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Proceedings of the
1982 Spring Meeting

April 28-30, 1982

Milwaukee, Wisconsin

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Industrial Relations Research Association Spring Meeting

April 28-30, 1982 Milwaukee, Wisconsin

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PREFACE

1982 Spring Meeting
Industrial Relations Research Association

The 1982 Spring Meeting of the Industrial Relations Research Association, in Milwaukee, featured parallel sessions and workshops on current problems and continuing issues in public and private sector labor-management relations.

Among the topics for the public sector sessions were the med-arb process, state employee bargaining, grievance arbitration, employment reductions in the public schools, and impasse resolution procedures. Those choosing to attend the private sector sessions heard discussions of "The Decision to Close a Plant," "The Duty of Fair Representation," "Origins of the Union Contract," "Behavioral and Industrial Relations Perspectives on Compensation," and "Innovative Approaches to Complaint/Grievance Resolution."

Luncheon speakers were William Wilberg, representing Wisconsin Manufacturers and Commerce, and John Schmitt, president of the Wisconsin State AFL-CIO.

The Wisconsin IRRA Chapter committee for the meeting—Robert Garnier, Steven Briggs, Francis Donal O'Brien, and Ruth J. Zubrensky—and others who assisted them are to be commended for arranging a stimulating program and for their generous hospitality. The Association is grateful to them, and to LABOR LAW JOURNAL for again agreeing to publish the papers and discussions from our Spring Meetings.

BARBARA D. DENNIS
Editor, IRRA

August, 1982 Vol. 33, No. 8

SESSION I

Innovative Approaches to Complaint/Grievance Resolution

Beyond the Grievance Procedure: Factfinding in Employee Complaint Resolution

By STEVEN BRIGGS*

Marquette University

GRIEVANCE PROCEDURES culminating in binding arbitration have long been the leading method of resolving disputes over the application and interpretation of private sector collective bargaining agreements. They serve a variety of purposes, including the clarification of agreement language, the prevention of strikes, and the management of employee conflict.[1] But the usefulness of such procedures is limited by their scope. That is, since most negotiated grievance procedures cover only those disputes related to the way in which a formal labor agreement is operationalized, conflict in areas of the employment relationship outside of that agreement is often not subject to any orderly avenue of resolution.

To illustrate, consider the situation where a personality conflict between an employee and a supervisor is causing performance problems for both individuals. Typically, the employee learns from a union steward when attempting to file a grievance on the matter that the situation represents a "gripe" but not a grievance within the meaning of the labor agreement. Both the employee and supervisor would benefit from a resolution of their problem, as would the organization, yet such complaints are generally considered beyond the scope of negotiated grievance procedures. Instead, employees are often told that the firm has an "open door policy" wherein they may take their complaints to higher levels of management. Even the most sincere of such policies, though, can be met with employee mistrust. Employees may fear reprisal from supervisors or anticipate that higher management officials will tend to "take the supervisor's side" in the matter. And it is rare for such informal procedures to provide for a neutral opinion, though some employers make the claim that a representative

* The author is grateful to Barbara Barrie for her capable research assistance.

[1] Steven Briggs, "The Grievance Procedure and Organizational Health," *Personnel Journal* 60 (June 1981), pp. 471-74.

of their personnel department objectively considers the complainant's view and carries it to higher management.

From a purely tactical perspective, it is understandable that employers might be reluctant to expand the scope of their grievance procedures to include such complaints as that discussed above. Conventional grievance procedures employing arbitration as their final step ultimately render managerial interpretation and application of agreement language subject to binding review by an outsider. In contrast, complaints outside the parameters of such procedures are ultimately resolved by unilateral management decisions.

Unions, on the other hand, prefer broad procedural scope in formal grievance mechanisms. The latest available figures from the Federal Mediation and Conciliation Service are illustrative. They reveal an average annual increase of nearly 18 percent in the number of substantive arbitrability claims brought before FMCS arbitrators since 1972.[2] Moreover, one of a union steward's most unrewarding tasks is telling an employee that a complaint is not subject to resolution through the grievance procedure. Employees tend to think in terms of what is fair and stewards and employers in terms of what is in the contract or policy. This disparity creates member dissatisfaction with the steward as well as with the organization.[3]

How then should employers, employees, and unions resolve conflicts arising outside the scope of their grievance procedures? The best method seems to be direct and informal discussion among themselves—especially in terms of cost, timeliness, and administrative burden. But, for a variety of tactical or attitudinal reasons, such directness may be unworkable.[4]

Procedural rigidity and formality should not substitute for direct and unencumbered discussion between the parties to a dispute,[5] but where such discussions do not adequately manage employer-employee conflict an orderly procedure may be appropriate. In Great Britain, for example, the parties can use formal procedures for resolving issues not subject to the grievance process.[6] Is it feasible for U. S. employers to consider formal, step-by-step mechanisms for the resolution of employees' noncontractual complaints? Would these systems encourage employees to prefer litigation over direct discussion with appropriate members of management?

Research Focus

This article addresses the foregoing issues by reporting on the operation of one such complaint resolution procedure currently in effect for the approximately 12,400 staff employees of the University of California at Los Angeles. The university is a public employer; the principles embodied in its complaint resolution mechanism, however, are equally applicable to the private sector. It should also be noted that, while unions exist on the campus, they have not yet been recognized as bargaining agents for staff employees. Employees of the university system have only recently been covered by legisla-

[2] Federal Mediation and Conciliation Service, *Thirty-Third Annual Report of the Federal Mediation and Conciliation Service* (Washington, D. C.: U. S. Government Printing Office, 1980), p. 41.

[3] Terence Connors, *The Story of a Steward* (Urbana, Ill.: Connors Publishing Co., 1980), p. 9.

[4] Stephen R. Michael, "Due Process in Nonunion Grievance Systems," *Employee Relations Law Journal* 3 (Spring 1978), pp. 516-27.

[5] Melville Dalton, "Unofficial Union-Management Relations," *Readings in Industrial Sociology*, ed. William Faunce (New York: Appleton-Century-Crofts, 1967), pp. 490-510.

[6] A. W. J. Thomson and V. V. Murray, *Grievance Procedures* (Westmead, England: Saxon House, 1976), p. 72.

tion enabling them to bargain collectively, and several unions are actively seeking exclusive representation rights. In the meantime, those unions are permitted to represent staff employees in individual complaint/grievance actions.

A twofold system for resolving employee complaints exists on the campus. First, there is a somewhat conventional grievance procedure culminating in binding arbitration on most issues; second, there is an "administrative review" (review) procedure providing for an impartial, advisory review by a neutral third party. The former covers issues such as discipline, discrimination, and alleged improper implementation of staff personnel policies. It essentially safeguards employee rights derived from formal personnel policy. The latter covers "any complaint regarding a specific management action which adversely affects the employee's terms and conditions of employment"[7] and extends beyond "rights" to cover issues of privilege and the general employment relationship.

Method: interviews were conducted with selected management and union officials connected with the administrative review process. In addition, cases filed for review in calendar 1980 were analyzed, as were appropriate personnel policies. Finally, the author served as third-party neutral in several of the cases, and it is hoped that this experience added insight to the research.

The Review Process

The broad scope of the review procedure includes such nongrievable issues as the amount of merit salary increases, the content of performance appraisals, and the appropriateness of the employer's selection for transfer and promotion. The procedure is available to all nonmanagerial staff employees and, to a limited extent, to managerial employees as well. Complainants may be represented by private attorneys, union representatives, or themselves at any of the following procedural levels.

Step (1): the complainant is required to discuss the nature of the conflict with the immediate supervisor. This gives the supervisor an opportunity to resolve the matter informally.

Step (2): if the dispute is not resolved between employee and supervisor, the employee may file a formal complaint with the personnel office. The complaint must include a description of the managerial actions cited for review, an identification of any personnel policy sections allegedly violated, indications of how the complainant was adversely affected, and a suggested remedy. The campus maintains a "policy development office" which screens formal complaints for timeliness, specificity, issue, and appropriateness of suggested remedy. Interestingly, the form used for the review process is the same as that used for the grievance procedure, and the office routes incoming complaints through what it determines to be the appropriate mechanism.

Step (3): a representative of the personnel department attempts to mediate between the complainant and supervisor. If mediation produces an agreement it is reduced to writing and signed by both parties.

Step (4): unsuccessful mediation results in a "first level formal review" by the complainant's department head. The department head prepares a written statement of relevant facts and provides reasons for granting, compromising, or denying the requested remedy.

Step (5): if not satisfied with the result of Step (4) the complainant may request a "second level review" by a

[7] *University of California Staff Personnel Policies,* Policy Number 290.

higher level of management. In addition, the complainant can invoke factfinding by an independent third party appointed by the policy development office. The independent party is procedurally bound to meet separately with the parties and may question witnesses and request relevant data.

After the factfinding hearing the neutral prepares a factfinding report. The report must include a statement of the issue, a summary of the parties' positions, findings of fact, and conclusions as to policy violations. Recommendations by the fact finder are prohibited. The factfinding report is then forwarded to the second level management reviewer, who uses it as a guideline in formulating a decision on the matter. The second level reviewer's decision and a copy of the fact-finder's report are then forwarded to the complainant.

Step (6): employees may appeal second level decisions to the highest management official on campus, the Chancellor, whose decision is final.

The Review Experience

There were 133 complaints filed for review in calendar 1980, or about one for every 100 staff employees. Twenty-seven of them (20 percent) were rejected for procedural reasons, leaving 106 to be processed. Almost three out of every four cases accepted into the review mechanism were settled at some point prior to factfinding. The table illustrates the types of issues raised, as well as the representation status of the complainants.

TABLE

COMPLAINTS REVIEWED IN CALENDAR 1980

Issue*	Representation Type						Total	
	Self		Union		Private Attorney			
	#	(%)	#	(%)	#	(%)	#	(%)
Performance Evaluation	14	(44)	17	(53)	1	(3)	32	(100)
Written Reprimand	6	(28)	14	(67)	1	(5)	21	(100)
Release During Probation	13	(76)	0	(0)	4	(24)	17	(100)
Position Classification	8	(80)	2	(20)	0	(0)	10	(100)
Selection for Promotion	1	(14)	6	(86)	0	(0)	7	(100)
Salary	2	(40)	3	(60)	0	(0)	5	(100)
Total	44	(48)	42	(46)	6	(6)	92	(100)

* Includes only those raised in at least five complaints.

Disagreement with assessed job performance was the focus of more than half of the complaints processed, with 53 (58 percent of the total) being filed over performance evaluations or written reprimands. More than half of the employees who filed complaints on these issues (53 percent for performance evaluations; 67 percent for written reprimands) were represented by a union.

Interestingly, none of the employees who complained about being released during probationary periods had union representation during the reviews. Most (80 percent) of the complainants in position classification cases were self-represented.

In contrast, a sizable majority (86 percent) of those protesting their non-selection for promotion used union ser-

vices, as did those complaining about the size of salary increments (60 percent). Only a small portion (six percent) of the complainants used private attorneys for representation.

Discussion

There are, obviously, both advantages and disadvantages to such a formal system for reviewing employee noncontractual complaints. These may differ depending on one's perspective.

The neutral view: the review procedure helps clarify the issue in dispute. The factfinding step permits the neutral to probe into what have been termed "submerged icebergs" in order to identify the true origins of the complaint.[8] Separate meetings with each party allow the neutral to obtain information which might not have surfaced had there been an "audience" of the opposition.

On the other hand, the procedural requirement to meet separately with the parties puts an especially weighty burden on the fact-finder. In an adversary proceeding like conventional arbitration, for example, the parties' cross-examination of witnesses helps the neutral understand important facets of the issue. The advocates' familiarity with the case enables them to raise appropriate questions. The fact-finder in the review procedure, however, must assume the cross-examination function for both parties, and it is sometimes difficult to know what questions will produce relevant information. Still, the factfinding step is most useful in that it provides a neutral point of view—an essential component of due process in the employment relationship.[9]

The union employee view: probably the most significant advantage offered by the procedure to unions and employees is the broad scope of covered issues. Virtually all supervisory action which adversely affects employees is reviewable. And, again, the provision for a neutral opinion via the factfinding step is comforting. It permits employees to complain with dignity. Among union criticisms of the procedure are the following: the fact-finder is unilaterally appointed by management; there is no opportunity to cross-examine management witnesses; and the ultimate complaint resolution decision is still made by management.

The management view: some employers might be wary of a system which expands the number of issues over which employees can complain formally, anticipating that the volume of complaints could become unduly burdensome. Yet the review procedure did not foster an unreasonable number of complaints.[10] Moreover, it did not seem to encourage those employees who did file complaints to be overly litigious and take every case "all the way." The potential for review by an outsider may have encouraged the parties to settle at early procedural levels, though in some cases it may have provided a forum for unions to publicize broader issues than those raised in the complaints themselves.

The procedure seems to be of value to organizational health in general. It seems likely, for example, that the provision for review by successively higher levels of management would minimize arbitrary supervision and encourage supervisors to settle some cases at Step (1). In addition, the factfinding reports may serve as training tools for the parties' subsequent behavior. Finally, to the extent that the procedure induces employees to express their organizational

[8] Paul Prasow and Edward Peters, *Arbitration and Collective Bargaining: Conflict Resolution in Labor Relations* (New York: McGraw-Hill, 1970).

[9] Michael, cited at note 4, p. 518.

[10] For a review of grievance rates under other systems, see Steven Briggs, "The Municipal Grievance Process in California," Doctoral dissertation, University of California, Los Angeles, 1981, pp. 94-95.

dissatisfaction, it helps management identify areas for potential workplace improvement.

Conclusion

As with any dispute resolution mechanism, such a procedure can be abused by the parties. Employers can ignore the neutrals' conclusions and unions can use the process to burden management. Still, the procedure represents a positive step toward workplace democracy by allowing employees more voice in managerial actions and decisions which affect their organizational lives. It is certainly not appropriate for all employer/employee relationships, but, in cases where employees' noncontractual complaints are going unresolved, a review procedure such as that described herein may be useful.

[The End]

Grievance Mediation: A Route to Resolution For the Cost-Conscious 1980s

By MOLLIE H. BOWERS, RONALD L. SEEBER, and LAMONT E. STALLWORTH

Ms. Bowers is with George Washington University. Mr. Seeber is with Cornell University. Mr. Stallworth is with Loyola University of Chicago.

SINCE WORLD WAR II, most labor relations practitioners have considered arbitration to be the favored means for resolving disputes over the interpretation and application of contract terms. Grievance arbitration was appealing partly because it was believed that use of this procedure would limit government intervention in the workplace and, thus, perpetuate the tradition of industrial self-regulation. Moreover, experience showed that arbitration was both efficient in terms of the time and cost expended and equitable in terms of the results obtained.

Over time, however, the parties' heavy reliance upon arbitration has significantly eroded the efficiency of the process and, as a consequence, has tended to result in the assumption of additional liabilities where employee morale and cost are concerned. Furthermore, the characteristic informality of grievance arbitration has been transformed by widespread interjection of legalism into the process, and government regulation has reemerged so that some types of cases are now subject to retrial through administrative agencies and the courts.[1]

Thus far, efforts to cope with these consequences have been focused primarily upon providing options which are intended to restore the attributes of grievance arbitration which made this procedure attractive in the first place. Although the use of expedited arbitration has produced some very satisfactory results, the haunting question remains. That is, whether or not there are other alternatives which can as well or better meet the needs of the parties in some cases. Obviously, this question will not be answered unless at least two critical conditions are met.

[1] See, for example, *Alexander v. Gardner-Denver Co.*, 415 US 36 (US SCt, 1974), 7 EPD ¶ 9148, and *Barrentine v. Arkansas Best Freight, Inc.*, No. 79-1006, *Daily Labor Report* No. 65 (April 6, 1981).

These conditions are that other options are suggested and that sufficient experimentation with such options occurs to provide a valid basis for assessment of the capability and consequences of utilizing grievance dispute resolution procedures other than some type of arbitration.

The purpose here is to consider the use of one such alternative procedure known as "grievance mediation." There are at least four ways in which this can be implemented. They include the intervention of: upper level labor and management advocates; federal or state mediators; private mediators; or arbitrators. Our research has concentrated on the second option, but none of them is new to the American industrial relations system. Prior to 1945, mediation was frequently incorporated into grievance procedures as either an intermediate step before a strike or as a final step. Since then, however, the widespread use of voluntary arbitration has supplanted grievance mediation in all but a small minority of bargaining relationships.[2]

In recent years, there has been a rekindling of both academic and practical interests in grievance mediation.[3] The purpose of this exploratory study is to ascertain from federal and state mediators their general perceptions of and experience with grievance mediation.

Survey

Federal and state mediators from cooperating agencies[4] were asked a series of questions. The general areas of inquiry were: geographic areas of usage; industries in which grievance mediation is most often used; issues which appear to be most suitable for resolution through grievance mediation; environmental and procedural factors important to the successful mediation of grievance cases; perceived benefits of grievance mediation; and future prospects of grievance mediation.

Mediators from the Federal Mediation and Conciliation Service and from state agencies were surveyed because it was known in advance that these neutrals have handled the majority of cases where grievance mediation is used. By surveying both state and federal mediators, it was also possible to gather data concerning grievance mediation activities in the public sector as well as the private sector. No sophisticated sampling techniques were used, but the responses reflect the attitudes and perceptions of neutrals who have had considerable experience with grievance mediation.

The average ages of federal and state mediators were 48.9 and 47.5 years, respectively. The average number of years of education beyond high school was 4.05 years for state mediators and 4.01 years for federal mediators. A majority of all the respondents has had

[2] *Basic Patterns in Union Contracts* (Washington, D. C.: Bureau of National Affairs, 1979), p. 15.

[3] William Simkin, *Mediation and the Dynamics of Collective Bargaining* (Washington, D. C.: Bureau of National Affairs, 1971), p. 300; Arnold M. Zack, "Suggested New Approaches to Grievance Arbitration," *Arbitration—1977,* Proceedings of the 30th Annual Meeting, National Academy of Arbitrators (Washington, D. C.: Bureau of National Affairs, 1978), pp. 105-20; James P. O'Grady, "Grievance Mediation by State Agencies," *Arbitration Journal* 31 (June 1976), pp. 125-30; Stephen B. Goldberg, "Mediation of Grievances in the Coal Mining Industry," a proposal submitted to the U. S. Department of Labor, October 14, 1980; and Mollie H. Bowers, "Grievance Mediation: Settle Now, Don't Pay Later," *Federal Service Labor Relations Review* 3 (Spring 1981), pp. 25-35.

[4] The federal agency is FMCS. Other cooperating agencies are in Alabama, California, Florida, Illinois, Iowa, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Wisconsin.

their most recent prior work experience representing either labor or management.

At the outset, we anticipated that federal and state mediators would differ in their views and perceptions of grievance mediation. However, analysis of the data showed that with very few exceptions there were no significant differences between the two groups of mediators. Consequently, most of the results reported here reflect the combined experience and perceptions of all the respondents.

The geographic areas where grievance mediation appears to be used the most are the Pacific states,[5] Mid-Atlantic states,[6] and the North Central states.[7] According to state mediators, the industry where grievance mediation is used the most is the public sector, followed by the food, health care, construction, and aerospace industries. Federal mediators identified the lumber industry as the most significant user of grievance mediation, followed by steel, printing, automobile, and food. The issues which appear to be most suitable for resolution through grievance mediation are discipline and seniority-related matters, followed by work-rule, layoff, and overtime issues. However, federal mediators indicated that equal employment opportunity issues (employment discrimination) ranked among the issues most frequently submitted to grievance mediation.

Interestingly, when asked what issues are not suitable for grievance mediation, both federal and state mediators shared the opinion that employment discrimination issues are not as suitable as some other issues for voluntary resolution. Other issues which were considered not particularly suitable for mediation were related to fundamental management rights, union security, union jurisdictional disputes, dues checkoff, pensions, and subcontracting.

Important Factors

There were a host of factors which were perceived to be important to successful grievance mediation. These factors have been grouped into the following categories: organizational environment, arbitration and strikes, procedural and technical skills, and relationship between the mediator and the parties.

Two factors dominated the environmental category. One was the interest dispute case load of government mediators. A large number of the respondents indicated that they often had little time for involvement in grievance cases in addition to their regular responsibilities. However, it is reasonable to suggest that the currently declining strike rate may ameliorate this situation. Nevertheless, budgetary and staffing limitations placed on many mediation agencies may still constrain involvement in grievance cases. The other factor which was frequently cited was a lack of support for, and even pressure to avoid, grievance mediation by peers and supervisors. This response was particularly prevalent among federal mediators. It is evident from these results that positive support from decisionmakers who have the power, authority, and resources is critical to the success of government-sponsored grievance mediation activity.

With respect to the second category, the results overwhelmingly support the conclusion that dissatisfaction with regular arbitration is an important catalyst for experimentation by the parties with grievance mediation.[8] Neither the

[5] Washington, Oregon, and California.

[6] New York, New Jersey, Pennsylvania, and Delaware.

[7] Ohio, Indiana, Illinois, Michigan, and Wisconsin.

[8] This result may be influenced by extensive involvement of some FMCS respondents in mediating grievances in the forest products and lumber industries.

availability of the right to strike nor arbitration as a final step was perceived to be an impediment to the serious use of grievance mediation as an intermediate step. However, federal mediators tended to think that the existence of a grievance mediation step made the parties less conscientious in resolving grievances at the lower levels of the grievance procedure prior to grievance mediation.

Among those factors categorized as procedural and technical skills, defining the issue(s) to be resolved in grievance mediation was mentioned most frequently by both federal and state mediators. Restricting the grievance mediator's authority to the defined issue ranked second. This result is interesting because it appears to be a carryover by the mediators or the parties, or both, from arbitration. Additional research is encouraged to determine whether this is the case or it reflects a lack of understanding of the potential for mediation to resolve other issues or some, as yet unidentified, motivation.

The manner in which recommendations for settlement are made by mediators was also considered to be an important factor. The respondents thought that it was appropriate to provide written recommendations only at the request of the parties. They also believed that any proposed recommendations which were to be made in joint sessions should be "cleared" first with the parties.

Other Areas of Inquiry

The survey also provided information on factors concerning the parties and the mediator. Regarding labor and management, there was a consensus among the respondents that it is essential for the parties to understand and to accept mediation as a process. A willingness by the disputants to attempt to resolve differences voluntarily ranked second in importance. Interestingly, the mediators reported that their personal skills and acceptability were important, but not as important as the parties' understanding and acceptance of the process. This result also raises some challenging avenues for subsequent research. For example, if the parties believe in both mediation and arbitration, is the acceptability of the neutral a less critical factor in the former than in the latter procedure and, if so, why?

The preponderance of the respondents indicated that a minimum of five years neutral experience was important to be successful as a grievance mediator.[9] They also felt that involvement in joint labor-management programs/committees provided valuable experience for those who aspire to be grievance mediators. Other considerations such as knowledge of the bargaining history and of the principles of contract interpretation and application were mentioned but were not primary considerations for the respondents.[10]

For potential consumers of the process, the paramount interest is the perceived benefits or advantages which may be derived from utilizing grievance mediation. Strengthening the parties' reliance on collective bargaining to resolve their own problems was considered to be the most important advantage of grievance mediation by the respondents. This was followed closely

[9] The state mediators who responded were successful, on average, in resolving 87.4 percent of the grievance cases in which they were involved. The comparable figure for FMCS mediators is 25.5 percent.

[10] Some FMCS mediators tend to believe that, once a neutral can mediate one type of dispute, he/she can mediate any dispute. Potential pitfalls of narrowly adopting this type of thinking are illustrated by the case of *T& T Industries, Inc.*, 235 NLRB 517 (1978), 1978 CCH NLRB ¶ 19,154.

by the significant decrease in the amount of time it takes to obtain a grievance mediator as compared to an arbitrator. The resolution of more "basic" problems in the collective bargaining relationship ranked third as a positive advantage of this procedure. The opportunity to consolidate grievances and, thus, to reduce the number of requests for arbitration panels was also cited as an important advantage.

The fact that a mediated grievance(s) could be resolved in one day or less was considered a benefit because of the saving of both time and cost. The respondents also indicated that, generally, attorneys are not used in grievance mediation so that there is a decrease in the cost of time spent by retaining legal counsel.

It is also worthwhile to note that the mediators did not believe that use of grievance mediation increased the chances that duty of fair representation charges would be filed against parties electing to use this procedure. This may in large part be due to the fact that the mediators generally agree that the grievant should always be informed of tentative settlements before the union accepts the offer of settlement.[11] This is an important consideration given the problems unions, in particular, often face in this area.[12]

The future prospects for the expanded use of grievance mediation was the last area of inquiry. Although the mediators did not support legislation mandating grievance mediation, they did suggest several conditions under which grievance mediation may gain further acceptance. First among these was positive support by key labor and management representatives for use of this procedure. This was followed by the endorsement of other neutrals and government officials such as the Secretary of Labor, heads of neutral agencies and professional organizations, etc.[13] The respondents were also asked to identify sources of grievance mediators. Predictably, the federal and the state mediators each thought that they should be the preferred source but listed private mediators and arbitrators as lower ranking possibilities.

Conclusion

The data gathered and analyzed in this study give considerable support to the idea that grievance mediation can serve a useful role in resolving grievances. The results also indicate that, where grievance mediation has been used, the parties have derived some noteworthy benefits from the experience. These benefits include a saving in both time and money which are critical issues to both parties under the economics of severe constraints and should be at other times as well. More importantly, it is apparent that grievance mediation yields an even greater benefit, that is, making labor and management more reliant on the process of collective bargaining and thereby to resolve more of their problems.

As we enter the 1980s, it is abundantly clear that more emphasis must be placed upon deregulation and less litigation and relitigation of issues. This will

[11] See, for example, Robert Coulson, "Satisfying the Demands of the Individual Grievance," LABOR LAW JOURNAL, Vol. 30, No. 8 (August 1980), pp. 495-97.

[12] See generally Jean T. McKelvey, ed., *The Duty of Fair Representation: Papers from the National Conference on the Duty of Fair Representation,* sponsored by the New York State School of Industrial and Labor Relations, Cornell University, April 28-29, 1977, New York City; John Truesdale, "Address of NLRB Member John Truesdale Titled: 'The Duty of Fair Representation: Must It Be Effective to Be Fair?'" *Daily Labor Report* No. 50 (March 13, 1979), pp. A11-12, F1-4.

[13] See, for example, Zach, "Suggested New Approaches . . ." and Goldberg, "Mediation of Grievances . . . ."

mean that labor and management must endeavor to resolve more of their own disputes, including such statutorily related issues as equal opportunity, without immediate government intervention. Mechanisms such as arbitration and, where appropriate, grievance mediation can serve an important positive purpose not only to labor and management but also to the greater society.[14]

The practical application of grievance mediation to the labor-management arena certainly is a positive alternative which deserves serious consideration, support, and experimentation to meet the needs of the consumers of grievance dispute resolution mechanisms in the 1980s. Realistically, however, the bottom line remains constant that none of us will know what the economies and consequences of settling now rather than arbitrating later will be unless advocates and neutrals are willing and able to attempt to settle now rather than pay later. **[The End]**

A Discussion

By LaVERNE ROLLE ALIAN

American Arbitration Association

IT WAS RECOGNIZED in the early 1940s and 1950s that a system was needed which would settle problems in the workplace in a fair, swift, and cost-effective manner.[1] Arbitration filled the bill when litigation and strikes were found to be counterproductive to employer and employee alike. Time has passed and the industrial community is again looking for "the way," arbitration being so formalized that it is picking up the attributes of its predecessors.[2] This discussion will focus on two papers suggesting alternative techniques that may be of assistance to the industrial community in settling/solving grievances short of rights arbitration. They deserve note.

Grievance mediation is a technique used primarily in three sections of the United States utilizing federal and state mediators. Although it may be found in a number of industries, it is used primarily by the "public sector [and] food industry, health care, construction, and aerospace" on the state level, and "the labor industry, steel, printing, automobile, and food industries" on the federal level. Only certain issues appear to lend themselves to grievance mediation: "discipline and seniority-related matters, followed by work rules, layoff, and overtime issues."

Mediation usually takes no more than one or two days. There is an 87.4 percent success rate by the state mediators and a 25.5 percent rate for federal mediation. The costs are low due primarily to the few days involved in

[14] See, for example, Chief Justice Warren Burger, "Isn't There a Better Way?" Annual Report on the State of the Judiciary at the Midyear Meeting, American Bar Association, January 24, 1982, Chicago. In this report Chief Justice Burger strongly advocates the expanded use of mediation and arbitration to resolve civil matters without litigation through the courts.

[1] Elkouri and Elkouri, *How Arbitration Works,* 3rd ed. (Washington, D. C.: BNA Books, 1974), p. 7.

[2] James L. Stern and Barbara D. Dennis, eds., *Truth, Lie Detectors, and Other Problems in Labor Arbitration,* Proceedings of the 31st Annual Meeting, National Academy of Arbitrators (Washington, D. C.: BNA Books, 1978), pp. 32-33.

session and lack of counsel.The parties find it most beneficial because it is an extension of the collective bargaining process.

There are relatively few disadvantages associated with grievance mediation, but one of the major ones appears to be that parties must comprehend what mediation is and what it can and cannot do. Second, participants at the levels below grievance mediation tend to put off resolution looking toward the mediation. Certain topics do not lend themselves to the process. These are not insurmountable roadblocks, but they are ones that need addressing. One might also see the requirement that a mediator have nine years of experience, or more, as another drawback, for if it was the norm there would be a tremendous shortage of competent mediators.

The major benefit of factfinding is its ability to address problems (gripes/grievances) that may otherwise fester into absenteeism, low productivity, sabotage, and pure frustration on the part of the employer/union.[3] Management gains also, since it does not have to lose any of its prerogatives while maintaining a "window into the workplace." The types of issues most commonly addressed dealt with "merit salary increases, contents of performance appraisals, or transfer and promotion." Here, too, costs were kept lower due to the absence of legal counsel. There is also more flexibility in getting one's "side known" about the case and the underlying factors leading up to the dispute.

Two major drawbacks to factfinding under this plan are that the fact-finder is selected by management and management still has the final say after factfinding. Both parties are also a bit wary of the caucus aspects of factfinding since the right to cross-examine the opposition is lost.

Critique

Both systems offered useful alternatives to the dispute-resolution process. The factfinding system was proffered to address grievances that do not fit into the bargained definition of a grievance. The mediation technique was proffered to reduce the number of grievances going to arbitration. They both (except for federal mediation) were successful, success being defined as helping the parties to settle disputes.

But it should be pointed out that both systems caused more steps in the grievance process. It cannot be ascertained whether or not participants "saved things" or refrained from settling pending mediation or factfinding. It cannot be ascertained whether or not the cases which were settled were settleable in the lower stages using traditional means. It cannot be ascertained whether it is the system of factfinding or the factfinding itself which is acquiring the resolution. Further, longitudinal and comparative studies, as the writers indicate, must be done.

Conclusion

Mediation and factfinding have been shown to be applicable to some situations in some industries. They (singularly or separately) may be the answer to getting the parties to solve their own disputes without the imposition of dicta. But what was also garnered from the papers is that they may also be just another way of making the grievance resolution process

[3] Maurice S. Trotta, *Handling Grievances* (Washington, D. C.: BNA Books, 1976), pp. 44-45.

take longer. Since the question of the duty of fair representation may impact upon the parties if they choose to mediate or to use factfinding, both alternatives might serve a greater purpose if they were part of an arsenal-of-weapons approach.

If all grievance procedures were a maximum of three steps, with the second step being either mediation or factfinding at the choice of the employer/union and the third step traditional arbitration, expedited arbitration, or advisory arbitration (decided contractually), then possibly disputes might be settled more expeditiously. Again, greater study and time will let us know.

[The End]

SESSION II

State Employee Bargaining

State Government Employee Bargaining: Selected Characteristics*

By JOYCE M. NAJITA

University of Hawaii at Manoa

STATE GOVERNMENT EMPLOYEE BARGAINING today remains a meagerly studied area despite the enormous amount of research that has been devoted to the public sector in recent years. There may be several reasons for this lack of research interest. The growth of collective bargaining among state government employees is a more recent development and has been proceeding at a less rapid rate than bargaining among local government employees. In addition, there are fewer employees of state governments than of local governments.

It is an area that ought to be studied. State government employment has increased more than 165 percent, compared to a 115 percent increase in local government employment.[1] Although state employment accounted for only 27 percent of all full-time state and local government employees in 1977, more employees worked for state governments than for any other type of local government except school districts. This employment is particularly significant when it is remembered that it is concentrated in only 50 governments. The 2.868 million full-time employees of the 50 state governments compares to 2.071 million municipal employees[2] who work in almost 19,000 separate governmental units.[3]

In this paper, I will discuss three aspects of state employee bargaining: the extent of collective bargaining, the legislation regulating collective bargaining, and strikes by state employees. (I am leaving to my fellow panelist that intriguing aspect of state bargaining—collective bargaining by faculty in institutions of higher education.)

* Helene S. Tanimoto and Gail F. Inaba were also involved in the preparation of this paper. We wish to thank James L. Stern and Craig A. Olson for their helpful comments on an earlier version.

[1] U. S. Department of Labor, Bureau of Labor Statistics, *Handbook of Labor Statistics,* Bulletin Number 2070 (Washington, D. C.: U. S. Government Printing Office, 1980), Table 100.

[2] U. S. Bureau of the Census, *Labor-Management Relations in State and Local Governments: 1980,* Special Studies Number 102 (Washington, D. C.: U. S. Government Printing Office, 1981), Table 1.

[3] *Ibid.,* Table 4.

Several characteristics of state employee bargaining become apparent from a review of available data. Distribution of state government employees (by function), presented in Table 1, shows that the largest group of state employees (39 percent) is made up of faculty, staff, and support personnel employed by institutions of higher education. The second largest category is hospital employees (15 percent), and the third and fourth are government administration and transportation (slightly more than six percent each). The remaining one-third are distributed widely over a variety of functions.

TABLE 1
EMPLOYMENT IN STATE GOVERNMENT, BY FUNCTION
OCTOBER 1979

	All Employees (full-time and part-time, in thousands)	
	No.	Percent
All Functions	3,699	100.0
Education Services:	1,577	42.6
Higher Education	1,455	39.3
Elementary and Secondary Schools	22	0.6
Local Libraries	—	—
Other Education	100	2.7
Social Services and Income Maintenance:	971	26.1
Public Welfare	175	4.7
Hospitals	571	15.4
Health	109	2.9
Social Insurance Administration	116	3.1
Transportation	268	7.3
Public Safety:	226	6.1
Police Protection	74	2.0
Fire Protection	—	—
Correction	152	4.1
Environment and Housing	188	5.1
Governmental Administration	236	6.4
Local Utilities	13	0.4
State Liquor Stores	16	0.4
All Other and Unallocable	204	5.5

— Represents zero.
Source: U. S. Bureau of the Census, *Public Employment in 1979,* GE79 No. 1 (Washington, D. C.: U. S. Government Printing Office, 1980), Table 3.

