INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

Proceedings of the
1984 Spring Meeting

May 2-4, 1984

Cleveland, Ohio

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Edited by Barbara D. Dennis

Industrial Relations Research Association
Social Science Building, University of Wisconsin
Madison, Wisconsin 53706 USA

Reprinted from the August, 1984, Issue of
LABOR LAW JOURNAL
Published and Copyrighted 1984 by
Commerce Clearing House, Inc., Chicago, Illinois 60646

Proceedings of the 1984 Spring Meeting
Industrial Relations Research Association

Library of Congress Catalog Card Number: 50:13564
ISBN 0-913447-27-7

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES

PROCEEDINGS OF THE ANNUAL MEETING (May Publication)
PROCEEDINGS OF THE SPRING MEETING (Fall Publication)
Annual Research Volume (Fall Publication)—MEMBERSHIP DIRECTORY-HANDBOOK every sixth year in lieu of research volume
IRRA NEWSLETTER (Published Quarterly)

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Industrial Relations Research Association Spring Meeting

May 2-4, 1984 Cleveland, Ohio

PREFACE

1984 Spring Meeting

Industrial Relations Research Association

Concurrent sessions were on the "menu" for the Spring Meeting of the Industrial Relations Research Association this year in Cleveland, with the host Northeast Ohio chapter offering those attending a choice of topics at each session, from appetizer to dessert.

Choices on the program menu were Organized Labor's Changing Face or Management Cooperation, Implementing Public Sector Labor Laws or Personnel Policies for Working Families, Plant Closings or Health Care, Drug and Alcohol Abuse or Grievance Procedures, and Arbitral Remedies or Concession Bargaining. The meeting closed with a plenary session where Rudy Oswald of the AFL-CIO and Pete Lunnie of the NAM presented opposing views on "The Effect of Chapter 11 on Collective Bargaining."

John J. Sweeney, international president of the Service Employees International Union, was the guest speaker at the Thursday luncheon.

Although some of the practitioner and academic members of the Association did present formal papers, a number of the sessions were panel discussions with extensive audience participation.

The IRRA congratulates Nels E. Nelson, Northeast Ohio chapter president, W. Kenneth Evans, chapter arrangements chair, and their committee for their hospitality and their success in planning a program of such wide interest to Association members. Again, the Association is grateful to the LABOR LAW JOURNAL for publishing the Proceedings of the IRRA Spring Meeting.

BARBARA D. DENNIS
Editor, IRRA

Organized Labor Needs a Facelift

By Leo Perlis

Industrial Relations Consultant

I have been asked to discuss "the changing face of organized labor." That is both sad and simple. What we need is a facelift. We have too many wrinkles.

Many of our wrinkles are caused by our enemies, and I know them all. I have met them at the bargaining table and seen them across the picket line. I have met them in city hall and in city room. I have met them on Capitol Hill and on college campuses. I have met them for 50 years, and I am not surprised that they are there. But what still angers me are those within who refuse to see their warts and who "dump on" those who point them out. They wear the fashionable labels of "realists" and "pragmatists" on the seats of their union pants, and they keep on doing the same old things in the same old ways. They dish it out to corporations and they dish it out to the media. They dish it out to government officials and they dish it out to politicians. But they just cannot take it—not even from their own. At best, such friendly critics are called "kibitzers" and at worst they are condemned as "opportunists." They find studies, both inside and outside, personally threatening and politically inexpedient. Introspection is a sport for which they have no taste, and it is reserved strictly for "intellectuals."

What I am saying today is exactly what I, and others, have been saying for some years. "Let us open our eyes and let us open our minds even as we opened our hearts. It is not enough for our hearts to bleed for the plight of the working people we represent; it is equally important that our minds think about the plight of the economy and society that sustain us all, including our unions."

Since the end of World War II, we have been witness to a large number of worldwide social and economic revolutions and an even larger number of scientific and technological explosions. Their impact on our national life, on our unions, and on ourselves, as individuals, has been both immense and intense. Early tremors were audible in both the marketplace and the workplace as well as in academia but hardly at all in the union hall. And those few who heard and spoke up were rewarded with silence or sarcasm. Most of us were deaf to the gentle warning in 1961 by Clark Kerr who, as president of the University of California, concluded, on the basis of a study by a trade union economist, that the American labor movement presents "the phenomenon of a great social institution remaining virtually unmoving on a plateau while society all around it keeps on growing and changing." Kerr added, "It might be more correct to say that unions have rested on two plateaus—a plateau of membership and a plateau of ideas."

Now, 23 years later, there is a difference. Now unions rest on only one plateau—a plateau of ideas. As for membership, organized labor was better off 23 years ago. How sad! Here it might be useful to suggest once again, as I did on several occasions since my memo of August 26, 1957, that a wide-ranging study of organized labor's role in its several areas of special interest be undertaken—a kind of ad hoc think tank composed of union officials, union professionals, experts, and academics. And here there can be no harm, only good, in enlist-

ing union retirees to lend perspective based on experience.

Role of Organized Labor

What is the role of organized labor in the labor-management relationship and in collective bargaining? What is the role of organized labor in international affairs with particular reference to foreign competition and multinationals? What is the role of organized labor in the total community, including the environment, health and welfare, and the consumer? And, of the highest priority, what is the role of organized labor in organizing the unorganized in a volatile economy and in a changing workplace? These are a few of the questions that study groups should explore. It is time for a facelift. Perhaps it is time for a number of facelifts since organized labor has as many faces as audiences, and each audience sees another face of organized labor.

First, there are the labor leaders and union members, most of whom see the face of organized labor as quite beautiful and without blemish. Then there is the employer who can not stand the ugly face of his companion or companion-to-be and spends a fortune on lawyers and consultants to avoid, evade, or sever. Third, there is the garden variety politician who does not recognize labor's face until election day and then extends himself with promises in exchange for votes. Finally, there is the rest of the community, including the media, academia, and the unorganized, which sees the face of organized labor, when it sees it at all, as either vague and nebulous or fat and frightening but only rarely as beautiful and bewitching which, of course, it is—even with all its blemishes.

Why? Unions suffer partly from the same credibility gap as other institutions do in our increasingly cynical society. And, in addition, unions continue to suffer from the same hostility, ignorance, and misrepresentation that have been foisted upon the people by the greedy and the gullible. But unions also suffer the consequences of their own actions, reactions, and inactions.

The PATCO strike is an example. Despite all its legitimate grievances, and there were many, PATCO should not have struck. When President Reagan asked the controllers to go back to work and the bargaining table, they should have gone back and continued their fight by other means. But this tragedy of errors was compounded by AFL-CIO inaction. The Federation should not have stood on the sidelines. It should have intervened actively to prevent the strike and dynamically to settle the strike—with PATCO, with MEBA, and with the White House. Here is a case where the traditional nonintervention policy simply did not work. The whole labor movement lost with the loss of PATCO. There are times when to go it alone is to go against the whole.

One lesson we have learned is that the central organization must be entrusted with more responsibility and authority in certain situations. But more important is what happened to all of us during the past 40 years: nuclear power, automation, television, computers, robots, conglomerates, multinationals, the invasion of American markets by the Japanese and the Taiwanese, by West Germany and Hong Kong, by the Greeks and the Swedes and almost everybody else—with shoes and steel and textiles and cars and almost everything else.

Labor's Reaction

And how did organized labor react? Usually with convention resolutions, often with legislative lobbying, occasionally with political action, and with all the other legitimate accouterments of the democratic process—except two. The first is thoughtful planning and the second is bold leadership.

There were reasons. One usually does not dare think the unthinkable for fear of the unknown. And one does not climb mountains for fear of falling—in organ-

ized labor's case, taking the risk of dragging along millions of workers and their families into the abyss of unemployment, privation, and misery. That is our dilemma: do we give up real jobs in exchange for the untried and possibly untrue?

Another very important reason is the absence of a compassionate and competent rescue crew in the White House and on Capitol Hill in case of misjudgment or accident. Who would feed and clothe and house and train workers? The voluntary agencies? Here there is a lot of interest but not enough money. Management? Here there is no interest and not enough money. Unions? Here there is great concern but very little cash. Government? Here is where the needle has been stuck while the problem goes round and round. And so, unions supported the building of nuclear power plants even while scientists and environmentalists signalled caution. And so, unions did not welcome automation, computerization, or robotization even while the Japanese and Taiwanese flooded world highways and world markets, including our own.

I recall organizing a conference on automation in San Francisco in the early 1950s, and a number of my colleagues cautioned me to take it easy. But who could blame them? And so, unions opposed multinationals and conglomerates even as the world continued to spin in that direction. "Stop the world, we want to get off," cried most of us.

All this, of course, is understandable and, from the point of view of short-term concern for our members and their families, even commendable. But for the long run, did it reflect deep thinking and bold leadership? The answer, sadly, is a beleaguered but not an embattled labor movement—an AFL-CIO that blames everything on Ronald Reagan and bets everything on Walter Mondale. How does one account for the banner headline in the *AFL-CIO News* of October 15, 1983: "Endorsement of Mondale begins new era for labor"? Frankly, I did not see October 15, 1983, as a red letter day for organized labor, nor can I see November 6, 1984, as a red letter day for organized labor, even if Walter Mondale is elected.

America is not Poland. Reagan is not Jaruzelsky. The AFL-CIO is not Solidarity. Nor was PATCO Solidarity, for that matter. We should be quite clear about all this even though there are those who would want us to believe that American labor under Reagan suffers almost as much as Polish labor under Jaruzelsky. Personally, I am for Walter Mondale. I recommended him for the highest AFL-CIO prize, the Philip Murray-William Green Award, when he was Vice President in 1977, and I wrote about him in the presentation speech that "second place is not always second best."

Moving Forward

I have been around a long time, and I worked in Washington for a long time in political action as well as community service. I was John L. Lewis's political action director for Franklin D. Roosevelt in South Jersey in 1936 and, for a short term, his national political action director in 1940 when I resigned because he decided to support Wendell Willkie and I preferred FDR. I give you this bit of personal history only to underline the fact that I recognize how a friendly administration in Washington or Tallahassee or Columbus can help create a more receptive climate for organized labor. But that is as far as it goes. To claim that the preprimary endorsement of Mr. Mondale inaugurated "a new era for organized labor" simply diverts our attention from our basic needs, which are new ideas for a new age and inspiring leadership to carry them forward. And if that sounds like Gary Hart, so be it. There are, after all, such things as new ideas, and there is such a thing as inspiring leadership.

And so let me dream for a moment as unrealistically and unprogrammatically as John L. Lewis when he organized the

Committee for Industrial Organization; as Sidney Hillman when he organized the first political action committee; as Walter Reuther when he declared that our plants could be converted to produce 50,000 planes a year; and as George Meany who felt that the AFL and CIO could be persuaded to merge after all. They had vision to see and the leadership to follow through.

If most trade union leaders are as dedicated, as I know they are, to the well-being of working people, and if they believe, as I know they do, that this can best be achieved through union organization and collective bargaining, then why do not they get together and pool their resources in a nationwide organizing drive with special emphasis on high tech, white-collar, and service industries? Why waste time, money, and moral capital on jurisdictional squabbles, in raiding one another, in going it alone?

And why is it not possible to promote multinational unions in multinational corporations? As the world shrinks, the world's economies are bound to become, at the very same time, both more integrated and more competitive. Why, then, can not our unions initiate the development of international unions that extend beyond the American-Canadian borders into other countries? I know all about the difficulties in overcoming jingoism, but a common union approach to multinationals makes more sense than tilting windmills. Multinationals and combinationals are here to stay unless they are killed by international tensions and wars, and we certainly want none of that.

All this may sound utopian, but somebody has to take more than one step forward to see what is going on and what is possible on the other side of the Atlantic, the Pacific, and the Rio Grande. But here at home we must face the new realities of the marketplace and the workplace. Both have changed, and are changing, faster than the face of organized labor. Instead of fighting for active participation in the creation of postindustrial America, organized labor is protesting the demise of old industrial America.

It reminds me of my days in Paterson, New Jersey, when we fought the development and installation of fully automated textile looms and what we then called the speedup and the stretchout. We were on fair grounds, but we also were behind the times. The problem in Paterson, as elsewhere, was not the presence of progress but the absence of planning and compassion. Since there was no compassion for expendable workers, there was no planning by employers or government for the period of transition, a period of great human stress: the planning of programs that would include not only unemployment compensation and early retirement benefits but also, and mostly, training, retraining, and placement.

Despite the widespread and self-serving myth that unions are all-powerful or too powerful, the fact remains that corporations, and certainly government, are much more powerful. Still, why should not organized labor assert itself in the reinvention of the American economy? One way of doing it is by establishing in each major international and national union as well as in the Federation itself departments of science and technology staffed by professionals and assisted by expert advisory committees. Such departments could help unions keep pace with the changing realities in the workplace and marketplace so that realistic and productive policies and programs can be developed for presentation across bargaining tables, in councils of government, union halls, and community forums. Sarcastic allusions to microchip minds may make good copy for headline hunters, but they cannot stop the national evolution of our economy propelled as it is by scientific, technological, and political forces and international trade.

When I was in Japan on a government-sponsored lecture tour several years ago, I was asked by a member of the executive

council of Domei, an AFL-CIO counterpart, why it is that Americans can land a man on the moon but cannot make radios and television sets. Why indeed? It was a good question and I had all the conventional answers but not the one that satisfied either me or my hosts in Tokyo, the executive council of the Japanese labor movement.

I talked about fair trade and free trade and international labor solidarity, but I knew as I talked that it all fell on deaf ears—that the Japanese enterprise culture, the Japanese economy, Japanese needs, and Japanese labor-management relations were different from our own, and that is what makes the difference between our products and theirs, our productivity and theirs, our exports and theirs. Can we learn from them? Yes. Must we imitate them? No.

In many ways we are years ahead of the Japanese, but in one major way we are behind. I am referring to the labor-management relationship. In Japan they generally accept each other. In America we do not. Corporate America, after more than 100 years, still questions the validity of unions, and organized labor responds, naturally, with its own deep doubts about the free enterprise system. At best, we pay only lip service to each other.

It is about time that labor and management officials, from top to bottom and all across the country, join in retreats away from the collective bargaining table to talk things over. They should talk about such things as the meaning of free enterprise and trade unions to the democratic society, the American economy and international trade, the nature of production and productivity and their relevance to profitability, competition and higher working and living standards, and the very fundamental fact that, after everything is said and done, while the company employee/union member is one and the same person, a balance of power must be struck between managers and the managed, between the owners and the workers.

Conclusion

What I am suggesting is the need for a more cooperative (not co-optive) and participatory relationship to replace the politics of confrontation and conflict. Open books, joint plant committees, labor representation on company boards, joint training sessions, and joint publications should enhance this new relationship. Union workers need not only safe and secure jobs and decent wages and benefits but also human dignity in the workplace, particularly at the hands of management personnel.

Why, then, should a contract negotiated between labor and management be called impersonally the union contract? Why not call it the human contract? The agreement, after all, is not between two impersonal forces but between human beings for the benefit of human beings. The purpose here is not to suggest still another empty euphemism but a realistic reflection of a practical approach to human relations, which is what labor-management relations is all about. Perhaps human relations experts can help where lawyers and economists failed.

This, of course, would result in a more positive response by the community at large. Union citizen and corporate citizen, while they will not bring about the millennium since tension is inherent in the manager-managed relationship, will nevertheless create a climate of credibility and acceptance by their fellow citizens.

But all this is not good enough if the labor movement continues to lose members in proportion to the work force. The first priority is still organization, and here unions must try other techniques and methods in addition to the tried and true methods of my own organizing days. What we need now is not only a return to the same evangelical spirit that inspired the steel, auto, rubber, and textile workers

but also tents, more radio, and more television. We need paid organizers, but we also need volunteers and retirees. We need union support, but we also need community support. We need to offer pledge cards but, like missionaries, we also need to offer health and welfare counseling and services. We need to bring the gospel to the unorganized, but we also need to spread the good word in our schools, our churches, and our civic and business organizations. We need to be persuasive and persistent at the same time because of our deep conviction that union organization, collective bargaining, and the human contract are absolutely essential to any society but particularly to a free, democratic society such as ours.

What we need, then, is a four-track approach in the 1970s. We need aggressive union organization of the unorganized, dynamic union participation in the workplace from the boardroom to the shop floor, active union participation in community affairs, including political action, and the constant education of the organized.

[The End]

Implementing Public Sector Labor Laws

By James W. Mastriani

New Jersey Public Employment Relations Commission

I am pleased to have the opportunity to offer my views on this subject, especially here in Ohio where a public employment statute has recently been implemented. We are into our 16th year of administering the New Jersey Employer-Employee Relations Act, and I can assure you that, while its newness has worn off, the controversies associated with the Act remain.

We have come to accept the fact that the law we administer is constantly scrutinized for change. Contentment with the law gives way to organizational and political forces seeking either to enhance or to constrict the rights afforded public employees. Our law, which is a comprehensive statute, was initially passed in 1968, creating a seven-member tripartite commission with authority in the areas of representation and nonbinding impasse procedures. It was amended in 1974 to establish the Commission's jurisdiction over unfair labor practices and scope of negotiations issues, in 1977 to provide compulsory interest arbitration for police and firemen, and again in 1979 to make agency shop fees mandatorily negotiable. In 1979, it was amended once again to provide for special legislation for transportation employees whose employers were subject to public takeover.

In any given year there are many bills introduced in our legislature designed to amend the law. It must be recognized that the rights granted to public employees and public employers in each state will always be subject to the shifting balance of organizational and political forces.

In order that any agency be truly effective, it must gain and retain the confidence of the public employers, public employees, and employee organizations in the integrity of its decisionmaking processes and its neutral mission. An agency's policy preferences must not interfere with its responsibility to be faithful to the existing statute. Changes in fundamental labor relations policy must be left to each legislature.

