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## PERSPECTIVES

*Perspectives*

# Crisis Negotiations: How Labor and Management can Best Navigate Major Changes in the Midterm Contract Period

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The economic downturn and uncertainty about the future, made deeper by the horrible events of September 1I, have had a severe impact upon unionized industries such as the airlines and their more than 730,000 employees. Virtually all of the major airlines face catastrophic shrinkage in passengers and revenue. The airline industry has already furloughed about fifteen percent of its workforce. It has also reduced fares, frequency of service, and fleet size.

Some airlines are working together with their unions to make adjustments to meet the changed-and still changing-circumstances. Some have come up with creative responses and have been able to implement them quickly. Others are having a much more difficult time both communicating and finding accommodations that meet the needs of both employees and the carriers.

## Traditional Collective Bargaining Ineffective

Any labor management negotiation that occurs midterm in the contract period and concerns such major issues with such high stakes is unusual. The parties are used to negotiations for a new or amended agreement that takes place every three to five years at a set, amendable (expiration) date, in advance of which much planning, strategy, internal discussion, polling, and analysis is conducted. Emergency midterm negotiations, almost by definition, lack such a structured and deliberate process.

Pilots like to say that flying involves ninety-nine percent dull routine and one percent sheer terror-when something goes wrong. They are extensively trained for just that one percent of the time. Similarly, with major midterm contract negotiations, the parties' history and especially their relationship-their level of trust and understanding of each others' circumstances-strongly determine whether they will be able to successfully navigate such intrinsically difficult negotiations. The stakes are high. Successfully adapting to changed circumstances will make a carrier stronger and put it in a more competitive position. Again, depending on the relationship, a stronger carrier can mean increased pay and benefits for the employees. On the other hand failure to adapt can lead to disaster. Witness U.S. Airway;' recent bankruptcy filing.

What happens when, in the period between contract negotiations, problems arise that are unanticipated or not fully appreciated by the parties?

This article addresses dispute resolution during the term of a collective bargaining agreement and will look at how labor and management can best address such events during the contract term'. Specifically, it looks at the recent economic devastation of the airline industry and how labor and management have reacted. It also addresses how the par-

ties can improve their relationship during the contract term in the absence of a crisis. Specifically, it discusses how grievance arbitration procedures can be designed and implemented to most effectively resolve "day-to-day" disputes. It will conclude by suggesting ways to build good relationships in "normal" times, relationships essential to enabling the parties to expeditiously and constructively address issues in a crisis.

## Airline Economic Woes

After the terrorist attack on September 11, the airline industry, already reeling from the economic downturn, lost more than half its revenue, and went into a tailspin. On September 11, the Federal Aviation Administration (FAA) shut down all U.S. air space for two days and closed Washington's Reagan National Airport for more than three weeks. It took the industry nearly a week just to reposition aircraft and flight crews and to get up and running again. The FAA has also imposed strict security requirements.

Despite a twenty to forty percent reduction in schedules and major fare reductions, planes are flying half full or less. Most major airlines lose money on flights that are less than seventy percent full. But those statistics do not tell the whole story. Even if a plane is full, low ticket prices and infrequent service means the carriers are receiving far less revenue than previously. One analyst estimates that, in its current situation, United will lose money unless its planes are more than ninety-five percent full, a virtual impossibility. Nonetheless, their costs remain the same. At major airlines labor costs are thirty-five percent of total costs. Fuel prices and other aircraft costs are generally fixed costs. Thus, labor costs are vitally important "flexible" costs which can potentially change with the carriers' economic circumstances.

The airlines have furloughed about 116,000 employees. Ordinarily, furloughed unionized employees receive furlough pay ranging from one month to six months at full pay. However, most airlines could, and several did, invoke the *force majeure* clauses in their contracts. These provisions permit a carrier to bypass certain contract obligations if the cause of the inability to comply was out of the carrier's control, such as war, national emergency, or an act of God. Thus, the carriers argue that the events of September 11 would relieve them of having to provide furlough notice, furlough pay, and certain benefits. *Force majeure* clauses differ in specific language from contract to contract.