As can be seen by inspection of Table 2, collective bargaining among state employees expanded between 1975 and 1980, with the number of employees covered by contractual agreements increasing by more than 60 percent. However, when compared with local government bargaining, state government bargaining falls in the former's shadow. Only slightly more than 20 percent of state employees are covered by contractual agreements, compared to about 36 percent of covered local government employees.[4] This relationship holds for membership in any employee organization; 40.5 percent of full-time

[4] *Ibid.,* Table 1.

TABLE 2

STATE GOVERNMENT BARGAINING, ORGANIZED EMPLOYEES

1975 - 1980

Item	1975	1976	1977	1978	1979	1980
No. of governments	50	50	50	50	50	50
No. of bargaining units, Oct. of each year	1,054	1,093	1,044	1,060	1,059	978
Average size of bargaining unit	680	688	832	828	900	1,024
No. of employees in bargaining units, Oct. of each year	716,244	752,059	865,032	877,477	952,888	1,001,842
Percent of employees in bargaining units, Oct. of each year	21.9	22.5	24.8	24.8	25.8	26.7
No. of written agreements in effect, Oct. of each year	942	1,052	873	892	948	959
Contractual agreements	632	708	683	689	742	728
Memoranda of understanding	310	344	190	203	206	231
No. of employees covered by contractual agreements, Oct. of each year	515,511	546,110	741,918	760,438	769,839	837,628
Average no. of employees covered per contractual agreement	816	771	1,086	1,104	1,038	1,151
Percent of employees covered by contractual agreements, Oct. of each year	15.8	16.0	21.3	21.5	21.8	22.1
Percent of full-time employees who belong to an employee organization	39.6	38.2	37.7	38.1	38.7	40.5

Source: U. S. Bureau of the Census and U. S. Dept. of Labor, Labor-Management Services Administration, *Labor-Management Relations in State and Local Governments: 1975; 1976; 1978; 1979; 1980,* Special Studies No. 81, 88, 95, 100, 102 (Washington, D. C.: U. S. Government Printing Office, 1977-1981), Table 1.

state employees are members of an employee organization while 51.9 percent of full-time local government employees belong to an employee organization.[5]

The large number of employees in each state government typically means that, where bargaining exists, the bargaining units are very large. In 1980, the latest year for which figures are available, there was a total of 978 bargaining units covering 1,001,842 state employees, or more than one-fourth of all state employees. The average number of employees in a state government bargaining unit in 1980 was more than 1,000, making the average unit nearly seven times the size of the average local government bargaining unit.

Not only do the organizational patterns of state and local government employees differ, but the organizations that represent them are different from those representing their private sector counterparts. Some of these groups do not consider themselves as unions but view their organizations as professional associations that engage in collective bargaining. Other organizations such as the Hawaii Government Employees Association, which is affiliated with the American Federation of State, County, and Municipal Employees, AFL-CIO, have a history as employee associations which predates the advent of collective bargaining in the public sector.

Although AFSCME is the dominant union representing local and state government employees outside of education, at least 70 other organizations also represent public employees, including AFL-CIO unions, independent unions, and professional associations.[6] Stieber has noted that, based on 1969-1970 data, union membership exceeded association membership at the local level, while the opposite was true in state government where associations had almost three times as many members as unions. A review of BLS data for 1972-1978 shows that at the local level the number of unions continues to exceed the number of associations; the reverse is true in state government. However, membership in associations between 1972 and 1978 has been higher than in unions at both the state and local government levels, except that in state government a shift occurred, beginning in 1978, when the New York Civil Service Employees Association was merged into AFSCME.[7]

Legislation Covering State Employees

The variation in organization patterns of state and local government employees is also reflected in the laws that regulate collective bargaining. In its infancy, the pattern of public sector collective bargaining legislation was characterized as a "crazy quilt,"[8] and after nearly two decades we find it is

[5] *Ibid.*, Table 2.

[6] The lists of AFL-CIO unions, independent unions, and independent employee associations were developed from information found in U. S. Department of Labor, Bureau of Labor Statistics, *BLS File of State, County, and Municipal Collective Bargaining Agreements, Fall 1979*, Report No. 598 (Washington, D. C.: U. S. Government Printing Office, 1980), p. 2. The list of other associations was based on information from U. S. Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations, 1979*, Bulletin 2079 (Washington, D. C.: U. S. Government Printing Office, 1980), pp. 21-49.

[7] See U. S. Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations, 1973, 1975, 1977, 1979*, Bulletin Numbers 1937, 2044, 2079 (Washington, D. C.: U. S. Government Printing Office, 1974, 1977, 1979, 1980), Table 16.

[8] "Testimony of Helen D. Wise on H. R. 8677," *A Federal Bargaining Act for State and Local Public Employees* (Washington, D. C.: Coalition of American Public Employees, 1974), p. 22.

still very much the same. It is marked more by variety than uniformity in terms of both coverage of employees and substantive provisions of the law. The piecemeal adoption of legislation based on private sector and federal executive order models has been the tradition, and there are few instances where a single statute governs all public employee collective bargaining in a state. In substance, the statutes vary and cover a wide range; as Schneider has observed, no law has been adopted "which reproduces the National Labor Relations Act, although many approximate it."[9]

By 1980, 38 states had some form of bargaining legislation covering all or some occupational groups; the right to bargain was granted in one state (Illinois) by executive order and in two (Michigan and New Mexico) by state personnel rules. Comprehensive coverage of all public employees in a state under a single statute is still the exception, although a few laws do provide such coverage.

Representation and bargaining rights for state employees have been extended by law in 25 states, by executive order in one state, and by rules in two states. In contrast, all or some local government employees in 40 states are covered by some form of collective bargaining legislation. State employees in five states (Alaska, Hawaii, Minnesota, Oregon, and Pennsylvania) have a limited right to strike, and local government employees in eight states[10] enjoy a similar right. Furthermore, certain local government employees—firefighters and police officers—are more likely to have final and binding arbitration available as a dispute-settlement alternative when public sector strikes are prohibited.[11]

Also, local government employees are more apt to be covered by comprehensive laws[12] than are state government employees. In at least six states—Maryland, Michigan, Nevada, Oklahoma, Rhode Island, and Washington—comprehensive legislation covers some or all local government employees but does not provide similar coverage for their state counterparts. Based on the foregoing, it would appear that state governments tend to set up less favorable statutory provisions for their own employees than they do for local government employees.

The above evidence indicates that, when compared to local government employees, state government employees are at relatively low levels of unionization and collective bargaining chiefly because the laws covering state employees are of more recent origin than those covering local government employees. The delay in the development of legislation can be attributed to the general opposition (prior to 1970) of state associations to collective bargaining for public employees.

Among government employees the traditional belief was that "their security and advancement came from the political machine and that the best way to work with the machine was through

[9] B. V. H. Schneider, "Public Sector Labor Legislation—An Evolutionary Analysis," *Public-Sector Bargaining,* eds. Benjamin Aaron, Joseph R. Grodin, and James L. Stern (Washington, D. C.: Bureau of National Affairs, 1979), p. 192.

[10] The additional three states are Maryland, Vermont, and Wisconsin.

[11] See Helene S. Tanimoto and Joyce M. Najita, "Strike Rights and Prohibitions," *Guide to Statutory Provisions in Public Sector Collective Bargaining,* 3rd issue (Honolulu: Industrial Relations Center, University of Hawaii, 1981), p. 3.

[12] Comprehensive laws are defined as those which: guarantee public employees the right to bargain collectively; establish procedures for selection of employee representatives; prescribe remedies for unfair labor practices committed by employers or employee organizations; provide dispute resolution mechanisms; and establish an administering agency.

the local employees' association."[13] Some employee associations went so far as to function as an auxiliary of a political party or faction, and their influence with state legislators and administrators was large. It was their custom to work through conference and consultation and to secure their objectives through legislation; they were unfamiliar with the process and techniques of collective bargaining.

When impetus finally developed for a collective bargaining law, as in New York and Hawaii, associations took an active role. They were instrumental both in the design of the laws under which they would be regulated and in the enactment of the legislation as well.

State Government Employee Strikes

National strike activity data for the period 1958-1979 show a slightly downward trend at the same time that the number of strikes by state employees was rising dramatically (see Table 3). State employee strikes increased from three in 1960 to 57 in 1979, or by 1,800 percent, as compared to local government employee strikes which increased during the same period from 33 to 536, or by more than 1,500 percent. Not only do state employee strikes occur less frequently, but, compared with local government employee and private-sector employee strikes, they are of shorter duration. Between 1969 and 1978, the average days idle per state employee ranged between 3.5 to 10.8 days, while the same measure for employees in all industries and local government ranged from 12.4 to 22.7 and 4.3 to 12.0, respectively.[14]

State government employee strikes also involve fewer employees than either local government or private sector strikes, when measured in terms of total employment. Strike participation rates, as a percent of total employment, in state government between 1960 and 1979 ranged from a low of .02 percent to 2.1 percent. In comparison, the range in strike participation rates among employees in local government and all industries was from .09 percent to 2.9 percent and from 1.1 percent to 4.7 percent, respectively (see Table 3).

However, because bargaining units in state government tend to be large, strikes among state employees involve more employees per strike (in terms of average number of workers involved). Between 1975 and 1979, this average ranged from 398 to 2081 for state government employee strikes; similar numbers for local government employee strikes were 383 to 565.[15] There is little doubt that, as Kochan has suggested, strike sanctions, the essentiality of services provided, and the intense public and legal pressure brought to bear on the strikers and management limit the duration and impact of the average public sector strike.[16]

[13] Sterling D. Spero, *Government as Employer* (Carbondale: Southern Illinois University Press, 1948, 1972), p. 205.

[14] See U. S. Department of Labor, Bureau of Labor Statistics, *Analysis of Work Stoppages, 1979,* Bulletin 2092 (Washington, D. C.: U. S. Government Printing Office, 1981), Table 1, and *Work Stoppages in Government, 1979* (Washington, D. C.: U. S. Government Printing Office, 1981), Table 1. Data for all industries and state and local government work stoppage average days of idleness per worker are from *Work Stoppages in Government 1958-68,* Report No. 348, Table 3 (1958-1968); *Government Work Stoppages 1960, 1969, and 1970,* Summary Report, Table 3 (1969-1970), and *Work Stoppages in Government, 1972 to 1979,* Table 2 (1971-1974), Table 3 (1975), and Table 2 (1976-1979).

[15] U. S. Department of Labor, Bureau of Labor Statistics, *Work Stoppages in Government, 1975-1979* (Washington, D. C.: U. S. Government Printing Office, 1976-1981), Table 3 (1975), Table 2 (1976-1979).

[16] Thomas A. Kochan, "Dynamics of Dispute Resolution in the Public Sector," *Public-Sector Bargaining,* p. 158.

TABLE 3

WORK STOPPAGES IN THE UNITED STATES, 1958-79[a]

	All Industries			State Government			Local Government[b]		
Year	Work Stoppages	% Total Employment	% Est. Total Working Time	Work Stoppages	% Total Employment	% Est. Total Working Time	Work Stoppages	% Total Employment	% Est. Total Working Time
1958	3,694	3.9	.18	1	.002	n.d.	14	.04	n.d.
1959	3,708	3.3	.50	4	.03	n.d.	21	.04	n.d.
1960	3,333	2.4	.14	3	.06	n.d.	33	.6	n.d.
1961	3,367	2.6	.11	0	0	n.d.	28	.14	n.d.
1962	3,614	2.2	.13	2	.1	n.d.	21	.5	n.d.
1963	3,362	1.1	.11	2	.02	n.d.	27	.09	n.d.
1964	3,655	2.7	.15	4	.02	n.d.	37	.4	n.d.
1965	3,963	2.5	.15	0	0	n.d.	42	.2	n.d.
1966	4,405	3.0	.15	9	.1	n.d.	133	1.7	n.d.
1967	4,595	4.3	.25	12	.2	n.d.	169	1.9	n.d.
1968	5,045	3.8	.28	16	.4	n.d.	235	2.7	n.d.
1969	5,700	3.5	.24	37	.807	n.d.	372	2.01	n.d.
1970	5,716	4.7	.37	23	.329	n.d.	386	2.4	n.d.
1971	5,138	4.5	.26	23	.5	.01	304	1.8	.04
1972	5,010	2.3	.15	40	1.0	.04	335	1.5	.05
1973	5,353	2.9	.14	29	.02	.02	357	2.3	.11
1974	6,074	3.5	.24	34	.01	.01	348	1.6	.06
1975	5,031	2.2	.16	32	2.1	.04	446	2.9	.09
1976	5,648	3.0	.19	25	1.0	.02	352	1.6	.07
1977	5,506	2.4	.17	44	1.0	.02	367	1.5	.07
1978	4,230	1.9	.17	45	.5	.02	435	1.8	.06
1979	4,827	1.9	.15	57	1.4	.06	536	2.2	.10

[a] The number of stoppages relates to in the year. n.d. means no data.
[b] Includes all stoppages at the county, city, and special district level.

Sources: U. S. Dept. of Labor, Bureau of Labor Statistics, *Analysis of Work Stoppages, 1979,* Bull. 2092 (Washington, D. C.: U. S. Government Printing Office, 1981), Table 1, and *Work Stoppages in Government, 1979,* Report 629 (Washington, D. C.: U. S. Government Printing Office, 1981), Table 1. Data for state and local government employee participation in work stoppages as a percent of total employment are from *Work Stoppages in Government. 1958-1968,* Report No. 348 (Washington, D. C.: U. S. Government Printing Office, 1968), Table 2 (1958-1968); *Government Work Stoppages, 1960, 1969, 1970,* Summary Report (Washington, D. C.: U. S. Government Printing Office, 1972), Table 2 (1969-1970); and *Work Stoppages in Government, 1972-1979* (Washington, D. C.: U. S. Government Printing Office, 1974-1981), Table 2 (1971-1974), Table 3 (1975), Table 2 (1976-1979).

There is some evidence to suggest that, similar to the experience in the private sector, substantial increases in state government strike measures often are the result of only one or two stoppages. Thus, for example, in 1975, the statewide strike in Pennsylvania involving almost 53,000 state employees and resulting in over 200,000 days of idleness increased the worker and idleness measures in state governments to record levels. The dispute accounted for 79 percent of all striking state workers and 69 percent of days off the job, although it accounted for only one of a total 32 work stoppages recorded that year.[17] Similarly, the 1979 statewide strike in Hawaii, involving 7,700 state and local government employees, accounted for nearly 42 percent of total days idle registered by state government employees during that year, although it represented less than 16 percent of total workers involved in work stoppages in 1979.[18]

Between 1975 and 1979 there were more walkouts of state and local government employee bargaining units represented by employee associations than by unions affiliated with the AFL-CIO or other unions. This would indicate, inter alia, that more organizing and negotiation activities are being carried on by the former and/or they represent employees in units or functions which have a predilection for striking. Another interesting feature of public employee strikes during this period is the noticeable number of work stoppages (139) in which no union or employee association was involved. Available data do not reveal the nature of these strikes, e.g., whether they are short demonstration strikes carried out to pressure lawmakers to enact legislation, recognition strikes erupting in the absence of legislation, or spontaneous walkouts occurring during the period immediately following enactment of legislation when procedures for recognition and negotiations have not been established.[19]

Conclusion

Probably because of the nature of the organization of state and local government employees and the peculiar characteristics of the enabling legislation which resulted, the development pattern of public employee bargaining is marked by diversity. In this arena, state employee bargaining is a relative newcomer, in part because the states have been slow in extending to their employees the bargaining rights they have granted to local government employees. Union organization among state employees, as a consequence, has not penetrated as deeply as it has among employees of local governments. We also find that strikes of state employees tend to be shorter and involve fewer employees than those against local governments.

The final shape of state employee bargaining is still being formed, as individual states continue to carry out healthy experimentation. How much more organization of state employees we can expect will depend upon the public mood and management resistance in each locale. This would lead us to speculate that, because much of the shape and pattern of state employee

[17] U. S. Department of Labor, Bureau of Labor Statistics, *Work Stoppages in Government, 1975,* Report No. 483 (Washington, D. C.: U. S. Government Printing Office, 1976), Table 8.

[18] U. S. Department of Labor, Bureau of Labor Statistics, *Work Stoppages in Government, 1979,* Report No. 629 (Washington, D. C.: U. S. Government Printing Office. 1981), Table 8.

[19] U. S. Department of Labor, Bureau of Labor Statistics, *Work Stoppages in Government, 1975-1979* (Washington, D. C.: U. S. Government Printing Office, 1976-1981), Table A-3.

bargaining seem to be determined by the structure and history of state government, the diversity in characteristics of state and local government bargaining will continue. Perhaps with the help of enriched data, the patterns will come into clearer focus.

[The End]

Faculty Unionism in Higher Education: The Public Sector Experience

By JOHN J. LAWLER

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WHEN I UNDERTOOK the assignment of preparing this paper last year, I envisioned it as a relatively thorough review of the literature dealing with faculty unionism and the impact of faculty collective bargaining in the public sector of higher education. However, the treatment of this topic is so extensive that any comprehensive review of the literature would only be redundant.[1] Therefore, while I shall first present a general, but brief, overview of research, I intend to focus my discussion on a largely unexplored, though decidedly significant, issue: the response of faculty bargaining to institutional retrenchment in the public sector.

Determinants of faculty unionism: as Garbarino has noted, faculty unionism is essentially a public sector phenomenon.[2] Of approximately 86,000 faculty members covered by agreements in mid-1979 (a total of 133 bargaining units in 1717 institutions), slightly less than 90 percent are employed in public universities or colleges.[3] Although the impact of unionism on faculty compensation is frequently an issue in organizing campaigns, that evidence suggests that institutional factors *other* than the salaries of faculty members play a dominant role in promoting unionization. In fact, neither relative nor absolute faculty salary levels are significantly associated with the probability of union victory in representation elections.[4]

Bargaining has been most likely to occur in public institutions undergoing rapid growth, accompanied by centralization of administrative authority and changes in perceived institutional mission.[5] Thus, institutions in which bureaucratic decisionmaking dominates collegial decisionmaking have been most prone to unionization. In the public sector this has meant that community colleges and four-year state colleges (typically former agricultural and/or education schools) have been most heavily unionized. The impact of structural characteristics on union proneness is, however, confounded by the probable impact of institutional quality and the prevalence of elitist values among faculty members.

[1] See, for example, J. W. Garbarino, "Faculty Unionism: The First Ten Years," *Annals* 448 (March 1980), pp. 74-86, and "Faculty Unionization: The Pre-Yeshiva Years, 1966-1979," *Industrial Relations* 19 (Spring 1980), pp. 221-230.

[2] J. W. Garbarino, *Faculty Bargaining: Change and Conflict* (New York: McGraw-Hill, 1975), pp. 51-82.

[3] Garbarino, "Faculty Unionization: The Pre-Yeshiva Years," cited at note 1.

[4] J. Lawler and J. M. Walker, "Union Elections Outcomes in Higher Edudcation: A Causal Model," Working Paper 81-08, Industrial Relations Center, University of Minnesota, 1981.

[5] Garbarino, *Faculty Bargaining: Conflict and Change,* cited at note 2, pp. 83-134.

The growth trend: the growth rate of faculty unionism has been declining in both the public and private sectors since about 1976, although 1982 will clearly mark a banner year for faculty unionism with the creation of a nearly 20,000-member bargaining unit in the California State University system. The California situation is clearly an anomaly, attributable to a delay in enabling legislation and tactical maneuvering between the competing unions. There are currently 23 states which have enacted laws which specifically allow faculty unionization in higher education; five states, plus the District of Columbia, allow bargaining at the option of governing boards.[6]

Garbarino argues that, since it is unlikely that there will be much additional enabling legislation passed in the foreseeable future, and since most organizable units have been unionized in states with supportive legislation, the potential market for faculty union services has been largely saturated.[7] It seems improbable that major research universities in states with supportive legislation will unionize, even in periods of fiscal adversity, as suggested by recent rejections of unionization at Berkeley, UCLA, Minnesota, and Michigan State.

The process and impact of faculty bargaining: writing and research in this area is often normative in focus, though descriptive studies (often qualitative or anecdotal in nature) are frequently encountered. The conceptual and non-quantitative emphasis of this research is largely a function of the novelty of faculty bargaining and the absence, until recently, of much hard data relating to bargaining practices or outcomes. There is a longstanding concern with the bargaining unit determination problem.[8] Of course, as with public sector bargaining in general, there are the dual problems of reconciling collective bargaining with the separation of funding and administrative powers and the constitutionality of delegating decisionmaking authority to nonelected individuals. But a more significant problem is the extent to which bargaining strengthens or weakens collegial governance structures.

In perhaps the most ambitious study to date, Adler conducted a followup in 1977 to a 1970 AAUP survey of approximately 1000 institutions to determine levels of faculty involvement in decisionmaking.[9] Since virtually none of the surveyed institutions had bargaining in 1970, Adler examined changes in the patterns of faculty governance among institutions which had no election, those in which bargaining had been rejected, and those in which a faculty organization had secured bargaining rights. Although average levels of participation had increased in all three groups during the period, Adler found no evidence to suggest that bargaining status contributed to a more substantial shift.

In another study, Lee concluded that faculties did enjoy, on average, increased involvement in campus decisionmaking as a result of bargaining. But, the nature and direction of the shift depended to some extent on preexisting conditions.[10]

A major distinction is often made between the professional association

[6] M. Garfin, *Directory of Faculty Contracts and Bargaining Information in Institutions of Higher Education* (New York: National Centers, Baruch College, 1981), p. 57.

[7] Garbarino, "Faculty Unionism: The First Ten Years," cited at note 1.

[8] See, for example, D. Wollett, "Issues at Stake," *Faculty Unions and Collective Bargaining*, eds. E. D. Duryea and R. Fish (San Francisco: Jossey-Bass, 1973).

[9] D. Adler, *Governance and Collective Bargaining in Four-Year Institutions* 1970-1977 (Washington, D. C.: Academic Collective Bargaining Information Service, 1977).

[10] B. Lee, "Governance at Unionized Four Year Colleges," *Journal of Higher Education* 50 (September 1979), pp. 565-585.

model of bargaining espoused by the AAUP and the more conventional "industrial" models of the NEA and the AFT.[11] However, Bognanno et al. observed relatively few differences among AAUP, NEA, and AFT contracts and were only able to explain an average of 25 percent of the variance in several different contract provisions in terms of bargaining agents and various institutional characteristics.[12]

Finally, there has been considerable interest in the impact of faculty bargaining on faculty salaries. Studies to date, however, suggest that faculty salary levels are relatively insulated from the impact of unionization.[13]

Contract Retrenchment Provisions

During the past few years, the problem of retrenchment in higher education, which almost invariably involves the reduction of academic staff, has become a central concern of administrators, faculty, and researchers. To be sure, enrollment declines attributable to changing population demographics have been long anticipated and institutions have generally adjusted academic staffs in response to this secular decline through attrition and the employment of adjunct faculty. However, the experiences of institutions in Washington, Michigan, and Minnesota testify to the growing vulnerability of public universities and colleges when state governments encounter fiscal crises. That state systems of higher education are often perceived as "overgrown" or "fat" makes them tempting targets for state budget-cutters.

In order to gain some understanding of the extent and nature of retrenchment provisions in faculty union contracts (at least in four-year institutions), data were obtained for a representative sample of twenty-two contracts, all negotiated since 1978, from the BRAIN data base, which has been developed and maintained by the National Center staff at Baruch College.[14] Frequency distributions for the various types of retrenchment provisions, broken down by bargaining agent (AAUP versus AFT and NEA contracts; contracts negotiated by independent unions and coalitions have been excluded), are presented in the table (chi-square statistics and the associated probability values for the cross-tabulations are also included).

The types of contract provisions observed fall into four categories: faculty involvement in retrenchment decision-making; faculty rights during layoffs; faculty rights after layoff; and early retirement programs and incentives. These categories will be treated in turn.

Retrenchment decisionmaking practices: none of the contracts in the sample included provisions specifically requiring faculty determination of either the existence of financial exigency or the allocation of budget cuts across institutional programs. While the majority of contracts were silent on both issues, the right to make major exigency/retrenchment decisions and to allocate budget cuts was reserved exclusively

[11] Garbarino, *Faculty Bargaining: Conflict and Change*, pp. 83-134.

[12] M. Bognanno, D. Estenson, and E. Suntrup, "Union Management Contracts in Higher Education," *Industrial Relations* 17 (May 1978), pp. 189-203.

[13] See, for example, J. Marshall, "The Effects of Collective Bargaining on Faculty Salaries in Higher Education," *Journal of Higher Education* 50 (May 1979), pp. 310-322.

[14] BRAIN is an acronym for Baruch Retrieval of Automated Information for Negotiations. Contracts in the data base are chosen to be representative of the broader population of faculty contracts. For information, contact Joel Douglas, National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY. I also wish to acknowledge the research assistance of Ken Bergstrom in the analysis of these data.

to administrators or governing boards in 46 percent and 32 percent of the contracts, respectively. Thus, the issues are effectively negotiable items in the majority of cases (barring restrictions imposed by prior practice or the conditions of the institution's charter).

Interestingly, the AAUP was generally *less successful* than the AFT or NEA in denying decisionmaking authority to administrators as a matter of right. This is especially pronounced in the case of decisions regarding the allocation of budget cuts (presumably less constrained by legislation or charter).

Faculty unions were somewhat more successful in securing some form of faculty decisionmaking authority in allocating layoffs among departments. Eighteen percent of the contracts called for the creation of a special commission (often including individuals from outside the institution) to determine the distribution of layoffs. The AFT and NEA contracts were less likely than AAUP contracts to vest such power exclusively in the administration and were more likely to require the establishment of a multilateral commission.

Other Provisions

Rights during layoff: while all of the contracts in the sample provided that all faculty members could be subject to layoff in times of exigency/retrenchment, they differed considerably in terms of the criteria to be used in determining layoff priorities and the right of individual faculty members to interdepartmental transfer in lieu of layoff. Some form of transfer was guaranteed in the majority of contracts, though contracts tended to allow employer discretion in offering transfers. A greater proportion of NEA and AFT contracts provided for transfer than AAUP contracts, perhaps reflecting an AAUP concern with the impact of such transfers on professional standards in institutional quality.

Although most of the contracts provided that seniority would serve as one basis in determining the order of layoff, 50 percent of the contracts specified that individual merit and/or program needs must also serve as a criterion. Not surprisingly, the majority of AAUP contracts required use of the merit/need criterion, while only about one-third of the AFT and NEA contracts included this requirement. Finally, advance notice of layoff (typically by one to two years) was required by the vast majority of the contracts, with little difference between AAUP and AFT/NEA contracts.

Rights after layoff: although faculty members may be offered severance pay after being terminated, the BRAIN data base does not include a clause category relating to severance pay. Therefore, there is no way of knowing whether any of the contracts in the sample provided for or required such payments. However, it was possible to determine the period over which faculty members retained the right to recall.

Most contracts provided for recall periods of between one and three years, with tenured faculty being guaranteed set recall periods more frequently than nontenured faculty; the recall periods for tenured faculty also appeared to be somewhat longer than for nontenured faculty. There were no marked differences between AAUP and AFT/NEA contracts in terms of the duration of recall periods.

Early retirement programs and incentives: all of the contracts in the sample provided for some form of early retirement, although only a very few contracts specifically allowed for retirement under age 60. Only two out of the sample of 22 contracts provided financial incentives for early retirement.

TABLE

FREQUENCY DISTRIBUTIONS AND CROSS-TABULATIONS FOR RETRENCHMENT/EXIGENCY PROVISIONS

	AAUP Contracts (n = 13)	AFT/NEA Contracts (n = 9)	x^2 (Pr<)[a]	Total
1) Determination of Financial Exigency				
i) Administration only	54%	33%		46%
ii) Multilateral Commission	0%	0%	.91	0%
iii) NP/NS[b]	46%	67%	(.35)	54%
2) Allocation of Budget Cuts				
i) Administration only	54%	0%		32%
ii) Multilateral Commission	0%	0%	7.18	0%
iii) NP/NS	46%	100%	(.01)	68%
3) Allocation of Layoffs				
i) Administration only	62%	22%		45%
ii) Multilateral Commission	7%	33%	4.00	18%
iii) NP/NS	31%	45%	(.13)	33%
4) Right to Interdepartmental Transfer				
i) Mandatory	31%	33%		32%
ii) At Employer Discretion	23%	56%	3.60	36%
iii) NP/NS	46%	11%	(.16)	32%
5) Layoff Criteria				
i) Merit/need specified	62%	33%	1.69	50%
ii) Merit/need not specified	38%	67%	(.20)	50%
6) Layoff Notice				
i) Advance notice specifically required	85%	78%	.16	82%
ii) Advance notice not specifically required	15%	22%	(.70)	18%
7) Recall Period: Nontenured Faculty				
i) 2+ years	15%	11%		14%
ii) 1-2 years	46%	44%		45%
iii) Varies	15%	11%	.35	14%
iv) NP/NS	24%	34%	(.95)	27%
8) Recall Period: Tenured Faculty				
i) 2+ years	31%	11%		23%
ii) 1-2 years	46%	67%		55%
iii) Varies	0%	11%	3.17	5%
iv) NP/NS	23%	11%	(.36)	17%

[a] Chi-square statistics and probability of x^2 (in parentheses).

[b] NP/NS = No provision or not specified in contract.

Conclusion

Faculty unionism in public universities and colleges appears to be moving from a period of growth to one of stability and maturity. Future research on faculty unionism will undoubtedly center on the impact of bargaining rather than the determination of its causes and the study of its legal setting. Studies of bargaining impact to date have focused on governance, compensation, and personnel policy issues and suggest that faculty bargaining has affected these policies to only a limited degree.

The recurrent, seemingly endemic, pattern of fiscal crisis in state government (given federal budget cuts, taxpayer rebellions, and a protracted downturn in the economy) suggests that a critical issue confronting public sector faculty unions over the next several years will be coping with the job security threat posed by retrenchment in times of financial exigency. In examining provisions relating to this problem in a sample contract recently negotiated in four-year public institutions, the following patterns seem to emerge.

One, while contracts were often silent in specifying the final decisionmaking authority in regard to exigency/retrenchment issues, between one-third and one-half of the contracts specifically define some or all forms of decisionmaking in this area as a management prerogative. Two, despite its stated concern with faculty participation in academic decisionmaking, the AAUP generally negotiated contracts which vested greater retrenchment/exigency decisionmaking power in administrators and/or governing boards. Three, there are marked differences between AAUP and NEA/AFT contracts in regard to faculty rights during layoff which reflect the competing ideologies of the organizations. In particular, AAUP contracts are less likely to include "industrial" model provisions which define seniority as the sole criterion for layoff and which allow interdepartmental transfers in lieu of layoff.

These findings are obviously preliminary and only suggest the true impact of bargaining on retrenchment/exigency practices. Further analysis requires obtaining a larger sample of contracts (including those negotiated in two-year colleges) and the specification of a causal model which incorporates a wide variety of institutional and contextual factors into the analysis. **[The End]**

A Discussion

By JACK STIEBER

Michigan State University

ABOUT THE ONLY THING the Lawler and Najita papers have in common is that they both deal with relatively new areas of collective bargaining. Whether they will, in time, actually become significant areas of bargaining remains to be seen.

Professor Najita distinguishes between unions and associations engaged in organizing and representing state government employees. Lawler also notes that the major organizations active in faculty representation include one union (AFT) and two associations (AAUP and NEA).

The differences between unions and associations have diminished greatly during the last decade. Ten years ago, associations went to great pains to differentiate themselves from unions. They

generally did not claim or seek the right to strike, stressed the professional nature of their organizations, played down the adversary relationship to employers, and were either ambivalent about or opposed to legislation granting them status as "labor" organizations with the right to engage in collective bargaining. The term "collective negotiations" was often used to differentiate the association-employer from the union-employer relationship.

By 1982 these differences were more or less nonexistent. Most associations are unions in all but name. Where collective bargaining rights have not been legislated, they lobby for such rights. They compete with unions for recognition as bargaining representatives. In their relationships with employers, they are just as adversarial as unions. And, most important of all, they strike. *Sic transit* employee associations.

We have also seen some erosion of the prohibition against strikes in public employment. Najita notes that five states now grant a limited right to strike to state employees as compared with eight which grant such a right to local government employees. Actually, many more local employees have the de facto right to strike by virtue of the reluctance of the courts in some states to enjoin public employee strikes even when they are prohibited by law. Michigan is an excellent example.

While state employee strikes are much rarer than local government strikes, the courts are likely to deal with them in much the same fashion as they have with other public employee strikes. Since the activities of state government are much further removed from the citizenry than those of local government, it could be much more difficult to argue that they should be enjoined because they interfere with essential services, let alone threaten health and safety.

The fact that collective bargaining laws for state employees are less favorable than those for local employees is in large part due to the much stronger influence of civil service at the state level. It is only recently that employees and legislatures have begun to question the impartial status of civil service in resolving employer-employee disputes. In a number of states, civil service commissions have provided grievance procedures with the right to appeal to hearing officers or even to arbitration, which have probably blunted the organizing efforts of unions.

The finding that there have been 139 state employee strikes that have apparently not been conducted by any organization is most intriguing. The origin of these strikes deserves further research.

The Lawler Paper

Turning to the Lawler paper, the fact that employment as a faculty member is basically individual rather than group-oriented is, in my view, the greatest obstacle to unionization in universities. This explains the much greater organization of faculty at community colleges and nonresearch four-year universities as compared with those institutions where graduate education and research is emphasized. The greater the emphasis on research, the more individualized the nature of the faculty job and the less amenable it is to subordinating individual to collective goals. A "community of scholars" is not an apt description of the modern large university in the United States. If it were, the job of organizing faculty would probably be less difficult than it is.

Lawler notes that previous research has found that faculty salary levels are "relatively insulated from the impact of unionization." This may be true

for the average *level* of salaries, but it is probably less true for salary differentials between departments and different faculty ranks. It is my impression that faculty organization has resulted in narrowing salary differences between departments as well as between full professors and lower ranking faculty. Indeed, this helps to explain why the impetus for organization often comes from faculty in lower salaried colleges and departments and is vigorously opposed by the most senior and prestigious professors, whose views may carry considerable weight with their peers.

Lawler's findings on contract provisions dealing with interdepartment transfers and merit/need criteria in layoffs, particularly the difference between the AAUP and AFT/NEA, are very interesting. A footnote showing the institutions included in the sample might contribute to a better understanding of these differences.

The fact that one-third of all contracts provide a "right to Inter-department Transfer" is consistent with Lawler's observation that research-oriented universities are the most difficult to organize. Faculty members in research universities and in research-oriented departments in any university are likely to resist strongly—one can almost say "to the death"—the transfer of a faculty member from another unit as a "right" rather than a privilege that only they are qualified to bestow after rigorous evaluation of qualifications as compared with others who are in the labor market. This may also help explain why the AAUP is more reluctant than the AFT and NEA to deal with this issue contractually.

