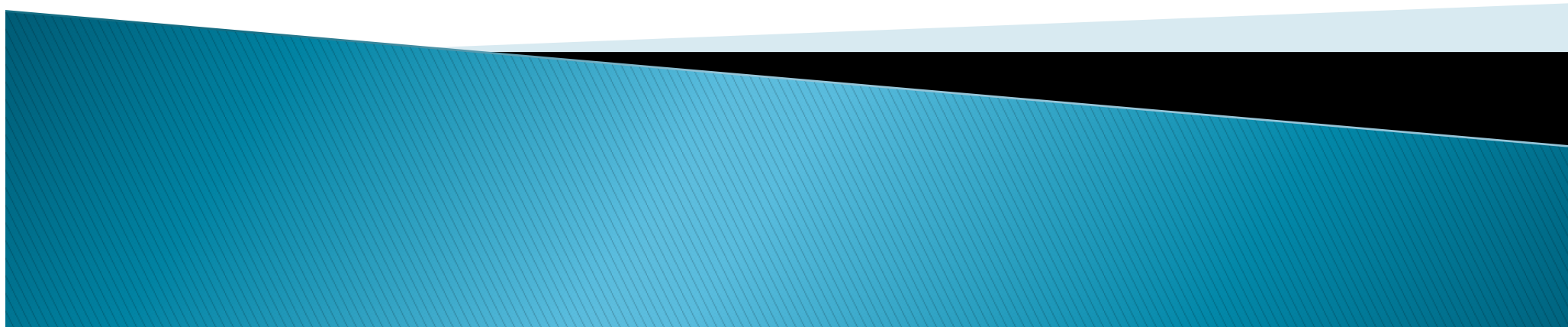


# Interest-Based Bargaining in the Collective Bargaining Context: Theory and Practice

Nancy E. Peace  
Trainer and Facilitator

Shrewsbury Public Schools and Shrewsbury Education Association  
December 10 & 13, 2018



# Negotiating labor agreements

*As conflict -- difference -- is here in the world, as we cannot avoid it, we should, I think, use it. Instead of condemning it, we should set it to work for us.*

*Why not? What does the mechanical engineer do with friction? Of course his chief job is to eliminate friction, but it is true that he also capitalizes friction. The transmission of power by belts depends on friction between the belt and the pulley. The friction between the driving wheel of the locomotive on the track is necessary to haul the train. All polishing is done by friction. The music of the violin we get by friction. We left the savage state when we discovered fire by friction. We talk of the friction of mind on mind as a good thing.*

*So in business, too, we have to know when to try to eliminate friction and when to try to capitalize it, when to see what work we can make it do. That is what I wish to consider here, whether we can set conflict to work and make it do something for us.*

Mary Parker Follett (Bureau of Personnel Administration Conference, 1925)





# Agenda

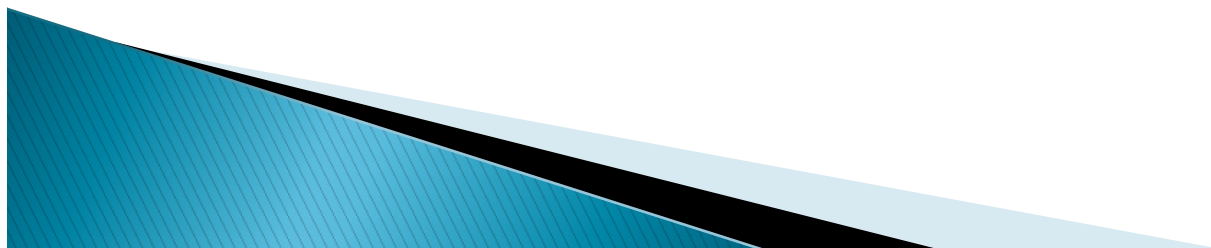
- ▶ Goals for the training
- ▶ Positional and interest-based negotiations
- ▶ Changing context
- ▶ Strategic bargaining
- ▶ Introduction to the five-phase model of collective bargaining
  - Preparation
  - Bargaining over how to bargain
  - Open and explore
  - Focus and agree
  - Implement and sustain

◦ © Cutcher-Gershenfeld, McKersie, Peace and Segal, *Negotiating Labor Agreement*



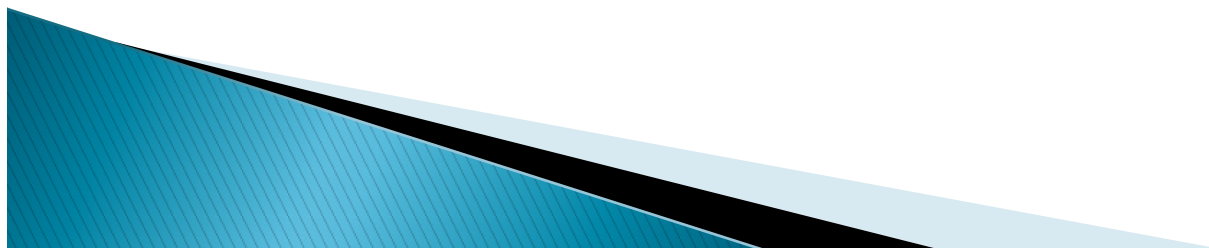
# Goals for student learning

- ▶ Understand two main approaches to (all) negotiations
  - Positional
  - Interest based
- ▶ Understand application of interest-based bargaining in collective bargaining context
- ▶ Develop skills that support effective interest-based bargaining



# Underlying assumptions

- ▶ Process matters
- ▶ No one best way
- ▶ Assume common and competing interests
- ▶ Appreciate creativity
- ▶ Respect power/economic realities



# Words matter: a glossary

Issue = Topic or subject of negotiations

Position = One party's solution to an issue

Interests = One party's concerns about an issue

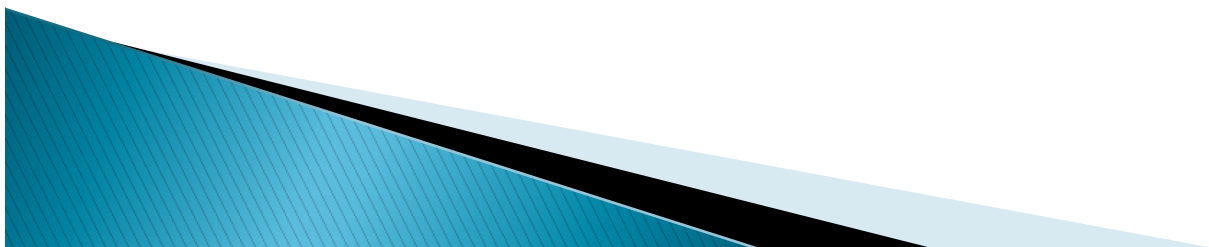
Options = Potential solutions to an issue

Win-win bargaining . . .

Mutual-gains bargaining . . .

Interest-based bargaining . . .

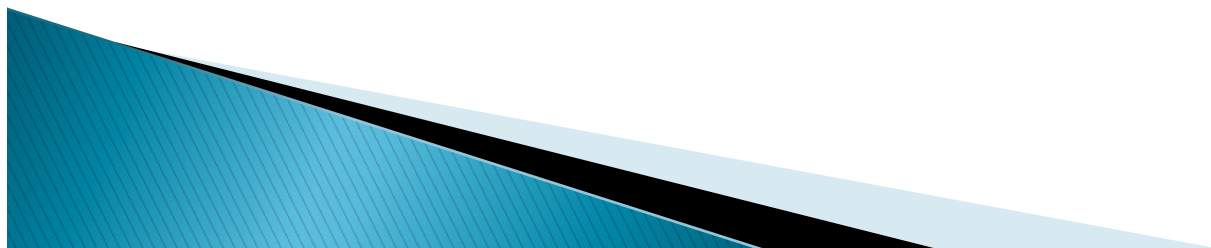
The way we bargain . . .





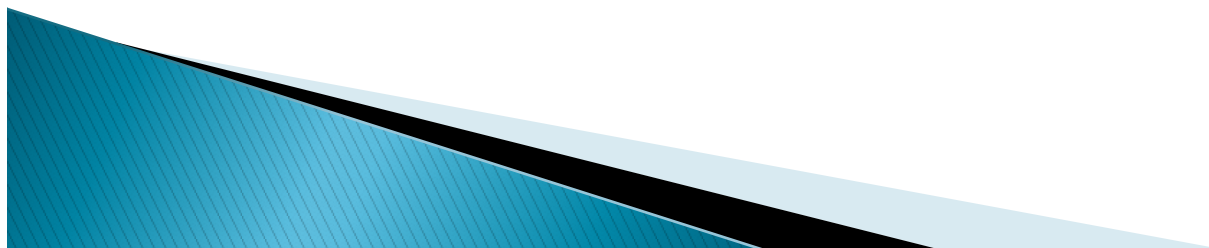
# Traditional Bargaining Tactics

- ▶ Develop target and resistance positions in advance
- ▶ Overstate opening positions
- ▶ Channel communications through chief negotiator
- ▶ Always keep the other side off balance
- ▶ Mobilize support from constituents
- ▶ Use coercive forms of power
- ▶ Divide and conquer the other side; protect against the same on your side
- ▶ An agreement reluctantly accepted is a sign of success



# Why change?

- ▶ The traditional model has served parties well for over 40 years -- why change?
- ▶ What forces would limit the effectiveness of the traditional model?
- ▶ What alternative models could be more effective?