The agency's achievement of acceptability is no small task. The extent to which there is a consensus in the labor and management community is critical. A law that has been imposed on labor or management may place an agency in the position of being perceived as an advocate by the discontented party. In implementing the law, the agency should seek consensus. It must demonstrate visibility and encourage participation by advocates in the development of its processes, even with those parties who may not accept the agency's mission as a matter of policy.

Political cooperation is also desirable. An agency may have to implement a law that has been vigorously opposed by powerful political elements in the executive or legislative branches of government. In New Jersey, the public sector labor law was passed in 1968 only after the legislature voted to override a governor's veto. An agency should maintain a nonpartisan posture. Adjudicatory powers must not be perceived as weapons against public employers or labor organizations possessing a particular political identity.

Implementation

A multitude of internal and external factors plays a role in the implementation of public sector labor relations laws. The authority to hire professional personnel should reside exclusively in the agency rather than an appointing authority less familiar with its needs. At PERC, the entire professional staff is unclassified despite the existence of a strong classified civil service merit and fitness system. Commission personnel are hired by the Commission through its chairman, and by statute they must be familiar with the field of public employer-employee relations.[1] They serve at the pleasure of the Commission. I believe that this is the most desirable personnel system. PERC has been able to maintain a highly qualified and productive professional staff in the absence of political and civil service system constraints.

An agency's neutrality is enhanced by independence from the executive branch of government. In New Jersey there is statutory language placing the agency within the Department of Labor for certain administrative purposes but outside the Department's supervision or control.[2] The agency submits and administers its own budget. It is obvious that any agency must be adequately funded if it is to perform its mission properly. Many of the amendments to our law were passed without fiscal riders, thereby forcing the agency to absorb additional functions and caseload within a nonexpanded budget.

PERC has found it helpful in preserving its acceptability and independence to maintain its own counsel independent of the office of the state attorney general. It became apparent early on in the administration of the Act that there was an appearance of conflict for the attorney general's office to appear in court defending an action of the agency while, at the same time, it participated as an advocate for the state as a public employer. Attorneys in our counsel's office must receive special counsel appointments from the attorney general, but such appointments are routinely granted upon request of the chairman.

Another factor bearing on the implementation of a new statute is the agency's organizational structure.[3] Decisions must be made on how the agency can best deliver its services. Questions to consider

[1] N.J.S.A. 34:13A-6(h) states: "The personnel of the Division of Public Employment Relations shall include only individuals familiar with the field of public employee-management relations. The Commission's determination that a person is familiar in this field shall not be reviewable by any other body."

[2] N.J.S.A. 34:13A-5.1 states: "The Division of Public Employment Relations is hereby allocated with the Department of Labor and Industry and located in the City of Trenton, but notwithstanding such allocation the office shall be independent of any supervision or control by the department or by any board or officer thereof."

[3] For an in-depth review of organization structures of various agencies, see Gibbons, Helsby, Lefkowitz, and Tener, ed., *Portrait of Process-Collective Negotiations in Public Employment* (Port Washington, Pa.: Labor Relations Press, 1979).

may include the following. Should the mediation function be separate and independent of the adjudication functions? Should hearing officers merely conduct hearings, or should they become involved in case investigation and processing? To what extent should there be staff cross-pollination? The agency's organizational structure should promote the agency's philosophy of case handling as well as its objective to be productive.

The implementation of any public sector statute cannot be effective without the adoption of workable rules and regulations. Rules must be expertly drafted to facilitate the use of the agency's services by its clientele. In this regard, agency rules are as important as the statute itself. While the opportunity for advocacy input is required under our Administrative Procedures Act, in the form of public hearings and written submissions with respect to a proposed rule, an agency's responsibility goes beyond the letter of the law. Advocacy input should be encouraged to permit an opportunity to help shape the day-to-day mechanics of practicing before the agency. An agency must anticipate an attack upon its rulemaking authority, and it must exercise its rulemaking authority thoughtfully to insure affirmance on judicial review. As the New Jersey Supreme Court noted in affirming an agency rule on appeal: "It is particularly important in the early phases of development of experience in this relatively new area of the administrative process that a broad and flexible latitude of interpretation of the statute be accorded the agency charged with its implementation." [4]

External Factors

Many external factors beyond agency control affect the implementation of a public sector statute. A new agency will inevitably find itself competing over jurisdiction with long-established administrative agencies. The lines of jurisdiction often are not clear. Eventually, through decisionmaking and judicial review, these lines will become clearer.

Departments of education may exercise rulemaking authority on matters that affect terms and conditions of employment, and such rules may be found to have a preemptive effect on what is mandatorily negotiable.[5] They may have the authority to hear and decide controversies involving reduction in force procedures, tenure proceedings, withholding of increments, and application of evaluation criteria.

Civil service commissions traditionally have had authority to hear and decide disciplinary grievances involving civil service employees and to establish salary structures. They also typically have had rulemaking authority in many areas involving terms and conditions of employment such as holidays and sick leave and vacation policies.

The bargaining law may be silent or ambiguous with respect to prior legislation involving these statutes and regulations. While an agency should strive for administrative comity in order to prevent interagency friction, it must establish its ability to develop respect for the new labor relations function.

Perhaps the most significant external factor affecting the implementation of a public sector law is the role of the judicial branch of government as the final arbiter in the interpretation of the provisions of the statute. Our agency has been successful in more than 90 percent of its appeals. In particular, the New Jersey Supreme Court has approved many of the fundamental principles underpinning the PERC law. These principles include the constitutionality of exclusive representation and interest arbitration, the existence

[4] *State v. Professional Association of N.J. Department of Ed.* (NJ SCt, 1974), 64 NJ 231, quoted in *Newark FMBA Local No. 4 v. City of Newark*, 447 A3d 130, 90 NJ 44 (NJ SCt, 1982), 1981-83 PBC ¶ 37,596.

[5] *Bethlehem Tp. Ed. Assn. v. Bethlehem Tp. Bd. of Ed.*, 91 NJ 38 (NJ SCt, 1982), 1981-83 PBC ¶ 37,840.

of a permissive category of negotiations for police and fire employees, and the deference given the Commission's expertise in making rules, conducting representation proceedings, establishing unfair practice standards, and adopting remedial orders.[6]

Our courts, however, have also reversed several early Commission decisions concerning the scope of negotiations. The Commission has relied upon national public and private sector precedent in developing guidelines on mandatory, permissive, and illegal categories of negotiations. However, court decisions have resulted in the adoption of restrictive standards in determining whether an issue is lawfully negotiable, and these decisions have had a profound effect upon the implementation of the Act.[7]

Conclusion

Under the New Jersey Employer-Employee Relations Act, as amended, the parties must negotiate, upon demand, "terms and conditions of employment." The statute requires negotiations concerning modifications of rules covering "working conditions." Further, there is a joint responsibility to meet at reasonable times and negotiate in good faith with respect to "grievances and terms and conditions of employment [N.J.S.A. 34:13A-5.3]."

Thus, on its face, the New Jersey statute is indistinguishable from national standards in terms of the duty to negotiate. The only specific limitations present in the statute regarding negotiability involve individual employee rights under civil service laws or regulations, and pension statutes (N.J.S.A. 34:13A-8.1). The exclusions in the statute are generally similar to those in other states, especially with regard to the preservation of civil service merit systems and pensions. In all other respects, there is little basis to distinguish the New Jersey Act from those in New York, Wisconsin, and Pennsylvania, all of which have been interpreted by their respective judiciaries to provide a much broader scope of negotiations than exists in New Jersey.

Among the topics found nonnegotiable in New Jersey, which have generally been found to be negotiable in other jurisdictions, are discipline,[8] reductions in force,[9] impact of nonmandatorily negotiable

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[6] See, respectively, *Lullo v. Int. Assn. of Fire Fighters*, 262 A2d 681, 55 NJ 409 (NJ SCt, 1970), 1 PBC ¶ 10,067, and *Division 540, Amal. Transit Union, AFL-CIO v. Mercer County Improvement Auth.*, 386 A2d 1290, 76 NJ 245 (NJ SCt, 1978), 1977-78 PBC ¶ 36,270; *Paterson Police PBA Local No. 1 v. City of Paterson*, 432 A2d 847, 87 NJ 78 (NJ SCt, 1981), 1981-83 PBC ¶ 37,306; *Newark FMBA v. City of Newark*, cited at note 4; *State v. Professional Assn. of N.J. Dept. of Ed.*, cited at note 4; *Bridgewater Twp. v. Bridgewater Public Works Assn.* (NJ SCt, 1984), 95 NJ 235; and *Galloway Twp. Bd. of Ed. v. Galloway Twp. Bd. of Ed.* (NJ SCt, 1978), 78 NJ 25.

[7] *Paterson Police PBA Local No. 1 v. City of Paterson*, cited at note 6; *Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed.*, 78 NJ 144 (NJ SCt, 1978), 1977-78 PBC ¶ 36,370.

[8] *City of Jersey City and Jersey City Police Officers Benevolent Assn.* (NJ SuperCt, 1981), 179 NJ Super 137, cert denied (NJ SCt, 1982), 89 NJ 433; *State of N.J. v. Local 195, IFPTE* (NJ SuperCt, 1981), 179 NJ Super 146, cert denied (NJ SCt, 1982). Contrast New York, *Board of Education v. Associated Teachers of Huntington, Inc.*, 30 NY2d 122, 331 NYS2d 17 (NY CtApp, 1972), 282 NE2d 109; Pennsylvania, *Philadelphia Board of Education v. Philadelphia Federation of Teachers*, 464 Pa 92 (Pa SCt, 1975), 346 A2d 35; and Massachusetts, *Middlesex County Commissioners v. AFSCME* (Mass SCt, 1977), 362 NE2d 523.

[9] See *Union Cty Reg. H.S. Teachers Assn., Inc. v. Union Cty. Reg. H.S. Bd. of Ed.*, 146 NJ Super 435 (NJ SuperCt, 1976), 2 PBC ¶ 20,360, cert denied (NJ SCt, 1977), 74 NJ 248. Contrast *Beloit City School Bd. v. Wisconsin Emp. Rel. Comm.*, 73 Wis2d 43, 242 NW2d 231 (Wis SCt, 1976), 2 PBC ¶ 20,297; see also New York, *In the Matter of City School District of New Rochelle and New Rochelle Federation of Teachers* (1971), 4 PERB 3060; *Yonkers School District v. Yonkers Federation of Teachers*, 40 NY2d 268, 368 NYS2d 657 (NY CtApp, 1976), 2 PBC ¶ 20,147.

decisions,[10] subcontracting,[11] and work schedules for police officers.[12]

The judiciary may also direct an agency to exercise authorities that are not specifically found in the statute that the agency is implementing. For example, PERC has been directed by the courts to entertain restraints of arbitration. When an employer disputes the negotiability/arbitrability of a grievance being submitted to arbitration, it may petition the agency seeking a temporary restraining order pending a final Commission determination on the negotiability of the grievance.[13] If the Commission finds that the grievance is not within the scope of negotiations, it has the authority to permanently restrain arbitration.

This authority has had a substantial impact on the agency's caseload and has forced the Commission to interject itself into the middle of the parties' contract administration relationship. We of the Commission also have the authority to issue temporary restraining orders in unfair practice cases pending final disposition of an unfair practice charge.

I have endeavored to review the areas that I believe most acutely affect the implementation and administration of public sector labor laws. The proper implementation of a law is an ongoing task and is not limited to a brief period of time following the passage of a law. No agency can become complacent, believing that it cannot improve the delivery of its services nor accept the criticism of its clientele. Above all else, an agency must never lose its ability to be responsive to the problems of the labor-management community in which it serves.

[The End]

The Work Force Is Changing; Are Employers?

By J. Thomas Churan

Mellon Bank

Twenty years ago, the "working family" would not have been a topic of discussion for many groups, and personnel policies relating to working families would have been on even fewer agendas. Yet today we are here to discuss personnel policies and their impact on working families or, better yet, maybe we should be looking at working families and the impact they have had or will have on personnel policies.

In the not too distant past, the working man, not the working family, was discussed and dissected by groups at events such as this one. When we talked about collars, they were blue and white, not pink. References to women and collars

[10] *Maywood Ed. Assn. v. Maywood Bd. of Ed.*, 168 NJ Super 46 (NJ SuperCtAppDiv, 1979), 1979-80 PBC ¶ 36,608, cert denied (NJ SCt, 1979), 81 NJ 292. Contrast *West Irondequoit Teachers Assn.* (1971), 4 PERB 3070, aff'd 35 NY2d 46, 358 NYS2d 720, 315 NE2d 775 (NY CtApp, 1974), 2 PBC ¶ 20,039.

[11] *In Re IFPTE Local 195 v. State* (NJ SCt, 1982), 88 NJ 393. Contrast *Saratoga Springs City Sch. Dist. v. N.Y. State Pub. Emp. Rel. Bd.* (1978), 12 PERB 7016, aff'd 416 NYS2d 415 (NY SCtAppDiv, 1979), 1979-80 PBC ¶ 37,677; *Borough of Wilkinsburg v. Sanitation Dept.*, 463 Pa 525, 345 A2d 641 (Pa SCt, 1975), 1 PBC ¶ 10,302.

[12] *Borough of Atlantic Highlands v. Atlantic Highlands PBA Local 242*, 192 NJ Super 71 (NJ SuperCtAppDiv, 1983), 1984-86 PBC ¶ 34,040, cert denied (NJ SCt, 1984). Contrast *Niskayuna PBA and Town of Niskayuna* (NY, 1981), 14 PERB 3067; *Int. Bro. of Police Officers Local 621 v. City of Hollywood* (Fla, 1981), 7 FPER 12293; and *In the Matter of the Arbitration between the Borough of Anbridge and the Anbridge PBA* (Pa, 1980), 11 PPER 11263.

[13] *Bd. of Ed. of City of Englewood v. Englewood Teachers Assn.*, 135 NJ Super 120 (NJ SuperCt, 1975), 2 PBC ¶ 20,138.

usually carried with them some association with Mondays and detergents. Sure, we had working women, single parents, and even working families then, but when you described the American work force, it was a male description.

Today things are not so simple. Professional and technical jobs have grown almost two-and a-half times as fast as the total number of jobs in the past 20 years. The number of clerical workers has grown three times as fast as the number of blue-collar workers. The number of married women in the labor force increased three times as fast as men in the labor force between 1960 and 1983.

Americans still work in factories, farms, and offices, but an increasing number shares work in computer rooms, hospitals, banks, and restaurants. And 3.5 million more people worked part time in 1982 than in 1970, a faster rate of growth than the work force in general. So complex has the labor force become that the government has abolished the terms blue collar and white collar as ways to describe it.

When we look at definitions of the working family, we find the concept has changed during the past 20 years and it is doubtful that things will remain as they are today. As the baby-boom generation becomes a larger share of the total labor force, with its better education and greater commitment to women's role as workers, the labor force will continue to shift. Today, for example, slightly more than two-thirds of women between the ages of 20 and 45 are working or looking for a job. But new labor projections show that by 1995 over 80 percent of women in this age group will be in the labor force.

The concept or definition of the working family is changing. Households maintained by a woman with no husband will increase by 26 percent, while those maintained by a man with no wife present will increase by 35 percent. Together, these two types of households (which also include men and women who live alone) will represent 29 and 16 percent of households, respectively.

As more young adults postpone marriage and more young parents divorce, the number of married-couple households with children in the home is expected to decrease by two percent between 1984 and 1990, while the number of one-parent households will increase by 33 percent. Households that contain only one person are projected to increase at twice the rate for all households—30 percent versus 15 percent. Although 40 percent of one-person households are maintained by persons aged 65 or older, by far the fastest rate of growth in single-person households has occurred among persons under 35 years of age who have never married or who have been divorced. This pattern seems likely to continue.

Two decades ago there were only 23 million American women in the labor force. Today there are 48 million. The number of working women has increased 109 percent since 1960 versus only a 36 percent increase for working men.

Labor force participation rates of married women have risen more than twice those of single women or divorced, separated, and widowed women and as much as 30 percentage points for some age groups. The greatest increase has been for married women aged 25 to 34, rising from 27.7 percent in 1960 to 62.5 percent in 1983—a 35-percentage point increase.

Married women have flooded the labor force in the past two decades, and married women with children have provided a deluge of new workers. In 1960, only 19 percent of women with children under age six were working. By 1983, 50 percent were. For women with children aged six to 17, 39 percent were working in 1960, but the number was 64 percent in 1983. Married women with no children under 18 at home have increased their labor force participation the least of all married women. In general they are older and their children are grown.

As married women with children have gone to work, however, an increasing proportion of them are working part time, contrary to the trend for all women workers, as they try to combine work with raising children. Among working women with children aged six to 17, 28 percent worked part time in 1960 versus 33 percent in 1981. Among working women with children under age six, 30 percent worked part time in 1960, rising to 35 percent in 1981.

As we move into the late 1980s and the 1990s, if the projections are correct, we will be faced with continuing changes in the work force, the working family, and in work itself. There will be changes that will put more and more pressure on employers, unions, and government to respond to the varying needs of their employees, members, and the constituencies they represent.

Response to Change

How will you respond as a business leader, with limited resources to allocate the labor cost? How will you respond as a union leader trying to negotiate a fair and equitable package for your membership? How will you in government respond, with rising costs and taxes facing you? Do you continue to address the current and future issues you face as we do now—by considering the American work force as a "he"? Do you fall into another pattern by considering the dual-career family or the working family as a "she"?

As rational decision-makers for the organization you represent, would you consider the needs of the following groups to be similar: first marriage couples in their twenties with no children, both with mobile management jobs; nonmarried couples in their twenties with no children, both with mobile management jobs; nonmarried or married couples in their twenties with no children, with nonmanagement jobs and nonmobile careers; the same groups with a child; the same groups with more than one child; and individuals with and without children? You can continue the list and describe an almost infinite number of possible working family situations—situations that need to be responded to in different ways in the 80s and 90s.

