BARGAINING POWER IN LABOR-MANAGEMENT RELATIONS

by Harold W. Davey

The concept of bargaining power is treated here as it may be usefully applied in understanding the specific total relationship between Company X and Union Y, who are parties to a collective labor agreement. Possible applications to the field of agriculture will be left to those more conversant with the latter field. The approach here is pragmatic rather than theoretical.

The discussion is divided into three sections: (1) a brief survey of the legal framework within which contemporary collective bargaining takes place, (2) an analysis of some common misconceptions of the nature and content of bargaining power in the labor relations field, and (3) an outline of some constructive ways to use bargaining power concepts in management-union relations.

Legal Framework of Collective Bargaining

More than half a century ago Sidney and Beatrice Webb defined a trade union as a "continuous association of wage earners for the purpose of maintaining or improving the conditions of their working lives." This still accurately describes the basic purpose of most American trade unions. The principal union instrumentality for achieving this purpose since the time of Gompers has been collective bargaining with employers.

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2 In speaking of Company X and Union Y, it is important to remember that the outstanding characteristic of union-management relationships in the United States is their diversity and variety. There is no such thing as a typical or average company or union. American unionism is heterogeneous in size and structure, although reasonably homogenous (as will be noted presently) in its basic emphasis on collective bargaining as the principal instrumentality for achieving economic goals. At this writing, there are nearly 200 national and international unions operating in the United States, to which are affiliated some 75,000 local unions. Approximately 125,000 collective-bargaining contracts with employers are in force today. The union movement embraces very small craft unions of a few thousand members as well as such sprawling giants as the Teamsters, who now claim 1,700,000 members, and the Auto Workers and the Steelworkers, each with membership in excess of 1,000,000.

The American union's philosophic orientation is normally as conservative as that of the typical American employer. This fact is not always easy for the employer to appreciate. American workers are not interested in having their unions assume control of industry, nor do they want their unions to have an official role in the running of the business enterprise. They are interested in improving their own economic position and status in a particular job in a particular company in a particular industry.

Unionism traveled a rocky road, legally speaking, until comparatively recent times. However, since the Norris-LaGuardia Anti-Injunction Act of 1932, unionism as an institution has benefited from Federal statutory recognition that the "individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." This implicit statutory presumption in favor of unionism and collective bargaining was made explicit in the Wagner Act of 1935 and continued in the Taft-Hartley Act of 1947 in the following language:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. (Emphasis supplied)

Taft-Hartley also recognizes that experience has demonstrated that "certain practices" of unions interfere with the effectuation of the "rights" guaranteed in the act and therefore must be eliminated. The act then states categorically, as did the Wagner Act, that it is the policy of the United States to encourage the practice and procedure of collective bargaining.

At the same time it must be remembered that Taft-Hartley embraces a conflict of interests and goals. It attempts to protect both the right of workers
to form and join unions and to bargain collectively and their right to refrain from any and all such activities. Taft-Hartley also prohibits some of unionism's historic instruments of economic pressure, notably secondary boycotts, strikes for closed shops, jurisdictional strikes, etc.

Notwithstanding the severe legislative control by Taft-Hartley and, more recently, the addition of pervasive regulations of the internal affairs of unions under Landrum-Griffin (Labor-Management Reporting and Disclosure Act of 1959), the basic policy of the Federal Government since 1935 has been to encourage the formation of unions and to encourage the practice and procedure of collective bargaining.

It is significant, however, that at no point has it been possible to give any substantive meaning to this legislative goal of equality of bargaining power. Achievement of such a goal may have been a plausible rationale on which to predicate the constitutional validity of the legislation in question (i.e., the objective of removing hindrances to "commerce.") Most students of labor relations, however, would agree that the concept and goal of equality of bargaining power has no real operational significance on an aggregative basis. It has meaning only in terms of specific bargaining relationships between particular companies and particular unions. Even on the microeconomic level, it would be naive to try to arrive at any precise quantitative estimates of relative equality or inequality of bargaining power. This brings me to the second area of analysis, an appraisal of some familiar misconceptions of the nature and content of bargaining power in the labor relations field.