## Union Interests

Although the unions have been concerned with the survival of the airlines through this period, their primary interest is in protecting employees from the harsh impact of sudden dislocations and in maintaining hard won contract improvements, especially in the case of the more recent pilot (United and Delta) and mechanics (Northwest and American) contracts. The unions are challenging the carriers' invocation of *force majeure* arguing that there was no declaration of war by the U.S. Congress or that the emergency situation has ended. The unions could also question the extent to which airline problems were caused by September 11 as opposed to the declining economy or each airline's own competitive circumstances. Interestingly, the air carriers may be in an awkward position because their assertion *offorce majeure* could potentially undermine their taking the opposite position with their insurance carriers, contractors, or in other commercial relationships where the contracts have their own *force majeure* provisions.

## Legislative Support Defuses the Short Term Crisis

Meanwhile, Congress provided a fifteen billion dollar emergency infusion of funds to the airlines, (five billion in direct payments and ten billion through loan guarantees) none of which was provided to affected employees.

As a result of all of these factors, many carriers decided to provide all or part of the furlough pay and benefits contractually required despite their rights under the *force majeure* clauses, if only to keep faith with the government, the public, and their own employees and to avoid undermining their legal positions in commercial contexts.

Generally, however, because of the emergency situation, the carriers were hard pressed to provide the full contractual notice period for furloughs. The carriers were also challenged financially to provide full furlough pay. Therefore, several carriers offered to the unions a package of furlough benefits. The carriers must be careful, however, not to change benefits outside of negotiations as such changes could violate their statutory "status quo" obligations not to unilaterally alter the contract. Currently, there is a delicate dance occurring at many carriers where the carriers are not specifically invoking *force majeure,* nor are they applying the letter of the furlough provisions. Rather, they are attempting to work out an arrangement or obtain the acquiescence of their unions.

## Longer-Term Changes Require Labor Input

Although the carriers appeared to have had the upperhand in these early interactions, they are recognizing that they need the unions, especially pilots unions, to relieve them of some of the long-term adverse effects of revenue loss and disruption to normal operations. In particular, seniority-based furloughs mean that the newer pilots, who generally fly the smaller jet equipment and also usually sit in the right seat as First Officers, are the first to be furloughed. But, a scaling back of flight schedules does not necessarily mean that all the smaller equipment will be unused or less used. In fact, on some routes, it makes financial sense to use a smaller jet where fewer passengers are flying. Where a carrier substitutes a smaller aircraft for a larger aircraft, the furloughing of junior pilots means that more senior pilots flying larger equipment must be trained on the smaller equipment.

On the other hand, another carrier that flew, for example, six flights a day between New York and Miami, might reduce frequency to twice a day and use a larger aircraft to

seat more passengers. But, those larger planes are likely to have First Officers who are quite junior and may be subject to furlough. That means more senior captains, who were flying smaller equipment, would have to be trained to fly on the larger aircraft as First Officers. Such training takes a pilot out-of-service for about one month and may cost up to fifty thousand dollars. Thus, there may be a disconnect between seniority rights and the emergency requirements of the carrier.

Accordingly, discussions with the pilots' unions about modifying the adverse impact of furloughs, furlough pay, and seniority provisions could be a win-win for labor and management. This can be done in the context of discussions about early retirement, voluntary furloughs with benefits, a reduction in the amount of guaranteed flying hours, training freezes, aircraft "fences," and other approaches. New arrangements in a time of desperation could also benefit both sides as the survival and eventual size of the carrier will determine the ultimate fate of the furloughed employees as well as those who remain.