When Lawler says that "[F]aculty unionism in public universities and colleges appears to be moving from a period of growth to one of stability and maturity," he obviously is not using the term "maturity" in the same way as Professor Richard Lester did in his book *As Unions Mature*. Writing in the mid-fifties, Lester said, "Trade unionism has come of age. . . . Obviously, labor organization has become part of the dominant economic and cultural pattern of our day." Faculty unionism is still in the developmental stage and is far from the "dominant economic and cultural pattern" of universities.

Lester was, of course, writing of trade unionism as a movement rather than about unions in particular industries or sectors of the economy. Judging by what has happened to union organization during the last 25 years, Lester's observation might bear reexamination today.

A Fateful Decade?

As to the future of faculty unionism, I think it is too early to reach a definitive conclusion. Organization of faculty in a major quality university could provide the impetus to growth and acceptance that has been so badly lacking up to now. On the other hand, if, as Lawler suggests, faculty unionism has moved beyond its growth period, it would not be very surprising to see a reversal in the trend of the last decade.

Such a countermovement might occur if faculty members found that unions could not protect them from layoffs during a period of retrenchment, such as many universities are experiencing in the early 1980s. Conversely, evidence that faculties in organized institutions fare better than nonunionized faculties during this period could provide a powerful incentive for unionization. Either way, this may prove to be a fateful decade for the future of faculty unionism. [The End]

SESSION III

The Duty of Fair Representation

The Statute of Limitations in Fair Representation Cases

By JAY E. GRENIG

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IN AN EFFORT to protect the rights of the individual employee, the judiciary has developed the doctrine of fair representation.[1] Usually an employee suit for breach of the duty also alleges that the employer has breached the collective bargaining agreement. The employee's right to sue the employer for violation of the agreement is governed by Section 301 of the Taft-Hartley Act.[2] Section 301 suits can be brought in either federal or state court.[3]

Congress has not enacted a statute of limitations governing actions brought under Section 301. The timeliness of a Section 301 suit is determined, as a matter of federal law, by reference to the appropriate state statute of limitations.[4] According to the United States Supreme Court in *United Parcel Service,* the appropriate state statute of limitations is the statute governing proceedings to vacate arbitration awards.[5] This paper examines the Supreme Court's decision and its implications.

In *United Parcel Service,* a car washer was discharged for dishonesty. His grievance was submitted to a panel composed of three union and three company representatives. After a hearing at which the employee was represented by the union, the panel upheld the discharge. Seventeen months later, the employee filed a complaint under Section 301,

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[1] The Supreme Court first recognized the duty in *Steele v. Louisville & Nashville R.R. Co.,* 323 US 192 (US SCt, 1944), 9 LC ¶ 51,188, a case arising under the Railway Labor Act (45 USC 151-88). In a series of decisions beginning with *Ford Motor Co. v. Huffman,* 345 US 330 (US SCt, 1953), 23 LC ¶ 67,505, the Court concluded that the duty applies equally to the National Labor Relations Act (29 USC 151-69). In *Miranda Fuel Co.,* 140 NLRB 181 (1962), 1962 CCH NLRB ¶ 11,848, enf den 326 F2d 172 (CA-2, 1963), 48 LC ¶ 18,646, the NLRB held that a breach of the duty constitutes an unfair labor practice.

[2] 29 USC 185.

[3] *Vaca v. Sipes,* 386 US 171 (US SCt, 1967), 55 LC ¶ 11,731.

[4] *Int'l Union, UAW v. Hoosier Cardinal Corp.,* 383 US 696 (US SCt, 1966), 53 LC ¶ 11,123.

[5] *United Parcel Service, Inc. v. Mitchell,* 101 SCt 1559 (US SCt, 1981), 91 LC ¶ 12,683.

alleging the union had breached its duty of fair representation and that UPS had discharged him not for the stated reasons, which it allegedly knew to be false, but to achieve savings by replacing him with a part-time employee.

Both UPS and the union claimed the action was barred by New York's 90-day statute of limitations for actions to vacate arbitration awards. The district court granted summary judgment in favor of UPS and the union, ruling that the action was properly characterized as one to vacate the arbitration award entered against him. The United States Court of Appeals for the Second Circuit reversed, holding that the district court should have applied New York's six-year statute of limitations period for actions alleging breach of contract.[6] UPS then petitioned the United States Supreme Court for review.

Reversing the court of appeals, the Supreme Court, in an opinion written by Justice Rehnquist, stated that the employee was dissatisfied with and simply sought to upset the panel's decision that the employer had not wrongfully discharged him. The Court said that the employee was required in some way to show that the union's duty to represent him fairly at the arbitration had been breached before he was entitled to reach the merits of his contract claim. Thus, the Court concluded this made the suit more analogous to an action to vacate an arbitration award than to a straight contract action.

The Court stressed that the grievance arbitration system could easily become unworkable if a decision which has given meaning and content to the terms of a collective bargaining agreement could suddenly be called in to question as much as six years later. Given what it characterized as the undesirability of suspending the results of the grievance and arbitral process in limbo for long periods, the Court held that the 90-day period imposed by New York for bringing an action to vacate an arbitration award was the appropriate statute of limitations.

The Court rejected the employee's argument that actions for breach of the duty of fair representation might also be characterized as an action upon a statute, a personal injury action, or a malpractice action. Because the parties had not raised the question of whether the six-month limitations period governing unfair labor practice actions should apply, the Court declined to consider the amicus argument of the AFL-CIO that the six-month limitations period is the appropriate one.

In a concurring opinion, Justice Stewart stated he would have imposed the six-month limitations period. He explained that the contract claim against the employer was based on Section 301, but the duty of fair representation was derived from the National Labor Relations Act.[7] Noting that the six-month bar of Section 10(b) is designed to strengthen and defend the "stability of bargaining relationships," Justice Stewart said that the time limit reflects the balance drawn by Congress between the national interests in a stable bargaining relationship and finality in private settlements and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining agreement.

Concurring in the result, Justice Blackmun indicated that he found "much that [was] persuasive" in Justice Stewart's analysis. But he said that resolution of the Section 10(b) question should

[6] 624 F2d 394 (CA-2, 1980), 88 LC ¶ 11,920.

[7] 29 USC 151-69.

await development of a full adversarial record since this argument had not been raised by either of the parties.

Justice Stevens's View

Concurring in part and dissenting in part, Justice Stevens pointed out that, because the union had not sought review, the only issue before the Court was the appropriate statute of limitations governing the employee's claim against the employer for wrongful discharge. He was concerned that the Court's failure expressly to limit its reasoning to the narrow question presented in the case may suggest that the decision also resolves the question of whether the same statute of limitations governs the employee's claim against the union for breach of the duty of fair representation.

Justice Stevens agreed with the Court's conclusion that the employee's suit against the employer was an action to set aside an arbitration award. However, he declared that an employee's claim against a union for breach of the duty of fair representation is of a far different character. In his judgment, a claim against a union cannot be characterized as an action to vacate an arbitration award since the arbitration award did not and could not resolve the claim against the union. Although the union was a party to the arbitration, Justice Stevens said it acted only as the employee's representative. He suggested that an employee's claim against his or her union is properly characterized as a malpractice claim.

Justice Stevens disagreed with Justice Stewart's view that Section 10(b) is applicable. He observed that the rationale might apply to a Section 301 claim against the union, but it is wholly inapplicable to the claim against the employer, because the employer is not accused of an unfair labor practice.

Discussion

Justice Stevens's concern about the Court's failure to limit its reasoning to the narrow question presented in *United Parcel Service* is well-founded. At least one court has declined to examine the factual basis of the majority's decision in *United Parcel Service* and has applied a state statute of limitations for vacating arbitration awards in a situation where no arbitration decision had been rendered.[8]

The U. S. District Court for the Western District of Pennsylvania ruled that Pennsylvania's three-month statute of limitations for appeals from arbitration awards applied to an employee's action against an employer for breach of contract and a union for breach of the duty of fair representation, even though the employee's grievance had never proceeded to arbitration. Recognizing that *United States Parcel Service* concerned a situation involving a final and binding arbitration award, the court said that the policy spoken of in the decision applies to all stages of a grievance procedure in any collective bargaining agreement and is not restricted to proceedings after the final arbitration stage alone. Although it would seem that the six-month statute of limitations governing unfair labor practice actions would be more appropriate here, the court did not even consider it.

Application of the statute of limitations governing the vacating of arbitration awards to fair representation actions seems reasonable when limited to situations where there has been a binding arbitration decision rendered and the employer is named in the suit. If the employee is successful in this

[8] *Fields v. Babcock & Wilcox* (WD Pa, 1981), 108 LRRM 3150.

situation, then the effect of the judgment is to vacate the arbitration award.

However, a breach of the duty of fair representation may also be found in situations where a union refuses to process a grievance to arbitration[9] or where a union negotiates a collective agreement.[10] Because there is no binding arbitration decision to be vacated in these situations, there would seem to be little justification for applying the statute of limitations for vacating arbitration decisions.

Justice Stevens's comment that the six-month statute of limitations is wholly inapplicable to the claim against the employer should not dissuade courts from applying it. An employee may go behind a final and binding award and seek relief against the employer only when the employee has demonstrated that the union's breach of its duty "seriously undermine[d] the integrity of the arbitral process."[11] In addition, an employer who participates in a union's breach of the duty of fair representation may be held by the NLRB to have violated Section 8(a)(1) or 8(a)(3), or both.[12]

Critical Concerns

Since an employee may bring an action for breach of the duty of fair representation in state or federal courts or may file an unfair labor practice charge with the National Labor Relations Board, applying the statute of limitations for vacating arbitration awards to judicial actions results in one statute of limitations for the judicial action and another for the NLRB proceeding. The mischief of having different statutes of limitations for the two forums can easily be avoided by applying Section 10(b) in both situations.

Of 42 states with specific statutes of limitations governing actions to vacate arbitration awards, 28 have a limit of 90 days. Nine have shorter limitations, two have longer, and three states have periods based on the term of court. The relatively short limitations periods may be appropriate where the person challenging the award is knowledgeable regarding arbitration proceedings, but an action for breach of the duty of fair representation is generally brought by an employee who is not knowledgeable regarding arbitration and the need for immediate action to vacate an award. The unsuspecting employee may be deprived of his or her day in court before the employee has even sought legal advice.

If the limitations period for actions to vacate arbitration awards is applied to suits where the union has failed to process a grievance, when does the period begin? When the time for appealing to the next level of the grievance procedure expires? When the union decides not to process the grievance? When the employee learns that the union has not processed the grievance? When the employee should have learned the grievance has not been processed? Determining the start of the limitations period when the breach involves the negotiation of a collective bargaining agreement is even more difficult. Although these questions may arise any time a statute of limitations is involved, they are especially critical when a limitations period as short as 60 days is involved.

For employees who have relied on longer statutes of limitations prior to the Supreme Court's decision, the retroactive applications of *United Parcel Service* is of considerable concern. In a case argued after *United Parcel Service,*

[9] See *Vaca,* cited at note 3.
[10] See *Steele,* cited at note 1.

[11] *Hines v. Anchor Motor Freight,* 424 US 554 (US SCt, 1976), 78 LC ¶ 11,115.
[12] See *Miranda,* cited at note 1.

the United States Court of Appeals for the Ninth Circuit declined to apply California's 100-day statute of limitations relating to vacating arbitration awards.[13] The court noted that it had previously held that the appropriate statute of limitations in Section 301 actions was the California three-year statute of limitations applicable to suits for breach of a statutory duty.[14] Stating that the employee may have reasonably relied upon the earlier decision to conclude he had three years to file a claim, the court refused to apply the 100-day statute of limitations retroactively.

The Seventh Circuit has had no such reluctance in applying *United Parcel Service* retroactively.[15] The trial court had applied the Indiana six-year limitations period for actions based on contract. After the district court's decision and after argument on appeal, the Supreme Court decided *United Parcel Service.* Without considering the prejudice to the employee of applying *United Parcel Service* retroactively, the Seventh Circuit held that the employee's complaint was untimely under the 90-day Indiana limitations period for moving to vacate an arbitration award.

Conclusion

Logic argues for the application of Section 10(b) in breach of fair representation actions. Since the Supreme Court has expressly reserved the question of whether Section 10(b) applies, the lower courts should not automatically apply the limitations period of *United Parcel Service.* Rather, they should give careful consideration to the application of Section 10(b). The interests of the employer and the union in the finality of arbitration awards will be served and the employee's access to the courts where there has been a breach of the duty of fair representation will be protected.

The lower courts should also give thought to the prejudicial impact of applying *United Parcel Service* retroactively to employees who relied on longer limitation periods. **[The End]**

Have the Courts Extended a Sound Doctrine Too Far?

By MARTIN WAGNER

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FOR MANY YEARS, numerous industrial relations scholars and practitioners have viewed with misgivings the intrusion of the courts into the administration of collective bargaining agreements and the accompanying day-to-day relationships among employers, unions, and the employees on whose behalf the union acts. For convenience I shall call them the "restraint school." They view the collective bargaining process and the consequent relationship of those involved in it as the central means for establishing industrial democracy and fashioning instruments of self-government that effectively meet the demands and expectations of

[13] *Singer v. Flying Tiger Line, Inc.,* 652 F2d 1349 (CA-9, 1981), 92 LC ¶ 12,967.

[14] *Price v. Southern Pacific Transp. Co.,* 586 F2d 750 (CA-9, 1978), 85 LC ¶ 11,039.

[15] *Davidson v. Roadway Express, Inc.,* 650 F2d 902 (CA-7, 1981), 89 LC ¶ 12,264.

the employees and managers in the work force.

In that system of self-government, the rules that govern the workplace and the administration of them grow out of the experiences and the bargaining capacities of the parties. If those rules or the administration of them do not fulfill their needs, again within the bounds of their bargaining capacity, they are dropped or altered. Thus, the source of the rules and the scheme for administering them come from within and are regularly tested against the views, interests, and expectations of those who fashion them.

In contrast, when the courts are drawn into the process, to review the procedure for making the rules and the substance of the rules themselves and to enforce the rules that are made, judges are called upon to formulate and declare general principles that are drawn from the authority of public law that reflects a larger and more inclusive public will transcending the will of the parties to the agreement. The required uniformities of that larger rulemaking base reduce the flexibility and adaptability of the parties to the agreement and, more important, reduce the parties' own responsibility and accountability for resolving problems and differences that arise between them. Given that outcome, scholars and practitioners (the restraint school) have been fearful that court intervention would adversely affect the developing system of self-government.[1]

But the members of this restraint school recognize that a legal framework for establishing the system of industrial self-government is necessary and even desirable. They also recognize that ultimately the issue to be decided is not the total absence or presence of court intervention but the bounds of intervention and the presumptions under which it occurred.

In 1944, the Supreme Court handed down its landmark decision in *Steele v. Louisville Nashville Railroad Co.*[2] It likened the authority of the exclusive bargaining representative to that of a legislative body that "could create and restrict the rights of those whom it represents" but imposed upon it the correlative duty of representing all on whose behalf it acts fairly and without hostile discrimination. Not even the most apprehensive member of the restraint school was disturbed. On the contrary, most regarded that determination as a fundamental requirement for effective self-government, particularly since the Court went on to point out that the bargaining representative was not barred from making agreements that might have different effects on members of the bargaining unit, provided the differences were relevant to the purposes of the bargaining agent and were made without "hostile discrimination, fairly, impartially, and in good faith."

Seven years later, in *Ford Motor Co. v. Huffman,*[3] the Court again addressed the scope of the bargaining agent's authority and again concluded that discretion had to be granted to the bargaining representative on how best to serve the interests of the parties. "[A] wide range of reasonableness must be allowed a statutory bargaining repre-

[1] An articulate spokesman for this position was the late Dean Harry Shulman of the Yale Law School and long-time umpire under the Ford Motor Co. and United Automobile Workers labor agreement, who brought his extended reflections on this subject together in his eloquent Holmes Lecture at the Harvard Law School in 1955, "Reason, Contract, and Law in Labor Relations." The lecture was reprinted in the *Harvard Law Review* 68 (April 1955), p. 999; I have drawn heavily on that lecture for my comments.

[2] 323 US 192 (US SCt, 1944), 9 LC ¶ 51,-188.

[3] 345 US 330 (US SCt, 1953), 23 LC ¶ 67,-505.

sentative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

While there was court intervention, inasmuch as the Court defined the bounds of the representative's discretion, the Court did not directly intervene in the agreementmaking process and actually began with a presumption of the propriety of the parties' actions, as long as the source of their actions was honestly related to its purpose. That determination, too, was supportive of the system of self-government.

In 1964, in *Humphrey v. Moore,*[4] the Supreme Court had to deal with a problem that has consistently given all courts great difficulty—the administration of a seniority roster in a merger and combining-of-operations setting in which jobs were at stake. In that case, a group of employees who lost their jobs as a result of the merger of two operations alleged that the seniority provisions of the collective bargaining agreement had been violated. The employees also alleged that the union had not fairly represented them in a proceeding before a national joint grievance committee which had decided to dovetail the seniority lists of the two merging companies. The Court held that the joint grievance committee had not exceeded its authority in administering the agreement and that "the union took its position honestly, in good faith, and without hostility or arbitrary discrimination."

The Court's decision caused some concern among the restraint school, because the Court now indicated that individual employees could bring actions in the courts to define and enforce their interests under the labor agreement and that the Court also would review the actions taken by a bargaining representative in the administration of the agreement.[5] However, since the standards under which the bargaining agent's actions were tested seemed to be the motive and intent of the parties in relation to the purposes of the agreement, no new requirements or limitations were imposed on the parties in carrying out their system of self-government.[6]

Vaca v. Sipes

The Court next faced the question of fair representation in the administration of an agreement in *Vaca v. Sipes,*[7] a case considered to be the leading one on the subject. The controversy involved a claim by an employee (Owens) who had been terminated by Swift & Co. because he was physically unable to perform the heavy work required in a packing house. Owens had medical releases to return to work from two doctors he visited, but the company's doctor refused to return him to his job.

Owens filed a grievance protesting the company's action, and the union processed it promptly and diligently. The company did not change its position in the grievance process. The union thereupon decided that it would need additional favorable medical evidence if it was to prevail in the final step of the grievance process (arbitration), so it sent Owens to another doctor at the union's expense. That medical examination did not support Owens's claim.

[4] 375 US 335 (US SCt, 1964), 48 LC ¶ 18,670.

[5] Earlier, in *Conley v. Gibson,* 355 US 41 (US SCt, 1957), 33 LC ¶ 71,077, a Railway Labor Act case, the Court held that a bargaining representative had to process grievances (administer the agreement) without invidious discrimination.

[6] Leffler argues that the addition of the word "arbitrary" to the standards the Court used to test the union's action in *Humphrey* reflected a movement from the test of the motive of the conduct to one which tested the conduct itself. Frederic Leffler, "Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling," *University of Illinois Law Forum* 1 (1979), p. 41.

[7] 386 US 171 (US SCt, 1967), 55 LC ¶ 11,731.

The union thereupon urged Owens to accept a company offer to refer him to a rehabilitation service. Owens declined that offer and insisted that the union take his case to arbitration. The union did not believe it could prevail in arbitration and refused. Owens then filed a suit in a Missouri court charging that the union had "arbitrarily, capriciously, and without just or reasonable cause" refused to take his grievance to arbitration.

After a jury trial, a verdict was returned awarding Owens $7,000 compensatory damages and $3,000 punitive damages. The verdict was ultimately upheld by the Missouri Supreme Court. The case was then appealed to the U. S. Supreme Court. Three major issues were involved in that proceeding.

In view of the National Labor Relations Board's recent determination in *Miranda Fuel*[8] that a failure to represent an employee fairly was an unfair labor practice, did the NLRB preempt the field under *San Diego Building Trades Council v. Garmon*?[9] Did the Missouri court apply the proper standard in testing the union's conduct? What remedies were available, if the union had failed to meet the proper standard?

The Court concluded that, even though the NLRB had now determined that a failure to represent an employee fairly was an unfair labor practice, the Board did not have exclusive jurisdiction over such claims. It declined to defer to the Board under *Garmon*.

Mr. Justice Fortas wrote a vigorous and, in my judgment, a very prescient dissent on that point arguing that the Court should defer to the Board. He stated, in part, "If we look beyond logic and precedent to the policy of the labor relations design which Congress had provided, Court jurisdiction of this type of action seems anomalous and ill-advised. We are not dealing here with the interpretation of a contract or with an alleged breach of an employment agreement. As the Court in effect acknowledges, we are concerned with the subtleties of a union's statutory duty faithfully to represent employees in the unit, including those who may not be members of the union. The Court—regrettably, in my opinion—ventures to state judgments as to the metes and bounds of the reciprocal duties involved in the relationship between the union and the employee. In my opinion, this is precisely and especially the kind of judgment that Congress intended to entrust to the Board and which is well within the preemption doctrine that this Court has prudently stated."

On the question of the standard to be applied, the Court decided that the Missouri court was in error in permitting the jury to decide the merits of Owens's case instead of deciding the propriety of the union's action in not carrying Owens's grievance forward. I shall return to this point later.

The Court also held that, in the event a determination is made that a union failed to represent an employee properly, courts could require the union to go forward with the grievance under the established arbitration procedure. Or, they could proceed to try the merits of the case and award appropriate damages.

Discussion of the Standard

All of these holdings are important and controversial. However, it was the language used with respect to the standard that has been at the center of much of the subsequent litigation on this subject.

[8] 140 NLRB 181 (1962), 1962 CCH NLRB ¶ 11,848, enforcement denied 326 F2d 172 (CA-2, 1963), 48 LC ¶ 18,646.

[9] 359 US 236 (US SCt, 1959), 37 LC ¶ 65,-367.

In its discussion of the standard the Court began by stating that "A breach of the statutory duty of fair representation occurs *only* when a union's conduct toward a member is arbitrary, discriminatory, or in bad faith [emphasis supplied]" and cited *Humphrey* and *Huffman* for support. However, it went on to add, "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration."

Still later it made reference to a union's "honesty and good faith" and set out the requirement that the claimant had to demonstrate "arbitrary or bad-faith conduct on the part of the union." Then finally it stated, "In administering the grievance and arbitration machinery as statutory agent of the employer, the union must in good faith and in a non-arbitrary manner make decisions as to the merits of particular grievances. . . . The union might well have breached its duty had it ignored Owens's complaint or had it processed the grievance in a perfunctory manner."

Whether the Court intended the result, or whether the language the Court used simply permitted the lower courts to reach it in later cases, it is now quite clear that a union's action in grievance handling under the varied language of *Vaca* can be tested not only on the basis of a union's motive—hostility, bad faith, invidious discrimination—but also on the basis of the union's handling of the grievance—arbitrary, perfunctory, ignoring the grievance entirely—without regard to motive.

Disturbing Impact

The *Vaca* holdings, and the subsequent cases that the *Vaca* language permitted, have had a very substantial and drastic impact on the system of industrial self-government. The shift from evaluating the motive of a bargaining agent's conduct to the detailed scrutiny of its action or inaction at all stages of the grievance procedure have, in my judgment, seriously constrained and damaged the system of self-government and have resulted in court reviews of many matters that would have been better left to correction by the internal union political processes than to the supervision of uninformed, and in some cases unsympathetic, judges.[10]

As a proponent of the restraint school, I am not too disturbed that the courts have nudged bargaining agents into handling grievances properly. It is within the capacity and competence of the men and women who serve as union representatives in the workplaces to examine thoughtfully an employee's grievance and to give the employee a direct answer, within the prescribed period of time, that the grievance will or will not be carried forward.[11] I would have preferred that the nudging had come through the operation of the unions' own political processes, but even the nudge from outside was directed at the processes and not the merits of the controversies involved.

But, when the courts begin to decide whether there is a rational basis

[10] Recently there has been a revival of the motive standard that was reaffirmed in *Motor Coach Employees v. Lockridge*, 403 US 274 (US SCt, 1971), 65 LC ¶ 11,805, that was decided four years after *Vaca*. However, at the same time cases continue to come down on the much broader *Vaca*-developed standards, so there is no clear guide to those carrying on at the workplace.

[11] As one who hears in arbitration what I believe is a representative sample of grievances, I would be more disposed to argue that cases of doubtful merit are more likely to be advanced than that cases of merit are likely to be ignored.

for the bargaining representatives' actions or whether the actions were merely negligent or grossly negligent (a distinction that has never been clearly delineated for me with respect to outcomes), determinations which are often influenced by the courts' views of the merits of the case, I become greatly disturbed. Surely, the appropriate approach here should be that developed in the *Steelworkers* trilogy[12] and its progeny, to support the system of self-government and to permit the tribunal chosen by the parties to deal with the merits. I think that position is true in cases in general and is particularly so in the seniority system cases in which some judges at least have so much difficulty in distinguishing between the interests of the group and those of the individuals who are members of the group.

Even more disturbing is the readiness of the courts to evaluate and pass judgment on the quality of the union's representation in handling a grievance that has been taken to arbitration and to second-guess the advocate's theory and strategy in representing the grievant. What judge, administrative law judge, or arbitrator in the process of writing an opinion has not wished for some piece of evidence or some argument that would make it easier to reach a clear decision? And which of them, in reviewing the record of a case he was called upon to resolve, has not found some shortcoming in the presentation of one of the advocates?

And, beyond this, which advocate in reviewing a case, particularly after a decision has been rendered, has not thought that a different line of attack, or perhaps even a theory of the case, might have resulted in a more favorable outcome? Of course, even this phase of the representation should not be shielded from scrutiny as to motive. But, to go beyond that to judge the quality and competence of representation and in some cases to suggest that the bargaining agent's representation should approximate the standard of a lawyer to a client, is asking more than can be reasonably expected in a system of industrial self-government generally carried out by employees and laymen not trained in law.

And still more disturbing is a recent tendency of some courts in fair representation cases, and more commonly in state-action cases, to hold unions accountable for the fulfillment of the commitments for benefits and health and safety conditions promised in the agreement. Surely, to open those areas of the agreement to attack under the guise of fair representation will not advance industrial self-government but instead will tend to remove the items from consideration for joint decision-making, an outcome that is in conflict with the very purpose of self-government.

With respect to remedy, the Court's determination in *Vaca* to permit, but not necessarily mandate, that a grievance which was not fairly handled be referred to arbitration, in my judgment, also undermines the system of industrial self-government. The procedure chosen by the parties for defining the rules of the workplace and their proper application has received congressional encouragement[13] and has long received court endorsement. To permit courts to determine the merits of even mishandled grievances and fashion remedies it considers appropriate in such cases is to impose a second system of "in-

[12] *United Steelworkers v. American Manufacturing Co.*, 363 US 564 (US SCt, 1960), 40 LC ¶66,628; *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 US 574 (US SCt, 1960), 40 LC ¶66,629; and *United Steelworkers v. Enterprise Wheel & Car Co.*, 363 US 593 (US SCt, 1960), 40 LC ¶66,630.

[13] Sec. 203(d), 29 USC 173.

dustrial law" on the workplace. Clearly that is not what the parties intended or expected and is damaging to the system of self-government.[14]

Conclusion

Finally, a review of the developments since *Vaca* compels me to conclude that the Court should have deferred to the NLRB on the question of the initial adjudication of duty of fair representation cases. The Board possesses the expertise to evaluate and to judge this facet of the statutory requirement in conjunction with the other facets of the statute it carries out.[15] Even more important, the Board's regional office processes provide for prompt investigation of claims and encourage voluntary settlements when a prima facie case is made. When one looks at the long periods of time that have elapsed before final determinations of duty of fair representation cases are made in the courts and the consequent costs, not only to the unions involved but to employers whose actions are finally reviewed, and particularly when a review of many of these cases indicates that the faulted action or inaction would have been voluntarily corrected upon notice of the fault, it seems clear that the outcomes by the Board's process will be more compatible with the goal of self-government.[16]

Once the Congress adopted the propositions embraced in Section 301 of the Labor-Management Relations Act, it was inevitable that the courts would be drawn into the enforcement of collective bargaining agreements. Under the skilled tutelage of David Feller and his colleagues, Mr. Justice Douglas guided the Court to a position that supported industrial self-government in controversies involving the enforcement of the arbitration provisions of the grievance procedure.

In the *Steelworkers* trilogy, the Court recognized that the grievance procedure in the labor agreement is an integral part of a system of self-government and that the terminal point of that procedure, arbitration, is not a substitute for litigation but a substitute for a strike. That approach did not entirely remove the courts from the process, but it defined the courts' role in a way that encouraged the self-government process.

It is time now that the same approach be developed in the related area of grievance handling, the duty of fair representation. Here, too, the Court should seek an approach that will support the process of self-government and refrain from becoming the minute scrutineer of the character and quality of the procedures the parties have adopted to settle disputes that arise between them as well as the merit of those settlements. I would welcome the judges to become members of our restraint school. **[The End]**

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[14] I have drawn heavily on this point, as in other portions of this commentary, on David Feller's very compelling monograph, "A General Theory of the Collective Bargaining Agreement," *California Law Review* 61, 3 (1973).

[15] In this regard, it is worth noting that Archibald Cox advanced this view in his early piece, "The Duty of Fair Representation," which appeared in *Villanova Law Review* 2, 2 (January 1957), pp. 172-175.

[16] I am mindful that there may be some problem in joining the employer in some cases in order to fashion a complete remedy. I believe this might be done without congressional action; however, should that not be the case, the current state of matters would justify congressional action.

SESSION IV

Advances to Impasse Resolution

The Use of the Legal Right to Strike In the Public Sector

By CRAIG A. OLSON

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THE RIGHT OF EMPLOYEES to withhold their labor to improve wages, hours, and working conditions is a key feature of the private sector industrial relations system. While the legal right to strike has existed only since 1935, organized labor's claim to a moral right predates the National Labor Relations Act. In addition to its importance to organized labor, the strike is the primary motivator that forces the parties to accommodate their competing interests over terms and conditions of employment. While strikes occur in only about two to three percent of all private sector negotiations, many of the remaining peacefully negotiated contracts would not be reached in a timely fashion if it were not for the threat of a strike.[1]

Despite the acceptance and apparent success of the right to strike in the private sector, experience with legal strikes in the public sector is confined to only eight jurisdictions.[2] This paper briefly evaluates the arguments used to justify the public sector strike prohibition, examines several policy issues that have been important in jurisdictions that currently allow the right to strike, and reviews the limited evidence about the consequences of strikes by government employees. The principal conclusion reached from this exercise is that there should be greater experimentation in the public sector with legal strikes.

The prohibition against strikes by public employees is usually based on two arguments. The first is grounded in the philosophical view that governments are sovereign entities and a strike against a government is a blow to the political fiber of a nation, state, or com-

[1] Thomas A. Kochan, *Collective Bargaining and Industrial Relations* (Homewood, Ill.: Richard D. Irwin, Inc., 1980), p. 249.

[2] The eight jurisdictions are Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania, Vermont, and Wisconsin. See U. S. Department of Labor, Labor-Management Services Administration, *Summary of Public Sector Labor Relations Policies,* 1981.

munity.[3] Although this is a recurring argument, none of the strike laws has been found to be illegal based on the sovereignty argument.

The second argument in support of the strike prohibition is that the political pressure on elected officials to settle the strike by capitulating to the demands of the union is tremendous when the services interrupted by a strike are essential in the sense that there are no alternatives and consumption of the service cannot be postponed at a low cost for the duration of the strike.[4] Moreover, since the employer is a monopoly supplier of public services within a jurisdiction, there is little economic competition in the market for government services that will balance the political pressures on employers to concede to the union during a strike. The net result is that public unions have an "unfair" advantage over employers and taxpayers if they are allowed to strike.

The evidence from at least the last couple of years is not consistent with this view. The Philadelphia transit workers strike in 1981 and the Minnesota State employee strike in the summer of 1981 are two significant instances where the employers did not capitulate to the unions' demands.[5] In addition to these large strikes, the ten-year record in Pennsylvania suggests that there have been few strikes where the public health, safety, or welfare has been endangered.[6]

There are a variety of explanations for why the predictions about the adverse effects of strikes have not materialized. First, observers such as Wellington and Winters simply overestimated the power of public sector unions.[7] Second, they failed to foresee several important changes in public management.

In the past ten years, as it gained bargaining experience, public sector management has become more sophisticated and less willing to avoid strikes at almost any cost. This professionalization has been reinforced by changes in the public's view of government expenditures. Since 1974 a number of states, most notably California and Massachusetts, have passed referendums that roll back property taxes.[8] Because labor costs represent the largest share of government costs, public sector unions are frequently a political minority at odds with the interests of most taxpayers.[9]

These observations suggest that unions have been less successful and employers more successful in negotiations than what some observers predicted ten years ago. Although there has been little systematic research about the consequences of public sector strikes, the

[3] For example, last fall during the PATCO strike President Reagan made the following statement in his address to the Carpenters' Convention: "you are the employers of all who serve in government . . . and none of us in government can strike against you, the sovereign people." Reported in the *Government Employee Relations Reporter*, No. 171 (hereafter, GERR) (Washington, D. C.: Bureau of National Affairs, August 3, 1981), p. F4.

[4] Harry H. Wellington and Ralph K. Winter, Jr., *The Unions and the Cities* (Washington, D. C.: The Brookings Institution, 1971), pp. 167-189.

[5] See *GERR*, No. 908 (April 13, 1981), p. 30, and *Minneapolis Star* (August 11, 1981), p. A-1.

[6] Craig A. Olson, James L. Stern, Joyce M. Najita, and June M. Weisberger, *Strikes and Strike Penalties in the Public Sector*, Final Report to the U. S. Department of Labor, Labor-Management Services Administration, March 1981, pp. 137-177.

[7] Cited at note 4.

[8] It should be noted that in the fall of 1980 when the Massachusetts referendum passed tax limitation measures failed in five other states. See *GERR*, No. 889 (November 24, 1980), p. 12.

[9] Clyde W. Summers, "Public Employee Bargaining: A Political Perspective," *Yale Law Review* 83 (1974), pp. 1156-1200.

available evidence can be interpreted to mean that the substantive impact of public sector strikes is not harmful enough to preclude greater experimentation with the right to strike.

Strike Limitations

At the outset it should be noted that the right to strike is not without limitations in any state that allows public sector strikes. In one sense, this is not significantly different from the private sector where there are either limits or prohibitions on the use of the strike in certain circumstances. Private sector strikes or other concerted activity are limited during national emergency disputes and prohibited where the primary intent of the activity is to pressure "neutral" individuals or firms or a nonmandatory bargaining topic is in dispute. Public sector jurisdictions that allow strikes have adopted similar limitations or prohibitions.

However, limitations on primary private sector strike activity are less constraining than those on public sector strikes. The presumption favoring the right to strike in the private sector and the requirement that a strike can be enjoined only if it endangers *national* health and safety means that few private sector strikes can be temporarily enjoined. This situation is different for the public sector where the traditional presumption has not been in favor of strikes and almost all that have occurred have been of sufficient size to affect the community whose health, safety, and/or welfare must be endangered in order to justify an injunction.

