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Stephen L. Hayford

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A Holistic Strategy for Coming to Grips with the Creeping Legalism of Labor Arbitration

*Stephen L. Hayford**

I. INTRODUCTION

Effective administration of the collective bargaining agreement is the heart and soul of the relationship between American employers and unions. That process works best when the parties resolve the controversies that arise during the life of the collective bargaining agreement with a minimum of formality and with as little involvement of outsiders as possible.

Recently, much concern has been expressed regarding what is perceived as a trend toward unnecessarily burdening the labor arbitration forum with the manifold legal machinations more typical of traditional civil litigation. This article proposes a straightforward solution to this widely perceived troubling direction of the labor arbitration process, which attacks the phenomenon at its origin.

Lawyers and their legalistic ways are most often assigned the primary responsibility for encumbering and thereby weakening labor arbitration by failing to recognize and take advantage of the many advantages offered by a forum that is administered and brought to closure by a mutually selected, highly experienced subject matter expert. This article asserts that however blameworthy some members of the labor relations bar may be in this regard, their presence and the arguably deleterious effect they can have on the labor arbitration mechanism is a mere symptom of a more fundamental shortcoming of the contract administration process in many bargaining relationships.

I submit that the increasingly cumbersome and confrontational nature of labor arbitration can be successfully remedied only if employers and unions take responsibility for making the contractual grievance procedure an optimally effective decision-making and problem-solving device intended to strengthen and cement the bargaining relationship. I urge that arguments about the material facts and harangues concerning whose interpretation of the collective bargaining agreement is correct in the labor arbitration forum, advanced by advocates endeavoring to gain tactical advantage by reverting to familiar legal artifices, should be the very last resort in the contract administration process.

My thirty-plus years of practice as a labor arbitrator and my long-time scholarly endeavors in the dispute resolution field convince me that labor arbitration works best when it is viewed by employers and unions as a last resort, a fail-safe device that signals their mutual failure to solve their own problems through the contractual grievance procedure. Achieving a “win” in arbitration cannot be the

* Professor of Business Law and Ethics, Kelley School of Business, Indiana University. Dr. Hayford is a member of the National Academy of Arbitrators and has practiced as a labor arbitrator since 1977. He is also a founder and past-President of the College of Commercial Arbitrators.

goal of the contract administration process. The loss of control over outcomes and process inherent in interjecting even a trusted, experienced outside arbitrator into the day-to-day life of the workplace should cause management and union leaders great pause.

The commentary that follows is a call to advocates to take back responsibility for settling the disputes that arise during the life of the collective bargaining agreement by becoming more adept negotiators, able and willing to find and engage the truth and unafraid to lead and make difficult decisions. Only then will the legal machinations and contortions that increasingly plague labor arbitration be rendered unnecessary in most circumstances. I assert that the “creeping legalism” of labor arbitration is a symptom of the too-frequent failure of the contractual grievance procedure to resolve difficult disputes. The conundrum that phenomenon presents can be ameliorated only if the parties mutually commit to attacking that underlying disease forthrightly and earnestly.

II. THE TRUE NATURE OF THE DILEMMA

The labor arbitration literature contains numerous articles lamenting what the late Reg Alleyne pithily dubbed the “lawyerizing” of the labor arbitration process.¹ In Professor Alleyne’s view, by 1989 that phenomenon was responsible for creating a “wide gap that often separates the simplicity of an arbitration issue and the complexity of the hearing employed to resolve it.”² The excessive legalism alarm was first sounded nearly sixty years ago,³ and it has continued to echo on a regular basis, notably increasing in the past two decades.

Among other factors, labor relations scholars and practitioners complain about the increased costs for arbitrator and attorneys’ fees,⁴ needlessly complex rules of evidence, unwarranted delays in scheduling hearings and those associated with the routine filing of post-hearing briefs,⁵ and the desire to insulate awards from judicial vacatur.⁶ While there are only a few empirical studies concretely confirming this perceived trend, it is the accepted wisdom that labor arbitration has become more expensive, time consuming, and complex than necessary.

These obvious downsides to the trend toward increased legalism in labor arbitration are a cause for real concern. Often, they reflect an effort by the parties to substitute aggressive advocacy for a good case on the merits, by inordinately encumbering the search for the truth that lies at the heart of the labor arbitration process. I submit that when employer and union officials substitute aggressive advocacy in the arbitration forum for effective negotiated decision-making in the pre-arbitration steps of the grievance procedure, they abrogate their responsibilities to the people and organizations they represent.

1. Reginald Alleyne, *Delayerizing Labor Arbitration*, 50 OHIO ST. L.J. 93 (1989).

2. *Id.*

3. Edgar Warren & Irving Bernstein, *A Profile of Labor Arbitration*, 4 INDUS. & LAB. REL. REV. No. 2, 200 (1951).

4. Pery Zirkel and Andriy Krahmal, *Creeping Legalism in Grievance Arbitration: Fact or Fiction?*, 16 OHIO ST. J. DISP. RESOL. 243, 244 (2001)

5. Alleyne, *supra* note 1, at 95-96.

6. Richard A. Posthuma & Maris Stella Swift, *Legalistic vs. Facilitative Approaches to Arbitration: Strengths and Weaknesses*, 52 LABOR L.J. 173, 176 (2005) (citing Joseph Raffaele, *Lawyers in Labor Arbitration*, 37 ARB. J. 14-23 (1982)).