### Examples of Successful Efforts

At AirTran Airways and Frontier Airlines, labor and management have been able to work out arrangements to avoid furloughs entirely, at least for now. Frontier pilots agreed to an eleven percent pay cut. AirTran and its pilots agreed to a one and one-half month deal in which, in exchange for no furloughs, there could be a twenty-two percent reduction in overall pilot costs composed of a nine percent pay decrease, a reduction in the minimum monthly guarantee, and a suspension of the company contribution to the 401k. Southwest Airlines unilaterally introduced a voluntary program in an effort to avoid furloughs where an employee may give up one day of work along with pay. Southwest has yet to furlough an employee and was unique among the airlines in showing a third quarter profit. Sun Country, a startup airline, agreed to a one-year extension of their pilots' contract, effectively a pay freeze, but there was no "no-furlough" guarantee. At America West, two hundred and fifty furloughed flight attendants have been moved into government mandated gate security jobs. At Delta, an agreement was reached to allow pilots in training, who were displaced out of their positions, to receive a fifty-five hour monthly pay guarantee, in place of the contractual seventy-five hour guarantee.

This is where the ongoing relationship of the parties between contracts is so critical. The trust of the parties in each other can inure to the benefit of both sides in times of crisis because both sides have many common interests. Abuse of a position of power can cost both sides much in a crisis.

Building up trust between contracts may lead to constructive resolutions in a crisis. Perhaps the need for an instant decrease in costs, accomplished through furloughs, was seen as the only effective, expedient alternative under the circumstances. The sheer complexity of the issues and of union politics may have killed chances for quick agreements at the larger airlines. Also, if the federal government had not stepped in with a bailout, many carriers would probably have gone to their unions for concessions as an alternative. In the end, decisions that could be made quickly, were made, without, it appeared, much discussion of alternatives between labor and management.

The same need for trust and openness is present in non-crisis situations during the midterm period between contract negotiations. Often shifts in circumstances or competition need to be addressed by labor and management to give maximum opportunity to weather or to take advantage of such changes. But, if the current circumstances persist, those employees and unions that adapt will survive and flourish. Those that do not may find themselves in bankruptcy. On the other hand, if the industry turns the corner in the near term, the unions do not want to find themselves in the position of looking back on concessionary agreements made in a climate of false exigency. Unfortunately, the nature of a crisis is to be unpredictable and uncertain, so timing is everything, as it is in collective bargaining generally. Nonetheless, creative agreements may be fashioned which provide relief in bad times and recoup losses in good times and perhaps lessen the impact of furloughs. Win-win solutions are possible.

### The Need to Institutionalize Long-Term Change

Airlines are constantly changing entities. Contracts need to be adaptable to reflect the changes in the company, industry, or the workforce itself. The Railway Labor Act (RLA), which governs airline negotiations, originally contemplated that the parties would engage in negotiations to amend a contract anytime either side wished to amend the contract. One party simply served a notice on the other party, and they would sit down and negotiate. Later, the parties introduced "amendable dates" and, on the railroad side, "moratorium" clauses, to avoid what developed into the turmoil of constant negotiations. Amendable dates tended to stop the revisiting of issues during the contract period but negotiations have become so complicated and protracted as to make interim deal-making often an elusive goal.

But, as we have seen, changes in circumstances sometimes require modifications in contract terms. An effective labor-management committee is one way the parties can deal with changing circumstances without the disruption of constant negotiations. Such committees can be effective if composed of representatives of good will, who appreciate the interests of each side, understand their constituencies, and have the confidence to take action. By working actively together, they may be prepared to deal effectively with crisis situations.

Grievance arbitration is an area in which labor and management have common interests. Those common interests are in peaceful resolution of disputes, applying the parties' intentions as set out in the collective bargaining agreement, and consistent application of the contract from situation to situation. Thus, grievance arbitration is more of a procedural than a substantive area. An area in which labor and management can work together to design the best process.

Most importantly, the parties to grievance arbitration must adhere to the principle that contract implementation is not the same as contract creation.