This difference means more careful consideration must be given to the meaning and administration of the injunction standard in the public sector than in the private sector to ensure that the right to strike is of substantive importance to the public sector collective bargaining process. The right becomes meaningless if only the most nonessential public employees are allowed to strike, or if mere citizen inconvenience is sufficient grounds for a strike to be enjoined.

Various approaches have been used to determine who may strike in the eight jurisdictions that now permit some strikes. In all of the states except Montana, the union is prohibited from striking during the terms of the agreement and the parties must exhaust the dispute resolution procedures before employees may strike in an interest dispute. In several states the union must also notify the employer and/or public employee relations board (PERB) of its intent to strike. Except in Wisconsin, where most municipal employees may legally strike only if both parties withdraw their final offers, these requirements do not significantly limit strike activity in interest disputes.

A more binding constraint on legal strikes results from statutory language that prohibits all strikes by employees who provide certain explicitly defined services. Seven states prohibit all strikes by "essential" employees such as police, firefighters, and prison guards and provide compulsory interest arbitration for the settlement of disputes involving these groups.

Impact Standard

Rather than determine that particular groups of employees cannot strike, a second approach would be to prohibit the initiation or continuation of a strike if it endangers the public health, safety, and/or welfare. This standard, which will be referred to as the strike-impact standard, is applied by PERBs or the courts when striking employees are not explicitly prohibited from striking according to the first standard. Six of

the eight states utilize this standard for at least some employees.[10]

Five states both prohibit all strikes by some employees and establish an impact standard that may prevent legal strikes by other employees. Except in Alaska, where the statute defines a set of employees with an unlimited right to strike, strikes by all employees in the remaining four states may be enjoined if the impact standard is met. Minnesota and Montana use only the first approach and outlaw strikes by "essential" employees and allow strikes by all other employees without any statutory limitation.[11] Vermont has only an impact standard to limit strikes.

In the six states that use an impact standard, the meaning of the right to strike depends on the wording, interpretation, and administration of the strike-impact standard. One issue that affects this meaning is whether or not it is interpreted to mean that employees can be prohibited from beginning a strike. This is an important issue because it both determines if employees can strike and indicates the level of proof required to establish the claim of a dangerous impact.

There is a presumption in some states that all employees subject to the impact standard have at least the right to initiate a strike if there is also an absolute strike prohibition for other employees. This is the policy that has been adopted in Pennsylvania, which has had the most experience with the right to strike.[12] Teacher strikes, which account for most of the strikes in Pennsylvania, are usually enjoined only if the strike prevents the district from meeting the legally mandated requirements of 180 instructional days by the end of June. Failure to meet this mandate endangers community welfare because the district has failed to provide the minimum quantity of education required by state law and might lose state aid. Since teacher strikes usually occur in the fall, this has limited the duration of a few strikes but has not prevented a union from beginning a strike.

Permitting employees covered by an impact standard to begin a strike under the standard is reasonable policy. If a legislature was certain that the initiation of a strike by some of these employees endangered the public, then presumably these employees would have been treated as police and firefighters are and explicitly prohibited from striking. The uncertainty about the impact on the public of a strike by employees covered by an impact standard will not be substantially reduced until after the strike has begun, because the impact of a strike depends on how successfully the employer offsets the effects of the stoppage. A strike may continue for a "long time" before it has a dangerous impact on the public if an employer allows "nonessential" services to be interrupted.

Unfortunately, an accurate evaluation by a PERB or a court of the employer's ability to respond to a strike prior to its occurrence is likely to be difficult because an employer has an incentive to understate the adequacy of its strike preparation before the agency that applies the impact standard. Understating strike preparedness may leave the employer in a very advantageous bargaining position because it may cause the agency to disallow the entire strike or prohibit a large number of employees in the bargaining unit from striking.

Even when the strike's impact on the public is evaluated after the strike has

[10] The six states are Alaska, Hawaii, Oregon, Pennsylvania, Vermont, and Wisconsin.

[11] In Montana, firefighters are prohibited from striking and may use interest arbitration as a strike substitute.

[12] Olson et al., cited at note 6, pp. 137-177.

begun, serious problems arise when the employer's potential response to the strike is not also carefully evaluated by the courts or PERB. This issue was apparent in the 1979 nonsupervisory, blue-collar strike in Hawaii.[13] As the strike progressed, it became increasingly difficult to keep the schools clean enough for them to remain open without the health of the students being endangered. On the basis of this threatened danger to public health, some of the school janitorial employees were determined to be "essential."

The problem with that decision is that negotiations in earlier years seemed to indicate that teachers could legally strike if they followed the prescribed procedures set forth in the law. Therefore, if sometime in the future teachers could legally strike and effectively close the schools, one must ask why janitorial services in the 1979 strike were considered "essential" since the employer could have closed schools to eliminate the health hazard.

The Role of Supervisors

A second issue of importance when employees are allowed to strike is the treatment of supervisors.[14] In the private sector, employees are given the right to strike and employers are given the right to take a variety of steps to reduce strike costs. Though firm size and the technology of the production process is an obvious constraint on the viability of this option, employers can use supervisors to maintain partial operations because supervisors are excluded from NLRA coverage and have a clear legal allegiance to management during a labor dispute.

In the public sector, many jurisdictions provide bargaining rights to all or most supervisory employees. Evidence of the widespread inclusion of supervisors in public sector bargaining units is provided in the *1977 Census of Government,* which reports that 20.8 percent of the 30,131 public sector bargaining units reported to exist in October of 1977 included supervisory personnel.[15]

Placing supervisors and nonsupervisory personnel in different bargaining units may not be sufficient to ensure that the employer can depend on supervisors to help maintain partial operations during a strike. The potential problem this can create for employers trying to maintain partial operations is illustrated by events that occurred in the 1979 Hawaii strike referred to earlier.[16] In the third week of the strike the school superintendent announced a plan to recruit volunteer help to clean the schools so they could be reopened.

The most serious challenge to the plan came from the school principals who were in the educational officers unit. The union representing this bargaining unit indicated that principals in several districts would not show up for the cleanup meetings; the superintendent warned principals that those who did not conduct the meetings would be subject to disciplinary action. Cleanup meetings were held without incident at all the schools, but more than 200 principals and vice-principals failed to attend and were subsequently suspended for 10 days. Some of these employees were the only employees to suffer any penalties during the course of the strike even though some "essential" employees

[13] *Ibid.,* pp. 213-230.

[14] David Lewin, "Collective Bargaining and the Right to Strike," *Public Employee Unions,* ed. A. Lawrence Chickering (San Francisco: Institute for Contemporary Studies, 1976), pp. 157-159.

[15] U. S. Bureau of the Census, 1977 Census of Governments, *Labor-Management Relations in State and Local Governments,* Volume 3, Number 3, p. 40.

[16] Olson et al., pp. 213-230.

struck in defiance of back-to-work orders.

While supervisors in existing units, and certainly unions that represent supervisors, will object to denying or eliminating bargaining rights to supervisors, the use of supervisors gives the employer some additional flexibility to respond to a strike. Although this will obviously increase employer bargaining power, it may also make the right to strike more meaningful for nonsupervisory employees. Courts or administrative agencies may be more reluctant to enjoin a strike when supervisors are in a position to provide emergency public services.

Revenue and Strike Costs

One of the most obvious differences between private and public sector strikes is that employer strike costs are primarily economic in the private sector and political in the public sector, because *local* tax revenues are not interrupted when a public employer is struck. This distinction overlooks the possible economic impact of a strike on local governments caused by possible reduction of revenues from federal and state governments because of a strike. This revenue and the conditions that must be met to receive it when a strike occurs has a tremendous impact on the balance of power between employers and unions because 44 percent of local government revenues comes from federal and state governments.[17]

The role of nonlocal revenues is especially critical in teacher and school board negotiations because most states require districts to have a minimum number (about 180) of student-teacher contact days in a school year. Teachers may lose little pay because of the payment they receive for the rescheduled days if schools in a district are closed by a strike and the lost teaching days are rescheduled to meet the state's requirements to receive aid. The rules governing the distribution of school aid to school districts that fail to meet the minimum teaching-day requirement will also affect school board bargaining decisions during a strike.

If a district will lose 100 percent of its school aid because it fails to meet the state standard, the employer's incentive to concede to union demands is enormous as the parties approach the deadline beyond which strike days cannot be rescheduled to meet the state mandate. Alternatively, the district will experience a "windfall" which may discourage employer concessions if a district that fails to meet the teaching-day standard does not lose any state aid.

The relationship between rescheduled strike days, state aid, and the incentive to either reach an agreement peacefully or end a strike is complex and not yet fully understood. A policy which encourages or requires districts to reschedule strike days may significantly lower employees' expected strike costs. Alternatively, the policy that gives employers some flexibility in rescheduling strike days may increase the incentive employees and unions have to reach an agreement but decrease the employer incentives.

While the magnitudes of these differing effects on strikes and negotiated outcomes is not yet known, the research recently done by Olson, Stern, Najita, and Weisberger shows that state aid policies have a significant impact on teacher strikes.[18] Although the strike impact of nonlocal revenues is important in states that outlaw all strikes and is less crucial outside of education because workdays lost from a strike

[17] Advisory Commission on Intergovernmental Relations, *Significant Features of Fiscal Federalism*, 1980-81 Edition, M-132, (Washington, D. C.: U. S. Government Printing Office, December, 1981), p. 59.

[18] Olson et al., pp. 369-413.

cannot be rescheduled, it clearly influences employer strike costs and must be carefully considered in jurisdictions that permit strikes.

Consequences of Legal Strikes

Earlier I argued that the impact of strikes in the public sector has not been sufficiently detrimental to the interests of the public to justify the current presumption against their legality. While I believe this to be a reasonable evaluation of existing knowledge about the impact of public sector strikes, it is a judgment based on only limited research about their short- and long-run consequences.

However, based on the research that has been done, a number of predictions can be made about what additional research is likely to show about what the consequences of legal strikes might be. In every case these predictions depend on the policies replaced by the right to strike because each state has different strike and strike-alternative policies that will determine the net impact of a policy change. Keeping this qualification in mind, I suggest at least four major consequences of the right to strike.

First, the number of strikes will increase if they are legalized in jurisdictions where penalties for striking are substantial and the penalties are currently enforced. The state with which I am most familiar that falls into this category is New York. There would undoubtedly be more strikes in that state if it were to pass a right to strike law because recent research shows that the current Taylor Law penalties have substantially reduced strike probabilities.[19] Alternatively, in Michigan and Illinois where strikes are illegal, the fact that strike penalties are minor and infrequently enforced means that the number of strikes might not change significantly under a right to strike law.

Second, the right to strike would change the average size of negotiated outcomes and the distribution of outcomes across bargaining units. Although there is a great deal of variance in the estimated union wage effects obtained in past studies, those that used comparable measures and data from both sectors show that *on average* unions in the private sector have a greater impact on wages than do public sector unions.[20] This difference may exist because most public employees lack the right to strike. While the average union wage effect is likely to increase, employees in small bargaining units or those who provide services that are demand elastic may lack sufficient bargaining power under the right to strike to achieve the gains available under the threat of arbitration.

Third, the right to strike is likely to produce more timely settlements of contract disputes. It is commonly recognized that, in states without arbitration or the right to strike, the total time spent in negotiations and the time period between the expiration of the old contract and agreement on a new one is significant. These delays occur because the parties have little incentive to reach agreement by a certain date because there are no costs associated with the passage of a deadline.

[19] *Ibid.*, pp. 93-136, 369-413.

[20] Using 1975 CPS data on individual workers, Smith obtained about a 22 percent union wage effect in the private sector, nine percent in local government, and 1.9 percent in state government. See Sharon P. Smith, *Equal Pay in the Public Sector: Fact or Fantasy* (Princeton, N. J.: Industrial Relations Section, Princeton University, 1977), p. 124. For a review of the public sector wage literature see David Lewin, "Public Sector Labor Relations: A Review Essay," *Labor History* 18 (Winter 1977), pp. 133-144, and an update by Lewin in D. Lewin, P. Feuille, and T. A. Kochan, eds., *Public Sector Labor Relations* (Sun Lakes, Ariz.: Thomas Horton and Daughters, 1981), pp. 397-405.

This would change under a right to strike law.

Finally, both labor and management would benefit from the right to strike because it yields the *bilateral* determination of terms and conditions of employment. The importance of this outcome cannot be understated. Despite the high costs of strikes relative to the direct costs of hiring an arbitrator to resolve interest disputes, few parties in the private sector voluntarily agree to substitute interest arbitration for the right to strike, which indicates that the parties derive tremendous benefit from being able to determine their own future free from the unpredictable decisions of an arbitrator. Assuming that labor and management in the public sector have similar preferences, each side would benefit from the right to strike because the outcome under a strike threat is a bilateral settlement that reflects the preferences and bargaining power of the parties.

[The End]

The Use of Interest Arbitration In the Public Sector

By DANIEL G. GALLAGHER*

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A REVIEW of the literature on public sector collective bargaining reveals considerable research and comment on interest dispute resolution procedures. Why is there this fascination with public sector impasse resolution procedures, and especially with compulsory arbitration?

Perhaps one answer is that public sector impasse resolution mechanisms, such as factfinding or compulsory arbitration, are rather foreign concepts in the private sector. They are a major departure from our understanding of the dynamics of conventional bargaining and may generate a need to reformulate existing theories of the bargaining process.

Second, the number of jurisdictions adopting compulsory arbitration as the terminal step for disputes has grown, thus increasing the opportunities for both intra- and interjurisdictional studies of various compulsory arbitration schemes: conventional, final offer (FOA) on an issue or package basis, and mediation-arbitration (med-arb). The primary concern in these studies then often becomes identification of the most effective procedural scheme. Closely related to this concern is the considerable attention being devoted by the so-called "interventionist tinkers" to making the arbitration process more effective in encouraging voluntary settlements.

There may be other reasons for this increasing concern with compulsory arbitration. Narrative essays on the advantages and disadvantages of compulsory arbitration may multiply as more practitioners and neutrals become involved in negotiations that terminate in arbitration and as the gradual increase in the number of public sector laws that allow strike action permits comparative studies of arbitration, not

* The author wishes to acknowledge Thomas Gilroy, Richard Pegnetter, and Peter Veglahn for their helpful comments on an earlier draft of this paper.

only with the weaker advisory forms of dispute resolution but with the recent experience in some jurisdictions where public employees have the right to strike.

The focus here is twofold. We begin with a brief review of the effectiveness of compulsory arbitration and then discuss a few selected concerns regarding the use and/or availability of arbitration as a dispute resolution procedure. The arbitration systems highlighted are those in Iowa, Michigan, Minnesota, and Wisconsin. By using these states we give a regional focus to our discussion and take advantage of the fact that, although they are geographically contiguous, their impasse resolution procedures, which involve compulsory arbitration for some or all categories of public employees, are both structurally and operationally diverse.

However, when evaluating the effectiveness of compulsory arbitration, a realistic appraisal of politically and operationally feasible alternatives is required. The common normative assumption is that the public both wants and needs to be protected against strikes by protective service or "essential" employees.[1] Thus, despite criticism of requiring compulsory arbitration in interest disputes involving these employees, the political reality is that they are not likely to be granted the right to strike.

In contrast, it is reasonable to compare the results under compulsory arbitration procedures and right to strike legislation, which is currently available in some ten jurisdictions. But, it is not reasonable to compare arbitration results with those under advisory procedures, such as factfinding, since the latter exclude the bilateral risk that is necessary to encourage the parties to reach a voluntary settlement.

Effectiveness of Compulsory Arbitration

The literature reflects different approaches to evaluating the effectiveness of compulsory arbitration as a dispute resolution technique. In a comprehensive study, Anderson identified the key issue when he said, "We really don't know . . . how effective . . . compulsory arbitration [is]."[2] In fact, as Anderson noted, the evaluations tend to focus on only a few dimensions, primarily that bargaining incentives should be protected.[3] In other words, considerable empirical research on the "effectiveness" of arbitration has attempted to determine if the infamous, but poorly defined, "chilling effect" is associated with arbitration as evidenced by the frequency of arbitrated settlements relative to voluntary agreements.

Using this conventional measure of usage rates, we may be tempted to reach conclusions about the effectiveness of the various impasse procedures in Iowa, Michigan, Minnesota, and Wisconsin. For example, in Iowa, where the statutory impasse procedure is mediation, factfinding, and tri-offer FOA, arbitration awards have been limited to 4.5–7.1 percent of all contract negotiations over the first six years of experience.[4] Available data on the Michigan experience indicate that about 10–15 percent of all public safety employee negotiations resulted in arbitrated awards.[5]

[1] Peter Feuille, "Selected Benefits and Costs of Compulsory Arbitration," *Industrial and Labor Relations Review* 33 (October 1979), pp. 64-75.

[2] John C. Anderson, "The Impact of Arbitration: A Methodological Assessment," *Industrial Relations* 20 (Spring 1981), p. 144.

[3] *Ibid.*, pp. 144-45.

[4] Iowa Public Employment Relations Board, "Impasse Statistics: Iowa's Collective Bargaining Law," Fall 1981 (mimeo).

[5] James L. Stern et al., *Final-Offer Arbitration* (Lexington, Mass.: D. C. Heath, 1975): Ernest Benjamin, "Final-Offer Arbitration Awards in Michigan, 1973-1977," 1978

(Continued on the following page.)

In Wisconsin, nine/eighteen percent of public-safety negotiations have been settled by the issuance of an FOA package award, while approximately 5.4 percent of nonessential employee impasses were settled by arbitration during 1978 and 1979 under the 1978 mutual-choice-of-procedure statute.[6] Between 1973 and 1980 in Minnesota, about 30 percent of all negotiations requesting mediation for essential-service employee disputes resulted in arbitrated settlements.[7]

Although these findings do indicate various jurisdictions' reliance on arbitrated settlements, it is often inappropriate to compare both intra- and interjurisdictional usage of arbitration and to suggest that one compulsory arbitration system works better than another based on the extent to which the parties rely upon voluntary compared to arbitrated settlements. Comparability among systems may be hampered by the number of statutory steps preceding arbitration, the category of employees who have access to arbitration, and, quite often, the very basic difference between state agencies in reporting impasses.

Another major limitation is the failure of most studies to account for various exogenous and endogenous variables that may affect not only the bargaining process but also the parties' inclination to arbitrate disputes. In other words, the relatively lower reliance on arbitrated settlements in Iowa compared with other midwestern jurisdictions may reflect not only the availability of factfinding prior to issue-by-issue FOA but also the considerable difference of the bargaining environment of rural Iowa from that of urbanized areas in Michigan and Minnesota. Even if such environmental factors are controlled, the explanatory power of the models that examine the effectivenes of arbitration through usage rates is often limited and erratic.

Alternatives

A few studies have used alternative approaches to measure the effectiveness of arbitration. One, by Kochan et al., used position convergence to measure the effect of the change in New York State's terminal impasse step from factfinding to arbitration. The results showed a significantly higher probability of impasse but no substantial impact on position convergence by those parties utilizing arbitration.[8] This tended to confirm prior research which suggested that, regardless of the terminal step, position modification prior to impasse apparently is limited. But such results on position convergence should be interpreted carefully since they are based on a sample of bargaining relationships where adjudicative intervention occurred.

An alternative measure of the effectiveness of arbitration is issue reduction. The rather fragmented studies appear to suggest little difference in the number of unresolved issues presented at factfinding compared to ar-

(Footnote 5 continued.)
(mimeo); and Michigan Department of Labor, *Labor Register,* Vol. 3 (April 1979) and Vol. 4 (September 1980).

[6] Craig Olson, "Final-Offer Arbitration in Wisconsin After Five Years," *Proceedings* of the 31st Annual Meeting, IRRA (Madison, Wis.: 1979), pp. 111-19; Arvid Anderson, "Interest Arbitration: Still the Better Way," *CERL Review* 2 (Spring 1981), pp. 28-32.

[7] Mario Bognanno and Fredric Champlin, *A Quantitative Description and Evaluation of Public Sector Collective Bargaining in Minnesota: 1973-1980,* report submitted to the Legislative Committee on Employee Relations (Minneapolis: University of Minnesota, 1981).

[8] Thomas A. Kochan et al., *Dispute Resolution Under Fact-Finding and Arbitration* (New York: American Arbitration Association, 1979).

bitration when they are terminal steps.[9] However, most studies of the relationship between arbitration and issue reduction tend to focus on the relative effectiveness of different arbitration schemes.

Once again, due to methodological limitations and procedural differences among jurisdictions, such as steps prior to impasse, two-tier mediation efforts, and scope of issues, our conclusions about the effectiveness of different compulsory arbitration schemes are limited to comparing the procedures. Among our four midwestern jurisdictions, the mean number of issues submitted to arbitration ranges from three in Iowa (tri-offer, issue FOA) and Wisconsin (package FOA) to seven under conventional arbitration in Minnesota and eight or more economic items under the Michigan issue-by-issue FOA.

Perhaps one of the most salient concerns in attempting to evaluate the effectiveness of arbitration is identifying its effect on wage settlements—primarily whether arbitrated wage awards tend to exceed negotiated wage settlements. But measuring the effect of arbitration on wages is not an easy task. In a Michigan study, a joint governmental agency that attempted to measure this effect had difficulty in reaching a conclusion because of problems in identifying a standard against which arbitrated wages would be judged excessive.[10] Thus, in order to estimate the effect of arbitration on wages, it is necessary to control the multitude of factors, aside from arbitration, which may influence wages. The results of multiple regression studies generally show a slight or nonsignificant relationship between arbitration and wage levels except where comparatively lower wage-rate units were brought closer to the wage settlement in similarly situated jurisdictions. Finally, the effect of arbitrated wage levels in jurisdictions with the right to strike option has not been explored in depth.

Thus, it seems that we know a great deal about the extent to which the negotiating parties in different jurisdictions and under various forms of arbitration rely on arbitrated awards and, to a lesser degree, about position convergence and issue reduction. But methodological concerns often make the existing comparative evaluations suspect and provide us with only limited measures of the effectiveness of arbitration. Even well-structured and comprehensive studies may not assist in resolving the controversy over the effectiveness of arbitration as a dispute-resolution technique. As Feuille noted, the same objective data may be interpreted differently depending upon personal preferences.[11]

An excellent illustration of the difficulties in reaching policy decisions based on empirical research emerged from the study of New York State's Taylor Law by Kochan et al.[12] Despite the rather detailed empirical research, unions and managements, after interpreting the data, reached rather different conclusions about the effectiveness of compulsory arbitration and the desirability of extending the arbitration statute to cover police and firefighters.

Furthermore, different statistical analyses of a single data set may

[9] Daniel G. Gallagher and Richard Pegnetter, "Impasse Resolution Under the Iowa Multistep Procedure," *Industrial and Labor Relations Review* 32 (April 1979), pp. 327-38.

[10] *Government Employee Relations Report* 820 (July 23, 1979), pp. 20-22.

[11] Peter Feuille, "Analyzing Compulsory Arbitration Experiences: The Role of Personal Experience," *Industrial and Labor Relations Review* 27 (April 1975), pp. 432-35.

[12] Thomas A. Kochan, "The Politics of Interest Arbitration," *Arbitration Journal* 33 (March 1978), pp. 5-9.

produce different results. Focusing on a "narcotic effect," Butler and Ehrenberg used substantially different statistical techniques in their reexamination of the data used in Kochan and Baderschneider's study and reached fundamentally different conclusions.[13] The issue raised by these illustrations is that interpretations of effectiveness are subject not only to the practitioner community's approval and experience but also to differences in analytical approaches used by academicians who provide much of the quantitative measures of compulsory arbitration experiences.

Concerns

Judging the effectiveness of compulsory arbitration also involves some subjective, less quantifiable issues. Much of the literature, especially on FOA, addresses the desirability of structuring impasse procedures to maximize "mutual anxiety" so that the parties will reach a voluntary rather than an adjudicated settlement. In practice, this pressure appears to differ among various arbitration schemes.

The Iowa statute requires the parties to submit final offers and prohibits the arbitration from mediating. Since the parties expect nothing other than an award, there appears to be a limited tactical advantage for the parties to hold back on an issue proceeding to arbitration.

In contrast, the med-arb process in Wisconsin and particularly in Michigan is more flexible, but it raises the concern that the pressure of "mutual anxiety" may be seriously eroded since an adjudicative decision is not initially expected. Although disputes in both states have been successfully resolved by second-tier mediation efforts at or prior to arbitration, the concern remains over the extent to which the parties' ability to modify final offers reduces the incentive to negotiate prior to arbitration. This ability to modify final offers seems contradictory to the underlying theory of FOA, even if justified on the basis of the sanctity of a voluntary agreement.

Judgments of the effectiveness of these various approaches depend on whether arbitration is considered a terminal adjudicative process at which a final decision is expected and rendered or a forum for the initiation of bona fide negotiations. The goal of promoting voluntary settlements, as in Michigan, must be weighed against the drawback of prolonging the bargaining process when disputes are remanded to further negotiations and final offers are resubmitted. At issue is the balance between the benefits of a voluntary settlement even if the process is prolonged with the benefits of a bargaining agreement that coincides with the parties' current employment needs and fiscal conditions rather than one that is retroactively applied.

A problem that has arisen in Iowa and Wisconsin flows from the statutes' distinction between mandatory and permissive bargaining items. Since both statutes imply that there must be mutual agreement to discuss permissive items, either party can exclude such items from arbitral review if the parties fail to reach a voluntary settlement. In addition, one party

[13] Thomas A. Kochan and Jean Baderschneider, "Dependence on Impasse Procedures: Police and Firefighters in New York State," *Industrial and Labor Relations Review* 31 (July 1979), pp. 431-49; Richard J. Butler and Ronald G. Ehrenberg, "Estimating the Narcotic Effect of Public Sector Impasse Procedures," *Industrial and Labor Relations Review* 35 (October 1981), pp. 3-20; and Thomas A. Kochan and Jean Baderschneider, "Estimating the Narcotic Effect: Choosing Techniques that Fit the Problem," *Industrial and Labor Relations Review* 33 (October 1981), pp. 21-28.

may be able to impose a cost on the other party which may be seeking an agreement on these items by using its willingness to agree to a permissive item or to maintain contract language about a permissive subject as a means of forcing concessions on other items that are in the mandatory category.

In the short run, the strategy of withholding concessions on permissive items may give a tactical advantage to one party. However, in the long run it may impair the effectiveness of compulsory arbitration as a dispute resolution technique.

A third, but closely related, concern, as Kochan suggested, is that arbitration may be subject to a "half-life" effect.[14] One or both parties may view arbitration as a mechanism to maintain the status quo. Although critics of compulsory arbitration frequently suggest that a party may achieve through arbitration what it could not through the bargaining process, little if any effort has been directed toward determining if in fact arbitration serves as a vehicle for introducing substantial innovations or changes in the contract. If innovation and change are forthcoming only when one party has a comparative advantage, then the perceived effectiveness of compulsory arbitration may diminish especially when the party at a disadvantage seeks an innovative solution to a particularly important problem. Should arbitration come to be perceived as a barrier to innovative resolutions of the emerging employment problems of the 1980s, the attractiveness of strike action may increase.

An ancillary concern, also involving some subjectivity, is the economic impact of arbitration. Studies have concluded that the impact of compulsory arbitration on wages is limited or statistically nonsignificant. But these studies have not quantified the possible broader economic costs. Little is known about whether arbitrated awards substantially increase the total labor cost within the bargaining unit or if there is a significantly higher disemployment effect than under voluntary settlements.

Second, the spillover effect of an arbitrated economic award on other bargaining units needs to be considered. Again, little is known about whether an arbitrated economic award results in a similar pattern for other employee units in the employment relationship or if the economic settlements differ depending on whether the other employee units use an advisory procedure like factfinding or whether they can invoke arbitration or resort to strike action. All of these questions remain unanswered.

Choice-of-Procedure Systems

A final question is whether arbitration is more effective if it is an option in a choice-of-procedures system. Minnesota management, for example, unilaterally selected either conventional arbitration or the strike in nonessential employee negotiations during the 1973-1980 period when it had those options. Wisconsin's choice-of-procedure system for nonessential employees, in effect since 1977, provides for strike action by mutual agreement. Based on the experience in these states, it appears questionable whether the choice-of-procedure approach alleviates many of the fundamental problems associated with impasse resolution systems.

[14] Thomas A. Kochan, "Dynamics of Dispute Resolution in the Public Sector," in *Public-Sector Bargaining,* eds. Benjamin Aaron, Joseph R. Grodin, and James L. Stern, IRRA Series (Washington, D. C.: BNA Books, 1979), pp. 150-90.

According to Ponak and Wheeler's analysis of the Wisconsin and Minnesota experience with these systems, there was no mutual agreement to pursue the strike option in Wisconsin during 1978, whereas in Minnesota managements' unilateral selection of the strike option was relatively rare in school district negotiations but was frequent in municipal and county unit negotiations.[15] Although in Minnesota a substantially higher rate of voluntary settlements followed the selection of the strike option, compared to the selection of arbitration, the system had a number of fundamental drawbacks which may account for its demise. Most notably, one party—management—was empowered to select the impasse technique, thereby giving it a major tactical advantage in being able to choose an impasse technique that best met its needs. In fact, Minnesota managements did make use of that advantage.[16]

From the union's perspective, the perceived advantage of strike action may be suspect when it can only be exercised if management concurs. As Cullen stated, "It's not a very smart labor union that strikes when management wants you to."[17]

Conclusion

This condensed review of a broad and complex issue identifies some concerns pertaining to compulsory arbitration that warrant further study before any definitive conclusions about the effectiveness of compulsory arbitration as a dispute resolution technique can be reached. But, during the course of such study we may expect that compulsory arbitration will continue to serve as a terminal impasse procedure in jurisdictions where it currently exists, particularly for negotiations involving essential service employees. For such employees, the normative assumption that the public wants and needs to be protected against strike action is both reasonable and sufficiently compelling that legislative action to exclude compulsory arbitration is unlikely. However, the increased willingness of many jurisdictions to permit strikes as a terminal step does suggest that the attraction of compulsory arbitration may be decreasing.

Given the volume of research studies and experiences, it does not appear that the questions concerning terminal impasse-resolution procedures are likely to be soon resolved. Debate and disagreement will continue as long as management and union representatives maintain fundamentally different perceptions of the relative advantages of compulsory arbitration and alternative terminal procedures. As a result, the focus in the future could shift from evaluating the effectiveness of compulsory arbitration relative to other terminal procedures toward identifying changes that might be made in the structure and implementation of steps prior to impasse in order to encourage voluntary settlements. **[The End]**

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[15] Allen Ponak and Hoyt N. Wheeler, "Choice of Procedures in Canada and the United States," *Industrial Relations* 19 (Fall 1980), pp. 292-308.

[16] Such a tactical strategy also appears in Canadian federal service where the union selects the impasse resolution technique. See John C. Anderson and Thomas A. Kochan, "Impasse Procedures in the Canadian Federal Service: Effects on the Bargaining Process," *Industrial and Labor Relations Review* 30 (April 1977), pp. 283-301.

[17] *Government Employee Relations Report* 738 (December 12, 1977), p. 13.

A Discussion

By R. THEODORE CLARK, JR.

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THE PAPERS PRESENTED by Professors Olson and Gallagher were both interesting and provocative. Although they approached the topic from different perspectives, both papers dealt with public sector impasse procedures, a topic on which I have written a fair amount in the past.[1] Like those of many others, my thoughts on this subject have changed over the years. The thoughts expressed by Gallagher and Olson in their papers have provided a catalyst for a rethinking and reformulation of my own views on impasse resolution in the public sector.

I do not agree with Gallagher's assertion that "advisory procedures, such as factfinding . . . are not realistic alternatives because they exclude the bilateral risk that is necessary to reach voluntary agreement."[2] However, I accept as a practical matter that in many jurisdictions the only impasse alternatives being considered by both legislative bodies and academicians for the terminal step of the public sector bargaining process is the right to strike and compulsory arbitration. For the last eight years I have publicly stated that, if I were faced with the task of selecting one of these two alternatives, I would unequivocally favor granting all nonessential public employees the right to strike in lieu of mandating compulsory arbitration as the terminal step of the bargaining process. Therefore, I would generally agree with Olson's conclusion that there should be greater experimentation in granting nonessential public employees the right to strike.

My reasons for favoring the right to strike over compulsory arbitration are primarily twofold. *First,* I am firmly convinced that voluntary agreements reached by the parties themselves are far better than agreements imposed by an outside arbitrator. *Second,* compulsory arbitration has a chilling effect on negotiations; its very availability tends to result in its overusage. I am not anywhere near as sanguine as some of the academicians who have studied compulsory arbitration are with respect to usage rates. For example, the fact that 10 to 15 percent of all police and fire negotiations in Michigan result in arbitrated awards does not take into account the effect which such arbitrated awards have on the parties in other cities and towns in Michigan or on other employee groups within the same jurisdiction. While compulsory arbitration may be good for neutrals who are employed as interest arbitrators, in my judgment it extracts too great a price in terms

[1] See, e.g., "Legislated Interest Arbitration—A Management Response," *Proceedings* of the 27th Annual Meeting, Industrial Relations Research Association (Madison, Wis.: IRRA, 1975), pp. 319-23; *Compulsory Arbitration in Public Employment,* Public Employee Relations Library No. 37 (Chicago: PPA, 1972); and R. Theodore Clark, Jr., "Public Employee Strikes: Some Proposed Solutions," LABOR LAW JOURNAL, Vol. 23, No. 2 (February 1972), p. 111.

[2] Gallagher article entitled "The Use of Interest Arbitration in the Public Sector."

of its adverse effect on the ability of the parties to voluntarily negotiate their own agreements.

Recommendations

Having opted for the strike model over compulsory arbitration for at least all nonessential public employees, I woud make the following six recommendations concerning its implementation.

First, the right to strike should only be available after the expiration date of an existing contract and then only after the appropriate PERB or PERC has certified that the parties are at impasse following mediation.[3] Appropriate notice of at least ten days should also be given.[4] I do not think it is advisable, however, as some have suggested,[5] to provide that the right to strike should only be available after the parties have gone through factfinding with recommendations and one party or the other has rejected the recommendations of the fact-finder. I would hasten to add, however, that this should not preclude the parties from voluntarily agreeing to factfinding or, indeed, from voluntarily agreeing to submit any outstanding issues in negotiations to binding interest arbitration.[6]

Second, I heartily concur in Olson's comment that the extension of the right to strike in the public sector should be concomitant with the exclusion of bona fide supervisors from bargaining units. As the Committee for Economic Development observed in its policy statement on public sector collective bargaining, "[i]n the event of a strike or other job action, it is especially important that supervisory personnel be clearly allied with management so that they can be counted on to help provide a minimum level of essential services."[7]

The relationship between the exclusion of supervisors from bargaining units and the granting of the right to strike to public employees has also been candidly recognized by some knowledgable union officials. For ex-

[3] For example, the Wisconsin municipal statute requires that the Wisconsin Employment Relations Commission must certify that "an impasse exists" before the mediation-arbitration process, which includes the possibility of the right to strike if both parties withdraw their final offers, may be commenced. Wis. Stat. § 111.70(4)(cm)(6) (Wesr Supp. 1981).

