Chapter 7: DRAFTING THE AGREEMENT

How to deal with the intricacies of Collective Bargaining:

In the previous chapters we have discussed the theoretical frame work of collective bargaining. Now we shall deal with how to deal with the practical issues and operation of Collective Bargaining.

(A) After completion of negotiations between the parties, the next step in the process is drafting of an agreement. More often than not, drafting of the agreement presents many problems. The importance of drafting of agreement cannot be underestimated as it involves integrating by means of written words the agreement that has been reached during the course of negotiations. The negotiations can be frustrated by perfunctory drafting of the agreement either by not expressing the intent and understanding of the parties or by omissions, which may give rise to disputes and litigation. Regardless of which party drafts the agreement, the problem remains the same. It is, therefore, desirable that after conclusion of the negotiation, the task of drafting the agreement is done mutually so that any possible legal pitfalls may be avoided.

(B) ***Awareness of common grievances in agreement****:* experience has proved that a collective bargaining agreement cannot be constructed in such a precise language as to obviate the possibility of more than one interpretation of many of its provisions. Moreover, there are many problems that arise or changes occur which cannot be anticipated or adequately covered in a written agreement. Thus, the causes for grievances arise out of dynamic nature of industrial life, misunderstandings, alleged violation of

agreement terms, clash of personalities and circumstances that surround the intricate working of employer- employee relationship.

The grievances that arise vis- a- vis the collective bargaining agreement can be broadly classified under two heads:

(a) Those arising under the agreement

(1) Over interpretation

(2) Over conflict between clauses

(3) Over application to specific cases.

(b) Those arising outside the agreement

(1) Because the agreement is silent on the issue

(2) Because the issue is too unusual to be covered by an agreement

(3) Because of defective supervision and agreement administration.

(c) General principles of drafting the agreement

While drafting of the agreement, the following general principles are to be kept in mind:

(1) The agreements opening clause defines the formal relationship between the company and the trade unions.

(2) Having negotiated a formal agreement, the first clause comprises a 'statement of intent' from both parties. The company recognizes the right of the trade unions to represent its employees and negotiate on their behalf, while the union in turn acknowledges certain rights to the company, to be exercised by its management.

(3) It is usual for some form of general statement to be made which formally stresses the interdependence and the common interest which exists between the parties. Such clauses outline that the parties

have some common long term objectives, the most important being to ensure the continuing efficiency and prosperity of the company for the benefit of the employees, shareholders and customers. Such clauses might read: the parties to this agreement attach the greatest importance to the need for mutual co-operation in brining about improvements in efficiency in order to ensure the future prosperity of 'the company's factories and its employees therein'.

(4) *Status quo* – provisions anticipate changes which must continually affect an organization, whether they arise directly from management action, financial necessity or government intervention. Although management is generally responsible for the ultimate policy-making decisions, it is recognized that unilateral decisions are more likely to induce conflict, while consultation and meaningful discussions with employees may reduce the risk of disruption and ease the implementation of change.

Many procedure agreements include a statement that existing arrangements (status quo), which regulate the relationship between management and unions, will continue until a new agreement is reached.

(5) The provisions embodied in the agreement should be clear and definite and should explicitly cover the subject matter in accordance with the intent of the agreement. In other words, there should be no vagueness or ambiguity – latent or patent – in the wordings of the agreement.

(6) The language of the agreement should be simple and comprehensible by the workmen covered by it. Verbosity and artistry in language should be avoided.

(7) The various provisions contained in the agreement should be so constructed as to cover clearly the complete intentions of the parties so that the third party should be able to comprehend their meaning without any difficulty.

(8) irrespective of whether the agreement is drafted by the management or the union, it is necessary that the draft agreement and, in particular, the language of all the clauses proposed to be incorporated therein should be clear from legal ambiguity before it is finalized for signature by the parties.

(d)Duration of the agreement

The term or duration forms an important provision of the collective agreement. The agreement may also specify the means of its renewal. Whether provided in specific terms or not, it remains applicable until it is replaced by the new modified terms.

There is no hard and fast rule regarding duration of the collective agreement. It may vary from one year to five years. Usually, a term of four years is considered to be neither too long nor too short.

(e) Relationships of the clauses of the agreement

In considering the meaning to be given to the various provisions of the collective bargaining agreement, it must be remembered that each provision is a definite part of the whole pattern of the employer – employee relationship thereby established. The meaning of each provision may be colored or affected by other provisions of the agreement and no clause thereof can be considered as standing alone.

