

## **Mitchell's Musings 2-4-13: Collective Bargaining Suggests That Everything is on the Table**

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Younger readers may not believe it but in ancient times when I went to grad school, there used to be courses in collective bargaining. Yes, really! Even in the business school! Not only that, but the coursework got into legal issues related to collective bargaining such as mandatory vs. permissive subjects of bargaining. Under the Wagner Act of 1935, and carried through within subsequent legislation, unions and employers were required to bargain in “good faith” over wages, hours, and working conditions. Much attention was paid to what bargaining in good faith meant. But there was also a literature on what you *had to* bargain about as opposed to what you *could* bargain about (but didn't have to).

The ambiguity arose in part due to the phrase “working conditions.” Eventually, “fringe” benefits such as pensions and health insurance were included under working conditions, even though these benefits were not explicitly described in the statute. Under the Wagner Act, neither side is compelled to concede to the other over demands on wages, hours, and working conditions. So the bargaining obligation translated into the notion that you negotiated in good faith but could legitimately bargain to an impasse (no agreement) and then you could take economic action, e.g., the union could strike to try to pressure the employer. Anything that could be construed as wages, hours, and working conditions was considered a mandatory subject, bargainable to an impasse.

There were still other issues classified as permissible. These issues were items that were otherwise legal to discuss but were not considered as wages, hours, and working conditions. An example could be a pension benefit improvement for workers already retired. Since they were not active workers, retirees' pensions could not be considered working conditions. Still, there was nothing illegal about a pension improvement for the already-retired. And so a union could ask an employer to make such improvements but could not bargain to an impasse over that topic.

Now economists reading about this distinction – mandatory vs. permissible – might well be puzzled. If there is a package being negotiated involving a variety of mandatory and permissible subjects, couldn't a union ask for something permissible but then strike ostensibly over a mandatory issue? Couldn't it, by winking and nodding, let the employer know that conceding on the permissible issue would lead to a settlement? I have a dim recollection of some literature indicating that despite the seeming fungibility of demands, the legal distinction between mandatory and permissible had some effect on bargaining outcomes. But the basic point to keep in mind is that there is some fungibility. And back in ancient times at least, unions did sometimes get pension improvements for their already-retired members even though technically they couldn't use their bargaining power to obtain them. We know that such improvements occurred. So apparently employers were willing to make retiree pension concessions in the face of union bargaining power.

In past musings, I have noted that the world of collective bargaining provides some insights into the kind of negotiations going on in Washington over fiscal cliffs, debt ceilings, and sequesters. So far, we have

had a confrontation on the fiscal cliff which was resolved around New Years. In a sense, it was a classic of collective bargaining and the timing was predictable. As we have noted in earlier musings, the logic of such bargaining leads to midnight settlements at the deadline – which essentially is what occurred. And the deal gave both sides some talking points to allow them to say they had not backed away from past assertions of what was acceptable. The deal preserved most of the Bush tax cuts but although the President had said he wanted the cuts for those with incomes above \$250,000 to be terminated, the figure was pushed to \$400,000. However, certain elements of a phase out starting at \$250,000 were included. So in the end the President could point to retaining the \$250,000 figure (in some fashion) while the Republicans could say they preserved more of the Bush tax cuts than the President wanted.

Beyond the cliff, however, was the debt ceiling. On the debt ceiling, the President took the position that the ceiling was essentially non-negotiable. It was not acceptable for the U.S. to be unable to pay its bills, etc. One lesson from collective bargaining is that once you declare something to be non-negotiable – which translates into saying that there will be no concession on that item, never, ever – you had better stick to that position. As we have noted, collective bargaining is a repeat game. If you say “never” about some item but later concede it, your credibility the next time you say “never” will be much eroded.

But even if you stick to the never position, the fungibility of items on the bargaining menu comes into play, as it does with the mandatory/permissible distinction. Saying never when there is a package on the table may insulate the one item about which never is being proclaimed. But you are nonetheless negotiating a package and there is a relative balance of bargaining power. So saying never on one item may mean more concessions on something else. In that sense, everything is being negotiated, even non-negotiable items.

At this point in time, the debt ceiling issue was put off until mid-May in a House-Senate deal, so the President was not tested on his “never” concerning that issue. But the issue is hardly settled and in the larger sense the debt ceiling is within the negotiations package even if it is somehow non-negotiable. Indeed, there is a wider negotiation going on that goes beyond fiscal and debt issues. The House remains in Republican hands. And the Senate – since the 60 vote for cloture rule remains largely untouched – remains a hurdle for the President even though it has a Democratic majority.

A recent court ruling has declared certain presidential recess appointments, including those involving members of the NLRB, to be invalid. The Obama administration has said it will appeal to the Supreme Court, which might decide not to take the case or might decide to uphold the lower court ruling. Since key presidential appointments must be approved by the Senate, overall Presidential bargaining power was essentially reduced by the court ruling for now.

In short, even if the debt ceiling is off the table, it remains part of the package of items in play. In the end, every item is on the table, even when one or more are ostensibly off. However, there is a key difference between collective bargaining and the kind of negotiations going on in the political world. Even though collective bargaining is a repeat game, it typically comes in intervals. Once a contract is

signed, bargaining ends until the date of the contract's expiration approaches. Often the contract duration is multiyear, 2 or 3 years or more. In the political world, there is no hiatus corresponding to the typical union-management contract duration. Negotiations are almost continuous and maintaining credibility from moment to moment is therefore important. Any slippage from a proclaimed "never" will have negative repercussions almost immediately. The lesson from collective bargaining is don't say never unless you mean it.

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*A nice thought from a stamp...*



*But be careful about what you concede.*