[4] The Hawaii statute, for example, provides that an exclusive representative, as one of the prerequisites to engaging in a lawful strike, must give "a ten-day notice of intent to strike to the board and the employer." Hawaii Rev. Stat. § 89-12(b)(4) (1980). The Alaska, Minnesota, Oregon, Pennsylvania, and Wisconsin statutes contain similar ten-day notification provisions. Similarly, Section 8(g) of the National Labor Relations Act provides that a union before engaging in a strike at any health care institution must notify the institution and the Federal Mediation and Conciliation Service "not less than ten days prior to such action" and that such "notice shall state the date and time that such action will commence." 29 U. S. C. 158 (g) (1976).

[5] The California Advisory Council chaired by Benjamin Aaron, in recommending that public employees in California should generally be given the right to strike, recommended that it be preceded by factfinding. *Final Report of the Assembly Council on Public Employee Relations,* 237 (March 15, 1973). Similarly, the Hawaii, Oregon, and Pennsylvania statutes require that factfinding be completed prior to any strike.

[6] Substantially all of the state statutes which permit certain categories of public employees to legally strike provide that the parties may voluntarily agree to submit unresolved collective bargaining disputes to final and binding interest arbitration. For example, the Oregon statute provides that "a public employer may enter into a written agreement with the exclusive representative of its employees providing that a labor dispute over conditions and terms of a contract may be resolved through binding arbitration." Or. Rev. Stat. § 243.701(2) (1975).

[7] Committee for Economic Development, *Improving Management of the Public Work Force: The Challenge to State and Local Government* 68-69 (1978).

ample, Al Bilik, an AFSCME official for some 20 years, in arguing that public employees should be granted the right to strike, noted that "the effective deployment of professional supervisory personnel should permit at least essential functions to continue."[8] He observed that in the private sector the essential functions provided by the various utilities do not cease when bargaining unit employees strike but rather are continued through the "skillful use of supervisory personnel."[9]

Third, as in the private sector under the NLRA,[10] public employee unions should not have the right to legally strike over nonmandatory or illegal subjects of bargaining. And, such strikes should be subject to injunctive relief.

Fourth, sympathy strikes by public employees in other bargaining units should be illegal.[11]

Fifth, public employers should have at least the same legal rights as private employers in responding to a legal strike by public employees. Thus, public employers should have the right to continue operations by subcontracting bargaining unit work or through the hiring of permanent replacements.

Sixth, a strike by public employees should be subject to injunctive relief, upon application by the affected public employer, if a court determines that continuation of the strike would pose an imminent danger to the health, safety, or welfare of the public. I agree with Olson that the mere inconvenience to the public should not be the standard.[12] If an injunction issues, the parties should then be required to submit any unresolved economic issues to final offer arbitration on a package basis.[13] By conditioning arbitration on the issuance of an injunction, this should remove the concern raised by Olson over the ability of one party or the other to unilaterally determine whether arbitration is available.

A Strike Model

It is not possible to have absolute symmetry in terms of the application of any given impasse procedure on all parties in all jurisdictions. However, there is one additional policy issue highlighted by Olson that should be dealt with.

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[8] Al Bilik, "Toward Public Sector Equality: Extending the Strike Privilege," LABOR LAW JOURNAL, Vol. 21, No. 6 (June 1970), pp. 338, 335.

[9] *Ibid.*

[10] See, e.g., *Scott v. Communications Workers, Local 9415* (ND Cal, 1980), 106 LRRM 2033.

[11] In *General Drivers, Helpers, and Truck Terminal Employees Local 120 v. City of St. Paul* (Minn SCt, 1978), 1977-78 PBC ¶ 36,397, the Minnesota Supreme Court held that a sympathy strike by public employees in other bargaining units in support of a lawful primary strike is illegal under the Minnesota Act. Both the Oregon and Pennsylvania statutes provide that "public employees, other than those engaged in a nonprohibited strike, who refuse to cross a picket line shall be deemed to be engaged in a prohibited strike and shall be subject to the terms and conditions of [the statute] pertaining to prohibited strikes." Or. Rev. Stat. § 243.732 (1975); Pa. Stat. Ann. Tit. 43 § 1101 (Purdon Supp. 1981).

[12] The Oregon statute specifically provides that the term " 'danger or threat to the health, safety, or welfare of the public' does not include an economic or financial inconvenience to the public or the public employer that is normally incident to a strike by public employees." Or. Rev. Stat. § 243.726(6) (1975).

[13] Since most public sector impasse situations primarily involve unresolved economic issues, requiring final offer arbitration over such issues if an injunction issues should result in an overall agreement being reached in most situations. With respect to unresolved noneconomic items, the decision of the arbitrator should be advisory only. Contract language should be written by the parties themselves and not mandated by an arbitrator.

If the right to strike is extended to teachers, it is then necessary to grapple with minimum attendance laws and the fact that in most teacher strikes all or substantially all of the days teachers strike are subsequently made up. Where this happens, the striking teachers incur no direct loss of wages for striking.[14] Of course, the theoretical underpinning of the strike as the terminal step of the bargaining process is that it imposes penalties on both parties, thereby encouraging both parties to resolve the dispute. If striking teachers are successfully able to avoid the financial penalty implicit in strikes by garbage collectors, park attendants, or private sector employees, it will remove any incentive on their part to make concessions that might settle the strike.

As Olson recognized, this is not an easy issue to resolve. While the same solution may not be appropriate in all jurisdictions, I would recommend that teachers be docked one-half of one day's pay for each day they strike which is subsequently made up. And, to avoid the "windfall" problem mentioned by Olson and to create an incentive to make up school days lost as a result of the strike, the state aid provided to a school district should be reduced on a pro rata basis for any school days that are not made up below the specified state minimum.

One probable result that would flow from the adoption of the strike model I have outlined would be considerably greater respect for the courts. As we are all painfully aware, in-injunctions against public sector strikes are far too frequently flouted. When this occurs, it undermines the integrity of the courts and respect for the judicial process in general.

If, however, the presumption against strikes in the public sector is reversed and the right to strike becomes the rule rather than the exception, I firmly believe that any injunctions that might be issued against illegal strikes would normally be complied with. This has certainly been the experience in the private sector when injunctions have issued against illegal strikes and secondary picketing, as well as injunctions issued under the national emergency provisions of the Taft-Hartley Act. In almost all instances—except perhaps in the coal industry—such injunctions have been routinely obeyed. It would not be overly optimistic to expect that this private sector experience would be duplicated in the public sector if the strike model I outlined above were put into effect. **[The End]**

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[14] There is an exception in a jurisdiction like New York where striking employees lose two days' pay for each day they strike. New York Civ. Serv. Law § 210(2)(g) (McKinney Supp. 1980).

SESSION V

Origins of the Union Contract

Development of Contractual Features Of the Union-Management Relationship

By SANFORD M. JACOBY and DANIEL J. B. MITCHELL

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A NEGLECTED TOPIC in labor history has been the day-to-day workings of labor-management relations.[1] Much has been made of broad conflicts between labor and management, such as the open-shop movement of the 1920s and the CIO organizing campaigns of the 1930s. But little attention is paid to the kinds of contractual features that were negotiated. The contents of a contract signed after a long struggle for recognition lack the drama of the struggle itself. But, since obtaining a contract was the ostensible goal of most such struggles, lack of interest in the final product cannot be justified.

Recent developments in economic theory suggest that a linkage between labor history and modern labor economics could be established. Wage determination has long been a weak area in macro- and micro-economic theory. Although there is division between Keynesians and monetarists on various issues, wage "stickiness" plays an important part in the explanation of unemployment in both approaches.

The macro puzzles have led to the development of new micro theories of implicit contracting in the labor market. Various versions of these theories exist. A common thread is that all seek to find foundations for wage stickiness and other "anomalies" in the labor market (labor hoarding, procyclical productivity, career ladders, and other internal labor market arrangements) in terms of the traditional objectives of profit and utility maximization. So far the relationship between implicit contracts (basically nonunion) and explicit contracts (union) has not been widely explored.

We suggest that a good place to start in the study of labor-market contracting is the development of explicit union agreements. Union contract practices are more readily documented than implicit nonunion arrangements, precisely because they are formalized and written. In

[1] Due to space limitations, only limited citations are provided. Complete references are available from the authors.

what follows, differences between pre-World War II and postwar contracting are discussed. It is asked whether the changes during that interval can be ascribed to "rational" incentives of the type featured in the implicit contracting literature or whether events related to the war are the primary explanation. Finally, some implications for public policy are discussed.

Although references can be found to "contracts" between employers and unions prior to the Civil War, collective bargaining agreements are generally a post-Civil War phenomenon and became increasingly popular during the late 19th century. By fixing wages and working conditions for a definite period, each party assured the other that it would not take advantage of seasonal or cyclical swings in production to secure more favorable rates than those negotiated. Unionized workers were guaranteed a steady wage and the employer could guarantee the product prices advertised to customers. Most importantly, by minimizing the risk of a strike, the employer avoided a costly disruption of production and possible loss of market share. The union's no-strike promise was the *quo* it offered for the employer's fixed *quid*.

Collective labor contracts were not legally enforceable in most states until after World War II. To secure the employer's good faith, the union had to make good on its promise not to strike during the term of the agreement. This was accomplished by the strict controls that national unions placed on strikes by their locals, especially the refusal to provide financial support to an unsanctioned strike. Thus, the spread of labor contracts after 1880 owed much to the development of a national union capable of enforcing its agreements.

Hypotheses

The prevailing wisdom is that modern collective bargaining provisions are traceable to the World War II and postwar period. To explore this assumption, we have collected a large number of contracts negotiated before the establishment of the National War Labor Board (NWLB).[2] The table, based on those contracts that have so far been coded, shows that many "modern" provisions in fact existed in the prewar period. These include wage reopeners, deferred wage adjustments, union security provisions (including maintenance of membership), grievance arbitration, and benefits such as health, welfare, and pension provisions. It is clear that the parties did not require the civilizing influence of the NWLB to invent these features. An important question is why these innovations developed. Five hypotheses can be suggested.

Hypothesis (1): an agreement of extended duration is a logical consequence of the employer's desire to minimize negotiation and strike costs over time. Also, a lengthy contract allows the employer more accurately to predict his labor costs, which facilitates planning and satisfactory customer relations. But three factors may make employers reluctant to sign two- or three-year agreements.

First, employers will not sign these agreements unless they are convinced of the union's integrity with regard to its no-strike promise. Second, employers will be unwilling to commit themselves to an extended agreement

[2] The contract file consists of nearly 600 pre-NWLB agreements gathered from library and other collections around the country. Contracts from the 1935-1942 period represent two-thirds of the sample. The sample is roughly consistent with the industrial distribution of trade union members over time. However, contracts from the apparel and printing industries are overrepresented, while contracts from the construction industry are underrepresented, in the sample.

until they have accepted the union as a permanent feature. In the early years of a union-management relationship, an employer might seek a short agreement in the belief that the union no longer will be around when the contract expires. As the relationship matures, the employer might switch from a short-run strategy of eliminating the union to a long-run strategy that minimizes the cost of what is now perceived as a quasi-permanent relationship. Third, an extended agreement only is possible after the parties have worked out the rules that will govern their day-to-day relations. Negotiations then can occur less frequently. These factors suggest that long-duration contracts will be found where the parties have been bargaining with each other for a number of years.

Hypothesis (2): contractual union-security provisions also may be related to the age of the bargaining relationship. An employer only will grant recognition to a union which has been accepted as a fixed feature of the environment. Alternatively, a union security clause may be a quid pro quo for union acceptance of an extended agreement. Union leaders would rather not renounce strikes for an extended period because the strike is the ultimate weapon for achieving union objectives. They may fear that, if the right to strike is limited, members no longer will perceive the union as a militant organization. A union security clause can assuage these fears.

Hypothesis (3): once an agreement of extended duration has been signed, mechanisms may be needed to adjust wages for future changes in economic conditions. A wage reopener clause provides some protection against *unanticipated* events; a deferred wage adjustment clause allows for a flexible response to *expected* future conditions. Use of these clauses should be positively related to the agreement duration.

Hypothesis (4): the use of third-party neutrals to arbitrate rights disputes may be a learning phenomenon unrelated to contract duration. Most agreements provide some mechanism for resolving intracontractual disputes. Yet neither party will be eager to grant outsiders the power to resolve these disputes until they have become convinced that outsiders can adjudicate effectively. Arbitration will become more prevalent as the parties learn that it has worked well in other industries. Also, arbitration will become more predictable and acceptable as the number of experienced arbitrators and a body of arbitral norms increase over time.

Hypothesis (5): in the absence of external incentives (such as those now provided by the tax code) there is no reason for workers to prefer that employers provide them with benefits "in kind" which they could otherwise purchase. Some unions, drawing on the earlier tradition of beneficial societies, might work out arrangements with employers whereby benefits such as life insurance would be provided. Or they might seek to provide benefits not available externally (such as unemployment pay before 1935). However, some employers might provide such benefits for "paternalistic" reasons or to reduce turnover among senior workers outside the union contract framework.

Supporting Evidence

As expected, the agreement duration was positively related to the age of the bargaining relationship. The longest agreements, including many of two- or three-years' duration, were found in industries where there was a long history of contracting, such as printing, apparel, mining, and construction. The proportion of agreements of less than thirteen months' duration was highest among those signed during the pre-1910 and 1935-1942 periods. These were

TABLE
FEATURES OF COLLECTIVE AGREEMENTS
(percentage of contracts)

	1875-1920	1921-1934	1935-1942[a]	1948-1954[b]	
Arbitration	55%	66%	76%	85%	(1948)
Union security clause	52	72	48	74	(1950)
Union shop	0	6	23	61	
Maintenance of membership	3	11	3	13	
Closed shop	52	64	24	0	
Deferred wage adjustment	5	7	4	20	(1954)
Reopener clause	9	22	29	49	
Conditional on inflation	1	4	5	—	
Escalator clause	—	—	1	19	
Health & welfare benefits	0	1	4	30	(1948)
Pension plan	0	1	3	5	
Duration					
1-12 months	31	34	54	26	(1954)
13-24 months	23	28	26	42	
25-36 months	11	23	10	13	
Over 37 months	7	2	2	17	
Indefinite or open	28	12	7	2	
	(N=103)	(N=83)	(N=378)		

[a] Contracts after February 1942 were excluded.
[b] 1948: "Survey of Contracts Under Taft-Hartley Act," *Labor Relations Reference Manual,* Vol. 22 (Washington, D. C.: Bureau of National Affairs, 1948); "Labor-Management Contract Provisions, 1950-51," Bureau of Labor Statistics Bull. No. 1091 (Washington, D. C.: U. S. Government Printing Office, 1952), p. 19; 1954: "Collective Bargaining Agreements: Expiration, Reopening and Wage Adjustment Provisions of Major Agreements," BLS Report 75 (Washington, D. C.: U. S. Government Printing Office, 1954), p. 3.

periods when bargaining was first being introduced to various industries.

Union-security clauses were least prevalent during these two periods; 25 percent of pre-1910 and 48 percent of post-1935 agreements contained union security clauses as opposed to 69 percent during the intervening years. This finding supports the hypothesis of a relation between age of the bargaining relationship and presence of a union-security clause. But there is also a positive and significant relationship between presence of a union-security clause and contract duration. It appears that such clauses were an employer concession to obtain union acceptance of a longer contract.

As predicted, a positive and significant relation was found between the presence of either a reopener or deferred wage provision and contractual duration. Both provisions rarely were found in the same contract, which indicates that they were alternative mechanisms for dealing with future circumstances. It might be noted that escalator clauses were rare but can be found in a few prewar contracts.

The provision that a neutral arbitrator be used to settle rights disputes had a positive and significant relation to the year in which a contract was signed. This supports, as does the table, the hypothesis that grievance arbitration grew steadily over time, ir-

respective of a contract's duration or the age of the bargaining relationship.

Employer-provided "fringe" benefits date back to the late 19th century but were not found with any frequency until after World War II. The benefits provided were meager; in 1929 they averaged only two percent of total annual payrolls. These benefits almost never were part of a collective agreement, except for the unemployment insurance plans found in clothing contracts during the 1920s. Each party preferred unilaterally to provide fringes rather than negotiate them. The "technology" of supplementary benefits was well-known but not widely implemented until the 1940s.

Thus, the general hypothesis that "rational" factors determined the content of prewar agreements is supported. Most features of the modern agreement can be found in older contracts. Bargaining relationships established after 1935 were likely to have matured into something closely akin to the modern contract even without external intervention. While older agreements rarely were as detailed as current contracts, they provided a wealth of experience and innovations upon which new bargaining parties could draw.

The Way It Became

The NWLB traditionally has been viewed as a key institution that created the framework for postwar bargaining. The Board reputedly was a major impetus for the adoption of contractual fringe benefits, grievance arbitration, and union security (maintenance of membership) clauses. While the NWLB was a contributing influence to the modern contract, we think that its ultimate importance has been overstated.

The NWLB's extensive wage stabilization program sought to control inflation by establishing limits for various types of wage adjustments. Approval of the NWLB was not required when the parties negotiated "reasonable" group health, welfare, and pension plans. This policy decision was an obvious stimulus to the growth of these plans and some have claimed that it "probably more than any other single event triggered the dramatic expansion of employee benefits. . . ."[3]

However, the number of trade union members covered by these plans did not begin to approach modern levels until well after the war. In part this was due to the Supreme Court's 1949 *Inland Steel*[4] decision, which brought such benefits into the scope of bargaining. But a learning phenomenon also is suggested by the data. The number of union members covered by some type of negotiated plan more than doubled from the close of the war to early 1947, when about 1.5 million members were covered. The number doubled again to three million in mid-1948. By mid-1950, coverage had grown to 7.6 million and reached 11.3 million in 1954. It is impossible to know what these figures would have looked like had it not been for the NWLB. Yet we think that much the same growth pattern would have been observed once changes in tax incentives are considered.

The role of the NWLB in establishing modern grievance arbitration is well-known. The Board "insisted, as a matter of paramount importance, upon arbitration as the final step of grievance procedure."[5] Its directives provided a framework for the handling and arbitration of employee grievances. But it would, perhaps, be more accurate

[3] Robert M. McCaffery, "Employee Benefits: Beyond the Fringe?" *Personnel Administrator* (May 1981), p. 26.

[4] (US SCt, 1949), 336 US 960.

[5] *The Termination Report of the National War Labor Board*, Vol. 1 (Washington, D.C.: U. S. Government Printing Office, 1947), p. 113.

to say that it was the wartime no-strike agreement which forced the parties to rely more heavily on arbitration, a procedure that had been used in a variety of industries—coal, apparel, printing, and construction—since the 1910s.

Admittedly, many older contracts provided for arbitration only if a joint committee could not reach a decision. Often arbitration was used only with discretion. But the outlines of modern grievance arbitration were clear long before the war. The successful use of arbitration in older bargaining relationships influenced the newer, post-Wagner Act relationships.

By 1940, both of the major contracts in the auto and steel industries provided for a multistep grievance procedure ending in arbitration. While there was reluctance in these new industries to entrusting contract interpretation to inexperienced outsiders, the pressure to avoid strikes during the war eroded this resistance. Also, the heavy wartime use of arbitration created an army of experienced labor arbitrators. One of the few issues that participants in the 1945 Labor-Management Conference could agree upon was the value of grievance arbitration. The NWLB provided additional pressure and guidance without which arbitration might have grown more slowly. But the prewar history of arbitration suggests that a learning phenomenon also was present.

It is sometimes said that maintenance-of-membership (MOM) clauses were "devised by the public members of the NWLB."[6] It is true that the Board was responsible for the wider use of these clauses, but it hardly invented or "devised" this form of union security.

Variants of these clauses can be found in a few pre-1920 agreements that combined them with a closed shop provision. During the 1920s the clauses appeared in some apparel and street railway contracts; they were a standard provision in some meatpacking, chemical, and paper industry contracts during the 1930s (see the table). In fact, it was the NWLB's short-lived predecessor, the National Defense Mediation Board, that first ordered the insertion of these clauses into disputed contracts. Here as elsewhere, the wartime authorities drew heavily on prewar contractual innovations.

The importance of the NWLB's repeated orders to establish MOM provisions should not be underestimated. Fifty-eight percent of the NWLB cases in which union security was an issue involved the new CIO unions, whereas only 34 percent involved the AFL. Many of the new unions did not have what they viewed as adequate union security at the start of the war and the NWLB helped overcome employer resistance on this issue. A counterfactual question may be posed here: had it not been for the NWLB, how long would it have taken the new CIO unions to obtain union security? We do not have a definite answer. But it is possible that employers eventually would have become resigned to the new unions as a *fait accompli*. Union security would have been granted or made a trade-off for multiyear contracts.

In some ways, the wage controls of World War II may have retarded certain modern contractual features. Controls discourage multiyear contracts. Hence, they discourage the paraphernalia of such contracts such as wage reopeners, deferred wage adjustments, and escalators. As noted, escalator clauses were known before World War II. But the widespread use of such

[6] Harold S. Roberts, *Roberts' Dictionary of Industrial Relations* (Washington, D. C.: Bureau of National Affairs, 1966), p. 233.

clauses began with the 1948 GM-UAW two-year agreement. Such agreements might have come earlier in the absence of wartime disincentives to long-duration contracts.

Conclusion

There have been recent suggestions that union contracting makes it difficult for monetary policy to reduce inflation. The argument is that long-term contracts "lock in" prior inflation and inflation expectations. Our analysis suggests that, even if long-term contracting has dysfunctional macroeconomic effects, its forms stem from micro-level incentives, mainly the avoidance of dispute costs. Thus the banning of such contracts—a proposal that is sometimes heard—would be strongly resisted by the parties.

If there is a macro-level need to build wage sensitivity to demand pressures into contracts, however, it might be possible to change the micro incentives by offering tax benefits to "gain-sharing" plans. Such plans include everything from conventional profit-sharing arrangements to Japanese-style profit-related bonuses. Gain-sharing would add the desired wage sensitivity to long-term contracts.

While our reading of the NWLB period does not suggest an ability of government agencies to impose features for which no need is felt by the parties, such agencies can "educate" the parties in the adoption of devices for which incentives exist. There is little doubt the NWLB assisted in speeding the spread of grievance arbitration. If incentives were created for innovations like gain-sharing, it might be possible for existing agencies (such as the FMCS) to play such an educational role.

Finally, the recent rash of wage concessions has raised the issue of whether a "turning point" has been reached in industrial relations. If "turning point" simply means lower wage settlements in the face of mass layoffs, obviously such a point has been reached. But, if "turning point" is taken to mean a new way of contracting, involving a permanent end to long-term agreements with their escalator clauses and deferred wage adjustments, our analysis suggests that such a turn is very unlikely. That is because we are evolutionists rather than creationists in our view of how such devices developed in the first place. **[The End]**

Origins of Seniority Provisions in Collective Bargaining*

By CARL GERSUNY

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SENIORITY RULES create hierarchies of precedence based on length of service among employees in a specified seniority district. Seniority is a kind of *institutional age* according to which "older" workers are entitled to preference over "younger" ones in promotion, layoff, and other conditions of employment. Negotiation of such

* This inquiry was supported in part by a grant from the American Philosophical Society.

provisions has stood high on the bargaining agenda of many unions, and bitter strikes have occurred over attempts to revoke established seniority practices.

Unions, as organizations formed to give coherent *voice* to the interests of their members, seek *due process* in the workplace not only through establishment of grievance machinery but also by means of seniority rules. Seniority is germane to due process because its implementation serves to restrict management's capacity for applying arbitrary and capricious criteria in making invidious distinctions among employees. Invidious distinctions may be unavoidable when one person is promoted while another is passed over and when one is retained while another is laid off. Seniority rights provide an element of due process by limiting nepotism and unfairness in personnel decisions.

Seniority also serves to buttress the bargaining power of unions by curbing competitive and aggressive behavior that pits one worker against another. Instead of fighting among themselves over scarce opportunities and currying favor with supervisors—behavior which enhances employers' capacity to divide and rule—employees submit to a hierarchic principle based on institutional age. Within limits, seniority provides an objective criterion of time priority for making distinctions. Thus, seniority reinforces the bargaining strength of unions, a strength that would vanish if the shop floor became the scene of cutthroat competition for preferment.

Background Factors

To understand the origins of employment seniority in the private sector, it is necessary to examine briefly three background factors. These are seniority-like structures in preliterate societies, treatment of people likely to evoke a sense of injustice, and public sector antecedents of private sector seniority rules.

Age differences are an inherently hierarchic dimension of all human societies, beginning with the dependence of new-born infants on, and their domination by, adults. Among siblings, "birth order establishes a natural hierarchy."[1]

Precedence based on age is a widespread feature in societies. In nonliterate societies, where there is no way of recording and recalling people's precise chronological age, ceremonial age becomes a factor differentiating members of a community. There is a strong analogy between this ceremonial age based on rituals of initiation in a pastoral society and institutional age based on hiring dates recorded in the seniority roster of a factory. Both establish a hierarchy of precedence which is only imperfectly correlated with actual chronological age.

Perhaps from time immemorial African pastoralists have been organized in age-sets which are stratified in order of seniority. The age-set consists of the men initiated with the same cohort in ceremonies held at intervals of four years or more, assuring a wide range of actual ages in the age-set, particularly where poor men have to wait an inordinately long time until they can afford the initiation fee.

Among the Nuer of the Sudan, it is customary that, "when a large number of people are gathered together drinking beer, they should be served in order of seniority. The division into age-sets establishes this order and at least obviates one reason for quarrelling." This hiearchy based on ritual age means that "every man knows whom he must treat with respect as his senior

[1] Pierre L. van den Berghe, *Man in Society: A Biosocial View* (New York: Elsevier, 1975), p. 67.

and who ought to behave with respect to him."[2] Adherence to this order of precedence is an accepted part of the culture that does not engage the sense of injustice of its participants.

The *sense of injustice* is characterized by resentment and anger when people perceive that their rights are violated, when they feel that they are deprived of something they *deserve,* or when there is a *lack of impartiality* in their treatment by others. Both the claim that one is deserving of consideration and the desire for one's treatment by others to be impartial reinforce demands for seniority to govern personnel decisions. People who have given the best years of their lives to an enterprise think that they deserve preference over Johnnies-come-lately, a classification that includes all who came later. With respect to impartiality, there is a pervasive skepticism concerning the validity of assessments of merit, as well as readiness to suspect discrimination against oneself and favoritism toward one's rivals unless objective rules of selection are clearly established. These factors serve to explain the great antiquity of seniority practices in large public sector organizations.

Over a thousand years ago, in the Sung dynasty, promotion in the Chinese civil service was governed by time in grade. "A rule of seniority was established in 962," wrote Kracke. "Once introduced, the seniority requirements gradually acquired greater emphasis and strictness."[3]

In the Prussian bureaucracy from the end of the 18th century, "the principle of seniority had been rigorously applied in matters of reward and promotion—first as a means of eliminating the influence of corruption and royal favoritism and later as a way of organizing the intraprofessional structure." The criterion of time in grade was defended against its critics on the grounds that the "examination system provided no objective means of ranking candidates, and . . . reliance on the recommendation of superiors would open up the possibility of favoritism and corruption. Seniority was the only equitable alternative."[4]

In the British civil service in 1854, theoretically promotion was to be based on "merit." "In practice, promotion within a given section and from one to another depended on seniority." Civil servants preferred seniority to merit because they perceived the latter "as a cover for jobbery and favouritism."[5]

Abatement of the evils of the spoils system in government employment was a major goal of the civil service reform movement in the United States. The first attempt to legislate in this direction was the Jenckes Bill of 1867, which provided that, in case of vacancy, "the senior of the next lower grade may be appointed to fill the same, or a new examination may be ordered. . . ."

Seniority had long served as a personnel criterion in the United States armed forces. For example, the 1833 rules and regulations for the government of the Navy provided that commissioned officers "shall take precedence and command in their respective ranks, according to the priority

[2] Lucy Mair, *Primitive Government* (Baltimore: Penguin, 1962), pp. 76, 80.

[3] E. A. Kracke, Jr., *Civil Service in Early Sung China, 960-1067* (Cambridge, Mass.: Harvard University Press, 1953), pp. 88, 123.

[4] John R. Gillis, *The Prussian Bureaucracy in Crisis, 1840-1860* (Stanford, Cal.: Stanford University Press, 1971), pp. 27-28, 194.

[5] Emmeline W. Cohen, *The Growth of the British Civil Service, 1780-1939* (London: Allen and Unwin, 1941), pp. 96, 113.

of the date of their commission. . . ."[6] Similar regulations applied for the government of the Army.

In the United States, the first private sector seniority rules were established in the railroads. Employees pressed for seniority rights because supervisors "in the early days practiced what amounted to a 'spoils' system . . . and 'accepted' a steady stream of little tokens of esteem from admiring subordinates at Christmas time, birthdays, and on other occasions. There is evidence that jobs were actually sold by petty railroad officials, but the extent to which this practice existed is in doubt."[7]

Unions' Views

Seniority became an important issue in the printing trades from the 1890s. Never was there a more articulate group of unionists than the printers who debated about seniority in the *Typographical Journal* during the decades around the turn of the 20th century.

One correspondent attributed adoption of seniority rules to "the innate sense of justice characterizing the majority of the membership of every organization. . ." (November 1, 1892). Another wrote that seniority "simply means first come, first served—if competent. . . . If a vacancy occurs, foremen. . . . are simply expected to put the oldest competent man on the floor—and there is an end to all the worry caused by wire pullers" (September 1, 1891).

A contrary view was expressed by an ex-foreman, who called seniority the "mad theory of some namby-pamby socialist in the craft" motivated by "an insane desire" to undermine the rights and privileges of foremen in hiring whom they pleased (August 1, 1981). Presumably the epithet "namby-pamby socialist" was intended as an antonym for rugged individualists who favored turning the shop floor into a jungle in which to wage a struggle for survival, a war of all against all.

Two decades later another printer objected to seniority on socialist grounds: "the right to work, to live, to be rewarded by the full product of one's labor is a right that cannot be wrested from our economic masters by a law establishing the right of one member to work in preference to another. . . . The instruments of collective labor must be owned collectively by all the people. When this is an accomplished fact, the necessity for a rule of [seniority] will not exist" (March 1912). Although the debate continued for many years thereafter, seniority has been a firmly established rule in the printing trades.

In the manufacturing industry, while there were some collective agreements with seniority rights in the 1920s, the major impetus for the establishment of such rights among large numbers of factory workers came from the Wagner Act in 1935. By imposing a legal duty on employers to bargain with unions chosen by their employees, the Act facilitated establishment of claims for precedence based on length of service, because such claims were often more urgent than demands for wage increases among the priorities of newly organized unions.

Seniority in layoffs was discussed at a personnel conference of the Goodyear Tire and Rubber Company in 1935. One participant declared that

[6] Thomas A. Jenckes, in *North American Review* 105 (October 1867), p. 492. U.S. Navy Regulations, 1833, in U. S. Congress, 23rd Cong., 1st Sess., House Document No. 20, p. 6.

[7] Dan H. Mater, "The Development and Operation of the Railroad Seniority System," *Journal of Business* 12 (April 1939), p. 400.

"merit is the first consideration and service is next. Merit being equal, the man with the longer service is retained. Merit and service both being equal, then the man with the most dependents is to be retained. During the last few years, *we have disregarded merit and taken the individuals according to their seniority, because that is the easiest way to handle the situation.*" Another discussant at the Goodyear conference observed that often merit is merely a matter of opinion. "Where it is a matter of opinion," he said, "you have to learn to determine whether the foreman is a fair sort of fellow . . . or whether he is not a fair fellow. The foreman who is keeping a fellow on a merit basis should be able to supply very convincing evidence. Unless he can, it is very apt to get down to a basis of favoritism and that sort of thing is not very good business."[8] Spurious claims for precedence based on merit were sure to engage workers' sense of injustice and, since the inception of collective bargaining in the rubber industry, "seniority became the governing factor in layoff, rehiring, and transfer."[9]

Part of the interest of unions in establishing principles of seniority had to do with curbing the discretionary powers wielded by first-line supervisors. In the *United Automobile Worker,*[10] an account of the preunion, preseniority dispensation in automobile factories gives a graphic description of workers' perception of the problem: "Before the . . . union came into the industry, the worker had no seniority rights, and the longer a man worked in a plant, the more insecure his position became. . . ." Foremen had complete discretion as to who would work, with the result that workers gave gifts to and performed personal chores for their supervisors, "such as repairing their cars, cleaning their basements, painting their houses." As for women workers, "the girls who had the most security and received the best pay were the ones who went out with the foremen after working hours. Many of these girls were told that if they did not step out occasionally with the foremen they would have no jobs."

If word was received that a reduction in force was imminent, each worker "would put his nose to the grindstone and work harder than before, hoping that the foreman would notice his greater effort and reward him by keeping him on the job and laying off his fellow worker. Every worker in the department did likewise and . . . the foreman in taking stock of his department would find that instead of having to lay off 10 percent . . . he could lay off 20 percent and still maintain the quota of production. . . ." Not surprisingly, curbing of such practices had a high priority for the nascent industrial unions.

Unemployment Compensation

More indirect but no less important than the Wagner Act in creating a legal foundation for seniority was Title IX of the Social Security Act. Particularly in times of high unemployment the choice between work-sharing and layoffs in inverse order of seniority was a contentious issue. The Social Security Act served to alleviate the pressure for extreme work

[8] 76th Cong., 1st Sess., Senate Committee on Education and Labor, *Violations of Free Speech and Rights of Labor,* pt. 45 (Washington, D. C.: U. S. Government Printing Office, 1939), pp. 16659-60 (emphasis supplied).

[9] Philomena Marquardt and Sophia F. McDowell, *Seniority in the Akron Rubber Industry* (Washington, D. C.: U. S. Bureau of Labor Statistics, 1944), mimeo, p. 4.

[10] *United Automobile Worker,* February 16, 1938, p. 6.

sharing—sharing the misery as it was called—because it laid the groundwork for unemployment compensation at the state level. The rationale for preferring seniority-based layoffs to equal sharing of available work was that the aggregate income of labor would be greater if some worked full-time and others received transfer payments than if all worked part-time. Unemployment compensation created a right based on insurance principles as distinguished from relief payments that entailed a degrading means test.

