Chapter **Eight**

The Environment for Bargaining

Organizing campaigns focus on the individual employer and union trying to organize a bargaining unit. While organizing is in progress, both parties concentrate on the question at hand—whether the employees desire representation. If employees vote to be represented, the employer and the union must bargain within the realities of the environment in which they operate. Environmental aspects influencing bargaining include the degree of competition in the employer's product market, the employer's financial condition, the employer's capital-labor mix, the bargaining-issue interests of the union, the effects of unionization on the employer's relationship with the labor market, and any laws and regulations related to the industry in which the employer operates and the fact that it is now unionized.

This chapter explores the economic environment in which collective bargaining occurs, the influence of the economic environment and the bargaining structure on bargaining power, and bargaining structures that unions and managements design. The chapter begins a four-chapter segment on bargaining issues and negotiations. Chapter 9 focuses on wage and benefit issues and evidence related to the effects of unions in these areas. Chapter 10 concentrates on nonwage issues and union members' perceptions of their unions' effectiveness. Chapter 11 covers the organizational structures in which employers and unions negotiate, important employer and union bargaining goals, the negotiation process, and the identification and quantification of contract costs.

In studying this chapter, consider the following questions:

1. How does the degree of competition within the product market influence the bargaining behavior of the parties?
2. What effect does unionization have on the wage and employment decisions of employers?
3. What influences do laws and regulations have on collective bargaining?
4. How does the globalization of certain markets affect employers and unions?

5. What joint decisions do employers and unions make in their bargaining relationship to attempt to insulate themselves from market conditions?
6. How do economic conditions, product market concentration, and bargaining structure influence bargaining power?

THE LEGAL AND POLITICAL STRUCTURE

Chapter 2 introduced the notion that, in some nations, labor relations is dealt with in a corporatist fashion. Under a corporatist regime, employers, unions, and governments are all actors in the evolving employment relationship. Prior to the passage of the Railway Labor Act (RLA) and the Wagner Act, with the exception of emergency periods such as World War I and severe labor unrest in the late 19th century, employers and unions used their sheer bargaining power to deal with each other without government involvement or intervention. In most cases, this meant employers were able to exercise substantially more power and rely on property rights to essentially crush unions except where employees controlled access to the acquisition of skills.

In 1926, the Railway Labor Act injected the federal government into transportation negotiations in the form of the National Mediation Board (NMB). In situations where employers and unions could not agree on how an industrial conflict was to be resolved, the NMB could assist, emergency boards could be convened, and ultimately Congress was empowered to impose solutions when the parties were unable to do so on their own.

In 1936 the Wagner Act established collective bargaining as the preferred method for resolving labor disputes in situations in which a majority of employees favored it. Unlike the Railway Labor Act, the Wagner Act did not create laws and regulations for dealing with impasses, but rather listed a set of prohibited practices for employers and left it up to the parties to negotiate a solution, taking into account their relative bargaining power.

After the large number of strikes that occurred immediately before and after World War II, the Taft-Hartley Act shifted the negotiating environment toward a more corporatist perspective by establishing the Federal Mediation and Conciliation Service (FMCS) to help parties reach agreement in difficult situations, legislating rules for so-called national emergency disputes that would temporarily enjoin strikes and require fact finding, and defining a set of union unfair labor practices to balance those that employers were forbidden to use.

Section 8(d) of the Labor Management Relations (Taft-Hartley) Act of 1947 sets forth in one sentence the essence of collective bargaining in the United States:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and representative of the employees to meet at reasonable times and confer in good faith with

> respect to wages, hours, and terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

This broad definition affects both the process and the issues. For example, regarding process, what does "good faith" mean? Regarding issues, what do "wages, hours, and other terms and conditions of employment" signify? Unions, employers, the National Labor Relations Board (NLRB), and the courts have all grappled with these questions. Novel demands and bargaining tactics have been challenged to determine whether they conform to the statute. Chapters 11, 12, 14, and 15 examine **good-faith bargaining** and its impact on process. Chapters 9 and 10 examine "wages, hours, and other terms and conditions of employment" issues.

