disposal for extracting agreement -- the "stick" of halting or hampering production through a strike or other means and the "carrot" of continuing or increased productivity through cooperation.

Uses Of The Law

Nonetheless, there are several reasons why the union negotiator will want to be familiar with the laws and legal precedents on bargaining. They are:

1. An employer's refusal or failure to bargain in good faith is an unfair labor practice that might be useful to the union as the basis for an unfair labor practice strike since such a strike may be far more advantageous to the union than an economic strike.
2. The employer's duty to bargain in good faith includes the obligation to provide to the union, upon request, information needed for the adequate representation of its members.
3. Familiarity with the law will protect the union negotiator from an unfounded reliance on its assistance in reaching agreement.
4. Union negotiators and leaders need to have a clear understanding of the union's right to refuse to bargain about internal affairs of the union. For example, many employers try to insist that the union

Team is legally requested to take management's final offer to the membership for a vote. This is completely false. How the union chooses to ratify or not ratify is, legally, none of the employer's business and it is illegal for the management to insist upon bargaining over this issue.

5. The possibility of mid-term bargaining -- the making of a demand to negotiate on something not dealt with and disposed of during negotiation -- which the law protects but which the unwary negotiator may lose only through agreeing to surrender the right.

Confident demands at the table that the employer comply with an asserted requirement of the law are frequently of some practical utility -- either because people generally tend to do what they are "supposed" to do or because the employer does not relish the prospect of Board litigation.

The Unfair Labor Practice Strike

Let us consider first, because it is the most important, the question of a refusal to bargain charge as the basis for an unfair labor practice strike. The basic advantage of such a strike over an economic strike is that the employer cannot permanently replace an unfair labor practice striker. Therefore, we can imagine no reason why any union should ordinarily call an economic strike. It is better to file every possible unfair labor practice charge and allege an unfair labor practice strike. These charges need not be limited to illegal employer acts during bargaining but may be based on any unfair labor practice such as discrimination because of union activism or attempts to

undermine the union's exclusive representative status.

Another charge which is often overlooked but which might contribute mightily to a union's effort to have a strike declared to be an unfair labor practice strike is one based on a violation of section 8(a)(2) of the law. This section was intended to prevent company unions, groups which claim to represent workers but are really controlled by employers. What many unionists don't realize is that most of the employer-initiated worker-management committees -- whether called "Quality Circle" or "Team" or "Cooperation Committee" or whatever -- are often illegal. Putting it more strongly, unless such groups were started and continue with the blessing of the union, it is probable that you can find that they have been used to undermine the exclusive bargaining status of the union. While both the Supreme Court and the NLRB have been good on this issue, some lower federal courts have made inconsistent decisions. Obviously the entire unfair labor practice area is a highly technical one and you will want to consult with a union labor lawyer.

An "economic strike", a strike to win or preserve some contract term or terms, is the most familiar kind. An "unfair labor practice strike" is a strike in protest of a violation of the Labor Act by the employer. While a union engaged in an unfair labor practice strike may have many objectives, it should make clear by its conduct that the precipitating cause of the strike is the illegal behavior of management. The unfair labor practice strike deserves and gets greater protection than the economic strike because it is in protest of an illegal employer action.

An economic strike is legal and a worker cannot be fired for engaging in such a strike but may be permanently replaced. In recruiting strikebreakers an employer is often appealing to their desperation and holding out the offer of permanent employment. Since an unfair labor practice striker cannot be permanently replaced, the workers have additional security -- individually or as a group they can go back to work whenever they choose during an unfair labor practice strike. In an economic strike, not only may the employer hire permanent replacements, but after one year it may be entitled to petition for a new election in which the permanent replacements vote and the economic strikers do not. Unfair labor practice strikers cannot be so removed and no election can be held during the progress of an unfair labor practice strike.

If the strike is successful the charges will ordinarily be dismissed as part of the strike settlement and thus be of no long-term consequence to either party. The union may at any point make an unconditional offer to return to work and insist that the employer make room for the strikers even if it means dismissing strikebreakers. The employer refuses to do so at considerable peril.

Consider the dilemma of the employer. At this point the union will have taken care -- through the same delaying and appeals tactics so regularly employed by employers -- that a final decision on its unfair labor practice charges has not been rendered. The employer is then in the unenviable position of having to fire the scabs (to whom he has probably pledged loyalty) and take the strikers back . . . or gamble on the Board ultimately ruling that the union's unfair labor practice charges are

without merit. It is a big gamble since, if at some point, perhaps years down the road, the unfair labor practice charge is sustained, the employer will owe back pay to all of the unfair labor practice strikers not reinstated. Depending on the number of unreinstated strikers and the time elapsed, this could involve a very large sum indeed.

It is not the kind of gamble that a prudent employer would like to take, particularly since it is a gamble in which he can lose big and win nothing. Since every lawyer has lost cases that he feels he should have won, no competent lawyer -- no matter how flimsy the ULP's may appear -- is likely to give an employer the kind of unqualified assurance of victory that he would like to have before embarking on such a gamble.

The employer is likely to be further inclined against such a gamble by the fact that the strikers will be (we confidently predict on the basis of no evidence other than long experience) accurately perceived by the employer to be far more skilled, productive, and desirable employees than the replacements.

There are additional tactical advantages that accrue to the union in an unfair labor practice strike as opposed to an economic strike. In the early days of a strike many of the members will be quite fearful. The person crossing the picket line is both hated and feared because of the prospect that he or she will take away the striker's job -- the job which is the foundation of home, family and self-respect. The union leader who can offer some assurance that the replacement will be there, "only until we decide to get him thrown out and take the job back," is going to give some needed reassurance to the fearful or reluctant picket.

Duty to Provide Information

The law requires that the employer supply the union with data needed and requested for bargaining and most union negotiators, we think, fail to request enough of the pertinent information early enough and explicitly enough.

The obligation to provide information is not limited to information needed for contract negotiations but continues during the contract and includes information needed for the processing of grievances or otherwise representing members of the bargaining unit in regard to their wages, hours, or conditions of employment. If worker representation includes advocacy before a government agency such as the Unemployment Compensation Board or the Equal Employment Opportunity Commission, the employer is required to supply relevant data at the union's request.

What information must the employer supply? Generally, anything relevant to the negotiation or administration of the contract. The employer has no obligation, however, to supply information in the form requested and the union may be required to pay the cost of providing the information. Such costs are usually merely copying costs and it is unusual for an employer to request payment. It is also proper and quite usual for the employer to request that certain company records be examined by the union only in company offices.

While information relating to wages and compensation must be provided to the union, financial information on the employer's business -- including profits and losses -- has consistently been held to be not

relevant to any legitimate union need unless the company pleads financial inability to comply with union demands. This being the case, most companies are careful to avoid claiming inability to pay and thus avoid the requirement to reveal information on the finances of the company.

An employer's offer to show the union its financial data is a certain clue that the data divulged will support the employer's position. Particularly when dealing with a single plant of a large corporation, one company of a conglomerate, or only the domestic data of a multinational organization, the union must be wary. Do not open the door for a Trojan horse; be careful what you ask for, you may get it.

Familiarity Avoids Undue Reliance

Familiarity with the law will prevent the placing of any unfounded reliance on assistance from the law in reaching agreement. The other side of the same coin is that knowledge will protect the negotiator from intimidation by the management negotiator -- particularly since that negotiator is very likely to either be a lawyer or to be assisted and advised by a lawyer.

Union's Right to Manage Own Affairs

Such matters as who will sit or speak at the bargaining table or how the settlement will be ratified by the union's members are not legally any of the employer's business. These are permissive subjects of bargaining and the permission is the union's to grant or withhold.

Ignorance is no Asset

Finally, the union negotiator should confidently assert and maintain at the table that management must, in order to meet its obligation to bargain in good faith, comply with the following ground rules and requirements:

Equality of the parties. Management will normally tend to subtly (or not so subtly) assume the role of sovereign graciously come to hear the petition of its subjects. Members of the union team, even though they may in fact be employees long conditioned to unquestioningly following the directives of management, go to the table not as employees but as the legal representatives of the bargaining unit -- as equals.