# New issues

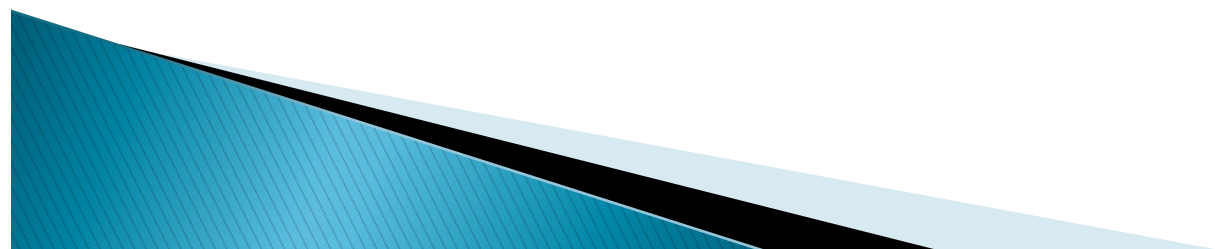
*Quality. . . Teams. . . New Technology. . .*

*Training. . . Work-family. . . Diversity. . .*

*Privatization . . . Outsourcing . . . Standards*

*Productivity. . . Gainsharing. . . Benefits. . .*

*Continuous improvement. . . Partnership*



# Why use interest-based bargaining in collective bargaining?

- ▶ Focus on interests rather than positions enables the parties to arrive at agreements that best meet the needs and concerns of both parties
- ▶ Provides for a fuller exploration of options for meeting parties' needs
  - coming to the table with pre-determined positions means the vast majority of options are never discovered;
  - bargaining becomes a dance toward the middle (compromise)
- ▶ Provides a more effective process for dealing with many of today's issues, including teacher evaluation, professional development and work-life balance
- ▶ Draws on the wisdom of all those at the table, not just the lead negotiators
- ▶ Tends to strengthen the parties' relationship and increase their capacity to work together effectively on a daily basis





# Examples of “new” ways to bargain

- ▶ Prepare based on interests and options, not wish lists
- ▶ Joint training
- ▶ Joint data collection prior to bargaining
- ▶ Pre-agreements on ground rules and a bargaining plan
- ▶ Use of facilitators and brainstorming during bargaining
- ▶ Use of content experts and sub-committees during bargaining
- ▶ Construct mutual gains options
- ▶ New ways of using electronic technology – projecting text, taking joint minutes, etc.
- ▶ New ways to engage & calibrate with constituents
- ▶ Anticipate implementation and contract administration

*© Joel Cutcher-Gershenfeld, Negotiating Labor Agreements*



# Comparing positional and interest-based bargaining

**Positions → A Limited Range for Negotiation and Agreement**

One Side's Opening Position

Other Side's Opening Position

***Many Underlying Interests → A Broad Range of Options***

**Interests → A Broad Range of Options to Build Mutual Gains Agreements**

Just focusing on “positions” will not effectively address today’s issues . . .

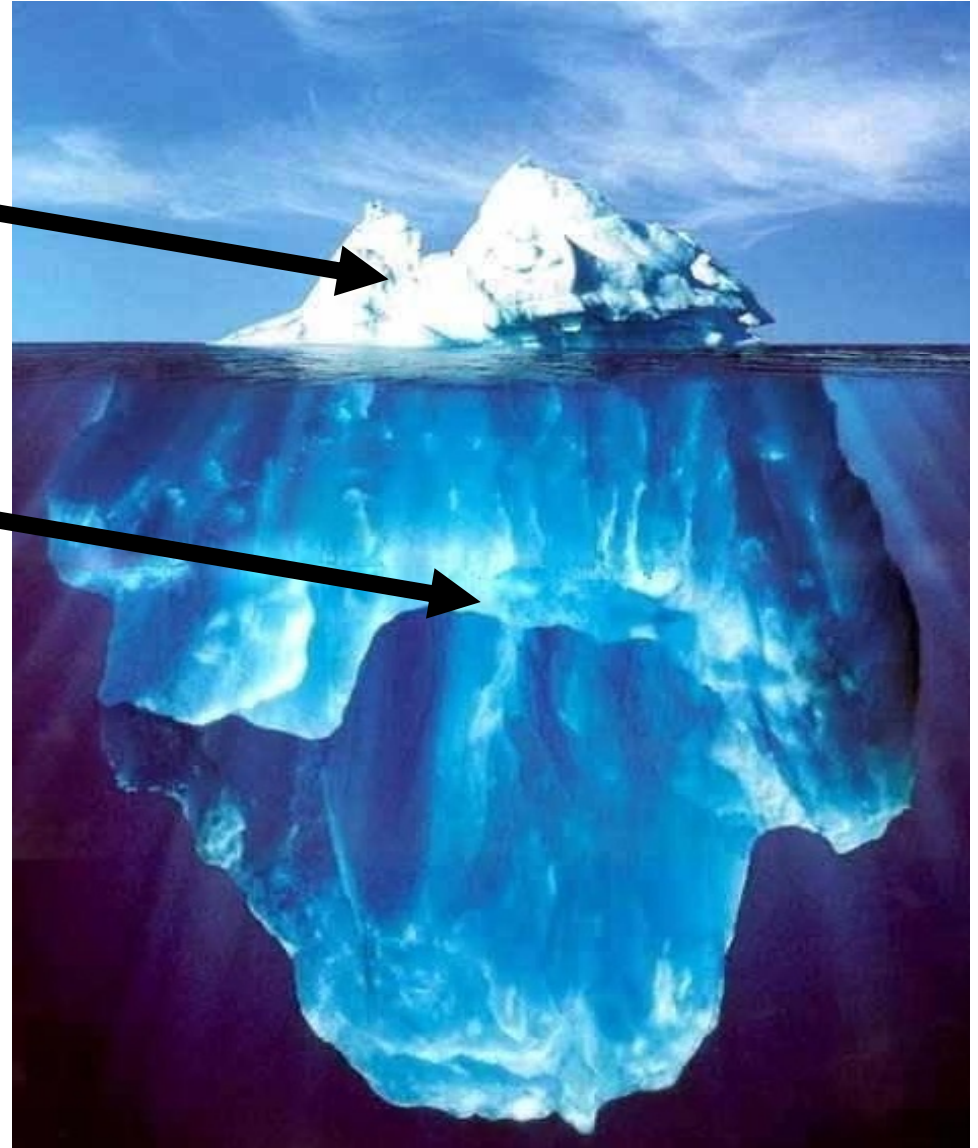
*Visible Positions*



*Underlying Interests*



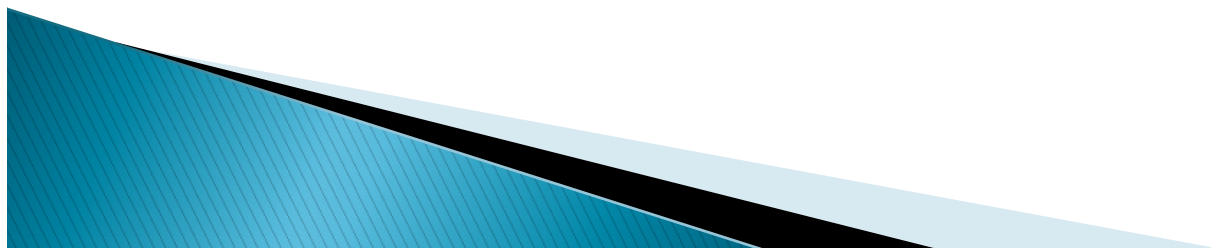
- Needs/Concerns
- Hopes/Fears
- Qualities
- Contingencies



# Curfew negotiation

**Scenario:** Parents are negotiating with their fifteen-year-old daughter over her curfew time for coming home.

- ❖ What are the parents' interests (needs/concerns)?
- ❖ What are the daughter's interests (needs/concerns)?