Bargaining issues can be divided into three legal categories: mandatory, permissive, and prohibited. **Mandatory bargaining issues** deal with wages, hours, and other terms and conditions of employment. Wages and hours are straightforward, dealing with economics and work schedules, but the concept "terms and conditions of employment" is amorphous. A reasonable test of whether an issue is within this area is whether the practice would have a direct and immediate effect on union members' jobs and is strongly determined by labor cost factors.[1] Examples are a plant closing or a reassignment of work between job groups. **Permissive bargaining issues** do not require a response because they have no direct impact on management or labor costs. A demand by a union to have a say in the establishment of company product prices would be permissive. **Prohibited bargaining issues** are statutorily outlawed, such as demands that employers use only union-produced goods. Another distinction between mandatory and permissive issues is that neither party may go to **impasse** (refuse to agree on a contract) over a permissive issue. Figure 8.1 describes tests used to distinguish between mandatory and permissive issues.

The labeling of issues as mandatory and permissive affects their appearance in contracts. Permissive issues are not included as frequently where the distinction is imposed. Union bargaining power increases the likelihood of dealing with permissive issues in the contract.[2]

Regulation of Employment

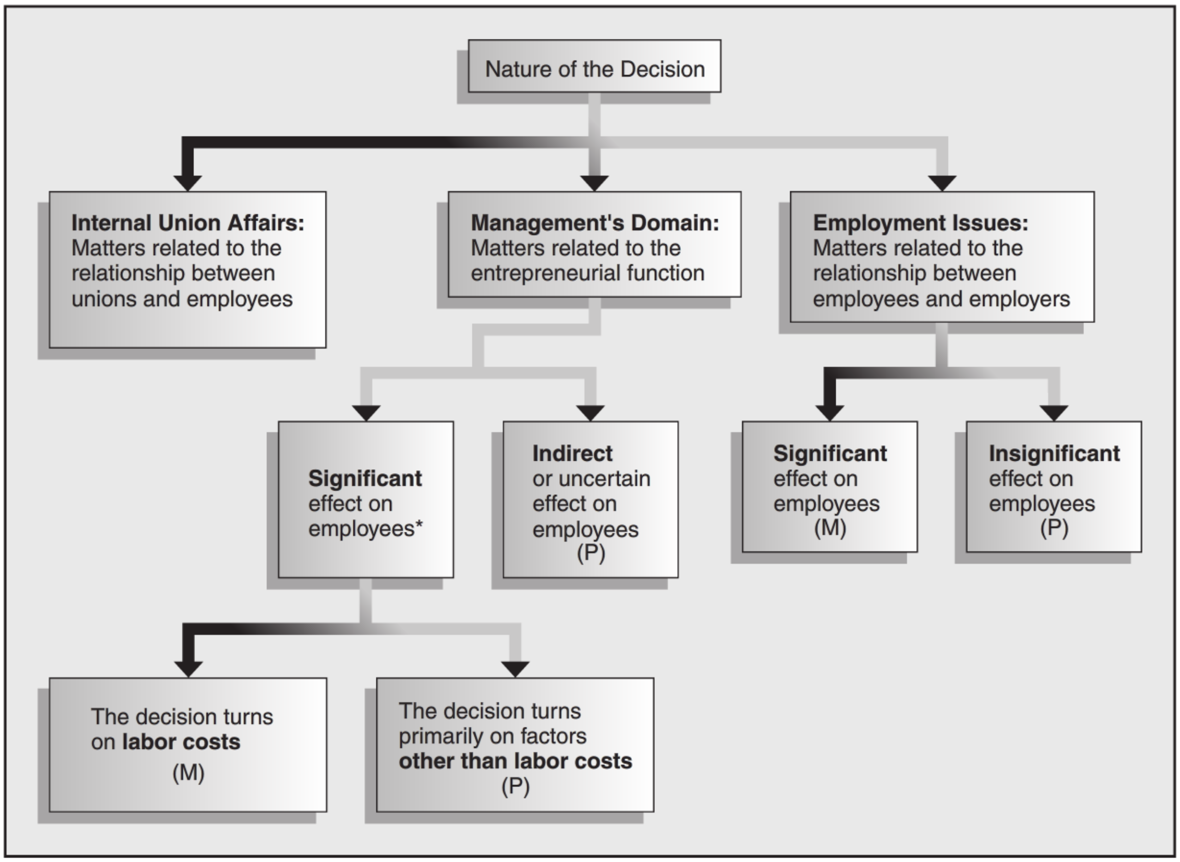
In addition to laws, regulations, and administrative agencies established to support collective bargaining as a method for resolving industrial disputes, other laws have been enacted to regulate wages and hours, prohibit