IMPLEMENTATION AND ADMINISTRATION OF THE AGREEMENTS

Methods of implementation

In some countries the implementation and supervision of collective agreements depend on the good faith of the parties, and their provisions cannot be enforced by action at law. This is the position , for example in the United Kingdom, where it is assumed that the working condition agreed upon collectively by the employers and trade

unions will be observed by the individual employees and the workers, who will conclude individual contracts in accordance with the terms of the process. It should be remembered that when a trade union and an employer's organization agree, for example, that a certain wage shall be paid for a certain job, neither the unions nor the employer's organization is actually employing workers on that job. The actual contract of employment is concluded between individual employers and individual workers. Under the British system, there is usually no legal impediment to their concluding contracts providing for lower standards of remuneration than those fixed in the collective bargaining; an action cannot be considered by the courts merely because its terms are less favorable than the terms of such an agreement. Only if the individual contract is violated can it be enforced by the legal process. The essential remedy for failure to observe the terms of a collective agreement by an employer belonging to an organization which is a party to the agreement is pressure by this organization and trade union concerned. In the last resort the union could use its economic power by calling a strike at the plant to secure enforcement.

In a great many other countries where the effects of collective agreements are regulated by special legislation, the provisions of collective agreements are automatically applicable to the employment relationships of all individuals covered by them. In these cases observance of a collective agreement may therefore be secured through action for damages in the courts wherever there has been a breach of the contract. Such actions can be brought either by an organization in the event of violation by another organization which is a party to the agreement, or by one of its members, to secure damages either for itself or for a member. Where this system exist the law often prohibits, during the validity of an agreement, strikes or lockouts intended either to enforce or to modify its terms.

Interpretation of agreements

Once collective bargaining has resulted in an agreement, the provisions of the latter are regarded as part of each contract of employment, whether written or implied, between an employer who is a party to the agreement and each worker in his employ in the occupations represented by the trade union or unions.

Many agreements contain clauses specifying the procedure to be adopted if disputes arise over the interpretation. These may provide that the dispute shall be submitted to a joint meeting of the representatives of the parties. Often, too, there are clauses providing that there shall be no strike or lock out over the question of interpretation until the procedure established for reaching agreement on interpretation has been followed without success. In other countries disputes over the interpretation of the collective agreements are settled by special labor courts. Such disputes are as a rule more easily settled than those which occur in the negotiations of new agreements, when much more important issues are at stake; and they are of a different character.

Administration of the agreement

In the administration of the agreement, both parties, viz, the management and the union, have to play their respective roles. It would be a mistake to assume that the sole responsibility of the agreement administration rests with the employer. There can be denial of the fact, however, that agreement administration requires a major and more active role on the part of the management than on the part of the union.

The agreement embodies a number of issues which are of complex nature. Such complex issues cannot be left for self administration. Experience has shown that during negotiations many problems escape

attention of the parties inadvertently; the reason being that collective bargaining cannot be as perfect as mathematical calculations. Moreover, many novel situations arise or develop which could not possibly have been conceived at the time of entering into the agreement. These problems within the framework of the agreement and without letting its balance tilt too much in favor of either party. This is definitely not an easy task.

With a view to making administration of the agreement smooth and easy, it should be the duties of both the parties to educate the line managers and the rank and file of workers on the meaning and interpretation of each clause of the agreement. There is a need for extensive and effective communication in this behalf. Various methods such as, house – magazines, bulletins, meetings and conferences are considered to be important media to interpret the agreement. Since detailed commentaries are usually avoided in the text of the agreement, the administration thereof is the proper time when detailed commentaries tend to serve a useful purpose. Proper care need, however, be exercised to ensure that no conflict arises while giving interpretations and making commentaries on agreement clauses by the parties concerned.

As already stated elsewhere, the process of negotiations does not end with the fruition of the agreement but is continued thereafter. The administration of negotiated agreement is a vital link in the chain of this process. A number of day to day problems crop up which have no direct bearing on the agreement. Such problems may require even longer time to negotiate than did the collective bargaining agreement itself. Generally speaking, the management is not inclined to enter into negotiations on these problems. The employer considers that conclusion of the agreement is the be-all-and-end-all of labor problems during its tenure. This attitude is not correct in the situation of collective bargaining. It must be borne in mind that the agreement is negotiated with the basic

objective of providing satisfactory cooperation of both the parties as a continuous process at all stages of negotiations and the same objective should pervade the administration of the agreement.