The responses to their needs have come and will come in many forms. You can elect the standard parent approach used by most corporations, unions, and government and provide what you think is best for all employees, regardless of their needs. You can provide everything to all people and introduce yourself and your employees to bankruptcy, unemployment, and higher taxes quickly. You can listen to this year's drummer, then the next and the next, and meet up with cost, employment, and tax problems in a slower fashion. Or, perhaps you analyze your own work force and allow your employees, members, etc., to tell you of their needs and allow them the opportunity to help design programs and systems that meet their needs and your costs.

Maybe—just maybe—if you ask the users, they may help resolve some myths about your existing programs and about your plans. You may, for example, find that parent care for the elderly may be as important as child care, that flex-schedules should not stop at starting, lunch, and quitting times, and that flex- or shared-retirement is important. You may find that: sabbaticals are needed; personal days rather than sick days make more sense; paternity leave would not be silly or unimportant; family relocation is not what you have in employee relocation; and employee assistance should deal with family assistance as well as with working-parents and parent-care programs, couples' preretirement counseling, and partner programs in career and stress management along with the more standard EAP activity.

Conclusion

The needs for your organization should not be endless, but there is a list whose

costs could be. Unless you opt for flexible options in your personnel policies, I believe you will find yourself in a cost/needs pinch you cannot tolerate or respond to in the future. Allow options, individually selected, that give each employee the decision on how to handle his or her own changing needs.

Allow choices between child and parent care. Support vacation purchase and selling so that individual decisions can be made. Develop leave options for education, paternity, self-renewal, maternity, and adoption. Consider the sale of duplicated benefits such as group medical by dual-career family members. Look at various work schedules and locations. Allow redirection of salary into benefits or benefits reduction for salary. The list goes on, but the concept can answer the best of both worlds for the user and his or her needs and for the organization from a cost and productivity standpoint.

Is it easy? No! Is it expensive initially? Yes! Does it work? Yes! It works if you design well and implement with the thought that you are bringing a new mind-set to your organization, your managers, and you will move from practices that have been ingrained for years to a new system—a system where you will have to deal with individual needs, changing expectations, and desires for self-direction. You and your managers will have to let go of fixed decisions, past practices, and existing management style and replace them with flexible personnel, pay, and benefits practices and options that, I believe, will become the standard for the 1990s.

[The End]

Issues for Working Families

By Karen Nussbaum

9to5, National Association of Working Women

Every year in Cleveland the 9to5 chapter gives the Heart of Gold award to a deserving company on Valentine's Day. The Heart of Gold award balances some of our better known events like Scrooge of the Year and the Pettiest Office Procedure contest. 9to5 does look for the good as well as the bad, contrary to popular belief.

But sometimes we have a hard time, as we did last year when we scoured the city for a company with the best child-care policy. We surveyed every major downtown employer for a good policy on child care. When we could not find a *good* one, we had to settle for the best. So the award for child care went to Ameritrust Bank because it had someone in a couple of days a week to give advice to 5000 to 6000 employees on child care.

There were no: on-site child-care facility; vouchers as payment for child care of your choice; special nurse program for sick children; or contribution to publicly supported child-care centers. No, a part-time referral service was the best company-sponsored child-care program in Cleveland. And Cleveland is typical. Somehow employers have not caught on. They have not seemed to notice some elementary facts. Men and women have children, and children need to be cared for.

There is indeed a problem. One out of five families is a single-parent one, and 90 percent of them are headed by women. Over half of all women with children

under six work outside the home. Most of these women work because they need to. Seventy-five percent of working women are either the sole support of themselves or their families or are married to husbands earning less than $15,000 in 1980.

Child care is a problem for just about all of them—blue collar and clerical, professionals and managers. They worry about finding good child care and having backup for it. They worry about whether they will have enough flexibility from their jobs to handle an emergency, and what the response of their peers and superiors will be if they need help in handling emergencies. Low-income women find it hard to pay for extra baby-sitting. Upper-income women may have few resources among family and nonworking friends to help out.

The *Personnel Journal* states: "As long as women need to work, society is obliged to make it a viable option." 9to5 agrees.

There are two major issues for women workers with families—time and money. Company policies on time and money bear little relation to the real lives of working women.

Let us take money first. A single mother with two pre-teenage children was working as a secretary at Syracuse University. She told me she had to place one of her kids with another family from her church because she could not afford to keep two kids at home on her salary.

Most women do not earn enough money to support themselves and their families. Just look at clerical work, a job held by over one-third of all working women. Average pay for female clericals is a little over $12,000 a year. Three million full-time female clericals earn less than the government poverty threshold—around $9,000.

The solutions are two—pay equity and unionizing. Women in female-dominated jobs (and 80 percent of women work in "women's jobs") earn less than men in jobs that require less in the way of skills, effort, and responsibility. Day-care workers earn less than liquor store clerks. Nurses earn less than tree-trimmers. And secretaries earn less than parking lot attendants and grocery-baggers in supermarkets. If our society is committed to ending discrimination, the only serious approach is to institute pay equity.

The argument for unionizing is even more straightforward. Unionized clericals earn 30 percent more than nonunionized clericals. The message is clear—if you want enough money to be able to pay for child care and keep your kids, organize.

Issues

Child care is a money issue. Child-care policies in the United States are worse than in any other Western nation and worse even than in a number of underdeveloped countries. In the U.S., maternity leave with full pay is rare, yet this would be considered backward in Brazil where workers are entitled to 12 weeks of maternity leave with full pay. Kenya mandates eight weeks of paid leave. Nearly every European country offers more generous maternity leave than the U.S. Many countries also require employers to provide half-hour nursing breaks for mothers with infants and grant extended periods of unpaid leave without loss of job rights.

Virtually anything here would be an improvement. Some specific corporate policy possibilities include: on-site child-care facilities, underwritten by the company; cash contributions, either to parents or centers; and "cafeteria plan" benefits in which employees can choose child care among an array of benefits (for low-income workers, however, it is no solution to choose between child care and health insurance, or some other necessity). Other possibilities include: information and referral services; summer day camps on company-owned recreation property (this actually exists in one place, administered by the YWCA); and sick-child-care programs, in which a qualified person is

available for pay on an emergency basis to care for a sick child.

Time is the other major issue. A secretary in Chicago told me of the time her child was sick and she had to stay home to take care of him. When she called in, her boss was furious. "You will just have to decide what's more important to you," he threatened, "your child or your job." She was fired.

Let me ask each of you—which is more important to you, your child or your job? That is a stupid question, is it not? Why should anyone have to make that decision in the normal course of daily events?

Companies have to become more flexible if women (or parents) are to work and children are to be taken care of. Here is how they can do it.

Sick leave for the employee should be available for use for a child's illness. As one clerical told me, "It's no vacation to be home with a sick child." Flex-time is a system where established core hours are worked (say 10 a.m. to 3 p.m.), but the employee chooses to work any eight hours around that time. Job-sharing is when two people share one job, each with prorated benefits. This is particularly attractive to mothers of infants.

Part-time work is an option some women choose but often with reluctance. Blue Shield in Boston recently switched over its clerical work force from working full-time 40-hour weeks to part-time 30-hour weeks. Even its beneficent name for the new schedule, "mothers' hours," could not fool the women there; they were performing nearly the same work but now with no benefits whatsoever, not even health insurance. Part-time work without benefits is a step backward in anybody's book. Maternity and paternity leave with pay should be available for at least eight weeks, with an option for a longer leave without pay available. This goes beyond the issue of being disabled by pregnancy. Parents need time with newborn babies or with new children brought into their home through adoption.

Cause for Concern

The last issue I want to touch on has to do with pregnancy and reproductive health—the start of it all. Though law now prohibits firing a woman because she is pregnant, it still happens. 9to5 gets calls every week from women who have been fired right after announcing their pregnancy to their bosses. Companies must commit themselves to following the law.

We also need sensitivity and prudence on the part of companies concerning possible reproductive hazards associated with some kinds of work. For clericals this issue has come up with video display terminals. There are a number of "clusters" of abnormal pregnancies reported among VDT operators—perhaps 30 clusters. These are worksites where 40 to 50 to 60 percent of pregnant VDT operators in a department have had adverse outcomes to their pregnancies—miscarriages, birth defects, and stillbirths. The rate for abnormal pregnancies in the population at large is 10-20 percent.

We do not know what is causing this incidence of abnormal pregnancies. Some scientists suspect that it could be radiation, especially low level radiation. It could be stress, for VDT operators have an extraordinarily high rate of stress, higher even than air traffic controllers, according to NIOSH.

It could be ultrasound, or PCBs, or something we have not even identified yet, or it could be chance. There have been no studies in the U.S. to ascertain whether there is a problem of what the causes might be.

There is surely cause for concern. Based on the same information, a Canadian Government Task Force recommended that pregnant workers have the right to transfer without loss in pay during the term of their pregnancies. 9to5 recommends the same, while we urge that stud-

ies be done. Please remember, too, possible reproductive hazards affect men as well as women.

I suggested pregnancy transfers at a meeting of executives and managers in Philadelphia last year. One high level personnel manager questioned me: "You mean to say you want transfers without loss of pay?" "Yes," I replied. "Next thing you know," he said, "you'll want to get paid for getting pregnant."

A VDT operator with Equitable Life in Syracuse, New York, ran into a similar attitude when she voiced her concerns to management. During her first three months of pregnancy, the VDT next to her exploded. She was told not to worry and to keep her mouth shut. But now she is sorry, as she recently told a congressional hearing, because her child was born with serious multiple birth defects. She can not help thinking there is a connection.

Management would gain from taking a more humane, prudent view. Implementing these policies is only a realistic thing to do. We are living in the 1980s, not the 1950s. Women work and have children.

Benefits of Programs

But, these policies are also good for business. Intermedics in Freeport, Texas, reported reduced absenteeism and a lessened turnover rate and a resulting savings to the company of more than two million dollars in the first two years of the operation of a child-care program.

A 1979 survey by the University of Wisconsin of 58 organizations that sponsored some form of child care showed 57 percent had lower job turnover. Seventy-two percent had lower absenteeism, and 88 percent had easier recruitment.

A 1982 study of employers who provided child care found that 90 percent reported lower turnover rates for parents using employer-supported child care; the average difference in turnover rates was 24.4 percent. The overwhelming consensus concerning the effect of child-care programs was positive in the areas of turnover, absenteeism, recruitment, publicity, morale, productivity, and public relations, with ratings ranging from 71 to 90 percent positive. More than half of the employers rated the effect of child care as positive in the areas of tardiness, quality of goods and services produced, quality of the work force, and scheduling flexibility in a report to the National Association for the Education of Young Children.

In a 1984 survey conducted for the American Management Association, more than three-fourths of employers reported that the costs of employer-sponsored child-care programs are far outweighed by the benefits, which include less employee absenteeism, improved employee morale, and greater ability of the company to attract and keep good employees. The same holds true for flex-time, job-sharing, and similar policies. Many of these good policies are coming at the initiative of unions, including the Service Employees International Union.

An office worker in Boston told 9to5, "My company runs as if every employee has a wife at home to look after the kids and cook dinner. But in my house, I am the employee and the wife."

Our choices, then, are to provide policies to aid the working family or wives for working women. The former may be easier.

[The End]

Finding Alternatives to Plant Closings (Preliminary Report)

By Paul F. Gerhart

Case Western Reserve University

Labor-management negotiations to save plants that management has tentatively designated for closing have become common. This study identifies a selected number of specific cases and reviews the parties' experience with such negotiations in an effort to identify factors that contribute to success. It is a sequel, on an international comparative basis, to a 1983 study of plant-closing negotiations in Cleveland, Ohio. The Cleveland study, sponsored by the W. E. Upjohn Institute for Employment Research (report forthcoming), found that certain factors contributed to negotiating success. Those factors were: early recognition and acceptance of economic reality by key union and management negotiators; a willingness on the part of both parties to negotiate on a wide range of issues, including restrictive work practices and investments in plant and equipment; and industrial statesmanship by labor union negotiators rather than political opportunism and a willingness to work toward fully informing their constituencies. An important corollary is that management not take advantage of the vulnerability of union leaders who undertake such behavior.

In a cross-national study, other important factors in plant-closing negotiations may be shown. Differences in the structure of union-management decisionmaking, and in the role of government regulation or political involvement, may affect the rate of success. Ultimately, the objective is to describe policy criteria for government, organized labor, and management, so that the waste of human and capital resources can be minimized.

The *a priori* model used for the Cleveland study is reproduced in the figure [on page 474]. It is not the usual causal model associated with IRRA papers. Rather, it attempts to describe the series of decisions and possible outcomes associated with the closing of a plant. The research questions are, of course, related to *why* the outcomes occur at the various decision points. How does an employer decide either to close a plant or to initiate discussion? What determines the union's response to the employer's announcement of closure or to the attempt to initiate discussions? If there are negotiations, what are the elements that lead to success?

Note the presumption, or bias, built into the model. A willingness to discuss or to negotiate precedes all successful outcomes. Refusal to negotiate or the absence of discussion is associated with closure. The findings presume that it is discussion, negotiation, and ultimately compromise that leads to the salvation of plants or service establishments.

Some European Cases

This is a *preliminary* report on the investigation in Europe to date. The model and findings from the Cleveland study formed the basis for the research paradigm. This report is based on 18 interviews with labor, management, and neutral representatives as well as other researchers in four countries. The three cases that I have developed in detail, so far, are all in Scotland. Others are to be developed in England, the Netherlands, Belgium, Germany, and Sweden. Any conclusions and findings must be seen as tentative. They rely on the three cases and on the views of practitioners and researchers with whom I have communicated.

Case 1 involves a boat builder on the east coast of Scotland. In March 1975, the boatyard suffered a cash flow problem; 80 employees were told that the yard would close and that they were to be made redundant at the end of the shift. The employees decided to "sit in." For approximately 20 weeks, they held hostage three unfinished boat hulls, a diesel engine, and all the tools and manufacturing equipment in the yard. Apparently, no legal action was taken to remove the occupants. Eventually the yard was purchased by an oil exploration company and converted to the repair of boats used for a North Sea taxi service.

Currently the yard employs 1218 permanent workers plus a varying number of contract workers who build North Sea oil platforms. Two key matters included in the 1975 *written* agreement between the union and the new owners are "flexibility agreements," modifying historic craft demarcation (jurisdiction) lines, and a dispute settlement procedure. The latter provides for mediation and arbitration instead of industrial action in the event of worksite disputes. Insisted upon by management, the convener of shop stewards reported that these measures are also seen by the unions as very positive elements.

Although the demand for boat repair facilities may have led to the reopening of the yard without a sit-in, that is not clear. Had the yard been liquidated and its assets dispersed, the new buyer may not have been attracted to this particular yard. Moreover, there would have been a higher cost associated with startup. It is reasonable to conclude that the industrial action (sit-in) led to a socially desirable result.

Case 2 was widely reported in the Scottish newspapers. It involved the Capacitor Division of Plessey Co. Ltd. in Bathgate, Scotland. During its peak production period in the 1970s, Plessey employed over 2000 workers at Bathgate. By 1982, employment had dropped to about 400. During most of 1981, the company had received a subsidy from the Department of Employment under a special scheme to prevent redundancy. By January 1, 1982, however, the company decided that market conditions dictated closure of the plant. The company complied with the Employment Protection Act of 1975, which requires a 90-day notice of major redundancy. Plessey announced the closure would take place on March 31, 1982. The unions would not accept that decision as final and requested negotiations.

The local convener of shop stewards and his committee argued that Plessey was a large corporation with many products that could be moved into the Bathgate plant. The local felt that the jobs should be saved. National union leaders, however, recognized that the Plessey decision was probably "irrevocable" (the words used by management spokesmen in these discussions). The national position was that redundancy payments should be maximized and that perhaps the closure deadline could be extended. Management sought to minimize costs by closing the facility quickly.

In early February, Plessey employees determined that major component shipments were occurring and capital equipment was being dismantled, presumably for shipment to an Italian capacitor plant. They immediately initiated a sit-in, preventing further movement of inventory or equipment. Negotiations were characterized by a split between national and local leadership. A heavy overtone of left- versus right-wing politics within the labor movement further confused the issue.

Eventually, a Dutch company, Arco Tronics, purchased the facility. With 80 employees, it is continuing to produce capacitors at a reduced output.

Case 3 involved a Motherwell (Scotland) shirt factory. The factory employed more than 300 workers when the closing was announced by the parent corporation.

Production actually ceased, but the employees immediately began a 24-hour picket line to prevent removal of machinery and stock. After several weeks, a "management buyout" was arranged with assistance provided by the Scottish Development Agency—a governmental unit that provides capital in such arrangements.

Management of the plant had also been threatened with redundancy. The present arrangement between the Tailor and Garment Workers Union and the new plant owners may be viewed as a "cooperative venture." Since the buyout, union participation has included assistance in marketing shirts produced by the plant.

Findings

Perhaps the most striking finding in the three Scottish cases concerns the role of confrontation versus cooperation in a plant-closing situation. Militant action prevents plant closure. This view is shared universally by the union respondents. Cooperation, in fact, may be a useless option in cases such as the boatyard and shirt factory. Both facilities ceased production and would have been liquidated had it not been for the workers' action. A similar fate probably would have occurred at Plessey.

When militant response occurs, it is stimulated at the local level. National union staff and leadership have learned to avoid confrontation with management unless local support imposes that response. In part, this is the result of the Redundancy Payments Act, which requires substantial bonus payments to permanently displaced employees. Several respondents reported instances where the leadership found itself isolated and powerless when virtually all constituents opted for the receipt of the redundancy pay. In one plant, only 80 employees out of 2000 who were made redundant attended a union meeting called to discuss the situation.

Militant response occurs at the local level when the union and its constituents see the decision to close as a rapid erosion of power. At the Plessey plant and at the boatyard, the corporate assets that were held hostage were crucial for the union to retain its strength in negotiations. Cooperation, even for a brief period, would have allowed the corporation to remove assets and eliminate union bargaining power. With reference to the figure, militant response at the local level is a variant of option 3B. Essentially, the union is left with no choice in the situation.