[1] J. T. Delaney, D. Sockell, and J. Brockner, "Bargaining Effects of the Mandatory-Permissive Distinction," *Industrial Relations*, 27 (1988), pp. 21–36.

[2] J. T. Delaney and D. Sockell, "The Mandatory-Permissive Distinction and Collective Bargaining Outcomes," *Industrial and Labor Relations Review*, 42 (1989), pp. 566–583.

FIGURE 8.1 **How Mandatory (M) or Permissive (P) Bargaining Status Is Determined**

Source: J. T. Delaney, D. Sockell, and J. Brockner, "Bargaining Effect of the Mandatory-Permissive Distinction," *Industrial Relations,* 27 (1988), p. 24. Reprinted with permission from Blackwell Publishing.



*The duty to engage in effects-bargaining typically attaches to such issues.

child labor, provide employment-based social welfare payments, prohibit discrimination in employment, promote health and safety in the workplace, and regulate private pension and benefit programs.

With the exception of worker compensation laws, which were passed during the 1900s and 1910s, and the 1926 Railway Labor Act, the Wagner Act preceded or was contemporaneous with most of the other non-civil-rights statutory employment laws. The enactment of all these laws was supported by organized labor. Some dealt with issues that unions were unable to win at the bargaining table, but at the same time, their passage and effective enforcement may have decreased the perceived need among employees to unionize.

To some degree, the extension of laws and regulations into broad areas of employment practices establishes a quasi-corporatist relationship between the government and employers, and it involves unions as well where they represent employees. Where unions are present, the laws and regulations establish a base on which gains can be negotiated. Ironically, legislation favored by unions that protects employees or applicants and regulates aspects of the employment relationship, when passed, reduces the need for unionization and bargaining to attain the ends that were not previously guaranteed by law.

Waxing and Waning of Corporatist Approaches in U.S. Labor Relations

As noted above and detailed in Chapter 2, federal government involvement in labor relations has varied substantially throughout the history of the United States. During all periods, as detailed in Chapters 2, 3, and 6, courts have generally held that property rights take precedence over the right to organize and collectively bargain. At the same time, courts and statutory law increasingly endorsed the legitimacy of labor unions and the role of collective bargaining in resolving employment disputes in situations in which this was the employees' preferred method.

Federal government involvement in labor relations was at its peak between the beginning of World War II and the middle of the 1970s. During World War II all wages and prices were administered, and strikes were prohibited. This meant that all collective bargaining agreements needed the approval of the federal government and all disputes had to be settled even if government intervention was required.

The Taft-Hartley amendments to the Wagner Act laid the groundwork for substantially more federal involvement in labor relations through the FMCS and national emergency dispute procedures. Over the next 20 years (1947 through the late 1960s), presidents who followed Harry Truman invoked the national emergency procedure on a number of occasions. In addition, it became fairly common practice in major disputes to call the parties to Washington to "jawbone" them into agreeing on an appropriate settlement. Federal government involvement probably moderated some extreme positions of the parties in a number of disputes, but it also dampened the bargaining power that the more powerful side held going into the negotiations.

