IMPASSE APPROACHES IN LABOR MEDIATION: DO THEY WORK IN EMPLOYMENT MEDIATION?
by

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DISTINCTIONS BETWEEN LABOR & EMPLOYMENT MEDIATION

Prior to discussing approaches to working through impasse in labor mediation and employment mediation, some reminders of the distinctions between the two contexts are worth noting. Because every case is different it is not possible to say that the following discussion applies to every labor dispute or to every employment dispute. What follows are generalities that mediators and advocates should consider and evaluate as they proceed into any negotiation or mediation process. Additionally while the following discussion may not be exhaustive, these factors are some of the most significant.

Ongoing Relationship

Labor Context: The parties have likely worked together for a significant period of time and will likely continue to do so. As a result there are interpersonal connections that bear on the resolution of any labor dispute. In addition long term economic cycles frequently impact negotiations so that while in any particular round of negotiations one party might “have an advantage”, if that party takes too much advantage of their leverage, at some point the tables will turn and they will be on the “receiving” end of similar treatment. As a result “balanced” settlements to the extent possible are in the best interest of the parties’ long term relationship.

Employment Context: The parties to an employment dispute may or may not have had a long-term ongoing relationship. Interpersonal factors will play a different role depending upon the tenure and quality of the employment relationship. Likewise they may or may not have a future relationship. Certainly dynamics will differ depending on the nature of the employment claim, and whether the parties are “parting company” or will be continuing their employment relationship.

Duty to Bargain in Good Faith

Labor Context: The legal requirement to bargain in good faith as stated in applicable labor laws and supporting case law actually guides the parties in their approach to the act of negotiating, and likewise carries over to the mediation process. At all times the parties are required to be “evincing an intent to reach agreement”.

Employment Context: No legal standard on how to negotiate exists in this context.
Political Considerations

**Labor Context:** On the labor side, those representing the union in the labor dispute are most likely elected (or appointed by someone who is elected) and therefore constituent concerns (beyond ratification of the settlement) are likely to play a role. In the public sector, the same direct political forces may play a role on the management side where public figures have run on a particular platform that relates to union negotiations (e.g. members of city or county councils or boards of education). In both the private and public sector less “directly political” community support can also impact the parties as they assess proposals and strategies. Finally the political aspects of collective bargaining may require a certain amount of “theatre” in order to satisfy constituents that the settlement should be ratified.

**Employment Context:** Truly political considerations generally play little if any role in employment mediation with a private sector employer. These disputes are much less likely to garner public attention simply because the dispute most likely involves a single person.

Political issues that do exist may include “internal” concerns in the organization regarding perceived fairness, rewarding bad behavior, and the slippery slope of agreeing to financial payments for “groundless claims”, among others. Sometimes there can be more danger in terms of organizational politics for a manager to agree to a settlement than to risk a costly defeat in court. On the other hand, some corporations will go to great lengths to settle a case rather than risk a costly and public defeat in court.

Where the employer is a municipal entity, politics can become a serious obstacle to settlement. Municipal legislative entities must vote on proposed settlement agreements at open meetings. Because these proposed settlements often attract the attention of the local media and can be politically unpopular, there is a risk for settlement agreements reached at mediation to be voted down.

Team Size

**Labor Context:** Teams may vary in size from 1 or 2 to 20+ or even more. A very small team size can result in a skewed view of what is critical to a settlement. A very large team most likely contains numerous factions making it extremely difficult to focus the negotiations. Within a large team there is also a greater likelihood of divergence between the interests of particular individuals and what is perceived as the overall greater good of the union membership. In addition these team size considerations may feed back into the political considerations where individuals may not want to take ownership of unpopular or concessionary elements necessary to reach settlement.

**Employment Context:** Generally teams are small and while the issues may be difficult, the challenge of reaching consensus among many diverging perspectives is not as pronounced. Sometimes, though, employers will appear at mediation without having a person with full authority to settle on the team. Instead, the lead negotiator for the employer will have been authorized only up to a certain amount. When the employer’s
team realizes that the authorized amount is too small, they find themselves calling company officials to ask for more authorization. This presents an obstacle to settlement because the decision-maker has not been participating in the mediation process, and may be less inclined to grant additional authorization. Additionally, if the decision-maker is unreachable, the mediation must go on hiatus.

**BATNA (Best Alternative to a Negotiated Agreement)**

*Labor Context:* Generally there is no BATNA better than a mutually agreed upon tentative agreement reached at the negotiating table. If no settlement is reached in the bargaining process, there is no court or agency that will determine the terms of the parties’ new agreement. While strikes, lockouts and fact-finding may serve to strengthen parties’ leverage at the table, none of these gives the parties a new contract.

Exceptions to this include public safety forces that may have access to binding arbitration, and the rare parties that mutually agree to interest arbitration. With respect to grievance mediation, most collective bargaining agreements also provide for binding arbitration, thus potentially leaving one party with a BATNA they perceive as better than a settlement under consideration.

*Employment Context:* Parties to an employment dispute do have alternatives to settlement. Because the claims underlying the dispute have either a statutory or contractual basis, enforcement through an agency or court is a real option. In determining whether the settlement under consideration is preferable to a BATNA, the parties weigh the strength and nature of the claim, witness credibility, the timeline for achieving a ruling, the scope of a potential ruling in his/her favor, the tangible and intangible costs of pursuing the claim compared to the resources of the party, the nature of possible publicity regarding the claim, and any other factors unique to the claim.

An attorney’s lack of preparation with his or her client regarding realistic outcomes prior to the mediation can result in the client having an unrealistic idea of his or her BATNA. Some attorneys rely on the mediator to help educate the client that the BATNA might not be as advantageous as the client believes.