When cooperation occurs, it appears to be the result of the following factors. One is powerlessness. The union perceives that it has no power except to cooperate. Unfortunately, this mode of behavior may lead to alienation and frustration on the part of the union if management overplays its hand. On the other hand, enlightened union leadership and educated members may recognize that flexibility agreements and impasse dispute resolution procedures may, in fact, increase job security. Cooperation with management to achieve higher levels of productivity may enhance the likelihood of the union achieving its goals.

Implications

Public policy: a 90-day closure notice is required in virtually all plant-closing situations. Technically, this requirement grows out of the Employment Protection Act of 1975 as well as the Advisory Conciliation and Arbitration Service Code of Practice. In general, wherever an employer intends to lay off more than 100 employees, notice must be given to the relevant trade union as well as to the local department of employment.

Theoretically, such notice should be useful to union representatives and public officials so that adjustments can be made prior to a substantial increase in the number of unemployed workers. Moreover, if alternatives are possible, the people who

might be able to develop them are given an opportunity to respond.

Prior notice of shutdown, as it has been enacted and administered in the U.K., appears to be of doubtful value. Employers frequently choose to ignore the requirement because penalties are not significant. In addition, an employer can legally avoid the requirement if there is "a sound commercial reason" for the closure. Finally, even when notice is given, employers are frequently prepared to close the facility immediately provided that they can achieve the assent of everyone involved. This is often possible where an employer makes a substantial redundancy payment offer above normal requirements. In essence, prior notice means that an employer will take all steps to close a facility and simply go into a holding action for 90 days.

A second aspect of public policy involves the requirement for redundancy pay where a substantial number of employees are laid off. This is also a feature of the Employment Protection Act of 1975.

An unexpected impact of the legislation is to undermine the potential militancy of a local union facing a plant shutdown. Union leaders are no longer surprised when virtually none of the constituents seriously objects. Despite the serious problem of unemployment and quite limited mobility, many of the employees simply "take the money and run." Union representatives express the view that they have been surprised by the numbers of workers who are "willing to sell their birthright" for so little.

From a public policy perspective, it is clear that mandatory redundancy payment reduces the potential conflict involved in plant closing and eases the transition for many employees. On the other hand, it also clearly reduces the role for the union.

A third aspect of public involvement in plant closings concerns intervention by politicians. Here, the British have a distinct disadvantage relative to the American experience. The consensus among union, management, and neutral representatives is that political intervention is nearly always useless. Politicians in Britain tend to be identified as pro- or anti-labor on the basis of political party affiliation. Hence, it is difficult to be accepted as an objective, if not neutral, conciliator. This potential role for politicians exists, but is generally sacrificed in order to obtain the immediate political capital associated with a denunciation of one side or the other.

Union policy: the finding of the Cleveland Plant-Closing Study was that cooperation by the union is the only realistic route to saving plants. It is now clear, however, that under certain circumstances militancy may be the preferred policy. In Scotland, several of the facilities would have been closed in the absence of militant confrontation. It is not clear whether any of the Scottish lessons easily can be transferred. Sit-ins would not be as hospitably received in our political environment.

Nonetheless, alternative forms of militant response to plant closure may be in the best interests of local unions under limited circumstances. A more complete review of plant closing in the United States and a comparison of the circumstances with those of Scotland and other parts of Europe would be helpful.

Management policy: articles, seminars, and books have given recent advice to management on how to close a plant. Two approaches appear for management. The first is to provide advance notice and discuss the closure, allowing employees, through their union, to suggest alternatives or ways to mitigate the impact. The second management alternative is merely to padlock the plant and sneak away in the middle of the night. Although the latter is of questionable legality, penalties are limited and it remains a viable option.

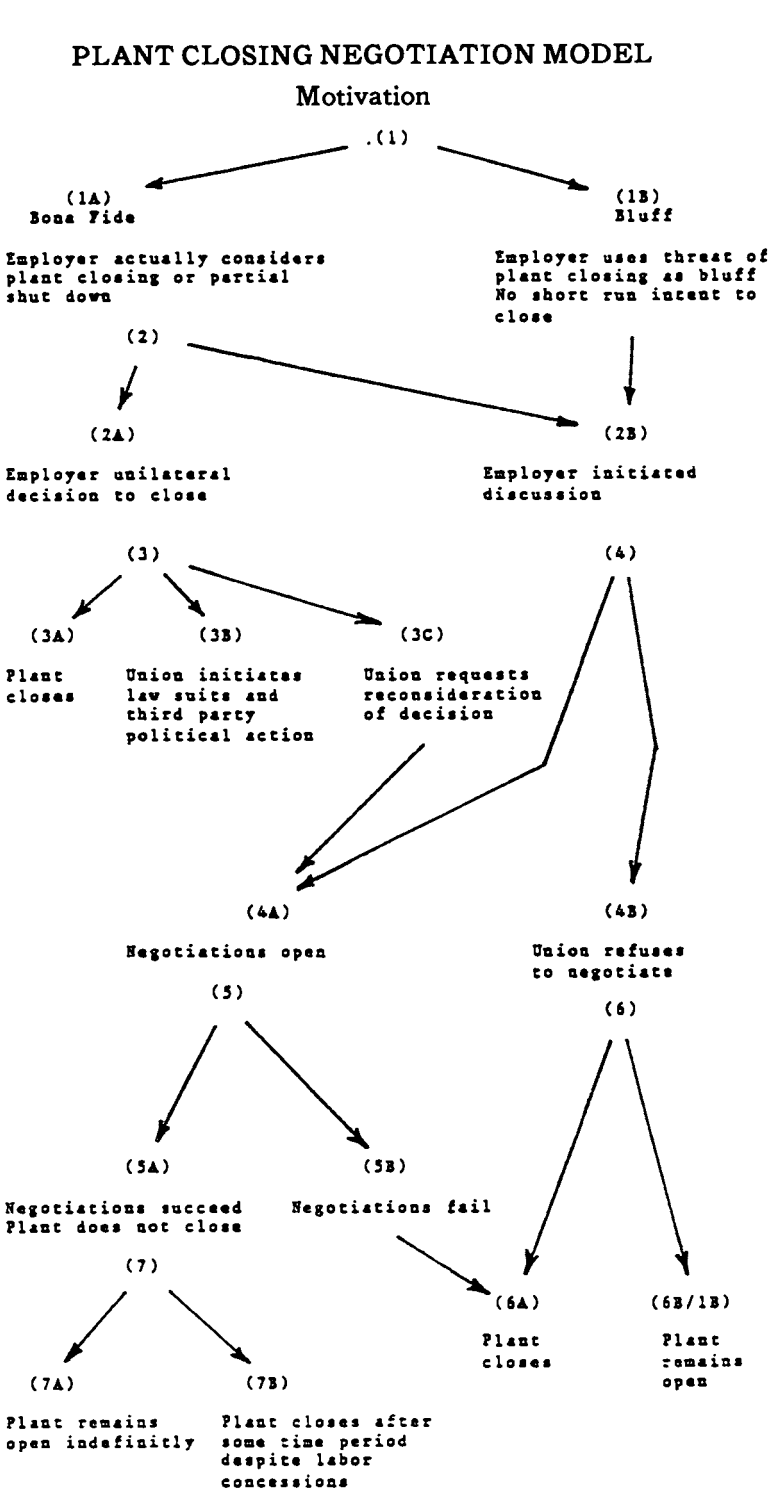
From the point of view of the employees and their union, the first of these alternatives is clearly preferable. Even from the social perspective, it would appear that advance notice and discussion would be desirable and less costly. From this study, however, it is not clear whether it is in management's interest to provide advance notice or to discuss plant closure with the employees and their union.

Only when management is convinced that such notice and a cooperative approach is in management and stockholder interest will management proceed to voluntarily engage in negotiations. Moreover, any effort to mandate advance notice legally will have only a marginal effect. Obviously, at the margin, the cost of violating or circumventing such legislation might encourage management to engage in discussions. In the typical case, however, it is not clear that such legislation will have the desired effect.

A principal hypothesis with which this study concerns itself on a continuing basis is that advance notice and discussion with employees is in the interest of all concerned. Unless clear evidence can be amassed to support this hypothesis, it is unlikely that public policy will be effective in promoting labor-management cooperation in this area.

[The End]

PLANT CLOSING NEGOTIATION MODEL



Unemployment Among New Entrants to the Labor Force: A Second Look at the New Unemployment

By Hirschel Kasper*

Oberlin College

This article reports on the unemployment problem of persons who enter the labor force in search of their first job, a group that has not received the attention it deserves given its size and potential importance to a better understanding of current labor markets. Much work in economics, as well as sociology and psychology, has concentrated on how people search for and obtain their first good *steady* job, that is, exit from unemployment or from what some term the "secondary labor market." There are also studies of specific demographic groups that are entering the labor force relatively faster than before, such as teenagers, women, and black workers. Many of them concentrate on the particular economic and social variables that seem to put the group at an economic disadvantage. There are, though, far fewer studies that examine the group of people who have in common only that they are searching for their first full-time job of *any* kind and have not yet found it.

It can be argued that the unemployed new entrants to the labor force are an especially interesting group because their search for work is largely independent of those factors that argue against an aggressive aggregate demand and active employment and training program. The unemployment of the "new entrants," defined as persons who have never worked full time for a period of two consecutive weeks, cannot be attributed to the labor market churning of teenagers who suffer recurring episodes of quits, terminations, unemployment, and another job, or to repeated withdrawals from the labor force in accordance with life-cycle decisions, and certainly not to the financial support of their own unemployment insurance. To put it another way, the unemployment of new entrants cannot be because of the "instability of individual employment." [1]

Although those workers who have either lost or left their last jobs account for 50 to 60 percent of the total number of unemployed, depending on the overall unemployment rate, approximately 40 to 50 percent of the unemployed are persons who formerly were not even in the labor force. In 1983, when the country's unemployment rate was 9.5 percent, slightly more than one million (nearly one out of eight) of the unemployed were new entrants who were looking for their first job. That proportion can be compared to the situation in 1975 when total unemployment was 8.5 percent and 10.4 percent of the unemployed were new entrants, and 1958 when unemployment reached 6.8 percent and only 8.3 percent of the unemployed were looking for their first job. Indeed, over the period 1958 to 1983 the proportion of the unemployed who were new entrants to the labor force has been steadily rising at the rate of nearly 0.1 percentage point per year.

The Problem

In the sections to follow we discuss the nature and extent of the apparent rise in the difficulty that new entrants have had

* The author wishes to thank Henry Willmore for his research assistance.

[1] Martin Feldstein, "The Economics of the New Unemployment," *The Public Interest* 33 (Fall, 1973), p. 5.

in finding work, especially compared to those who lost or left their last jobs.

Most of the unemployed new entrants are teenagers, although the fraction has been declining so that now less than 75 percent, rather than nearly 85 percent of two decades ago, are teenagers. The growth in the number of unemployed new entrants who were 20 and over probably can be associated with the deferral of work by the increased number of high school graduates who enroll in college or vocational school and the decision of adult women to obtain employment. There is no evidence, though, that the growth should be attributed in any significant fashion to a statutory requirement that persons on welfare must try to find employment.

However, the mere recital that a larger share of the unemployed new entrants are "adults" raises the more interesting question of why so many (young?) adults never worked full time for as little as two consecutive weeks before. And, further, might the reasons why such adults were never employed be important reasons in understanding the duration of their unemployment? Although rising family income may be thought of as one reason why some people can more afford to defer employment, there is evidence presented below that casts doubt on the hypothesis that high or rising family incomes have enabled teenagers to choose not to work.

Since the total unemployment rate is the weighted sum of the unemployment rates of the experienced workers (those who have lost their jobs, left them, or are reentering the labor force) and the new entrants, it is possible to infer the condition of the new entrants by examining the difference over time between the total unemployment rate and that for the experienced workers. Because of the gap between the two increases over the period from 1949 to 1983, it is clear that the unemployment of new entrants has become an increasingly important component of total unemployment. In other words, over the past 34 years it has become increasingly difficult for labor force entrants to find their first job relative to the ability of experienced workers to find another job.

That finding is not entirely surprising, since it may be presumed that new entrants have less knowledge about the distribution of wages, both mean and variance, that they are about to face and may be expected to search less extensively for work if they do not know where to find useful job information. What may be surprising is that new entrants appear to be having increasingly more trouble finding employment, as if either they were having more difficulty understanding the distribution of potential job offers or the distribution itself was becoming less understandable.

If one assumes that workers can invest in labor market knowledge about alternative job opportunities and that one by-product of labor force experience is information about the wage distribution, it would follow that new entrants would have the least knowledge of the market, even if they recognize their own talents. Moreover, the best-known wage packages often include large portions of fringe benefits that may be heavily discounted by young, single workers, so the new entrants may extend their search either to firms that offer "cafeteria"-style compensation packages or to smaller firms that offer fewer fringes but slightly higher wages.

Statistical attempts to gauge whether the employment problems of new entrants were results of the baby boom growth in the labor force suggest that they were not, although there is some evidence to suggest that the situation of the new entrants is of accelerating importance in determining the total unemployment rate. In 1967, R. A. Gordon observed that it had already "become increasingly difficult for new

entrants into the labor force to find their first job." [2]

The median duration of unemployment for the new entrants is less than that for others who are unemployed; the difference between the two narrowed in relatively good times, such as 1968 when it was 4.2 versus 4.3 weeks for all unemployed, and widened in 1983 to 6.7 versus 10.1 weeks. Since entry into the labor force depends in part upon the rate of unemployment, it is possible that some potential new entrants to the labor force, fearful of a prolonged spell of unemployment, may choose to remain outside the labor force, perhaps either in school or in the home. There is abundant research to indicate that the line between entering the labor force and remaining out of it is ambiguous, where many persons not in the labor force are actually ready, willing, and able to work but do not begin to "search" for work until offered a job.

Duration of Unemployment

Some evidence that the duration of unemployment of new entrants is the consequence of complex and ambiguous behavior can be gleaned from Table 1. It reports two measures of the sensitivity during the period 1969-1983 of the duration of unemployment of various groups relative to the duration of unemployment of workers who lost their last jobs.

TABLE 1

Estimates of Sensitivity of Median Duration of Unemployment, Relative to Median Duration for Job Losers, 1969-1983

(1) Reason for Unemployment *	(2) Duration of Job Losers*	(3) R^2
1. New Entrants	0.4496 (0.1815)	.50
2. Reentrants	0.4163 (0.0893)	.79
3. Job Leavers	0.7418 (0.1779)	.73

*Measured in logged form.

The numbers in Column 2 are the parameter estimates (and standard errors) from equations where the log of the median duration of unemployment of each named group was regressed against the log of the median duration of unemployment of job losers and time during the period 1968 to 1983, adjusted for autocorrelation. Neither the intercept nor the parameter estimate for time were significant in any equation.

Column 2 reports the elasticity, or rate of change, of the median duration (in weeks) of unemployment spells of, for example, new entrants relative to the change in the median duration (in weeks) of spells of unemployment of workers who lost their jobs. Thus, a one-percent change in the median duration of unemployment of job losers may be associated with a change of .4496 percent (just less than half as much) in the median duration of unemployment for the new entrants. As expected, the duration of unemployment spells of the new entrants is relatively inelastic compared to that of the job losers, similar to the elasticity for the reentrants, and both are much less than

[2] Robert Aaron Gordon, *The Goal of Full Employment* (New York: Wiley, 1967), p. 138.

that for the job leavers who are already in the labor force.

However, the variation in the duration of the unemployment spells of the new entrants is not well "explained" by the variation in the spells of job losers, at least compared with the variation in the spells for either the reentrants or job leavers. Column 3 reports that only half the variance in duration of unemployment spells for the new entrants can be associated with variation in the duration of unemployment for job losers, but three-fourths of the variance in duration for both reentrants and job leavers can be associated with the variance in the duration of job losers. One implication of that result is that the determinants of the duration of unemployment for new entrants is more complex than that of either of the other categories.

As a result, it appears that, not only are the new entrants becoming a relatively larger component of total unemployment, but also the explanation for the duration of their unemployment is not well understood. Certainly, the explanation is unlikely to lie in the areas of job-hopping, unemployment insurance, or the rhythm of the academic year. Nor is the explanation for the relative increase in the number of unemployed new entrants likely to be found in allusions to the federal minimum wage, since the ratio of the minimum wage to the average manufacturing wage has remained within a very narrow range for the past 30 years.[3] More likely explanations may be found in the relatively unexplored areas of the effect of increased family incomes on labor force participation rates, the possibility that teenagers and young adults no longer personally know individuals who have the discretion to hire (a group that, itself, may have declined over the period as a result of the growth in civil service employment, etc.), or adverse shifts in the accessibility and (money and time) cost of information about job opportunities.

New Entrant Unemployment

Because data are available on the race of the unemployed new entrants, it is possible to determine whether the buildup in the increase of unemployed new entrants is a result of either growth in the total labor force and/or growth in the labor segmented by race. Regressions were run to learn more about the effect of labor force growth on the proportion of the unemployed who were new entrants to determine whether there was an increase in the fraction of the unemployed who were new entrants whenever there was relatively rapid growth in the labor force. That hypothesis would be consistent with a notion that unemployment was the consequence of an overcrowding, the result perhaps of an insufficiently flexible labor market. Since our model is unsophisticated and published data are available only as far back as 1968, the results we report must be viewed as merely tentative or suggestive.

[3] Finis Welch, "Minimum-Wage Legislation in the United States," *Evaluating the Labor-Market Effects of Social Programs*, ed. Orley Ashenfelter and James Blum (Princeton, N.J.: Princeton University Press, 1976), p.2.