After several decades of work as a grievance mediator, I understand how politically difficult it can be for a union officer or business agent to look a grievant in the eye and tell him that his behavior on the job constituted misconduct that gave the employee just cause to terminate his employment. Similarly, it is no small task for an employer's labor relations manager to speak the truth to a high-level line executive regarding the latent ambiguity of a disputed contract provision that could significantly hinder the efficiency of operations. Faced with the negative career ramifications of candidly communicating these often harsh realities to their constituents, labor relations officials of both stripes too frequently kick the problem up the hill and delegate the authority to decide the matter in dispute to an arbitrator.

At first, this strategy of advancing difficult decisions that require the parties to take risks and acknowledge and address the weaknesses in their respective positions to a third party who can then be blamed for bad outcomes can seem an attractive alternative. However, there is one very significant downside to that approach. It requires the principals in the grievance procedure to cede control over important matters to outsiders who, no matter how objective and analytically skilled they may be, can never hope to have the same depth and breadth of understanding of the impact those important decisions will have in the workplace—on management and employees. The hope that aggressive advocacy in arbitration will consistently produce results superior to those that can be achieved through a vigorous effort at negotiated decision-making within the context of the contractual grievance procedure is a fallacy.

The prospect of being stuck forever with an ill-advised, binding arbitration award setting workplace policy by interpreting ambiguous contract language, or deciding a disciplinary issue based on the limited inquiry permitted through a "lawyerized" arbitration proceeding, should give even the most risk-averse management or union official pause. The unavoidable truth is that the persons assigned responsibility for making the grievance procedure an efficient problem-solving process that produces accurate (on the facts) and correct (on the contract) results cannot shirk that responsibility by punting vexing contract interpretation and discipline-related controversies to arbitration when it is not absolutely necessary to do so.⁷

Leaders must lead. Decision-makers must make difficult decisions and solve perplexing, high-stakes controversies. They cannot be debilitated by the fear of incurring the ire of their constituents when the facts and the contract indicate that those whose interests they represent have it wrong in either of those regards. Otherwise the model on which the contract administration process is founded falls apart. I assert that this fact of labor relations life is the true key to ameliorating the toxic effects of the creeping legalization phenomenon that is the subject of this "Creeping Legalism" symposium, at which this paper was first presented. I will now describe the model I propose as a solution to that conundrum.

7. An example of this dynamic in operation is the recent trend by mainline labor arbitrators, including the Author, toward retaining jurisdiction over matters pertaining to the implementation of the remedy aspect of their awards, particularly in discipline cases where reinstatement of the grievant is directed.

III. ATTACKING THE DISEASE, NOT ITS SYMPTOMS

I am convinced that much of the failure of leadership and risk averse behavior that results in employers and unions succumbing to the temptation in arbitration to rely inordinately on the much-maligned tactics more typical of the traditional civil justice system stems from a misperception of the purpose of the contractual grievance procedure. Properly conceptualized, the grievance procedure is viewed as a problem-solving mechanism involving two parties to a de facto permanent relationship. In that scenario, the ongoing nature of the relationship between the parties results in great value being placed on candid communication, empathy, compromise, face saving, and other behaviors in which one engages when long-term coexistence with another is required.

Making a long-term relationship work requires wise and thoughtful decision-making and adroit problem-solving. Sitting as I do at the final step of the contractual grievance procedure, I sometimes leave with the impression that the parties have done neither of these. Instead, the evidence and the posture of the advocates too often indicate the parties' behavior in the pre-arbitration steps of the grievance procedure has centered almost exclusively on arguments about whose interpretation of the collective bargaining agreement is correct or consists of threat-based efforts to exercise power.⁸ I do not have sufficient empirical data to ascertain the origins of this apparent phenomenon. I do have some sense of how the underlying dynamic can be shifted in a manner that can return the contractual grievance procedure to its true purpose, while doing much to vitiate the creeping legalism of labor arbitration. I will now attempt to articulate and explicate my thesis.

The persons on the point in the contractual grievance procedure—the union and employer officials who call the shots—must be competent negotiators and bold decision-makers. If they are not, they can never confidently take the types of risks or deal with the palpable uncertainty required to settle difficult disputes short of arbitration. Merely being an experienced negotiator does not make one a proficient negotiator. Instead, I am convinced that the real key to dispensing with the need for the much-maligned legalistic machinations that are becoming more and more common in labor arbitration is the mastery by management and union leaders of a set of process-based strategies for decision-making and dispute resolution that are grounded in the negotiations process.

The decision-making strategies I describe, *infra*, focus on process and relationships, instead of results and winning. Thus, instead of immediately resorting to arguments about whose version of the relevant facts is accurate or whose view of the contract's proper application is correct, effective contract administrators should focus diligently on the decision-making and problem-solving processes, trusting that they will lead to mutually acceptable outcomes that satisfy the true needs of the parties to the collective bargaining agreement.

Those advocates who have not mastered these negotiated decision-making strategies find themselves with no alternative but to resort to contentious rights-based arguments or attempts to wield their power in an effort to coerce the other

8. This view of the two alternatives to negotiated decision-making is most cogently articulated in WILLIAM URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT 3-19 (1988).

side into submission. Those rights and power-centered strategies for resolving the disputes that arise during the life of the collective bargaining agreement can be very destructive of the bargaining relationship. At the same time they can vitiate the contract administration process by preventing a candid airing of the facts and any form of interests-centered dialogue. It is not difficult to conceive how and why those dysfunctional behaviors so often make resort to the legal machinations that are the subject of this symposium inevitable.

