EXPECT THE BEST

Blaney
McMurtry
BARRISTERS & SOLICITORS LLP

AVOIDING THE PITFALLS IN BARGAINING

Mark E. Geiger
Blaney McMurtry LLP
416.593.3926
mgeiger@blaney.com

AVOIDING THE PITFALLS IN BARGAINING

by: Mark E. Geiger

1. OVERVIEW:

Bargaining takes many forms. All of us bargain from time to time as a regular part of our daily lives. Whether its the movie we want to go to, the television show our kids want to watch, or the new car we wish to purchase, regular everyday life involves negotiations of one sort or another. While there are many principles which apply to all of these different situations, this paper is designed to deal primarily with a very specific, and in some ways unique form of bargaining - bargaining for a collective agreement.

Although the principles applied to bargaining a collective agreement can also be applied to other types of negotiation, there are important differences and unique skills that can assist every HR practitioner called upon to perform this function.

2. FIRST PRINCIPLES

Bargaining collectively usually, but not always, takes place under a statutory framework. The specific nature of that framework has tremendous influence on the process itself. For example, those who bargain in the hospital sector in Ontario where the right to strike does not exist are faced with very different challenges than those who bargain in the private sector under the *Ontario Labour Relations Act*. Those who bargain outside any statutory scheme face unique challenges. The ongoing negotiations between the Ontario Medical Association and the Government of Ontario is an example of collective bargaining with no legislative framework to guide the process.

It is absolutely essential that you be aware of the statutory scheme under which you are bargaining. Timing is crucial in bargaining. Statutory frameworks usually have built in timing provisions, rules and procedures. You must be familiar with them, and with what they mean.

For purposes of this paper, the framework for bargaining as set out in the *Ontario Labour Relations Act* will be the one referred to in large part. Most statutory schemes have similar processes to those set out in this Act, but there are differences you need to be aware of if you are under a different scheme. Hospitals, school boards, police, colleges, firefighters, public servants as well as other groups all bargain under separate legislative schemes designed for the specific group. Many of these legislative schemes control or prohibit the right to strike, or set out certain provisions which must be satisfied before the right to strike can be exercised. In addition, many schemes control the members of the bargaining unit which are able to exercise such right.

To successfully conclude collective bargaining involves many of the same skills as any other form of bargaining, but there are both skills and pitfalls unique to the process. This paper is about acquiring the skills and avoiding the pitfalls of this process

3. THE RIGHT TO STRIKE: IMPASSE REMEDIES AND PROCEDURES

Whether the bargaining unit has the right to strike has profound effects on how the bargaining takes place. Many commentators have observed the differences in bargaining tactics and techniques under legislative schemes which prohibit the right to strike.

The bargaining normally proceeds to impasse in much the same way as it would under the Act. However, instead of the right to strike, the parties normally are required to place their differences before an arbitrator, or board of arbitration for binding settlement. Arbitrators are not elected by anyone, are not responsible to anyone, and are sometimes prepared to do the unexpected. For this reason unions seem prepared to put issues to arbitration that would very seldom be bargained to

impasse under a strike permitted regime.

Management often holds back on giving what they would in all probability be required to give in order to avoid a strike. Often bargaining in these sectors becomes posturing for an arbitrator. Over time, collective agreements negotiated under these regimes are seen to deviate from provisions found in collective agreements bargained under a right to strike statute.

Many scholars have attempted to devise methods of dispute resolution which provide similar pressures to reach a negotiated agreement. In my view these attempts to date have been less than successful. With all of the negative effects the right to strike creates for the workers, the company, and society as a whole, the possibility of a strike or lock out focuses the bargaining process and forces the participants to deal with the issues and to find solutions they can live with.

4. PREPARATIONS

Successful negotiations start with good preparations.

Personal skills are crucial to the process. Although there are similar skills required on both sides of the table, the skills are not the same. The management representatives are almost always seen as being in the superior position at the table. They are the ones who are "giving", the union representatives are the ones that are "asking". If you are bargaining for the management side it is crucial that you understand the differences in your function, from that of the person opposite.

Usually, the spokesperson for the union will be a business representative. Most business reps bargain dozens of agreements in a year. Most of them are just as anxious to get a deal as you are. However, the business rep's job is to get the best deal he or she can for the members she represents. Often the expectations of the membership will be unrealistic. Sometimes it will be very difficult for the business representative to tell the bargaining committee their expectations are too high. That's your job if you represent management - but you've got to be careful how and when you say it.

When preparing for negotiation, you need to amass the information you're going to need before the process starts. Most collective agreements are opened one or two months before the expiry date. In my view it's a mistake to start bargaining too soon. There's no pressure on either side and often the parties get wedded to their positions making movement when movement is needed more difficult.

Preparation involves an examination of trends in your sector, as well as a general review of the negotiated increases generally in your region. An examination of issues that have arisen during the current collective agreement will often give you an indication of the demands the union is likely to put on the table. Prior to sitting down at the table, I advise my clients to talk with their front line supervisors. These people are crucial to your relations with the union – and with your employees. If they're doing their job properly, they will have a very good idea of what the membership's concerns and expectations are likely to be.

Preparation also involves a review of the collective agreement operation over the last term to examine changes that you may need. If there has been an increased problem with employees neglecting to provide medical documentation, you need to have that information before you prepare your demands. For many years bargaining consisted of the union putting forward its demands and management merely reacting to those demands. More and more, companies are preparing demands of their own and aggressively pursuing them at the table. If the demands are based on real needs, unions often agree without the necessity of a work disruption. The key is to make sure you can justify the demand with real issues. Contract stripping for its own sake is bound to cause resentment. In my experience more strikes are caused by resentment and anger than by true economic issues.

