THE 3-D NEGOTIATOR

Facing a Protracted Dispute? Consider a “Virtual Strike”

Undistributed revenues offer you and your counterpart a growing financial incentive to settle an entrenched conflict.

BY JAMES K. SEBENIUS

SOME NEGOTIATED RELATIONSHIPS seem inherently unstable, prone to costly blowup and escalation. Take Major League Baseball (MLB). Between 1972 and 1995, the league suffered five strikes and three lockouts in which the Major League Baseball Players Association and the club owners were unable to negotiate new contracts.

The 1994–95 strike was particularly costly, lasting 232 days and eliminating 921 games and the season’s World Series. The rocky, dysfunctional bargaining inflicted immense losses not only on players and owners but also on fans, host cities, hotels, and vendors. Poststrike game attendance dropped by approximately 15% the following season and was still down 12% in 2002; World Series television ratings stayed low over the nine years following the strike. The value of the sport was seriously damaged for at least a decade.

This isn’t just a baseball story. The National Hockey League and the National Basketball Association also have suffered harmful strikes or lockouts in recent years. Contentious, escalating disputes in other realms—including labor strikes, protracted lawsuits, price and advertising wars, and actual wars—are common.

Imagine that there were a novel way to reach the same outcome that results from some of these brutal negotiations without significant costs. In fact, a different path to resolution is available: the virtual strike. Here I describe the benefits of this approach in the context of the 1994–95 baseball strike and show you how you might use it to treat similar disputes.

Structural factors leading to escalation

What causes standoffs such as the baseball strike? In part, the tendency of negotiators to irrationally escalate their commitment to a chosen position, as Harvard Business School professor Max Bazerman described in his article for our February 2004 issue, “Do You Know When to Walk Away?” Escalation and wars of attrition often are rooted in a history of bad blood, greed, and mutual hardball tactics, as was the case between the baseball players and the team owners. If these factors are the core causes, then the cures would appear to be mirror-image tactics: trust-building moves, better communication, and creativity.

Yet sometimes an underlying structural factor magnifies the tactical and interpersonal causes of escalation. Once a negotiation reaches impasse, parties begin to incur costs (such as lost pay and ticket revenue). While each side hangs tough, those amounts—along with the costs to bystanders—grow and grow. Whichever side ultimately wins, on whatever contract terms, the forgone pay, time, and revenue are sunk costs; no one gets them back.

These sunk costs can have a toxic effect on negotiating parties. Before one side caves in or an outside force (such as an arbiter, a judge, or even Congress) intervenes to mandate a deal, negotiators’ positions harden and their perceptions become more partisan. As escalation of commitment feeds on itself, the situation can get ugly. Be alert for negotiations with these structural characteristics: an impasse that triggers aggressive action, mounting costs for each side over time, and sunk costs that raise the emotional temperature and cause the conflict to escalate. When you find yourself in such a situation, it may be time for a virtual strike.

A structural solution: The virtual-strike clause

A term coined by Harvard Business School professor Michael Wheeler, a virtual strike is an agreement to: (a) resume revenue-generating activities interrupted by an impasse among the disputing parties, (b) put most or all of the revenue into some form of escrow fund pending resolution of the dispute, and (c) negotiate the distribution of those funds once the underlying dispute is resolved.

In terms of the 1994–95 MLB dispute, a virtual-strike clause would have permitted baseball owners and players to maintain their strike in financial terms while simultaneously continuing with the regular season and the World Series.

Here’s how. Suppose that the two sides call a real strike, but that they previously agreed on a virtual-strike provision in their prior contract. According to this provision, they
would continue to play all scheduled games until the virtual strike ended by mutual agreement. Yet neither side would receive any more money—salaries or revenue—than the minimum necessary to put on the games; neither owners nor players would enjoy any meaningful revenue from the gate, television, or other sources. Instead, virtually all of the money earned would be put into a national pot—a type of escrow—under the control of a neutral outsider. During the virtual strike, the only outflow from this pot would be the direct expenses of playing the rest of the season—lights, parking-lot attendants, insurance, and so on.

The money in the pot—which could swell to hundreds of millions of dollars for each month of games saved—could be distributed only after owners and players settled all of the issues on the table. The division of the money could be decided in many ways: through negotiation, arbitration, or even the flip of a coin. Critically, the two sides could not know the ultimate division in advance. If they did, they could mentally “bank” the money, and the virtual strike would have little effect.