This corporatist approach worked reasonably well during a period in which productivity was growing at an annual rate of about 3 percent and inflation was in check. However, by the end of the 1960s, inflation started to rise rapidly and with it came an increase in wage demands. Increasing uncertainty led negotiators to take more extreme positions. In addition, unions were not particularly willing to adhere to wage-increase ceilings promulgated by the Nixon administration, given the uncertain inflation environment.

While it was not then readily apparent, the growing globalization of the economy was becoming more apparent as a result of the Arab oil embargo of 1972 to 1973. Increasingly, the U.S. economy was becoming more tightly linked with the rest of the world, and the value of the dollar and the relative desirability of U.S. goods and services at home and abroad depended on their quality and cost.

The declining corporatist regime essentially ended with the inauguration of Ronald Reagan as president. The federal government reduced its regulatory profile and a more laissez-faire approach to labor relations was permitted. Employers had already begun to take a harder line on economic negotiations and to actively avoid unionization.[3] The unionized proportion of the labor force had been falling for 30 years. As a result, the political imperative to intervene on labor's behalf had declined. When President Reagan fired and replaced striking federal air traffic controllers, private sector employers were emboldened to take a harder line in bargaining.

While there have been both Democratic and Republican presidents over the past 30 years, there haven't been major differences in the federal government's approach to labor relations. The laissez-faire approach has prevailed in the sector covered by the Taft-Hartley Act. While the NLRB members appointed by various presidents have frequently switched their interpretations of the law, mostly related to issues of representation, no new legislation has been enacted that has altered the bargaining power of either of the parties. As long as the parties comply with the most basic legal requirements, they are essentially free to slug it out in the collective bargaining arena. As succeeding chapters will note, this also means that there is substantially more decentralization and variation in how labor relations are practiced than existed during the earlier corporatist period.

PUBLIC POLICY AND INDUSTRIAL ORGANIZATION

Since the passage of the Sherman Antitrust Act in 1890, public policy has limited industrial concentration and collusive activities between producers in a single industry. Excessive industrial concentration is not defined in the statute or by the courts, but it is dealt with by the Federal Trade Commission on a case-by-case basis. On the other hand, price fixing and other collusive activities have been vigorously prosecuted when discovered, and persons or organizations that have been harmed by them have been entitled to recover treble damages.

The growth and maturation of most industries seem to follow a general pattern. During an industry's infancy, production is labor-intensive. Product characteristics are relatively diverse. As consumer preferences are revealed, some producers go out of business because their products do not meet consumers' needs. As production methods become standardized, capital and cheaper labor are substituted for skilled craft work, and more efficient producers lower prices to gain market share, thus driving

[3] See A. Freedman, *Managing Labor Relations* (New York: Conference Board, 1979).

marginal producers from the industry. Over time, an industry becomes dominated by relatively few firms, and the less dominant either mimic the leader or occupy niches in which the leader chooses not to produce. For example, the microcomputer industry had hundreds of manufacturers and software development companies in the early 1980s producing equipment and programs that were largely incompatible with one another. Apple gained an early lead, and IBM realized that it needed a product in the rapidly growing market. The PC was developed for that market and used an Intel processor and an operating system developed by Microsoft. These became the standards for the industry. New manufacturing and sales models were developed (e.g., by Dell), and a variety of applications were increasingly produced by a smaller subset of software firms. By the late 1980s, the industry was substantially consolidated. The introduction and promotion of freely available LINUX operating systems and JAVA software are attempts to reduce the Microsoft-Intel control of the computing market.

COMPETITION AND CONCENTRATION IN MARKETS

In the classic economic model, a competitive market includes many producers that sell similar products. Consumers have good information about product attributes and prices. Producers that sell at prices above the market will not be able to remain in business. The demand for goods and services in this type of market is highly *elastic,* meaning that if a producer decreases its prices, buyers will quickly shift toward purchases from this low-price firm. The reverse would happen to producers that did not respond to the decrease. In a competitive market, if a producer does not quickly match a drop in the market price, it will be unable to sell enough to remain in business.