The handling of grievances is a part of agreement administration. The administration of the agreement enjoins upon the parties that the grievances are handled promptly and satisfactorily so that these are not allowed to accumulate and later emerge in the shape of a major dispute. If the grievances defy satisfactory solution or settlement the deficiency lies in the agreement administration rather than in the agreement itself. Except minor grievances of transitory character, it is necessary to put all grievances on record so that their examination is conducted in a proper and systematic manner. Such recording also helps in the preparation of further negotiations between the parties.

Due t dynamic character of labor management relationship, occasions may arise necessitating adjustments and modifications in the agreement by mutual consent. While such actions form an integral part of agreement administration, the authorities on the subject have strongly advocated that such adjustments and modifications should not be effected without prior consultation with shop stewards and line managers in whose area the problem originated. Their participation is deemed absolutely necessary as they are not only directly involved but also have to carry out the compromises to workable implementation. Any attempt to ignore this important link is fraught with difficulties, is tantamount t give rise to avoidable resentment and violates an important principle of agreement administration.

COLLECTIVE BARGAINING CONTRACT ADMINISTRATION – GRIEVANCE MACHINERY

Collective bargaining introduced a process of joint determination of the rules under which the employer – employee relationship would be governed. At the same time it is to be borne in mind that an operative

type of industrial democracy between employers and employees depends not only upon jointly determined rules governing the relationship, but equally so upon a process by which differences over the interpretation of the terms may be jointly settled. Without the right to grieve, the concept of industrial democracy would have been only partially realized. The grievance machinery under a collective bargaining agreement" is at the heart of the system of industrial self government".

As such negotiating the terms of the collective bargaining agreement establishes a constitution to guide the parties in their joint relations in the work place but, is not enough to fully establish industrial democracy. To be really meaningful, the terms needed to be supplemented with a mechanism by which questions or problems arising in the day to day application of labor agreement may be jointly and peacefully resolved.

After a labor agreement has been negotiated and the parties have signified their commitment to its provisions for a specified contract period of one, two, three, or more years, the process of giving meaning to the agreement begins. Management and the bargaining – unit representative continue, in effect, to bargain collectively on a day-to-day basis for the length of the contract period. Such bargaining does not involve negotiation of new terms or a new labor agreement, nor it is directed – although by agreement of the parties it can be – at altering the terms already negotiated in the contract. The administration of the agreement on a day-to-day is an interpretative process whereby the labor contract is applied, given meaning, and in effect transformed into a 'living organism'. The grievance procedure is the formal mechanism through which this transition is effected.

The grievance procedure provides management and the union with an institutional mechanism by which to dispose of complaints and charges of contract violation in an orderly and equitable manner. It provides a peaceful means of resolving misunderstandings, permits enforcement of

the contract, and minimizes the use of strikes and lock outs. Grievance procedure is crucial in vitalizing the agreement through the daily process of contract administration.

Last step of formal grievance procedure is *grievance arbitration.* This involves a third party and is a judicial rather than a legislative step. Grievance arbitration is a part of the contract administration process. Grievance arbitration is a final appeal step in the grievance procedure through the voluntary agreement of the parties. This voluntary agreement becomes a part of the language of the negotiated agreement and therefore a contractual obligation of the parties for the term of the agreement. This use is in contrast to compulsory arbitration, which is imposed upon the parties rather than resulting from their voluntary agreement.

The use of a quasi- judicial process such as grievance arbitration indicates recognition by the parties that more is to be gained by a judicial solution to problems of contract interpretation than by resorting to such overt actions as lock outs and strikes. In adopting grievance- arbitration clause in their contracts, the parties are agreeing under the

Contract this process will be followed in lieu of the right to lock –out or to strike.

Check points for effective grievance handling

As with negotiations, the variety of situations that arises in the handling of grievances precludes a formal approach. Each grievance, while similar in some aspects to others grievances, also has its own peculiar characteristics, either as to the details of the problem giving rise to it or as to the personalities involved in it. As a substitute for formulas for effective grievance handling, below is given a list of what might be called grievance procedure guidelines. This list is a composite of the sound kinds of do's and don'ts that are found essential to successful grievance handling.

For management

- Establish clear-cut policies, understood by all supervisors and employees.
- Authority to handle grievances should be given to the supervisor, and the limits of such authority made clear.
- A responsible management representative should provide time for the grievant to tell his/her full story in private and without interruption. Give him/her your full attention. End on a friendly note.
- Show your concern for the grievant problem by following through promptly on an action required by a settlement.
- No grievances should be considered too trivial for your attention.