# The big picture: Three-tier transformation model



Source: Adapted from Thomas Kochan, Harry Katz, and Robert McKersie, *The Transformation of American Industrial Relations*. New York: Basic Books (1984)

# Strategic Negotiations: The Theory of Forcing and Fostering

Strategic Negotiations: A Theory of Change in Labor–Management Relations, by  
Richard E. Walton, Joel E. Cutcher–Gershenfeld, and Robert B. McKersie

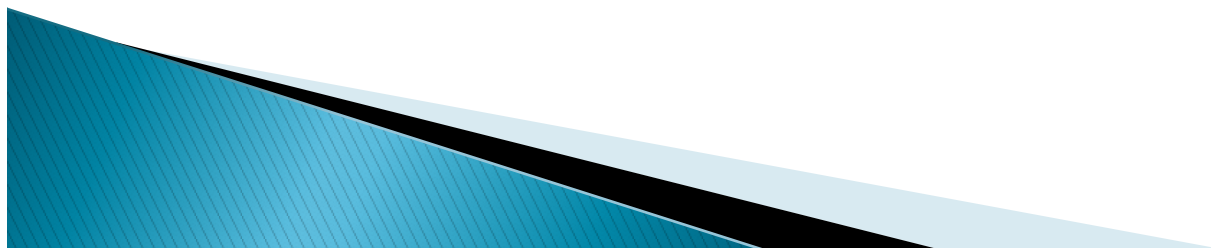


# Why think about theory?

Effective collective bargaining is not a list of things to do . . .

It is a way of thinking . . .

Theory provides a framework for challenges that we can't even anticipate!



# Linking strategies with interests

When you are forcing. . .      When you are fostering. . .

You are insisting that attention be paid to your interests

*. . . mindful that this is likely to be seen as contrary to the interests of others*

*. . . hopeful that areas of mutual interests will none-the-less surface*

You are surfacing issues that are likely to be seen as having a high mutual gains potential

*. . . mindful that complicated, related issues may still generate tensions*

*. . . hopeful that truly creative solutions will prevail*



# Bargaining strategies emerge after a series of tactical choices

## Strategies Triggering Downward, Deteriorating Cycles

### Unrestrained Forcing

Surprise  
Anger  
Counter forcing  
A “winner” – Imposed agreement  
Paybacks  
Downward cycle of mutual mistrust

### Superficial Fostering

Avoidance  
Surface courtesy  
Superficial agreement  
Unexpected events  
Entire relationship doubted  
Downward cycle of mutual distrust

Openness to future fostering  
Realistic Agreement  
Exploration of options  
Respect for interests and power  
Sense of urgency  
Realistic constituent expectations

### Restrained Forcing

Anticipate future forcing  
Robust Agreement  
Ask tough “What if?” and “What about?” questions  
Exploration of options  
Sense of urgency  
Constituent support for problem-solving

### Robust Fostering

## Strategies Enabling Upward, Developmental Cycles

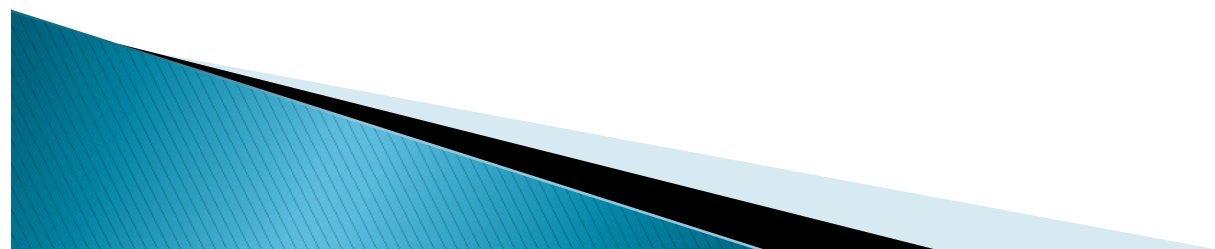
# Guidelines for restrained forcing and robust fostering

## Restrained forcing

- Don't be greedy
- Focus on interests
- Explain why
- Generate options
- Deliver results
- Prevent escalation
- Anticipate and attend to recovery

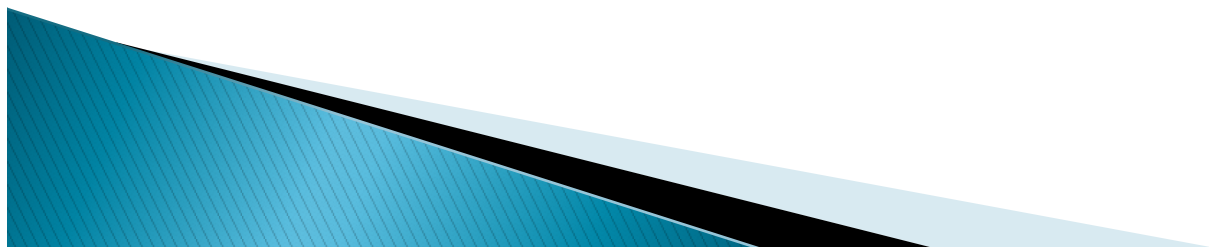
## Robust fostering

- Be bold
- Focus on interests
- Explain why
- Generate options
- Deliver results
- Promote synergy
- Anticipate and attend to conflict



# A five-phase model of interest-based collective bargaining

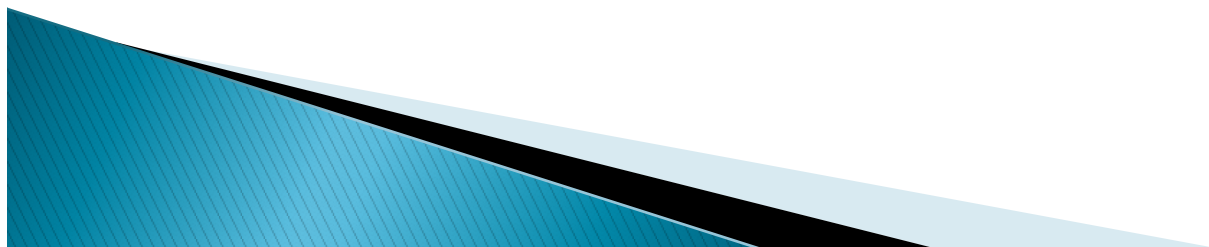
- ▶ Phase I Prepare
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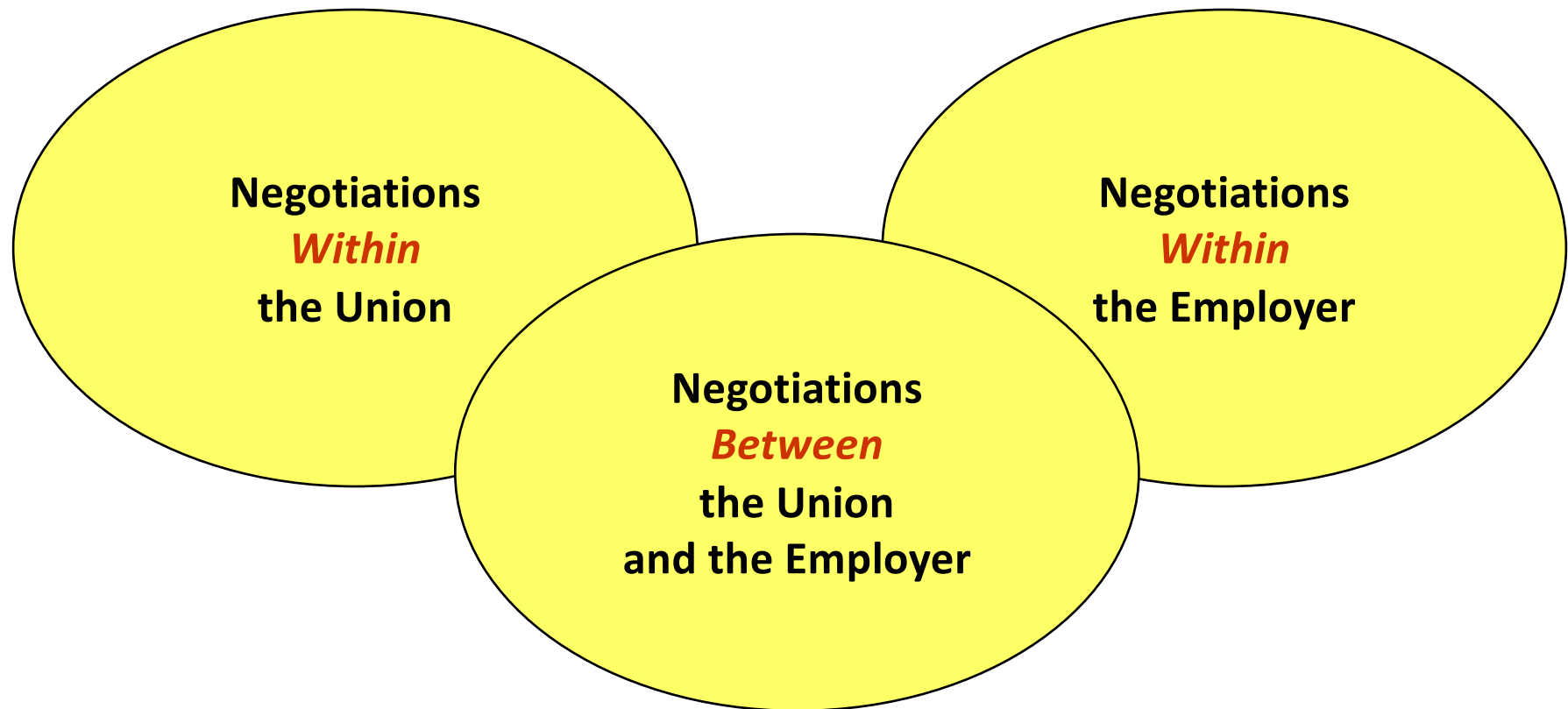
# Phase I: Prepare