Authority to bargain. Management must send to the table representatives with authority to make binding commitments. Real bargaining is virtually impossible when the company spokesperson is little more than a messenger who has to check every decision with someone else.

Exclusivity. Management must bargain exclusively with the union team and not appeal directly to the bargaining unit members for support for management positions. Bargaining with the union through its members -- "Boulwarism" -- was the notorious and illegal tactic of a General Electric Vice President, Lemuel Boulware. The employer must bargain exclusively with the union which acts in behalf of the bargaining unit.

Ground rules jointly agreed. Management must determine jointly with the union -- not by management dictate -- meeting times and places and other ground rules of the negotiations.

Preserve present practices. Management must make no changes -- up or down -- in wages or benefits during negotiations or afterwards, except through bargaining with the union.

There is support in the law for each of these positions. And while the union negotiator should sound confident that each is a clear requirement of the employer's obligation to bargain in good faith, he should never forget that in reality this position is based as much on strategy and tactics as on the law and that in any event the law is general and vague and, in practice, impossible of effective enforcement.

The Law On Organizing Vis-A-Vis The Law On Negotiating

By now most union leaders recognize that the Taft-Hartley Act was, at its best, of limited assistance in organizing unions and some unions now ignore it. The law can be a definite deterrent in a multitude of cases where unions, relying on Board processes and procedures, permit employers to utilize those processes and procedures to gain time in which to erode union strength. A union that might have been capable of mounting an effective strike at the time that it petitioned for an election will, in all probability, be unable to do so if it permits the employer to delay both an election and certification through appeals to the Board and the courts.

Ironically it is frequently the time taken in the adjudication of unfair labor practice charges brought by the union -- during which these charges, unless waived, delay an election -- that the employer utilizes in order to mount an anti-union campaign,

weed out militant union supporters and carefully screen and select new hires on the basis of company "loyalty". In fact, the employer need not necessarily conduct an anti-union campaign. Time itself cools organizing ardor, dims the hope of union benefits and in a variety of subtle ways saps union strength. Nonetheless, the Board can and does conduct representation elections and can and does certify unions as the exclusive bargaining agents and winning an election and obtaining certification are sometimes -- naively and unrealistically, we think -- taken to be synonymous with organizing. The major purpose for which the original Wagner (National Labor Relations) Act was passed, as is clearly stated in the law itself, was to promote the practice of collective bargaining and the purpose for which workers organize into unions is to obtain the benefits of a union contract, the product of collective bargaining. Neither purpose is achieved simply through certification.

The Mirage of Good Faith Without Concessions

Once a union is certified and turns its attention to the negotiation of a contract, it finds even less help from the Board and the law than in organizing. Here the law is impotent or worse and the impotence is built into the very language of the law: "... to confer in good faith" but, "such obligation does not compel either party to agree to a proposal or require the making of concession."

How can the law be "worse" than impotent? It is worse because some union leaders and probably most union members are tempted to rely on the law. Quite reasonably, but totally erroneously, they

assume that the legal requirement to bargain in "good faith" should logically require at least some degree of fairness and justice. But fairness and justice are never considered to be elements of good faith by the board or courts. It is difficult to see how "bargaining" in which no concessions are made or required can, in the common sense practical meaning of the term, be considered to be bargaining at all. The first NLRB, during the early New-Deal NRA (National Recovery Administration) period ruled that "The employer is obligated by statute to negotiate in good faith with his employees' representatives, to match their proposals, if unacceptable, with Counter-proposals and to make every reasonable effort to reach agreement." (Houder Engineering Corp., NLRB (old) 35, 1934.) The successor National Labor Relations (Wagner) Act was weaker and in its amended (Taft-Hartley) form worse than useless in forcing the employer to agree to a contract.

Avoiding Entanglement In The Law

Were it not for the false hopes raised by the existence of the Board, unions would perhaps be more diligent in organizing and orchestrating effective power for collective bargaining. If they expend energy and resources on pursuing charges of "failure to bargain in good faith" against the employer, they are certain to find that such charges, even when successful, are mostly a waste of time, for the law provides no meaningful remedy. Victory will produce no more than an order to the employer to return to the table for another try at bargaining in "good faith" -- but this time armed with a blueprint, contained within the Board or court decision, on how to go through the motions of bargaining and still stay within the

technical boundaries of what is legally considered to be "good faith" bargaining.

Some employers will not even go through the motions of bargaining but simply refuse to bargain at all. Such a refusal is often based on an argument -- which the employer may not even believe -- that the Board erred in its determination of a unit "appropriate" for collective bargaining. The worst that can happen to an employer for taking such a stance is an order to bargain. The law provides no penalties or fines (so long as the employer steers clear of the risk of a contempt finding through the blatant defiance of a court order). There is no provision, either in the law or in Board procedures, for making the union and its members "whole" through the award of retroactive pay as is done in the case of employees discharged for union activities.

While it would be folly for any union to rely on the law alone for meaningful help in negotiating a contract, there is, as we pointed out above, sound reason for every union negotiator to be familiar with the laws affecting bargaining and with the precise legal meanings of some simple sounding terms -- including "good faith" and "unfair labor practice".

Scope Of Bargaining -- Mandatory, Permissive and/or Illegal

The duty to bargain in good faith, however limited its meaningfulness and practical enforceability, is additionally limited as to what must be bargained about. There are a few subjects about which it would be illegal for the parties to bargain, even should both be willing, even eager, to bring them to the table. Most subjects that the union will generally want to bargain

about, however, will fit somewhere within the broad category of "wages, hours and other terms and conditions of employment" and are, legally, "mandatory" subjects of bargaining and neither union nor employer may simply refuse to discuss them. There is a third category called "permissive" subjects of bargaining and it consists, most simply, of anything that is neither mandatory nor illegal.

Mandatory Subjects

Mandatory subjects of bargaining are "wages, hours and other terms and conditions of employment" but this apparently straightforward definition has left abundant room for dispute. Unions have been innovative and surprisingly successful in bargaining for such things as firewood and free beer by persuading the NLRB or the courts to rule that such benefits were part of their "terms and conditions of employment" and thus mandatory subjects of bargaining. Some examples:

At one New England college the professors demanded and won the contractual right to gather firewood on college property.

Brewery workers have historically enjoyed the right to drink freely from the beer they brewed -- just as railroad workers have generally ridden the railroads on passes. One brewery union succeeded in forcing the employer to bargain mandatorily over a union demand that the workers not have to drink beer but be provided alternate beverages such as milk, juice, or coffee. (Interestingly, the employer said it opposed this demand not because the beer represented no out-of-pocket cost but

because the beer was claimed to be healthier -- "beer makes a man strong!")

Since the union's legally protected right to strike is limited to strikes over unfair labor practices and/or over mandatory subjects of bargaining, it is important to understand these distinctions and to make certain that any economic strike is over mandatory subjects. This, in practice, may mean taking care that agreement is not reached on all mandatory subjects before all permissive items have been disposed of satisfactorily.

The pensions of already retired members, for example, is a subject that is clearly not a mandatory subject of bargaining and a strike to compel an employer to bargain about the pensions of retirees or to agree to a union proposal on the subject would not be a legally protected strike. In such a situation the union's most practical recourse -- assuming that it had taken care to keep unresolved mandatory subjects on the table -- would be to strike over the mandatory subjects and thus bring pressure on the employer to agree on all unresolved issues -- including the pensions of retirees. Strikes in the coal mines have even included, as a major issue, the pensions of widows who were, themselves, never employees.

Prohibited Subjects

Prohibited or illegal subjects of bargaining are those which could not legally be included in the contract. Perhaps the most important example is the closed shop, which was outlawed by the Taft-Hartley Act. Even here, while the prohibition against the closed shop is clear and unequivocal, some bargaining does occur. In industries where work is casual or

intermittent, as on the waterfront and at construction sites, the union hiring hall is common. And while such hiring halls may not legally discriminate against non-members, in practice few non-members apply to such halls for employment.