Misconceptions about Bargaining Power

Union not a monopolist. Economists writing about unionism and collective bargaining are partially to blame for the prevailing misunderstanding and misuse of the term bargaining power as it applies in the field of management union relations. Many economic theorists treat collective bargaining as a special case of bilateral monopoly in which the parties to the bargaining are concerned solely with wage determination. The union is treated as a single seller with complete control of the supply factor, the employer is regarded as sole buyer of this factor, and both are regarded as concerned only with the price of the factor.

It is unrealistic to treat a union, when it negotiates, as a monopolistic seller in control of the total existing supply of the commodity in question. The only union that fits such an image is a craft union with closed shop contracts covering the total employment of a particular kind of labor in a particular factor market where the union in question is also a closed union. A closed shop held by a closed union does approximate the picture of a monopolistic seller. However, the number of situations of this type is negligible today. Most craft unions, while they still seek closed shop contracts where legally permissible, have abandoned closed union policies of a discriminatory nature and no longer engage in the cruder methods of supply restriction, makework, or technically
unauthorized strikes. Cape Canaveral is, in my judgment, an exception and not the rule.

Industrial unions, whose membership is mainly semiskilled or unskilled, have no control over the supply of labor to the firm. Excepting some special situations such as longshoring, the industrial union has no control over hiring. The industrial union must seek to attain its job security objectives through seniority and union shop provisions, plus limiting the employer's right to discipline to cases where good and just cause can be proved.

To put the matter somewhat differently, the trade union is not a seller of labor in the way a business firm is the seller of a commodity. The trade union is an agency for the collective representation of particular groups of labor in particular situations. The union serves as the exclusive bargaining agent for employees in a defined unit of representation. Such a unit must be appropriate for bargaining purposes and one in which a majority of employees have signified their desire to have the union represent them.

The concern of the union. Another common misconception derives from the average economist's conviction that the trade union is concerned only with maximizing something purely economic. Some economists assume that the union is out to achieve the highest possible money wage rate with little or no regard for the effect on volume of employment opportunities. Others assume that the union has the studied objective of maximizing total income to the membership. Such thinking assumes that the union operates within the same economic framework as business firms, who are presumed eager to maximize profits. Such analysis oversimplifies. It ignores the fundamental fact that unions by their very nature are not concerned with cost-price-quantity relationships in the same way or to the same degree as is the employer.

The key to understanding trade union behavior lies in an appreciation of the proposition set forth some years ago by Arthur Ross of Berkeley that, "A trade union is a political agency operating in an economic environment." As a political institution with an elected leadership, the union is under constant pressure from its members to deliver tangible gains or to appear to deliver tangible gains. Unions today still operate with the same pragmatic, nonideological orientation and objective of Sam Gompers -- "more, more, more -- now."

Union leaders are thus constantly preoccupied with the essentially political question of what and how much needs to be "delivered" to the membership at each successive contract negotiation to maintain membership loyalty. The leadership must cope continuously with such questions as what is equitable, what is obtainable, and what is acceptable. These are intensely practical

questions whose answers may or may not be consistent with the so-called pure economics of the situation.

I do not say than union leadership does not generally have some fairly aggressive ideas on utilizing collective bargaining as a vehicle for maximizing membership welfare as seen by such leaders. I do say that analysis of union behavior based on an assumed effort at maximization in purely economic terms is likely to be partial and misleading in specific situations for two fundamental reasons:

1) Such an analysis ignores the fact that to achieve the most for the welfare of its members in particular situations the union may have to trade economic demands for noneconomic ones.
2) Or the union may have to insist on securing or maintaining an essentially noneconomic objective no matter what inducements might be offered to cause it to abandon such an objective.

An illustration of the first point is the union which in facing an economically hard-pressed company reduces or abandons its economic demands in favor of securing some improved contract language (from the union's standpoint), dealing with seniority, promotional policy, and similar matters. The reverse of this is the familiar story of the union leader who brags that every year he "sells the union shop for a nickel." That is, a strong union makes a noisy show of demanding a union shop contract for the coming year; then it withdraws the demand as the employer offers to "sweeten" his wage offer by 5 cents.

The second reason involves certain basic union objectives in bargaining that are essentially non-economic and nonmeasurable in nature and which are not substitutable. That is, they will not be traded under any circumstances no matter how attractive the economic inducement to abandon them. An example of this is an employer offering an extremely attractive wage increase in exchange for an abandonment of contract language requiring the observance of seniority as the primary factor governing layoffs, recalls and promotions. No union could or would consider making this kind of a trade regardless of the economic calculus involved. Nor would any industrial union trade off contract language requiring that no employee be disciplined except for good and just cause.

