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Cooperative Bargaining Styles at FMCS: A Movement Toward Choices

Carolyn Brommer*
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Steven Loeffler***

I. INTRODUCTION

The Federal Mediation and Conciliation Service ("FMCS") was created in 1947 "in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce and settle such disputes through conciliation and mediation."¹ While an array of subsequent statutory enactments have expanded the FMCS charter, the core mission of FMCS has been, and remains, to assist labor and management to settle their disputes through mediation as well as to promote the development of sound and stable labor-management relationships.²

The vision of how that mission will be realized has changed significantly in response to changes in our society, to expanded knowledge of conflict resolution and labor relations, and to lessons gathered by the nation's mediators over a half-century of work with collective bargaining relationships and dispute mediation interventions.

During FMCS' first twenty-five years, the adversarial labor-management relationship model was so deeply ingrained in our minds that it was the model of choice. Few even considered the possibility that other options existed. Provisions of the National Labor Relations Act (as amended) regarding contract negotiation, for example, were fashioned on the adversarial model. Experienced negotiators in labor relations grew up on the traditional adversarial model, as did mediators who had been experienced bargainers in their former lives. The adversarial model permeated all aspects of labor-management relations, and it was evident even in other sectors of society where bargaining took place. In order to fulfill its

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1. Taft-Hartley Act, 1947.

2. FMCS Mission Statement, available at <http://www.fmcs.gov/pubinfo/Brochures/Putting%20Custom%20rs%20First.htm> (visited Apr. 11, 2002).

mission statement, the focus at FMCS was twofold: first, provide effective mediation assistance, usually in the last period of time prior to contract expiration, during the negotiation of collective bargaining agreements; second, provide training in negotiation skills to both labor and management bargainers in the belief that the adversarial model was the appropriate way to bargain, and that bargaining efficacy on both sides would be increased by improving the practitioners' skills. The training proffered was to educate the parties how to bargain effectively within the traditional model, not "how to get the best of one's opponent." Mediators, ever mindful of neutrality, encouraged interested parties to engage in joint training. When joint training was declined, the mediators always offered the same training to both groups.

By all accounts, this system of collective bargaining, with the adversarial model as its foundation, worked. And, the reputation of federal mediators was first built during this period through one successful intervention at a time. For many relationships, it remains a viable model. Over the last three years, FMCS mediators have provided assistance in an average of 5,275 traditional negotiations per year, and 93.4% were successfully concluded without an interruption to production.

However, under the adversarial model, symptoms of deteriorating labor-management relationships that stemmed from failure to adequately address problems during the term of the contracts were increasingly manifesting at the bargaining table. The number and intensity of non-economic issues frequently grew to unwieldy dimensions. In a surprisingly large number of bargaining relationships, mediation began to be used at every round of negotiations. Many mediators were able to enumerate a number of cases where the list of issues was so long, and the intensity of feeling so high, that a work stoppage or lockout occurred before the parties got to serious discussions about the economic issues. Further, in many of these cases the level of rancor was so high that it prevented the parties from engaging in effective negotiations regardless of the presence of a mediator.

FMCS responded by developing a variety of interventions to be utilized by parties during the life of collective bargaining agreements. The avowed purpose was to solve problems and manage conflict that arose in between contract negotiations to minimize the number of non-economic issues that would arrive at the bargaining table. One such intervention, for example, was increased promotion of the labor-management committee ("LMC") concept. In a functional LMC, a fairly regular group including representatives from both labor and management would meet at regular intervals, usually once a month, to address issues that would crop up dur-

ing the normal administration of the collective bargaining agreement. Training of committee members in LMC functioning, problem solving, consensus decision-making, group dynamics, and conflict management tools was provided by FMCS. In keeping with the adversarial model mindset of the time, it was standard practice to suspend the LMC meetings during the period of contract negotiations, since the cooperative problem-solving model of the LMC was inconsistent with the adversarial bargaining model.

II. DEVELOPMENT OF INTEREST-BASED BARGAINING AT FMCS

The design and implementation of a new form of collective bargaining, called Interest-Based Bargaining or "IBB," proved to be one of the most important FMCS interventions to solve labor-management problems and manage conflict. Some of the numerous synonyms for IBB help describe it with greater color and accuracy: Win-Win, Mutual Gains, Best Practices, Principled Negotiations, and Integrative Bargaining are other names for the basic cooperative process FMCS calls IBB. No matter how it is described, three key elements stand out as critical to its development and inception. First, in 1965, Walton and McKersie introduced the concept of a dichotomous choice of bargaining styles, which they named "distributive" and "integrative".³ In a comprehensive discussion of each, they examined the parameters, characteristics, and key variables of each style of bargaining. Second, in 1983, Fisher and Ury, in *Getting to Yes*, laid out the basic principles that underlie all current IBB models in use today.⁴ Third, in 1989, Jerome T. Barrett developed the PAST model (Principles, Assumptions, Steps, Techniques), which offered a formalized win-win bargaining system *and* a training program.⁵ It was only after the progression of Walton and McKersie, Fisher and Ury, and Barrett that IBB was ready to be developed in a systematic, meaningful fashion with real potential for implementation.

3. See generally ROBERT MCKERSIE & RICHARD WALTON, *A BEHAVIORAL THEORY OF NEGOTIATIONS* (1965).

4. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES* (1981).

5. See generally JEROME T. BARRETT, *P.A.S.T. IS THE FUTURE - A MODEL FOR INTEREST-BASED COLLECTIVE BARGAINING THAT WORKS!* (5th ed. 1998).

III. THE PAST MODEL AND THE ORIGINS OF IBB

In 1989 and 1990, Barrett began to run pilot IBB programs using his PAST model. In some of those efforts he worked in conjunction with FMCS mediators in negotiations that had been identified as appropriate for the process. Barrett also briefed FMCS mediators in a series of meetings across the nation. An initial cadre of FMCS mediators began employing the process, training other mediators, and experimenting with changes. Although FMCS statistics for that period of time did not separately categorize cooperative bargaining uses, it is believed that FMCS conducted no more than a dozen PAST-based cooperative bargaining sessions in the 1989-91 period. These early pilots were overwhelmingly successful in reaching agreements.