If you are negotiating a first collective agreement, significant additional preparation is required. If you don't have experience in drafting collective agreement language, or if you're unfamiliar with arbitral jurisprudence, my advise is to get someone who has this experience and knowledge. Your first collective agreement will, in all probability be your best. You need to understand the effects that restricting your management rights will have on the operation of your business. The addition

of a seemingly innocuous statement such as "... these management rights shall be exercised in a fair and consistent manner..." can have a very profound affect on your ability to manage the business as you see fit. Unions want to restrict the operation of your management rights. The more restrictions you have, the less flexibility you have, and the greater problems you will have competing in the market place - especially if your competition is not so constrained.

One of the most important "preparations" for bargaining, is how you run your business when you're not bargaining. If you leave your employees in the dark with respect to your business decisions and why you made them, or if you treat them, or are perceived to treat them unfairly or inconsistently you can be sure the union will try to severely restrict your rights. My advice is always to attempt to bargain language which gives you the greatest flexibility possible **but** don't use it except where absolutely necessary. If you abuse your management rights, sooner or later you will lose them.

5. THE UNION COMMITTEE

The way you treat the Union Committee prior to and during bargaining will have tremendous influence on the results. Treat them with respect and courtesy. Make sure you don't confuse their role as union representative with that of employee. For most employees, the bargaining process is strange and very different from anything else they do. Some employees, even those with no previous experience, turn out to be skillful bargainers. Others never really understand their role, bargain from their own perspective and fail to appreciate the fact that they are there to represent all the members of the bargaining unit. Regardless of how they behave, you need to maintain courtesy and respect. While it is always appropriate to disagree about issues, it is crucial to the process that you do your best to avoid personalizing the issues. If the union team behaves inappropriately, it is best to simply end the meeting, or to caucus as opposed to responding in kind.

It is almost always in your interest to have your best employees on the union bargaining team. If you treat union officials with respect throughout the year, you are more likely to have the role seen by employees as being important. It will then attract better incumbents. If you treat union

representatives as the enemy, and show them little or no respect, don't be surprised if your chronic complainers are the only candidates for the job.

6. THE PROCESS ITSELF

There is no one right way to bargain. There are however, several wrong ways.

TIMING

Knowing when to make a move and when not to is a key skill. It's almost always a mistake to take on the toughest issue or issues at the beginning. My advice is to start with an overview. Ask the other side to outline all of the issues they wish to address. I usually don't insist that all issues are on the table at the start, but I tell them if they want serious consideration of any issue, we need to know about it up front.

Most of the time it pays to deal with non-monetary issues before tackling monetary ones. Usually its the non-monetary issues that take the greatest amount of discussion. It's better to achieve some momentum in bargaining before dealing with the tough issues. Try to bargain the bulk of the non-monetary issues to resolution before tackling the monetary ones. It's fine if some major non-monetary issues are still unresolved. Once you get the issues down to a manageable number, in most cases it pays to make complete proposals on all outstanding issues.

Bargaining is a bit like chess. There's a beginning "game", a "mid game" and an "end game". There are also rules – but they aren't written down. Here's a few I have discovered to be helpful.

Some Rules:

1. *No* - means maybe.

2. *Absolutely never* - means you might have difficulty granting that demand.

3. *Maybe* - means yes, but not yet.

4. *We are prepared to consider this* - means you will give this issue along with an acceptable deal on other issues.

5. *Once the bell's been rung, the bell's been rung.* Once you've offered something, even if part of an overall package that wasn't accepted, the opposite party knows you are prepared to give on that issue.

6. Don't raise a major issue half way through the process.

7. Deadlines are crucial, use them to your advantage.

8. Explain your position clearly and succinctly, but don't beat it to death.

9. Don't continue to meet if nothing is happening.

Order of Issues:

It's important to deal with issues in the right order. Many people assume that the tough issues should be dealt with first because they will take the longest time to solve. This is almost always wrong. Firstly, if you tackle the tough issues first, you will frustrate each other. Because the issue is important, you will spend a long time explaining your views to each other. Neither side will want to make the first concession on the biggest issue. If instead you deal with simpler issues first you can build up mutual trust together with momentum to then tackle the hard issues.

Secondly, if you manage to solve the tough issue, there's a tendency to give far more on the other issues than you need to. An astute union bargainer can use the agreement on the tough issue to force concessions on the minor issues by threatening that nothing's agreed until everything agreed. I have seen agreement on a difficult issue dissolve because of frustration in dealing with minor issues that should have been out of the way before the major issue was addressed seriously.

Beginning

I recommend that at the first meeting general introductions are made. Usually it helps to have an opening statement from a company representative perhaps giving an overview of what's happening with the Company. Normally the union gives its demands first. Let the chief spokesperson outline the proposals even if you've had them in advance. Remember, its your job to discover which of their proposals are really important to the union and the membership, and which ones are there because a vocal element wanted them there.

The major job at the beginning is to delineate the wheat from the chaff. Sometimes I ask for priorities. Most union reps won't give this to you because its tantamount to telling you what they really don't need. However, every negotiator gives hints about what is and is not important, even if they don't intend to. Look for clues in what is said and how it's said. Carefully observe the other members of the team while the spokesman is dealing with the issues. Assign members of your team to observe members opposite during bargaining sessions.

However you do it, the first meeting or meetings should be used to explore what's important to the other side, and what isn't.

Mid Game

After the preliminary meeting management needs to carefully examine the union's proposals in combination with their own. If possible I try to **not** exchange proposals. Let the union give you its proposals at the preliminary meeting. Give yourself time to examine these proposals and prepare your response. Give your proposals for change to the union together with your response to their proposals at the next meeting. If there are some proposals you can agree to right away, I suggest you do so. I always try to keep control of the documentation. That way you know where you are and you have a little more control over which issues are addressed when.