## ► *To prepare well:*

- ❑ Identify stakeholders and potential issues
- ❑ Assess stakeholder interests on each issue
- ❑ Analyze power realities on each issue, anticipate reactions to forcing
- ❑ Explore opportunities for joint data collections
- ❑ Involve stakeholders in gathering relevant data
- ❑ If shifting to IBB, prepare constituents by explaining the reasons for using this approach
- ❑ Clarify constituent mandates on each issue
  - Be direct on tough issues
  - Reframe positional mandates into issues



# Preparing for three negotiations



***Discussion:***  
***Which is harder – the negotiations  
between or the negotiations within?***

# Questions to consider in preparation for internal negotiations (representatives and constituents)

## Who are the representatives?

- ❑ Who should be on the bargaining team?
- ❑ What additional content experts might be need?

## What are our issues?

- ❑ What is the full range of issues?
- ❑ How do we convert positions into interest statements?
- ❑ How do we establish priorities?

## What can be expected from others?

- ❑ Have we anticipated issues likely to be raised by others?
- ❑ What are others likely positions and what are possible underlying interests?

## What is our bargaining strategy?

- ❑ What is the likely mix of forcing and fostering?

## What will be the bargaining process?

- ❑ What level of information sharing and problem solving is likely?
- ❑ What is appropriate consultation with constituents during the process?

## How will we handle ratification?

- ❑ Have we anticipated non-traditional solutions and early settlements?

# Collective Bargaining

*The unions hitherto have been chiefly combative organizations designed to protect and enhance the workmen's share in distribution.*

*This is still a necessary function, and one that must be performed by the strong organization of unions. . .*

*The cooperative features of the relationship between employer and employee, however, need to be developed equally, in order that the size of the pie may be increased as much as possible.*

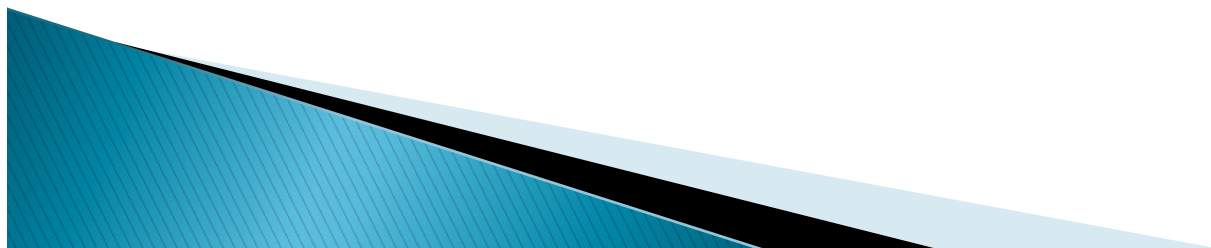
Paul Douglas (*Journal of Political Economy*, 1921)





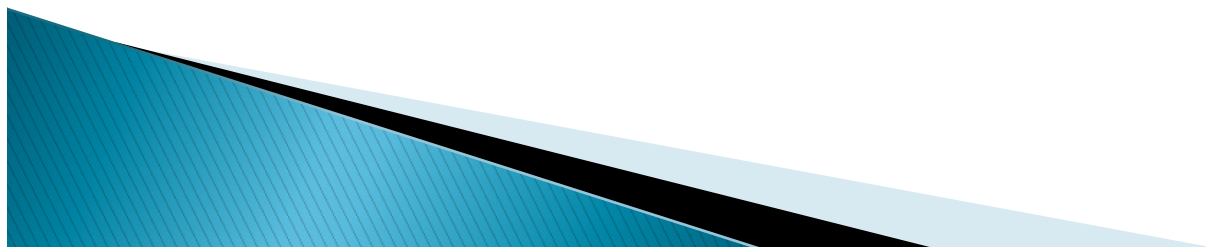
# A five-phase model of interest-based collective bargaining

- ▶ Phase I Prepare
- ▶ Phase II Bargaining of how to bargain
- ▶ Phase III Open & explore
- ▶ Phase IV Focus & agree
- ▶ Phase V Implement & sustain



## Phase II: Bargaining over how to bargain

- ▶ To effectively bargain over how to bargain:
  - ❑ Seek an agreement on overall approach to bargaining
  - ❑ Establish clear, mutually acceptable ground rules
  - ❑ Consider having advanced dialogs on key issues likely to be on the agenda
  - ❑ Consider use of joint sub-committees and task forces
  - ❑ Ensure mandates for joint sub-committees and task forces
  - ❑ Agree on logistics: location, timing, food, etc.
  - ❑ Acknowledge that the process will include forcing and fostering
  - ❑ Agree on the use of brainstorming, consensus, facilitation and other potential process improvements



# Preliminary agreements – Bargaining Plan

## Options to consider for preliminary agreements on a bargaining plan:

- *Mandate Generation:* Schedule and structure for input from constituents prior to bargaining
- *Joint Data Collection:* Advance planning on the use of joint task forces before and during bargaining
- *Opening:* Timing for the opening of negotiations
- *Location:* Where will the sessions be held
- *Pay:* Pay and release time for negotiators during bargaining
- *Agenda:* Agreement on the agenda -- sequencing of issues
- *Calibration:* Timing of briefings to constituents during bargaining
- *Schedule:* Anticipating anywhere from 2–4 hours per issue to 2–4 days per issues, plus 1–2 days for preliminary agreements and 1–2 to conclude negotiations
- *Ratification:* Schedule and structure for ratification

Note: These materials build, in part, on the “After the Training” guide developed by Michael Gaffney, NYSSILR, Cornell University

# Options for ground rules

## General Tone and Approach

- ▶ Focus on interest and options – avoid jumping to positions
- ▶ A “process time out” can be called by any person at any time
- ▶ Caucuses can be called by either team at any time (with as much transparency as possible)
- ▶ Options identified in brainstorming do not represent proposals or offers – they should not be treated as representing the views of either team on a given issue
- ▶ Open sharing of all relevant information

## Public Statements

- ▶ All press releases and other public statements will be made on a joint basis

## Confidentiality

- ▶ All discussions in the room during bargaining will be treated with appropriate respect and confidence

## Meeting Minutes

- ▶ A visible record of the negotiations will be maintained on a flip chart or on a computer with an LCD projector – capturing agreements and relevant discussion points
- ▶ Minutes will be reviewed and accepted at the following session

## Sub-Committees

- ▶ Sub-committees only include members of either bargaining team, but can consult with subject matter experts as appropriate

## Facilitation

- ▶ Internal or external facilitators may be used as appropriate

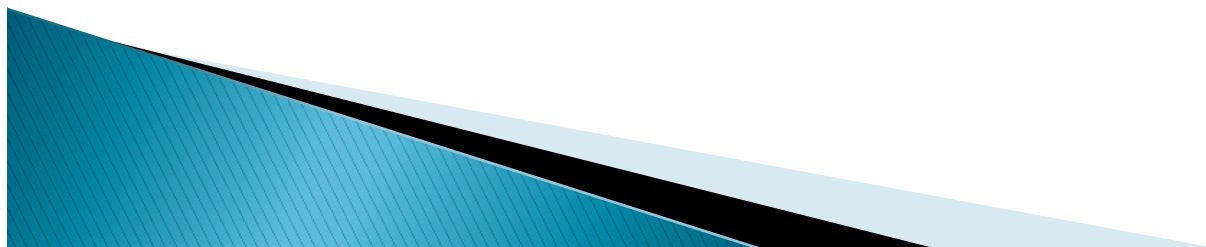
## Agreements

- ▶ A tentative agreement (TA) will not be re-opened without new information or changed circumstances
- ▶ Nothing is final until everything is final

# Options for sub-committees/task forces

## Options to consider for preliminary agreements on task forces/sub-committees:

- Topics for which task forces/sub-committees would be appropriate
- Membership
- Mandate
  - Definition of the issue
  - Analysis of stakeholder interests
  - Generation of options
    - Substance . . . Process . . . Governance
  - Identification of linkage or contingent issues
  - Identification of potentially contentious or complicating aspects of the issue
  - Delivery date
- Linkage to the main table