A brief review of the PAST model is a helpful framework for understanding obstacles to successful use of the process and current best practice in cooperative bargaining. As mentioned above, PAST stands for: Principles, Assumptions, Steps, and Techniques, and it forms the backbone of the workings of the process.⁶

Principles:

1. Focus on issues, not on personalities.
2. Focus on interests, not on positions.
3. Seek mutual gain.
4. Use a fair method to determine outcome.

Assumptions:

1. Bargaining enhances the parties' relationship.
2. Both parties can win in bargaining.
3. Parties should help each other win.
4. Open and frank discussion and information sharing expands the areas of mutual interests, and this in turn expands the options available to the parties.
5. Mutually developed standards for evaluating options can move decision making away from reliance on power.

Steps:

1. Pre-Bargaining Steps:
 - A. Prepare for bargaining.
 - B. Develop opening statements.
2. Bargaining Steps:
 - A. Agree on a list of issues.
 - B. Identify interests on one issue.
 - C. Develop options on one issue.
 - D. Create acceptable standards.

6. JEROME T. BARRETT, A SUCCESSFUL MODEL FOR INTEREST-BASED COLLECTIVE BARGAINING AND PARTNERING IN THE PUBLIC SECTOR 4:5 (1996).

E. Test options with standards to achieve a solution or settlement.

Techniques:

1. Idea charting.
2. Brainstorming.
3. Consensus decision-making.

An integral prelude to the PAST model is joint training for bargaining teams that intend to use this win-win bargaining model for their upcoming negotiations.

For FMCS mediators, the first five years using the PAST-type of interest-based negotiation revealed consistent patterns of experience on both the positive and negative sides. On the positive side, the end results of an IBB bargaining session were invariably an agreement, an improved relationship and understanding between the bargainers, and a favorable view toward future use. There were several negatives as well. First, the process consumed an enormous amount of time and energy, required almost constant third-party facilitation, and created a mountain of information on flip charts, all of which hampered the efficiency of the process. Second, the PAST model's insistence on delayed handling of economic issues meant that even the most cooperative parties were surprised with the challenges posed by difficult economic issues midway through the process. Finally, it was never uncommon for a lengthy PAST process to consume 15, 20 or even 25 days of bargaining sessions.

Though the PAST model of interest-based negotiation had some problems, the benefits far outweighed the drawbacks. PAST conclusively demonstrated that parties could bargain labor contracts cooperatively through the use of a carefully structured process. At that time, reading Walton and McKersie's work on integrative bargaining, one was struck by how seldom the authors offered examples of successful interest-based labor negotiations. Was it because they felt that the design of a truly integrative bargaining process remained elusive? Other important contributors, such as Fisher and Ury, offered a powerful vision of integrative bargaining that seemed difficult to apply to the hard realities of labor-management collective bargaining. As far as FMCS was concerned, the PAST model of cooperative negotiation was an integrative process that essentially worked — not once, but time and again.

FMCS mediators were enthusiastic about PAST's successes. Success rates are important, to be sure, but PAST excited mediators for another reason: it offered them options to bring to their clients. Mediators often

worked with parties who had developed viable, cooperative working relationships during the administration of their contract. In these situations, it felt like a step *backward* to help the parties use traditional adversarial bargaining to negotiate their successor contract. With an interest-based process, the mediator could offer these clients a negotiating method that more closely matched the tone of their normal relationship. This was the original power of the PAST model: it brought a new, cooperative style of bargaining to the table for parties that wanted it and could use it.

Though they were enthusiastic, FMCS mediators worked individually and collectively to identify the causes of some of the PAST model's drawbacks. PAST's important role as the first practical interest-based negotiation process made it critical for FMCS to conduct a careful analysis of the model's pros and cons in order to learn from the experiences. The negative aspects of PAST were identified as stemming principally from six distinct areas:

1. Vagueness and lack of specificity in the way issues were placed on the agenda.
2. Developing interests without first holding a group discussion about the issue.
3. The process drive to exhaust all possible interests before moving to options.
4. The process requirement that standards be brainstormed for each issue anew.
5. The lack of prior discussion, understanding, or training on dealing with economic issues.
6. The sheer burden caused by the magnitude of items flip-charted and placed on the wall (this problem was further exacerbated by the volume of interests noted in #2 above).

Initially, the identification of issues was done in short phrases, e.g. "leave of absence", "sick leave", or "health insurance". The placing of an issue on the bargaining table indicated the desire for some change. In stark contrast to traditional bargaining, the interest-based process operates without proposals. In interest-based negotiation, the bare listing of the issue serves as the starting point. If for example, there was confusion over the meaning of "holiday" and "vacation" in conjunction with the use of a personal leave day, simply listing "leave of absence" as the issue left open the question of which of the three contractual pages on 'leave' was at issue. Thus, with PAST, moving immediately to identify issues left the parties with an overly generalized list in which the issues had not been properly focused.

Moving into the interest-generating phase of the PAST process without a more focused discussion of the issues led to a lack of focus as the group moved into the next phase of the process. It also placed half the group at a potential disadvantage. While the group placing the issue on the agenda was clear about the issue, the rest of the group was left to infer the specific nature of the issue from the dialogue as the process moved forward.

Another concern with using PAST stemmed from the bargainers' acculturation that predisposed them to think in terms of solutions, or options, rather than interests. Even with adequate PAST training, it proved challenging for experienced bargainers to think comfortably about all the interests underlying the issues on the table prior to searching for solutions. While using the PAST model, often bargainers were not adequately encouraged to uncover all the relevant interests. This fact, coupled with inadequate issue definition, usually resulted in a proliferation of extraneous issues that bogged down the bargaining process in a morass of delay and consequently left the bargainers feeling profoundly dissatisfied with the process.

It was also felt that PAST engendered confusion over how to develop and administer a list of standards, or criteria, necessary to ensure that options generated satisfied the interests so carefully enumerated during the bargaining process. At first, PAST suggested that parties use a joint, consensus-based brainstorming session to set criteria for each issue on the table, giving the groups an ability to express their own value set and thus take ownership of their own standards. Early PAST bargaining trials showed this process to be so time consuming that it became easier to develop a "standardized" list of criteria that could be employed in *every* PAST bargaining session. These criteria were: acceptable to constituents, fair and equitable, understandable and simple, workable and manageable, affordable and cost effective, flexible, and mutually beneficial. Though this system helped expedite a PAST bargaining process, the groups did not participate in the development of the criteria. Therefore, they were not encouraged to check whether the options generated satisfied the list of interests. This in turn reinforced the tendency of groups to ignore the interests list, and in this way, the entire value of an interest-based process was diminished.