Negotiating Union Security In "Right To Work" States

This divergence of legality and reality in prohibited subjects of bargaining may even apply under so-called right-to-work laws. It is a peculiarity of U.S. labor law that a federal law gives explicit sanction to the states to adopt legislation prohibiting labor-management negotiations over a subject that is, under the same federal law, a mandatory subject of bargaining. That is, however, what Section 14(b) of the Taft-Hartley Act does and it has been used to outlaw most forms of union security in 20 states, most of them in the Sun Belt and South.

Despite this seemingly iron-clad prohibition of the union shop in the right-to-work states, we have nonetheless successfully negotiated contracts in many of those states under which, in practice, virtually 100% union membership was attained. There are certain provisions that may be legally negotiated in right-to-work states that will give the union as much strength as a union shop agreement. Two examples will illustrate the possible approaches. The first is a contract clause requiring the company to prominently post the following notice:

The XYZ Company is a union company. We operate under a collective bargaining agreement with the ABC Union. ABC is the exclusive bargaining agent for all of our production and maintenance

employees. All matters relating to wages, hours, benefits, working conditions and other terms and conditions of employment are determined jointly in negotiations between the company and the ABC Union. We may not and do not deal with any other organization, group of employees or individual employees concerning these matters except with the presence and participation of representatives of the ABC Union. We sincerely believe that the interests of each employee and of the company will be best served if every employee becomes and remains a member in good standing of the ABC Union.

A second but not inconsistent approach is a contract clause stating:

The employer shall hire employees as needed. After the employer has made a tentative decision to hire a new employee the Chief Steward of the Union, or his or her designee, shall be given an opportunity to meet with the prospective employee, in private and with sufficient time to explain the employment benefits provided by the collective bargaining agreement. The Chief Steward may encourage the prospective employee to apply for membership in the ABC Union.

Neither of these provisions is illegal nor are we recommending any illegal action. The same First Amendment that, right-to-work proponents have successfully argued, gives employers the right to discourage union membership, gives them an equal right to encourage union membership.

Hot Cargo

Another example of an illegal subject of bargaining is the "hot cargo" agreement prohibited by the 1959 Landrum-Griffin amendments. Before 1959 many unions negotiated contract language stating that members of the bargaining unit could "not be required by their employers to handle or work on goods or materials going to, or coming from, an employer designated by the union as 'unfair'". Section 8(e) of Taft-Hartley prohibits employers and unions from "making an agreement whereby the employer agrees to stop doing business with any other employer" and Section 8(b) (4) makes illegal a strike or picketing for such purposes. (The construction and garment industries, however, are largely exempted from these restrictions by language that states "a union and an employer in the industry may agree to a provision that restricts the contracting or sub-contracting of work".)

Other Prohibited Subjects

In general the language and provisions of the collective bargaining agreement may not be in conflict with existing laws. No contract provision may legally provide for violation of the Fair Labor Standards Act (FLSA), Employment Retirement and Income Security Act (ERISA), or Title VII of the Civil Rights Act -- to name a few of the most important laws with which the terms of a collective bargaining agreement could possibly come into conflict.

It is not always possible for union and management negotiators to steer with absolute certainty a safe course among sometimes seemingly apparent contradictions in the prohibitions with the result that the legality of certain contract

provisions may, in practice, never be determined absent litigation to test them in court. The law does not necessarily mean what it may appear to mean; it means whatever the courts determine it to mean. To protect against this ever-present uncertainty, it is common practice for the collective bargaining agreement to include a "savings" clause stating: "Should any portion of this agreement be ruled to conflict with state or federal law, such clause shall be without effect but the remainder of the contract shall continue to be binding on the parties."

Permissive Subjects

Any subject of bargaining that is neither illegal nor mandatory is "permissive" and may be bargained about if the parties agree. It is important to remember that a strike to compel agreement on a permissive subject of bargaining is not a protected strike. In practice this means that workers participating in such a strike may be fired whereas workers engaged in an economic strike may not be fired, only replaced, with right of recall. This is a distinction without much of a difference since being fired or replaced with an unlikely chance of recall add up to the same thing.

In other cases, however, depending on the particular state's unemployment laws, it may be a distinction with an important difference. If the fired striker is deemed to have been fired for proper cause, he or she may be ineligible for unemployment benefits, whereas the "replaced" striker is treated as if laid off and once he or she is no longer engaged in a labor dispute, may be eligible for unemployment benefits. See the chapter on unemployment compensation during work stoppages.

Mandatory vs Permissive - The Elusive Border

The borderline between mandatory and permissive is elusive and shifting. It now seems firmly established that bargaining over the pensions of retirees is permissive but bargaining future pension benefits for current employees is mandatory. But when the Steelworkers first demanded a pension plan for incumbent employees, management insisted that it was not a mandatory topic for bargaining and refused to negotiate on the grounds that retirees are not, by definition, employees and that the union could bargain only for employees. Ultimately the Supreme Court upheld the union and established pensions as a mandatory subject for bargaining. The court held that pensions were, in effect, deferred wages, not unlike holidays or vacations which are earned while working but paid later.

The Supreme Court victory, however, did not result in pensions for steelworkers. That victory was won at the cost of a long strike and when the steelworkers won, they won it not just for themselves. If private pensions are common in other union (and even in non-union) situations today, it is due in part to the combined legal and picket line battle waged by the steelworkers.

The relationship between mandatory bargaining issues and the type of strike that may be conducted, is often confusing. Just as any subject that is not illegal or mandatory is, since there is no other category left, permissive, so, too, an economic strike is most simply defined as what it is not. Any strike that is not an illegal strike or an unfair labor practice strike is an economic strike -- even though it may not be over money. A strike for a

check off or against a management rights proposal is, because these are mandatory subjects of bargaining, an economic strike. The following listing of Mandatory, Permissive and Illegal subjects of bargaining is taken from, Negotiating a Labor Contract: A Management Handbook, as a way of demonstrating that union and management consultants agree on what is the legal scope of bargaining:

Mandatory Subjects of Bargaining

Wage Compensation for Services

- * Wages
- * Salaries
- * Incentive pay or bonus
- * Shift premiums
- * Overtime premiums
- * Premium pay for work on Sundays and holidays
- * Merit pay increases
- * Equity pay adjustments
- * Cost of living adjustments (COLAs)
- * Premium payments for undesirable schedules or work
- * Red-circle pay
- * Longevity pay or premiums
- * Pay for training

Wage Compensation for Non-worked Time

- * Holidays
- * Vacations
- * Jury duty pay
- * Funeral or bereavement pay
- * Call-in or call-back pay
- * Reporting pay or daily/weekly minimum pay
- * Standby pay
- * Travel pay

- * Pay for time spent on union business
- * Pay for time spent on safety matters
- * Severance pay
- * Pay for lost wages due to contract violation

Non-wage Benefits

- * Holiday bonuses or "gifts"
- * Pension benefits for current employees when they retire
- * Profit-sharing plans
- * Stock purchase or bonus plans
- * Employer-provided or employer-reimbursed housing, meals, and services
- * Medical, life, sickness and accident, dental and vision plans
- * Legal services plans
- * Discounts on company products
- * Leaves of absence (paid or unpaid)
- * Clothing and tool allowances or benefits
- * Company-provided or employer-reimbursed transportation
- * Tuition reimbursement programs

Working Conditions on the Job

- * Hours of work and work schedules
- * Rest and lunch periods
- * Plant rules of conduct
- * Grievance procedures and arbitration
- * Promotions, transfers, layoffs, recalls, etc.
- * Workloads
- * Discharge and discipline
- * Safety and safety rules

- * Probationary and trial periods
- * Testing of employees, including use of lie detectors
- * Job-required clothing or equipment
- * Job duties
- * Job qualifications and certification requirements
- * Workplace facilities and conveniences
- * Seniority accumulation (loss and application)
- * Work assignments

Management Rights and Union-Management Issues

- * Subcontracting
- * Management rights clause
- * Effects on employees of plant closure, relocation, sale, etc.
- * Union shop or other union security agreement (unless state law prohibits)
- * Dues checkoff clauses
- * Bargaining unit work
- * No-strike clause
- * Union hiring halls
- * Nondiscrimination clauses
- * Waiver or "zipper" clauses
- * "Most favored nation" clause
- * Arrangements for labor contract negotiations