A concentrated market is one with relatively few producers. Probably the best example is the commercial aircraft industry with only two companies producing intercontinental airliners—Airbus Industries and Boeing. The investment necessary to enter the industry, in both financial and production competence terms, creates an almost insurmountable barrier to entry.

In a competitive industry there are many small producers. Organizing one company gives the union virtually no bargaining power on wages. Since there would be a great deal of effort necessary to unionize the industry, unions don't focus on competitive industry companies unless they are concentrated geographically or the employees in the company request assistance. With regard to geographic concentration, this usually involves a set of local service providers such as janitorial services, security services, or hotels. Here the service is provided in the locality where the employees reside.

In concentrated industries, it's important for the union to organize most or all employers and to bargain with them on the same time schedule. In this way, all employers will encounter the same demands and will be less resistant because at least part of any negotiated wage increases can be passed on to consumers through simultaneous price increases. With globalization, this has been increasingly difficult because unions operate nationally, while product competition is international.

A firm may also gain competitive advantage through patents. Companies in the pharmaceutical and information technology industries often earn higher profits from their monopoly positions as patent owners, either through higher prices for the patented products they produce or through license fees paid by other producers to use the patented attribute.

REGULATION AND DEREGULATION

Regulation of certain industries has existed in the United States for over a century. The Interstate Commerce Act was passed in 1887 to regulate interstate rail freight rates. Congress intended to reduce or eliminate price discrimination between small and large shippers and to maintain an incentive for transportation companies to provide service to rural areas. Other industries that have had services and charges regulated include communications, banking, petroleum products and natural gas, electrical utilities, interstate trucking, and airlines. But over the past several years, federal regulation in many of these areas has been reduced or eliminated. The initial result has been the elimination of monopolies and the restoration of price competition.

Deregulation enabled new companies to enter and created competition in wages between union and nonunion sectors of the industries. Until now, wages and employment have been most affected by deregulation in trucking, air carriers, and telecommunications. Airline deregulation had relatively little initial effect on mechanics' pay, but pilots' salaries fell between 3 and 11 percent, and salaries of flight attendants dropped from 11 to 18 percent.[4] Mechanics would have alternative employment opportunities in their occupation in other industries, an advantage not enjoyed by pilots and flight attendants. Following deregulation in the trucking industry, coverage of truckers by the National Master Freight Agreement negotiated by the Teamsters and Trucking Management Inc. fell by two-thirds. Wages fell by 27 percent, and return on equity for unionized trucking companies fell by 22 percent between 1977 and 1990 due to decreases in freight shipping rates.[5] The effects of deregulation continue to occur in other industries. Exhibit 8.1 contains information about how a union used the fact that its employer was in a regulated industry to guarantee jobs in a proposed merger.

[4] D. Card, "Deregulation and Labor Earnings in the Airline Industry," in J. Peoples, ed., *Regulatory Reform and Labor Markets* (Boston: Kluwer, 1998), pp. 183–229.

[5] M. H. Belzer, "Collective Bargaining after Deregulation: Do the Teamsters Still Count?" *Industrial and Labor Relations Review*, 48 (1995), pp. 636–655.

Exhibit 8.1

QWEST UNIONS SAY THEY WON'T BLOCK TAKEOVER

A settlement between Qwest and its [Minnesota-based] labor unions over jobs and severance has removed one major barrier to the $10.6 billion acquisition of [Denver-based Qwest,] Minnesota's largest telephone company[,] by Louisiana-based CenturyLink.

In the settlement, the Communications Workers of America [(CWA)] and the International Brotherhood of Electrical Workers [(IBEW)] agreed to drop their opposition to the Qwest acquisition and CenturyLink agreed to maintain approximately the current Qwest ratio of union workers to management employees for 30 months after the acquisition closed.

In addition, CenturyLink agreed to not close any Qwest call centers staffed by union employees before May 2012. CenturyLink also would provide enhanced severance benefits for Qwest union workers if they are laid off before October 2012.

Qwest has about 3,300 employees in Minnesota, including 2,100 union employees.