Dealing with economic issues soon became the most troublesome aspect of using the PAST model. Parties were encouraged by mediators to use the PAST process to handle non-economic issues first, and then economic issues second. By the time the parties were able to get to the critical economic issues, they regularly became anxious, hesitant, more guarded, and less secure in the PAST process. Mediator activities would then shift noticeably from facilitation roles to traditional mediation roles. Interestingly, this difficulty occurred at the same juncture – when it was time to handle economic issues – in each PAST negotiation. Labor-management folklore surrounding interest-based negotiation began to describe the process as effective for non-economic issues but undesirable for economic issues. In short, while the PAST model

was a critical learning component for FMCS with regard to the development of viable interest-based negotiation processes, certain critical drawbacks encouraged FMCS mediators and leadership to design the next generation of interest-based processes.

IV. INTEREST-BASED BARGAINING (IBB) EMERGES

During the early 1990s, FMCS mediators and others worked to improve the process areas of the PAST model that needed improvement, both at the training and facilitated negotiation stages of the model. By the mid 1990s, there was sufficient divergence from the PAST model practice that FMCS decided to name the resultant new model: Interest-Based Bargaining.

One of the strengths of FMCS has always been the high degree of professional freedom among the mediators to try new approaches to dispute mediation. FMCS continues to encourage experimentation on all process models, and the next section of this paper discusses the current version of IBB as FMCS mediators practice it (and also how it is taught during the 200 hours of required training for new FMCS mediators). Though what follows is the predominant IBB practice at FMCS, of necessity there continues a diversity of practice and continued experimentation throughout the agency.

A. *Current IBB Best Practice at FMCS*

The following is an in-depth discussion of the current FMCS interest-based bargaining practice:

Information Sharing and Assessment: Typically, parties that have an interest in IBB seek further information about the process to assist them in making an informed decision about which bargaining process to choose. The inquiry will usually lead to an opportunity for an FMCS mediator to meet with the key decision makers, their bargaining teams, and often with some of the constituents. At this stage, the mediator shares information about the IBB process and assesses whether the parties are ready, willing and able to adopt a cooperative bargaining process for their upcoming contract negotiation.

Those considering using the process must receive a firm grounding of what IBB is, and is not, as well as realistic expectations of what they can reasonably expect in the way of results. The term “mutual gains” is frequently thrown around in an imprecise manner. More often than not, parties come to believe that it means they will get a ‘gain’ on every issue brought to the table that is *at least equal* to the amount of ‘gain’ they perceive the other party has achieved. Results that ‘fall short’ of that expectation lead to the conclusion that the other side has not bargained ‘cooperatively’. Inflated expectations can doom an otherwise promising IBB negotiation. It is the respon-

sibility of the mediator to spend sufficient time making sure parties understand that in IBB, mutual gains are not measured issue by issue, nor *in toto* on the 'scales of justice'. Rather, IBB can legitimately be expected to provide sufficient solutions to the interests and needs that emerge during the process – or offer an understandable rationale as to why those interests cannot be met.

While the parties are learning about the IBB process, the mediator assesses the parties' suitability for IBB. Some groups might never be good candidates for use of IBB, while other groups are frequently good candidates. A third variety of group may possess the potential for successful IBB (and may even have used IBB in the past), however, extant timing issues that will negatively impact the process would disqualify such groups at that particular time.

Some assessment indicators that the mediators look for include:

- Evidence of successful labor-management cooperation during the term of the past contract.
- The willingness of the parties to fully share bargaining information.
- Sufficient time remaining prior to contract expiration to complete the necessary sequence of assessment/decision-making, training, and application of the IBB process.
- A willingness to forego the use of power to secure outcomes.
- The absence of clearly divisive, critical issues and/or fixed positions on important issues.
- An understanding and acceptance of the process by key decision-makers, bargaining teams and constituents.
- Significant motivation by the parties to change their existing traditional bargaining styles.

Pre-Bargaining Training

Training of *all* members of the bargaining teams is critical to successful use of IBB. The task for team members is not only to learn the steps and techniques of IBB, but also to learn how extinguish certain traditional bargaining behaviors that will prove fatal to IBB.

A typical IBB training includes a concept presentation, followed by a careful comparison of IBB versus traditional adversarial bargaining. The mediator then conducts exercises to "test" the beliefs of the group around the concept that focusing on interests will result in collaborative problem solving and ultimately, in a new collective agreement that is bargained cooperatively. Skills building training in brainstorming, consensus decision-making, and

communication practices follow the belief “test.” The training then moves to the practical side: the group must now apply IBB elements to a mock labor issue.

The training culminates with a simulated labor dispute that tests the teams’ ability to work the IBB process to completion. A failure to reach successful conclusion during the simulation will signal the mediator to recommend that the parties retain their traditional bargaining method. At the conclusion of the training, a separate caucus is held by each party to allow the group, with the guidance of the FMCS facilitator, to explore the feasibility of using IBB.

Pre-Negotiation Meeting

Prior to the actual start of the negotiations, the parties need to meet to accomplish the following four tasks:

1. Develop ground rules under which the bargaining will be conducted;
2. Develop rules providing for a smooth transition to traditional bargaining without litigation in the event that the IBB process breaks down;
3. Exchange lists of issues to be bargained, including grouping and sequencing;
4. Focus the issues.

The following is a more detailed discussion of these tasks:

1. *Bargaining Ground Rules:* When engaging in traditional bargaining, there is little discussion or need to address ground rules (except in the public sector). Most bargaining teams, and especially committee spokespersons, have significant experience in the rituals that constitute the unwritten “rules” under which the process is conducted. Parties engaging in IBB must receive specific guidance concerning the “rules of the road.” Team composition, questions of quorum, timing and scheduling of meetings, communications allowed outside the bargaining teams, and methods of documenting tentative agreements are all examples of important considerations that are better addressed prior to the start of negotiations. This is a continuation of the establishment of group norms that begins during the training phase.⁷ Group norms will develop early on during the training. The question is, will they form randomly, or by conscious design?