Nonmandatory Subjects of Bargaining

- * Definition of bargaining unit
- * Conditions affecting supervisors
- * Formal parties to the collective bargaining agreement
- * Performance bonds
- * Legal liability or indemnification clauses

- * Identity of either party's bargaining representatives
- * Internal union affairs including contract ratification procedures
- * Union label
- * Industry promotion funds
- * Settlement of unfair labor practice charges
- * Multi-employer or multi-level negotiations
- * Pension benefits for persons presently retired
- * Interest arbitration
- * Recording or transcribing of negotiations
- * Closed shop (illegal)
- * Hot cargo clauses (illegal)
- * Clauses which are racially or sexually discriminatory (illegal)
- * Union shop clauses (in states with right-to-work law)
- * Strike insurance or mutual aid plans (MAPs)

Negotiation Timetables: New Bargaining Relationships

Assuming that no question of representation exists and that the union has an established bargaining relationship with the employer or has been recognized by the employer or certified by the Labor Board as the exclusive bargaining agent, the employer must, when requested by the union to bargain, make its representatives available within a reasonable period to meet with the Union at convenient places and times. The employer's obligation to bargain is not limited to contract negotiation time but is a continuing obligation and relates not just to contract negotiations but to grievances,

stipulated reopeners, other day-to-day issues and, sometimes, mid-contract negotiation.

In newly organized units the union will ordinarily want to make a request for bargaining immediately after the union is certified or recognized. Even if the union is not fully prepared to begin serious bargaining, it will nonetheless be advisable to make an immediate request for meetings to begin. Particularly in new bargaining relationships, the first meetings are likely to amount to little more than get-acquainted sparring matches with no issues of substance being seriously discussed.

Negotiation Timetables: Renegotiations

In the renegotiation of contracts the language of the existing contract may or may not specify the date on which bargaining is to begin, but generally the parties are free to begin negotiations at any time they mutually agree to do so. It is not uncommon for both union and company to resolve to begin negotiations on the next contract well in advance of its expiration in order to avoid the pressure of last minute negotiations. Nothing generally comes of these good resolutions, which is probably just as well, since not much is usually accomplished in leisurely, premature negotiations. It is the pressure of a deadline that produces agreement.

Notice Procedure

Contracts may be for an indefinite period of time or for a definite period with or without an automatic renewal provision. Notice of intent to renegotiate the contract should be given so that it is received by the company at least sixty days before expiration of the contract. Forms are available

from the Federal Mediation and Conciliation Service for notice to the employer and state and federal mediation agencies. Failure to provide timely notice may delay the date on which the union is free to strike.

Contract Bar

It is important to remember that while contracts may be entered into for any period of time or for an indefinite period, contracts for more than three years will not serve as a "contract Bar" for more than three years. Normally a valid contract "bars" any NLRB election during the period of the contract (up to a maximum of three years) and during that time the Board will conduct neither a decertification election nor a representation election petitioned for by a rival union.

Where there is a valid contract in existence there is a 30-day "insulated period" (beginning 90 days before expiration of the contract and ending 60 days before expiration) during which the Board will entertain election petitions even if the contract has been extended or a new contract negotiated, signed, and ratified.

The existence of this insulated period may be of relevance to the timing of negotiations if the union leadership fears either a decertification attempt or a raid by a rival union. In either case it might be advisable for the union to delay reaching agreement until after the insulated period. Otherwise it would give the rival union or decertification group a sitting target: a contract that could not be improved or changed.

To Notify Or Not To Notify

It has traditionally been the union which served notice on the employer of a desire to negotiate changes in the contract because, in most instances, it has been the union which has sought to change and improve the terms. The advent of concession bargaining and the growth of union busting efforts require that the union carefully weigh whether it is in its best interests to serve such reopener notice. Suppose the union has reason to suspect that the employer is in an aggressive posture and that the union would be better served by not disturbing the status quo. Depending on the language of the contract there are two possibilities. If the contract states that it is automatically renewed for a specific period of time unless either party notifies The other by a certain date, if the union doesn't serve timely notice the employer may fail to do so and the contract would thus be extended. If the employer serves the notice, the union's suspicions may be confirmed and it can prepare itself accordingly. Any doubt that the employer is the aggressor is resolved and this can be used to stiffen the backs of weak members, to educate their families, the community, the public, and the media.

If the contract does not automatically renew by its terms, the situation is slightly more complex but the principles are the same. If the union doesn't serve the notice the employer may do so sixty days before its expiration or sixty days before a proposed modification of termination can take effect. Although the contract will not renew itself, the fact that the employer serves the notice, even later than the sixty days prior to expiration, serves as an early warning. One Message which the employer may be communicating is that if there is to be a strike it would prefer it sooner than later. If the employer is eager to end the relationship and thus triggers an opportunity for the

union to strike this may be a good reason not to strike at that time. There are ways in which the union can avoid striking at the employer's convenience, or shift the legal nature of the conflict from strike to lockout which are dealt with later.

This advice on avoiding giving notice must be weighed in connection with our advice on decertification or raiding and the "contract bar" rule. A contract extended for more than three years will not bar a rival union raid or a decertification for more than three years and a contract which the union cannot promise to even try to improve may make the union a sitting duck.

Lockouts, Unemployment Insurance Significance

As indicated above, the advent of concessionary bargaining requires the union negotiator to become even more familiar with the laws affecting labor negotiations -- including particularly the Unemployment Compensation (UC) laws. The potential for lockouts has always existed, but the frequency of lockouts is many times greater during periods of employer aggression.

The definition of lockout we are concerned with here is not the Taft-Hartley definition but the UC concept of lockout. The UC concept is important because in some states workers who cannot collect UC if they are on strike can collect UC if they are locked out.

It is important not only to know about this rule but also to understand its rationale since the conditions for collecting UC vary from state to state. (A list of states in which workers are eligible for UC during lockouts is found in the chapter on Unemployment

Compensation.) If the union negotiators know the law and understand it they will better be able to serve their members. These examples may help to explain the importance of knowing both the law and its rationale:

During the Greyhound strike/lockout in 1983 and again in 1990 union members in some states collected UC while members of the same union in other states did not. The 1982 Steelworker strike against USX and United Paper Workers strikes against International Paper in the late '80s saw similar state-by-state differences. During a 1983 International Brotherhood of Electrical Workers contract dispute with a telephone company in Pennsylvania, the State UC system initially ruled the workers eligible for benefits, subsequently reversed itself and ruled them ineligible, then, on appeal, once again found them eligible. The workers received and kept their UC benefits but experienced union leaders will not find it difficult to imagine the impact of the conflicting decisions on the union members. In some cases economic strikers whose employer declared them to be permanently replaced were held, because they were therefore no longer employed, to be eligible for UC.

Since the employer's major weapon in a labor shutdown is the fact that workers have no income -- and since UC is almost always higher than strike benefits, knowing how, when and where to apply for UC by virtue of an employers aggressiveness is vital. The first principle is that workers on a strike (except in New York and Rhode Island and there are only after seven weeks on strike) may not draw UC. The principles involved are:

The state does not want to encourage, reward or subsidize labor disputes.

No one should collect benefits unless they are unemployed through no fault of their own -- or, put another way, workers cannot obtain UC when they are not ready, willing and able to work.

The states which have ruled for UC eligibility during lockouts reason that:

It is not the workers who refuse to work.

Employers should not be able to deprive their employees of this legislated right at the employers whim.

In the traditional meaning of lockout -- which we picture as an employer standing at the entrance denying the workers admittance or, literally, putting a lock on the gate -- it is easy to see that the workers are unable to enter. But the more frequent kind of lockout, common when employers are demanding cutbacks in pay or benefits, occurs when the parties have bargained to impasse and the employer implements a reduction and the workers (through the union) offer to continue working under their old contractual wages, hours and working conditions. Their refusal to work under the reduction unilaterally imposed by the employer is, for Unemployment Compensation purposes, construed to be not a strike but rather a lockout and the workers are therefore eligible for UC benefits in some states.