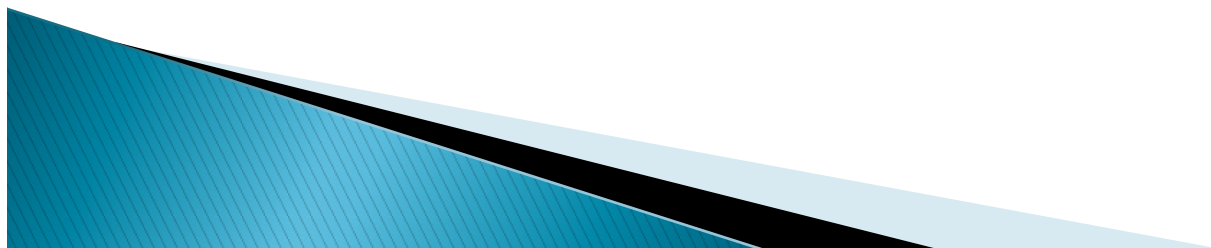
# The case of the joint sub-committee

- ▶ Assess the following scenario – Positive and Negative aspects:
  - A joint sub-committee is established to explore health and safety in advance of the opening of negotiations. Management leaders brief the subcommittee on the rising number of lost-time incidents. Union leaders brief the sub-committee on all the work areas where union members have complained about unsafe conditions. The sub-committee includes four internal subject-matter experts on health and safety – two selected by the union and two selected by management – but no members of either of the bargaining teams. They spend two months interviewing people around the plant and examining government safety reporting records. Four key issues emerge as priorities: ergonomic seating, training in proper lifting, enforced use of “guards” on machinery, and special awards for teams with safe records. The sub-committee negotiates agreements on all of these issues and reports back with enthusiasm to the union and management bargaining committees.
- ▶ What are the implications of your observations?



# Process design

- ▶ The process a group uses to address a problem or negotiate a labor agreement has a significant impact on the substantive outcomes the group is able to achieve.
- ▶ The process used also impacts the parties' relationship.
- ▶ As parties approach a new round of collective bargaining, it is helpful to review what worked well and what might be improved in the upcoming round.





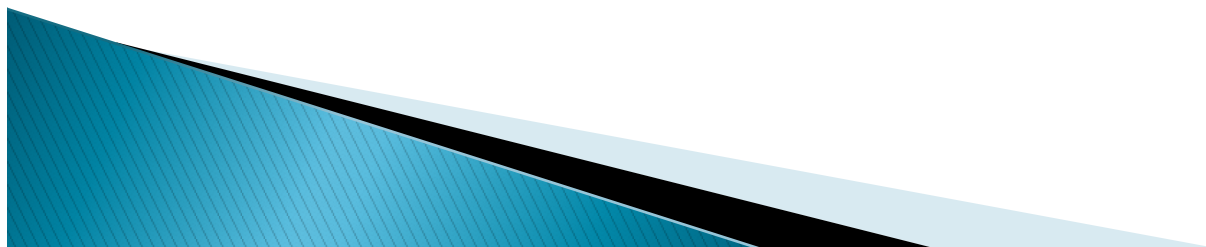
# Designing upcoming negotiations

+

—

What worked well ?

What might we change?



# Collective Bargaining

*The unions hitherto have been chiefly combative organizations designed to protect and enhance the workmen's share in distribution.*

*This is still a necessary function, and one that must be performed by the strong organization of unions. . .*

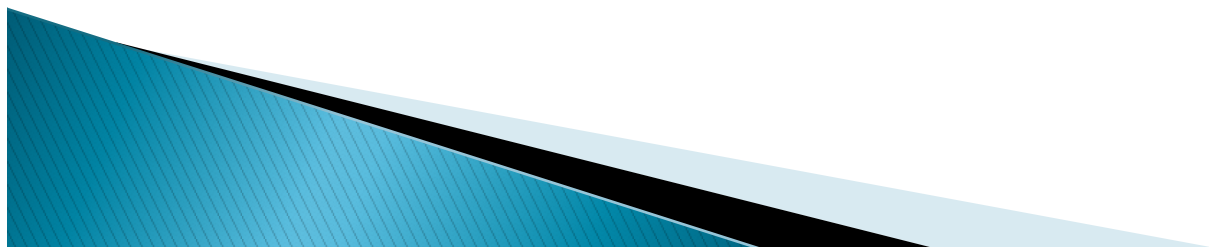
*The cooperative features of the relationship between employer and employee, however, need to be developed equally, in order that the size of the pie may be increased as much as possible.*

Paul Douglas (*Journal of Political Economy*, 1921)



# A five-phase model of interest-based collective bargaining

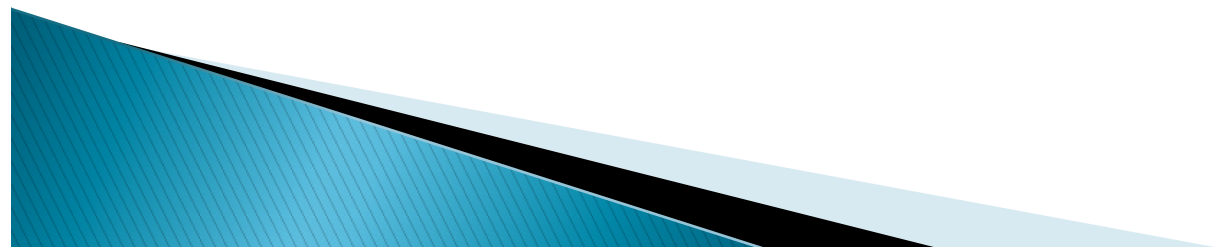
- ▶ Phase I Prepare
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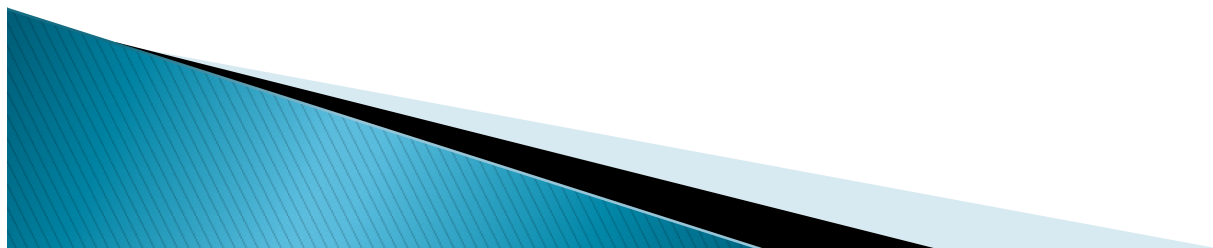
# COMMUNICATION

SENDING

RECEIVING

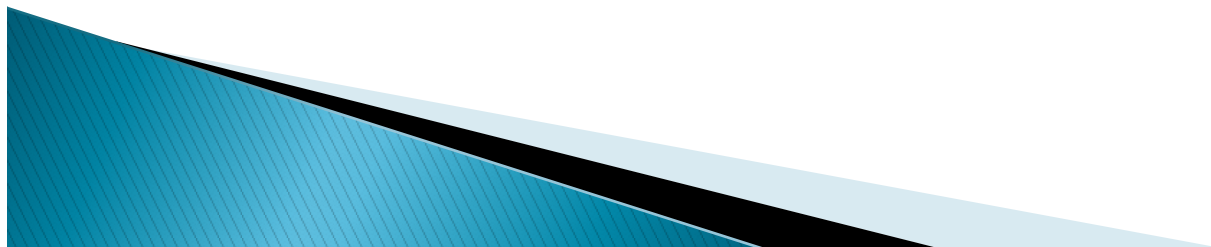


# Exercise: The Story



# Directions:

1. Read the story
2. Answer the questions:
  - True
  - False
  - Need more information



# Filters and Screens

Assumptions

Culture

Values

Needs

Background

Experience

Perceptions

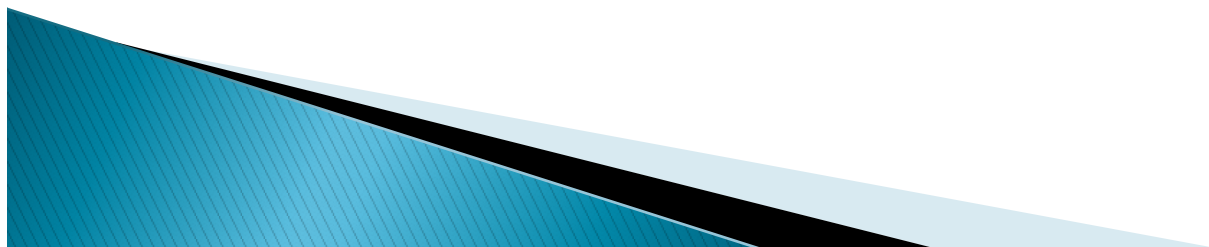
Bias

Prejudices

Goals

Education

Wants





# Effective listening

Can you tell me more?