2. *Transitional Ground Rules:* Cooperative bargaining must be a voluntary process by definition. Any attempts to enforce cooperation are self-defeating. Therefore, parties must be encouraged to anticipate the questions

7. Deborah Ancona et al., *The Group and What Happens on the Way to Yes*, 6 NEGOTIATION J., 155, 160-161 (Spring 1991).

that will arise if the process falters to the point that one or both parties choose to abandon IBB and return to traditional bargaining. Transitional ground rules will provide the answers to the questions that would inevitably arise if an IBB session failed. These include questions of notice to the other side, handling of tentative agreements already reached, and ability to add agenda items, among others.

3. *Exchange of Issues*: One of the flaws noted in the PAST model (as it was originally practiced) was the failure to be sufficiently specific when listing issues for the agenda. After much experimentation with problem statements, and various other forms of problem questions, the following guidance is now given to all parties in order to provide sufficient detail at the issue-exchanging phase:

Pose the issue in the form of a question which cannot be answered with a single word and which contains within its borders no hint of a solution to the issue. If there is relevant contract language currently existing in the contract, include the appropriate citation as reference.

4. *Focus the Issues*: The mediator will work with the group to frame each issue, often by forcing the group to come up with detailed reasons and the background that led one or both parties to bring a particular issue to the bargaining table in the first place. This will help the group identify the specific nature of each issue, as well as the boundaries that frame the issue. Emphasis on focusing the issue at this stage greatly shortens the time necessary to process the issues, enables groups to avoid discussion of unrelated matters, and aids in reducing the number of interests expressed that are irrelevant to the actual problem.

The FMCS mediator will now bring the group through the IBB process. First, the parties will develop a list of interests (on both sides) that accompany each issue. Generally speaking, FMCS experience with IBB sessions has shown that the parties should be limited to *nine* important interests for either the union or management on any one issue. Mediator emphasis on enforcing this guideline (which is introduced in training, and stressed throughout the process) has been a very effective mechanism to reduce the time and energy expended on the IBB process without sacrificing the creativity, quality and efficacy of resolutions reached.

Standards

Now the group is ready to develop standards that will serve to measure the efficacy and acceptability of the problem-solving options that are generated during the brainstorming step. Though older models of IBB encouraged groups to develop long lists of standards, the current best practice employs a three-stage Factor Analysis System (FAS). The FAS brings each option (or grouping of options) generated through three different levels of analysis, one stage at a time. If the option proves feasible at one stage, the group will advance that option to the next stage; each option is tested in this fashion. Options that pass all three stages are submitted for inclusion in the tentative agreement.

The individual stages of the FAS work as follows:

Stage I: The Feasibility Factor. The group holds up the option and answers the following question:

- Is this option capable of being done or carried out?

Important considerations in this analysis are legality, affordability or cost effectiveness, workability, practicability or manageability, understandability or simplicity, and flexibility.

Stage II: The Benefit Factor. In this stage, the group investigates the extent to which the option considered will contribute to an improvement in the condition that underlies the issue raised. This stage links the interests developed with the options brainstormed to see how well the option raised will do. The following questions help define Stage II:

- Does this option satisfy important interests listed?
- Does this option harm any important interests of either group?

It is important to note that if mutually exclusive options offered are of equal value, the option that provides the greatest mutual value should be chosen.

Stage III: The Acceptability Factor. At this third stage, the group must examine whether both parties' constituents will receive the option favorably. This analysis may require a discussion of how the overall agreement, or tentative agreement, will look. Though not all parts of the agreement will be equally liked, it is valid to apply this test to any piece of the overall picture. The fundamental question is whether the option generated will stand the test of formal approval, i.e., will the union refuse to ratify over this issue, or will top managers refuse to approve a deal that includes this issue. The following questions help refine the acceptability factor:

- If one or both parties' constituents will not approve this option, why not?

- Are there political problems connected with this option?
- How can this option be re-worked to make it acceptable while enabling it to maintain compliance with stages I and II?

It is difficult, but necessary to avoid discussing interests and solutions during this third stage. For example, “vacations” is too broad an issue description. “How to schedule vacations during peak periods when more employees than can be accommodated desire the time?” gives better focus for efficient team processing.

Handling Economic Issues

In dealing with economics, the fundamental flaw in the early practice of interest-based processes was the premature and seemingly inexorable movement into distributive bargaining. Greater rapport was the primary distinguishing characteristic between economic issue bargaining under interest-based and the traditional model. It happened with such frequency that attention focused on constructs that would facilitate a settlement under that expectation. Once such device was the use of an “ABC filter.

The strategy underlying the “ABC filter” is to postpone to as late as possible, the final decisions that eventually have to be made. There are two reasons for doing this. First, since so much is interrelated, an early positioning on any one issue may have been avoided by later discussions or decisions on other economic issues. Second, the farther you can get in the process, the greater the motivation of the parties to try to reach a cooperative conclusion. Listed below are the steps for using a filtering mechanism:

1. Place in order the final set of issues that need discussion and resolution. Direct compensation is always last.
2. Take the first issue and follow the IBB steps of focusing the issue, developing interests, and brainstorming options.
3. Categorize the options into one of three categories by group consensus:
A-TA regardless of what the rest of the economic package might be.
B-Eliminate regardless of what the rest of the economic package might be.
C-Hold for later consideration.
4. Work the remaining issues one by one through the A-B-C filter.
5. Those options remaining in the C category are all that is left to be processed to obtain a final contract TA.

While helpful, these devices when used too early undermine the potential power that should be the most important reason for using the IBB process, the opportunity for the parties to create wealth by applying their joint creativ-

ity to the parties' important interests before focusing on how to distribute that wealth. In its most succinct form this is usually stated as, "Expand the pie before slicing it up".

Best practice to accomplish this involves a short intervention by the facilitator just before starting the economic issues to reaffirm this principle, and then concentrating on the interest step and brainstorming step of the process as parties process the economic issues. Finally, the facilitator should be prepared to more actively intervene to counteract the parties' tendency to fall into distributive bargaining.