Source: Excerpted from Steve Alexander, "Qwest Unions Say They Won't Block Takeover" *Star Tribune* (Minneapolis, MN), October 26, 2010, pp. D1.

GLOBAL COMPETITION

Many U.S. industries encounter formidable foreign competition. Steel is an example. Because it is essentially a commodity, production and shipping cost differences cannot be passed on to buyers. Certain fixed costs for plants and equipment, incurred whether the company is operating or not, lead producers during periods of lower demand to sell steel at a loss for a short time rather than shut down a plant. Where excess capacity exists in the short run, foreign firms may "dump" steel in the United States at prices below their costs. Services can also be dumped. In 2002, President Bush imposed steel tariffs that were ruled in 2004 to be in violation of World Trade Organization (WTO) agreements. Exhibit 8.2 tells about the imposition of tariffs on Chinese-produced tires by the Obama administration. The political power of unions appears to influence the imposition of tariffs since industries with higher union coverage are more likely to have them levied against competitive goods produced offshore.[6]

In the auto industry, American producers encountered global competition in the mid-1970s as a result of increased fuel prices following the formation of OPEC. Fuel efficiency became a more important criterion in purchase decisions. Increased consumer attention to quality also began to

[6] M. J. Slaughter, "Globalization and Declining Unionization in the United States," *Industrial Relations*, 46 (2007), pp. 329–346.

Exhibit 8.2

OBAMA ADMINISTRATION ORDERS TARIFF ON CHINESE TIRE IMPORTS

WASHINGTON, D.C.—Following an announcement by the White House, United States Trade Representative Ron Kirk released the following statement today on the U.S. decision to impose remedies under Section 421 of the 1974 Trade Act to stop a harmful surge of imports into the U.S. of Chinese tires for passenger cars and light trucks. Following what the ITC determined was a surge, production of similar products in the U.S. dropped, domestic tire plants closed, and Americans lost their jobs. Today's steps are designed to level the playing field for American workers in the tire market.

The three-year remedies, consisting of an additional tariff of 35 percent ad valorem in the first year, 30 percent ad valorem in the second, and 25 percent ad valorem in the third year, are being imposed after a finding by the United States International Trade Commission that a harmful surge of imports of Chinese tires disrupted the U.S. market for those products. President Obama also announced today that Trade Adjustment Assistance will be targeted to help affected workers, industries, and communities immediately, while tariff changes take effect.

"When China came in to the WTO, the U.S. negotiated the ability to impose remedies in situations just like this one," said Kirk. "This Administration is doing what is necessary to enforce trade agreements on behalf of American workers and manufacturers. Enforcing trade laws is key to maintaining an open and free trading system.

"These remedies are a necessary response to the harm done to U.S. workers and businesses, designed to achieve the objective of curbing what the ITC determined was a harmful surge of Chinese tires into the U.S. market," said Kirk. "China is America's second largest trading partner, and the health and strength of our relationship are very important to both countries. We consulted with China as allowed for under the WTO. This decision has been based carefully on America's rights under WTO rules, namely China's accession agreement, and on sound economic calculations."

Source: "Kirk: White House Fulfilling Trade Enforcement Pledge With Announcement of Remedies in Chinese Tire Case," Press Release, Office of the United States Trade Representative, Executive Office of the President, September 2009.

dominate purchase decisions within various price ranges. Differences in labor costs across producing countries led to price advantages for producers in some nations. These differences include variations in both wages and labor productivity. Relative costs also increase or decrease depending on the exchange rate between the dollar and foreign currencies.

When these types of changes occur, the elasticity of demand for a particular firm's products increases substantially because the industry is no longer concentrated. Wage increases cannot be as easily passed through. Auto union wage and benefit concessions that began in the 1980s and continued through the 2007 bargaining round were partly due to labor costs (combined with other costs) that would not permit U.S. manufacturers to operate at a profit given competitive pricing of products in the industry. After short-run reductions in wages (labor) and parts suppliers' prices