Those who wish to contort the parties' contract, to "renegotiate" the contract through filing grievances and arbitrating, do not enhance the parties' relationship. The reason for this is that when the parties negotiate an agreement, which process is usually difficult and long, they expect it to be respected. Because contract language is the result of compromise and a single paragraph may be the result of numerous authors contributing words and subclauses, a contract may be tougher than the Rosetta Stone to interpret and apply. If its meaning is distorted by the parties or the arbitrator, there will be little faith in the negotiation process and it will be even more difficult to get an agreement in the next round of negotiations. The parties will spend even more time at it and add more language, concepts, and compromises in an attempt to anticipate every potential application of the provision. Unless the parties are in full harmony, even their efforts to simplify language often end up with even more complicated language.

Unions will sometimes throw a weak, self-serving interpretation of the contract at the wall in the form of a grievance, and hope it sticks. There may sometimes be political reasons to do this on behalf of the union leadership or an individual pushing the grievance, but such grievances do not foster a trusting relationship between the parties during subsequent negotiations, or during the period of contract administration.

Management is also occasionally willing to contort the co.ntract. Of course, management usually does not bring gnevances, but they may distort the meaning of the contract in two ways. First, when management runs into an operatIOnal problem and there is a contractual obstacle, the contract sometimes loses and operational expediency wins. This is especially so when management is under financial or operational pressure. Management should avoid strained contract interpretations--especially if they are not in accord with the general intent of the parties. The cost of such a misapplication may be great if the case goes to arbitration. In addition, it damages the trust factor.

Second, in response to a grievance, management sometimes comes up with convoluted interpretations in justifying their actions. Just because a grievance is filed, management need not have knee-jerk defensive reactions. Grievances may be sustained with no loss of face. Unjustified denials of grievances do not encourage trust by the union groups.

Why is trust so important? Because, if the parties do not want negotiations, which last an average of six months to two or three years already, to last even longer, they should not undermine their relationship during the period between contracts. In fact, the parties should be actively and affirmatively working on their relationship during this time penod. Resentments that build up midterm may become open warfare during contract negotiations.

## The Three Phases of a Collective Bargaining Agreement

Conversely, a good inter-contract relationship tends to produce speedier, more open, more streamlined negotiations and more positive perceptions. A good example is the joint Railroad/Operating Craft Unions Wage and Rules Panel which met for several years between contracts to address the basis for pay for operating employees. The United Transportation Union (UTU), the fargest operating craft union, reached an agreement with the carriers reflecting that work. However, the turmoil between the operating crafts (United Transportation Union and Brotherhood Locomotive Engineers), alternating merger and war has left that agreement in limbo.

Thus, it is critical for the parties to work on their relationship between negotiations. How can the parties do this? Let's divide the period between contract negotiations into three phases.

In the beginning period, just after a contract has been reached, there are numerous issues that arise calling for the interpretation or application of the new contract. For the first time, people outside of the negotiations are seeing and having to live by the new language. The negotiators should educate them as to what it means. While I was representing management, some of my clients in the airline industry Jointly created a forum in which members of both the union and management negotiating committees jointly discuss the new contract with, for instance, crew scheduling, while they are both still in agreement about what was agreed to. Making that initial bridge between negotiations and implementation and making sure the implementers understand what the negotiators agreed to, is essential to avoid unnecessary disputes in the future. The parties should capitalize on that handshake when they reach an agreement to launch a construction relationship.

## Labor-Management Committees

Another approach for this key bridge period is for the parties to agree to a honeymoon period during which no contract grievances will be filed. During this initial adjustment period, the parties recognize mistakes may be made, but that they can be remedied quickly. However, at this early stage, there must be a mechanism for addressing contract application issues. Midwest Express Airlines and ALPA set up a Joint Implementation and Review Committee (JIRC) after reaching an agreement. It was created for a six-month period, and served to resolve disputes and to inform those who were not directly involved in negotiations about what the parties had agreed to. Participants included the same people who negotiated the agreement, plus some others who would be responsible for the administration of the contract during its term.