Encouraging

When did this happen?

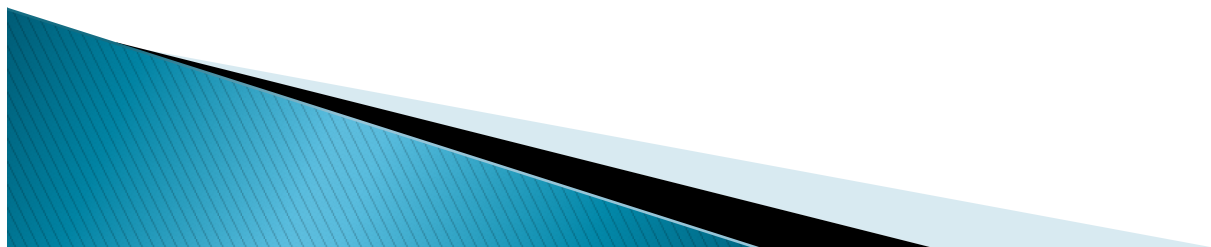
Clarifying

Let me see if I understand you?

Summarizing

I see that you are angry.

Acknowledging



# Brainstorming skills

## ▶ Definition:

- A process for generating new ideas by drawing on collective wisdom and synergy in a group

## ▶ Logistics:

- Identify a recorder and facilitator (can be the same person)
- Clarify the issue or question
- If appropriate, first generate ideas individually on paper
- Cluster before you prioritize

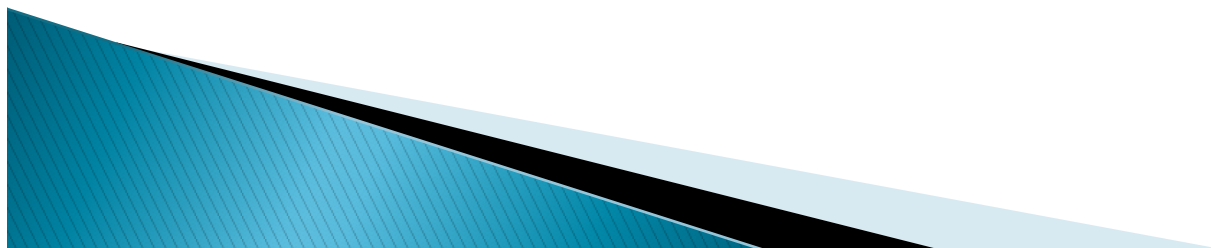
## ▶ Process:

- Begin recording ideas from the group -- sequentially or otherwise
- Encourage “piggy-backing” and “wild or crazy” ideas
- Discourage criticism or judgmental comments
- Push past “the pause”



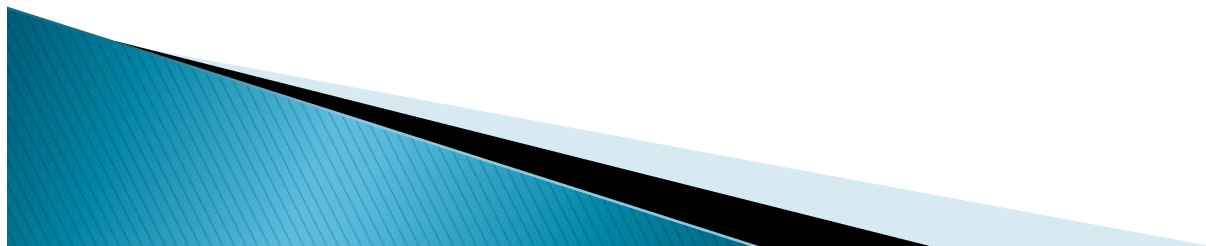
# Dialogue on table tactics

- ▶ Calling a caucus and a “time out”
- ▶ Revealing internal differences
- ▶ Use of content experts
- ▶ Enforcing ground rules and keeping minutes
- ▶ Tentative agreements -- TAs

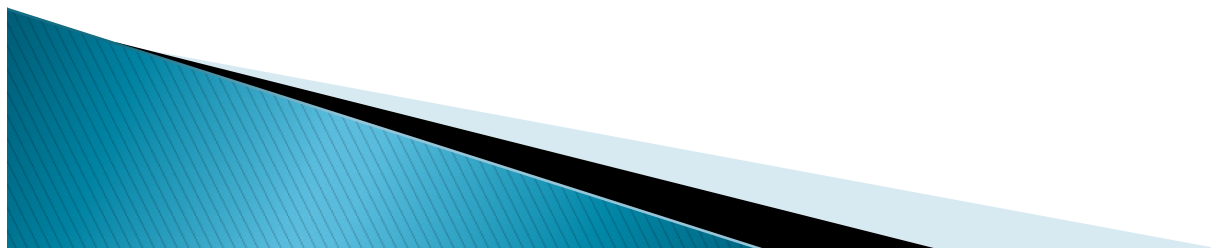


# Facilitation when using IBB

- ▶ Many models
  - *Internal facilitators, private consultants, state or federal mediators, public officials/community leaders, self-facilitation*
- ▶ Facilitation during Exploring
  - Capturing brainstorming items
  - Summarizing content
  - Surfacing underlying interests
- ▶ Facilitation during Focusing
  - Establishing ranges
  - Fostering reciprocity
  - Shuttle diplomacy
- ▶ Facilitation of Agreements
  - Building a sequence of “small” agreements (“can we at least agree...”)
  - Testing against plausible scenarios
  - Ensuring implementation support

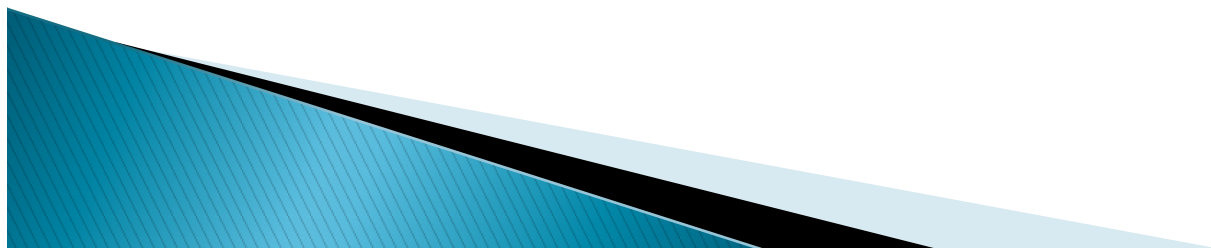


# Open & Explore Exercise: The Attendance Challenge



# A core process skill for exploring

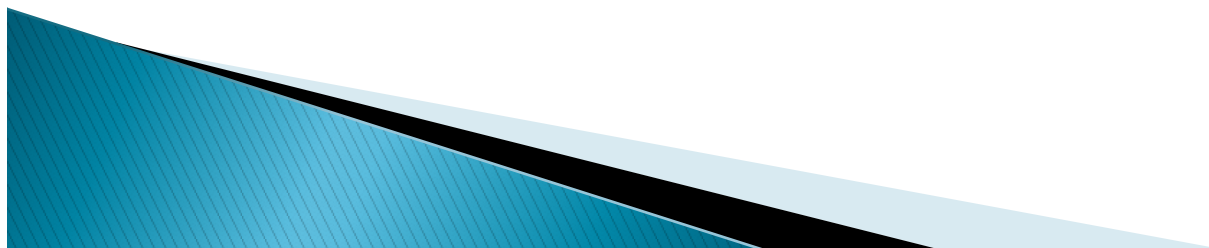
- ▶ **Generating options by listening for interests**
  - Signal that you are focusing on the interests of others
  - Summarize what you have heard
  - Build on it to offer an option
- ▶ **Welcome proposals as the beginning of a deeper dialogue on underlying interests**
  - Why would that be important to you?
  - If it were possible, what would be the benefits?
  - What are some complicating factors that we would all have to sort out associated with this proposal?