Mid game is the time to explore options and fully explain and develop your proposals and

responses. Attempt to deal with the union's proposals, where possible without changes to the collective agreement. Often a proposal reflects a concern of some or all of the membership which can be dealt with without contractual changes. Too often negotiations is the only time the union or the employees get a chance to bring their concerns to management. If you have well developed communications during the currency of the contract, you can avoid many potential problems at the bargaining table.

End Game

You need to make sure you don't give away your best card until the right time. If you give too much too soon, the union will assume there's lots more to get. The use of conciliation and mediation is crucial. Unless the union you deal with doesn't believe in this process (the CAW is such a union), conciliation can be very helpful. Some unions don't believe they get everything there is to get unless they have gone to conciliation. If the union you deal with has this view you need to know it in advance. Don't make your best offer too early - the union will not believe it is your best offer and assume there's more.

Try to be consistent in your approach from one set of negotiations to the next. If you tell them this is the final offer, make sure that it is. If they go on strike for a very short time, and you cave in, you have taught them that a strike is the best way to get what they want. That's not the message you want to send. Some companies have created a situation because of the way they have bargained in past sets, where it is almost impossible for them to get a deal without a strike.

Try to develop a good working relationship with the Business Agent. At end game, the communication between you and she is critical. You both need to know what it will take to get a deal on either side.

Part of the process is "theatrical". The union, and more importantly, the employees need to

believe they got the best deal available. There needs to be a "climax" to the process – the point at which the deal is made possible. Sometimes you will need to stage manage this – perhaps by bringing several senior members of management to your caucus – and making this fact known to the union team. Your conciliation officer can be very helpful in staging the climax.

Negotiations have momentum and inertia. If the process is moving, it's often wise to keep it going even if it's late. However, staying up all night for the sake of staying up all night is stupid - and often counterproductive.

7. DRAFTING

Drafting clear concise language that unambiguously sets out the intention of the parties in a collective agreement is an art. Very few collective agreements are so well drafted that the meaning of every clause in every situation is clear. Some collective agreements are so badly drafted that it's difficult if not impossible to tell what they mean.

It is difficult to overstate the importance of good drafting.

The test I use is this:

- Is there any way this provision could be interpreted apart from the meaning I wish it to have.

Ask someone else who doesn't know the intent of the clause what interpretation they would put on it. If they tell you something other than what you intended, you've got a problem.

Sometimes parties purposely draft ambiguous language in order to avoid a problem at bargaining they otherwise can't solve - that's the reality of collective bargaining and all of us do it from time to time. We have a duty, after all, to keep arbitrators in business! However, avoid this approach to the

maximum extent possible.

Let's look at some of the areas where language is crucial.

1. ***Management Rights***

In a non-union workplace management is free to do anything not otherwise prohibited by law. Hiring, firing (subject to notice and severance), contracting out, and so forth are all within management's exclusive authority. Unions inevitably try to reduce managerial authority. Management wants to keep maximum flexibility. There is a built in conflict.

There is an inherent decrease in management rights once a collective agreement has been introduced. Some arbitrators have been prepared to find that the very existence of a collective agreement creates limitations on management's ability to exercise rights not specifically set out in the collective agreement. Another view is that management rights must be exercised "reasonably". Several recent court decisions dealing with this issue suggest that there is no general requirement that management exercise its rights reasonably but that a collective agreement may provide this requirement. Later decisions suggest that this requirement may be explicit or implicit.

Meeting a "reasonableness test" means that the Union can challenge just about any decision of management on the basis that it was not reasonable.

FOR THIS REASON BE VERY CAREFUL NOT TO AGREE TO SEEMINGLY INNOCUOUS STATEMENTS ABOUT EXERCISING RIGHTS FAIRLY – YOU MAY BE GIVING AWAY FAR MORE THAN YOU THINK!

I always try to get the broadest statement of management rights possible. This is not because you want to "oppress the workers" but because you want the greatest flexibility and

ability to respond to changes in your workplace.

Some important rights:

- layoff
- transfer
- classify
- discipline and discharge
- assign, promote, demote

- The right to determine:

Some important inclusions.

- whether to perform or contract for goods and services
- the qualifications of employees
- the standards of performance
- location, extent of operations, their commencement or discontinuance
- rules and regulations to be observed by employees
- starting and quitting times and setting of shifts and schedules
- use of improved or changed equipment or methods

2. ***Probationary Employees***

Virtually all collective agreements contain provisions regarding a probationary period for new employees. Many older collective agreements provide that the discharge of a probationary employee "shall not be the subject of a grievance". It was long thought that this provision would protect the employer from a grievance concerning the unjust discharge of a probationary employee.

Some more recent cases have found that such provisions are contrary to the Act because they purport to prevent a dispute concerning the administration of the collective agreement

from going to arbitration and thus are contrary to Section 48 of the Act.

I recommend the following sort of language:

a) *As part of management rights clause*:

"... to discipline or discharge provided that the claim of a seniority employee that his discipline or discharge was not for just cause may be the subject of a grievance and shall be dealt with pursuant to the provisions of Article __."

b) *In the seniority language*:

"... An employee shall be considered a probationary employee until he has performed _____ days of actual work for the employer within a _____ month period. During this probationary period and until a probationary employee shall obtain seniority status as herein provided, his name shall not appear on any seniority lists, nor shall there be any obligation on the Company to retain the services of such employee or to re-employ him if he is laid off or discharged during such period."

"... A probationary employee shall have no right to lodge a grievance with respect to his discharge, layoff or non-recall after layoff and the discharge of a probationary employee may be for cause or for no cause".

3. ***Layoff and Promotion***

One of the most important areas in any collective agreement for both the Employer and the Union is seniority. In reality, seniority is only important because it grants preference to employees with longer service in certain important areas. Perhaps the most important areas in which this preference is sought involve lay-offs and promotions.