The employer bent on unilaterally implementing concessionary demands risks not only a lockout but NLRA violations, unfair labor practices, as well. If the reductions are put into effect before he has

bargained to impasse there is a clear refusal to bargain and a creative and patient union negotiator can postpone impasse by offering new proposals, making new responses to management proposals and requesting additional information.

The general rule is: If a union is willing to unconditionally continue working under the existing terms of the contract after its expiration but the employer insists on instituting cutbacks when the contract expires, there is a lockout and workers may, in some states, draw UC benefits. Even when the union has gone on strike, the strike may be converted into a lockout if the union makes an unconditional offer to return to work under the terms of the expired contract. If the employer refuses there is, for UC purposes, a lockout.

The UC laws regarding collecting unemployment benefits during labor disputes differ from state to state (and from time to time) so it is essential that union leaders check carefully what the rules are in a particular state.

Certain other circumstances, in addition to a lockout, may make striking workers UC eligible. For instance, in Minnesota workers are eligible if a strike is caused by the "employer's willful failure to comply with either Federal and State occupational safety and health laws or safety and health provisions of a union contract."

Having said all this we must reemphasize our basic position: unions should rely primarily on the power of a united, educated and militant membership, not on legalisms. The thrust of the union's activity must not be diverted from its major task, organizing the

work force for collective bargaining and collective action.

Up to this point we have been considering the conventional negotiations situation in which a first contract is being negotiated or a renegotiation is taking place at the end of a contract period. The right to bargain about certain subjects and about unanticipated changes that may impact working conditions during the term of a contract is known as "midterm" bargaining.

The Continuing Duty To Bargain In Good Faith

While we have emphasized that many unionists place too much reliance on the law to aid them in negotiating a first or renewal contract, they are perhaps equally likely to utilize the law too little to force the employer to continue to bargain in good faith during the term of the agreement. The employer's legal obligation to bargain exclusively and in good faith with the union about all matters affecting the wages, hour and conditions of employment of all members of the bargaining unit does not end with the signing of the contract but is a continuing duty. Failure to fully appreciate this fact and its implications causes many unions to ignore the possibilities of mid-term bargaining or to lightly bargain away this important legal right.

The common management device for undermining the union's right to mid-term bargaining is the "zipper" clause. Early in negotiations management may assert its desire to bargain about and resolve all issues and to include in the contract a statement that this has in fact been done and that no additional issues will be raised during the term of the contract. Or, at the close of long

hard negotiations, the union negotiators may be all too willing to agree with management that it is a relief that "we won't have to go through this again for x years". From that general and innocuous agreement there is only a small, seemingly logical, step to agreement that all issues have been bargained about and that no new issues will be raised by either party. We discuss below the appropriate union responses to demands for such a zipper clause but first let's look briefly at the potential importance to the union of mid-term bargaining. Exactly what is it that many unions all too casually give away -- most often by just sitting on their rights?

Grievances And The Mid Contract Duty To Bargain In Good Faith

One of the areas where the requirement to bargain in good faith continues, with or without a zipper clause, is in the administration of the contract through the grievance machinery. Many unionists fail to understand, however, that the processing of grievances is really a continuation of the bargaining process and that the union is entitled to the same kind of data from the company that it could obtain during contract negotiation. Due to the usually very specific nature of a grievance, such demands can be more precise and call for information in greater depth. For instance, a worker may have been disciplined for alleged habitual tardiness. While the contract itself may not give the union the right to the tardiness records of other employees, the law gives it that right and an unfair labor practice charge alleging refusal to bargain in good faith may compel the divulging of attendance records that the employer had refused to provide.

Unfair Labor Practices And Individual Grievances

Some contract violations may also be unfair labor practice but ordinarily where there is a contractual forum, normally arbitration, for the resolution of a dispute, the Board will defer to that forum and refuse to intervene. In some cases, however, where the contract violation goes to the heart of the law, discharge for union activities for instance, the Board may not defer to arbitration but assert its jurisdiction. Where this happens all of the costs of presentation of the union's case are borne by the Board since the union's case becomes, once a complaint issues, the government's case. At the same time, of course, the company must bear all of the costs of its defense and they are often greater than the cost of arbitration. Of course the limitations of labor law and of the Labor Board previously discussed, particularly delay, need to be weighed when considering the use of the Board in handling what might be grievances under the contract.

In addition to the Board other forums may also be available for the resolution of grievances. In the public sector many public employees, including virtually all federal employees, have the option of processing a complaint through the grievance machinery, through the civil service appeals procedure or through filing with the Labor Board of an unfair (sometimes called "improper" or "illegal") practice charge.

Unfair Labor Practices And Mid Contract Failure to Negotiate

The Board may also provide relief in cases where the union's complaint does not involve a contract violation. The unilateral decision of an employer to start paying more

than some of the rates established by the contract, while not necessarily a contract violation, might be prompted by a desire to discredit the union and undermine its majority status and thus be grounds for an unfair labor practice charge. Certainly it would be evidence of failure to bargain with the union about wages and therefore be the basis for a refusal to bargain unfair labor practice charge. Simultaneously it might also be very logical grounds for the union to demand mid-term bargaining concerning all the other contractual areas affected and impacted by the employer's decision to raise selected rates. That might involve the relationship of all the other rates to those increased.

Differentiated From Contract Reopeners

Mid-term bargaining, the union's continuing right to represent the workers in the bargaining unit, is sometimes confused with a contract re-opener. For a variety of reasons -- inability to reach agreement and more than usual uncertainty as to the future of the company's business, the economy in general or the cost-of-living being the common ones -- the parties may agree to postpone bargaining on some subject or subjects until some specified date or dates during the life of the contract. Most commonly the contract will be reopened for the negotiation of wages only, though fringes and other subjects could be included.

In a surprising number of contracts the union fails, when agreeing to a reopener, to provide any mechanism for the resolution of an impasse should one develop. An impasse is the failure of the parties to reach agreement after a good faith effort to explore all areas of likely compromise. In such cases the union may find itself in the

position of being unable to persuade management to agree to a satisfactory wage settlement but barred from striking in support of its demands by the no-strike clause of the contract. The wording of the reopener and the wording of the no-strike clause need to be carefully -- and jointly -- considered.

The union negotiator should make certain that the reopener clause makes provision for the resolution of impasse. Either the dispute should be submitted to binding interest arbitration or the union's right to strike, despite the no-strike clause of the contract, should be clearly established. Bear in mind however that the area of dispute will, by the nature of a reopener, be narrow -- usually involving wages only and sometimes only the extent of an increase within pre-established parameters -- and perhaps not a satisfactory base upon which to build the broad membership support needed for a successful strike. In addition the membership may simply not be emotionally prepared for a strike during the life of a contract, particularly where a history of "no contract, no work" sentiment may have conditioned members to expect strikes only at the end of a contract.

Opportunity To Expand The Contract

But mid-term bargaining is not contract enforcement through the grievance machinery nor a contract reopener (though both are related to the employer's continuing obligation to bargain in good faith). It is instead the opportunity for the union to bargain for its members over issues not covered in the contract -- particularly about mandatory subjects of bargaining and particularly where the union's right to negotiate over such issues has not been

abridged by a zipper clause. But even in the presence of the strongest zipper some bargaining may be possible and often will prove successful if attempted.

A zipper clause may typically assert:

The parties acknowledge that this collective bargaining agreement represents the results of negotiations between said parties and constitutes the entire agreement between the parties for the term of this agreement. Each party waives its right to bargain with the other with reference to any other subject, matter, issue or thing, whether specifically covered here or wholly omitted herefrom whether or not said subject was mentioned or discussed during the negotiation preceding the execution of this argument.

The dangers in such language are several but first it must be noted that the union "waives its right to bargain", a clear indication that it has such a right.

When contracts were of short duration -- until after World War II one-year contracts were typically the rule -- this right was of lesser importance. But the combination of longer agreements and the accelerating rapidity of change, technological, economic and financial, mandates that unions pay closer attention to this legal right.