The second phase between negotiations, the mid-contract period, is when the parties can lapse into bad habits-unions throwing around grievances and management

ignoring contract provIsIons. To avoid a breakdown, constructive relationships between the key representatives of each side are essential. But, sometimes personality chemistry is absent or the pressures to push the limits of the contract on both sides are great. Thus, it may be worthwhile for the parties to consider institutionalizing a permanent joint working group-a kind of pre-grievance sitting board, a joint labor-management committee, or a continuation of the Joint Implementation Committee. What is important is that the entity be authorized to hear issues and try to resolve them informally before they become highly-charged grievances. This entity may even discuss some broader issues than grievances.

A labor management committee can also be very useful in the third phase of the midterm period, at the end of the contract period and just before negotiations begin again. Much like a magistrate who sets a discovery schedule for the parties before major litigation, a joint labor management committee can organize subcommittees or create task forces to deal with complex issues much earlier in negotiations than the usual full negotiating committee approach. Too many negotiating sessions and caucuses waste time with ten to fifteen people formally dissecting complex issues they know little or nothing about. Speeches and posturing abound.

## Grievance Mediation

Finally, a good mechanism for resolving disputes between contracts is grievance mediation. Mediation is really just facilitated negotiations. A good mediator may help the parties resolve their disputes without the formality and contentiousness of arbitration. He or she may help the parties address issues underlying the grievance itself and thus resolve multiple grievances or sources of chronic friction. Also, the parties are able to fashion creative solutions that usually do not come from traditional arbitral remedial orders.

Grievance mediation may be used in both situations: resolving grievances and resolving issues resulting from significantly changed circumstances not contemplated by the parties in negotiations. Through grievance mediation, the parties learn how to play well together-how to communicate well and work together toward an acceptable resolution. Learning this helps when it comes time for full negotiations.

There are many examples of airlines and unions which have negotiated grievance mediation programs in the past few years, including Hawaiian Airlines/ALPA, America West Airlines/ALPA, American Airlines/APFA, United Airlines/ALPA and AFA, Northwest Airlines/ALPA, DHL Airways/ALPA, Midway Airlines/ALPA, and Atlantic Southeast Airlines/AFA.

Labor and management should not be afraid to get help before they may really need it. A mediator's business is dispute resolution. He or she can facilitate and train the parties to resolve day-to-day issues which will produce enormous rewards by avoiding arbitration, litigation, loss of trust, and bitterness. He or she can put a fouled-up relationship back on track. If the mediator becomes familiar with and is trusted by the parties, he or she can act like a magistrate in helping the parties set the best schedule and environment for negotiations.

Many large unionized industries such as steel, auto, and aluminum, used to have a permanent referee or umpire who got to know the parties intimately and was available to informally resolve work place disputes. While these roles are a thing of the past, many companies and other institutions, including government agencies, are adopting internal ombudsman programs, which perform similar functions but usually for non-contractual disputes. These institutions recognize the value of consistent attention to issues in the workplace.

Contract negotiations have become so complex, contentious, and endless because so many day-to-day disputes are either swept under the rug or fought over but unsatisfactorily resolved in the view of one or both parties. If effective dispute resolution processes can be employed between contract negotiations, the enormous list of small "g" grievances and capital "G" grievances, which eventually become contract proposals, can be significantly reduced and attention can be paid sooner to the larger issues of pay and benefits.

Major airline contracts are often more than five hundred pages of tiny type, convoluted beyond reason after fifty years of the amendment process. Only a select group of high priests knew or remember the contract's meaning. They are regularly brought out of retirement to orate at arbitrations on their intentions. Then the arbitrator gets dizzy for three days writing an incomprehensible decision. Then one side or the other is so aggravated at the result that it becomes an issue in negotiations, even though it may have affected only one employee once in the preceding five years.

Such convoluted activity is no way to run a business or a union. Crisis prevention is an everyday effort. Keeping good relationships and using the tools available for conflict resolution between negotiations is essential to developing a mutually beneficial relationship during the contract term and limiting the fallout from a crisis. 0