Before turning to what I propose as the true antidote to the creeping legalism phenomenon, I will devote a few paragraphs to describing what I see as the proper balance between the pre-arbitration and arbitration steps of the contract administration process.

IV. THE PROPER INTERFACE BETWEEN LABOR ARBITRATION AND THE PRE-ARBITRATION STEPS OF THE GRIEVANCE PROCEDURE

The ultimate victory of the Braden model, which conceptualizes the labor arbitration process as an adjudicatory device and not a problem-solving mechanism,⁹ may have made the legalization of the process inevitable. At the same time, the demise of George Taylor's view of labor arbitration as a problem-solving process and the arbitrator as a shaper of the contract almost certainly has served over time to diminish the importance attached to negotiated decision-making and problem-solving in the pre-arbitration steps of the grievance procedure. This article is not a call for return to the Taylor model of labor arbitration. Instead, it is an exhortation to employers and unions to revitalize the contractual grievance procedure by clearly demarcating it from the adjudicatory process of the labor arbitration forum and thereby regaining control of the contract administration mechanism.

Contemporary labor arbitration is an almost exclusively adjudicatory process, appropriately employed only when the parties have made a forthright and exhaustive effort to resolve a grievance in the contractual grievance procedure. Instead of negotiated decision-making or problem-solving, the role of arbitration today is to ensure a rigorous, arbitral search for the truth and a correct interpretation and application of the relevant terms of the collective bargaining agreement, consistent with the mutual intent of the parties. If labor arbitration is to serve its true proper role, the parties' administration of the grievance procedure in its pre-arbitration steps must promote a frank, pre-arbitration exploration of the truth of the matter at issue and an honest evaluation of the parties' mutual intent in negotiating the relevant contact language.

If the parties do not make that happen, they allow too many questions of fact and contract (or law), and application of contract (or law) to be decided by an outsider. Ultimately, such decisions should be made by the union and employer officials tasked with leading their respective constituents through the contract administration process. I submit that labor arbitration works best when it is spa-

9. There are numerous thoughtful articles describing the origins, dynamics and outcome of the classic debate between J. Noble Braden and George Taylor. See, e.g., Dennis R. Nolan & Roger I. Abrams, *The Labor Arbitrator's Several Roles*, 44 MD. L. REV. 873 (1985); Dennis Nolan, *Labor and Employment Arbitration: What's Justice Got to Do with It?*, 53 DISP. RESOL. J. 40 (1998); George Nicolau, *The Future of Labor Arbitration*, 51 DISP. RESOL. J. 75 (1996).

ringly used; and when used, it has the least intrusive effect on the bargaining relationship and the day-to-day events of the workplace.

Effective negotiated decision-making and competent problem-solving in the course of administering the collective bargaining agreement will resolve most grievances, both the meritorious and non-meritorious ones. Even if negotiated decision-making does not settle all grievances, it can, in most all situations, narrow and focus the search for the truth in arbitration and reduce the number of issues or questions advanced to arbitration for resolution by an outsider.

Thus, I contend that the real key to ameliorating the much-decried intrusion of legal machinations into the labor arbitration realm is found not in the arbitral forum itself, but rather in the pre-arbitration steps of the grievance procedure. The answer lies in making those pre-adjudicatory steps of the grievance procedure an optimally efficient means for revealing the truth and fashioning outcomes the parties can live with.

If that happens, it will dispel much of the perceived need for the jury trial tactics and related histrionic measures that have little place in the arbitral forum where the trier of fact is an experienced neutral, savvy to the ways of the workplace. By shifting the focus of the contract administration process to negotiated decision-making and problem-solving, and away from tests of strengths and arguments about who is right, the parties will soon come to realize how dysfunctional and unnecessary the “lawyerizing” of labor arbitration is.

That is so because when an exhaustive, honest search for the truth has already been made in the pre-arbitration steps of the grievance procedure, it is much harder to conceal the truth when the arbitrator is asked to decide the remaining questions of fact. Similarly, when in the grievance procedure, where the parties have conscientiously endeavored to clarify their mutual intent underlying disputed contract language, it is much more difficult to distort it when the arbitrator is asked to decide the remaining issues regarding that intent.

I will now turn to an explication of the two process-based strategies for negotiated decision-making and problem-solving that I believe are the true antidote for creeping legalism that currently plagues labor arbitration. They are the very processes that effective mediators facilitate when the parties chose to utilize grievance mediation. Nevertheless, I am convinced that labor and management advocates, who are willing to embrace and eventually master these skills sets, can facilitate these processes without the aid of an outside neutral. As I describe the elements of each process, try to envision how they can, if skillfully utilized by properly motivated labor and management advocates, greatly increase the likelihood that grievances are resolved in the pre-arbitration steps of the contractual grievance procedure, saving arbitration for the truly insoluble controversies where resolution will legitimately require the intervention of a outside third party.

V. THE TWO PREREQUISITES TO A PARADIGM SHIFT

I believe much of the attractiveness and most of the overuse of traditional civil trial tactics in the labor arbitration venue results from a failure of the contractual grievance procedure to fully engage the core inquiries and make the attendant, often difficult decisions that are the key to resolving the controversies underlying the grievance. In discipline cases, the critical contract administration task is accurately determining the facts regarding the grievant employee’s alleged miscon-

duct, the actions of management, past practice in similar misconduct cases, and the like. Nevertheless, too often in the pre-arbitration steps of the grievance procedure, the parties are unable to get a clear read of those key facts. When the grievance remains unresolved and is advanced to arbitration, the parties' hearing behavior often seems centered on efforts to conceal or massage the truth rather than reveal it.