The interests of the Company and the Union are usually diametrically opposite when negotiating these clauses. Companies want to promote their best people. During a layoff they want to keep their most productive employees. Unions on the other hand want to promote solely on the basis of seniority and lay off on the same basis.

The time to get the right promotion/layoff language is in the first collective agreement. Once negotiated these clauses are extremely difficult to change.

Types of Promotion/Layoff clauses

Arbitrators have recognized three general classes of seniority provisions. The meaning of each clause will depend on its specific language but it is useful to look at the three types.

a) SUFFICIENT ABILITY CLAUSES

Clauses of this nature provide that an employee will be retained or will be promoted on the basis of seniority provided he has the ability/qualifications/fitness/etc. to perform the work available/work required. There are great variations in the actual wording of clauses of this sort. Often there are provisions for training, which can cause great problems in implementation. It is advantageous to have words of the following sort in a clause of this nature if a relative ability clause is unachievable:

"In the event of a layoff or promotion, the most senior employee will receive preference provided he has the fitness, ability, and qualifications to efficiently perform the work required without further training."

Sufficient ability clauses are most common in older manufacturing facilities. In any modern plant or where greater individual skill is required, or where productivity is a primary consideration, sufficient ability clauses can create inflexibility and less than the most efficient work force.

b) RELATIVE ABILITY CLAUSES

These clauses are often referred to as competitive clauses and are universally disliked by most unions. The best time to get one of these is in the first set of negotiations. It is extremely difficult to change from a sufficient ability to a relative ability clause (however, some employers have successfully done so).

A standard clause of this sort provides:

"In all cases of filling job vacancies (except those in respect of positions excluded from the bargaining unit) and in all cases of layoff from the plant or recall from layoff, the following factors shall be considered:

(a) seniority as defined in this Agreement;

(b) qualifications and ability;

(c) fitness and reliability."

Where the factors listed in (b) and (c) are relatively equal, (in the judgement of the Company) factor (a) shall govern. In the event that the Company desires to fill a new position and there are no employees in the Company who are fully qualified (in the opinion of the Company) to perform the work in question, the Company shall have the right to fill the job as it deems fit".

As is readily apparent, this sort of clause gives the Employer tremendous flexibility to keep or promote those employees who are best suited. The recourse to considerations of seniority is only when employees' various qualifications are "relatively equal".

c) HYBRID CLAUSES:

Hybrid clauses are those which attempt to combine elements of sufficient ability clauses with some element of competition. The precise wording of these clauses is absolutely critical. Without very careful wording they can create uncertainty. In one situation I handled, four different arbitrators gave four different interpretations to the same seniority clause.

Standard of Review

The wording can also be important to the standard of review that an arbitrator will apply.

- "in the opinion of the Company" - this phrase has the effect of restricting the inquiry to an investigation of the bona-fides of the Company's position.

- in general the arbitrator's jurisdiction is to ensure that:
  a) the qualifications as set out by the Company reflect the true requirements for the job in question;
  b) the Company applied these standards without bias, and without improper motive;

- the extent to which the arbitrator can determine whether the decision of the Company was "reasonable" will depend on the particular arbitrator, and on the wording of the particular clause. Where clauses contain "in the Company's opinion", the review by the arbitrator should be restricted to factors (a) and (b) above.

4. ***Absenteeism, Medical Testing, Doctors Certificates***

Absent specific language in a Collective Agreement, or under other specific and special conditions, employers have no inherent right to require their employees be subjected to medical examinations or tests.

In certain situations an employer may have such a right:

1) Where an employee is returning from a disability or medical leave, the Company has an obligation to ensure that the employee is medically fit to perform the work. Arbitrators have upheld in some cases, a requirement in these circumstances, that the employee be examined by the Company doctor.

   BE CAREFUL: Don't have your doctor performing "full medicals" if someone has been off work with a broken arm.

2) Where the job is such that the health or safety of others is involved i.e., bus drivers, truck drivers, etc.

3) Where the Company has reasonable and probable grounds for doubting the correctness of the medical report submitted by the employee. The onus will be on the Company to establish these reasonable and probable grounds.

In order to have a more general right to demand medical and/or drug testing, the employer must have some provision in the Collective Agreement.

Examples:

1.00 An employee who is away from work for three or more working days as a result of

illness or injury must provide a medical certificate indicating the medical reason for the absence and certifying that the employee is now fully recovered and able to perform all of his regular duties.

2.00 Disability Leave – An employee because of illness or injury, whether work related or not, requiring absence from work shall furnish evidence of such illness or injury, which may include an examination by a Company appointed physician if requested by the Company. The employee shall furnish such supplementary medical evidence of disability from time to time, as may be required by the Company. Failure or refusal to furnish such evidence of disability or to attend for a medical examination may result in the termination of the employee's employment and seniority. Before any employee on disability may return to work, he must satisfy the Company that he is able to perform the work required.

5. ***Absenteeism – A special case***

Because of the difficulties involved in dealing with chronic absenteeism, I have included as Appendix A is a short description of the issues and considerations surrounding this issue.

6. ***Grievance Procedures***

With the passage of Bill 7, the Act returned to the pre- Bill 40 provisions regarding the ability of an arbitrator to overrule the time lines in a collective agreement. Section 49(13) of the Act allows the parties to contract out of this provision. Whether or not you make use of this contracting out provision, it is very important that there be time lines clearly set out in the grievance procedure. Without such time lines, an employee can bring forward a complaint about wages or any other matter many months after the facts which give rise to the grievance. In one recent case with which I am presently involved a large group of employees claim they were paid for only 35 hours a week when in fact they worked 40. The events occurred more than one year ago. Proper language in the collective agreement would have prevented this delayed grievance from proceeding.