In short, the practical questions of what is equitable, what is obtainable, and what is acceptable in contemporary bargaining relate to both economic and noneconomic issues.

Most trade unions do not serve a homogeneous constituency. The typical industrial or multi-industrial union, for example, embraces a highly heterogeneous conglomerate of conflicting interest groups whose diverse pressures on the leadership need to be blended and rationalized prior to and during negotiations and during contract administration.
The typical heterogeneity multiplies as the scope of bargaining extends beyond a single plant or enterprise into multi-employer or industry-wide bargaining. As Professor Fletcher emphasizes in his paper, the more comprehensive the alliance, the greater the potential gain in bargaining power. However, this very source of strength is also a source of weakness in that such alliances can be formed only by bargains among those who are potential participants. The industrial union forcefully illustrates the validity of Professor Fletcher's proposition.

Bargaining gains and losses. A third misconception arises because of many academic discussions tend to place too much stress on the word "power" and not enough on the word "bargaining." Such usage tends to support the familiar dichotomy of gain versus loss or pleasure versus pain which appears to dominate many discussions of this subject. Such an emphasis on power is certainly justified when applied to instances of what has been termed "collective bludgeoning" rather than collective bargaining, i.e., when the inequality in bargaining power has been so extreme that it sanctioned take-it or-leave-it bargaining by the union in some situations and by the employer in others. I respectfully suggest, however, that such situations are not representative of union-management relationships. I also suggest that the emphasis on a gain to X necessitating a corresponding loss to Y is not necessarily accurate. My experience supports the proposition that a sound bargain is a mutually acceptable bargain, resulting in some gains to all parties to that bargain.

A so-called agreement that is in fact an imposed ultimatum by X on Y or Y on X is not a bargain. It is an edict. Most collective bargaining relationships, I submit, are not of this nature. On the contrary, the ultimate product of most negotiations is a written joint understanding that is mutually acceptable to the contracting parties and which contains advantages for each.

Bargaining Power in Labor Management Relations

I have elsewhere defined collective bargaining as a process in these words:

...the negotiation, administration, interpretation, application, and enforcement of written agreements between employers and unions representing their employees setting forth joint understandings as to policies and procedures governing wages, rates of pay, hours of work, and other conditions of employment.6

This definition underlines the fact that collective bargaining must be viewed as embracing much more than contract negotiation. It must be seen as a continuous, dynamic process concerned with the total relationship involving the employer, the union, and the employees represented by the union. It is axiomatic that administration of collective labor agreements is of greater importance to the success or failure of the particular union-management relationship than contract negotiation. The process of continuous, joint consideration and adjustment of problems arising under the contract constitutes in many cases the real heart of the collective bargaining relationship.

These adjustments are effected by the grievance and arbitration machinery provided for in the contract itself. Although many academicians neglect contract administration, it is of decisive importance. Yet, bargaining power considerations do not normally play a critical role in contract administration.

In fact, agreement by the two sides that arbitration shall be used as the last step in a grievance procedure means that they have jointly abandoned their relative bargaining strength as a means for reaching agreement. Under arbitration, authority is delegated by contract to an outside party to make a final and binding decision on unresolved disputes arising under the contract. When companies and unions provide in their contracts for grievance arbitration, they are saying: "We hereby jointly agree to give up the right to use economic forces as the ultimate arbiter of disputes arising under our contract; instead we choose to accept as final and binding upon us the decision of an arbitrator on the meaning of our contract and its application to specific, unresolved disputes that may arise between us."

A responsible arbitrator does not make his decisions in terms of his estimate of the relative bargaining power of the parties. The arbitrator derives his authority from the contract. He is responsible to the contract rather than to the parties as such; he makes his decision in terms of this contract and the record made before him at the arbitration hearing.7