In 1938, a few months before the first payout under Michigan unemployment compensation, UAW leader Emil Mazey sought to explain the advantage of layoffs over work-sharing. "In a plant working 24 hours per week with an average wage of one dollar per hour, if we worked one shift, each worker would receive $24 per week. If this work was equally divided by working two shifts, the average income would be $12."[11] He advocated that one shift of workers should continue to earn $24 and that the laid-off workers should turn to the public sector, earning the WPA minimum of $15 per week. The whole group would then earn an average of $19.50 instead of $12 per week. The same argument of course applied to unemployment insurance, which was then in its infancy, as well as to any other alternative sources of income.

Schatz, in his study of electrical workers, reports such worker comments as "Why work twenty-hour weeks when you can collect unemployment insurance?".[12] In coal mining, the abandonment of work-sharing in favor of seniority-governed layoffs came with the 1950 National Bituminous Coal Wage Agreement amended in 1952. This contract, which provided the first seniority provisions in the coal fields, came after unemployment compensation was long established and in the midst of substantial migration from Appalachian mining communities to the burgeoning urban industrial centers. Availability of alternative income sources, whether through transfer payments or in other labor markets, clearly serves to reinforce support for seniority.

Conclusion

Tracing the origins of seniority provisions in collective agreements leads to the conclusion that seniority is an industrial adaptation of a hierarchic principle inherent in the human condition—precedence of elders. Today's elders are tomorrow's retirees and decedents whose successors stand behind them in a seniority queue.

Why length of service came to be regarded as a fair and objective criterion in personnel decisions in contractual employment relationships can be seen from its antecedents and alternatives. In servile labor, paternalist masters were known to bestow tokens of appreciation for long periods of humble and obedient service, raising the inference that those who give the best years of their lives *deserve* recognition. Careers in the civil and military service of pre-industrial societies were regulated by seniority, as was beer-drinking among East African pastoralists. Waiting one's turn on a basis of time priority is a widely held principle of distributive justice and the individual who tries to cut in at the front of the line is viewed with displeasure.

In the absence of seniority rules, personnel decisions could be made by drawing lots or be left to the discretion of management. Drawing lots

[11] *Ibid.*

[12] Ronald W. Schatz, "American Electrical Workers: Work, Struggles, Aspirations, 1930-1950," Ph.D. thesis, University of Pittsburgh, 1977, p. 149.

would maximize uncertainty and it denies that those who have given a greater proportion of their lifespan to an enterprise than junior employees deserve consideration for having depreciated themselves there rather than elsewhere. As for managerial discretion, assessments of merit are suspect more often than not. Nepotism and other modes of favoritism evoke a strong sense of injustice, as does negative discrimination. Since valid measurement of ability is often elusive, claims that personnel decisions are based on it evoke skepticism and resentment.

What remains then is seniority, an objective criterion within the arbitrary boundaries of seniority districts. It is susceptible to objections from those who are barred in the absence of fair hiring from the end of the queue in the entry-level positions, but that is a problem that is germane to a study of consequences rather than of origins. [The End]

Industrial Democracy, Contract Unionism, And the National War Labor Board

By NELSON LICHTENSTEIN

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NOW THAT THE PATTERN of industrial relations characteristic of the years since World War II has begun to disintegrate, it is of more than historical interest to look at the ideology and institutions that gave rise to this collective bargaining regime. Of course, the Wagner Act provided a legal basis for modern unionism, but it was the specific social and political context of World War II that created the institutional framework for the kind of collective bargaining that evolved in the decade or so after the war. A key institution in these developments was the National War Labor Board. This government agency was a powerful force in nationalizing a conception of routine and bureaucratic industrial relations. It was instrumental in setting, for the first time, industrywide wage patterns, legitimizing fringe benefit bargaining, fixing a system of industrial jurisprudence on the shop floor, and influencing the internal structure of the new industrial unions born in the 1930s.

It is important to recognize, however, the political context of this pioneering work. The NWLB was an institution created during a wartime emergency. Its prime function always was to insure continuous production, and, although it sought to do so by creating mechanisms by which industrial conflict might be ameliorated, it did not seek to alter in any fundamental way the economic status quo or to advance the cause of a larger industrial democracy. In fact, I will argue that the NWLB's institutionalization of a particular form of collective bargaining came at the expense of an alternate industrial relations order, one that held a greater democratic potential and one that might be of possible service in today's troubled environment.

If one is to gauge the impact of the NWLB on the evolution of the contract, it is important to understand what problems and possibilities existed

for this institution in the prewar era. In the late 1930s, the relationships between capital and labor, unions and managers, and workers and their foremen were still in flux. If the Depression decade was not as radical and turbulent as historians once thought, the political and institutional structures that emerged from the late New Deal era were nevertheless subject to considerably more variation than hindsight now seems to warrant.

In the later 1930s and early 1940s, the institution of collective bargaining was but one of several elements that defined the relationship between workers and their employers. At the shop-floor level, day-to-day conflict over production standards and workplace discipline permeated the work structure and authority in the factory. Rank-and-file work groups often battled managers to assert a degree of control over the conditions of their labor. In the mid-1930s this struggle provided the essential energy that activists and radicals in the rubber, auto, electrical, and meatpacking industries coordinated to build plant- and companywide unions that could secure recognition and bargain collectively with the major corporations. In many cases union recognition increased the leverage of such shop-floor militants.

Few workers accepted the modern distinction between contract negotiation and contract administration; thus, shop-floor assemblies, slowdowns, and stoppages proliferated after the sit-down strikes of 1936 and 1937. Among workers, militancy and organization were dialectically dependent, building confidence and hope in a new and powerful synthesis. Direct shop-floor activity legitimized the union's presence for thousands of previously hesitant workers who now poured into union ranks, and such job actions established a pattern of union influence and authority unrecognized in the early, sketchily written contracts.[1]

National trade union leaders recognized that, under the political conditions existing in the late Depression era, shop-floor bargaining of this sort was incompatible with the establishment of a stable relationship with management. Thus, the Congress of Industrial Organizations officially opposed wildcat strikes and shop-floor violations of the grievance procedure. Top leaders like Philip Murray and John L. Lewis declared collective bargaining contracts "sacred," and even younger militants like Walter Reuther and Harry Bridges sought to curb such unauthorized activity.[2]

However, a considerable gap existed between what these leaders wanted and what they got. As late as 1941 major corporations like Ford, the Little Steel companies, and Wilson resisted recognition of the new industrial unions. At the same time, firms such as General Motors and U. S. Steel, which did bargain collectively, refused to sign a union shop contract which, in the eyes of many unionists, indicated that these employers were keeping open the possibility of withdrawing recognition when economic and political conditions proved more favorable. As long as the major cor-

[1] Melvyn Dubofsky, "Not So 'Turbulent Years': Another Look at the American Thirties," *Amerika Studien* 24 (1980); Peter Friedlander, *The Emergence of a UAW Local, 1936-1939: A Study in Class and Culture* (Pittsburgh: 1975); Ronald Schatz, "American Electrical Workers: Work, Struggles, Aspirations, 1930-1950," Ph.D. dissertation, University of Pittsburgh, 1977; and Nelson Lichtenstein, "Auto Worker Militancy and the Structure of Factory Life, 1937-1955," *Journal of American History* 57 (1980).

[2] "Address by John L. Lewis to Officers and Members of the UAW," April 7, 1937 (Box 11, Henry Kraus Collection, Archives of Labor History, Wayne State University); *Steel Labor,* February 18, 1938; and *United Automobile Worker,* December 4, 1939.

porations resisted a union presence, real union power and initiative would tend to lie at the departmental and local level. Thus, United Steelworkers officials Harold Ruttenberg and Clinton Golden argued that, without a union shop clause in steel contracts, a sort of guerilla warfare would necessarily persist in steel industry labor-management relations.[3]

A Tripartite Idea

It is important to recognize, however, that, as much as these moderate union leaders sought stability and security in their contractual relationships, they also envisioned a form of collective bargaining which far transcended the kind of contract unionism that most business leaders were prepared to accept. Bargaining with management would take place not only in terms of wages and working conditions but also in the context of government-management-union negotiations at the industrywide level.

This tripartite idea had a long history, but its most notable trial came during the National Recovery Administration experiment of 1933 and 1934. Among its champions at that time had been the Amalgamated Clothing Workers president, Sidney Hillman, who sought to restore membership to his union and stability to the chaotic garment trade through a state-enforced, but privately negotiated, industrial compact. In this context, tripartite bargaining would complement the pioneering efforts of the Amalgamated to restore industrial order in the clothing industry, for it was Hillman and his associates who had long pushed for a system of grievance handling and arbitration that would suppress the job actions and wildcat strikes that had once characterized the garment trade and which now permeated the industries recently organized.[4]

Industrial reorganization of the sort Hillman favored had been attempted only in those industries where several weak firms bargained with one strong union. In the late 1930s and early 1940s many CIO leaders sought to transplant the tripartite idea to the core industries of the economy—steel, auto, and nonferrous mining—and to shopbuilding. With the defense emergency revealing the inability or reluctance of some corporate managers to convert to military production, many unionists hoped that the collectivist tendencies inherent in the mobilization of the society for total war might provide the opportunity to restructure industry on a basis in which labor could have a real say.

In its most advanced form, this strategy unfolded in the industry council plan put forward by Philip Murray in the fall of 1940. Inspired by the social reformist encyclicals of Pope Leo XIII as well as by the NRA tripartite planning experience, quasi-corporatist councils would bring together representatives of labor, management, and government to administer jointly those industries that became vital to the defense effort.

The Murray proposals were considered abstract and impractical until up-and-coming Walter Reuther captured headlines with a program to convert Detroit auto plants into "one great production unit" to fulfill Roosevelt's ambitious call for the manufac-

[3] Clinton Golden and Harold Ruttenberg, *The Dynamics of Industrial Democracy* (New York: 1942), pp. 48-57 passim.

[4] Steve Fraser, "Dress Rehearsal for the New Deal," *Working-Class History: Toward an Integrated View of Labor in American Life*, eds. Daniel Walkowitz and Michael Frisch (Urbana, Ill.: 1982); also Matthew Josephson, *Sidney Hillman, Statesman of American Labor* (New York: 1952), pp. 359-380.

ture of 50,000 aircraft a year.[5] The Murray-Reuther plans were never put into effect, but they held the promise of a fundamental reform of industry and a powerful labor presence in the administration of the wartime production effort and the postwar industrial order.

NWLB Philosophy

This political and institutional background helped shape the decision to establish a wartime labor board and determine the policies it subsequently carried out. The National Defense Mediation Board, the immediate predecessor to the NWLB, was set up in March 1941 in the midst of the defense-boom strike wave. The key figure pushing for the board was Sidney Hillman, then codirector of the Office of Production Management and the man primarily responsible for labor mobilization in the pre-Pearl Harbor military buildup. Many of the public members of the Board, such as William H. Davis and George Taylor, had worked with Hillman in the garment industry and the NRA. The business representatives were what we would today call "corporate liberals," favorably disposed to the New Deal's labor reforms but unrepresentative of business sentiment in general. Despite its liberal coloration, which was essential to give the NDMB credibility with the unions, both Hillman and other Roosevelt Administration officials established the labor board chiefly as a mechanism for maintaining continuous production and the government's wage ceiling at the same time. The NDMB and the NWLB were institutions designed to carry out the economic program of a mobilizing state.[6]

The evolution of NWLB policymaking is a complicated one that involved the specific needs of various sections of the labor movement, the requirements of the government's anti-inflation program, and the growing pressure of an increasingly conservative business community. Here I want to focus on just two elements of the Board's overall policy: first, the NWLB's approach to the union security problem and its development of a "union responsibility" doctrine and, second, the failure of tripartism, especially in terms of the Board's wage policy.

The first major issue confronting the NWLB was that of union security. Although the NDMB had tried to avoid a definitive policymaking approach to labor's demand for the union shop, Pearl Harbor made such a program imperative. Labor's no-strike pledge, followed within a few months by NWLB promulgation of the Little Steel wage limits, threatened to unravel the web of loyalties which bound workers to their unions. Trade union officials feared that the mass of new war workers would prove difficult to organize since many of the basic conditions of employment were now being set by the government. Furthermore, they worried that labor's patriotic sacrifice of the right to strike might wear thin, as ultimately it did, and engender internal opposition inspired by political mavericks such as John L. Lewis or non-Communist champions of the prewar wildcat strike tradition.[7]

[5] George R. Clark, "The Strange Story of the Reuther Plan," *Harpers Magazine* 134 (May 1942), pp. 645-654.

[6] For a detailed discussion of the establishment of the Board and its early policy development, see Nelson Lichtenstein, "Ambiguous Legacy: The Union Security Problem During World War II," *Labor History* 18 (1977).

[7] On the problems faced by one key union, see United Steelworkers of America, *Proceedings of the First Constitutional Convention* (May 1942), pp. 41, 48, 81.

In an effort to avoid a crisis, the NWLB sought to strengthen the institutional and contract-enforcing power of those union leaders who cooperated with the Board. In the prewar years union leaders had not been successful in their demands for union shop contracts in basic industries as a guarantee that hostile employers would not seek to weaken the new unions during periods of slack employment. Now the unions argued, in the words of CIO counsel Lee Pressman, that union officials could "reorient" their organizations, turning their "energies to the smoother operation of labor relations and to the improvement of production," if the NWLB granted maintenance of membership and the dues checkoff.[8]

Even business representatives on the NWLB found such arguments persuasive. As West Coast shipping magnate Roger Lapham put it: "Can union leaders be held accountable for labor troubles if, because of a falling off in their membership, they find they control a minority rather than a majority in the plants where they are the bargaining agents? If one is realistic, it is hard to reconcile the views of those in management who wish to hold union leaders responsible for more stable labor relations, and yet will not help them, in some practical way, to attain responsibility."[9]

Grievance Procedure

At the core of the NWLB industrial relations philosophy was the idea that a system of industrial jurisprudence could resolve shop-floor conflict and harmonize worker-manager interests. Of course, the NWLB understood that innumerable grievances would arise in the day-to-day life of the workplace, but the Board sought to build a system of shop governance which would at once settle these disputes and at the same time prevent them from either interfering with production or challenging the necessary authorty of shop management.

To this end, the Board elaborated a system, first worked out in the prewar garment and needle trades, which removed industrial disputes from the shop floor and provided a set of formal bureaucratic procedures to resolve them. This system rested upon a four-step grievance procedure, capped in most industries by the adjudication by an impartial umpire of those disputes not settled at lower levels. Immensely influential in setting a national postwar pattern, the NWLB came "to regard an appropriate grievance procedure, with its terminal point in an impartial umpire as indispensable to the establishment of justice within the industrial community."[10]

So universal became the adoption of this system that its deployment seemed a natural and inevitable evolution of a mature system of industrial relations. But the elimination of all other forms of worker-manager bargaining was never entirely voluntary, for the NWLB policy was developed as part of a campaign to suppress the prewar tradition of autonomous shop-floor collective activity while at the same time defend and discipline the strata of politically cooperative unionists upon whom the Board relied to enforce the no-strike pledge. The NWLB demanded "union responsibility" and threatened to withdraw or deny maintenance of mem-

[8] *Bethlehem Steel et al.*, 1 War Labor Board Reports 397 (July 16, 1942).

[9] Roger Lapham, "Thinking Aloud, or the Present Thoughts of One Employer," (March 1942), reprinted in U. S. House, Committee Investigating the Seizure of Montgomery Ward, 78th Cong., 2nd Sess. *Hearings,* May 22-June 9, 1944, p. 627.

[10] National War Labor Board, *The Termination Report,* Vol. 2 (Washington, D. C.: 1947), p. 539.

bership and the dues checkoff to any union whose leadership led or condoned wartime stoppages.

This doctrine helped advance the centralization and bureaucratization of the new unions and defined as an industrial crime the sort of extra-contractual struggle which had earlier given vitality to the union presence in many shops and factories. In the rubber industry, for example, the independent power of shop stewards, committeemen, and local leaders had been built and tested in several years of daily struggle with Akron's rubber companies. A tradition of shop-floor militancy, born in the 1930s, continued well into the war.

Recognizing that "the elimination of habits, nurtured in successful practice, from thousands of workers is no overnight task," the NWLB encouraged the United Rubber Workers' leadership to curb the power of these secondary leaders and eliminate the use of such direct action techniques. "The practical and symbolic value of union security" declared the labor board in April 1943, "will further this process." In 1944 and 1945 the NWLB repeatedly backed URW efforts to discipline wildcat strikers and political radicals in the industry.[11]

Tripartism Limited

Many unionists and public officials had put great faith in the democratic potential of tripartite bargaining, but, as a path toward the democratization of the industrial order, it narrowed steadily in the course of the war. Most unionists initially supported the NWLB because of the participation it gave them in setting national labor policy, but the authority of this Board never approached that of the NRA experiment or of that envisioned in the CIO industry council plan. For tripartism to work, it had to be comprehensive; yet the NWLB mandate extended only to the narrowly defined union-management relationship.

Although labor demanded a greater role in the War Production Board, this key institution of the wartime state remained dominated by the military and the large corporations. To meet union demands for a role in production planning, the WPB did establish several thousand factory-level labor-management production committees, but few of these became more than morale-boosting operations. This disjuncture meant that neither labor nor the NWLB had the tools to help shape the economic climate necessary to institute an orderly and progressive reconversion process in the latter half of the war.[12]

In theory, the NWLB had the authority to set wage standards, but tripartism was increasingly limited even in this sphere. After Pearl Harbor, the NWLB came under Roosevelt Administration pressure to limit wage increases in the interests of a general anti-inflationary program. In the famous Little Steel decision of mid-1942, the NWLB set January 1, 1941, as a base line from which hourly wages could rise no more than 15 percent. Although the Board allowed for a number of exemptions for substandards of living, gross inequities, and the like, the flexibility of this formula was sharply limited by Presidential Executive orders in September 1942 and April 1943 (the Hold the Line Order).[13]

The Little Steel Formula

The Little Steel formula had two far-reaching consequences. First, the

[11] *Big Four Rubber Companies,* 8 War Labor Board Reports 598 (May 21, 1943); *U. S. Rubber Co.,* 21 War Labor Board Reports 182 (January 16, 1945).

[12] Paul A. C. Koistinen, "Mobilizing the World War II Economy: Labor and the Industrial-Military Alliance," *Pacific Historical Review* 42 (1973).

[13] NWLB, Termination Report, pp. 183-194.

NWLB policy "stabilized" wages at levels which reflected conditions of the late Depression era and perpetuated those relationships through the boom years of World War II when they might most easily have been altered. The prewar differential between pay levels in aircraft and auto, meatpacking and steel, and southern and northern textiles were all maintained by the NWLB. Perhaps even more importantly, the Little Steel formula represented the first major linkage of wages to the cost of living (even if capped), thus establishing a pattern that made it more difficult for unions to maintain the prewar outlook which called for increased wages, not simply as a means of maintaining employee purchasing power but as a way of progressively redistributing national income.[14]

The Little Steel formula became increasingly unpopular with labor, but its most celebrated enemy was certainly the Mineworkers' John L. Lewis, who thought the wage ceiling completely undermined the integrity of NWLB tripartism. Because the Board had "fouled its own nest," Lewis felt unconstrained by its policies and procedures. The four mine strikes he led in 1943 were designed not only to win a substantial wage increase in excess of the formula but to restore a form of free collective bargaining which Lewis thought the NWLB now stifled.[15]

To temper labor's dissatisfaction with the Little Steel formula, the NWLB encouraged unions to bargain for wage incentive plans and fringe benefits. The former was received rather coolly, especially after the Communists began a vocal campaign for such pay schemes. But the idea became increasingly popular in 1944 and 1945 that shift differentials, vacation pay, sick leave, and some insurance and pension plans could be used to circumvent in part the government wage ceiling, and bargaining precedents were established that had a powerful influence after the war.

However, this collective bargaining initiative, which stemmed in part from labor's failure to break the Little Steel formula, began a process which effectively constrained much of the essential infrastructure of the emerging welfare state. In the postwar period this had the effect of diffusing the political pressure for improvements in the federal government's tax-based welfare system while at the same time increasing the benefit differential, and the segmentation, of workers in the various industries and sections of the working class.

Conclusion

When World War II ended, the collective bargaining regime fostered by the NWLB hardly wobbled. The major industrial unions had achieved relative security. They had completed the organization of basic industry, nearly doubled their membership, and established themselves so firmly that their postwar disintegration was hardly contemplated.

But, if the NWLB experience stands as an important stage in strengthening contract unionism, it also tightly circumscribed the possibility of a large industrial democracy. The NWLB used much of the rhetoric and some of the methods of tripartite decisionmaking, but, because of the Board's subordination to the government's overall economic program, bargaining and planning of the sort envisioned by the CIO industrial council proposals never had a chance. Equally important, the wartime routinization and expansion of collective bargaining took place under circumstances which put a premium upon

[14] Golden and Ruttenberg, cited at note 3, p. 153.

[15] Melvyn Dubofsky and Warren Van Tine, *John L. Lewis, A Biography* (New York: 1977), pp. 415-440 passim.

union leadership authority and a penalty upon rank-and-file self activity. In effect, the NWLB declared illegitimate a whole realm of autonomous shop-floor bargaining, upon which so much of the vitality and democracy of the industrial union movement had been based.

[The End]

A Discussion

By M. E. ROPELLA

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IT IS MY INTENTION in the following paragraphs to set forth some of my observations on the three scholarly papers presented by the academic presenters. It appears to me that I was selected to be a discussant on this subject because of my practical experience of over 30 years in the negotiating of labor agreements. At least this is the approach which I took at the conference and which I intend to follow in this discussion.

First off, I would like to indicate that the subject was of great interest to me and to the audience mainly, I suppose, because it has been a subject that has been neglected for so many years. As a matter of fact, of all the conferences in which I have been involved, none has really directed itself to this particular subject of how we got where we are insofar as contract language is concerned.

I might add that, in preparation for this conference, I surveyed several of my clients and also bargaining committees from various unions with which I have negotiated recently. My purpose was to determine the knowledge and the recognition of these individuals regarding the historical background of specific contract clauses. In this connection, I was amazed to find that very few, if any, of the individuals surveyed had any understanding of how specific clauses in contracts came into being. The general consensus was that these clauses were developed from the imagination of union leadership or from government intervention—or, in essence, they just grew like "Topsy."

Since I negotiated my first labor agreement in 1949, I have observed the beginning and the gradual growth of contract clauses. And I emphasize *gradual* because that is exactly what happened, in my opinion. While the presenters in most cases gave considerable credit to the National War Labor Board, other factors also came into play in the evolution of the labor contract.

It is my considered opinion that, if we had not had the NWLB in the 1940s, we might even have advanced sooner toward more sophisticated industrial relations relationships between employers and unions. This was pointed out to me by Professors Perlman and Witte in the early 1940s. If my recollection serves me correctly, both of these scholars were concerned that government intervention in the labor-management area would deter advances and possibly a tripartite philosophy would serve no real purpose. Of course I agree with Professors Lichtenstein, Jacoby, and Mitchell that there were many "modern" provisions that existed in labor agreements in the prewar period. As Jacoby and Mitchell point out, "It is clear that the parties did not require the

civilizing influence to invent these features."

In my own experience negotiating contracts in the late forties and early fifties, it became apparent to me in many cases that the decisions of the NWLB did nothing but antagonize my clients and make them more resistant to the labor union demands. In fact, when requests for such now standard contract clauses as seniority, arbitration, or union security were brought to the bargaining table, the employer placed the blame squarely on the NWLB.

Any criticism I might have of the papers presented would be directed to the fact that most of the research involved large companies or industries rather than the small and medium-sized companies which constitute the bulk of our industrial society. While I had some personal experience with the General Motors Corporation, the bulk of my negotiating for over 30 years has been with small and medium-sized companies who really did not care about General Motors or Big Steel or any large industrial group.

The NWLB did, of course, affect small companies during the war years, and, since it was a very influential agency of the government, employers remembered the effect for many years after the war. Obviously, large company and industry settlements had a considerable effect on local union representatives and in many cases they attempted to use this experience in negotiating with smaller companies. So you had a situation where the union and management were playing with a different deck of cards at the bargaining table. The employer, on the one hand, was operating on his own principles and in most cases ignoring the NWLB effect. The union representative, on the other hand, was attempting to convince the employer of the advantages of the NWLB and large company and industry settlements.

This created considerable difficulty, and I can recall representing clients who objected to such standard clauses as seniority, arbitration, union bulletin boards, and many other provisions that appear in almost all present-day labor contracts. So when we talk about the effect of prewar contract clauses, the NWLB, and big company settlements, much of this fails to impress the small and medium-sized employers. In essence, the union representatives bargaining with them almost had to start from "scratch," by developing on a company-by-company basis a philosophy that had been promulgated by the NWLB and adopted in prewar contracts.

To conclude: the subject matter discussed and the papers presented were a real refresher course for me and, I am sure, for all of the attendees. If we follow the theory that past is prologue, more attention should be given by both academicians and labor relations practitioners to learning how we got to where we are in this very important aspect of our economic life. **[The End]**

SESSION VI

Behavioral and Industrial Relations Perspectives on Compensation: Contributed Papers

Correlates of Just Noticeable Differences In Pay Increases

By HERBERT G. HENEMAN III and REBECCA A. ELLIS*

University of Wisconsin-Madison

EMPIRICAL EVIDENCE clearly indicates that pay is an important outcome to employees.[1] Moreover, employees invariably experience changes in their pay level in the form of pay raises. From the organization's perspective such changes are intended to influence employee attitudes and behaviors, including satisfaction, willingness to join and remain with the organization, and job performance.[2] Consequently, it is important to understand both how employees evaluate pay raises and the factors that may be associated with these evaluations.

One type of evaluation that has been investigated is that of a "just noticeable difference" (JND) in a pay raise.[3] Theoretically, a JND represents the minimum or threshold pay raise that would

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[1] E. E. Lawler III, *Pay and Organizational Effectiveness* (New York: McGraw-Hill, 1971).

[2] H. G. Heneman III and D. P. Schwab, "Work and Rewards Theory," *ASPA Handbook of Personnel and Industrial Relations*, eds. D. Yoder and H. G. Heneman, Jr. (Washington, D. C.: Bureau of National Affairs, 1979), pp. 4-1—4-34.

[3] C. M. Futrell and P. L. Schul, "Marketing Executives' Perceptions of a Pay Increase", *California Management Review* 22 (1980), pp. 87-93; J. H. Hinrichs, "Correlates of Employee Evaluations of Pay Increases," *Journal of Applied Psychology* 53 (1969), pp. 481-489; L. A. Krefting and T. A. Mahoney, "Determining the Size of a Meaningful Pay Increase," *Industrial Relations* 16 (1977), pp. 83-93; and S. Zedeck and P. C. Smith, "A Psychophysical Determination of Equitable Payment: A Methodological Study," *Journal of Applied Psychology* 52 (1969), pp. 343-347.

be perceived to "make a difference" to an employee.[4] Thus, pay raises would have to be at or above the JND level in order to have any impact on employee attitudes or behaviors. For example, in a performance-based pay system, failure to provide JND raises would mean no effects on subsequent performance, even though the raises may have been administered in a performance-contingent manner.

Zedeck and Smith[5] found that, while the dollar amount of a JND was larger for executives than secretaries, the JND as a proportion of base salary was the same for both groups. Unfortunately, no correlates of JND perceptions were investigated.

Hinrichs[6] studied white-collar employees' evaluations of five different size raises, ranging from a JND raise to an "extremely large" one. He found that current pay level was positively related to the dollar amount of a JND. Hinrichs also measured four potential correlates—education level, age, sex, and employee status (exempt, nonexempt). Unfortunately, he only related these to perceptions of an "average" raise, so their relationship to a JND raise is unknown.

In an identical replication of Hinrichs' methodology, Futrell and Schul[7] also found that current pay level was related to the dollar amount of a JND raise. As did Hinrichs, they failed to relate measured demographics to individual differences in the JND raise perception.

By far the most comprehensive study of JND raises is that of Krefting and Mahoney.[8] They constructed a theoretical model of JND raise correlates and tested it on a heterogeneous sample of employees. The independent variables were: current pay; last pay raise; comparison of last pay raise with estimates of that of others; expected pay raise; total family income; expected change in cost of living; income necessary to improve one's standard of living; and pay and job satisfaction (one item each). Using stepwise multiple regression, it was found that these variables accounted for 25 percent of the variance in JND pay raises. However, not all of the variables entered the equation, regression coefficients were not reported for these variables, and zero-order correlations between any of the independent variables and JND raises were not reported.

Krefting and Mahoney also examined whether different variables might be most predictive of JND raise, depending on whether the person most valued a raise for *recognition* or for the *money*. Thus, individuals were placed into a recognition or money group, depending on their responses to an item that tapped the value of a raise. To investigate the effect of the hypothesized moderator variable, a separate stepwise regression was run for each group, and the resultant regression equations were then judgmentally compared. While nearly identical amounts of variance in JND raise were accounted for in each group, there were some differences between the two groups in terms of which variables significantly entered the equations. Unfortunately, this is not a statistically acceptable procedure

[4] Various terminologies have been used for this construct, such as Smallest Meaningful Pay Increase (Krefting and Mahoney, cited at note 3). For simplicity's sake, only the term Just Noticeable Difference will be use in the present study.

[5] Cited at note 3.
[6] Cited at note 3.
[7] Cited at note 3.
[8] Cited at note 3.

for testing the effects of a moderator,[9] and thus the presence of the recognition-money moderator can be neither supported nor refuted.

Study Objectives

The first objective of the present study was to investigate how numerous variables, singly and in combination, relate to employee perceptions of JND raise. The results of Krefting and Mahoney clearly indicate a need for this approach. These variables were conceptually grouped into three categories: personal characteristics, economic, and future expectations.

The personal characteristics were age, number of dependents, months of job and company tenure, and education level. It was hypothesized that each of these characteristics would be positively related to JND raise, though there is no previous empirical evidence relevant to these hypotheses.

The first three economic variables were current pay, size of last raise, and gross family income. These variables were utilized by Krefting and Mahoney, and all were hypothesized to have a positive relationship with JND raise. There were three additional economic variables—own gross income, percentage tax bracket, and average weekly work hours. All were predicted to have a positive relationship with JND raise.

Krefting and Mahoney used two future expectation variables (expected pay increase and expected change in the cost of living), and they were utilized in the present study as well. Estimated months until next raise was also measured in the present study, and it was hypothesized to have a positive relationship with JND raise. Finally, the present study incorporated self-report likelihoods of leaving the company and of difficulty finding a new job. It was felt that the first of these two indicators of "marketability" would correlate positively with JND raise and that the second would correlate negatively.

The second objective of the present study was to investigate the "value of a raise" variable that Krefting and Mahoney hypothesized would moderate the relationship between JND raise and the independent variables. As noted, they examined this hypothesis, but unfortunately they utilized inappropriate statistical procedures. Moderated regression is generally accepted as the most appropriate means of testing for the presence of a moderator variable,[10] and it was thus used in the present study.

Method

Respondents ($n = 76$) were full-time nonunion construction crew employees of a medium size manufacturing and construction firm located in the midwest. The employees worked in small groups at numerous geographically dispersed locations. All but one of the respondents were male, and 55 percent of them were married. The average age and tenure with the company were 29.5 and 8.3 years, respectively. On average, respondents had slightly less education than a vocational or high school graduate.

Questionnaires were distributed to crew members at work. They were instructed to complete them off-site and mail them directly to the authors. All responses were anonymous. Of the 125 questionnaires distributed, 76 usable questionnaires were received, for a response rate of 61 percent.

All measures were contained in the questionnaire. To measure JND raise, respondents were asked to indicate the smallest pay raise (cents/

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[9] See S. Zedeck, "Problems with the Use of 'Moderator' Variables," *Psychological Bulletin* 76 (1971), pp. 295-310.

[10] Zedeck (1971), cited at note 9.

hour) that would be just meaningful to them.

On the independent variable side, the first set of items pertained to the following personal characteristics—age, number of dependents, months of job and company tenure, and education level (seven gradations of level, with a "4" indicating some college exposure). The economic variables were current wage, own gross annual income, family gross annual income, percentage tax bracket (state and federal combined), size of last raise (cents/hour), and average work week (in hours).

The future expectations variables were size of next raise (cents/hour), months until next raise, expected percentage change in the cost of living over the next year, and the likelihoods of leaving the company and of having difficulty in obtaining a new job (both were measured on seven point scales ranging from "not at all likely" to "very likely").

The moderator variable (meaning of a pay increase) was measured as it was by Krefting and Mahoney. Specifically, respondents were asked to indicate which one of five reasons best indicated why a pay increase was important. Three of these (reward for past performance, shows improvement in my work, shows progress in my company or career) were considered reasons dealing with recognition, and the respondents indicating these reasons were placed in the "recognition" group. The other two reasons (helps me keep up with cost of living changes, helps improve my standard of living) dealt with the value of added money, and the respondents indicating these were placed in the "money" group. There were 17 and 59 individuals in the recognition and money groups, respectively.

In the few instances where there were missing data, mean values were inserted in their place. Zero-order correlations between the independent variables and JND raise, as well as means and standard deviations, were first computed. JND raise was regressed on the independent variables using stepwise multiple regression with a .05 level of significance for inclusion of a variable in the equation.

Moderated regression[11] was then used to test for the hypothesized moderator effect. Basically, this compares the R^2 obtained from an equation containing all of the independent variables and the moderator variable with the R^2 obtained from an equation containing the independent variables, the moderator, and interactions between the moderator and each independent variable. If the latter R^2 is significantly greater than the former R^2, this is empirical support for the presence of a moderator variable.

Results

The mean JND raise was 57 cents/hour (SD = 53 cents/hour), which was 10.9 percent of current average wage. The means, standard deviations, and zero-order correlations with JND raise for the independent variables are shown in the table. Inspection of the table indicates that directional hypotheses were confirmed in 11 of 16 instances. Four significant ($p < .05$) correlations were obtained, and all four were in the hypothesized direction. The highest significant correlation involved current wage, followed (in order) by expected size of next raise, average weekly hours, and difficulty in finding another job.

Two variables entered the stepwise regression equations; the first was current wage (partial $r = .44$, $p < .01$), followed by average weekly hours (partial $r = .23$, $p < .05$). Together, these two variables yielded a corrected $R^2 = .25$.

[11] Zedeck (1971).

TABLE
INDEPENDENT VARIABLE MEANS, STANDARD DEVIATIONS, AND CORRELATIONS WITH JND RAISE

Independent Variable	Mean	SD	Zero Order Correlation with JND
Personal Characteristics:			
Age	29.50	10.18	—.18
Education Level	2.86	.89	.19
Number of Dependents	1.96	2.02	.08
Months of Job Tenure	36.92	31.39	—.02
Months of Company Tenure	49.47	36.17	—.02
Economic Factors:			
Current Wage	5.22	1.74	.47**
Average Work Week (Hours)	57.38	13.04	.31**
Size of Last Raise	.24	.14	.17
Own Gross Income	12,005.00	5237.10	.18
Family Gross Income	13,712.00	6296.90	.11
Percentage Tax Bracket	22.75	7.35	—.17
Future Expectations:			
Size of Next Raise	.35	.27	.36**
Months Until Next Raise	7.34	15.72	—.04
Expected (%) Change in COL	17.87	12.57	.08
Likelihood of Leaving Company	3.61	1.88	.15
Difficulty Obtaining New Job	2.89	2.15	—.27*

* $p < .05$
** $p < .01$

Results of the moderator variable analysis indicated no significant ($p < .05$) moderator effect for the meaning of a pay increase. That is, inclusion of the interaction terms between the money-recognition variable and the independent variables did not lead to a significantly greater R^2 than that obtained from a straight additive model ($F_{16, 42} = .65$, n.s.).