8. NEGOTIATING PENSIONS AND BENEFITS

OVERVIEW

Negotiations in the nineties is very different from negotiations at other times, especially in the late eighties. The days of 10% or better salary increases have been over for some time. Last year average negotiated increases for private sector unionized employees was in the range of two percent. In this economic climate it is doubly important to control the cost of negotiated benefits.

For many employers the cost of benefits is very difficult to control. If short term and/or long term disability are part of your benefit package, the cost of benefits can increase sharply because of the experience rating of the bargaining unit covered. Often insurance companies will offer an attractive rate in order to write the business. After one or two years, the experience rating will take effect and benefit costs can increase substantially. I have seen cases where the increase in costs of premiums can amount to significantly more than two percent of total payroll cost.

Employees generally are not aware of the cost of benefits. When the cost of your benefit package increases because of your employees usage, you are unlikely to get any "credit" for this increase at the bargaining table.

The cost of benefits in terms of the overall compensation cost can be as high as fifteen or twenty percent. Once benefits have been introduced it is very difficult to get rid of them. There are strategies however that every employer can use to reduce the cost of benefits.

CONTROLLING BENEFIT COSTS

Controlling the cost of benefits requires a number of related strategies.

Firstly, the benefits that are negotiated in the first instance are important. Some types of benefit plans are much more costly than others. Co-payment options are very effective in reducing unnecessary usage thus effectively controlling premium costs. Dental benefits need not pay on the most current ODA schedule. Most dentists will accept a one, two or even three year old schedule

as full payment. When negotiating short term disability coverage be sure you understand the plan you are getting and its ramifications. I have seen companies adopt a first day accident, hospitalization and sickness short term disability plan without realizing until too late the significance in cost of the last digit.

Secondly, there are other parts of the collective agreement that need to be in place to help you control benefit costs. Before you agree to any disability plan, insist on the right in the collective agreement to have an employee examined by a company appointed Doctor. This right is important not only for the control of disability costs, but also as a deterrent to other inappropriate uses of sick leave.

Most insurance companies sick benefit plans contain provisions which require employees to be seen by a Doctor appointed by the insurance company. Some carriers are less vigilant than others in using this right. If you have questions about the legitimacy of an employee absence, you should discuss this with your carrier. If you are not happy with the response you get, consider changing carriers. Let the insurance company know you are considering the change. In the best circumstances, insurance companies work with the employer, not only to control abuses, but also to insure that employees get the benefits to which they are legitimately entitled.

A consistent absenteeism policy can go a long way to reduce the costs of benefits. When a company becomes lazy about absenteeism, the hard working employees are the most affected. When you tolerate clear abuse from some employees, the hard workers come to resent the Company, not the abusers. This not only increases absenteeism generally, it also decreases the commitment and motivation of your other employees. An effective absenteeism policy will not only decrease benefit usage, it will also improve employee morale and commitment.

Problems which arise during the currency of the contract can create real problems at the bargaining table at renewal. I have seen several instances where the actions of a carrier during the term of a collective agreement created almost insurmountable problems at the bargaining table. Management should monitor benefit administration by the carrier in order to be aware of issues before they

become problems in bargaining.

BARGAINING BENEFITS

The time to consider benefits is before you start. Costing proposals and options is time consuming. Unless you are a very large employer, there are only certain options available for you from the various carriers. Some insurance companies provide packages that are not offered by others. All too often management goes into bargaining ill prepared to deal with these issues.

I would suggest obtaining the services of a recognized, experienced broker who is familiar with group plans from a number of carriers. Discuss the options available before you start bargaining. If you have existing benefits, ask your broker for suggestions on how costs can be reduced. In one negotiation in which I was involved a change in carrier coupled with the introduction of a modest deductible was able to cut the cost of the benefits in half. This allowed the Company to offer a modest, but in the end acceptable wage increase without any increase in overall cost.

In these days of aging workers and low salary increases, many bargaining agents are increasingly stressing benefits, including pensions. Examine the collective agreements recently negotiated by the Union. Determine, if you can, the priorities in bargaining in other recent sets with other employers. This will give you a fair idea of what you can expect at the bargaining table. Obtain quotes and options from your broker before you start. Consider taking the initiative in proposing changes especially where they save you money.

GIVING INFORMATION TO THE UNION

For reasons which will be dealt with later, the information you give the union about your benefits may be extremely important to the Company, not only during the currency of the immediate agreement, but potentially for years to come.

Under the labour relations act you have a duty to bargain in good faith. As interpreted by the OLRB, that duty includes the duty to provide the union with the information they require to bargain rationally about any topic. Clearly you are required to provide complete information about the

benefit plans you currently provide. In my view the union is entitled to a copy of the terms of the contract between the employer and the carrier (As we will see later, it is to your advantage that the union be given this). Make sure you provide the union with complete information about the benefits you are proposing especially if there is a change.

In my view the Union is not entitled to know the cost of the benefits you provide. However, it may be in your interest to tell them, if not in absolute dollars at least in terms of the percentage of overall compensation their proposals represent. I almost always give the union the company's costing of their benefit requests in percentage terms at the onset of bargaining the monetary issues. In almost every instance the cost of the benefits is not appreciated by the members of the bargaining team.

It is usually the union representative and not the employee representatives that will push for increases in benefits at the expense of increases in the wage package. Consider bargaining these together indicating that it all comes from the same pie and increases granted in one place mean they will not be granted in another.

Where appropriate, link benefit issues with other issues in negotiations, such as Medical leaves, absenteeism etc. Be very careful in the drafting of Benefit and Pension benefits language. This area, perhaps more than any other can produce very significant problems when drafting is ambiguous.

Let me now turn to some specific areas to discuss some of the issues which can arise.