B. Observed Results

FMCS has been clear from the outset that it regards IBB as an alternative to traditional bargaining, not as the next step in the evolution of collective bargaining. IBB is not, and should not, be seen as a replacement to the traditional adversarial bargaining model with which bargaining parties are so familiar. Among the potential advantages that the IBB process offers are:

1. An enhanced and cooperative relationship,
2. Heightened respect and trust between the parties,
3. An agreement containing more elegant solutions in terms of needs and permanence.

Because it is a cooperative process, those labor and management groups that have achieved a cooperative relationship during the administration of their collective bargaining agreements are likely candidates for a fruitful IBB process. In this way their contract negotiation approach will be consistent with the rest of their relationship. Since IBB is also a problem-solving process, those parties who have complex, information laden, or changing-relationship issues to manage can benefit from the use of the model.

An evaluation of IBB then, logically, would measure three dimensions:

1. If IBB is an alternative rather than an experiment, do substantial numbers of bargainers know of the process, have they tried it, and are they favorably disposed toward it?
2. Is IBB better suited to longer-term solutions that require improvements in the strength of the relationship? There should at least be some evidence that IBB negotiations involve issues that deal with relationship change more frequently than traditional negotiations.
3. If IBB engenders a cooperative relationship, do parties using the approach show a positive change in their relationship following use of the process (holding intervening variables constant)?

While there is much anecdotal evidence from FMCS mediators regarding IBB and comparisons to traditional negotiations, hard data is still scarce.

FMCS case statistics provides some general information regarding volume of use, issues on the table, and level of strike/lockout activity. Also, there is some data available from the 1999 national random-sample survey of union and management lead bargainers conducted for the FMCS to fulfill the Federal Government's National Performance Review requirement.

FMCS case statistics show that FMCS has been actively involved in slightly over 1500 IBB negotiations in the last five years. This represents an average of 5.44% of total contract negotiations involving an FMCS mediator, ranging from a low of 2.6% in 1996 to a high of 6% in 2000, and 5.4% in the most recent fiscal year. Data from the 1999 survey report that "over 80 percent of union negotiators and 67% of management negotiators were familiar with IBB and a majority of both sets had used these techniques."⁸ Further, seventy percent of management negotiators and approximately half of union bargainers prefer the process to traditional bargaining.⁹ Finally, the survey revealed that IBB was rated good to excellent by between 60 and 77% of negotiators who used the process.¹⁰ While IBB has *not* emerged as the most widely used form of FMCS dispute mediation activities, the consistent level of activity over a five-year period, favorable reviews, and a high level of awareness among labor negotiators all emphasize that IBB has left the experimental phase and become a useful bargaining alternative.

Longitudinal data has not been collected to determine whether IBB reduces either the volume of issues on the table and/or the perennial repetition of difficult relationship issues. While anecdotal evidence from FMCS mediators supports these hypotheses, there is a clear need for formalized statistical research. FMCS case data supports the hypothesis that relationship issues will be more frequently found on the IBB table, and "bread-and-butter" economic issues less frequently on the table, when compared with traditional bargaining. An analysis of negotiations involving mediators showed that between 1996 and 2001, the occurrence of working conditions was an issue in IBB negotiations 14% to 26% more frequently than in traditional bargaining cases. Similarly, work reorganization was an issue in IBB negotiations 7% to 14% more frequently than in traditional bargaining cases. Conversely, wages showed up in traditional bargaining cases between 11% and 23% more

8. Joel Cutcher-Gershenfeld et al., Final Report on the Second National Performance Review Survey for the Federal Mediation and Conciliation Service, 6 (2000).

9. *Id.*

10. *Id.*

frequently than in IBB cases, and pension issues 10% to 16% more frequently than in IBB. These results match expectations. A study of contract changes bargained in Canada showed a similar pattern, and it concluded that IBB provided more innovative changes in collective bargaining agreements than did traditionally bargained agreements.¹¹

An analysis of FMCS case data from 1995 to 2001 also shows that FMCS mediators were actively involved in approximately 400 negotiations a year in which there was a work stoppage or lockout. This represents approximately 8% of the total number of dispute mediations per year, on average. In principle, mediators are only involved in traditional negotiations when there are difficulties. Therefore, it is not surprising that in a high percentage of negotiations with FMCS involvement there is a work stoppage or lockout. What *is* surprising is that for the same period of time (1995-2001), there have been only three work stoppages and lockouts out of 1500 interest-based negotiations involving FMCS mediators. As part of the assessment phase of IBB, mediators look for concrete signs of a positive relationship, and therefore will seldom offer an IBB process to the parties with the most difficult relationships. However, clearly the data warrant further analysis: three work actions out of 1500 IBB negotiations in a 5 year period is a surprising statistic even for the most experienced FMCS mediators.

V. BEYOND INTEREST BASED BARGAINING

Originally parties were limited to two distinct bargaining models, traditional adversarial and IBB, each located at opposite ends of the spectrum. Since IBB is not a step in the evolution of collective bargaining, it will not and should not be seen as the only alternative to the traditional bargaining processes that parties have embraced. IBB is an option that offers distinct advantages in a proper setting. In order to make IBB successful, however, both parties must be sufficiently committed and trusting to fully share information. Further, parties must also be ready and able to work toward integrative solutions. All, or most, of the issues must lend themselves to cooperative resolution, and constituents on both sides must embrace a cooperative relationship.

An analysis of IBB negotiations that break down shows two likely situations. The first involves an unsuccessful IBB effort in which parties are able to resolve many, even most, of the issues before the process comes unhinged when it is time to address the economic issues. In the second instance, the level of group cooperation is not high enough for the participants to reach

11. Renaud Paquet et al., *Does Interest-Based Bargaining (IBB) Really Make a Difference in Collective Bargaining Outcomes?*, 16 NEGOTIATION J. 281, 292-293 (Summer 2000).

consensus on some, or all, of the potential options for resolution of the issues.

Until recently, numerous parties to a collective bargaining relationship that desire to employ a cooperative process, and can benefit from a successful one, have had only one choice: IBB. Unfortunately, for reasons mentioned above, IBB is not suitable for all labor-management collective bargaining relationships. The result is that in between those groups persisting with traditional bargaining and those groups that are compatible with an IBB process there exists a potentially large population of bargainers desiring some level of cooperative relationship, but do not have a cooperative process to employ.