Variations on virtual strikes have been attempted in a few settings: by the U.S. Navy to deal with a supplier’s threatened strike during World War II, in an Italian airline dispute, among Pennsylvania child-care workers, and in Israeli national parks. They differ from the “cooling-off periods” during which labor and management return to business as usual—and continue to receive pay and profits—in the hope of defusing tensions.

How virtual strikes work—and why they’re beneficial

Why would MLB players and owners play games for virtually nothing? Under a “normal” strike, the escalating pain from forgone revenues is supposed to pressure all sides to settle; whoever holds out long enough is the one who wins. In a virtual strike, undistributed revenues offer a growing financial incentive for resolution, since a deal carries a large “bonus.” This incentive should be very attractive to those on each side who genuinely seek a workable middle ground—as well as to fans, vendors, tax collectors, and others with an interest in continuing the season.

As compared with an ordinary strike or other impasse, in a virtual strike, each combatant can inflict the same costs on the other side, for as long as he pleases, and hold out for the same deal—but afterward receive a bonus payment and an undamaged sport. What’s not to like?

The concept of the virtual strike has wide potential. Suppose that a dispute causes a supplier to suspend ship-

ments to a manufacturer; both sides suffer as end-use customers migrate elsewhere, perhaps for good. If disputants can continue to generate revenue and set aside proceeds pending resolution, a version of the virtual strike may be their best option.

Will irrationality doom a virtual strike?

Is this solution too reasonable? What about “irrational” parties who want to crush the other side, or at least teach the other side a costly lesson, rather than settle?

Such vengeful souls should also find the idea of a virtual strike appealing, as they could still threaten punishment simply by refusing to agree to a deal. If MLB players believe the team owners’ unity will collapse under the pressure of withheld revenues or if the players simply have come to loathe the owners, the players can hold out as long as they like. If the owners believe they can outlast the players or if some simply want to clobber them, a virtual strike makes that possible, too; the players will go without paychecks until a sufficient group of owners agrees to a deal, if they ever do.

As long as the impasse continues, however, the pot grows, offering no financial relief yet serving as an increasing lure to agreement. Since even the irrationally vindictive tend toward greed, the virtual strike could appeal to this hard-core constituency. In the heat of an impending strike, however, agreement on a virtual strike may prove impossible. Thus, it’s best to include such a clause in a prior contract, when all sides can more dispassionately see its advantages.

Do virtual strikes remove the incentive to settle?

Some might argue that the benefits of virtual strikes, such as the prospect of recouping lost revenues and retaining loyal customers, would eliminate any real incentive to settle. This fear is unfounded.

Why? First, remember that the virtual strike does not stop the financial hemorrhage until after settlement, permitting whatever virtual hardball—but with real ongoing consequences—parties want to play. Second, neither side can count on ultimately receiving any known proportion of the pot once the strike ends; its division depends entirely on agreement between the parties. Third, one is tempted to ask, “So what?” With games still being played and revenues banked in escrow, a long virtual strike probably matters less—certainly to the bystanders harmed by the ordinary player-owner war of attrition.

What about the argument that in a traditional escalating
dispute, each warring party depends on the costs inflicted on third parties—fans, cities, and workers, in the case of baseball—to pressure the other side to settle? The MLB players' union might bet that, deprived of a season, angry fans would pressure Congress to force the team owners to make concessions. Or the team owners might calculate that annoyed fans would pressure “rich, greedy” players to give in. In reality, baseball fans spoke very clearly during the 1994–95 strike: “A pox on both your houses!” Fans spent their entertainment dollars elsewhere, and baseball attendance and TV viewership dropped for a decade.

Ratcheting up the incentive to settle
A further twist could head off the concern that a virtual strike might lessen the incentive to settle: let the pot continue to grow, but for every week or month that passes with no contract agreement, immediately distribute a percentage of the total accumulation—say, 20%—to a relevant charity (such as Little League or Special Olympics, in the case of baseball). As each deadline approaches and the pot threatens to shrink dramatically, the incentive to settle could become acute.

In the case of traditional strikes and impasses, no matter who ultimately “wins” or “loses,” both sides often forfeit a huge amount of money and accept a variety of other hardships. Replacing a war of attrition with a virtual strike can change the game for the better. Indeed, whenever a negotiation could escalate into long-term financial damage, a virtual-strike provision should be on the table for serious consideration. ☐

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