The problem which such a zipper poses to the union is more easily understood when considered from the management viewpoint. That management should want a zipper clause ending all negotiations for the life of a contract is natural. The employer typically views negotiations and other dealings with the union not only as bothersome and costly

but also as a distraction from his business-running the company and making money. For the union, however, collective bargaining is its only business and it should recognize that a zipper is an attempt to close down a major portion of its business for the life of a contract.

The zipper described above is known as a "defensive zipper" -- and the party being defended has typically been the management. Putting the best face on it from management's viewpoint, it is accepted as reasonable by many unionists that contracts are and should be final and binding and should constitute the complete agreement between the parties. Other contracts with which they are familiar are usually not subject to modification through continuing negotiations. A contract to buy a house is final and binding. Such a purchase agreement, or a lease to rent an apartment or the installment purchase contract of a car or refrigerator, however, are fairly simple and self-contained documents.

The Labor Agreement As Constitution

A labor contract is far more intricate and complicated and impacted by more external variables. It is more in the nature of a constitution, a set of basic rules including rules on changing the rules, than is a commercial contract. Since it deals with people as well as with things it is apt to work best if it is subject to constant interpretation, re-evaluation and revision.

Because of fundamental misconceptions about the nature of a contract and the unions right to continuous bargaining, inexperienced union negotiators may rather lightly agree to a management request for an end to bargaining for the life of the contract

-- to a "zipper" clause. Even if the negotiating team resists, it may be difficult to mobilize membership support in opposition to a zipper because, superficially and to the uninitiated, it seems so reasonable.

Danger Of Sitting On One's Rights

Failure to aggressively assert such rights will almost always result in their forfeiture. When an employer unilaterally introduces a change in a mandatory area of bargaining -- or a change that affects a mandatory subject -- and the union fails to demand negotiations (i.e. sits on its rights) it may be barred from later filing refusal-to-bargain charges.

Since even experienced union negotiators may have come to think of bargaining as a temporary process that is concluded once a contract is agreed to and signed, it may be helpful to think of the contract not as ending the employer's duty to bargain in good faith but rather as partially and temporarily meeting that obligation. Only the subjects discussed in negotiations are precluded from further negotiation (except, of course, if by mutual agreement the parties agree to broader restrictions) and only for the life of the contract. It may be helpful to spell out some circumstances under which mid-term bargaining may be used:

Circumstances That Lend Themselves To Mid-Term Bargaining

Mid-term bargaining cannot, of course, be demanded by the union or the employer if the subject was negotiated at the table and agreement reached. If the union demanded nine paid holidays per year and settled for seven, it can not during the life of the contract reinstate its demand for two

additional holidays to be paid during the period of the contract. In theory at least it would be within its right to request negotiations and demand the two additional holidays to become effective after termination of the contract, though ordinarily such a request would be pointless.

If a demand was raised in bargaining, fully explored and consciously withdrawn, it may not ordinarily be subsequently advanced in mid-term. However if the demand was withdrawn in order to encourage movement in negotiations and there was no conscious intent to abandon the proposal, it may subsequently be advanced in mid-term. Obviously the facts in a particular situation will be crucial to the Board's rather subjective determination as to whether a particular demand was "fully explored" or "consciously withdrawn".

If a subject was not raised at all during negotiations -- or if it was raised and not fully discussed or consciously withdrawn -- then it may be raised in mid-term and, if it is a mandatory subject of bargaining, the parties must treat it with the same good faith required in contract bargaining.

We have been primarily discussing situations in which the union is the initiating party for mid-term negotiations. In these situations there will exist the same limitations on the value of the law and the Board in enforcing good faith bargaining as in contract bargaining. The employer is apt to resist mid-term bargaining and the filing and pursuit of an unfair labor practice charge for refusal to bargain may take so long that the contract will have expired and the question become moot before a Board decision is rendered. And even if the victory should be timely the remedy is

nothing but an order to bargain in good faith and may produce nothing more than the motions of good faith.

There may none-the-less be virtue in raising mid-term bargaining issues if only to educate the membership and build support for the demand in subsequent contract negotiations. And, in some situations, there may be an additional virtue, as for example:

A change in working procedures or payments, brought about, perhaps, by a new machine, equipment or methods, could be so unpopular as to generate irresistible membership pressure for the union to do "something". A demand to bargain about the impact of the change might well be met by a refusal to bargain which could then be the justification for an unfair labor practice strike. The union could not strike over the change because of the no-strike clause but it could legally strike in protest of the employer's refusal to bargain about the change. A no-strike clause does not bar an unfair labor practice strike -- but if the unfair labor practice charge is ultimately not upheld, then this strike does not revert to an economic strike, as does a claimed unfair labor practice strike which claim is rejected during contract expiration negotiations, but instead would revert to an illegal -- in the sense of breach of contract -- strike.

Some negotiators, painfully aware of how difficult it sometimes is to reach agreement in contract renewal negotiations even with the club of a strike threat or an actual strike, may be tempted to conclude that mid-term bargaining is futile since even the threat of a strike is ruled out by the no-strike clause. This is not necessarily or in all cases true. There may be pressure points

that can be touched without recourse to a strike.

Some bargaining units work under contracts that provide for voluntary overtime or require union approval of overtime and during peak seasons the curtailment of needed overtime can constitute effective pressure.

Not all contracts of course contain a no-strike clause and even those that do may exclude certain issues from its provisions. The UAW and the auto makers, for instance, have traditionally agreed that a dispute over the speed of the assembly line is exempt from the grievance and arbitration procedure and is thus a legitimate strike, issue even during the life of the contract.

Failure To Use Mid-Term Bargaining

There are several reasons for the almost universal failure of unions to make full use of mid-term bargaining. Where bargaining for a group of local unions is essentially conducted by an International Union Representative or Business Agent, the norm in many unions, the Rep may simply not have the time to pursue mid-term bargaining. Frequently he or she may have such a heavy workload that it is difficult enough to merely keep abreast of contract expirations.

Another reason that mid-term bargaining is utilized so little is simply ignorance of the continuing right to bargain. Mid-term bargaining is encouraged in the law for the explicit purpose of discouraging strikes. The sound assumption is that problems and conflict are natural to the employment relationship and where they are not dealt with by a contract and a grievance procedure

it is desirable that they be subject to the bargaining process lest they fester and explode.

Taft-Hartley stipulates, in Section 8(d), that neither party is required "to discuss or agree to any modification of the terms and conditions (of a contract) . . . if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract". (emphasis added) However, if the subjects were neither discussed nor embodied in the contract, the duty to bargain remains. The concept is that every problem must have a forum for resolution -- either it was dealt with thoroughly and, perhaps, spelled out in the contract or it remains subject to negotiation.

Management Rights Clause

Management in many cases does not even insist on anything called a "zipper clause" but achieves the same end through incorporation into the management rights clause of a statement to the effect that management retains the right to make "unilateral changes as necessary to adjust to business conditions". In agreeing to such language a union may waive its right to bargain over mid-term changes.

A management rights clause should only permit management to keep certain legal rights -- and emphatically should not permit unilateral changes in mandatory areas of bargaining. A strong maintenance of standards clause will go a long way toward protecting against the potential damages of a management rights clause. Since management seeks to retain all rights not specifically bargained away, the union should likewise retain all of the conditions

of employment (past practices) that it did not trade for other contract benefits.

That unions sometimes agree to zippers is understandable -- the bargaining process requires give in order to take. But the truth is that unions frequently concede a zipper too easily, without trading and without recognizing how valuable it is to management. A strong past practice clause is essential if the union is to agree to a zipper. Another appropriate trade might be the strengthening of the grievance arbitration procedure with a broad definition of "grievance" as, ideally, "any dispute between the parties" and not, as is usual, "an alleged violation of the contract". Fortunately for the union negotiator, arbitrators, labor boards and the courts have all tended to issue very "narrow" interpretations of zipper clauses. Recognizing that the right to continuous bargaining is a legislated right set forth in the basic private and public sector laws, all have repeatedly ruled that the right can be lost only through "clear and unmistakable" language in the contract. The bulk of the precedents indicate that the zipper clause described previously gives management merely a "shield" to protect it against demands from the union for bargaining on new issues but not a "sword" to permit it to unilaterally institute changes in mandatory subjects of bargaining.