Discussion

Results of the zero-order correlation analysis were mixed. Although directional hypotheses were confirmed in 11 of 16 instances, only four of the 12 correlations were significant. Consistent with past evidence, current pay and expected size of next raise were both significantly related to JND raise.

Two other variables, investigated for the first time in the present study, were also significantly related to JND raise. The finding for average weekly work hours is consistent with equity theory, which would predict that, the greater the input (hours), the higher the output (raise) must be in order to maintain equality of the pay/input

ratio. It is also consistent with economists' views of the income-leisure tradeoff. The finding regarding difficulty in obtaining another job suggests that perceptions of one's "marketability" may also shape JND raise perceptions, with people who view themselves as highly marketable requiring a higher JND raise than those who do not feel as marketable.

Many of the hypothesized relationships were not statistically significant, and five were not even in the hypothesized direction. It should be noted that many new variables were included in the present study and, as with all exploratory research, these results may well be sample specific. On the other hand, Krefting and Mahoney did find that expected cost of living changes were significantly related to JND raise, while surprisingly no such relationship was found in the present study. In addition to the usual methodological explanations (e.g., unreliability of measurement), a more conceptual explanation for this is that macroeconomic events such as economywide increases in the cost of living have little, if any, impact on pay raise evaluations for these employees. Instead, more microeconomic variables may be the primary source of influence on JND raise. This is certainly consistent with the four variables found to be significantly related to JND raise in the present study.

The regression results indicate that a sizable percentage of variance in JND raise (25 percent) was explained. This is quite comparable to the variance explained by Krefting and Mahoney. While the entry of more variables into the equation might have been expected, a somewhat small sample coupled with collinearity among the independent variables probably explains this.

The results of the current study provide no support for the meaning of a pay increase moderator variable proposed by Krefting and Mahoney. One tenable explanation for this is that in fact no such moderator exists. As argued by Schmidt and Hunter,[12] "many proposed moderators in personnel psychology are probably illusory," and the moderator in the present study may be one example of this. On the other hand, Schmidt and Hunter also noted that reasonably large samples are needed in order to test for moderator effects with statistical power, and the sample size in the present study may have served to constrain statistical power.

Finally, the authors would like to make three suggestions for future research on JND raises. First, the present results suggest that more attention be paid to microeconomic variables in future studies. Second, these efforts should be accompanied by more study of the reasons underlying, or contributing to, what people regard as a JND raise. Essentially, this will probably require the use of open-ended questioning and content analysis. By doing this, we hope to be able to construct better theoretical formulations for subsequent investigation. Third, while there may indeed be moderator variables involved in JND raise evaluations, it is our contention that at least for the near future we should attempt to "keep it simple" by concentrating on the identification of significant independent, as opposed to moderator, variables. **[The End]**

[12] F. L. Schmidt and J. E. Hunter, "Moderator Research and the Law of Small Numbers," *Personnel Psychology* 31 (1978), pp. 215-232 (p. 215).

Free Agency and Salary Determination In Baseball

By JAMES R. CHELIUS and JAMES B. DWORKIN

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IN THE EARLY DAYS of baseball, players were free to switch teams after the completion of each and every season, engaging in a process which came to be referred to as "revolving." Thus, a player could seek out that team which was willing to pay the highest price for his services. Incidentally, no compensation was due to the team that lost the services of such a free agent player. While the players were quite happy with the above system, for obvious reasons the team owners wanted to curb this freedom of movement and the associated higher salaries that were demanded *by* and paid *to* those mobile stars.

The owners' actions were essentially threefold. First, as early as the year 1859, a group of amateur clubs known as the National Association of Baseball Players promulgated a rule banning a player from participating in a game until he had been a member of his new team for a specified period of time, usually thirty days.[1] Second, some twenty years later, a group of National League officials met secretly in Buffalo, New York, to establish the game's first "reserve rule." Under this new rule, each team was allowed to protect *five* players for the upcoming season. This rule worked so well that the owners' third step was to expand this ruling to cover every player on every team by the year 1890. In essence, players were bound to the team with which they had signed their initial contract until such time as they were traded or released.

While there were several individual player attempts (and unionization movements) aimed at challenging this reserve system, the players remained essentially powerless until the year 1975. It was in December of this year that arbitrator Peter Seitz ruled that baseball's reserve clause allowed for only a one-year option on a player's services instead of the so-called perpetual option which the club owners had possessed for almost ninety years.[2]

This arbitration award was handed down at the same time that players and owners were involved in negotiations over a new collective bargaining contract. While the players had won the right to become free agents one year after their contracts had expired, both parties sincerely believed that some sort of a player reservation system was necessary in the game of baseball. The stage was set for a compromise that would preserve the essence of the reservation system while allowing for freer movement of players from team to team.

[1] Much of the material presented in this section is from James B. Dworkin, *Owners versus Players: Baseball and Collective Bargaining* (Boston: Auburn House, 1981). For a fuller treatment of these issues, the interested reader can consult this text.

[2] *Ibid.*, pp. 72-82.

That compromise came in the form of a *six*-year reservation system which was written into the 1976 *Basic Agreement* to become effective for the 1977 championship season.[3] Under the agreement, clubs possessed the rights to a player's services for six years, after which time a player *could* enter his name in the reentry draft and become a free agent, eligible to negotiate a new contract with one of several clubs. The 1976 agreement provided minimal compensation to teams losing free agents through this process in the form of one amateur draft choice from the June Amateur Player Draft.

The stage was now set for the first crop of free agents to appear in baseball's labor market for nearly ninety years. In the next section of this paper, we turn our attention to the impacts that this free agency system has had on player salaries.

Theory and Hypotheses

There have been several attempts at modelling the salary determination process in professional baseball in the literature, most notably the works of Scully, Pascal and Rapping, and Chelius and Dworkin.[4] These models have been reviewed elsewhere and need not be repeated in detail here. It should be sufficient to note that the models of Scully and Pascal and Rapping rather arbitrarily employ several player and team performance variables to explain player salaries. The model of Chelius and Dworkin addresses this problem of variable inclusion by employing a principal components analysis to determine the underlying attributes in the salary-determination process. While each of the above models could be used to test the major hypotheses of this paper, the Chelius and Dworkin model was chosen based on the situation described above.[5]

The baseball players' labor market prior to free agency can be described as monopsonistic in nature. That is, each club possessed a perpetual option for the services of every one of its players.

Players did not have to be paid according to their marginal revenue products and, in fact, the studies cited above have shown that player salaries were lower than they would have been under competitive labor market conditions. Each owner, in determining salary payments, would discriminate among similarly performing players based upon these players' opportunity wages, or their nonbaseball alternatives. Players with greater nonbaseball alternatives would generally receive higher wages.

However, owners could not perfectly discriminate among players based on the imperfect state of their knowledge regarding player opportunity wages. Additionally, the morale factor would argue for a system that would tie pay to performance. Thus, prior to free

[3] For terms of the compromise agreement, see Dworkin, pp. 82-89, 105-112.

[4] Gerald Scully, "Pay and Performance in Major League Baseball," *American Economic Review* 64 (December 1974), pp. 915-930; Anthony Pascal and Leonard Rapping, "The Economics of Racial Discrimination in Organized Baseball," *Racial Discrimination in Economic Life*, ed. A. Pascal (Lexington, Mass.: D. C. Heath, 1972); and James Chelius and James Dworkin, "An Economic Analysis of Final-Offer Arbitration as a Conflict Resolution Device," *Journal of Conflict Resolution* 24 (1980), pp. 293-310. An earlier attempt at modeling the baseball salary-determination process can be found in James Scoville, "Labor Relations in Sports," *Government and the Sports Business*, ed. R. Noll (Washington, D. C.: Brookings Institution, 1974).

[5] For a test of the impact of salary arbitration on salary determination where all three models were estimated, see Chelius and Dworkin, "Arbitration and Salary Determination in Baseball," *Proceedings of the 33rd Annual Meeting, Industrial Relations Research Association*, Denver, 1980, pp. 105-112.

agency, baseball players were subject to monopsonistic exploitation on the part of their club owners.

The labor market monopsony just described, when combined with the owners' product market monopoly powers, enabled the clubs to generate a set of economic rents which the players were eager to get at through the process of collective bargaining. One such successful attempt, the adoption of final offer salary arbitration, has been studied in some detail.[6] The results of this study were that the availability of arbitration led to higher average player salaries, lower team profits, and less discrimination in wages among equally performing players.

In a like manner, the adoption of the six-year free agency system in 1976 could reasonably be expected to force club owners to share a portion of their economic rents with the players. Two specific hypotheses flowing from this argument can be tested empirically.[7]

One, the total wage bill in baseball after free agency should increase. With the total number of players held constant, the average wage of baseball players should increase with the availability of free agency. Two, individual players who were eligible for and used the free agency route negotiated in the 1976 *Basic Agreement* should receive higher salaries based on their greater bargaining power from being able to negotiate with several teams interested in acquiring their services.

Formal tests of the above hypotheses are of interest for several reasons. First, they will enable us to investigate whether these newly won player free agency rights did force the clubs to share more of their economic rents with their ballplayer employees. This is especially interesting for the year 1977 because salary arbitration was unavailable that year. Thus, the only major change in the game's employment relationships during the time period of our study was the adoption of free agency. Second, although most people would agree that player salaries in baseball have increased since the adoption of free agency, no one has provided a precise estimate of the magnitude of that increase. After controlling for other factors related to the salary determination process, we will be able to specify such an estimate.

Finally, in light of the recent bargaining that has just been completed between the owners and the players over the issue of free agent compensation, it will be useful to have a baseline estimate for the impact of free agency on salaries. This estimate can then be used as a comparison to future estimates based on the workings of the most recently negotiated free agency procedure.

Empirical Results

One way to look at the impact of the free agency system on player salaries is to focus on average baseball salaries over time. Table 1 presents data on average baseball salaries over a twelve-year period. It is evident from this time series of data that average, nominal baseball salaries jumped $24,848 in the initial year of free agency. This increase in 1977 was followed by other large nominal increases in subsequent years.

Also note the large increase in real salaries in the first year of free agency. While the data in Table 1 fail to control for other factors which might arguably have been related to this increase in average salaries, one is left with the strong impression that the advent

[6] Chelius and Dworkin, "An Economic Analysis," cited at note 4, pp. 301-309.

[7] Data unavailability precludes the testing of several other hypotheses regarding the decreased profitability of the game after free agency, etc.

of free agency was largely responsible for these gains.

A much clearer picture of the effects of free agency can be gleaned by looking at the impact of actually using the system upon player salaries. In order to accomplish this end, the Chelius-Dworkin model referred to above was employed. As there is no consensus as to which variables best measure a player's performance, and in order to avoid selection bias, indices of performance were created through principal components analysis.

Salary data were available on 248 professional baseball players from both leagues as of opening day 1977.[8] Since there were only 26 pitchers in the sample, it was decided to run only the non-pitchers (hitters) model. This brought the sample size down to a total of 212 players. Four other players had seen very minimal playing time during the previous season and thus they were also dropped from the sample, leaving us with a total of 208 observations.

TABLE 1

AVERAGE MAJOR LEAGUE BASEBALL PLAYER SALARIES, 1969 - 1980

Year	Nominal Salary	Real Salary
1969	$ 24,909	$24,909
1970	29,303	27,665
1971	31,543	28,552
1972	34,892	30,575
1973	37,606	31,023
1974	40,956	30,446
1975	44,676	30,430
1976	51,501	33,166
*1977	76,349	46,188
1978	99,876	56,123
1979	113,558	57,354
1980	130,592	58,099

* First year of Free Agency

Source: Major League Baseball Players Association and various issues of *The Sporting News.* Also see *Sports Illustrated,* January 5, 1981.
1969 = 100.

As noted earlier, many different variables had been used to explain player productivity in baseball. With no guiding theory to expedite the variable selection processes, Chelius and Dworkin chose to use a broad range of commonly used measures in a principal components analysis framework.[9] Table 2 presents the Varimax Rotated Factor Matrices resulting from running a principal components analysis on the performance measures for the hitters in our sample.[10] All components with eigenvalues greater than 1.0 were extracted.

[8] The data are from the *Chicago Tribune,* April 10, 1977.

[9] See Chelius and Dworkin, "An Economic Analysis," pp. 307-310.

[10] Performance data are calculated from *The Baseball Encyclopedia* (New York: Macmillan, 1979).

TABLE 2

VARIMAX ROTATED FACTOR MATRICES

Performance Measures	Factor 1 (Production)	Factor 2 (Power)	Factor 3 (Seniority)
LSA	.382	.762	.128
HR	.145	.893	.150
LAHR	.085	.885	.323
LAB	.533	.287	.479
AB	.674	.281	.306
M	.106	.267	.898
Y	.060	.138	.922
LBA	.871	.188	.040
BA	.889	.049	-.023
Eigenvalue	4.32	1.61	1.12
Variance Explained	48.0	17.9	12.5
Cumulative Variance Explained	48.0	65.9	78.4

Source: The Baseball Encyclopedia. The acronyms in Table 2 stand for the following variable used in the analysis: lifetime slugging average (LSA), home runs in the previous season (HR), lifetime average home runs per season (LAHR), lifetime average at bats per season (LAB), at bats in the previous season (AB), years in majors (M), age of player (Y), lifetime batting average (LBA), batting average in the previous season (BA).

It can be seen that, for the hitters in our sample, the thirteen performance measures employed are largely explained by (broken down into) three factors. These factors accounted for 78.4 percent of the total variance in the nine performance measures. Factor 1 loaded most heavily on LBA, BA, AB, and LAB and was labelled *Production.* Factor 2 loaded most heavily on LSA, HR, and LAHR and was labelled *Power.* Factor 3 loaded most heavily on M and Y and was termed *Seniority.*

The factor score coefficients obtained from this principal components analysis

TABLE 3

FACTOR SCORE COEFFICIENTS

Performance Measures	Production	Power	Seniority
LSA	.039	.357	-.141
HR	-.108	.477	-.142
LAHR	-.150	.440	-.028
LAB	.182	-.049	.189
AB	.267	-.036	.072
M	-.063	-.086	.489
Y	-.063	-.161	.540
LBA	.404	-.063	-.086
BA	.445	-.134	-.092

See Table 2 for the definitions of the performance variables used.

were then employed to build composite indices of Production, Power, and Seniority. Table 3 presents these factor score coefficients. For example, an index representing Factor 1 (Production) is computed as: Index $= b_1X_1 + b_2X_2 + b_m X_m$ where b_i represents the relevant factor score coefficient and where X_i represents the standardized value of the performance measure [$(LSA - \overline{LSA}) / \sigma_{LSA}$, etc.].

In order to test our second hypothesis regarding the impact of free agency on individual player salaries, a regression analysis was employed. Since no one set of variables was compelling based on past theoretical or empirical work, the indices of performance created through the principal components analysis discussed above were used. The model estimated was:

Salary Hitters = $\delta_0 + \delta_1$ Production + δ_2 Power + δ_3 Seniority + δ_4 Free Agent + Error.

The results of this regression analysis of salary and performance are presented in Table 4. As can be seen in the table, the variables employed in the analysis accounted for 53 percent of the total variation in the dependent variable, hitter salaries.

Of primary concern to this paper is the coefficient on *Free Agent,* which was estimated to be $40,505 and which was statistically significant at the .01 level.[11] The interpretation of this coefficient is that being a free agent after the 1976 season was worth a little over $40,000 to a player, ceteris paribus. This is strong evidence in support of our second hypothesis that individual salaries of free agents would increase due to the greater bargaining power inherent in the right to negotiate with as many as fourteen teams.

Conclusion

After many long years of virtual indentured servitude, baseball players finally won the right to become free agents through the process of collective bargaining. The first wave of free agents appeared on baseball's labor market after the completion of the 1976 season. Our predictions were that average salaries of baseball players would increase after free agency and that individual players employing the free agency mechanism would enjoy higher salaries based on their enhanced bargaining power. Both of our hypotheses were supported through

TABLE 4

REGRESSION MODEL OF SALARY AND PERFORMANCE

Variable	Coefficient	F Statistic
Constant	95,053*	680
Production	30,480*	75
Power	31,099*	75.5
Seniority	26,095*	52.7
Free Agent	40,505*	7.7

* Statistically significant at the .01 level.
N = 208
Overall F = 58.7
$\overline{R}^2 = .527$

[11] The variable Free Agent was a dummy variable coded 1 if a player was a free agent in 1976. In this first year of free agency, a total of 25 players participated in the open market. Our sample of 208 hitters included 14 of these free-agent ballplayers.

empirical evidence with respect to the year 1977, the first year after the adoption of the six-year free agency system.

An obvious extension of this paper would be to derive similar estimates of the impact of free agency on player salaries for years subsequent to 1977. It would be interesting to see if our findings of an impact on salaries due to both the *availability* and *actual usage* of free agency hold up in subsequent years.

Particularly fascinating would be an attempt to assess the accuracy of the predictions of the two chief negotiators in baseball's recent conflict over free agent compensation which led to a 58-day strike and the cancellation of 714 regularly scheduled games during the 1981 season. The eventual settlement provided for additional compensation for teams losing free agents above the amateur draft choice agreed to in 1976.

As is common in labor negotiations featuring a protracted strike, both sides claimed victory. Ray Grebey, baseball's chief negotiator and head of the Player Relations Committee, recently noted, "We set out to get additional compensation and we got more compensation than we set out to get."[12] Marvin Miller, executive director of the Major League Baseball Players Association, commenting on the owners' strategy during the negotiations, noted, "It did not succeed. The players could not be broken."[13]

However, Miller also commented, "I believe this was simply the first in a series of attempts to cut player rights, to be followed, if successful, in 1983 with an attack on basic free agency and salary arbitration and perhaps other rights."[14] After we have witnessed several more years of salary negotiations under this newly bargained free agent/compensation system, it will be possible to evaluate the accuracy of the above statements using a framework similar to that proposed and employed in this paper.

[The End]

A Discussion

By LAMONT E. STALLWORTH

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ISSUES OF WAGES and salaries are important topics, particularly given our current difficult and inflationary times. In such an uncertain economic environment, employers are faced with the question of what constitutes a fair wage and salary increase. It should be acceptable to the employee and yet not be inflationary. Of course, any proposed increase should be within the employer's ability to pay.

In the two papers, "Free Agency and Salary Determination in Baseball" and "Correlates of Just Noticeable Differences in Pay Increases," the authors have attempted to analyze factors that might determine an appropriate salary and wage. Although they examine two different industries, baseball and nonunionized construction workers, there are several factors common to both industries, particularly the "marketability" factor.

The paper by Dworkin and Chelius seems to support their hypotheses that the availability of free agents increased

[12] "Both Sides Claim Victory in Baseball Strike," *Indianapolis Star,* August 9, 1981.

[13] *Ibid.*

[14] *Ibid.*

the average salary of baseball players and that the individual salaries of free agents increased due to the greater bargaining power inherent in the right to negotiate. These conclusions support what one might have assumed where the dynamics of free market economics were allowed to exist. This would be particularly true in a highly skilled industry such as professional sports.

The authors indicate that any future research would employ more of a time-series approach. I agree that this would be appropriate, but I would hasten to add that any future research should consider the sample of baseball players to be analyzed; for example, there should be some assurance that the sample is not biased.

Second, I would suggest that any future behavioral research should also consider the employer's "ability to pay" in the equation. This is particularly the case given the apparently rapid transition to "sports pay television." Absent an employer's ability to pay, it is doubtful whether free agency would have as great an effect. Lastly, of course, some measure of the labor relations environment must be considered. On this score, I would be particularly interested in learning of the possible influence of the threat of work stoppages and actual work stoppages. In sum, the authors employed an interesting approach and have offered a worthwhile foundation for future research in this area.

I found the paper entitled "Correlates of Just Noticeable Differences in Pay Increases" particularly interesting and noteworthy for what the authors attempted to do. That is, they essentially attempted to apply Weber's Law* to the just-noticeable-differences area. Their findings that such factors as current pay, expected pay raises, hours of work per week, and marketability support the findings of other researchers and are what might have been expected.

It is worth noting that they found that such "macroeconomic events" as the expected cost of living changes were not significantly related to JND raises. On the other hand, "microeconomic events" appeared to be the primary source of influence relative to JND raises. As the authors suggest, this may be due to the relatively small sample or to another factor. Nevertheless, a larger sample of respondents might have yielded different results concerning possible moderator variables.

I also would be particularly interested in knowing whether different factors explain JND for the "money group" vis-à-vis the "recognition group." It is presumed that the authors did not run separate regression analysis on these two groups separately because of the small sample size (17 respondents in the recognition group and 59 in the money group).

It is suggested that any future research be conducted along the lines of, for example, a laboratory experiment or simulation in order to determine an employee's perception of a JND. Among other things, such a technique might approach or simulate the effects of a real pay raise. Also, this "laboratory" simulation approach would afford the researchers the opportunity to gather data from a larger and more diverse population, and it would allow them to operationalize the term JND.

* Investigations into observable differences were conducted in the early nineteenth century by Ernst H. Weber (1795-1878) which resulted in what became known as Weber's Law: "The increase of stimulus necessary to produce an increase in sensation in any sense is not an absolute quantity but depends on the proportion which the increase bears to immediate preceding stimulus." See *Encyclopedia Britannica: Micropaedia*, Vol. X, 15th ed. (Chicago: Encyclopedia Britannica, 1974), p. 593.

As stated earlier, behavioral research in the JND area is particularly difficult. The authors of this paper have made a worthwhile step in applying behavioral research methods in this area.

[The End]

A Discussion

By MARK L. KAHN

Wayne State University

THE CONTRIBUTED PAPERS selected for this program represent two extremes of the wage-change continuum. They are: the highly subjective notion of the kind of minimal improvement that is "just noticeable" and the presumably far more gratifying quantum leap based on a dramatic structural change in employment—in this case, the impact in 1977 of free agency in major league baseball.

The factors involved in how workers perceive a pay change constitute a worthy object of study. I am concerned, however, that the concept of the "just noticeable difference" (JND) is simply too amorphous to serve as a basis for such analysis. Remember: the respondents were simply asked "to indicate the smallest pay raise (cents/hour) that would be just meaningful to them." Meaningful in relation to what? To keep the respondent from looking for another job? To improve his or her standard of living? To serve as an indicator of employer approval? To be fair in relation to one's peers? To be reasonable in relation to what the respondent believes the employer can afford?

I suggest that a respondent may have a variety of subjective JNDs for a variety of considerations and that a single cents-per-hour JND response produces a package of heterogeneous data that is not fit for reliable statistical analysis. Ask yourself about this: what is your JND today?

In any event, hypothetical questions—even if unambiguous — elicit questional responses. Would it not be more insightful to ask a group of workers who have just received pay rate adjustments how they evaluate them and why?

It is not clear to me why the anticipated direction of correlation of JND with each of the independent variables was a "hypothesis" rather than a "hunch," since we are not given a theoretical basis for the expected outcome. All that the statistically significant results indicate to me is that JND tends to be higher for workers who have higher incomes (either because their hourly rates are higher or because they work more hours, or both) and for workers who expect higher pay increases. (Does this mean that one might fail to "notice" a smaller pay increase than was expected?) On the other hand, if a respondent thought that a new job would be difficult to get, he believed that a smaller pay adjustment would be "just noticed." My hypothesis is that the independent variables listed may have a closer correlation with how wage changes are perceived than this study, because of its focus on the spongy JND concept, could identify.

In regard to the authors' suggestions for future research, I suggest that pursuit of the JND will be less helpful to the development of useful theoretical formulations than would open-ended question-

ing and content analysis concerning reactions to pay changes actually obtained.

Moving now from nonunion construction workers to nonpitching major league unionized ballplayers, I am sure that none of us is caught off base by the conclusion that it was worth a lot of money to be a free agent in 1977. What the authors have given us is their measurement of the effect of free agency on those fourteen of the 208 major league hitters in the sample: more than $43,000 in 1977.

I think the authors should be commended for their effort to isolate the impact of free agency. The more appropriate dependent variable, of course, would have been the change in salary from 1976 to 1977, the year of free agency adoption, rather than the salary level in 1977. It is unfortunate that these data were not available.

It should be clear—and this is not a criticism, but only an observation—that all of the players' salaries in these data were salaries paid under the free agency (after a six-year reserve) system. In other words, the study discloses what it was worth to have been a free agent in 1977 under that free agent system, but it cannot disclose what any ballplayer's salary would have been in 1977 if free agency had not been instituted. It would clearly be erroneous to assume that free agency did not affect the pay of those who were not free agents in 1977.

The study may have been biased by the omission of variables apart from each player's production, power, and seniority, e.g., team-specific variables (league standing, profitability), city-specific variables (attendance, gate receipts), length of service with his particular team, etc. It would be useful to determine whether major league ballplayers now act like purely economic men within their peculiar universe—perfectly mobile upon becoming free agents and moving instantly in response to any proferred earnings improvement or whether there still exists a vestige of home-team loyalty or other sentimental values among the players which require a substantial monetary differential for their sacrifice. **[The End]**

SESSION VII

Public Sector Issues: Contributed Papers

Limitations on Final Offer Proposals: "Evaporation"? Delay?

By SUSAN J. M. BAUMAN

Thomas, Parsons, Schaefer & Bauman, Madison, Wisconsin

THE WISCONSIN Municipal Employment Relations Act (MERA) was amended in 1977 to provide for final and binding arbitration of contract disputes between municipal employees and employers. Originally adopted for a three-year trial period, the amendments were extended in 1981 for an additional six-year period.

The amendments, frequently referred to as SB-15,[1] provide that, absent an agreement to utilize an alternative impasse procedure, bargaining impasses shall be resolved through utilization of the mediation-arbitration process. In its final stage, med-arb provides that a third-party neutral shall select the final offer of one of the parties to be incorporated into the collective bargaining agreement. Proposals includable in final offers are statutorily limited to mandatory subjects of bargaining unless both parties are agreeable to the inclusion of specific permissive subjects. In the absence of a timely objection to an arguably permissive proposal, it is includable in the final offers considered by the arbitrator.

In the event of a dispute as to the bargaining duty associated with a particular clause or proposal, MERA provides for suspension of the med-arb process until such time as the Wisconsin Employment Relations Commission has issued a declaratory ruling (DR) defining the bargaining nature of the challenged language. The limitation on language includable in final offers has two possible implications for the outcome of the bargaining process: "evaporation" of existing permissive clauses from collective bargaining agreements and delay of the final resolution of the underlying bargaining dispute.

The adoption of SB-15 did not make any substantive changes in the types of proposals which may be negotiated. SB-15 allows for suspension of the med-arb process until a DR has been issued by the WERC. Since 1971, MERA has provided that disputes as to the duty

[1] 1977 Wis. Laws, Ch. 178.

to bargain on any subject are to be resolved by the WERC on a petition for a DR which shall be issued within 15 days of submission.[2]

In both the private and public sectors, classification of a particular subject of bargaining as mandatory, permissive, or prohibited takes on significance at the point of impasse in negotiations. In *NLRB v. Wooster Division of Borg-Warner Corp.*,[3] the United States Supreme Court adopted the trichotomy of bargaining duties initially formulated by the NLRB. It held that permissive subjects fall outside the mandatory category of "wages, hours, and other terms and conditions of employment." Although such topics may be placed on the bargaining table for voluntary bargaining and agreement, the other party is not required to bargain with respect to them. Insistence on voluntary subjects as a condition to the execution of a contract is an unfair labor practice.[4]

It is lawful, on the other hand, "to insist upon matters within the scope of mandatory bargaining."[5] This means that, in the event of an impasse in bargaining, the private sector employer may unilaterally impose wages, hours, and conditions of employment on the members of the bargaining unit, provided that they were previously presented to the union during the course of good faith bargaining.

The bargaining duty with respect to a particular matter is not altered by the fact of prior inclusion in a collective bargaining agreement. In *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*,[6] the Supreme Court stated that "[b]y once bargaining and agreeing on a permissive subject the parties . . . do not make the subject a topic of future bargaining."

Public sector labor law in Wisconsin closely tracks developments in the private sector. In *Beloit Education Association v. WERC*,[7] the Wisconsin court affirmed a WERC decision which categorized bargaining subjects as mandatory, permissive, and prohibited. It is a prohibited practice for a municipal employer or labor organization to refuse to bargain with respect to a mandatory subject.[8]

The duty to bargain, however, does not carry with it the duty to make concession or reach agreement on a proposal.[9] In the event that bargaining on a mandatory subject results in impasse rather than agreement, a public sector employer may unilaterally implement the proposal, if it has been previously presented to the union in bargaining.[10]

Inclusion of a permissive subject in a collective bargaining agreement does not change the bargaining duty with respect to that subject. In *Greenfield School District No. 6*,[11] the WERC expressly rejected the argument that an employer, "by having included permissive subjects in the expired collective bargaining agreement, must bargain

[2] 1971 Wis. Laws, Ch. 124, codified as Wis. Stat. § 111.70(4)(b), "Date of submission" is: "[t]he date on which a hearing is closed, the date on which the last brief is received, or the date on which the last document necessary to the decision of the case is received, whichever is later, shall be regarded as the date of submission of the case." Wis. Adm. Code ERB 18.09(1).

[3] 356 US 342 (US SCt, 1958), 34 LC ¶ 71,492.

[4] Labor Management Relations Act §§ 8(a)(5) and 8(b)(3).

[5] *NLRB v. Borg-Warner*, cited at note 3.

[6] 404 US 157 (US SCt, 1971), 66 LC ¶ 12,254.

[7] 73 Wis 2d 43, 242 NW2d 321 (Wis Cir Ct, 1975), 1 PBC ¶ 10,014.

[8] Wis. Stat. §§ 111.70(3)(a)4, 111.70(3)(b)(3) (1977).

[9] Wis. Stat. § 111.70(1)(d) (1977).

[10] See *Winter Jt. School District*, WERC Dec. No. 14482-B (1977), aff'd by Commission, WERC Dec. No. 14482-C (1977).

[11] WERC Dec. No. 14026-B (1977).

over such subjects in the future as having become mandatory subjects of bargaining."

The WERC has held that the scope of bargaining under med-arb does not differ from the scope of bargaining prior to the enactment of SB-15.[12] However, the limitation of final offers to mandatory and agreed-upon permissive subjects has resulted in increased significance to the labelling of a proposal as a mandatory subject of bargaining.

Although MERA provides that the WERC will issue its decision on scope of bargaining petitions for DRs within 15 days of submission, it is well-known that this time limit is not often met.[13] A party can succeed in extending the time period for resolution of a bargaining dispute by negotiating to impasse and then challenging the bargaining duty associated with a particular subject. This results in suspension of the med-arb process and delay of final resolution of the contract dispute.

Research

Information on evaporation and delay was gathered from several sources. Most was obtained from the statistics books, docket sheets, and files of the WERC. Additional information was obtained by mailing or telephoning inquiries to the employer, union, or both parties involved in a particular dispute.

Petitions for DRs filed in the period from January 1, 1978, the effective date of SB-15, to June 30, 1980, were examined. Information was sought as to the nature of the petition for DR, the status of the challenged language, the final disposition of the challenged language, and the amount of time elapsed in the various periods between filing for med-arb, filing for a DR, issuance of a DR or withdrawal of the DR petition, and contract settlement. Where this information was not ascertainable from the WERC, contacts were made with representatives of the union or the employer. In considering if SB-15 caused delay in the bargaining process, it was not possible to control for delays caused by administrative processes such as the WERC's 100-mile rule.[14]

Finally, labor and management representatives receiving the mailed questionnaire or interviewed by telephone were asked to make any general comments, observations, or suggestions on revising this aspect of Section 111.70 and/or its effects on collective bargaining.

Results

From January 1, 1978 to June 30, 1980, 68 petitions for DRs were filed with the WERC. Fifty-four of these sought scope of bargaining determinations. Of these, only 23 resulted in rulings (see table).

The challenged language was existing contract language in 35 cases and involved new proposals in 26 instances. In 28 situations the language, in some form, appears in the successor contract. In 17 cases, the DR petition was withdrawn after the challenged language was modified, most frequently by rewriting as "impact language." In four cases the language was withdrawn in response to the challenge. In only a very small num-

[12] *Sheboygan County Handicapped Children's Education Board*, WERC Dec. No. 16843 (1979).

[13] In 1978, DR proceedings took an average of 98 days and in 1979 an average of 129 days from date of filing to decision. "The Effect of Senate Bill 15 Amendments to the Municipal Employment Relations Act," a Study by the Wisconsin Center for Public Policy submitted to the Wisconsin Legislative Council, December 1, 1980 (hereinafter WCPP Report), p. 154.

[14] The 100-mile rule restricts WERC staff from scheduling trips in excess of 100 miles unless more than one municipality can be served at the same time. This does not apply in the event of an emergency.

TABLE

SUMMARY OF FINDINGS

Petitions for DR Filed January 1, 1978 — June 30, 1980

Number of petitions filed	68
Number seeking scope of bargaining determination	54
Number involving scope of reopener clause	3
Number involving grievance considerations	2
Number unrelated to duty to bargain	9
Of the 54 petitions seeking scope of bargaining determination	
Filed by union	15
Filed by employer	39
Declaratory Ruling issued	23
Declaratory Ruling petition dismissed	28
Untimely filed	2
Settlement reached	5
Challenged language withdrawn	4
Challenged language modified	17
Petition Pending (as of May, 1981)	3
Context of Filing	
In med-arb process	42
In MIA process	1
Outside med-arb process	11
Contract settled with proviso to seek DR	4
In negotiations, before med-arb petition	6
After settlement, seeking duty during contract period	1
Classification of Challenged Language*	
New proposal	26
Existing language	35
Modification of existing language	9
Status of Language after DR issued*	
Language, in some form, is in contract	8
Language is not in contract	8
Contract settled with proviso to seek DR	4
Contract pending MIA decision	1
Status of Language after DR petition withdrawn or still pending*	
Language, in some form, is in contract	20
Language is not in contract	7
Agreed to abide by decision in another case	2
Unknown	2
Status of Language where contract was settled with proviso to seek DR	
Language found to be nonmandatory	3
Language found to be mandatory	1

* Because of multiple issues in some petitions, totals don't agree.

ber of cases did any existing contract language "evaporate."