BARGAINING PENSIONS

A major question which arises when bargaining for pension benefits is where to memorialize the agreement. Many collective agreements incorporate the plan into the collective agreement. This of course makes disputes which may arise under the plan subject to the grievance and arbitration provisions of the collective agreement. In my view the pension plan should be treated as a separate document. If it is referenced in the collective agreement, which is not necessary, the agreement should provide that the pension plan document and not the collective agreement govern, and further

that any disputes are to be dealt with pursuant to the plan document and not the collective agreement.

Sometimes an employer will simply make contributions to an existing union pension fund or other multi-employer plan. In such cases the collective agreement should set out the contributions to be made and then specify that the sole obligation of the employer is to make the contributions as set out in the collective agreement. Before agreeing to contribute to a particular plan insure that it is a properly registered plan. Find out who administers the plan and whether or not trustees are involved. A little time spent investigating a proposed plan at the front end can save significant difficulties later.

SURPLUSES

As indicated earlier, surpluses often arise when a plan is wound up, or partially wound up and the assets of the plan are greater than required to provide the benefits specified for the existing members.

The present act was amended in 1987, largely as a result of Conrad Black's attempt to obtain the very large surplus he created by purchasing Dominion Stores, and then selling its assets and terminating a large number of employees. The pension plan in question had a very large surplus. The common law rule up to that point had been that the surplus reverted to the "settlor" unless the plan otherwise provided.

The legislation now requires the consent of the Pension Benefits Commission before any payment of surplus can be made to the employer. There are provisions insuring that there is indeed a surplus and requiring retention of some surplus in the plan after any pay out. To be eligible for return of any surplus, the plan must specifically provide for payment of any surplus to the employer on wind up. If the plan does not so provide, the Act deems that any surpluses accruing after December 31st, 1986 be distributed among members and former members of the plan. There are provisions for notice to be provided to members, former members, unions, other persons receiving payments and any advisory committee established under the Act. All of these persons have the right to make

written submissions to the Commission within thirty days of receiving such notice.

PROVIDING BENEFITS TO RETIREES

Many collective agreements, especially in the Automotive Sector have provisions which provide some benefits to retirees. In most cases these provisions date back to a time when benefits were considerably cheaper, and when the number of retirees was low. In the U.S. where there is no public health care, the existence of these provisions makes considerable difference to the employees and retirees concerned. In Canada, provisions of this type received little or no attention until the Dayco decision.

In 1984 Allen Industries, a subsidiary of Dayco at the time closed its plant in Hamilton and moved to Mexico. The collective agreement contained a provision which stated "... Retirees to receive negotiated benefits." On final wind up a close out agreement was negotiated which provided that all employees would receive benefit continuance for six months following the plant closure. The Company also continued benefit coverage for retirees during the same period. The Collective Agreement expired, the Company asked for conciliation and at conciliation requested a "no board". The no Board was granted. Some time later the benefits for active and retired employees were terminated.

The CAW grieved the termination of retirees benefits. The Company argued that since no violation of the Collective Agreement had occurred during the currency of any agreement, whatever rights the retirees had were individual rights and an arbitrator had no jurisdiction to determine them. The Company also argued that they had specifically dealt with retirees benefits in the close out agreement and that they had complied with what had been agreed.

The issue of jurisdiction was determined separately. The matter went all the way to the Supreme Court. There it was determined that such benefits could be provided for in a collective agreement and that they could, depending on the language of the agreement, "vest". If they were vested in the

agreement, an arbitrator would have jurisdiction to enforce them. The matter was remitted to a new arbitrator to determine if they had vested in this case. The matter proceeded before the new arbitrator for several days of hearings and finally settled. Whether or not the language in question did create vested rights was thus never determined.

In the Dayco case the issue of retirees benefits was specifically addressed during negotiation of the close out agreement and yet the ambiguity of language in the collective agreement, negotiated more than ten years previously created the possibility that vesting was intended. Extraneous evidence of the negotiations conducted more than twenty years earlier thus became not only relevant, but crucial during the rehearing which took place after the Supreme Court decision.

The crucial difference between Canadian and American law is that in Canada, all matters that are put on the table must be negotiated in good faith. In the U.S. only that class of issues referred to as mandatory issues must be negotiated. Retirees benefits are considered not mandatory, but permissive, thus the union cannot use the threat of strike to force the company to negotiate benefits for retirees.

The decision of the Supreme Court thus places employers in Canada in a very real quandary. The Union can force them to negotiate with respect to benefits for retirees. Unless great care is taken, such benefits can vest. In the Dayco case, once the underlying large group of active employees was gone, no insurance company was prepared to provide the benefits in question except on an administration of cost basis.

If you are going to provide benefits for retirees you should insist that the language in the collective agreement state that such benefits are to be provided only during the currency of the agreement and that such benefits are not to be considered as having vested.

Once you have decided what benefits are going to be provided to the bargaining unit, it is absolutely crucial that the language in the collective agreement be unambiguous. Ambiguities can arise with respect to benefits perhaps more easily than in other areas of the collective agreement.

Most collective agreements do not provide details with respect to the precise benefits which are provided. Often unions will claim that statements were made at the bargaining table representing that certain benefits were available. If the language in the agreement is ambiguous, then these assertions give rise to the introduction of extrinsic evidence.

There are many examples in the reported cases where unions have alleged that certain benefits were included or that ambiguous language in the collective agreement must be interpreted in light of promises made at the bargaining table or other representations made by representatives of the employer. Inevitably, these hearings become costly and the results difficult to predict. Sometimes statements made as much as ten or even more years previously will be crucial to the determination if the language in the collective agreement is ambiguous.

