Drafting Contract Language

SkillBrief

The initial goals for bargaining should be established by the membership through the methods described in Part 2 of the manual. However, in addition to member goals, the bargaining team must also consider past grievances and arbitration decisions, problem areas pointed out by stewards, and union-building language that is often overlooked by the membership. After taking all of this into consideration, the negotiating committee, with the assistance of staff, should oversee the drafting of language.

The wording of contract clauses can make a big difference in the rights and benefits members will later enjoy—especially in the way arbitrators will rule on grievances involving those clauses.

Therefore, the committee and its advisors should…

Make language giving rights and benefits as specific as possible so the intent of the agreement is clear.

For example, compare the following phrases with ones that would leave the employer and the arbitrator much less room for interpretation.

1. The employer will consider…

Better to negotiate, "The employer must…" or "The employer shall…" Otherwise the employer can say, "I did consider doing what you wanted; then I decided not to do it."

2. The employer will provide reasonable opportunity to…

What seems "reasonable" to you may not seem reasonable to the employer, and you can't control what will seem reasonable to an arbitrator.

Better to leave the word out or give the power to decide to the union member instead: "The employer will provide the opportunity to…" or "Stewards shall have the right to…" or "The senior employee shall have the right to…"

Another fallback position is to define what is reasonable in advance: "Health and safety committee members shall have the right to inspect the workplace on work time at least once per month."

3. The most senior qualified employee…

Words like "qualified" or "able to perform the work" give the employer a great opportunity to discriminate, and arbitrators will tend to consider judgments about qualifications and ability to be part of management's role. Again, omit words like that or define them.

4. Leave may be granted if…

"May" usually is interpreted to mean that it's up to the employer.

Use "shall" instead.

Be careful about asking for more specific language you know you can't win.

For example, let's say the current contract says that "Computer operators shall be provided with a reasonable number of breaks to minimize eye and muscle strain."

Ideally, you would like to get rid of the word "reasonable" and negotiate breaks of a specified length every so many hours.

If you have filed a grievance on this, citing union and government studies on computer operator stress, and were unable to get the specific limits you wanted, then you have nothing to lose by trying to negotiate those limits.

But your decision is more difficult if the existing language has never been interpreted by an arbitrator.

If you leave it as it is, you run the risk of a bad arbitration decision because of the word "reasonable."

But if you ask for specific limits and don't win them in negotiations, you will have a very difficult time raising the same issue in arbitration because the employer will say, "The union is trying to win in arbitration what it could not win in negotiations."

Before proposing or agreeing to language, have a number of people check it.

For instance…

Stewards or other members who might be affected by the contract clause may be able to see problems you wouldn't have thought of.

Union reps or labor attorneys with long experience in handling arbitration cases also may be able to see hidden problems.

Another check might be to show the language to a few people who have no connection to this workplace or the union at all. Ask them for their common sense interpretation. They may help you catch confusing wording.

Propose specific language in a way that doesn't rule out broader rights.

For example, let's say you propose and win the following:

"The employer shall provide necessary equipment to protect employees' safety and health, such as gloves and masks."

Then let's say you file a grievance arguing that the employer must provide aprons because they are "necessary equipment to protect employees' safety and health." There is a chance that a bad arbitration decision might find that, if the two sides had wanted to include aprons, they would have included them along with gloves and masks.

Therefore, it would have been safer to either include aprons in the list to begin with

or make clear that gloves and masks are only examples:

"The employer shall provide all necessary equipment to protect employees' safety and health. Examples include gloves and masks of the type and for the jobs listed below…"

or

"The employer shall provide all necessary equipment to protect employees' safety and health, including but not limited to gloves and masks of the type and for the jobs listed below…"

Loaded Words

May — Implies permission and/or leaves it up to the employer. **Should** — Expresses a "moral" obligation, but not more than that. **Will** — Simply means the future, does not imply compulsion or a mandate. **Shall** — Denotes compulsion. **Must** — Implies necessity or compulsion. Stronger than "shall" but often too direct and strong to win in contract language.

When appropriate — Grants full discretion to management.

When practical — Only slightly more compelling than "when appropriate." Although there is some room for argument that something is practical, it is still management that has the final say.

When practicable — Really means when "workable." Management decides when something is workable, though there may be some room for discussion and argument.

Normally — Allows management to decide when the situation is "other than normal."

To the extent practical — Allows management to decide if the action is practical. It would be better to substitute "possible" for practical."

When possible — Very compelling. The only argument for inaction is that something is impossible — a very difficult case to support.

Make sure language in one part of the contract doesn't contradict language you've won in another part of the agreement. If it does, you are leaving it to an arbitrator to decide which clause to give more weight to.

Consider whether any proposal would have a discriminatory effect on particular groups of workers. You not only want to do a good job of representing everyone, but you also must provide fair representation to all and avoid any discrimination based on gender, age, race, or ethnic origin.

Draft language using the simplest words and sentences that will communicate accurately. Even if a lawyer is involved in drafting the language, workers should read the drafts to see if there are phrases they don't understand or that could be said more simply.