TABLE 2

Proportion of Unemployed New Entrants, by Race

Variable	(1) White Workers	(2) Black Workers
% Change in Total Labor Force	2.865	0.682
	(1.503)	(0.891)
% Change in White Labor Force	− 2.409	
	(1.715)	
% Change in Black Labor Force		0.658
		(0.333)
White Unemployment Rate	− 1.759	
	(0.841)	
(White Unemployment Rate) ^{2}	0.084	
	(0.072)	
Black Unemployment Rate		− 1.067
		(0.482)
(Black Unemployment Rate) ^{2}		0.024
		(0.017)
Time	− 0.025	0.335
	(0.062)	(0.117)
Constant	− 27.212	632.72
	(115.632)	(215.85)
R^2, D-W	.90, 2.04	.81, 2.18

(Standard errors are in parentheses)

Nonetheless, the results in Table 2, particularly the racial differences in the significant variables, are provocative. First, the estimates in Column 1 suggest that the fraction of white unemployed workers who are new entrants is negatively related to the unemployment rate for all white workers, as one would expect since the larger swings in the total unemployment rate arise from changes in the incidence of layoffs, terminations, and quits.

More interesting for our purposes is that the time variable is insignificant but that the rate of growth in the *total* labor force is positively related to the fraction of unemployed white entrants. It appears that one problem for new entrants may be that the market cannot provide enough job opportunities fast enough for them, so that when the labor force grows relatively fast it becomes more difficult for new entrants to find work. The fact that the rate of growth of the labor force of white workers may not be significant in determining the proportion of white unemployed workers who are new entrants is of interest in this case only because of the contrary result for black workers.

The estimates in Column 2 for black workers are sufficiently different from those for white workers so that it appears as if white and black workers are not entering into the same labor market. For example, although the total unemployment rate for black workers is negatively related to the fraction of unemployed black workers who are new entrants, with the same implications as above, the growth in the *total* labor force (black and white) has no apparent effect. Instead, the growth in the *black* labor force is found to be a determinant of the proportion of new entrants among the unemployed black workers.

That is a sharp difference from the white results and suggests that the job opportunities for black new entrants is, for some reason, not associated with the

growth in the labor force as a whole but only with the growth among black workers. Can it be that the job opportunities for white new entrants depend on the growth in the market as a whole but that for black new entrants only the black segment of the labor force is important?

Column 2 also indicates that over and above the growth of the black labor force, which has been faster than that of whites during this period, the proportion of black new entrants who are unemployed has increased during the period 1968 to 1983. Apparently, there has been a secular determination in the ability of black new entrants to find employment.

Thus, we have one clue to the mystery of why new entrants to the labor force have had a more difficult time finding their first job during the last 30 years. Over and above the baby boom and growth in the labor force, black and/or white, black persons who have never worked before have had a more difficult time, for undetermined reasons, in finding their first job. If a large part of the larger problem is the unemployment of black new entrants, then it may not be that higher family incomes have enabled the new entrants to postpone their labor market search. True, labor force participation rates for young black men have been declining, but the rates for young black women have been increasing nearly as fast. The explanation is unlikely to lie in claims of *increasing* racial discrimination or in educational differences since the median years of schooling of black workers has become insignificantly less than that of white workers.

Conclusion

In summary, there is evidence that one segment of the unemployed, those who are new entrants to the labor force, is becoming relatively more numerous. New entrants are having more difficulty than before in locating their first jobs. Their plight cannot be explained by the standard arguments of job churning, weak attachment to the labor force, life-cycle decisions, or unemployment insurance, but there is little original research on the causes of their plight. Their situation cannot be likened to that of teenagers, although the majority of the unemployed new entrants are teenagers. But, from what we know of the group of more than one million persons, there is little reason to believe that aggregate demand would not overcome the apparent racial segmentation.

[The End]

Refurbishing the Grievance Procedure Under Collective Bargaining*

By Robert J. Callaway

Federal Mediator

There is a need to consider refurbishing the grievance procedure in the collective bargaining relationship, with a focus on the contractual process that precedes arbitration, at a time when the duty of fair representation is becoming more stringent. Disagreement over interpretation continues to be commonplace after bargaining is completed, and the grievance procedure is the mechanism for the orderly resolution of such disagreement. It allows the parties to enforce the provisions of their bargain, and it also becomes a source of "future interests" derived from "the law-making aspects of grievance adjustment" and the resulting accumulation of precedent.[1]

As Bok and Dunlop indicated in their book, *Labor and the American Community,* "it is clear ... that an effective, well-administered grievance procedure can play an indispensable role in improving labor relations and providing a measure of industrial due process to the workers involved. The advantages ... have been summed up ... by a distinguished panel of experts: 'A major achievement of collective bargaining, perhaps its most important contribution to the American workplace, is the creation of a system of industrial jurisprudence ... under which employer and employee rights are set forth in contractual form and disputes over the meaning ... are settled through a rational ... process .... The gains ... are especially noteworthy because of their effect on the recognition and dignity of the individual worker. This system helps prevent arbitrary action on questions of discipline, layoff, promotion, and transfer .... Wildcat strikes and other disorderly means of protest have been curtailed and effective work discipline generally established. In many situations, cooperative relationships marked by mutual respect ... stand as an example of what can be done.' " [2]

Why then do we consider refurbishing the process in the face of such auspicious commentary? The thesis here is that the world is changing, and our system of industrial relations, including even the grievance process, must change along with it.

In the forefront of this change, our national economy has been swept along with the emergence of an entirely different world economic order in which we no longer have sole control. We are captives of rising costs of natural resources, changing and shifting technology, economic competition from other cultures we are advised to emulate, jet-age transportation, satellite telecommunications, and computer-based information systems that allow us to simultaneously feel the difficult effects of global events without full comprehension in Rockford, Illinois, Washington, D.C., or even Cambridge, Massachusetts. These events are equally mystifying and frustrating to the manager and the worker as they engage in some of the most difficult labor bargaining since the process legislatively arrived.

We recall the "simpler" times when management approached bargaining with

* This article has benefited from the review and comment by representatives of the Sundstrand Corporation, the International Union and Local 592, UAW, and colleague Gilbert E. Donahue.

[1] Archibald Cox, "Rights Under a Labor Agreement," 69 *Harvard L. Rev.* 615 (1956).

[2] *The Public Interest in National Labor Policy* (New York: Committee for Economic Development, 1961), p. 32, as quoted in Derek C. Bok and John T. Dunlop, *Labor and the American Community* (New York: Simon and Schuster, 1970), p. 221.

primarily a defensive posture, attempting to resist change and maintain the status quo, ultimately passing on to the customer what had to be yielded to obtain the bargain's ratification. This has not been the case today. Management has become an assertive, aggressive bargaining partner with the union, and we are just as likely to see broad and comprehensive proposals from management in its search for cost-effective operational changes. One veteran observer, Jack Barbash, suggests that a 1984 "reckoning" is taking place in the labor-management field.[3]

It is also my thesis that managerial efforts at change are bringing forth a wave of labor contract reconstruction, with new contract language being tried and tested—except that the bargaining is still being done by people of varying skills, personalities, temperaments, and understanding, under conditions which do not provide the best of circumstances for "impeccable draftsmanship," to borrow Dean Harry Shulman's classic expression.

It is also my view that the developing case law dealing with the issue of fair representation compels the parties to take stock of their grievance-handling model and periodically gauge how well it is performing its functions. Decay and malfunction from an older procedural model add friction, cause fatigue in the bargaining relationship, create new areas of potential liability, and intensify the need for restoration and repair in the grievance process. The system of industrial jurisprudence we have developed over the years provides us with sufficient principles for the competence and good will of practitioners in the labor-management community to refurbish the grievance process. We need not keep dwelling on that part of the *Business Week* view that our system is "jerry-built," "outmoded," and contains "a deeply rooted sense that a wide gap separate[s] those who work from those who manage." [4] There is opportunity here to improve the process, test ingenuity and determination, and possibly release old purposes and values.

The Sundstrand Project

In October 1982, such a restoration project began between the Sundstrand Corporation in Rockford, Illinois, and Local 592 of the United Automobile, Aerospace, and Agricultural Implement Workers of America. It is used as the vehicle for considering this subject.

The company, Rockford's largest employer, is an old-timer in the high-tech field and is an internationally known manufacturer of power transmission and aerospace/space shuttle components. It is heavily into research and development, with some products needing up to ten years to turn a profit.

The union represents an hourly work force of about 1,000 members who traditionally have been among the better paid and benefited workers in the community, consisting of predominantly high-skilled, long-service employees. They have been a prime example of the skilled trades in industrial manufacturing. The parties themselves have engaged in collective bargaining since 1946.

The grievance procedure project grew from a 1982 concessionary bargain of tempest proportions over the issue of "Rockford's long-term viability." The settlement occurred within a plethora of unemployment and concessionary confrontations in the community.[5] When we consider the perspective that time and the experiences of others lend to an understanding of difficult events, the parties not only avoided a work stoppage but also demonstrated courage and sacrifice that only the rigors of adversity allow us to

[3] Joann S. Lublin, "As Big Labor Contracts Lapse in '84, Both Sides Expect to Be Tougher," *Wall Street Journal*, December 29, 1983, pp. 11 and 21.

[4] "The New Industrial Relations," *Business Week*, May 11, 1981, p. 85.

[5] See "Rockford Chronicles," *Washington Post*, June 5, 1983, pp. 1 and 6C.

measure accurately. They agreed not only to undo—with wage and benefit reductions in return for the nonrelocation of certain bargaining unit work—but also to redo. Hence, this restoration project was begun.

Among other things, the company had proposed that the union give up the contractual right to strike over certain types of grievances during the term of the contract, citing its need for assured, uninterrupted production. The union resisted, long having had reservations over relying exclusively on arbitration as the ultimate method for deciding the merits of a grievance dispute.[6]

Beyond this, the union expressed dissatisfaction with what it felt was a lack of responsiveness to grievance action at the supervisory level, with some grievances still in process after six years. Management countered by alleging a predisposition on the part of the union to pursue and appeal regardless of the merits of the grievance, ultimately "having gotten all dressed up with nowhere to go."

These are fairly common contentions, except that concessionary bargaining quite easily becomes crisis bargaining, and during a crisis bargain the announced displeasure with the way the other side is operating in the grievance process can be small potatoes. What is uncommon is the fact that the parties did not consider the grievance procedure to be "small potatoes," and they decided to judge whether the process did, in fact, need help before attempting to fix it.

They each appointed a study committee of three members who had an intimate knowledge of grievance handling and reputations for open-mindedness. Union appointees came from the job-steward ranks; management appointees came from the middle echelon. The writer agreed to participate following his involvement in the bargaining settlement. The bargaining spokesmen from the company and local union joined several of the study discussions.

The study group reached immediate accord on seeking candor, scholarship, and joint recommendations. The talks continued over six months, with a pronounced element of idealism, tempered by 36 years of "marriage." They sought discernible trends in their grievances and efficient resolution of grievances. They asked whether new or better methods and techniques are available that could be recommended to the bargaining committees for incorporation. They read and discussed selected reference materials,[7] and outside practitioners who deal with similarly skilled work forces were invited and participated.[8] Even a nonunion employer with highly skilled employees attended and explained the workings of his employee complaint process.[9]

In its study, the group found that several factors continue to have relevance in evaluating grievance dispute activity in a bargaining relationship. These were: the state of the relationship; the experiences of the parties in dealing with each other; the personalities of key representatives; the methods and changes in plant operation, particularly with reference to wage payment; union politics and policies; man-

[6] The union has the right to strike with proper process and notice over the following: a new or changed incentive standard; the occupational description or day or base rate for a new or changed job classification; the reasonableness of the company in breaking out a portion of an existing classification or combining two or more classifications; or a subcontracting dispute tied to a layoff relationship as determined in arbitration.

[7] Frank Elkouri and Edna A. Elkouri, *How Arbitration Works* (Washington: Bureau of National Affairs, 1974), pp. 106-68; John A. Fossum, *Labor Relations Development, Structure, Process* (Dallas: Business Publications, 1982), pp. 361-83; and Harry Graham and Brian Heshizer, "The Effect of Contract Language on Low-Level Settlement of Grievances," LABOR LAW JOURNAL, Vol. 30, No. 7 (July 1979), p. 427.

[8] Representatives attended from Borg Warner Corp. and Local 225, UAW, Rockford, Ill.; Beloit Corp. and District 68, IAM, Beloit and Delavan, Wis.; Fahy and Cheney, Ltd., Rockford, Ill.

[9] Ingersoll Milling and Machine Co., Rockford, Ill.

agement policies; and the grievance procedure itself.[10]

In the evaluation of procedural experiences, there are quantitative comparisons, e.g., finding 11.7 grievances per year per 100 employees on the average over five years. This figure is within the "frequently encountered" 10 to 20 range referred to in the Slichter, Healy, and Livernash study.[11] It is considerably outside the 27.5 ballpark of the International Harvester "horror" years, and it does not fall within the context of being "distressed."[12] In the cited McKersie, Shropshire, and Ross studies, the parties agreed to the need to introduce a number of procedural modifications in order to reduce their grievance volume. By such standards, Sundstrand and Local 592 were not numerically noteworthy.

Just as procedures alone do not assure settlement outcomes, "volume" alone should not be relied upon as the exclusive tool in evaluation. There are several diagnostic considerations for the uninitiated for helping with such evaluation, including where grievances tend to be settled, the frequency of failure to observe prescribed procedures, whether procedural steps accurately reflect the reality of the parties' authority structures, and whether, in the absence of resolution at a particular step, the process is at least exploited to clarify the issue in dispute.[13]

The Sundstrand-Local 592 study raised several mutually agreed concerns along these lines and offered some suggestions. I daresay they could be randomly considered throughout the field in the search for improved grievance handling methods and techniques, particularly within the context of a more complex issue of fair representation.

Employee Rights and Involvement

There is an inherent void for grievance settlement when the employee who feels aggrieved is absent from early attempts at joint discussion of the problem. This is where the facts and circumstances are best understood, whether or not there is merit to the inquiry or claim. Employee absence can become the rule rather than the exception where the union has discretion in supervising the grievance machinery.

The study group agreed that the "elected" role of the steward can dampen the first step's screening and settlement function if the employee is absent. The steward serving as a go-between at this stage assumes a needless burden of accurately understanding and explaining the supervisor's response to the employee in addition to the legitimate role of understanding and explaining the basis of the claim to the supervisor. Any element of doubt is resolved in favor of pursuing the matter further because of the increasingly involuted obligation of faithful representation.

As to the supervisor, the resolution process is corrupted when it is cut short and the steward is vicariously invited to file a grievance if there is any unhappiness with the response. It is common practice for the supervisor to have asked higher-ups about the matter, and the grievance, when filed, is made to order for creating captious workplace litigation. Some 20 years ago David Cole wrote: "[C]onventional grievance procedures have become instruments of a tactical

[10] Sumner H. Slichter, James J. Healy, and E. Robert Livernash, *The Impact of Collective Bargaining on Management* (Washington, D.C.: Brookings, 1960), pp. 701-20.

[11] *Ibid.*, p. 698.

[12] Robert B. McKersie and William W. Shropshire, Jr., "Avoiding Written Grievances: A Successful Program," 35 *J. Business of Univ. of Chicago* (April 1962); Arthur M. Ross, "Distressed Grievance Procedures and Their Rehabilitation," *Proceedings of the 16th Annual Meeting, National Academy of Arbitrators* (Washington: Bureau of National Affairs, 1963), pp. 104-38.

[13] A.W.J. Thomson and V.V. Murray, *Grievance Procedures* (Lexington, Mass.: Saxon House/Lexington Books, 1976), pp. 187-89.

kind. They tend to enlarge rather than to resolve problems. There are more appeals made than when one raises a constitutional question in the federal courts, and the irony of it is that the appeal, except in the final step of arbitration, is not to some unbiased forum but . . . to someone higher up in the employer's echelon who has already participated in the decision announced in the preceding step. The same is . . . true on the union side. The representative who handles the appeal has invariably been consulted in the prior step. And yet the ritual goes on . . .." [14]

Of increasing significance in this scenario is the judiciaries' acceptance of the invitation to review the merits of employee grievances under the premise of determining whether the union has properly exercised its duty of fair representation. Union conduct can come under review over the denial of arbitration and in the manner in which a grievance is processed. Such intervention preserves our treasured right to judicial trial in independent courts according to due process of law, as occurs under Section 301 of the Taft-Hartley Act. This portion of the law was given broad, substantive life under *Lincoln Mills*[15] over the issue of arbitrability.

The individual grievant finds the mechanics remarkably simple for filing in federal district court a suit charging mistreatment. Where the grievant can show financial incapacity, even the filing fee is waived and the court can appoint counsel if one is desired. Considering the subsequent "exposure" and pretrial hearing process, it is sometimes difficult to comprehend why certain problems must come to trial, except for the basic stubbornness of those who are involved when it comes to judging or accepting the complaint's prospects. Our judicial structure and bureaucracy may look forbidding to the individual worker, but today the employer and union are ill-advised to assume that this alone will muzzle an aggrieved employee. We live in an age of litigation—of lawsuits over product liability, professional malpractice, and breaches of contract. It is in this regard that Justice Frankfurter, in his dissent in *Lincoln-Mills,* predicted a judiciary ill prepared for the "inventiveness" to make Section 301 "a mountain instead of a molehill . . . ."

With respect to this metaphor, under *Smith v. Evening News Association,*[16] even where a breach of contract grievance is also an unfair labor practice issue within the jurisdiction of the National Labor Relations Board, "[t]he authority of the Board . . . is not exclusive and does not destroy the jurisdiction of the courts in suits under 301," and jurisdictional conflicts are faced "when they arise." But the grievant, under *Republic Steel,*[17] is denied the right to bring a Section 301 suit until he has attempted to exhaust the exclusive grievance and arbitration procedure established by the contract.

Under *Vaca v. Sipes,*[18] "the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under . . . 301 charging an employer with a breach of contract." Section 3(a) of the NLRA as amended gives the employee "the right at any time to present grievances to [the] employer and to have such grievances adjusted . . . ." However, also under *Vaca,* where such adjustment cannot be accomplished, a grievant has no "absolute right to have his grievance taken to arbitration."

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[14] David L. Cole, *The Quest for Industrial Peace* (New York: McGraw-Hill, 1963), p. 82.