In contract interpretation cases, the goal of the grievance procedure dialogue is to discern and give effect to the mutual intent of the parties in negotiating the disputed provisions of the collective bargaining agreement, clarifying latent ambiguities, and engaging and resolving patent ambiguities. When an issue arises that was not contemplated by the parties when they negotiated the agreement, the parties are obliged to concede their omission and attempt to fashion a new decision or rule that they both tolerate.

I aver that instead of effectively focusing their efforts in the pre-arbitration steps of the grievance procedure on these matters, the parties too frequently focus on their respective idiosyncratic views of the disputed contract language's meaning, advancing to arguments about what it arguably could mean. When these contract interpretation cases proceed to arbitration, the parties many times fail to understand that without probative, objective evidence of true mutual intent to support their view of the contested contract language, their chances of winning are minimal at best.

I maintain that the adjudicatory callisthenic of arbitration is best saved for the controversies where the truth cannot be truly discovered, or where the mutual intent of the parties accurately cannot be discerned. That its use is many times not limited to those circumstances is evidence that the grievance procedure is not working because the parties do not know how or chose not to do an effective job of negotiating and problem-solving. The process-based strategies described below should be the core activities of the pre-arbitration steps of the grievance procedure.

A. The First Step: Accurate Diagnosis of the Elements and Predominant Character of the Controversy

Not all grievances are the same. While virtually all contract administration disputes will have both distributive (win-lose/zero sum) and integrative (win-win/variable sum) dimensions, every grievance will have a predominant character. Correct assessment of a grievance's primary character will signal the likely nature of the dialogue between the parties in the pre-arbitration steps of the grievance procedure. Once that assessment is made, the parties can begin to comport their behavior to the controversy before them.

The elements of a particular grievance where the parties' goals are in direct conflict, or mutually exclusive, will be resolved through distributive bargaining, a process that centers on the familiar quid pro quo, something-for-something, tradeoffs that typically characterize the negotiations that transpire between unions and employers. When the parties are able to identify areas where their respective goals are not in conflict, the potential exists to move the conversation into an integrative bargaining, problem-solving mode that offers tremendous potential for mutual gain, but requires employers and unions to get out of the box and begin thinking of the contract administration process in new ways.

B. The Second Step: Rethinking the Grievance Procedure Dialogue

When a union and an employer agree to binding arbitration as the final step in the contractual grievance procedure, they effectively set aside, or at least minimize, the effect of their relative power, as measured by tests of economic strength like the strike and the lockout, for the duration of the collective bargaining agreement. In the place of power, the parties agree that any disputes concerning the proper meaning and effect of the contract that are not brought to closure in the grievance procedure will be adjudicated by a mutually selected outsider charged with deciding who is right and who is wrong on the contract and the disputed facts.

There are many circumstances where the parties can engage in a productive discourse about whose version of the facts or whose interpretation of the contract is correct within the context of the pre-arbitration steps of the grievance procedure, especially where the contract language is latently ambiguous or when the facts cannot be objectively ascertained.¹⁰ However, more often than not, in both contract interpretation and discipline cases, grievance procedure conversations focused in this distributive bargaining manner quickly diminish into arguments over which of the two mutually exclusive views of the facts or contract is correct. When the parties find themselves unable to reconcile their conflicting perspectives, their positions harden and the dialogue effectively ends, no matter how many grievance procedure steps remain to be traversed.

I assert that the grievance procedure works best, and the use of arbitration is most effectively minimized, when the parties center their efforts in the grievance procedure on the integrative bargaining process. The identification of mutual, non-conflicting goals, the definition of the problems and obstacles preventing achievement of those goals, and the shift of the dialogue to a conversation intended to reveal and serve the parties' respective interests, which are the hallmarks of integrative bargaining, have very little, if anything, to do with who is right or more powerful. While integrative bargaining is not an antidote for all of the ills currently plaguing the contract administration process, it is an essential element of any meaningful effort to make the grievance procedure work.

The commentary that follows will describe in detail this refocusing of the grievance procedure from a zero-sum argument about who is right, glossed by the relative power of the parties and (at least implied) threats to use that power, to a problem-solving effort centered on serving the parties' true needs and cultivating and strengthening their relationship. I aver that employers and unions that learn how to affect that shift from the distributive to the integrative mode of decision-making will both reduce the number of grievances unnecessarily advanced to arbitration and help restore the simple elegance that is the hallmark of labor arbitration done right.

10. Thus, for example, within the context of a discipline case, union and management officials could engage in a candid, forthright exploration of the facts attendant to a disciplinary matter, instead of merely arguing about whose version of the facts is accurate. Similarly, when a latently ambiguous contract provision pertaining to the payment of benefits comes into dispute, the parties could focus their efforts on fashioning a new, innovative solution that would take effect during the term of collective bargaining agreement instead of arguing about which of their competing views of the current contract provision is most defensible.

VI. MASTERING THE PROCESS OF NEGOTIATED DECISION-MAKING

As implied above, every conflict that begs to be resolved, every decision that must be made within the context of a contractual grievance procedure (or elsewhere), requires the effectuation of two negotiated decision-making processes—distributive bargaining and integrative bargaining. The function of distributive bargaining is to resolve the pure conflicts of interest between the parties, where their goals are mutually exclusive. The function of integrative bargaining is to identify the areas where the parties' goals are not in conflict, and to fashion solutions to the problems and obstacles that are preventing achievement of those mutual, non-conflicting goals. This section will describe the essential elements of each of the decision-making processes.