It is for these groups that Modified Traditional Bargaining ("MTB") and Enhanced Cooperative Negotiation ("ECN") have been specifically developed. There may be a group early on the path to a collaborative relationship seeking to increase its level of cooperation at the bargaining table. Or, perhaps a group desires cooperation but recognizes that it will face some clearly divisive issues that do not lend themselves to a cooperative resolution. Or in a third scenario, perhaps a group faced with a challenging business environment is forced to cooperate for survival, however, circumstances surrounding the labor-management relationship are proving challenging. For all these cases, and others, where groups seeking to cooperate may find full consensus at the bargaining table impossible to achieve, MTB or ECN offer realistic, attractive options beyond IBB.

VI. MODIFIED TRADITIONAL BARGAINING

Though the results of increased use of IBB in labor-management negotiations were encouraging, the problems identified by field mediators with the IBB process, as well as the sheer extremity of the departure from the traditional adversarial model, rendered the IBB process unsuitable for many negotiating parties. Further, in addition to the technical, logistical and practical hurdles that parties looking for an alternative (non-adversarial) bargaining process would face, often the political circumstances surrounding a particular labor-management relationship made it unlikely that IBB could gain acceptance. On the other hand, the experience with IBB clearly demonstrated that introducing negotiating parties to the concept of underlying interests — what were they, how to identify them, and what their value was to the bargaining relationship — was a powerful means of conflict resolution within bargaining.

The FMCS leadership felt the agency should investigate the possibility of increasing parties' exposure to the value of exploring "underlying interests" for bargaining purposes without necessitating a comprehensive IBB training. Four FMCS mediators with extensive experience in the development and use of the IBB process formed a committee in early 1999 to address this question. The task was to identify and refine an interest-based process that would allow for an easy reversion to traditional adversarial collective bargaining in order to close issues left outstanding by the interest-based process. Practitioners dubbed the resulting bargaining model "Modified Traditional Bargaining," or MTB.

MTB was the first negotiating model formally developed by FMCS in an attempt to cover the middle ground between the traditional adversarial model and the alternative IBB model. A large population of potential clients for MTB existed among groups that desired and were capable of a more cooperative approach than traditional collective bargaining offered, but that were not ready to achieve the levels of consensus required for a successful IBB effort. MTB was conceived as an alternative model to both traditional bargaining and IBB, and it was designed to capitalize on parties' desire for greater degrees of interest sharing, problem-solving, enhanced communication and information sharing that were needed to fulfill their mutual desire for a cooperative process without requiring the level of commitment required by IBB.

The premise underlying MTB is simple: levels of ability to cooperate vary widely, and the collections of issues brought to the table are likely to span a full spectrum of potential for collaborative resolution. MTB enables parties interested in cooperation to maximize the cooperative potential in bargained issues. On a continuum defined by traditional adversarial bargaining at one end, and IBB at the other end, MTB falls roughly near the middle, but closer to the IBB side of the spectrum. Similar to IBB, a formal training session is required, and the actual negotiation is conducted in a structured fashion.

A. The MTB Process Examined

Generally speaking, the MTB process works as follows: first, parties share their respective issues to be negotiated as problems, not as proposals or positions; next, for each issue parties will start by sharing their interests, and then explore interest-based options for resolution of the issue. If no resolution is forthcoming and the parties have exhausted their discussion, they may negotiate the issue using a traditional bargaining approach. In this traditional bargaining phase, parties are free to develop positions or proposals based on the interests that have been discussed. Herein lies one of the most valuable

aspects of MTB: after an interest-based discussion, the proposals offered are more likely to fall within the realistic range of settlement as opposed to an extreme position that the offering party knows will be immediately rejected. In short, MTB encourages information sharing to enhance problem solving and thus improve the parties' relationship by demonstrating how cooperative development of interest-based options can lead to swift resolution.

More specifically, an FMCS mediator will conduct the following steps to implement an MTB process:

Initial Inquiry and Assessment: The mediator will make a group presentation outlining the fundamental expectations, helpful guidelines, steps and techniques necessary for MTB. In particular, the mediator will also assess the parties for some of the following indicators of what will make a good MTB candidate, such as evidence of commitment to developing a cooperative relationship, willingness of the parties to share important bargaining information, sufficient time to complete the MTB process prior to contract expiration, a willingness to forego the use of power as a first choice to secure outcomes, and an understanding and acceptance of the process by all the constituents.

Training: All members of both bargaining teams must be trained in the steps and techniques of MTB in order for the effort to be successful. Further, the training must take care to minimize or extinguish the emergence of traits and behaviors instinctive to seasoned traditional bargainers that would prove fatal for an MTB process.

Pre-bargaining: Prior to bargaining, parties must (1) reach agreement on ground rules for the bargaining sessions, and (2) exchange the issues that will be bargained, including necessary groupings and sequencing of these issues.

Facilitated MTB Process: It is necessary for a skilled facilitator to conduct the actual bargaining sessions. The fundamental expectations for the MTB sessions should be clear to both parties, such as: parties prefer cooperation, effort will be expended to solve problems, negotiations can enhance relationships, and mutual gain is required to ensure ratification and acceptance.

Once the above conditions are met, the three-part MTB process can begin. In Phase I, parties will work with non-economic issues believed to possess a high potential for cooperative problem solving. In Phase II, non-economic issues with a low potential for cooperative problem solving will be considered. Finally, in Phase III, the economic issues will be addressed.

In Phase I, the parties treat the issue much the same way they would during the option generation stage of an IBB session: they focus the issue, share interests and generate options. After this has occurred, the parties then

have a “resolution discussion” based on the options. MTB differs from IBB here in that the application of standards or criteria is not required, and further, in that consensus is not mandatory. If resolution is reached, the parties treat it as a tentative agreement. If there is no resolution, the issue is placed in a holding bin for later discussion.

In Phase II, the parties focus their list of issues, and share their interests on outstanding issues. Once all the issues have been discussed, the parties caucus privately and develop proposals on their own issues. From this point the parties exchange proposals and negotiate as they would in a traditional bargaining setting until resolution is reached. Resolved issues are treated as tentative agreements, and unresolved issues are placed in the holding bin.

In Phase III the parties tackle their economic issues. They focus their particular concerns, share their interests and make financial presentations. Following this step, the parties proceed to bargain traditionally on all outstanding economic and non-economic issues.