[15] *Textile Workers Union of America v. Lincoln Mills of Alabama,* 353 US 448 (US SCt, 1957), 32 LC ¶ 70,733.

[16] 371 US 195 (US SCt, 1962), 46 LC ¶ 17,962.

[17] *Republic Steel Corp. v. Maddox,* 379 US 650 (US SCt, 1965), 51 LC ¶ 19,458.

[18] 386 US 171 (US SCt, 1967), 55 LC ¶ 11,731.

Except, now, under *Bowen v. United States Postal Service,*[19] a Section 301 suit may obtain damages against the employer, and against the union as well, where the union has breached its duty of fair representation by failing to pursue an unresolved breach of contract as determined by the court. The essential reasoning appeared in *Vaca.* "We cannot believe that Congress, in conferring . . . the power to establish exclusive procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches . . . by wrongful union conduct in the enforcement of such agreements."

In the main, then, it would appear that the shared interests of both the company and the union are better served when they more diligently involve the employee in the grievance process and do not routinely provoke the writeup of grievances for any purposes. There is evidence that the adjustment and resolution of legitimate grievances are also advanced and that the employee is less inclined to "sic" the union on the supervisor over some petty disgruntlement.

First Step Efforts at Adjustment

Negotiators will contractually commit to an "earnest" effort to resolve a grievance in the first step; however, follow-through is sadly lacking. The commitment becomes unfulfilled due to the recognized inability to decide an issue early in the process because of the precedent-setting implications of any adjustment. This can occur with or without broad questions of policy or contract interpretation at stake.

The 1945 National Labor-Management Conference, in addressing the subject of filing grievances, advised: "Issues should be clearly formulated at the earliest possible moment. In all cases which cannot be settled at the first informal discussions, the positions of both parties should be reduced to writing." [20] The Sundstrand-Local 592 study, along with relevant research,[21] suggests a somewhat different approach: keep the problem in an informal state for a longer period of time while early adjustment is being considered. The outside practitioners even encouraged bringing higher decisionmaking authority from both sides onto the shop floor just to avoid having an issue reduced to writing and given a "docket" status.

This raises an understandable dilemma for parties seeking to avoid the posturing and ritual of formality on the one hand yet needing consistency and propriety on the other. But, as with litigation generally, the study group concluded that having to reduce a grievance claim and then its rejection to writing should be likened more to failure. Maintaining informal consideration of an employee problem is more crucial to agreement-making than how well the problem is formulated and written as an issue. The group agreed to the desirability of strengthening this early step in the process.

Judging Fair Representation

On this exceedingly touchy area, alleged discriminatory treatment of employees brought the courts into the issue of faithful representation. The foundation decisions dealt with union conduct in negotiating and applying contract provisions that adversely affected the interests of specific groups of employees to the advantage of other members of the bargaining unit.

The "landmark" *Steele*[22] case, under the Railway Labor Act, found that railroad employers and a union of firemen had entered into an agreement that

[19] 103 SCt 588 (US SCt, 1983), 95 LC ¶ 13,910.

[20] *President's Conference Report,* Section 2(c)(2), as quoted in Elkouri and Elkouri, cited at note 7, p. 108.

[21] Graham and Heshizer, cited at note 7.

[22] *Steele v. Louisville and Nashville R.R. Co.,* 323 US 192 (US SCt, 1944), 9 LC ¶ 51,188.

placed a restrictive quota on the number of black firemen who would be employed, even to the point of disregarding their seniority in preference to junior white firemen. The Court ruled against this contractual arrangement and instructed that the union must conduct its representation "without hostile discrimination, fairly, impartially, and in good faith."

Then, in *Ford Motor Co. v. Huffman,*[23] under the NLRA as amended, the Court considered an employer-union agreement to grant additional seniority credit to employees for preemployment military service, ruled in support of the contractual arrangement. Also, it found: "A wide range of reasonableness must be allowed a statutory representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." It introduced this statement by saying: "Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals .... The bargaining representative ... is responsible to, and owes complete loyalty to, the interests of all whom it represents .... Inevitable differences arise in the manner and degree to which the terms of any ... agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected."

Subsequent to these decisions there appears to be no precise definition of fair representation but only a continuing comparison of a specific set of problematic facts with the "properness" of union conduct toward the member(s) of the bargaining unit under those circumstances. It does appear settled that a union does not breach its duty of fair representation in an exclusive grievance procedure merely because it settles a grievance short of arbitration, but it must exercise this contractual power "honestly and in good faith." [24]

It is under *Humphrey*[25] that proper union conduct in the grievance process short of arbitration comes fully into view. The case arose over a union's role in merging the seniority lists of employees working for two separate employers, thereby absorbing the employees of the employer bought by the other.

Relying heavily on *Ford,* the Court looked at the merits and the evidence and ruled in support of the union conduct. First, the contractual authority existed to "merge" the seniority lists over the strong objections of the employees of the surviving employer. Second, there existed "insufficient proof of dishonesty or intentional misleading on the part of the union." Third, the "record show(ed) the union took its position honestly, in good faith and without hostility or arbitrary discrimination." Fourth, a "fair hearing" was conducted for those employees who had been adversely affected by the action of the union. Although the Court did not consider the matter of arbitrability, this offers a partial roadmap for satisfying indefectible conduct.

The issue of denial of arbitration did arise under *Vaca,* and although the Court ruled in favor of the union's action in denying arbitration to a discharged grievant—the grievant had died by the time of the decision, denoting an obvious weakness in this remedy—it also offered its acceptance of "the proposition that a union may not arbitrarily ignore a merito-

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

[24] *Vaca,* cited at note 20.

[25] *Humphrey v. Moore,* 375 US 335 (US SCt, 1964), 48 LC ¶ 18,670.

rious grievance or process it in perfunctory fashion . . . ." [26] It was in *Bowen,* decided early last year, that this admonishment bore fruit, when a union denied arbitration to an employee discharged over an altercation on the job. A Section 301 suit resulted in a jury verdict that found the discharge to be without just cause. Both the employer and the union were found to have breached the grievant's rights. An appropriate remedy amounting to $53,000 in apportioned damages was awarded. The Court explained: "His [Bowen's] evidence at trial indicated that the responsible Union officer, at each step of the grievance procedure . . . recommended pursuing the grievance but . . . the national office, for no apparent reason . . . refused to take the matter to arbitration."

Indeed, this case bristles with some of the same questions and implications that arose in the discussions in our study project. Did the national office see Charles Bowen in arbitration as marginal at best? Was there a breakdown in communication within the union, where the grievance processors got too far ahead of the organization? Did the grievant have expectations that the union came to feel would be impossible to meet through "negotiated" or alternative adjustments? Aside from the spirit in the procedural pursuit, what else was happening in the process with management? Were the parties simply going through the motions to test the other side's resolve?

Must we now find a way to allow "marginal" cases to go to arbitration at the expense of the grievant so as to minimize organizational liability? This would not be a new approach but rather one that may now have greater prominence.[27] Should this approach be confined to discharge cases where potential damage awards are greatest? Should a union now seek to indemnify itself in the event it decides not to proceed to arbitration on behalf of the grievant?

Possible court intervention into the merits and conduct of grievances has significant impact on the grievance process. Some would hold, as does Justice White in his partial *Bowen* dissent, "that unions will now take many unmeritorious grievances to arbitration simply to avoid exposure to the new breach-of-duty liability, [with impairment in] the ability of the grievance machinery to provide for orderly dispute resolution." Others (e.g., Judge Edwards, 1983) feel it is arbitration that is threatened when courts continue to act.[28]

We must conclude that it is far easier to demonstrate faithful representation when the record shows vigorous pursuit of any claim that is not frivolous. If arbitration is then to be denied in a marginal or gray area, the record should also show that there is substantial evidence of rational and objective criteria as the basis for the decisionmaking; that the grievant has been kept fully involved, or at least informed; and that union conduct reveals honesty, good faith, and lack of arbitrary discrimination. These are factors, incidentally, that could better serve the parties in the earlier stages of the grievance procedure to reach resolution and avoid arbitration and costly court litigation.

The Sundstrand-Local 592 study discussions, along with the case law, concede that there always will be difficulties confronting the competent and conscientious practitioner regardless of the fact that judicial remedies must be available to oversee malfeasance, incompetence, and the inexperienced and not-so-skilled. The successful practitioner demonstrates skill and perspicacity in grievance handling through meticulous investigation and resourceful dialogue to find a basis for

[26] The proposition appears to have taken shape in *Republic Steel,* cited at note 17, concerning the question of redress forms available to the grievant "[i]f the union refuses to press or only perfunctorily presses the individual's claim . . . ."

[27] On the matter of suits by grievants, see Cox, cited at note 1, pp. 645-52.

[28] *Daily Labor Report,* No. 206, October 24, 1983, p. A-2.

adjustment or withdrawal short of having an outsider determine who is right and who is wrong.

The Effect of Contract Language

Contract language that the parties use to explain the procedural process can be unduly harsh, legalistic, and unsettling in itself. Stringent time limits can act as a propellant, particularly where failure to appeal to the next step in a timely fashion deems the issue to be "abandoned" and the same subject cannot be further considered or made the subject of a further grievance. Untimely appeal of a grievance can also open up the fair representation liability syndrome.[29]

Aside from the possible negligence in failing to make timely appeal, the grievance procedure is not just a private system of due process. It serves valuable administrative, communicative, and training functions as well,[30] which sometimes we fail to heed. Human nature tends to operate far more psychologically than logically; that is, placing the grievant or an issue in an "abandoned" category does not carry a remotely agreeable connotation, particularly in a marginal grievance where resolution is likely to be difficult to achieve.

Perhaps a more practical method for denoting mutually agreed case closure is in contract language that deems the unappealed grievance resolved, rather than abandoned, on the basis of the last answer, which is explained and placed into the record. This would call for exerting more emphasis on the draftsmanship of the written response and deemphasizing the prejudicial nature of the other side's giving up. It also possibly represents a different kind of "winning" for both sides.

Group Recommendations

Deviations or hybrid steps can evolve outside those that are contractually prescribed—that is, the half-step between the Third Step (Grievance Committee) and the Fourth Step (Arbitration), which becomes a sizable holding tank, or a parking lot as referred to by one national union official. Grievances can remain there indefinitely, without prejudice, awaiting disposition, possibly through a "fire sale" of sorts which may occur after a local union election.

Union members in the study group were strongly antagonistic toward this "limbo" treatment of grievances and the horse-trading; they felt that it vivifies the fair representation issue in the mind of the individual worker. They also expressed frustration over the "limited" alternatives: abandonment, incurring the rising costs of arbitration, or the disruption in exercising the right to strike where contractually allowed by the terms of the contract. Some 300 such grievances are currently at the three-and one-half phase at Sundstrand.

The unrestricted use of "new" facts as a grievance moves through the steps can also discourage early adjustment or withdrawal. If one waits long enough in facing the reality of a weak claim or a weak basis for rejection, the theory is that case prospects might improve and a "bargained" settlement will contain better politics or policies than a case abandoned or lost in arbitration. The essential problem occurs when we try to prove or disprove the theory.

After considerable discussion, the study group decided to propose that "intentionally withheld" facts or "known but unreported" facts be given less weight if presented after the Second Step. The bargaining committee, however, had difficulty accepting this proposal because,

[29] For an informative analysis of proper union conduct under procedural time limits, see *Dutrisac v. Caterpillar Tractor Co.*, 511 FSupp 719 (DC Cal, 1981), 95 LC ¶ 13,765.

[30] James W. Kuhn, *Bargaining in Grievance Settlement* (New York: Columbia University Press, 1961), p.35.

even under such a restriction, facts offer the only agreed basis for investigation, persuasion, and satisfaction, and facts are still facts whenever found or revealed. The parties agreed that this is more a matter of education and training and that procedures should be written to encourage open investigation and exchange of known facts early in the process.

Finally, the group recommended that any procedural rehabilitation that attempts to place greater reliance on lower level representation would be grossly unfair and incomplete without an extensive period of training for both job stewards and supervisors, as they may lack the expertise to deal with the complexity of contract interpretation where there is a history of frequent deferral to chief stewards and higher union officials and the company's labor relations department.

At a meeting with the bargaining committees in April, assembled to consider training and the status of the study, the parties agreed to try joint training and to coordinate their separate in-house programs and personnel so that "everyone was singing from the same hymn book." Training began in August 1983, continued into February 1984, and involved 240 management and union representatives equally divided into small groups for discussion. The sessions covered the structures of their respective organizations, contract clauses and work practices, shop-floor problem-solving, discipline, and arbitration. Participants dissected past cases and shop experience to see whether they could have been handled more effectively. The sessions straddled company and employee time. Participation was voluntary. Although there was initial apprehension over "joint" training, it soon cleared with the level of response, and some of the sessions were videotaped for future use.

Post-training feedback reveals that supervisors "related" well to the joint nature of the discussions, particularly the "real world/absence of theory" format. Stewards, on the other hand, tended to give their high marks to having the regular discussions with their opposite numbers in a nonadversarial atmosphere.

Status of Refurbishment

In January 1984, the bargaining committees agreed to modifications in their grievance procedure under a one-year experiment. The writer did not participate directly in the talks at this point but was kept abreast of developments by both parties. One preliminary development of particular note is that by the end of 1983 the submission rate for new grievances had declined by one-half of the relatively constant rate of the previous file years. In calendar year 1984, as of the end of April, there were no written grievance submissions.

In essence, the procedural modifications supplement or replace the provisions of the old procedure with a trial procedure that requires grievant participation, extends and expands the "oral" phase of the process, asserts the need for early presentation of all facts, and centralizes the authority to write up a grievance and its response with the chief shop steward and the labor relations department. Should a grievance be appealed to the Third Step, there will be "an earnest effort to resolve, grant with or without precedence, or drop . . . ." The agreement stipulates "that all grievances filed during this one year will follow the . . . steps . . . listed and no $3\frac{1}{2}$ meetings will take place." The parties agreed to try mediation on "three or four jointly (Company and Union) selected grievances which have been processed through the New Grievance Procedure and are appealed to Arbitration . . . to make (nonbinding) recommendations to either party on the future status of each grievance as the facts dictate." Furthermore, early in the grievance procedure, "both parties will clearly identify to the aggrieved employee(s) the remaining steps of the

grievance procedure and alternatives available to them."

Grievance processing is a crucible in labor-management relations—wearisome to be sure, yet an unending trial. Fair and efficient governance of our day-to-day affairs is probably the most underappreciated art form in our society today. Episodes of friction and disharmony in the workplace are the continuing price our society pays for industrial efficiency and democratic and individual freedom. The grievance process is due process in accommodating each of these exalted, though painfully maintained, goals. To borrow from a colleague: the foremost contribution to society that can be made by the labor-management practitioners is found not in "New Deals," "Fair Deals," and "Square Deals," but in "Higher Ideals." [31] It is the view of this writer that, through study projects and refurbishing efforts such as these, the parties reach for the "Higher Ideals" in our system of labor-management relations.

[The End]

Empirical Measures of Grievance Procedure Effectiveness

By David Lewin

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What constitutes an effective grievance procedure? This apparently straightforward question has received a variety of unidimensional answers. For example, an effective grievance procedure has been described as one that features a "low grievance rate" or "settlement as close to the point of origin as possible" or "infrequent recourse to arbitration."[1] Yet, as with most industrial relations phenomena, the grievance procedure is subject to numerous influences and contains numerous operational dimensions. Consequently, the procedure is best conceptualized and empirically examined in a multidimensional framework.

This paper reports preliminary empirical findings from a study of grievance procedure effectiveness utilizing data from four industries and sectors: steel, retail trade, nonprofit hospitals, and local public schools. The data were collected over the 1981-83 period and deal with grievance activity occurring between 1978 and 1981.[2]

Table 1 presents some descriptive statistics concerning the grievance rate, level of settlement, speed of settlement, arbitration rate, and perceived equity of settlement based upon data collected from respondent employers and union officials in the aforementioned industries and sec-

[31] D. Yates Heafner, "Comments and Conclusions," *Industrial Relations Seminar,* North Carolina State University, Raleigh, N.C., November 13, 1981.

[1] For a review of the relevant literature, see David Lewin, "Theoretical Perspectives on the Modern Grievance Procedure," *New Approaches to Labor Unions, Research in Labor Economics,* Supp. 2, ed. Joseph D. Reid, Jr. (Greenwich, Conn.: JAI Press, 1983), pp. 127-47.

[2] The study is supported by a grant (#SES-80-23041) from the National Science Foundation. The research design, sample selection, data collection instruments, and methods of analysis for the study are presented in David Lewin and Richard B. Peterson, *Grievance Procedure Effectiveness in the United States,* Report to the National Science Foundation, forthcoming. Also see Richard B. Peterson and David Lewin, "A Model for Research and Analysis of the Grievance Process," *Proceedings of the 34th Annual Meeting, Industrial Relations Research Association* (Madison, Wis.: IRRA, 1982), pp. 303-12.

tors. Each of these variables represents a dimension of grievance procedure effectiveness that was operationalized and measured in this study.[3]

TABLE 1

Grievance Procedure Activity In Four Industries And Sectors, Annual Averages*

MEASURE	STEEL [a] MANUFACTURING	RETAIL [b] TRADE	NONPROFIT [c] HOSPITALS	LOCAL [d] PUBLIC SCHOOLS
Grievance Rate (per 100 employees)	14.7	7.5	9.4	7.9
Level of Settlement (1 low—5 high)	2.6	1.8	1.6	2.1
Speed of Settlement (in days)	28	22	44	36
Arbitration Rate (per 100 employees)	2.4	0.7	1.1	0.9
Equity of Settlement (1 low—10 high) Employee-Union Perception	4.6	6.2	3.6	5.1

* Data are for the 1978-81 period

[a] Data are for 28 firms

[b] Data are for 21 firms

[c] Data are for 12 hospitals

[d] Data are for 18 school districts

The grievance rate was highest in steel manufacturing and lowest in the retail trade. The level of settlement was also highest in steel but was lowest in nonprofit hospitals. The speed of settlement was slowest in nonprofit hospitals and fastest in the retail trade. Observe that, while it had the lowest level of settlement, the nonprofit hospital sector had relatively slow settlements. The arbitration rate was more than twice as great in steel as in any other sector. The equity of grievance settlements, as perceived by local union officials, was highest in retail trade and lowest in nonprofit hospitals.[4]

Not shown in Table 1 are variations in the several measures of grievance activity among employer organizations within

[3] For some other uses of these measures, see John C. Anderson, "The Grievance Process in Canadian Municipal Elections," paper presented to the 39th Annual Meeting of the Academy of Management, Atlanta, Georgia, August 1979.