A. Distributive Bargaining Conceptualized

When, in the course of attempting to settle an outstanding grievance, a union and an employer find that their goals regarding certain aspects of the grievance are in direct conflict, also described as *mutually exclusive*, those issues will be resolved through distributive bargaining. Distributive bargaining is a zero-sum game wherein both parties are endeavoring to maximize their respective net gain. The resources they are dealing with are fixed and limited (*e.g.*, money, time, and people), and their interaction centers on deciding how those scarce resources will be allocated. There is no way to grow the pie, or create value, in distributive bargaining.

In *Getting to Yes*, Fisher and Ury refer to distributive bargaining as “*positional bargaining*” because the exchange of information between the parties is largely limited to a conversation about their respective positions, with little consideration of the interests, motivations, or real truths that underpin or relate to those positions.¹¹ The distributive bargaining dialogue typically starts with the parties framing their opening offers in a manner intended to anchor the negotiation over the issues in a direction favorable to them by asking for substantially more or less than they actually expect to achieve. They progress toward settlement (or not) through a *quid pro quo*—centered movement toward some sort of viable bargaining range. If that series of tradeoffs does not place the positions of the parties in reasonable proximity, the negotiation ends and the parties set a course for arbitration.

Despite the typical fixation on the opening offers and the outcomes the parties *want* to achieve (their “*target points*”), the true gravamen of the decision-making in distributive bargaining is the parties' respective resistance points, what they *need* with regard to the issue at hand. In laying their *a priori* strategies in distributive bargaining, savvy negotiators endeavor to ascertain the other party's and their own resistance points by objectively assessing (i) their respective outcome utilities (their bottom line on an acceptable outcome on the merits of the issue); (ii) the costs each attaches to an extended or difficult negotiation (their delay costs); and (iii) the costs each would experience if the negotiation ended (their termination

¹¹ ROGER FISHER & WILLIAM URY, *GETTING TO YES* 3-10 (1983).

costs). To a great extent, the parties' termination costs, and to a lesser extent, their delay costs, are determined by the best alternative each has to a negotiated agreement with the other (their "BATNAs").

One should never enter into a distributive negotiation without carefully assessing one's own and the other party's resistance points. Effective distributive bargaining strategy must be firmly grounded in reality. Sophisticated negotiators know that one of their key tasks is to manage the expectations of their team and their constituents. Leaders who avoid this often-difficult task in order to build enthusiasm and solidarity among their team members and constituents at the front end of a negotiation betray their followers and lay the foundation for failure.

As you might guess, distributive bargaining tactics also center on their respective resistance points. At the bargaining table, the goal is always to move the other party's resistance points on the distributive issues in a direction favorable to you while you hold your ground as much as possible by competently deploying four distinct tactical skills.¹²

- *Assessing the other party's resistance point.* Throughout the decision-making process, skilled negotiators will assess in real time the desired outcome utilities, the delay costs, and the termination costs of the other party. Based on that ongoing assessment of the other party's resistance point, the negotiator adapts her *a priori* strategy to fit that perceived new reality.

As Sun Tzu advises in *The Art of War*, the key to victory always lies with the opponent. If you do not have a clear, constantly updated, and refined picture of the other party's resistance points, you can never make informed, bold decisions regarding the timing and nature of concessions and other initiatives intended to stir your opponent into action. Instead, you will be merely guessing.

- *Managing the other party's perceptions.* Skillful negotiators also deliberately manage the other party's perceptions of their (the other party's) outcome utilities, delay costs, and termination costs. This is achieved by carefully fashioning all of your communications to the other party, both verbal and nonverbal, and by mastering emotion so as to not inadvertently divulge useful information to the counterparty.
- *Modifying the other party's resistance point.* The third distributive bargaining tactic involves modifying the other party's resistance point determinants. Here, the task is to persuade the other party that (i) they really could get by less or give more on the issue at hand; (ii) they need to move quickly toward settlement; and (iii) their alternative(s) to a negotiated agreement with you (their BATNA(s)) are not as attractive as they originally thought they were.

12. This distributive bargaining tactics template is based on a model described in ROY J. LEWICKI, ET AL., *NEGOTIATION* (6th ed. 2009).

- *Manipulating delay and termination costs.* These manipulative tactics are best used sparingly. Thus, threats should be avoided, except when absolutely necessary. Caution must also be exercised to speak the truth. Gaining a reputation as a bully or prevaricator will not inure to your benefit over time.

All of these distributive bargaining tactics are concerned with the exchange of information. We are talking here about the process of trying to nudge the other party's shield down, to make it porous, so that he reveals information that enable you to accurately divine his true resistance point. At the same time, you try to keep your shield up, to remain inscrutable, revealing as little resistance-point-determinative information as possible, until it is to your advantage to do so in pursuit of a settlement you can live with.

It is important to remember, however, that properly viewed within the context of the essentially permanent bargaining relationship between an employer and a representative union, the game of distributive bargaining does not result in either side taking inordinate advantage of the other. Instead, it is a forthright process, through which the parties explore and gradually reveal to one other their true resistance points—their respective bottom lines on each of the zero-sum issues that they must decide if a grievance is to be resolved short of arbitration. Those zero-sum issues can take many forms.