In any given mediation then, the previously discussed factors may bear on the choice of and effectiveness of various approaches for working through impasse.

**TEN HIGHLY EFFECTIVE IMPASSE TECHNIQUES**

Before discussing specific approaches, a reminder is in order that impasse should be viewed as a normal part of a negotiation or mediation process and not something to be feared. Parties should be “educated” that this is so. A mediator’s calm demeanor in the face of impasse, along with his/her usual approaches of conveying optimism, sense of humor, realism, competence, credibility, trustworthiness, and perseverance, allows the parties to remain calm, and continue working toward resolution. That being said, what
follows are ten “favorites”, meaning generally very effective approaches, to help parties break through and reach a settlement.

1. **Mutual Withdrawals of Unrealistic Proposals**

   Suggesting that parties develop packages of mutual withdrawals of unrealistic proposals can be a comfortable way to start working out of impasse. Because the parties recognize that the proposals are not attainable, pulling them off the table feels safe—no damage is being done to their higher priority proposals. This can promote a sense of reciprocity in the negotiations and start building momentum to work on more difficult issues. The next step is frequently either to work on issues on which they are “close” or a “lynch pin” issue upon which resolution of the remaining issues is dependent.

2. **Simultaneous Multiple Offers of Roughly Equal Value**

   This approach is effective because it requires the party making the multiple offers to be flexible and explore alternatives to reaching settlement—it promotes greater open-mindedness. At the same time it conveys to the other party flexibility, a desire to get a deal, and a genuine attempt to meet their needs. Finally when faced with multiple offers, the party receiving the offers is forced to prioritize issues (in essence, a mini “decision tree”), and actually make a choice.

3. **Supposals & Related “Lay it on the Mediator” Concepts**

   “Supposals,” “mediated settlement packages,” “mediated offers,” “mediator’s proposals” and any number of similarly titled concepts allow the parties to explore the real zone of settlement, save face, and perhaps safeguard their legal positions in the event settlement is not reached in the short term. In labor negotiations, they may be particularly helpful with ratification and concerns for any related political fallout.

4. **Face-to-Face Discussions with “Side Bar” Rules**

   These discussions allow parties to explore the zone of settlement “off the record” and capitalize on the strength of positive interpersonal relationships that may exist within the employment relationship. The approach asks that one to three people from each party participate. The “Side Bar” rules include: a) the talks are exploratory; b) if what is explored is not delivered it will not be considered a renge by either party; and c) they must be in agreement on the issue of confidentiality of the discussion in the “side bar” (e.g. general report back to teams but no further, only general concepts will be shared with teams, etc.). Occasionally this has worked with entire teams going “off the record”. This approach often results in the transformation of a potential “final offer” into an actual tentative agreement. A further variation of this is to suggest that the parties engage in a problem-solving or brainstorming session on an issue.

5. **Problem-solving or Brainstorming**
In either a subcommittee or with entire teams, parties can move into a problem-solving or brainstorming mode wherein all members are permitted to share interests and options, ask questions and generally express concerns. The mediator most likely will be facilitating this dialogue and flip charting as the parties work through the issue. This can be an “off the record” process or a “let’s just see what we come up with” process, which frequently leads to hard proposals. The benefits of the approach include greater buy-in, greater creativity, better outcomes, and consensus. It works because individuals are focused, figuratively “side by side” working on a problem, instead of working against each other.

6. Drilling into the Financials and Costing Out the Package

Asking both parties to share information on the financial aspects of the package and to cost out the package under consideration takes them out of the emotional reactionary mode and into a more rational, analytical mode. Working with the numbers actually triggers new ideas, helps both parties see the strengths and weaknesses of their proposals, and can help the parties “find” money. Walking through the calculations as necessary can provide the mediator with the opportunity to find flaws in their analysis (like not considering “compounding” of wage increases in the labor context) and to share different perspectives on the value of the offer.

7. Flip Charting Comprehensive Economic Packages

When parties have reached conceptual agreement on most of the components of an economic settlement and are apart on only a few issues, especially small issues, it can be extremely helpful to flipchart the two packages side by side. This visual helps create a sense of accomplishment in how far they have come, and a sense of perspective so that they can make moves on the remaining minor items in order to settle.

8. “You’re too close not to settle!” Speech

This observation by the mediator may be appropriate after a very protracted and exhausting negotiation where parties have come a long way, and just seem to have run out of gas, and need some encouragement and energy. This speech will likely include some sort of question like “what else can we do to close this gap?” or “what are we missing?”

9. Reframing “Success”

Parties frequently have unrealistic expectations of what exactly is a successful outcome. Reframing “success” away from “getting everything we want” is critical. Reframing “success” as **getting the best that can be gotten from the other party, considering the hurdles that were faced** is key in almost every negotiation.

10. Mediator, not Miracle Worker
As a last resort, the parties may need a strong reminder that this is their negotiation, and that in order to be effective a mediator must have something to work with! The mediator can indicate that without some sign of flexibility or a willingness to try any of the above techniques (or anything else the mediator can think of) the timing may just not be right. The mediator can come back when there is a better likelihood of progress. The potential withdrawal of the mediator can result in a sudden willingness to share areas of potential movement or to make a counterproposal.

As in all areas of mediation there is no right way or one way to mediate. Every mediator develops his/her own approaches consistent with his/her personality and style. The intent of this discussion has been to share some approaches that work in the labor context and to promote dialogue regarding their utility in employment mediation. Dialoguing across the labor and employment sectors allows both mediators and advocates to take their practice to a higher level and provide improved conflict resolution opportunities for the parties in these economically-stressed times. Quality mediation in labor and employment is now more important than ever.