[4] Equity of settlement was measured by a five-item, four-interval set of questions. The responses formed an equity index. For more on the construction of this index, see Lewin and Peterson, cited at note 2.

each industry and sector. For example, over the 1978-81 period, the average annual grievance rate among the 28 steel firms included in this study ranged from 2.4 to 26.9 grievances per 100 employees, and the average annual arbitration rate varied from 0.2 to 5.3 per 100 employees. Relatively large variations were also present in the nonprofit hospital sector, where the average annual grievance rate ranged between 3.7 and 17.4 per 100 employees among the 12 hospitals studied, and the arbitration rate ranged between 0.5 and 6.2 per 100 employees. Variations in grievance and arbitration rates were considerably smaller among the retail trade organizations (n = 21) and local public schools (n = 18) included in the study.

Concerning union officials' perceived equity of settlement, which was measured on a one (low) to ten (high) scale, the hospital sector features the largest variation, ranging from 0.7 to 7.8, followed by steel, which ranged between 1.7 and 7.2, local public schools, which ranged between 2.7 and 8.0, and retail trade, which ranged between 3.8 and 8.7. A separate analysis of management's perceived equity of grievance settlement showed a similar pattern of industry/sector variation, although aggregate data suggest that, on average, management perceives grievance settlements to be more equitable than do union officials.

Are the measures of grievance procedure effectiveness listed in Table 1 truly independent constructs or do they merely represent the same phenomena? The zero-order correlation matrix of these measures is given in Table 2. It shows that only level of settlement and speed of settlement are highly intercorrelated, and even this finding must not be overgeneralized. Recall that the nonprofit hospital sector had the lowest level of grievance settlement but the second slowest speed of settlement among the four industries and sectors studied.

TABLE 2

Zero-Order Correlation Matrix of Grievance Procedure Effectiveness Measures

MEASURE	GRIEVANCE RATE	LEVEL OF SETTLEMENT	SPEED OF SETTLEMENT	ARBITRATION RATE	PERCEIVED EQUITY OF SETTLEMENT
Grievance Rate	1.00	.52	.47	.61	.67
Level of Settlement	.52	1.00	.82	.73	.48
Speed of Settlement	.47	.82	1.00	.69	.54
Arbitration Rate	.61	.73	.69	1.00	.65
Perceived Equity of Settlement	.67	.48	.54	.65	1.00

Newer Effectiveness Measures

Beyond the grievance procedure effectiveness measures discussed so far, other constructs of effectiveness may be formulated and measured. These include the type and severity of grievances filed and

resolved. For example, a grievance about the subcontracting of work or an employee discharge is (arguably) more severe or important than a grievance about an overtime assignment or a shift differential. To examine these dimensions of the grievance procedure, we asked our respondents to identify the types and frequency of grievances filed during the 1978-81 period and to rate them on a one (low) to five (high) scale in terms of their severity-importance.

These data, presented in Table 3, show, for example, that grievances over job safety, health, and working conditions occur most frequently in steel manufacturing and nonprofit hospitals but occur relatively infrequently in retail trade and local public schools. Pay issues and supervisory relations are the most frequently grieved aspects of the employment relationship in retail trade and local public schools, respectively.

With respect to the severity of grievances filled, the data in Table 3 [on page 498] suggest that, in general, ratings of severity are positively associated with judgments about frequency of occurrence. In fact, the simple correlation coefficient between severity rating and frequency ranking was + .68. However, the correlation was considerably stronger for the union officials' severity-frequency ratings (.79) than for the management respondents' severity-frequency ratings (.53).

Management and union respondents' severity ratings were then correlated with three of the aforementioned grievance effectiveness ratings, namely, speed of settlement, arbitration rate, and perceived equity of settlement. Across the four industries and sectors, management and unionists' severity ratings were significantly negatively correlated with speed of settlement and perceived equity of settlement and significantly positively correlated with the arbitration rate.[5]

However, disaggregated analysis showed that in the steel industry, for example, speed of settlement was curvilinearly related to both management's and unionists' severity ratings. That is, for grievances of low through medium severity, the time to settlement increased through the relevant range, but for highly severe grievances the time to settlement quickened. By contrast, in the nonprofit hospital sector, the time to settlement increased linearly through the range of low and medium severity grievances, but slowed perceptibly for highly severe grievances.

In terms of perceived equity of grievance settlement, the relationship with severity ratings also varied noticeably by industry and sector. In retail trade and local public schools, perceived equity of settlement was negatively and linearly related to both management and union officials' ratings of grievance severity. In nonprofit hospitals, management's perceived equity of settlement declined through the range of low to medium severity grievances but actually increased slightly for highly severe grievances. For the union officials in this sector, perceived equity of settlement declined linearly through the range of low to medium severity grievances but declined at a more rapid rate for highly severe grievances. In steel, both management and union respondents' perceived equity of settlement declined linearly for grievances ranging between low and medium severity *and* declined at even more rapid rates for highly severe grievances. These perceived equity of settlement-severity of grievance relationships are diagrammed in the figure [on page 499].

Additional Data

Another potential measure of grievance procedure effectiveness is the parties' reli-

[5] A separate analysis using researcher-assigned (rather than respondent-assigned) severity ratings yielded similar findings in terms of the relation between grievance severity and perceived equity of grievance settlement.

ance on expedited procedures.[6] An expedited grievance procedure may include provisions for skipping certain grievance steps or reducing the time between steps or capping the total time for settlement or eliminating certain procedural requirements (e.g., written transcripts, witnesses, etc.) or various combinations thereof. How extensively do the employers and unionists included in this study rely on expedited grievance procedures?

The data in Table 4 show that expedited grievance procedures are most commonly used in the steel industry and least commonly used in nonprofit hospitals and local public schools. Clearly, the steel industry dwarfs the other industries and sectors listed in Table 4 in terms of the proportion of labor agreements that contain expedited grievance procedures. However, actual usage of these procedures in steel is well below potential usage. Between 14 and 26 percent of the respondents in the four industries and sectors expected the usage of expedited grievance procedures to increase in the next several years.

TABLE 4

Expedited Grievance Procedure Coverage, Usage and Exclusions in Four Industries and Sectors

DIMENSION OF EXPEDITED PROCEDURE	STEEL MANUFACTURING	RETAIL TRADE	NONPROFIT HOSPITALS	LOCAL PUBLIC SCHOOLS
Expedited Grievance Procedure Contained In Labor Agreements (% yes responses)	74%	22%	11%	6%
Frequency of Use of Expedited Procedure (% of all grievances, 1978-81)	37%	9%	4%	2%
Major Exclusions From Expedited Procedure	Discharge, Subcontracting, Mgmt. Policy	Discharge, Technological Change, Health and Safety	Discharge, Suspension, Discrimination	Discharge, Transfer, Discrimination
Expected Increase in Use of Expedited Procedure in next 3 years (% of responding "yes")	14%	26%	19%	23%

An important limit in the use of expedited grievance procedures is the formal exclusion of certain issues from coverage (a few of these issues are listed in Table 4). In general, such issues are of high rather than medium or low severity, and the parties are loathe to treat them in a short-cut manner. Yet, across the four industries and sectors the data show that management and union respondents perceive grievance settlements to be more equitable when reached through expedited than through nonexpedited procedures. The mitigating or intervening variable at work here appears to be speed of settlement, which is significantly faster under expedited than under nonexpedited procedures and which, as was noted ear-

[6] See, for example, Marcus Sandver, Harry Blaine, and Mark Wagar, "Time and Cost Savings Through Expedited Arbitration Procedures," *Arbitration Journal* 36 (December 1981), pp. 11-21.

lier, is positively related to perceived equity of settlement.

Respondents in this study were also asked to indicate what proportions of grievances decided during the 1978-81 period were settled in favor of the employer and employee, respectively. In the aggregate, management respondents indicated that about 40 percent of all grievances were decided in favor of employees, 50 percent in favor of employers, and 10 percent had mixed or unknown results. Union respondents indicated that about 30 percent of the grievances were decided in favor of employees, 60 percent in favor of employers, and 10 percent were mixed or unknown. These management-union "attribution" differences were largest in the nonprofit hospital sector (where there was about a 20-percent difference between management and union views of grievance outcomes) and smallest in retail trade (about a five-percent difference).

Perceptions of equitable grievance settlement were significantly related to the respondents' views of grievance procedure outcomes. For management, perceived equity was positively related to favorableness of the grievance settlements to employers. Similarly, for union officials perceived equity was positively related to favorableness of grievance settlements to employees.[7]

Conclusion

Taken as a whole, what do the findings reported here tell us about grievance procedure effectiveness? First, they support the notion that effectiveness is not a unidimensional concept. Second, and relatedly, different analysts and different parties to grievances can and do have different views as to what constitutes grievance procedure effectiveness. Third, when perceived equity of settlement is taken as a measure of grievance procedure effectiveness, each party's perception is importantly shaped by its corresponding judgment about the favorableness of grievance settlement. Fourth, by themselves grievance rates and arbitration rates do not appear to be particularly robust indicators of grievance procedure effectiveness. Fifth, and in view of management and union respondents' views about the relative severity of different grievance issues, it may be more appropriate to investigate effectiveness in relation to the handling of particular types or categories of grievances than to grievances as a whole.

Beyond these immediate points, there are other issues pertaining to the measurement of grievance procedure effectiveness that merit brief discussion. First, more attention needs to be given to the determinants of one or more measures of grievance procedure effectiveness, especially perceived equity of settlement. Second, even if it is fully developed in a multivariate framework and completely measured, grievance procedure effectiveness is, in reality, an intervening variable that needs to be studied in relation to such "final outcome" measures as employee turnover, absenteeism, and productivity, among others.[8] Third, additional dimensions of grievance procedure effectiveness should deal with the post-settlement behavior of the parties.

For example, how effective is first-line supervision after one or more grievances have been settled and how is such effectiveness affected by the perceived favorability and equity of settlements?

[7] The statistical relationship between perceived equity of settlement and favorableness of grievance outcomes was stronger for union officials (.57) than for management officials (.49).

[8] For more on this, see Lewin, cited at note 1. Such analysis will help to illuminate the connections between unionized employees' exercise of "voice" through grievance procedures and voluntary departure or "exit" from the workplace. See, for example, Richard B. Freeman, "The Exit-Voice Tradeoff in the Labor Market: Unionism, Job Tenure, Quits, and Separations," *Quarterly Journal of Economics* 94 (June 1980), pp. 643-73; John C. Anderson and David Lewin, "The Role of the Union and the Employee's Decision to Leave: A Test of Exit, Voice, and Loyalty," paper presented at the Spring Meeting, Industrial Relations Research Association, Honolulu, Hawaii, March 1983.

How effective are employees in performing work after grievances are settled and how is such effectiveness influenced by the perceived favorability and equity of settlements? Are the future promotional opportunities of supervisors and employees who have been party to grievance filing and resolution in any way affected by such activity? Does management use the data generated by grievance filing and settlement decisions for analytical purposes, that is, does managemment treat such information as part of its human resource information system? These and other questions about grievance procedures are being investigated in a larger study, the initial phase of which has only briefly been taken up in this paper.[9]

[The End]

[9] See Lewin and Peterson, cited at note 2.

TABLE 3

Frequency of Grievances and Ratings of Grievance Severity in Four Industries and Sectors*

Category of Grievance	Steel Manufacturing			Retail Trade			Nonprofit Hospitals			Local Public Schools		
	Frequency[a]	Severity[b]		Frequency	Severity		Frequency	Severity		Frequency	Severity	
		m[c]	u[d]		m	u		m	u		m	u
Pay, Overtime, Shift Differentials	5	2.8	3.0	1	2.4	3.2	4	2.6	3.4	6	2.2	2.6
Job Safety, Health, Working Conditions	1	2.6	3.4	5	2.7	3.3	1	3.5	4.7	5	2.4	3.0
Employment Discrimination	3	3.2	3.8	6	1.9	2.8	6	3.0	3.6	4	2.9	3.4
Supervisory Relations	6	2.9	3.2	4	2.7	3.6	3	3.7	3.8	1	2.8	4.3
Demotion, Transfer, Suspension, Discharge	2	3.6	4.3	3	3.2	4.3	2	3.4	4.3	3	3.3	4.0
Technological Change, Subcontracting Mgmt. Policy	4	2.8	4.1	2	3.0	4.6	5	2.7	3.9	2	2.8	3.7

*Data are for the 1978-81 period

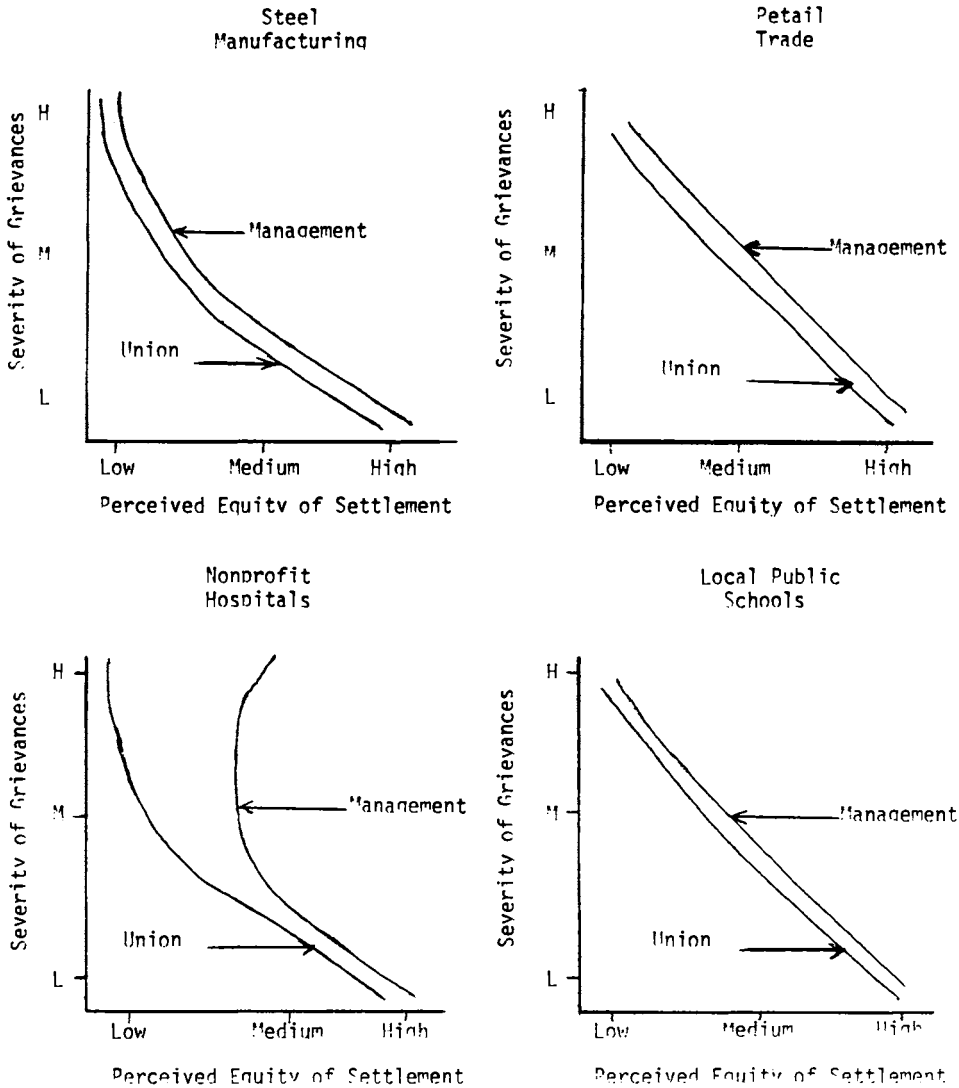
[a]Frequency ranked on a 1(high) to 6(low) scale

[b]Severity rating based on a 1(least severe) to 5(most severe) scale

[c]Management respondents' ratings

[d]Union official respondents' ratings

RELATIONSHIPS BETWEEN PERCEIVED EQUITY OF GRIEVANCES SETTLEMENT AND SEVERITY OF GRIEVANCES IN FOUR INDUSTRIES AND SECTORS



Justice and Dignity: A New Approach to Discipline

By Elliot I. Beitner

Arbitrator

Labor contracts have recently been negotiated that include a provision titled "Justice and Dignity." This awesome title is used specifically to refer to a contract clause that allows a suspended or discharged employee who files a grievance to continue to work until his grievance is resolved. Such a provision was negotiated and included for the first time in the 1981 collective bargaining agreement negotiated between the United Steelworkers and the can industry. Similar provisions have since been negotiated by the Steelworkers with the steel industry and the aluminum industry as well as with Colorado Fuel and Iron, Continental Fibre Drum, and Kennecott Mineral Company.

I am not the only one who considers the title "Justice and Dignity" to be of interest. Management negotiator T. S. Hoffman, Jr., Vice President and General Manager of Human Resources for Continental Packaging Company, was bothered by the title because he felt that his company had always sought to treat employees fairly and with dignity, and this title suggested otherwise. What is more, when he attempted to explain this feeling during negotiations, the union responded, "We understand, but . . . ." There are reasons, Hoffman concluded, why this message had not been heard by everyone.