# The Attendance Challenge

## ► Directions

- Work together at your tables
- Read the Attendance Challenge handout
- List as many interests as you can—both joint and competing
- Be prepared to report back to the full group

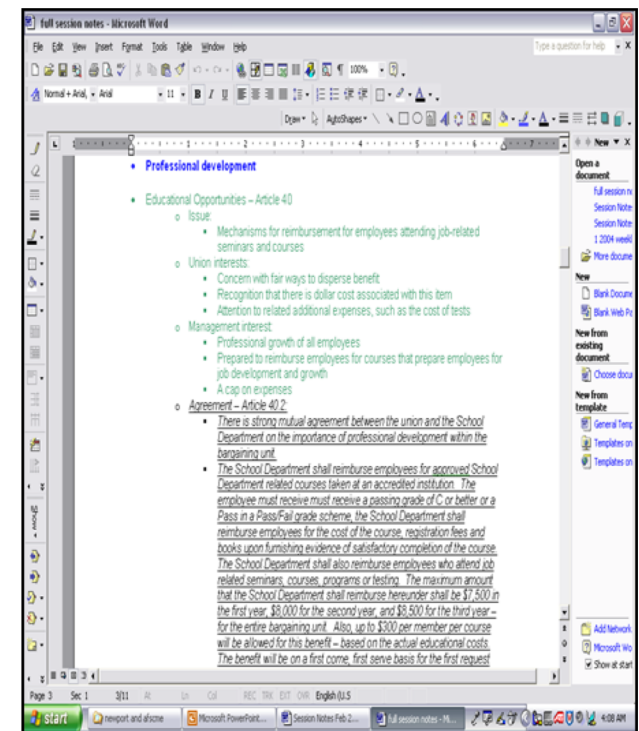




# Uses of new technology

## ► During the “explore” phase, what has been your experience with:

- The use of LCD projector as electronic flip chart
- Review of existing language using LCD projector
- Exchange of draft language electronically
- Web sites to update constituents
- Video teleconferencing with subject matter experts
- Other uses of new technology



## ► What has been your experience?

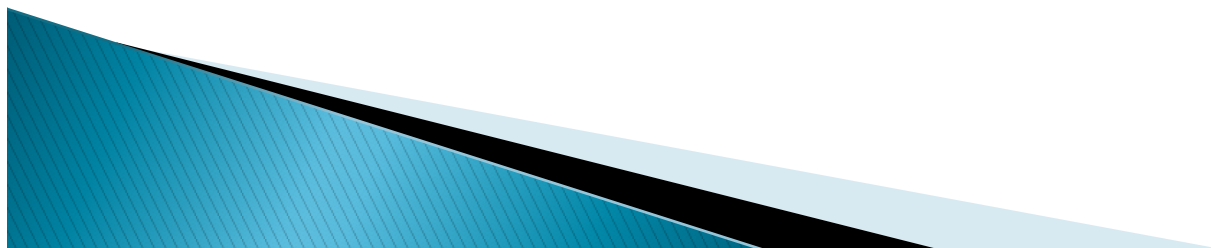
# Issue tracking matrix

(Based on work of Michael Gaffney, Cornell University, ILR)

Issues	In Progress	Tentative Agreement	Language Complete	Stuck	Really Stuck	External Standards
1 _____						
2 _____						
3 _____						
4 _____						
5 _____						
6 _____						
7 _____						
8 _____						
9 _____						

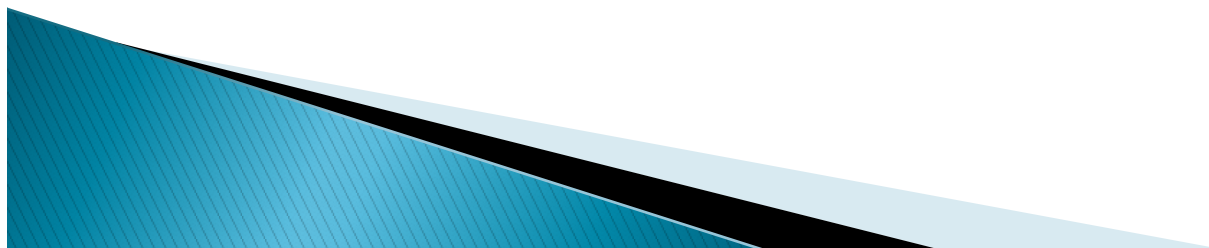
# The bottom line

- ▶ The measure of success when opening and exploring:
  - Clearly defining the issue and exploring interests
  - Generating the maximum number of options possible



# A five-phase model of interest-based collective bargaining

- ▶ Phase I Prepare
- ▶ Phase II Bargaining of how to bargain
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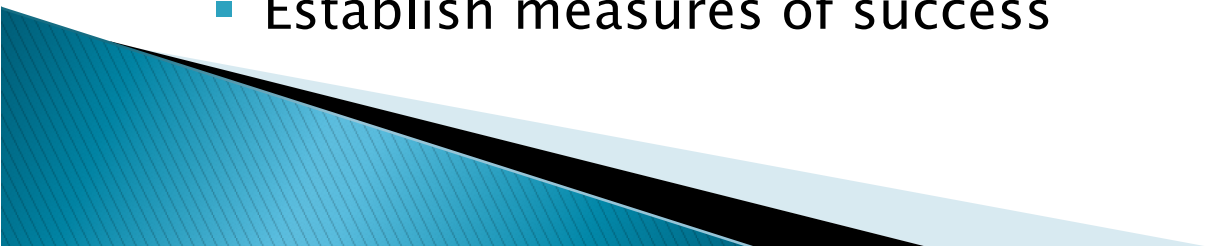


# Phase IV: Focus & Agree

## ▶ *To focus well. . .*

- Determine that exploring is as complete as possible – that it is time to focus
- Offer “supposals” and other potential resolutions
- Organize options into “clusters,” identify “linkages,” establish “ranges”
- Agree on fair criteria/standards (if appropriate)
- Outline the “structure” of an agreement
- Appreciate each other’s “constraints” and “BATNAs”

## ▶ *To ensure durable agreements. . .*

- Establish Agreements – taking into account the interests of all stakeholders
  - Draft Language – balance broad principles with needed specificity
  - Anticipate Implementation – timing, resources, governance
  - “Error Proof” the Agreement
  - Ensure mechanisms for dispute resolution
  - Establish measures of success
- 

# Use of Standards in evaluating options

- ▶ Some IBB models urge the establishment of “Standards” or “Criteria” before exploring options
- ▶ We have found that this is sometimes helpful and sometimes just an additional complication
- ▶ Establish standards where it is feasible and likely to be helpful in ensuring a wise agreement
- ▶ Where helpful, introduce standards prior to brainstorming to encourage open dialogue, knowing that options will later be held to these criteria

## Sample basic standards or criteria:

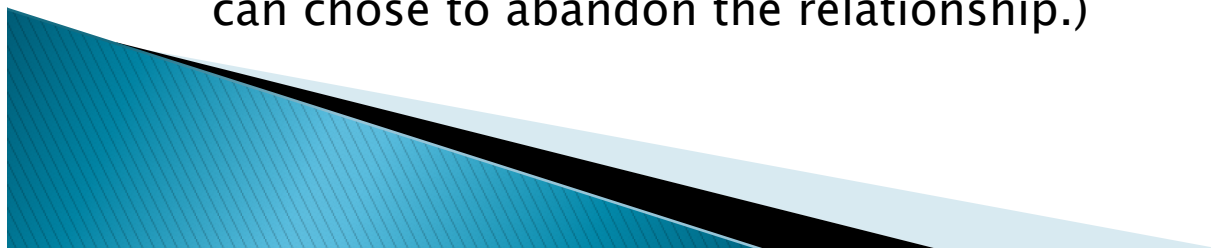
- **Legal**
- **Workable/feasible**
- **Ratifyable**
- **Cost effective**
- **Addresses mutual interests**
- **Likely to achieve intended outcomes**

## Sample context-specific standards:

- **A defined set of comparable bargaining units**
- **A specific target impact on an outcome of importance**

# What is a BATNA and why does it matter?

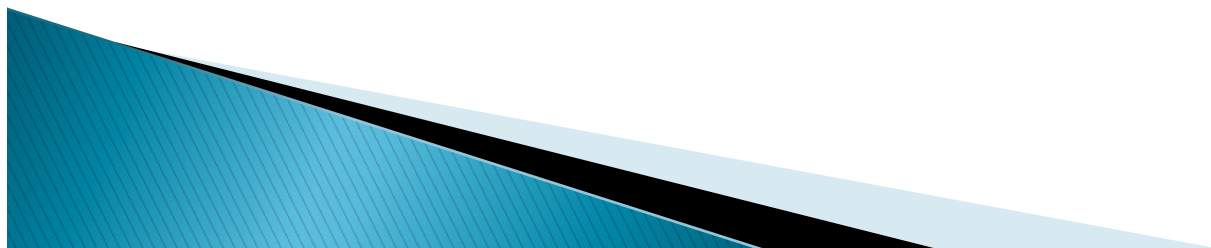
- ▶ Best Alternative to a Negotiated Agreement (BATNA)
- ▶ Example: Several years ago, a school committee was seeking increases in health insurance co-pays, the cost of which exceeded the wage increase that was being offered to the teachers. The contract had an “evergreen clause.” The teachers were better off not agreeing to a new contract until they received a more balanced agreement. (Neither party is able to abandon the relationship.)
- ▶ Example: Union Square in Somerville, where there is a large proposed mixed using development currently being negotiated. The project has been in process since 2014. The most recently elected Board of Alderman is now seeking additional contributions from the developer with regard to affordable housing units, space for small businesses and commitments to hire local residents for the construction. Each side likely has a BATNA. (Either party can chose to abandon the relationship.)