VII. MTB: BENEFITS AND CONCERNS

MTB has a high utility in situations where the parties’ relationship is *not* fully collaborative and there is a measure of unwillingness to share information. The broad appeal of MTB in these situations has an additional political benefit: the negotiators themselves are able to report to their constituents that they are not “selling out” by engaging in MTB, rather, they are engaging in a certain quantity of collaborative problem solving, and if they are not successful, they will naturally transition to traditional bargaining.

Though sharing information is encouraged, MTB differs significantly from IBB in that there is no *requirement* to completely share information. This makes MTB attractive to many private sector employers who are loathe to disclose financial and other sensitive information. MTB further differs from IBB on the issue of consensus. IBB requires consensus for all decisions, and those decisions must conform to standards. Some parties prefer a simpler “common sense” discussion in order to reach their decision, and they are easily distracted by the rigid delineation of criteria required by the IBB process.

On the other hand, for parties who have used IBB, or simply place a high value on reaching consensus in a problem-solving situation, MTB can prove troubling. MTB does not require the development of criteria, or standards, like an IBB session does. Some groups experience difficulty reaching decisions without objective standards. Further, resolution discussions tend to be more “aimless.”

Some of the criticisms of MTB come from the mediators themselves. For example, many mediators feel that MTB does not differ significantly enough from IBB to make it a useful model: mediators that could not use IBB with certain groups would not consider using MTB with those same groups. In addition, for groups interested in a collaborative problem-solving model that are not ready for IBB, MTB's participatory format may present additional challenges, for example, to bargaining committees that are unwilling to abandon their leadership structure.

Finally, the emphasis MTB places on information sharing makes it an unlikely alternative to IBB for private sector employers unwilling to offer, for example, full financial disclosure in the name of collaborative problem-solving. Though it is less structured than IBB, MTB still encourages information sharing at its core. This will suit parties unconcerned about sensitive or proprietary information, however, it does little to increase the field of options for employers looking for alternatives to traditional bargaining but are unwilling to share information.

VIII. MTB: OBSERVED RESULTS AND CONCLUSIONS

FMCS mediators have employed the MTB process in dispute mediation approximately fifteen times over the last three years. Mediator reports suggest that MTB has been extremely successful: according to several mediators, parties that bargained using MTB reached settlements that were superior to what they would have achieved using a traditional adversarial approach. As expected by the designers, mediators reported that MTB worked well for groups that were not ready to commit to a pure interest-based process such as IBB. Further, several mediators reported that groups employing MTB completed their bargaining process with a better relationship than the parties had experienced prior to the beginning of the contract negotiations. For some groups, the knowledge that the MTB could be abandoned at any time in favor of traditional bargaining gave the participants a high level of comfort with the MTB process.

Problems with MTB included a feeling among one participating union that management had abused the MTB process in order to force a sub-par compensation package. In another case, the enhanced cooperative relationship the parties gained through their MTB negotiations was destroyed when the principals departed; the relationship worsened and subsequent negotiations were conducted using the traditional adversarial model. Finally, one particular

group opposed to using IBB did not see any benefit to using MTB; it was felt that the requisite training period and structured nature of MTB was no different from the IBB process, and since these caveats were the principle detractors in the first place, MTB did not present a viable alternative to IBB in this particular case.

As discussed above, and in terms of a continuum of alternative bargaining processes, MTB represents a moderate step away from IBB in the direction of traditional bargaining methods. FMCS considers its development and utilization to be successful. As with all dispute mediation tools, however, occasions for use must be carefully vetted, and candidate parties must display the required level of commitment to the process in advance. Certain parties, however, will wish for a bargaining process that encourages a discussion of interests, yet eschews a lengthy training and a formalized negotiation system. In response to these needs, FMCS extended the continuum of interest-based processes further: toward Enhanced Cooperative Negotiation.

IX. ENHANCED COOPERATIVE NEGOTIATION

Though FMCS mediators began to employ the MTB process for interested parties almost immediately after the development committee finished its work, they found that the similarities between the MTB process and IBB made MTB unsuitable in many situations. Specifically, the formalized nature of the MTB process (for some parties, MTB appeared similar to an IBB process), the emphasis on information sharing, and the radical departure from the traditional adversarial bargaining structure rendered MTB unusable for certain parties. However, many mediators realized the inherent value of including a civil discussion of interests that surround the issues while at the traditional bargaining table. They felt that an interest-based outlook could benefit many traditional bargaining sessions without severely disrupting the normal flow of negotiations and discomforting the parties.

Some of the mediators involved with the development of MTB believed that a less formal, interest-based structure could be layered over traditional adversarial collective bargaining situations. In the fall of 1999, FMCS mediators began offering their clientele a new approach to bargaining: Enhanced Cooperative Negotiation, or ECN. ECN was placed squarely between traditional bargaining and MTB on the bargaining process continuum, thus creating a full spectrum of dispute resolution process options for the mediator to utilize. ECN was clear about its goals. It had to be simple; not require extensive training; not interfere with the parties' normal bargaining committee structures; promote communication and an understanding of interests that lie underneath the issues; and utilize the traditional bargaining process.

A. *The ECN Process Examined*

ECN can roughly be described as a three-part process: (1) mediator-facilitated issue preparation and exchange; (2) proposal preparation and exchange; and (3) traditional collective bargaining. As with IBB or MTB, any ECN initiative will be preceded by an initial inquiry and assessment, conducted by the mediator. The mediator will make a group presentation outlining the fundamental expectations, helpful guidelines, steps and techniques necessary for ECN. As with MTB, the mediator will also assess the parties for some of the following indicators of what will make good ECN candidates, such as: parties that already have a good working relationship, parties who are not candidates for IBB or MTB, evidence of commitment to increasing cooperative efforts beyond traditional adversarial bargaining, willingness of the parties to share individual interests and explore joint interests, sufficient time to complete the ECN process prior to contract expiration, and an understanding and acceptance of the process by all the constituents.