A final disclaimer is perhaps in order. The entire area of labor law is not only complex but in constant change and we have meant to do no more than suggest ways in which the union negotiator may avoid some pitfalls and adapt negotiating tactics to legal realities. While an attorney may not be the best person to serve as negotiator, that does not mean that a labor lawyer cannot provide

valuable information and advice. From our perspective the only kind of labor lawyer a union should use, particularly in regard to the crucial area of contract negotiations, is one whose practice is limited exclusively to representing unions, not one who also represents management in labor issues. But it is still the chief negotiator who must make the tough decisions. One example will illustrate the problem:

For years many union negotiators, deliberately or otherwise, failed to include in the contract specific language concerning preservation of bargaining unit work (and/or against sub-contracting, plant closure or other forms of work removal). That omission had been of no major consequence since a long line of NLRB and Court decisions held that a unilateral action by the employer to subcontract or otherwise remove the work traditionally done by the bargaining unit, was an unfair labor practice. In addition, most arbitrators held the unilateral removal of work normally done under the collective bargaining agreement to be a contractual violation even in the absence of express language. These arbitrators have reasoned that the "recognition" or "wages and hours" or "seniority" clauses imply some restraint on the employers right to take the work away. In other words, a contract describing wages and hours and working conditions would be meaningless if there were not work.

Given the direction that the Board and Courts are now taking, it would seem the course of prudence to attempt to negotiate specific contract language on work preservation. The danger is that to seek and fail to get such explicit protection might lead some arbitrators to conclude that they could not reasonably infer such protection from

other contract clauses or from the general nature of a collective bargaining agreement. In the end this is more a judgment call than a legal question. The actual utilization of legal remedies and board procedures, will, usually best be planned and executed with the advice of competent counsel -- that is a union labor lawyer.

FINANCIAL INFORMATION FOR COLLECTIVE BARGAINING

Obtaining information about the employer for use in collective bargaining is a somewhat difficult but very vital part of preparation for negotiations. This outline provides guide to help unionists find information concerning their employer.

Most of what follows focuses on the private sector not because it is a less important activity in the public sector but because it is much easier. When dealing with government, access to much of the necessary labor cost data is yours by virtue of two kinds of rights. The same rights that are given to unions in the private sector under the National Labor Relations Act described in the Chapter on The Law of Labor Negotiations apply under state and local government public employee bargaining laws. But the union will want more information about the employer than just labor cost; the union will want to know other things about the public employer's "business" and "financial health". This information is also yours as a matter of right--the right of a citizen and taxpayer.

The income and expenses of the public employer are a matter of public record. Tax rates and revenues, management salaries and benefits, personnel benefits and purchasing rules--all are available. But, herein lies a danger. It is not just the private company that fudges figures and uses accounting tricks. Two examples, one from the private and another from the public sector will illustrate the way the published or official data may be misleading.

A major airline, infamous for its unfair labor practices, as a matter of routine does not record as "income" tens of millions of dollars that it has on hand. They do not count as income money received for tickets sold until the flight takes off. The explanation, of course, is that some passengers might not fly and refund the ticket. But, if the union looked only under "sales income" and not at "receivables" it might get a distorted picture of the company's ability to pay.

A medium size city whose labor relations history includes not only strikes, arbitrations and unfair labor practices but illegally discriminatory layoffs which brought it before the U.S. Supreme Court was preparing for negotiations. The lawyer/consultant arranged for the city to exaggerate its pension obligation, putting more money in that account than the actuaries said was necessary. The city workers' union was, of course, in favor of having an adequately funded pension plan and was not likely to look at that item in the budget as being excessive. So, whereas the actuary had projected that it was necessary to put 7 1/2% of payroll into pension funding, the treasurer put 11% of payroll into that account--which is just another location for its money. Then the city said it had no money for wage increases that year.

The moral of both stories is, "Be careful what you ask for, you may get it and not know what to do with it." The further moral for the public worker union is that whereas the employer cannot legally refuse data the official reports need to be examined with a fine tooth comb. In this process the union has allies in the press and in opposition politicians--both are likely to enjoy finding and publicizing anything

negative about the party in power. The other side of that coin is that the union may have to help the public employer take in enough revenue to meet the labor (and other) costs of running the government entity. Therefore, the public employee union will want to be involved in all phases of the running of the enterprise: making sure that taxes are adequate, fair and paid by all; participating in the budget development process as representative of the workers and/or as citizens and taxpayers; making alliances with the receivers of government services whose concerns for quality of health, education, welfare or other services are a potential source of support for the union.

The private sector union is not likely to have a lot to say about what the company produces, how it markets its product or services, what it charges, etc. Nor is the employer likely to be generous about sharing such information. So, what follows might be viewed as, "Spying On The Boss".

There are two types of information:

1. Information about the company
2. Information about the labor market

The Company:

There are many sources of information about the company and the industry which the union should be sure to utilize. Some, while obvious, are easy to overlook. All involve time. The list below is not in order of importance.

A. LOCAL NEWSPAPERS: For small companies the local newspaper will frequently be the only source of ready information concerning the general health of

the company. Union members should watch for articles concerning the company (and its competitors) and clip these articles for the union's records. Articles about executives of the company may be very important. If the treasurer or other officer was involved in a divorce, this may be a clue that the local court records of that case may include data that the official was forced to disclose in the divorce proceeding.

Occasionally, the local library will maintain a vertical file which includes articles on local companies. However, this practice is not as widespread as it used to be, so the union cannot rely upon the library to do this job.

If the union has not maintained such records, or if information on another branch or competitor from another town, state, etc. becomes necessary, it is often possible to call the newspaper in that locality and obtain a listing of dates when relevant articles were published, or copies of the articles themselves.

B. BUSINESS PRESS: The union will want to understand the state of the industry as a whole. Information on this topic which cannot be obtained from the national union can be found by using The Reader's Guide to Periodical Literature at the local library. There is likely to be a subject heading for the subject for the industry and a list of recent articles in popular business and general magazines. The Reader's Guide, however, will not list articles published in trade publications, etc. If there is a magazine which deals with specific industry, the local should have a subscription. The Business Periodical Index, lists articles by company and by industry which have appeared in the Business Press. You can

then order copies of these through your library.

General Business Publications of
Note:

Business Week, Industry Week, Fortune, The Wall Street Journal. (Most local libraries will subscribe to these publications.)

C. CITY HALL OR COUNTY COURT HOUSES: maintain records of who owns what property, what taxes are paid, property sold, etc. If possible, find a courthouse employee (perhaps a union member) who will be willing to help you in locating the information you need.

D. THE COMPANY ITSELF: If the company provides information to the workers (such as a newsletter or announcement sheet), the union should scrutinize these as well. The company may applaud workers for a "job well done", or for helping make a "profitable quarter", etc. If the company changes its tune during negotiations, the union will know.

Most companies (and virtually all publicly owned companies) issue yearly financial statements. The union should obtain these. If the company sells stock, the union becomes entitled to the financial report by purchasing a share of the stock. If the company is privately owned, the union might attempt to obtain a copy of the financial statement by asking the company for it. It should be remembered, however, the internal financial statements are not necessarily accurate.

A much more valuable body of information is wage and hour information

which the union is entitled to for negotiations. The courts divide information available from the employer into two groups: wage data and financial data. In general, the first group is always available to the union.

"Wage Data" has a broad meaning. It includes the names and addresses of all bargaining unit employees (union members & non-members), wages of employees, job rates and classifications, time study data, pension information, insurance data, incentive earnings. In general, the employer must supply all requested wage data which is not obviously beyond the needs of the union. If the employer refuses to do so, the employer becomes liable for a refusal to bargain charge. The employer's only defense would be either that the information requested was not obviously relevant, or that providing such information would be enormously burdensome to the employer [Supreme Court decisions on this point include: *NLRB V Truitt Manufacturing Company*, 351 U.S. 149, 10 L.ED. 1027(1956), and *NLRB V ACME Industrial Company*, 385 U.S. 432, 17 L. ED., 495 (1967)].