Thus, for example, in discipline cases, the search for the truth is often a distributive issue. At the outset of their grievance procedure dialogue, the parties often strongly disagree as to the actual nature of the grievant's actions or the disciplinary past practice in similar cases. If settlement is to be achieved, both of the parties likely will have to adjust, either explicitly or tacitly, what they are willing to acknowledge as those material facts. In discharge cases, decisions regarding the terms of a possible reinstatement, like back pay, benefits, and reinstatement to a position filled by another employee, require the same type of distributive bargaining.

In contract interpretation cases, the search for the truth typically focuses on divining the parties' mutual intent in negotiating disputed contract language—requiring a candid exchange regarding bargaining history and relevant past practice. Similarly, the decision whether to stick with the ambiguous current language or take the risk of offering a clarification of the provision presents risks that can be viewed as distributive.

For sure, the exchange of information underpinning distributive bargaining is guarded and restrained, especially at the outset. Nevertheless, the dialogue necessary to achieve satisfactory resolution obliges the parties to fashion their messages with the objective of ensuring that they get through to the other party intact with a minimum of distortion, to listen actively, and to elicit and provide feedback to ensure that result.

Employers and the unions certified as the representatives of their employees are highly interdependent. Their relationship is for all intents and purposes a permanent one. Their interdependency is contrient with regard to the distributive issues that arise during the contract administration process, in that each aspires to maximize their respective net gain, placing their respective goals in direct conflict. But they are still interdependent in that neither can achieve its goals, in whole or

in part, without the cooperation of the other. The *quid pro quo* and compromise that lie at the heart of proficient distributive bargaining do not occur because the parties want to make those difficult tradeoffs. They transpire because the parties eventually learn that compromise is better than not reaching an agreement whose terms they control, and because they value and wish to nurture the relationship between them.

While an essential dimension of decision-making within the context of a contractual grievance procedure, in most circumstances, distributive bargaining alone is not sufficient to produce the kind of movement and creative thinking necessary to resolve difficult grievances. If the parties remain stuck in the something-for-something mode, it eventually becomes very difficult for them to move past their target points to their true resistance points where settlement invariably resides in negotiations between co-equals. Instead, they begin to pull back and blame the other party for the failure of the process, often projecting their own obdurate attitude onto the other party. The parties retreat, their positions harden, and they begin to shield their resistance points. Inevitably, the communication channel is hobbled by increasing distortion, and the feedback loop essential to effective problem-solving shuts down as the parties increasingly talk at and past one another, instead of with each other.

I am convinced that the key to breaking the logjam that is invariably produced by reliance on distributive bargaining as the sole device for resolving disputes submitted through the course of the contractual is effecting a transition to an integrative bargaining-problem-solving mode of information exchange. How the parties to the grievance procedure can affect that shift and make the most of this second negotiated decision-making process is the subject of the commentary, *infra*.

B. Integrative Bargaining Conceptualized

The trigger to integrative bargaining is the shared realization that the employer and the union have goals that are not in conflict. These mutual, non-conflicting goals can be present even though their achievement does not produce equal benefits for both, and even if the parties have different objectives. The identification of common goals (same objective—equal benefits), shared goals (same objective—unequal benefits), and joint goals (different objectives—a cooperative effort) signals that the dialogue between the union and the employer can and should shift from the win-lose, zero-sum distributive bargaining to a problem-solving focus.

Where parties are addressing matters where their goals are not in conflict, the interaction of the parties in integrative bargaining is substantially different in tone and content from that typical of distributive bargaining. Because they are playing a variable-sum/mixed-sum game intended to solve mutual problems and not arguing about who is right or attempting to coerce the other party into submission, unions and employers that master the integrative problem-solving process are much more likely to get out of the box and find unique solutions to difficult disputes that typically must be delegated to an outside arbitrator for decision.

In *Getting to Yes*, Fisher and Ury refer to integrative bargaining as interests-based bargaining.¹³ That is so because the success of the process turns largely on the parties' ability to reciprocally lower the shields behind which they conceal their resistance points in distributive bargaining in order to reveal and explore the things that really matter to them regarding the issues at hand. In doing so, a union and employer skilled at integrative bargaining will candidly discuss the following matters:¹⁴

- *Substantive interests*, which concern the actual issues on the table and are what they consider to be acceptable outcomes on those issues.
- *Process interests*, which relate to the manner in which the parties view the particular dispute, the reasons why they are negotiating in an effort to resolve it, and their predispositions about the ways in which conflict should be resolved within the context of the contractual grievance procedure.
- *Relationship interests*, which go to the extent to which the employer and the union value the relationship between them and their respective desires to avoid damaging while instead strengthening that relationship.
- *Principles-based interests*, which go to the parties' beliefs about what is fair, what is right, and what is acceptable.

Instead of endeavoring to remain inscrutable and conceal their bottom lines as to possible solutions to the problems at hand, the parties in integrative bargaining center their dialogue on working toward solutions that serve their interests as well as the interests of the other party.

The less confrontational nature of the integrative bargaining process notwithstanding, it is important to remember that the relationship between the parties remains an adversarial one. Thus, even though the union and the employer are working toward mutual, non-conflicting goals, their interests are not identical and cooperation is not guaranteed. For the conversation in the grievance procedure to shift to a problem-solving mode, the parties must earn one another's trust.

In order for the more open communication and willingness to take risks essential to effective integrative bargaining to transpire the parties do not come to trust one another. The several conditions precedent to trust building provide useful guides to advocate behavior:

- First, the parties must objectively and thoughtfully determine their positions on the issues and remain firmly committed to them until it is time to compromise. Experience shows that the other party will

13. FISHER & URY, *supra* note 11, at 41-57.

14. This integrative bargaining construct is founded on a model described in ROY J. LEWICKI, ET AL., *NEGOTIATION* (6th ed. 2009).

not take you seriously and will not make the difficult decisions necessary to resolve tough disputes if they do not believe you mean what you say. Thus, you must avoid hedging your position, or repositioning without explaining why.