THE ARBITRAL JURISPRUDENCE

Most employers provide benefits through an insurance carrier. Over the years, the various methods by which benefits are provided have been categorized by arbitrators dealing with disputes concerning such benefits. Many arbitrators have said with respect to this issue (as with others) that parties are presumed to be aware of the arbitral jurisprudence when negotiating their collective agreement. Thus, the actions that you take in your negotiations will be interpreted as if you were aware of the four categories as described in the jurisprudence whether or not you were so aware.

1. *Benefits Completely Outside the Collective Agreement*

   There is no requirement that benefits be negotiated and included in a collective agreement. It is possible for an employer to discuss with the union what benefits are to be provided and then to simply provide them by purchasing insurance. Where the employer uses this approach, the traditional arbitral view is that these benefits are provided outside of the collective agreement and are therefore not properly the subject of a grievance or arbitration. Arbitrators therefore have stated that they have no jurisdiction to deal with any disputes which arise concerning benefit which are provided outside the collective agreement. Not surprisingly, unions are reluctant to adopt this approach. It becomes very difficult for a

union to enforce rights it has negotiated unless those rights are specified in the collective agreement. Thus, although this approach might be the best from the point of view of the employer, it is probably unachievable in most circumstances.

2. *The Collective Agreement Provides Specified Benefits*

Many collective agreements simply state that the following benefits will be provided to the employees and then list briefly those benefits. It is this kind of collective agreement which can cause the greatest difficulties. Often, such an agreement will merely list benefits, without specifying what they are. Extended health plans, drug plans, dental health plans, and short and long term disability plans have great variations from one carrier to another. Some are capped, some are not; some have co-payment options, some have deductibles; some provide benefits which are not provided by others. Where the collective agreement merely provides that the company will give certain benefits to employees, in the event of a dispute it is almost inevitable that extensive extrinsic evidence will be required to resolve the dispute. Evidence about what was said at the bargaining table, evidence about benefits that have been provided in the past, evidence about representations made to individual employees, all become relevant and material.

For obvious reasons, I do not recommend this approach.

3. *The Collective Agreement Incorporates the Provisions of the Insurance Plan*

While this is not the best approach from the view of the employer, it is significantly better than the approach set out in paragraph 2. Here, a specific insurance plan is identified and then incorporated by reference into the Collective Agreement. This eliminates any ambiguity concerning the benefits to be provided (assuming the insurance plan is itself clear), but places a number of significant restrictions on the employer. Firstly, once a particular plan is specified, it is extremely difficult for the company to change carriers. Such a change would of course require the consent of the union. In addition, any disputes

concerning whether or not an individual employee is entitled to a particular benefit would be subject to the grievance and arbitration provisions of the collective agreement. Where an employer engages an insurance company to provide particular benefits, and the insurance company determines that an employee is not eligible for those benefits pursuant to the agreement between the insurance company and the employer, it would appear the employer takes the risk in the event an arbitrator disagrees with the insurance company's determination.

4. *The Collective Agreement Provides for Payment of Premiums for a Benefit Plan Supplied by an Insurance Company*

This is the most common approach used by employers who are aware of the arbitral jurisprudence. Appropriate contractual language will first of all outline briefly the types of benefit plans to be provided by the company. The agreement will then go on to say that the company's sole obligation under the collective agreement is to attempt in good faith to obtain coverage for the specified benefits for substantially similar benefits and to pay the required premiums. The agreements most typically go on to provide that the particular benefits provided are as set out in the insurance plan and further that any dispute as to whether or not a particular employee is entitled to receive such benefits is a matter between such employee and the insurance company.

Arbitrators have consistently taken the position to date that the inclusion of language of this sort into the collective agreement restricts their jurisdiction in dealing with the specific benefits provided or the eligibility of a given employee to obtain them. So long as the employer can demonstrate that they have paid premiums in order to provide benefits substantially similar to the benefits as listed in the agreement, arbitrators have indicated that they have no further jurisdiction to make orders concerning whether or not individual employees are or are not eligible.

RECENT CASE LAW

A 1995 decision of the Supreme Court may challenge the traditional approach. In *Weber v. Ontario Hydro (1995)* 95 C.L.L.C. 210-027, the Supreme Court dealt with a court action commenced by an

employee of Ontario Hydro covered by a collective agreement. The court action had been brought after filing a grievance through the union. The court action alleged tort damages and breaches of the employee's rights under the *Canadian Charter of Rights and Freedoms*. In that case, the court found that where the difference between the parties arises from the collective agreement, the claimant must proceed by way of arbitration. The court went on to find it had no power to entertain an action in respect of a dispute which arose from a collective agreement. The court found that Section 45 of the *Labour Relations Act* (now Section 48) required all such disputes to be dealt with through the arbitration procedure. The court found that the jurisdiction of the arbitrator was an exclusive jurisdiction and covered disputes which arise either expressly or inferentially from the collective agreement.

Applying this approach it could be argued that any dispute concerning benefits that are referred to in a collective agreement arises at least inferentially from the agreement and therefore must be dealt with through the arbitration process. However, the court in *Weber* indicates:

> "It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case the courts of inherent jurisdiction in each province may take jurisdiction."

In my view, it will still be available for the employer to argue in appropriate cases that the arbitrator does not have jurisdiction to provide the appropriate remedy. The insurance company is not a party to the collective agreement, and since the collective agreement specifies that any disputes concerning eligibility for benefits is between the employee and the insurance company pursuant to the contract of insurance, arbitrators lack jurisdiction to deal with the matter notwithstanding the *Weber* decision.

It is likely *Weber* will be argued in cases dealing with benefits in the future. The language in your collective agreement will, if anything, become more important following the *Weber* decision.

CHANGING CARRIERS

Often it is advantageous for an employer to change carriers during the currency of a collective

agreement. This may be because new benefits become available at reduced rates or because the company becomes dissatisfied with the service being provided by the current carrier, or because the current carrier increases premiums during the currency of the collective agreement.