For the union

- Exercise a firm but fair hand in screening grievances for appeal. A poor grievance results in a lost grievance, a dissatisfied union member, and a loss of valuable time.
- Take care to distinguish between gripes and grievances.
- Don't let grievances become political issues or let union politics influence your work.

For both parties

- Be sure information on the grievances is complete and accurate.

- Know your labor agreement; check it often. Remember that it may take on a different meaning when applied to different grievance situations.
- Settlement at the lowest step in the grievance procedure pays off in time, expense and emotions.
- Keep the grievant fully informed of the course of a grievance.
- Control your emotions
- Delay can be costly as well as disruptive. Process grievances with promptness and dispatch.
- Facts! Facts! Facts! Do not base your case on hearsay. Do not allow verbal statements and hearsay testimony to substitute for written proof and first hand testimony.
- Accept settlement graciously. Tomorrow you must go back to living with each other.
- Keep adequate written records to ensure consistency and effectiveness.
- Saving face is important to the grievant, the employer and the union. It can mean the difference between an amicable and a hostile settlement.
- Always use recognized channels
- Remember the grievance procedure is intended to resolve, not create conflict.

Negotiation strategies

In collective bargaining, negotiation process holds a very significant position for decision making. In the current scenario, all decisions with respect to industrial relations are taken by collective bargaining. It is also expected to increase in the future. With this increasing importance it is very necessary to develop good negotiating skills. Much of the behavior

which is to be observed at the negotiating table can be explained in terms of strategies and tactics which the parties adopt in an attempt to secure their goals in distributive bargaining.

(a)Target and resistance – to take the example of wage claim, both parties are likely to have what can be termed as 'target' and 'resistance' points. This shows that both the parties would know, what they would like to achieve and what they would be prepared to settle for. The trade union will want to convince the management that its resistance point is higher than it actually is and the management will try to convince the trade union at the same time that the opposite is true.

(b) Commitment – The commitment which each party is able to demonstrate is the key to determining the outcome. This is the reason for rational argument being out of the negotiation process most of the time. Instead, the most successful negotiator is often the one who can keep going and who seems totally impervious to the argument. This is the reason of the negotiation going endlessly repeated. Each position keeps trying to probe the position of the other. Thus by probing the other position they keep on checking and validating the commitment which the other party has demonstrated.

(c) Adjournments – It is extremely difficult to adjust ones' position in negotiations without loss of face and this explains to explain the importance of adjournments. Not only do adjournments allow informal contact but they also enable the parties to adjust their position without loss of face.

(d) Patient hearing – the management should always give a patient hearing to whatever the trade union has to say, even if there is a threat, whether of strike or any other form of withdrawal of work, they should not react as if they have received an ultimatum. In India, particularly, trade unions often take an aggressive initial stand and it is a poor strategy on the part of the management team to be equally aggressive or impatient.

(e) Guard against revealing position - A tactic on the part of the union , which is not seriously thinking of concluding a negotiation with the management but to take the dispute to conciliation, is to induce the management to state how far it would 4go and then break off the negotiation. The next step would be to make the concessions announced by the management as the starting point for further negotiation before the conciliation officer. This is not bargaining in good faith. Sometimes union may initially ask, to generally discuss each demand, so as to asses the managements mind how far it can give concessions and then create a breaking point. The management representatives should be on their guard against such tactics and should not reveal their position, when they suspect such a move.

(f) Informal Discussions – It has been noticed that sometimes informal discussions, before the actual negotiation meeting, between the management team leaders and the union representatives helps in reaching an agreement. Sometimes a mediator's role is useful which is voluntarily accepted by the parties. This helps in bringing the parties together.

(h) Integrative bargaining – situations often arise in which the goals of the parties are not in fundamental conflict with one another. The 'share of cake' analogy is useful: it is not simply the question about arguing about the share of the cake of a given size but of increasing the size of the cake. Integrative bargaining is the term used to describe the activity in this process. A reduction in overtime working or abolition of any other restrictive practices along with wage settlement is examples for the same. At the same time it gives the management more opportunities to introduce more strategies.

(i) Continuous relationship – it should be always remembered by the negotiating parties that negotiation is an on going process and thus you develop a continuous relationship. Thus the words like 'defeat' or 'victory' are never found in the language of the negotiators. One party

might have an upper hand today but tomorrow the condition may be different. The negotiators should always believe a relationship of trust. The relationship between negotiators also affects their standing in the eyes of other members of their party.