- The parties must exhibit mutual patience and support during the course of the problem-solving process. You cannot expect the other party to take risks, or to leave their comfort zone, if you are unwilling to invest the time it takes to build consensus among their constituents or allow them to save face when they are obliged to change their position on an issue or back out of a commitment.
- The best way to elicit cooperative, trusting behavior from the other party is to be willing to initiate it, by demonstrating your willingness to trust the other party and to cooperate with them by taking the other party at its word, or by making that first concession without linking that concession to a demand for reciprocation.
- It is important to share as much information as possible. The goal here is to use information exchanges to maximize the common pool of information and thereby increase the ability of the union and the employer to achieve their common, shared, and joint goals.
- Building trust also requires employer and union representatives to exercise care to ensure that, during their grievance procedure interactions, each communicates its needs and priorities clearly, with a minimum of ambiguity. They must use language that describes reality and communicate in clear, straightforward terms.
- Finally, it is essential that the parties demonstrate their willingness to accept that the other party's positions are both sincerely held and based upon valid considerations (in terms of the other party's frame of reference). Here we speak of legitimating the other party by refraining from challenges to the rationality or wisdom of their positions.

The trust essential to centering the contractual grievance procedure on integrative problem-solving is built over time, through a pattern of consistent behavior whereby union and employer representatives demonstrate to one another that they can afford to take the risks inherent in lowering the shields that normally obscure their true priorities and motives.

Several behaviors are key to effecting this shift from the typical cautious and defensive mode of information exchange that characterizes distributive bargaining to the more open, candid interaction between the parties required in integrative bargaining. First, the employer and union must empathize with each other's perspective on the issues at hand, the relationship between them, and the possible obstacles to more cooperative behavior they each face. My thirty years of experience as a grievance mediator has revealed scant evidence of a willingness by the parties to adopt this mindful approach to the contract administration process.

Contrary to the oft-displayed conventional wisdom, empathy is not a sign of weakness. It requires courage and true leadership to demonstrate a willingness to step into the other party's shoes and try to gain an accurate and complete picture of its view of the controversy at hand. Thus, once an employer representative gains a clear picture of the union's political problems in acknowledging that a discharged grievant in fact engaged in the charged misconduct, she can move the dialogue to a discussion of the possible outcomes, short of termination, that could result if the factual dispute is set aside. Of course, there can never be a guarantee that this tactic will work, but it does at least clear the way for a problem-solving effort that is impossible if the core subject matter of the parties' exchange in the grievance procedure remains on the "you say/we say" fact-centered dynamic.

The second behavior critical to the integrative problem-solving process in the contractual grievance procedure is maintaining a focus on the problems that are preventing the parties from achieving their common, shared, and joint goals. It requires strong discipline for a union and employer representative engaged in a problem-solving effort to avoid straying back to the win/lose distributive elements of the underlying controversy. Thus, when discussing the possibility of unique solutions in a termination case (*e.g.*, front pay in lieu of reinstatement) or a contract interpretation case (*e.g.*, a supplemental letter of agreement intended to resolve a latent ambiguity in the disputed language of the collective bargaining agreement), the parties must resist the temptation to return to the zero-sum issues involving money and similar fixed resources matters, or arguments about whose version of the facts is correct.

Finally, the union and the employer must come to view the problem-solving dimensions of their grievance procedure dialogue as a search for solutions that will lead to achievement of their mutual, non-conflicting goals. The seminal activity in that search must be a robust and candid exploration of the parties' respective interests that underpin their positions on the issues at play. Common, shared, and joint goals are achieved if the parties ensure that their interests and the interests of the respective constituents are adequately served by the outcomes they devise in the contractual grievance procedure.

Unions and employer labor relations officials who master integrative bargaining will direct the contract administration process away from an exclusive focus on power-centered arguments about whose version of the facts and whose interpretation of the collective bargaining agreement is right. When the grievance procedure conversation remains mired in that conundrum, the parties greatly reduce the chances that they will successfully resolve grievances short of the arbitration terminus of the contract administration process. It is when that opportunity for fashioning mutually acceptable outcomes is squandered that the parties often feel compelled to pull out all of the stops in arbitration in order to prevail in what is often a winner-take-all contest. That is a most unfortunate, unnecessary, and highly dysfunctional outcome.

VII. TWO CURRENT EXAMPLES OF A PROBLEM-SOLVING APPROACH TO THE CONTRACT ADMINISTRATION PROCESS

Making the contract administration process work requires mastery of both distributive and integrative bargaining, paired with the ability to accurately diagnose which issues pertinent to a particular grievance are appropriate for resolution

through each of those negotiated decision-making processes. Effective utilization of these two skill sets also requires the negotiation effort to be founded on an accurate and complete assessment of the facts and attendant circumstances presented by a given grievance.

My many years of experience mediating grievances and serving as the neutral in several other alternative dispute resolution forums utilizing a methodology based on the negotiated decision-making paradigm previously described, convinces me that unions and employers can learn and successfully implement the decision-making, problem-solving strategy previously described. I have also seen it work effectively in two hybrid, neutral-driven processes, one dictated by federal law and a second created by the parties out of frustration with a traditional model of contract administration that resulted in far too many contractual disputes being advanced to arbitration.

