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# BETWIXT & BETWEEN BEARINGS NEGOTIATION (A & B)

## Teaching Note

Best Bearings, Ltd., is a large manufacturer of metal ball bearings, based in Great Britain, with manufacturing locations in upstate New York and the Southeastern U.S., as well as overseas, in Great Britain, Thailand, and Australia.

Six months ago, the new chief engineer at the Best Bearings New York plant learned that the company was not in compliance with certain environmental regulations and reported this to the General Counsel of Best Bearings, USA. As required, the General Counsel advised the NY Division of Environmental Compliance (DEC), which investigated and issued a formal citation for air pollution issuing from smokestacks and hazardous waste containment practices.

Best Bearings and DEC have agreed upon the fixes necessary to address the problem and bring Best Bearings into compliance. Best Bearing has already ordered new scrubbing equipment and has agreed to contain its waste using new, more expensive leach-proof materials. However, it appears that Best Bearing's emissions were out of environmental compliance over the past five years. DEC is now intent on collecting a sizeable fine from Best Bearings and requiring Best Bearings to clean the site of previous waste disposal and fund a comprehensive, annual, external audit of its environmental practices for the next five years. While Best Bearings recognizes that it is unlikely to escape without paying any fine, it believes the fine should be low because Best Bearings came forward and reported its non-compliance. When Best Bearings' new engineer discovered the problems, they did not try to hide them. DEC notes that this reporting was required by law and that the violations were serious and had been going on for some time.

The President of Best Bearings and the representative of the DEC are about to meet to negotiate an agreement concerning an appropriate fine and other compliance and redress issues.

At some level, this is a multi-issue mix of distributive and integrative negotiation. The DEC would prefer higher fines; Best Bearings of course would prefer lower. DEC would value more intrusive monitoring options and more stringent clean-up requirements; Best Bearings would prefer less intrusive and less stringent. An instructor could simply have the students negotiate Version A, or Version B and do a classic debriefing of the results. The question to examine whether the agreements reached reflect relatively efficient trade-offs that reflect the parties relative priorities/values.

The difference between Version A and B is that, in Version B, Best Bearings has numbers: estimates of how much the monitoring options and the levels of cleanup will cost. It was designed to enable the class to consider the impact of firm numbers attached to options vs.



more general expressions of preferences. To do that, the instructor would have half the class negotiate Version A, and half the class negotiate Version B and compare the results, as well as how the negotiators believe having numbers (or not) affected the way they negotiated. That's a worthy discussion, and it should make the point that lawyers and clients are wise to discuss what the costs of potential agreement terms will be for the clients. Estimates are fine and the exercise of making estimates is worth the time and effort. Without cost or value estimates, it's too easy to hold out for a term that may be less consequential and concede too easily on a term that matters more.

The instructor-reader may see a document in this simulation folder titled *Betwixt & Between – Trade-Offs*. This case and that sheet are intended to teach negotiators how to come up with a scoring system in a multi-issue case. It recognizes that some issues (and the various options for each issue) are easily quantified, in dollars, but others aren't valued in dollars. Their importance may arise from their impact on policy, public perceptions, likely effectiveness, or linkage to other cases or priorities. It also makes the point that not all dollars are necessarily created equal. Put differently, the marginal utility of a dollar is not plotted on a straight line. In a personal injury case, dollars under a minimum threshold, or over a certain point, may be unimportant to the plaintiff. In the *DEC v. Best Bearings* case, DEC may highly value fines at certain discrete points, for reasons of publicity or precedent.

The instruction sheet walks students through the process of setting up a point-scoring system. I ask them to try it for DEC and Best Bearings, and then provide the Trade-Off handout as an example of how one might do it. It's worth discussing (while it should be obvious), that a point-scoring system makes it easier to see how efficient trade-offs can be made. For each party, their point scoring systems let them know when a negotiation trade among issues and options would be favorable.