"Financial Data" is all data relating to sales, profits, and production data. In general, the employer is not required to supply this type of information to the union during negotiations, unless the employer makes his inability to pay a subject of negotiations. However, even here, the NLRB will not automatically find a refusal to bargain. The decision will hinge on the facts of the particular case.

E. STATE OR LOCAL BUSINESS DIRECTORY: Many states and large localities publish business directories.

Frequently, the Chambers of Commerce or other business groups will compile a book which contains information about each company in the area. Since these books are not standardized, the types of information in them varies. However, they should not be ignored. Most local libraries will carry these directories.

F. STATE'S DEPARTMENT OF STATE:

All corporations, whether privately or publicly (through sale of stock) owned, must be licensed in each state in which they do business. Requirements vary from state to state, but in many states the corporation is required to file a brief statement, usually on a yearly basis.

Each state requires the company to reveal the names of subsidiaries and fictitious names under which it operates. These are frequently filed in such a way to make it easy to learn if the company is larger than it may appear.

G. OFFICIAL DOCUMENTS: Large, publicly traded companies are required to file many federal documents relating to their finances. In addition, there is much information available from stock analysts, etc. who scrutinize large companies to determine their soundness for investors. The following summary of these documents describes the information available. We have developed a step by step system designed to first determine if this information exists, and second to deliver it into the hands of the union. The procedure can be adapted as necessary and should be understood as a working guide.

The most important thing to remember about obtaining official information is that it takes time. One cannot

expect to receive government documents quickly.

PROCEDURE

Get the official name and address of the company. A worker's pay check or a W2 form is a reliable source for the company name [The name on the door is not always the real name of the company].

Is the company public or private? A public company sells stock to the public, and therefore is required to file financial statements with the Securities and Exchange commission. A private company is not required to file these statements. To find out if the company is public or private, go to the local library and try to look up the company name in a corporate directory.

The best directory to start with is called the Directory of Corporate Affiliations, better known as Who Owns Whom. By looking up your company you will learn if it is actually a subsidiary of a larger company, and what the other subsidiaries of the large company are. Likewise, if the company under study is a "parent" company, Who Owns Whom provides a listing of the subsidiaries.

After searching Who Owns Whom, you might want to check other corporate directories which provide more information. Among the best are Standard and Poor's Register of Corporations, and Dun and Bradstreet's Million Dollar Directory. The Million Dollar Directory also contains some information on large private companies. Standard and Poors and Moody's publish many volumes of corporate analysis, including financial statements and

investment information of all major public corporations.

3. If the company is public and has \$1 million in assets and 500 or more stockholders documents about it are available from the Securities and Exchange Commission. These forms, called the 10-K and the 10-Q provide a wealth of information. This will include: history and structure of the company and its subsidiaries; products; numbers of employees; property owned and location of facilities; executive officers; value of stock and number of stockholders; foreign operations; income/expense statements; pending lawsuits against or by the company. The 10-K contains a detailed annual financial statement. Some financial information is given for the last five years. The 10-Q contains the unaudited financial statement for the most recent quarter. In addition, a form called an 8-K is filed when something unexpected happens between filing periods.

To receive these documents, write to the Public Reference Section, Security and Exchange Commission, 1100 L St., N.W., Washington, D.C., 20549 or call (202) 523-5506. Be as detailed as possible concerning which reports are desired, the name of the company, and the year(s) for which you desire information. Be prepared to wait for the documents.

In an emergency, a company called Disclosure, Inc., provides the same service as the Public Reference Section of the SEC for more money but in better time. Disclosure has a toll-free number (800) 638-8241 for clients to call. The company will tell you the most recent filings by a company and will quote a price for the cost

of copies. You can also place a standing order with Disclosure to receive copies of filings as soon as they are available. Disclosure also publishes a booklet listing companies for which information is available.

4. If the company is public, you will also be interested in receiving the financial statement that the company provides its stockholders. In addition to the financial information, these statements provide investors with a lengthy advertisement for the company. It is useful information to have.

Even if the local does not own stock in the company, it may still be possible to receive this report and to receive informative analyst's reports on the health of the company. To do this, the union need only "shop" for stock at any investment brokerage. By expressing interest in the company, the union will encourage the stock broker to supply these documents.

Note: There are two sourcebooks which make the job of determining whether a company is public easier. Both are available at the best local libraries, or at the libraries of colleges and universities which teach business. The first is called Directory of Companies Filing Annual Reports with the Securities and Exchange Commission. It lists all companies (but not subsidiaries) which file 10-K's and 10-Q's. A second excellent sourcebook is called Directory of Securities Research. This book will tell you which analyst and brokerage firm has studied the company you are

interested in. It makes the job of finding an analyst's report easier.

After this round of negotiations is complete, begin researching for the next round. Keep files on all information gathered about the company during the term of the contract, and the financial research for the next contract will be much simplified.

Valuable information is available from the U.S. Department of Labor (DOL). For information about health and other insurance benefits, pensions, profit sharing plans, etc., you will want DOL forms EBS-1, 5500, and Summary Plan Description. These forms are filed by companies to inform the Department of Labor and the IRS about their insurance plans, pensions, and profit sharing. All are useful. Form 5500 contains a detailed income statement and balance sheet on the particular plans. The other two forms should be acquired at the same time, seeing that all three can be obtained at the same price from the nearest IRS service center. You can also contact the U.S. Department of Labor, Office of Pension and Welfare Benefit Programs, at (202) 523-8771. While you're at it you may want to obtain data on benefit plans at other employer operations so you can make comparisons. You will want to look carefully for comparison of benefits to executives and to members of the bargaining unit.

Union Busters. Forms LM 10, 20, and 21 deal with Labor Management Consulting firms. LM 10 is filed by the company using the union buster and provides detailed information concerning the cost and efforts of the labor management consultant. LM 20 and 21 are filed by consultants themselves and will reveal all of

the clients of each union busting firm. All three of these are filed at the Department of Labor, Office of Labor Management and Welfare Pension Reports, at (202) 523-7393. Or, contact the DOL office nearest you.

The Corporate Data Exchange conducts research for unions on companies and their stockholders. To discuss the nature, extent and cost of such a search call them at (212) 962-2980 or write to: CDE, 198 Broadway, Room 707, New York, NY, 10038.

For general labor market information (wages and benefits paid in the area or industry by other employers) there are several potential sources. The first and best will be the headquarters of your national union if you are affiliated with one. Through them you can also obtain information and assistance from the Department of Economic Research and the other departments at AFL-CIO such as: Industrial Union; Building and Construction; Food and Beverage; etc.

The Bureau of Labor Statistics of DOL publishes studies on wages, benefits, hours and other conditions of employment both nationally and for particular regions. For local labor market information check with state AFL-CIO and local labor councils. It is a good practice to share copies of collective bargaining agreements and similar benefit information with unions in your area.

Most unions fail to do nearly as much as they could cheaply and easily in researching the employer. First, they start too late; this is a task which should be conducted by a responsible person or group on an ongoing basis. Second, they need to

buy and read publications which will help.
For example:

American Labor published by
American Labor Education Center, 1835
Kilbourne Place, NW, Washington, D.C.,
20010, (202) 462-8925 has issued studies
such as "Their Business Is Your Business:
How to Investigate Your Employer"

Closely Held Corporations published
by New York State School of Industrial and
Labor Relations, Western District, Cornell
University, 120 Delaware Avenue, Buffalo,
NY, 14202.

Economic Notes published
by Labor Research Association, 80
East 11th Street, New York, NY,
10003, (212) 473-1042

Open the Books: How to
Research a Corporation published by
the Midwest Academy, 600 Fullerton
Avenue, Chicago, IL, 60614, (312)
975-3670

Spying on Your Employer:
A Guide to Researching Your
Employer in Your Local Library
published by Labor Education and
Research Project, Box 20001,
Detroit, MI, 48220, (313) 883-5580