The first mechanism is the System Board of Adjustment device mandated by the Railway Labor Act in the airline industry.¹⁵ Ironically this approach to resolving contractual disputes results in the serious problem-solving taking place within the context of grievance arbitration, at the post-hearing stage. When the System Board of Adjustment mechanism works properly, the neutral chair's decision of the issue before her is informed by one or more off-the-record, pre-award executive sessions with the management and union System Board members.

The purpose of the post-hearing executive sessions is not to re-argue the parties' cases-in-chief. Instead, if done correctly, those conversations give the advocate board members an opportunity to clarify the interests underlying the positions of their respective constituents in an informal venue. It also provides the neutral chair with a unique opening to ask questions that he would be ill-advised to raise in the hearing for fear of interfering with the advocacy dynamic on which the hearing and the arbitration process itself is based. Most importantly, I have found that the executive board executive session also enables the neutral chair to tailor remedies in a manner that greatly enhances the likelihood that the award will be successfully executed with a minimum of the post-award implementation snafus that have led to the increasing tendency of arbitrators to retain jurisdiction.¹⁶

The second hybrid mechanism I have worked with is a pre-arbitration process created by AT&T, the Communication Workers, and the International Brotherhood of Electrical Workers for use in discharge cases. The parties have dubbed this alternative approach Early Neutral Evaluation. While it does involve direct insertion of the neutral into the negotiated decision-making process, the Early Neutral Evaluation procedure has proven to be an effective means for accelerating the truth-finding and reality-checking dynamics that are essential to settling difficult discipline cases.

Remarkably, this entire process takes no more than ninety to 120 minutes to complete. It begins with the company and the union each taking thirty minutes to articulate their cases in support of and in opposition to the challenged discharge. Each party is permitted to call one person with knowledge of the events at issue to provide a narrative description of their version of the disputed facts. The neutral

15. See 45 U.S.C. § 153 (2006).

16. The retention of jurisdiction device, while often necessary, frequently results in a second level of dysfunctional "lawyerizing" of what should be a simple, elegant dispute resolution technique.

evaluator is permitted to ask questions, but there is no cross examination. Thereafter, the neutral evaluator has thirty minutes to appraise the facts and consider the parties' arguments.

When the process is brought to conclusion, the neutral evaluator offers his assessment of the disputed facts and the likely outcome if the grievance before him is advanced to arbitration. I always make it clear to the parties that while I will explain my findings, I will not defend them or entertain any attempts at rebuttal. The parties then have ten days to notify their counterpart that they reject the neutral evaluator's findings. If they do not, those findings become binding and are adopted in resolution of the grievance.

At times during the course of delivering my evaluation of a particular case, I will endeavor to smooth the way to effective implementation of a reinstatement order, or to facilitate face saving for the grievant when her discharge is upheld. I am convinced that this interest-based dialogue is due in part to my many years of service with the parties—I am not aware of any case where my findings as to the ultimate outcome were rejected. It appears that virtually all of the termination cases submitted to the Early Neutral Evaluation process are settled without resort to arbitration.

VIII. CONCLUDING THOUGHTS

I am confident that, if asked, most experienced union and management representatives would aver they are knowledgeable, skilled negotiators. I am not certain that is true.

The fact is very few line managers, labor relations officials, union stewards, or union business representatives have had the benefit of intensive, extended training in the body of knowledge and the attendant skills critical to mastering the art of effective negotiated decision-making. I would speculate that, if asked, they could not concretely articulate the processes they follow in attempting to resolve grievances in the contractual grievance procedure; could not describe the patterns of behavior that lead to settlement or result in non-settlement of grievances; or could not define the strategies they pursue in the course of discharging their contract administration responsibilities.

Effective contract administration requires disciplined decision-making and courageous, thoughtful leadership. That cannot happen without mastery of the process-based strategies for negotiated decision-making described, *supra*. It is the only way employer and union representatives can maximize the control they wield over processes and outcomes in the contractual grievance procedure, thereby minimizing the need for resort to the histrionics and machinations associated with the excessive legalism of labor arbitration.

It is undeniable that there is risk associated with the proactive approach that I advocate. However, in light of the element of arbitral principle that bars admission of any evidence pertaining to settlement negotiations in the grievance procedure, that risk is minimal. The safe harbor of arbitration will not be contaminated by the strategy I suggest.

I realize that by appearing to admonish union and employer advocates for a failure to lead, and by championing an approach that could greatly diminish the number of grievances that are advanced to arbitration, I run the risk of being "Borked" for my comments by advocates and arbitrators alike. However, I am

convinced that my views represent the best way to minimize the distortion of the arbitration process to which I devote so much of effort and passion—and that is a risk I am willing to take.

I believe in the labor arbitration process. I have devoted much of my professional life to practicing this honorable craft. Done correctly, it is the best way for employers and unions to bring closure to the disputes that arise during the life of the collective bargaining agreement that they are unable to decide on their own. Nevertheless, I cannot stand by and watch the process I love and believe in be debilitated and diminished by the premature and often unnecessary resort to the tactics and mindset that govern traditional civil litigation.

At the least, my thoughts here are a plea to employer and union advocates alike to regain control of the contract administration process by becoming more adept at negotiated decision-making and by exercising their respective leadership roles in a more audacious, mindful way. If they are to pick up the gauntlet that I throw down, I am convinced that most of the disconcerting outfalls of creeping legalism in labor arbitration would be greatly diminished. It is my sincere hope that they do.