Many practitioners, in responding to a request for general observations on the interplay of SB-15 and scope of bargaining DRs, mentioned the evaporation question. One said, "Language other than illegal language which parties in good faith bargain and include in a labor agreement should be mandatory subjects of bargaining for those parties." Another offered the observation that "if 'permissive' language is removed arbitrators often ignore this 'status quo' and look solely at comparable impact language. There is often little or none and the union ends up with a risky final offer. A classic Catch-22 example."

The results show that the average amount of time elapsed from filing of a petition for a DR to issuance thereof is 227 days (excluding those still pending in May 1981), whereas the average amount of time from the filing of a petition for a DR to its dismissal is 130 days. An average of 85 days are permitted to elapse from the filing of an MIA or med-arb petition to a petition for a DR; 140 days is the average time elapsed from issuance of a DR or withdrawal of a DR petition to settlement of the contract. In those cases where an arbitrator's award was issued, including consent awards, the average length of time from petition for med-arb to award was 344 days.[15]

The amount of time which elapses in the various stages of the process was mentioned by practitioners asked to comment: "[t]hreatened with delay," "a stalling tactic," and "long delay has caused us to agree to a less than acceptable interim agreement." Suggestions to eliminate the delay were offered. The deadline for filing a petition for a DR "should be moved to time when the party first sees the alleged permissive item and have time-line by which they must file the objection." "[M]ake the avenue to DR more stringent, less frivolous; make a party commit to a DR early in the bargaining process; enforce the law requiring DRs to issue in 15 days."

Discussion

Practitioners are concerned about "evaporation" of existing contract language and perceived delays in achieving contract resolution when the bargainability of a contract clause is challenged. The results of this research do not provide definitive information on either aspect of the practitioners' concerns.

Provisions of the law limiting final offers to mandatory subjects of bargaining are in keeping with case law in both public and private sector labor relations. Research has indicated that very few contractual provisions have "evaporated" as a result of this provision. Time delays are of concern to practitioners. Together with the ability to interrupt the med-arb process to obtain a DR, the limitation would appear to be in contradiction to the policy declaration of MERA which states that parties should have a fair and speedy means to effect a peaceful settlement of contract disputes.[16]

There are two intervals of time in the process during which much delay may occur. These are the periods between the filing of a petition to initiate med-arb and the filing of the petition for a DR (average of 85 calendar days), and the time from filing a petition for a DR to issuance of the ruling by the WERC (average of 227 calendar days). Even when the DR petition is dismissed, time elapses before the med-arb process can proceed.

Restrictions on final offers to mandatory subjects of bargaining may re-

[15] WCPP Report, p. 224.

[16] Wis. Stat. § 111.70(6).

sult in a loss of language which was the result of prior negotiations. A party which believes existing language to be nonmandatory and desires to purge such language from a successor contract should raise the issue and, if necessary, petition for a DR prior to commencement of bargaining for the successor contract. It should occur no later than at the exchange of proposals for the successor contract. Where a party proposes new language and a question arises as to the bargaining duty associated with it, the initiating party should attempt to rewrite it as "impact language," if appropriate, early in the bargaining process. The issue of bargainability should be brought to the table as early in the process as possible.

If the dispute cannot be resolved, the WERC should attempt to issue DRs within the statutory 15 days of submission. The WERC should give priority consideration to those petitions which are filed in connection with med-arb.

Research does not demonstrate that much permissive language has evaporated since the passage of SB-15. However, sufficient concern exists within the affected community that attempts were made in the 1981 legislature to categorize existing permissive language as mandatory for purposes of negotiating successor contracts. Time delays in achieving settlements are perceived as being excessive, in part due to the restrictions on inclusion of permissive language in final offers. Whether these concerns are valid or not, the perceived difficulties are among those which should be addressed during the six-year extension of the med-arb amendments to the Wisconsin Municipal Employment Relations Act. [The End]

Faculty Unionism and Bargaining Unit Attitudes and Perceptions: A Case Study Of Central Michigan University*

By SAHAB DAYAL

Central Michigan University

RECENT HISTORY of faculty unionism in the United States shows a steady upward movement both in membership figures and in the coverage of two-year and four-year colleges by the collective bargaining system. In 1970, for example, only 15 four-year institutions had been organized with a total representation of 5,626 faculty; by 1980, the figures had increased to 267 and 100,000, respectively.[1] Most of the recent research on faculty unionism has focused on the economic and administrative consequences of faculty collective bargaining, the impact on in-

* Professor Syed Shahabuddin, Information Systems and Analysis, Central Michigan University, assisted in the use of computer SPSS programs for processing the questionnaire data. His help is gratefully acknowledged.

[1] For details, see Joseph Garbarino, "Faculty Unionization: The Pre-*Yeshiva* Years, 1966-1979," *Industrial Relations* 19 (Spring 1980), p. 223, and the *Chronicle of Higher Education*, September 23, 1980, p. 6. According to the estimates prepared by the National Center for the Study of Collective Bargaining in Higher Education, New York, the coverage of faculty members in certified bargaining units as of January 1982 has increased sharply to 157,000 (*Chronicle of Higher Education*, April 28, 1982, p. 2). It should also be noted that four of five institutions subject to bargaining agency elections in fact receive certification.

stitutional governance, the contents of agreements, and the institutional process of negotiation itself.[2]

The faculty attitudes, perceptions, and opinions, however, have not received the attention they deserve. These are critical to an understanding of the bargaining environment as well as the outcome of the negotiation process in higher education. The central objective of this paper is to examine the unionized faculty's perceptions of bargaining goals and their attitudes and opinions of bargaining priorities, based on an empirical research undertaken recently at Central Michigan University.

A major part of our investigation was inspired by a recent study of hospital nurses by Allen Ponak. His central task was to test two interrelated assumptions: that unionized professionals not only consciously distinguish between professional and economic bargaining goals but also attach more importance to professional goals. Ponak's questionnaire survey of 1,000 nurses offered strong support to the validity of both the assumptions.[3]

In our study of CMU professors we addressed the proposition that, in an institution of higher education that provides faculty access to decisionmaking mechanisms in addition to collective bargaining, faculty union members' preoccupation with the professional issues will be much less intense than their concern for economic issues. We did not find this to be true.

Central Michigan University, a well-known state-supported institution, was ideally suited in all major respects to provide a valid setting for this study. Among four-year colleges it was a pioneering institution in accepting academic collective bargaining. The first agreement between the university and the faculty association was concluded in 1969 and, in the intervening years, four other contracts have been negotiated.[4] The current agreement, covering 1981-1984, was negotiated in the fall of 1981, following bargaining sessions spanning over seven months. The bargaining unit membership surveyed at that time was current in its concerns over bargaining goals and issues.

Another important element worth noting is the divided faculty sentiment over support for the faculty association: a significant proportion of the faculty, who have been openly opposed to the association, are now compelled by a court ruling to either embrace full membership or, at the very least, agree to pay an agency fee. This brought into sharp focus the need for some bargaining unit membership's awareness at the bargaining table. Finally, CMU is a large school with 16,500 students and a faculty bargaining unit made up of more than 500 members.

Research

In September of 1981, two weeks following the membership ratification of the new contract between the university and the faculty association, we surveyed the bargaining unit member-

[2] Some good examples are Margaret Chandler and Daniel Julius, *Faculty vs. Administration: Rights Issues in Academic Collective Bargaining,* and Bernard Mintz, *Living with Collective Bargaining: A Case Study of the City University of New York* ([both] New York: National Center for the Study of Collective Bargaining in Higher Education, 1979).

[3] Allen Ponak, "Unionized Professionals and the Scope of Bargaining: A Study of Nurses," *Industrial and Labor Relations Review* 34 (April 1981), pp. 396-407. See also, by the same author, "Registered Nurses and Collective Bargaining: An Analysis of Job-Related Goals," Ph.D. diss., University of Wisconsin-Madison, 1977.

[4] For details of events at Central Michigan University, see Neil Bucklew, "State College: Central Michigan," *Faculty Unions and Collective Bargaining* (San Francisco: Jossey-Bass, 1973).

ship. A questionnaire comprising 63 questions, with additional space for comments, was sent out to the entire bargaining unit (500 members). Of these, 249 were returned, yielding a response rate of 50 percent.

The questionnaire was designed to gather information on several fronts, including bargaining goal importance and priorities. Respondents were presented with an undifferentiated list of 10 professional goals and 10 economic goals (summarized in Table 1) and were asked to pick the five most important in each category and rate them on a five-point scale (1 for lowest and 5 for highest). They were further presented with an undifferentiated mix of 20 professional-economic bargaining goals and asked to choose only five, using the same five-point scale. Since the total quantity of data generated by this survey is too extensive for a single short paper, a selective presentation follows.

Among the significant characteristics of the respondents, the following are noteworthy. Sixty percent were under 45 years of age; the vast majority (80 percent) were male; and two-thirds held ranks of associate professor or below. The great majority (83 percent) were tenured; under two-thirds (61 percent) had annual salary levels of below $25,000; and 70 percent were members in good standing of the faculty association.

TABLE 1

PROFESSIONAL AND ECONOMIC BARGAINING GOALS OF CMU PROFESSORS AS LISTED IN QUESTIONNAIRE

Professional Goals

Faculty control/influence over class size
Faculty control/influence over course load
Sabbatical leave
Academic freedom
Standards and procedures for hiring faculty
Procedures for reappointment, tenure & promotion[a]
Criteria for reappointment, tenure & promotion[b]
Evaluation of teaching effectiveness
Procedures for handling faculty grievances
Funding of academic programs

Economic Goals

Annual salary
Cost of living adjustments
Summer pay
Sick leave
Sick leave buy-back (payment for unused sick leave)
Rate of pay for off-campus teaching (External Degree Division)
Faculty share in medical/health insurance premium
Retirement program/benefits
Dental insurance/benefits
Money for research & professional travel

[a] This refers to procedures such as where the review for reappointment begins (example: at the department level), duration of the review process, who notifies the faculty member of the outcome of the review, etc.

[b] The 1981-1984 agreement between the Central Michigan University (CMU) and the CMU faculty association lists four general criteria: teaching competence, scholarly and creative activity, professional growth, and university service.

Results

Faculty opinions on goal importance are summarized in Table 2. In the category of professional bargaining goals, CMU professors considered academic freedom to be most important with a mean of 4.23 on the five-point scale. About two-thirds of all respondents assigned the highest possible rating (5) to this goal. This was followed by criteria and procedures for reappointment, tenure, and promotion; the fourth and fifth places were taken by course load and academic program funding.

It is interesting to note that, although an overwhelming majority of the respondents are tenured, they are still concerned with reappointment and tenure procedures and criteria. Clearly these issues are perceived to be closely aligned to the need for maintaining professional standards. Perhaps it is also the product of the faculty perception that the faculty association needs to address more effectively the overall professional concerns including, of course, reappointment and tenure matters which establish the basis for attracting good new faculty: only 31 percent of the respondents thought the association was successful in bargaining on professional issues in 1981.

Salary, the standard money denominator, emerged as the number one economic bargaining goal. Sixty-eight percent of all respondents thought it was the most important bargaining issue (mean = 4.39). This finding is not unexpected. Academic salaries have in recent years fallen behind the rate of inflation, and the desire for a catch-up is natural.[5] The money situation in Michigan state campuses has been particularly bad, further aggravating faculty salary expectations. Perhaps the bargaining unit membership is reacting also to only modest economic gains in the 1981 contract. Only 41 percent of the respondents thought the association had successfully negotiated economic issues.

Salary is followed by the issues of retirement benefits, separate cost of living component, medical/health insurance premiums, and research money. It should be noted that the ratings for the top two economic goals are significantly higher than for the top professional goals.

In the combined list, of the top five choices, the first, fourth, and fifth places are taken by professional concerns of academic freedom, faculty hiring standards, and reappointment criteria. The second and third places were given to salary and inflation-based compensation. The findings appear to present a mixed picture. While it is true that CMU professors considered academic freedom to be the most important bargaining issue on the basis of percentage frequency, it should be noted that salary as a bargaining goal has been chosen by more people and also has a higher mean. The predominance of the perception of economic goals could be further reinforced from another angle: when asked which category of bargaining goals was more important, 62.4 percent chose economic goals over professional goals, while only 21.7 percent identified the latter.[6]

Discussion

An important perceived difference between the blue-collar union membership and professional association membership, as reflected in their collective bargaining goals, may be that the professional membership attaches a higher importance to the issues of professional

[5] For details of the relationship between academic salaries and the consumer price index in recent years, see the *Chronicle of Higher Education,* November 4, 1981, p. 2.

[6] This observation is consistent with Ponak's expectation; see Ponak, "Unionized Professionals," cited at note 3, p. 406.

TABLE 2
RATING AND RANKING OF INDIVIDUAL FACULTY COLLECTIVE BARGAINING GOALS. TOP FIVE CHOICES*

	Mean[e]	Standard Deviation	Absolute Frequency	% Frequency[a]
Professional Goals[b]				
Academic freedom	4.23	1.26	234	64.1
Criteria, reappointment, etc.	4.03	1.14	232	45.3
Procedures, reappointment, etc.	4.00	1.16	234	44.4
Course load	3.73	1.21	232	34.1
Funding-academic programs	3.60	1.15	228	26.3
Economic Goals[c]				
Annual salary	4.39	1.07	241	67.6
Retirement programs	4.23	1.10	234	57.7
Cost of living adjustment	4.07	1.20	236	52.1
Medical/health insurance premiums	3.96	1.21	236	44.9
Research money	3.67	1.22	228	31.6
Combined Goals[d]				
Academic freedom	3.84	1.49	113	52.2
Annual salary	3.87	1.33	176	46.6
Cost of living adjustment	3.54	1.26	93	25.9
Faculty hiring standards	3.19	1.42	31	25.8
Reappointment (etc.) Criteria	3.14	1.38	89	21.3

* Individual respondents were asked to rate their top five choices on a scale of 1-5, 5 being the highest. This applied to professional and economic goals in each category as well as the combined list of goals.

[a] This represents the percentage of all respondents who rated this goal at 5. Example: under academic freedom, 150 of the 234 respondents rated this goal at the top of the scale.

[b] These are the top five of the ten possible professional goals.

[c] These are the top five of the ten possible economic goals.

[d] These are the top five of the twenty possible professional-economic goals.

[e] Means and standard deviations based on responses obtained on a scale of 1 (low) to 5 (high).

quality and standards than do blue-collar union members. Ponak's study of registered hospital nurses supports this perception.[7] Our investigation of CMU professors also lends significant support to Ponak's conclusions.

Respondents rated academic freedom, faculty hiring standards, and criteria for reappointment, tenure, and promotion among the top five of the 20 possible professional-economic bargaining goals (Table 2). Since academic freedom received the highest rating, some specific discussion of this goal is in order.

Fifty-two percent of all respondents (n = 113) selecting this category gave it a rating of 5 (highest). Several other features of this group should also be noted: an overwhelming majority (85

[7] *Ibid.*

percent) were male; more than half (53 percent) were from the School of Arts and Science, which includes economics, but only 15 percent of all Business School respondents thought academic freedom deserved a rating of 5. Perhaps this difference can be explained in large part by the traditional liberal arts orientation in Arts and Science, and a more market and economic orientation of business faculty.

Fifty-four percent of those giving academic freedom the top rating were between 30-45 years of age, 25 percent were in the 46-55 bracket, and 20 percent were older (55+). It would appear that CMU faculty in the formative professional years are more concerned with the precious freedoms, such as those applied to course design, professional goal pursuit, pedagogical emphasis, and other aspects of the academe,[8] than older faculty who presumably have settled into a stable and controversy-free mode. This is further reinforced by their income rankings—66 percent of those most concerned with academic freedom were earning below $30,000 a year, which may indicate that faculty in higher income brackets and older age groups show a lesser concern for this bargaining goal.

Several other points need to be made by way of additional explanation for the importance of academic freedom in our investigation. In their written comments, many members of the CMU faculty bargaining unit expressed concern that the deteriorating budget picture in Lansing (the state capital), as well as the level of appropriations for CMU, would most likely result in the university administration's interference in the process and mechanics of the faculty's pursuits and delivery of knowledge.[9] This could be interpreted as a concern for safeguarding academic freedom through collective bargaining.[10]

It is tempting to suggest that the preeminence of academic-freedom-related bargaining concerns may be due to some pressures unique to Central Michigan University. However, our interviews with key officials of the National Education Association, American Federation of Teachers, and American Association of University Professors seem to indicate that this is widely representative of higher education faculty across campuses today.

Conclusion

Several recent studies have shown the importance of academic governance mechanisms, and faculty access to them, for faculty collective bargaining.[11] A major implication of our investigation is that the mere availability of the means of faculty participation is not enough to ensure faculty satisfaction with professional concerns, such as academic freedom. Central Michigan University has an academic senate in which faculty participation is required

[8] The meaning of academic freedom has been extended to include a faculty member's rights of secrecy on how he/she voted in personnel committee selections. See the *Chronicle of Higher Education*, November 25, 1981, p. 1.

[9] It is conceivable that the bargaining unit membership is sending out a signal to the Association officials since about two-thirds of those rating academic freedom were full members of the Association.

[10] A hypothesis based on the recognition of this point was suggested to me by Thomas Mannix of the California State University Collective Bargaining System in a telephone interview. Mannix believes that money difficulties on unionized campuses would tend to generate a new faculty concern for academic freedom.

[11] Some good examples are Susanne Schmalz, "Faculty Unionism: Does It Have a Future?", *The Relationship Between Theory, Research, and Practice: An Assessment of Fundamental Problems and Their Possible Solution* (Atlanta: Southern Management Association, 1981), p. 49-51, and Chandler and Julius, *Faculty vs. Administration*, cited at note 2.

from each academic department, and a network of committees, and yet we have found a widespread concern for professional issues. While more studies are needed to build upon our limited effort and to lend generalizability to our findings, it appears that the presence of a faculty union raises the memberships' expectations on all fronts—economic and professional—by generating prospects of ever-improving results.

[The End]

Problems in Federal Sector Labor-Management Relations under Title VII of the Civil Service Reform Act of 1978

By DOUGLAS M. McCABE*

Georgetown University

LABOR-MANAGEMENT relations in the federal sector are enduring "growing pains" because collective bargaining and the entire area of labor relations have been legislated by innovative congressional controls stipulated by Title VII of the Civil Service Reform Act of 1978. The purpose of this paper is to examine the viewpoints of federal sector managers, labor representatives, mediators, and arbitrators regarding the major problems under Title VII that the parties face at the collective bargaining table. Furthermore, this paper reviews adjustments in thinking and action which federal sector management personnel and labor representatives should make either because of Title VII or because their prior experience has been in the private or public sector. Those adjustments require an understanding of the problems facing labor and management in dealing with each other effectively in the federal sector.

A concise overview of the collective bargaining framework in the federal sector reveals negotiators on both sides of the federal sector bargaining table having unenviable jobs. Both sides' negotiators are more often novices than trained and experienced. A century of accumulated traditions in the private sec-

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tor's labor movement clamors to be recognized, only to be counterbalanced, and even overbalanced, by federal management's traditional dominance of its employees, with management prone to dally at the bargaining table because it sees little advantage in pressing for a contract.

In contrast with the relative simplicity of private sector negotiations, federal sector negotiators must feel their way almost blindly through a confusing (to both sides of the table) labyrinth of laws, bureaucratic rules and regulations, the voluminous Federal Personnel Manual, decisions of the Comptroller General, and the case law developing not only in the courts but also in the administrative tribunals, such as the Federal Service Impasses Panel and the Federal Labor Relations Authority, to which after fruitless mediation deadlocked disputes are referred. The favorite response of management to a union proposal, sometimes without regard for the facts, is that the matter is "nonnegotiable."

Labor's principal concern, namely, wages and fringe benefits, is nonnegotiable, being specified by Congress, with the result that relatively unimportant issues tend to clutter the bargaining table. Labor's most potent bargaining lever, the strike, is illegal. Everything considered, labor is distrustful of the federal sector bargaining table and inclined to rely more than it otherwise would on its lobbyists in the halls of Congress, while management personnel are only gradually resigning themselves to a way of life restricted by labor-management agreements. Both sides need time and experience in order to adjust effectively to Title VII.

This brief description of the present environment of federal sector labor-management relations indicates the need for both sides to give serious attention to the problems generated by the uniqueness of federal sector collective bargaining.

Problems

My research revealed seven major problems facing the parties in general in the federal sector. These are: the existence of multiple dispute resolution tribunals; remaining balkanized bargaining units; the "bugaboo" of negotiability; the limited scope of bargaining; the lack of pressure on negotiators; the lack of authority of management negotiators; and the lack of sophistication in bargaining.

The first problem deals with the existence of multiple dispute resolution tribunals. The ideal labor-management relations are those which are achieved by the two parties without outside intervention. That is generally the case in the private sector.

The situation is different in the federal sector in which negotiation impasses, after fruitless mediation, are referred for resolution to the FSIP or the FLRA. The practical, and not always proper, effect of this situation is that labor or management sometimes seeks to gain time in avoiding a disliked negotiated settlement by refusing to come to an agreement, usually after aimless and time-consuming dallying at the bargaining table, thereby forcing the dispute into the hands of the FSIP or the FLRA.

The second problem is the continued existence of fragmented bargaining units. The present trend is toward larger bargaining units, but the continued existence of numerous small units is detrimental to effective labor-management relations. Larger units can more efficiently represent similar groups of employees, and management is impeded by having to deal with an unnecessary number of unions.

The third major problem is the "bugaboo" of negotiability. There tends to

be an inclination on the part of some management negotiators in the federal sector, sometimes after consulting their superiors, to label numerous union proposals "nonnegotiable" without adequate justification. The practice sometimes is a tactic to avoid bargaining in good faith. Situations were mentioned in which inexperienced union negotiators thereupon unnecessarily withdrew such proposals.

Occasionally a mediator will suggest to a union that a really nonnegotiable proposal can be corrected by a change in phraseology. A deadlock over negotiability requires a time-consuming decision by the FLRA, the delay usually being welcomed more by management than by labor. Excessively frequent claims of nonnegotiability are possible because of the situation described previously: the complexity of the laws governing the federal sector labor-management system, including bureaucratic rules and regulations, the voluminous FPM, and rulings by administrative appeal boards and the courts.

The fourth major problem in the federal sector concerns the limited scope of bargaining. Wages and pensions, the two matters of greatest concern to labor, are not negotiable at the bargaining table, as they are proscribed by Congress.

The resulting lack of bargaining subjects of a substantial nature causes relatively unimportant and even frivolous issues to clutter negotiations, and they tend to linger on the table because not much is accomplished by disposing of them. That negative picture is a serious problem in the federal sector. It is only partially compensated for by such accomplishments in some bargaining units as merit promotion procedures, evaluation procedures, evaluation criteria to be used in promotions, union participation on promotion panels, overtime distribution, procedures related to job assignments, health, safety, equal employment opportunity, leave administration, work rules, codes of discipline, and performance standards.

The fifth problem is the lack of pressure on the parties. The limited scope of bargainable issues discussed above is not the only factor which tends to cause dallying and even stagnation at the bargaining table. A more influential factor is the absence, in contrast with the private sector, of serious negotiating deadlines. As strikes are illegal, management generally has little stimulus to push negotiations to a rapid settlement.

Furthermore, the lack of pressure for quick settlement at the federal sector bargaining table has another consequence: lackadaisical preparations on both sides for negotiations. As there is no such impending crisis as the private sector's strikes and lockouts, the negotiators and their superiors tend to skimp on their preparations for bargaining. This is in contrast with the meticulous homework of the private sector: clarified options, assignment of priorities to issues, study of and adjusting to the other side's problems and psychology, and devising of bargaining strategies. A final result of the lack of pressure on negotiators is that mediation is invoked as a delaying tactic.

The sixth major problem in the federal sector is the lack of authority of management negotiators. In the private sector negotiators are well-schooled by their superiors and given substantial authority to initial bargaining issues as concluded agreements, but in the federal sector that is less often the case on the union side and least often on management's side. Mediators bemoan their frustration with chief negotiators for management who appear to be little more than errand boys between the bargaining table and the bureaucratic chain of command, because a mediator cannot function

satisfactorily if he does not know who and where the management decision-maker is.

In the private sector a mediator is careful not to undermine a negotiator's prestige by going over his head to his superiors, even if the negotiator's position seems unreasonable, but in the federal sector mediators are inclined to search for the real decision-maker, with some managers appearing to welcome such action. One effect of the lack of authority of management negotiators is delays, which slacken negotiating momentum, while negotiators recess for consultation with their superiors.

The seventh and final major problem is the lack of sophistication in bargaining. When this researcher interviewed federal sector managers, labor representatives, mediators, and arbitrators, he found an unusual word in their vocabulary: "sophistication," with those interviewees using it to bemoan its lack at the federal sector bargaining table. What was meant is the present immaturity and lack of training of negotiators on both sides of the table due to the newness of collective bargaining in the sector, to which must be added on the management side inadequate understanding by the negotiators' superiors of the principles and processes of collective bargaining. A complicating factor is that, on both sides, negotiators are subject to frequent personnel turnovers and assignment to the job as merely a part-time task.

This researcher was told of instances on the management side in which persons have been designated as negotiators without training and even against their will. Several mediators stated that they find it necessary at the bargaining table to teach negotiators how to negotiate; only then can the mediators do their own jobs effectively.

Policy Recommendations

Based upon his research, this writer advocates the following actions. They should be taken immediately where appropriate by either labor, management, or the government, or in combination as required.

First, more experimental use of the impasse resolution technique of final offer arbitration is needed in the federal sector by the parties and the FSIP. The use, or rather the threat, of final offer arbitration can cause the parties to engage in feverish bargaining on a new agreement. This researcher does not recommend this procedure in every disputed contract, but it does give both parties incentive to get down to hard bargaining. It forces both sides to look carefully at the merits of their proposals, and that is the essence of good faith bargaining.

Second, a mediator's responsibility is and should be twofold when faced with a negotiability problem. The mediator should help the parties resolve it by pressuring them to take it to the appropriate forum for resolving that particular problem or probe to find out if there is an underlying problem which, if not negotiable, can be restated in terms of negotiable issues, or which needs resolving, negotiable or not.

Third, the federal sector mediation process cannot be inhibited by the parties' ground rules. When union or management representatives create roadblocks to mediators by attempting to set conditions under which they will participate, mediators have and should continue to exercise the appropriate vigor and assertiveness necessary to overcome the roadblocks. The Federal Mediation and Conciliation Service is authorized by Title VII to perform the mediation function. The parties cannot, under normal circumstances, limit the FMCS in the performance of its

duties. Although the parties may have traditional hours of negotiation when meeting by themselves, it is the mediator who has and should continue to schedule meetings when mediation is involved.

Fourth, there are opportunities for mediators to be imaginative and innovative in the federal sector even within the limits imposed by the endemic idiosyncrasies of federal sector collective bargaining. Mediators should pay particular attention to and study the proposals, suggestions. and alternatives that they have used to help facilitate agreement. Furthermore, all mediators should treat federal sector assignments with the same high level of concern that they do all their other assignments. Issues that are important to the parties are important to the mediators.

Inexperienced negotiators should be treated with special care. Such special care includes (but is not limited to) separate sessions at which the process of negotiations and collective bargaining problem-solving are discussed in order to assist inexperienced negotiators to perform their tasks better. Many such sessions can be conducted informally. not as an element in any official negotiations. The point of this comment is that mediators have the responsibility to help lubricate the engines of the federal sector collective bargaining system, even if some union or management representatives are inadequately prepared for their roles.

Finally. as was noted throughout this paper, the absence of pressure levers (such as the strike and other economic sanctions) is an element of the challenge mediators face. It is probably advisable. in most situations. to avoid any reference to the absence of such pressure levers. The parties. in most cases, are well aware of the world in which they live. The frustrations that the mediator and the parties suffer due to the inherent nature of federal sector collective bargaining can become pressure levers in and of themselves. Reference to the complexity of FSIP procedures is a lever that mediators can use instead of reference to potential economic sanctions.

Fifth, a concerted effort should be made by the FMCS and the FSIP to have more "cross-fertilization" of personnel and ideas. In this researcher's opinion, an exchange program shuffling FMCS mediators and FSIP fact-finders between agencies would be a constructive effort in integrating these two agencies' separate yet interrelated functions. as well as producing a healthy dialogue on federal sector dispute resolution techniques.

Sixth, this researcher advocates an "activist" point of view when it comes to federal sector mediation. That is to say—together with patience, impartiality, knowledgeability. and a reasonably thick skin—the most important quality a mediator should have is an approach, a "play-to-win" game plan. This has nothing to do with preconceptions or absolute rigidity. It entails, however. developing, keeping in mind, and projecting to the negotiators an open attitude which leads to strategic settlement of the issues. It also entails having a tactical plan for each mediation session and controlling the proceedings.

Conclusion

The federal government has entered a new era of labor-management relations under Title VII. and this requires managers at all levels to adjust their attitudes toward their employees and their methods of dealing with them. Integrative bargaining dictates that federal managers look upon the newly developing situation not as a nuisance but as an opportunity.

The first consideration is that growing pains are unavoidable in implementing

Title VII. Labor must learn the critical differences between the bargaining tables of the private and federal sectors, while federal managers have even more to learn about differences between a nonunionized government and a unionized one. Federal managers must react positively and optimistically to their growing pains if they are to establish mutually beneficial relations with their employees.

The above mentioned opportunity is one of minimizing, as the new situation develops, the ingrained and smouldering antagonism between management and labor which unfortunately has characterized the private sector. That antagonism is much easier to avoid at the begining than to eradicate later.

The second consideration is that each federal agency head must develop a competent negotiating committee headed by a good chief negotiator who, if he is to be effective, must be given clear parameters within which he has authority to commit agency management to each negotiated detail of a labor-management agreement. If he must shuttle back and forth between the table and the agency management officials who have decisionmaking authority, he is no better than an errand boy; negotiations bog down, and the union officials have no respect for him because experienced federal sector unions grant considerable authority to their negotiators.

A third consideration is that federal managers should avoid unjustified raising of the claim of the nonnegotiability of various union proposals, which is the "bugaboo" of the federal sector bargaining table. The scope of federal sector bargaining is so limited that fairness to employees requires that nonnegotiability claims not be used as a deliberate tactic to put union negotiators in a straightjacket.

The final and key consideration in federal labor-management relations is to distinguish between personal leadership and impersonal administration. Maximizing the former and minimizing the latter reduce the need for employees to have recourse to the bargaining table. **[The End]**

A Discussion

By GEORGE R. FLEISCHLI

Arbitrator

TODAY WE HAVE BEEN privileged to hear what I consider to be three timely and interesting papers dealing with three diverse dimensions of the public sector collective bargaining scene. In a way, they represent "what's happening now" in those three dimensions.

On the one extreme we have Douglas McCabe's analysis of the growing pains still being experienced in what he aptly calls the federal "sector." Negotiations under the existing federal framework are certainly unique enough in the public sector to be identified as being a "sector" apart from most state and local negotiations. On the other extreme we have Sue Bauman's interesting analysis of the super-sophisticated (some might say pseudo-sophisticated) bargaining arrangements that exist in local negotiations under Wisconsin's complex mediation-arbitration, total package, final offer arbitration law.

Somewhere in between these two extremes we have Sahab Dayal's study of bargaining unit attitudes and perceptions. This study reflects the heart of the debate that surrounds what might be characterized as the last major frontier of state and local negotiations.

I find the results of Doug McCabe's study of labor relations in the federal government ironic but unsurprising. E.O. 10988 was, in a way, the first public sector collective bargaining law. It was signed subsequent to Wisconsin's pioneering 1959 statute Section 111.70, authorizing collective bargaining, but it was far more comprehensive and ambitious in its attempt to encourage the establishment of bargaining arrangements and the use of dispute resolution procedures.

One might expect that today, 20 years later, negotiators in the federal sector could not properly be characterized as "inexperienced," but I have no little doubt concerning the accuracy of that characterization. However, that problem as well as a number of the other problems identified in his study can probably be traced back to the twin problems of balkanized bargaining units and the limitation of negotiations to nonmonetary matters. Until a solution is found to those two problems, there will be a continuing tendency to focus on trivia, debate the question of authority, and generally pass the buck.

The Bauman Study

Sue Bauman's study demonstrates how the mechanics of collective bargaining in the public sector have begun to surpass those in the private sector, at least on a pure technical or legal level. I doubt that many practitioners in the private sector have even heard of the concept of "evaporation," though the same phenomenon certainly exists and has existed since the Supreme Court's decision in the *Borg-Warner*[1] case she refers to.

If an employer or union has no obligation to bargain concerning a provision in an existing agreement, there is no reason why either party cannot simply place the other on notice of its intent not to agree to include that provision in a successor agreement. Certainly the automobile companies understood in the 1979 negotiations that they were not obligated, under the *Pittsburgh Plate Glass*[2] decision, to bargain for increased benefits for retired employees, yet expansion of those provisions helped settle that round of negotiations.

The difference here relates to the relative disparity of bargaining power that exists in many public sector negotiations and the traditional reliance by both parties on legal procedures such as unfair labor practice proceedings, declaratory rulings, and interest arbitration as a substitute for the strike mechanism. I sometimes entertain pipe dreams that these things will change, but I do not think they will unless and until the public's attitude toward interest arbitration and strikes by nonessential employees shifts.

However, to put Sue's study in perspective, I think it should be pointed out that during the period of her study hundreds of voluntary settlements were reached even after a petition for mediation/arbitration had been filed. Thus, only a small number of cases that were headed for arbitration anyway devolved into disputes over the right to evaporate existing provisions. Further, as her study shows, most of those cases were resolved voluntarily, generally with the result that existing provisions

[1] *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 US 342 (US SCt, 1958), 34 LC ¶ 71,492.

[2] *Chemical Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 US 157 (US SCt, 1971), 66 LC ¶ 12,254.

were left intact and any new proposals deemed undesirable enough to provoke a dispute were reworded.

Nevertheless, her study shows that parties in local negotiations have begun to raise questions of first impression regarding the parameters of the bargaining process. This is no place for the unsophisticated!

The Dayal Hypothesis

Finally, Sahab Dayal tests an extremely significant hypothesis: that the faculty at institutions which have a highly developed governance system will place greater relative importance on economic rather than professional concerns. This hypothesis is certainly consistent with one aspect of the debate that rages in Wisconsin over faculty bargaining at the University of Wisconsin.

I am told that the faculty at the Madison and Milwaukee campuses, to the extent that they are interested in collective bargaining at all, are most interested in what it can do to help their current economic plight. Many are clearly fearful that it will result in a diminution of the right to participate in governance and thereby their control over matters of professional concern. The faculties at many of the other campuses, which have a less developed system of governance, feel quite differently, I am told.

Two major problems I have with Mr. Dayal's study are the lack of an objective measure of the relative degree of governance that actually exists at Central Michigan University and the possibility that academic freedom was viewed as a major issue in the recent negotiations because of some currently perceived threat to governance internal or external to that institution. The additional studies recommended will no doubt help place the results of this study in proper perspective.

[The End]

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