Whether or not the employer on its own initiative has the ability to unilaterally change carriers will depend upon the language of the specific collective agreement. If you adopt language as set out in paragraph 4 above, you probably have the right to change carriers **unless** you have made a representation to the union that you will not do so.

The ability to change carriers can be extremely effective in reducing the cost of negotiated benefits. If you are going to change carriers, however, you must ensure that the benefits being provided by the new carrier meet the requirements of your collective agreement.

If you have the right to change carriers under your collective agreement, I would advise you nevertheless to inform the union well in advance of the fact you are changing carriers. One way to antagonize unions and create problems which otherwise need not exist is to exercise rights you have in a manner which embarrasses the union.

9. SUMMARY

This paper is not designed to deal with all of the difficulties or issues than arise when bargaining a collective agreement. Instead I have attempted to provide a few tips on how to avoid the more common pitfalls you are likely to encounter.

Bargaining a collective agreement involves a unique blend of personal and professional skills. You need to know about the law which governs the process. You need to understand the principles of jurisprudence which apply to the topics discussed. You need to be able to develop appropriate strategies and time them properly.

But most importantly, the process is a very human one. The successful practitioner needs the ability to communicate with and relate to the representatives on the other side of the table. Your people skills and your personal credibility are essential to the process.

In this area, perhaps more than any other, the Human Resources professional can make a vital contribution to any organization.

APPENDIX #1

ABSENTEEISM

One of the most prevalent problems facing employers today involves absenteeism - often accompanied with a claim for WCB benefits or short/long disability benefits. Sometimes an employee will be cleared by either the WCB to return to work, or cut off further benefits by an insurance company. In these circumstances, and in cases of chronic episodic absenteeism what can the employer do?

Firstly: I urge employers to attempt to bargain third party examination provisions so that you have the right to insist on a medical examination by a doctor of your choice, or at least one agreeable to you.

Secondly: I urge employers to establish clear, consistently administered absenteeism policies.

Some Basic Principles

There are two types of absenteeism facing employers:

1. *Culpable Absenteeism*

What do I mean by culpable absenteeism?

A good example would be:

"I'm late because I slept in."

Most employers would not discipline an employee because of a one time incident of the sort described above. The problem is with the employee who is constantly absent and late with a variety of excuses - some valid, others not.

2. *Innocent Absenteeism*

Innocent absenteeism is absenteeism for which the employee is not responsible. Sickness,

and injury are the most common examples.

SINCE INNOCENT ABSENTEEISM IS INNOCENT, IT IS INAPPROPRIATE TO DISCIPLINE FOR SUCH ABSENCE.

The real difficulty is with the employee who always gives a reason for absenteeism that would be accepted from anyone else - its just that this guy has an excuse too much of the time.

What can the Employer Do?

1. ESTABLISH WELL UNDERSTOOD RULES.

- First, the employee must phone and inform his supervisor if he is not going to be in. The phone in must be by a certain time, either just before the shift or by a certain time into the shift. Make sure your supervisors are available to receive these calls when required. Don't accept phone calls from girl friends, wives, husbands, etc. without later asking the employee why she didn't call herself.

- Second, make a habit of having the employee phoned during the day and asked how he is doing - will you be in tomorrow etc. This should be part of the responsibility of your supervisors. They won't like it but it will help them in the long run.

- The employee should also be required to inform the Company each day of his absence if he will be absent the next day (except in cases of long term illness).

- Require valid reasons for absence, and apply the same rules to everybody. No favorites.

2. TRAIN YOUR SUPERVISORS

- Require your supervisors to keep accurate and up to date records of attendance AND THE REASON GIVEN FOR ABSENTEEISM.

- Make sure they enforce the rules

3. ESTABLISH PLANT WIDE POLICIES.

- Establish and enforce a plant wide attendance policy, i.e., after ____ absences, a meeting to be conducted.

- For employees with chronic absenteeism problems, ask them if they have any personal problems that are causing their absence. This is a crucial step for the alcoholic employee (really in a separate category).

- If the problem persists warn the employee that their absenteeism is jeopardizing their continued employment. In order to sustain an innocent absenteeism discharge, the employee must be warned of the consequences of his continued absenteeism.

- Long term absence because of legitimate illness or injury should not be treated in the same way as frequent short term absences not related to the same cause. A recent case of termination for absenteeism was overturned by the courts because a period of absence because of cancer was included in the absences considered. Such inclusion was seen to be contrary to the *Human Rights Code*.

- Discipline employees for breach of attendance rules (i.e.,. failure to call in, failure to keep the Company informed etc.)

- Discipline for culpable absenteeism. Warn for innocent absenteeism.
  DON'T CONFUSE THE TWO!

The Effect of STD and LTD on the Ability to Terminate

Several recent cases have determined that the ability of an employer to terminate for innocent absenteeism may be reduced by the provisions of STD or LTD plans.

If the plan requires an employee to still be an employee in order to continue to receive benefits, the termination of the employee would prevent him from receiving the very benefits for which THE UNION bargained. The jurisprudence in this area is still developing. If you intend to terminate an employee and you have STD or LTD plans in place, you will need to carefully examine the provisions of your plan and examine the effects of the termination on the rights of the employee under it.

These considerations are probably more relevant to long term absences.

In my experience the real problem with absenteeism is caused by the employee who is frequently absent for short term, unrelated periods.

Seniority Loss Provisions

Many collective agreements contain provisions which declare an employee's seniority and employment terminated after an absence of more than X months. Since the introduction of the requirement to re-employ an injured worker was introduced into the *Workers Compensation Act*, this period has most commonly been 24 months.

However, several recent cases have found that the requirement to re-employ may in fact extend for more than 24 months in cases where the absence is related to a handicap as defined in the *Human Rights Code.* In such cases the duty to accommodate may over rule the provisions of the collective

agreement.