Once the mediator has determined that ECN could be applicable to a particular group of parties and their bargaining situation, he or she will conduct an ECN Overview session. During the overview, the mediator educates the parties about the value of exploring interests during the bargaining process, and how traditional bargaining overlooks this important element. The overview also stresses the need for parties to limit their issues and to only deal with what *must* be changed at the bargaining table in order for the labor-management relationship to continue for a successor contract. The overview culminates with a facilitated discussion about what type of experience the parties want, or expect to have, for their upcoming bargaining. If the mediator determines that the parties are ready to commit to the process, the ECN will go forward as follows:

Training: A six-hour training session is all that is required (versus two days for IBB). The main objectives of the training are to make sure the participants understand how to properly frame and focus their issues; differentiate between interests and positions; improve their communication skills; and familiarize themselves with the remainder of the ECN process. The training is also designed to help the parties get to know each other prior to the bargaining, in order to create a more relaxed bargaining atmosphere.

Issue Preparation: Subsequent to the training, the parties meet in separate caucuses to identify their issues. No positions, solutions or proposals are developed at this time. The parties simply identify their issues, and then list

each issue on its own separate “issue form”. Each issue form contains space for the parties to state the issue, and then list the interests that underlie the issue. The issue forms are collected and submitted to the mediator, who reviews them to make certain they are complete and in the proper format. The mediator uses the issues to assemble a bargaining agenda — a sequenced list of all the non-economic issues that the parties must address.

Pre-Negotiation Meeting: The parties come together for a pre-negotiation meeting, for two reasons. First, the ground rules for the negotiation will be established. The mediator will assist the parties to establish their own ground rules, however, for a successful ECN effort, the mediator will normally include four additional ground rules:

- The parties agree to craft proposals on all issues in the bargaining agenda, even if the proposal is to maintain status quo on a particular issue; the parties also agree to offer their rationale for each proposal they craft.
- The parties agree to take into account as many joint interests as possible when crafting proposals.
- During negotiations, non-economic issues will be handled first and resolved to the greatest possible extent prior to handling economic issues.
- If the parties reach impasse, they agree in advance to re-engage the mediator prior to taking any form of adverse work action.

The second part of the pre-negotiation meeting is the issues exchange. The mediator will move through the bargaining agenda, and have each party exchange their interests on each issue in the agenda. After the initial exchange, the parties separate and begin to work on each other’s issues, comparing their own interests to the other parties’ interests on a given issue. The parties will then meet again in joint session and discuss individual and mutual interests for each issue; it is critical at this stage that each party record the other party’s interests for each issue. After this exchange is complete, the parties will each have a written record of the issues with a comprehensive list of all the interests that underlie each issue from both sides.

Proposal Development: After the pre-negotiation meetings have been completed, the parties receive a period of about one week to prepare their proposals for the actual negotiations. The parties must craft a proposal for *each* of the issues on the bargaining agenda, even if their proposal is to retain the existing contract language (or the other party’s language). Parties are also required to record their rationale for each proposal to force them to refer to their interests or the interests of the other party. Further, as specified in the ground rules, the parties have agreed to try and incorporate as many of each other’s interests as possible into their issue proposals. In this way, ECN encourages the parties to craft proposals that will be more realistic, and potentially much closer to the other party’s proposal than a traditional bargaining

setting would encourage. Parties develop a written proposal for each issue on the bargaining agenda, and copies are prepared for distribution during joint session.

Proposal Exchange: The mediator convenes the parties in joint session and facilitates the exchange of proposals. The main reason for the mediator participation is to ascertain that proposals are exchanged for every item on the bargaining agenda, and also to ensure that parties offer their rationale behind each proposal, even in a “no change” situation. After the initial round of proposal exchanges, the mediator exits the meeting and leaves the parties to continue the process in this manner. The parties proceed down the bargaining agenda, reviewing each other’s proposals on each issue, and determine areas of commonality. Areas of easy agreement are recorded and put aside. Counter proposals, including the rationales behind the proposals, can be developed and exchanged. Tougher issues are handled via traditional bargaining starting from the positions offered in the final round of proposals that are exchanged. Additional traditional bargaining sessions are scheduled as needed.

Closure: Proposal exchanges and traditional bargaining proceeds on the non-economic issues until they are all resolved. Any issues left at impasse can be re-addressed during the economic issue bargaining sessions. At that point, economic packages and proposals are introduced, and the parties engage in traditional bargaining to reach closure. Traditional dispute mediation should be employed at this point if necessary. Parties are reminded that the ground rules they developed specify an agreement to re-engage the mediator before any work action will be taken.

X. ECN: OBSERVED RESULTS AND CONCLUSIONS

Since its development in late 1999, FMCS has employed ECN for eight separate contract negotiations. Five cases were public school systems with bargaining units sized from 100 to 4800 members. Three cases were in the private sector, with bargaining units sized from 50 to 300 members. Though not a statistically significant sampling, mediator-observed results are as follows:

- Seven out of eight groups have already committed to using ECN for their upcoming contract negotiations;
- All eight ECN mediations settled without any declaration of impasse or adverse work action;

- Seven out of eight groups described their negotiations as having concluded in "record time;"
- All eight groups found the process to be very efficient.

ECN also enhances the efficacy of the mediator, for several important reasons:

- Parties have engaged the mediator from the outset of contract negotiations, in a proactive setting, rather than utilizing the mediator to handle an extant crisis;
- Parties start the bargaining process with a short training period, helping neutralize competitive tendencies, increasing comfort levels, and enabling the mediator to get to know the participants before bargaining starts;
- Parties' bargaining positions are brought closer together before actual negotiations even begin;
- Adverse work actions are reduced or eliminated.

There have been numerous calls from around the country for more information on ECN, and FMCS has received several serious requests to have its mediators conduct ECN contract bargaining in locales nationwide. As it gets more exposure, the experience will help FMCS refine and augment the process as needed. Recent experience, however, indicates that ECN will become a powerful dispute mediation tool for a wide variety of groups located across the full spectrum of public, private and industrial activities.

XI . CONCLUSION

All FMCS mediation services are aimed at promoting and improving the conflict resolution and collective bargaining processes in the United States. This, in turn, helps American business remain competitive in the global marketplace, and thus helps increase the American worker's quality of life. As an organization, FMCS has developed an extensive ability to design and implement new processes for dispute mediation and conflict resolution interventions. As the options for bargaining increase, and the processes are refined through study and experience, FMCS moves closer to its stated goal of becoming the leading performance-based, customer-focused conflict resolution organization in the nation.