# Drafting contract language

- ▶ Framing issues in contract language
  - Core strategic choice:
    - More detail clarifies understandings but constrains flexibility
    - Less detail increases flexibility but risks misunderstandings
  - For “self-implementing” language:
    - Provide all necessary details
  - For language requiring oversight and joint governance:
    - Focus on process and principles, keep substance flexible
  - If you establish a joint committee, provide a clear mandate
    - Selection, milestones, deliverables, budget, authority, etc.





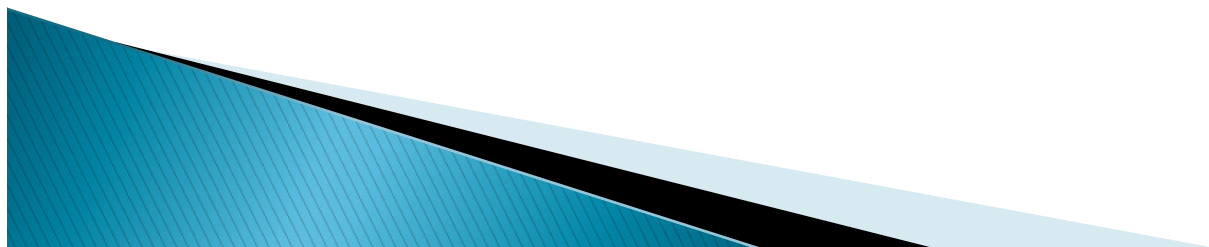
## Table tactics during interest-based bargaining

- ▶ Calling a caucus and using a “process time out”
- ▶ Roles of the chief spokesperson and bargaining team members
- ▶ Enforcing ground rules and keeping minutes
- ▶ Electronic files to display draft language, spreadsheets and other information
- ▶ Tentative agreements – TAs



# A five-phase model of interest-based collective bargaining

- ▶ Phase I                      Prepare
- ▶ Phase II                     Bargaining of how to bargain
- ▶ Phase III                    Open & explore
- ▶ Phase IV                    Focus & agree
- ▶ Phase V                    Implement & sustain



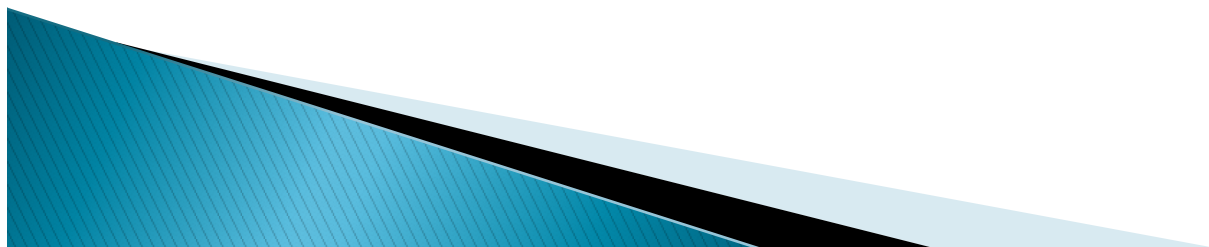
# Phase V: Implement & Sustain

## To effectively implement new contract language. . .

- ❑ Ensure a shared vision
- ❑ Establish clear strategic plan, with milestones
- ❑ Anticipate ongoing “negotiated change”

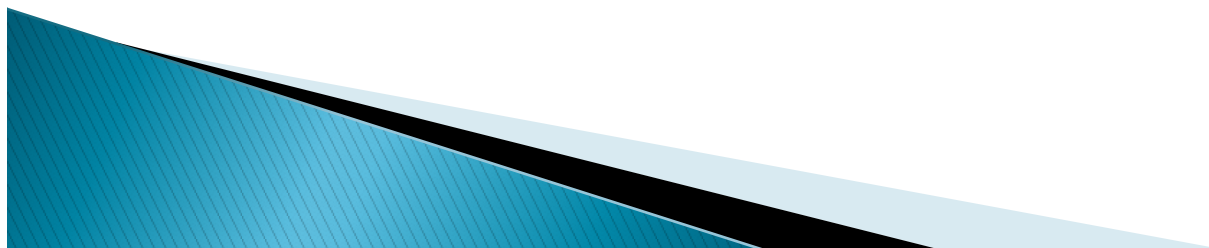
## To effectively sustain a labor–management relationship. . .

- ❑ Resolve problems “close to the source”
- ❑ Avoid positional approaches to grievance administration
- ❑ Ensure appropriate funding, staffing and other resources for joint programs
- ❑ Ensure stability during leadership turnover, including standardized agendas, meeting times and other agreements on joint forums
- ❑ Attend to internal union dynamics between appointed and elected officials
- ❑ Attend to internal management dynamics between line and staff functions
- ❑ joint implementation



# Focusing Exercise

- ▶ At your table, examine the list of attendance/absenteeism options that were generated in Part 1 of the Attendance Challenge
- ▶ Use the “Focusing Worksheet” to develop categories and linkage issues for attendance/absenteeism
- ▶ Be prepared to report out to the full group for discussion



# Consensus decision making

- ▶ Decision making options

Unilateral  
decision...Delegation...Consultation...Voting...Consensus

- ▶ Consensus principles

- Need not be everyone's first choice
- Disagree without being disagreeable
- Everyone should be at least 70% comfortable with the decision and 100% willing to defend the decision as the group's agreement

*(based on the consensus principles utilized by the UAW and Saturn Corporation)*

- ▶ Checking for consensus -- three questions to ask:

*"Is everyone in agreement?"*

*"Does anyone disagree?"*

*"Do we have a consensus?"*



# Phase V Traps and Tactics

## *Traps to Avoid*

- ▶ Not agreeing on actual wording
- ▶ Sending issues to joint committees without clear guidance, direction and support

## *Restrained Forcing*

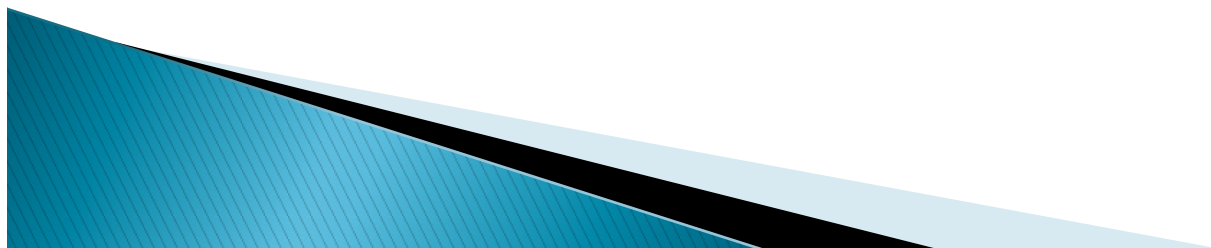
- ▶ Plan for ratification and implementation
- ▶ Anticipate future fostering

## *Robust Fostering*

- ▶ Plan for ratification and implementation
- ▶ Anticipate future forcing

# Contract administration

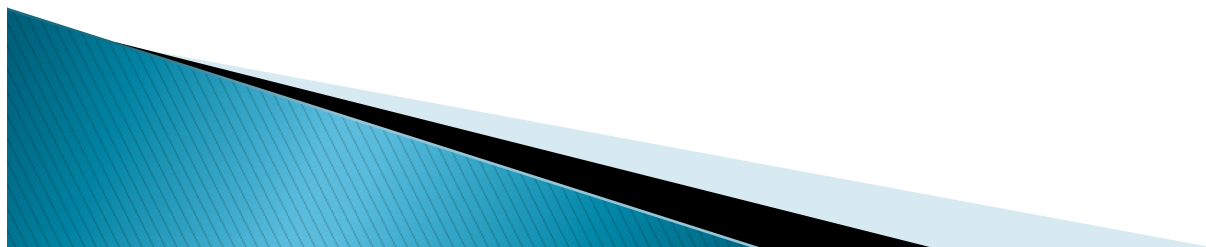
- ▶ How is interest-based bargaining different during contract administration?
  - Issues often come up one at a time
  - Complaints or grievances are usually stated in positional terms
  - Joint committees and partnership activity is usually more visible than collective bargaining meetings



# The overall objective of collective bargaining

- ▶ *To secure durable agreements that effectively address the interests of labor, management and other key stakeholders in an employment relationship – and that provide a foundation for constructive future relations*

• --“Negotiating Labor Agreements,” Program on Negotiations at the Harvard Law School





# Acknowledgements

This presentation incorporates the work of many colleagues in different contexts. Some sources have been noted on specific slides. In addition, the following programs, in which the trainer has taught, must be acknowledged:

- ❖ *Negotiation Labor Agreements*, a program previously offered through the Program on Negotiations at The Harvard Law School, but also through the Institute for Work and Employment at MIT and the University of Illinois.
- ❖ The Massachusetts Education Partnership

*My colleagues and I ask that if you use our materials, you give credit to both organizations.*