7It is worth noting that approximately 90 percent of the more than 125,000 collective bargaining contracts now in effect in the United States provide for arbitration as the last step in the grievance procedure for finally resolving disputes arising under such contracts. The role of arbitration in contract administration is not well understood by many not immediately involved. For a more complete analysis see Harold W. Davey, "The Proper Uses of Arbitration," Vol. 9 Labor Law Journal (February, 1958), pp. 119-126. For an analytical treatment of arbitration in a particular management-union relationship, see Harold W. Davey, "The John Deere-UAW Permanent Arbitration System," in Jean T. McKelvey, editor, Critical Issues in Labor Arbitration (Washington: The Bureau of National Affairs, Inc., 1957), pp. 161-192.
We also need to understand the limitations of the Hicks analysis of bargaining power. This analysis deals solely with the wage variable at the negotiation phase in developing its concepts of employer concession curves and union resistance curves; it thus regards strikes and lockouts as the result of a divergence of estimates; i.e., the union overestimates the employer's capacity or willingness to concede, or the employer underestimates the union's capacity or willingness to resist. The Hicks analysis is perhaps the best and most closely reasoned of the many efforts by theoretical economists to analyze bargaining power in a labor relations framework. However, like many other analysts, Hicks in my judgment misses the fundamental point that the concept of bargaining power has utility only if it is viewed, as Neil Chamberlain aptly suggests, "as an effective force behind the whole collective bargaining relationship and the process of intergroup agreement..."9

Chamberlain makes the crucial point that bargaining power relates to the entire organized economic relationship between management and union. Bargaining power must be viewed from the point of view of all the conditions under which the cooperation of the economic partners takes place. It must be considered in terms of the costs of agreement relative to the cost of disagreement (using costs here in the broadest possible sense rather than in the purely economic or pecuniary sense). Bargaining power also must be regarded not only in relative terms, but as a dynamic, shifting phenomenon depending on the objectives sought. If it is to be meaningful, bargaining power analysis must consider the capacity of the parties to secure specific objectives. This point is well stated by Chamberlain in these words:10

The nature of the objective sought is determinative of bargaining power no less than is the bargaining skill or financial resources or membership strength of the organizations involved. The bargaining power of employer and union thus changes with the nature of the demands made. Their costs of agreement and disagreement are relative to specific objectives.

Whenever Company X and Union Y negotiate for a new contract, each is engaged in the process of evaluating the costs of disagreeing relative to the costs of agreeing. They are doing so in terms of their respective specific objectives. Such a cost balancing operation, however, is not entirely or even primarily pecuniary. Rather it is an effort to appraise relative advantage and disadvantage when viewing a range of issues, some of which lend themselves to quantitative appraisal and many of which clearly do not.

10 Ibid., p. 221
It is the very process of appraising nonmeasurable costs of agreement and disagreement that lends value and importance to the negotiation process. It is in that process that the company and the union jointly discover the feasible combinations that ultimately produce an agreement for the next contract period. If they do not discover such a combination, a strike or a lockout results. In this connection, one must remember that the basic function of a strike or a lockout is to produce agreement. Excluding the extreme case of one party seeking to smash or obliterate the other, the goal of economic force is the same as the goal of negotiations, i.e., the reaching of a mutually acceptable agreement on wages, rates of pay, hours of work, and other conditions of employment for a future period of time.

Put in the simplest possible terms, agreement between the parties occurs when the costs of agreement are equal to or less than the costs of disagreement. In the overwhemning majority of cases, this goal is reached short of economic force.

Summary

In summary, a realistic conception of bargaining power in management-union relations must, in my judgment, embrace the following considerations:

1. Estimates of actual bargaining power must be made in terms of company X and Union Y, not in terms of such generalizations as "unions are becoming too strong," etc.

2. Bargaining power must be regarded as taking into account the total situation—not only the striking or resistance capacities of the parties but also the entire range of economic, political, and social circumstances insofar as these may have a bearing on the costs of agreement or disagreement.

3. Bargaining power must be regarded as a shifting matter in which even in a fairly brief period of time, substantial changes may occur in relative positions, e.g., as a result of political pressures.

4. For agreement to be reached, terms must be negotiated that for all parties concerned represent a cost of agreement equal to or less than a cost of disagreement. Disagreement may persist where the parties find that the terms under discussion make it cheaper to disagree than to agree.

5. Bargaining power for any party may be increased by any variable or any proposal or any contemplated consequence that contributes to lowering the relative cost of agreement to that party or to raising to the other party the relative cost of disagreement.

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11 This summary closely parallels that of Neil Chamberlain, a perceptive recent writer on bargaining power. The reader should consult Chamberlain's Collective Bargaining, cited supra, pp. 213-238.