He recalled the story of the man who discovered a magic solution to solving personal problems. In the course of breakfast with his wife, who was angry at him, he began whistling a song and discovered that it had a calming effect on her. After some thought on the subject, he decided that, if his whistling could have such a profound effect on his wife's state of mind, it might have an equally positive effect on public and world problems. He decided, being something of a scientist, to test his theory before offering his services to the nations of the world. He went into the jungle and discovered there that his whistling had the same effect on animals, large and small, docile or ferocious. Finally, with increasing confidence, he approached the lion, the king of the jungle, and began whistling his song for the last time. The lion attacked and killed him. The other animals protested to the lion, asking him how he could kill someone who could sing such beautiful music, and the lion responded, "Eh?" [1]

If the union had been deaf to the company's previous attempts to treat its employees fairly, this action of agreement to the desired clause was, from the company's viewpoint, an attempt to speak louder or to demonstrate by actions its desire to be fair.

I will attempt in this paper to discuss briefly the implicit philosophical assumptions that appear to underlie justice and dignity clauses and will speculate on whether such clauses are likely to be adopted in other industries. First, however, as background, I would like to describe the reasons the union and industry have offered for negotiating such a provision originally, the language of one such provision, and how the provision works.

The union has for many years been concerned with the employee who is mistakenly or unjustly disciplined. Even when that discipline is ultimately set aside through the grievance procedure, an award of backpay often cannot rectify the wrong visited on the employee. A discharged employee may suffer such financial stress that he loses his car or even his

[1] Dee W. Gilliam, "Innocent Until Proven Guilty: The Union View," *Arbitration—Promise and Performance*, ed. James L. Stern and Barbara D. Dennis (Washington, D.C.: Bureau of National Affairs, 1984), pp. 77-84.

home. In one instance described by Dee W. Gilliam, Director of the Arbitration Department for the United Steelworkers of America and the union negotiator of the provision, an employee lost not only his car and his home but—through divorce—his family. The union's interest, then, in a provision that would allow an employee to work until the resolution of his grievance is obvious.[2]

How industry was persuaded to agree to a provision that would limit management's authority seems at first less obvious. Hoffman explained that Continental and the Steelworkers had a long-standing relationship dating back 30 years. Continental and the union had both experienced tremendous growth during the period before 1970 when the can industry in general had grown dramatically.

In the 1970s, new technology and processes that emerged in the packaging industry led to a more competitive market, and the industry sought ways to regain its market advantage. The industry itself was by that time mature, as was its work force, and a labor cost disadvantage was a major concern. As solving cost problems became critical, labor and management attempted to establish a new dimension in their relationship that was less adversarial and, at least to some extent, directed at mutual problem-solving. Continental, according to Hoffman, felt management had to demonstrate through positive actions its willingness to address noneconomic issues that were of concern to the union.

The parties anticipated no serious problems with such a provision because of a stable work force: the average age of company employees was 45 to 50 and the average length of service was 15 to 20 years. Disciplinary actions had been fewer as the work force matured. Moreover, the parties included a speedy method to process cases since challenges under this provision were to be handled by expedited arbitration.

1981 Provision

The original justice and dignity provision negotiated in 1981 between the United Steelworkers and the can industry reads: "An employee whom the Company suspends or discharges or whom it contends has lost his/her seniority under Article XII, Section 5 of the Master Agreement or Article XI of the applicable Local Supplemental Agreement shall be retained at or returned to active work until any grievance contesting such suspension, discharge, or break in service question is finally resolved through the grievance and arbitration procedure. However, the employee may be removed from active work (without pay) until the resolution of the grievance protesting the suspension or discharge if his alleged cause for suspension, discharge, or termination presents a danger to the safety of employees or equipment in the plant due to fighting, theft, concerted refusal to perform their assigned work. Grievances involving employees who are retained at work under this provision will be handled in the Expedited Arbitration Procedure unless the Union Staff Representative and the applicable Regional or Area Manager of Labor Relations mutually agree otherwise. If the Arbitrator upholds the suspension or discharge or break in service under Article XII, Section 5 of the Master Agreement or Article XI of the applicable Local Supplemental Agreement of an employee retained at work, the penalty shall be instituted after receipt of the arbitration decision. The above references to suspensions, discharges, and terminations are examples and are not intended to be all inclusive but indicate how various types of issues will be handled."

Gilliam and Hoffman tell of agreeing to this language after all-night bargaining from 10 p.m. to 8 a.m. when the parties

[2] T. S. Hoffman, Jr., "Innocent Until Proven Guilty: The Management View," *Arbitration—Promise and Performance*, cited at note 1, pp. 84-89.

had only a brief time to reduce their agreement to writing. The last sentence of the clause has come under particular criticism, with some critics going so far as to say it is so confusing and ambiguous that an arbitrator must have written it.

The parties agreed to this addition so as to achieve flexibility in the application of this new innovative provision. The clause was obviously intended to allow for the immediate suspension of employment rights for allegations of wrongdoing that threaten the safety of persons or property and was left flexible to accommodate what might be various types of wrongdoing. It is possible that the parties had tended to use the flexibility of the exception language of the contract to encompass serious types of offenses not restricted to those dangerous to person or property, but arbitration decisions have held otherwise.

The interpretation of this final sentence resulted initially in various disagreements that were decided by arbitration awards involving National Can Corporation and American Can Company. The general provision has been held to require that an employee who is not permitted to remain at work after discipline is issued must file both a grievance challenging that denial and a separate grievance challenging the discipline itself. The provision has also been interpreted to require an employee to file two separate grievances in instances where an immediate suspension was converted to a discharge several days later. The original grievance protesting the suspension, while it entitled the employee to protection under the justice and dignity clause for the period of the suspension, did not provide such protection after the suspension had been converted to a discharge. A separate grievance was necessary grieving the discharge for the justice and dignity coverage to continue.

Perhaps to avoid such harsh results, the parties amended the provision in 1983 to make it procedurally more simple by requiring the filing of only one grievance to invoke a claim for justice annd dignity and to contest the just cause of the discipline.

Other Disputes

Other disputes that have arisen have revolved around the question of whether the offense charged entitled the company to remove the employee from the workplace immediately. The phrase "due to fighting, theft, concerted refusal to perform their assigned work" has been interpreted to be merely examples of activities that could constitute a danger to the safety of employees or equipment, but it is not an exhaustive list of such activities. The basic criterion to be applied was whether any danger to the safety of employees or equipment existed, and this could not be determined solely on the basis of the wording of the suspension notice.[3]

In that case, Impartial Chairman Louis A. Crane held that charges that the grievant had defaced, destroyed, and improperly handled company property, left his work station without permission, and had performed poor work did not fall within the prohibited conduct that could act to suspend the justice and dignity provisions since no danger to persons or equipment was found to be present. The defacing-of-company-property charge, for example, arose from an isolated incident of improper work performance rather than from conduct that endangered company equipment. The employee had in fact run some bad cans and had tried to conceal that fact.

In another case Arbitrator James J. Sherman sustained a grievance, ruling that an employee charged with involvement in a scheme that resulted in cash payments being made to a department

[3] Louis A. Crane, *National Can Corp. and United Steelworkers* (Case No. LC-11), *Steelworkers Arbitration Awards*, Report 375 (7-30-82), pp. 11,017-21, 17,017-17,021.

supervisor presented no danger to persons or property by remaining at work. Sherman also offered dicta to the effect that the justice and dignity clause was limited to situations where an employee might be anticipated to repeat his behavior if allowed to continue on his job. Arbitrator Sherman concluded: "If the grievant were retained on his job, is it likely that he would concoct another scheme to make improper payments to a supervisor? The Arbitrator views this as most improbable. Nor is there any evidence to suggest that the grievant would engage in any other misconduct, related or unrelated to the alleged cause of his discharge. So his presence in the Plant could hardly be viewed as fitting the definition of an exception to the general 'Justice and Dignity' rule. That is, his presence in the Plant would present no danger to the safety of employees or to equipment." [4]

The can industry provision has been in effect now for approximately three years. According to both union and management personnel, it is working well. The company's initial apprehensions were twofold. First, the company was worried that it might erode the authority of first-line supervisors and inhibit disciplinary actions on that level. This has not occurred: the number of disciplinary actions, if anything, is slightly higher than before. The second apprehension of the company was that unions would not make serious attempts to settle disciplinary grievances. This fear has proved to be groundless: the same percentage of cases is being settled now as before. It has also worked well in the steel industry with only one grievance having been filed under this clause.

Philosophical Basis

This then has been a description of the clause, how it first came to be in labor contracts, and how it has worked since its initial inclusion. I would now like to discuss briefly the philosophical basis for such provisions and make a few speculations of my own. Before I do that, however, let me suggest that, if I were a member of management, my concern would be with how this type of clause might be interpreted or expanded in the future. As we all know, both actions and words can be interpreted in different ways depending upon the point of view of the interpreter.

I am reminded of the three French boys, ages six, eight, and ten, who came upon a couple making love. "Mon dieu," the six-year-old says, "that man and woman, they are fighting."

"No, no, you silly boy," the eight-year-old answers. "They are making love."

Looking carefully at the couple, the ten-year-old adds, "Mais oui, you are right. They are making love . . . but very badly."

So it is with contract language. Our point of view—even our sophistication—can affect our attitude.

Both union and industry negotiators have discussed this clause as standing for the underlying philosophical assumption that a person is innocent until proven guilty. Other attempts to adopt concepts found in our criminal law into the arbitration procedure have been by and large rejected by arbitrators. For example, the concept of double jeopardy has been held as generally inapplicable to prevent an employee acquitted in a criminal or civil court from being disciplined for the same work-related offense at the plant. Moreover, requiring proof of guilt beyond a reasonable doubt is generally not the accepted standard in a disciplinary arbitration hearing. Why then should an employee be presumed innocent until proven guilty at an arbitration hearing?

Discipline, including discharge, is not generally effected until after some type of investigation is conducted by the com-

[4] Janus J. Sherman, *American Can Co. and United Steelworkers* (Case No. JJS-24), *Steelworkers Arbitration Awards*, Report 375 (7-30-82), pp. 17,021-17,025.

pany. Why should a company be required, after determining that an employee should be discharged or suspended, to retain that employee until the matter is resolved in the grievance process? Is the resolution of disciplinary grievances enhanced by adopting concepts from the criminal law?

Certainly pragmatic reasons exist for delaying an employee's removal from the workplace that are valid for both parties. Not infrequently the employer's investigation is conducted in haste and sometimes also in anger. Decisions may be made without the awareness of essential facts and without a dispassionate consideration. An employer who immediately suspends or terminates an employee may find itself liable to reinstate that person with full backpay and thus pay him for work not performed. By agreeing to this procedure, the employer has limited its potential liability. This practical reason, however, does not address the philosophical assumption of the clause.

Conclusion

Extending the reasoning underlying the inclusion of the justice and dignity provision could also result in the applicability of this concept to other areas covered in collective bargaining agreements. One might speculate that unions may attempt to expand the implicit assumptions of a justice and dignity clause to nondisciplinary provisions. For example, the justice and dignity clause bears some similarity to status quo provisions of contracts that prevent management from performing certain acts or making certain changes until a contract interpretation necessitated by a grievance is resolved. Management, it is assumed, would resist attempts to expand the underlying concept to nondisciplinary areas.

One can anticipate that justice and dignity clauses will find their way into more and more industry contracts. The experience of the parties in the can industry has been positive, and the plan has been expanded to several other industries. It is a provision of tangible importance to the union and is assumed to be politically popular. By the same token, a justice and dignity provision does not cost management any money and is, therefore, an attractive countermeasure that a company can give to the union when it is unable or unwilling to grant substantial increases in economic benefits. In fact, the provision found its way into the steel industry contracts in 1983 in a climate of concession bargaining.

It is suggested that, for such a plan to work, it requires that a mechanical procedure be included to process grievances speedily. The provision itself establishes an expedited arbitration procedure. Whether the arbitration is handled in an expedited manner or not, speedy resolution is obviously necessary. At National Can there has been a tendency to combine the justice and dignity arbitration with the substantive disciplinary arbitration. These grievances are still resolved relatively speedily—within a few months time.

It seems likely that the clause will work more successfully in companies and industries that have a stable and mature work force. The number of disciplinary actions necessary is reduced to a minimum in a work force made up of workers who are experienced, capable, committed, and mature.

In conclusion, justice and dignity clauses have been included in contracts of the can and steel industries and have proved to be agreeable to both union and management. Some of the original procedural problems that arose have been resolved by amending the clause. It remains to be seen what other difficulties may arise with regard to the implementation and interpretation of the clause and whether the underlying assumptions will be extended and applied to nondisciplinary areas of the collective bargaining agreement. As labor relations practitioners and arbitrators, we will probably be

seeing more of this new approach to discipline through the inclusion of justice and dignity clauses with minor changes being made to accommodate the individual parties and to adapt the provision to problems that may yet develop.

[The End]

The Science of Discharge Arbitration

By John E. Drotning and Bruce Fortado

Case Western Reserve University

This article deals with arbitral decisionmaking and specifically attempts to apply decision tree analysis to the resolution of discharge cases. The arbitrator relies on briefs and/or oral arguments and, ideally, the advocates work the oral and written evidence in order to prove their respective positions just as a social scientist subjects his data to testing procedures to accept or reject the null hypothesis.[1]

Discharge cases comprise a large percentage of arbitration cases, and it is obvious that the arbitral process in such cases serves to protect the individual employee from an unfair or abusive employer decision to terminate his employment. But, at the same time, arbitration also serves to protect the employer's right to be intolerant of abuses from an employee who may be dishonest, excessively absent, insubordinate, or a sloppy, substandard worker. These are both important protections, and the arbitrator's task is not an easy one as he sorts through the differing evidence, the advocates' arguments, and his own biases. Thus, it is useful to discuss the decisionmaking process and to suggest an analytical framework that might contribute to the arbitral determination process.[2]

Here we propose that arbitral decisionmaking in discharge cases is similar to the statistical problem of decisionmaking under uncertainty. This method acknowledges that arbitrators' decisions involve not only an objective assessment of the evidence but also a subjective sense and feeling of the case. This proposed approach does not hide the subjective nature of arbitral decisions but recognizes and incorporates these subjective assessments into a rational, logical thought process.[3]

Let us look at the statistical techniques of making decisions under uncertainty. To make business decisions, MBAs are taught to use decision trees and to consider all the possible outcomes at various junctions of the decision sequence as branches. This requires a rigorous, logical examination of the problem. It requires an analysis of the proper sequence of questions or events and a consideration of all the possible answers, outcomes, or explanations.[4]

This rigorous approach to defining all aspects of the situation produces a

[1] John E. Drotning and Bruce Fortado, "Arbitral Decisions: A Social Science Analog," *Journal of Dispute Resolution* 1 (forthcoming 1984).

[2] Thomas S. Kuhn, "The Route to Normal Science," *The Structure of Scientific Revolutions*, Chapter 2 (Chicago: University of Chicago Press, 1962), pp. 10-22.

[3] Julian L. Simon, "The Concept of Causality in Social Science," *Basic Research Methods in Social Science*, Chapter 32 (New York: Random House, 1978), p. 47.

[4] Barry M. Staw, "Attribution of 'Causes' of Performances: A General Alternative Interpretation of Cross Sectional Research on Organizations," *Research in Organizations*, ed. R.T. Mowday and R.M. Steers (Santa Monica, Cal. Goodyear, 1979), pp. 136-50.

sequence of decision steps and all the possible outcomes, and, if both are thought out well, the tree and its branches are mutually exclusive and collectively exhaustive. This means there is no overlap between alternatives, and all possibilities are accounted for at each branch so the branch probabilities sum to 1.00. Each observation represented in the tree will be independent of the others. Probabilities are multiplied to events connected by "and" as, for example, "if A and B," while probabilities are added for events which are mutually exclusive as, for example, "if A or B." The probabilities at the tip of the tree's branches represent all possible joint probabilities and, as noted above, must sum to 1.00.

Just as management can use decision trees to convert uncertainty of risks in order to make decisions, one may consider this attempt to utilize the decision tree in the arbitral process as a way to minimize errors or wrong decisions, namely, awards that do not reflect reality.[5] Moreover, both business decisions and arbitral decisions have to be made on some basis, and the more one understands the problem and the more one recognizes the extent of subjective assessments of probabilities and where these take place in the arbitral process, the higher the likelihood that the decision will reflect reality and, therefore, be more acceptable to the loser.[6] It is our view that arbitral decisionmaking is akin to the statistical technique of making decisions with imprecise information and that a decision tree analysis can produce clear, well-reasoned, and thoughtful decisions.

Let us explain how the arbitral decision process can be formulated in the framework of a decision tree. The first requirement is that the decision process be sequential, that is, the final decision rests on the joint probabilities of a series of prior questions.

Critical Points

There are three major steps or critical points in making an arbitral decision regarding a discharge. Sequentially, these are as follows.

(1)	(2)	(3)
What is the probability that the incident occurred?	What are the identifiable possibilities?	How can the responsibility be apportioned?

The first critical question is whether the alleged incident occurred.[7] Regardless of the nature of the alleged incident—be it theft, poor workmanship, absenteeism, drinking or drugs—the question is: to what degree does the evidence support the claim that the incident happened? Is there any doubt that a fight occurred, that a theft took place, that beer was consumed on company property, that there was faulty workmanship? Often the situation is such that there is not much uncertainty about whether or not the incident occurred, such as an absence from work or a fight on the plant floor, but at times it is not clear that there actually was a theft or that beer, indeed, was being consumed in the plant parking lot.

If the probability assessment that the alleged incident occurred is low, the critical point is reached. This means that, if the arbitrator assesses the probability that there was a theft as 0.5 or less, there is no reason for him to assign probabilities

[5] Philip A. Roussel, "Cutting Down the Guesswork in R & D," *Harvard Business Review* 5 (September/October 1983).

[6] Simon, cited at note 3, Chapter 26, p. 386.

[7] Graham C. Lilly, "Procedural Concepts Consequences," *An Introduction to the Law of Evidence* (St. Paul, Minn.: West Publishing Co., 1978), p. 45.

to steps 2 and 3, since the discharged grievant would be reinstated. If the probability that the event occurred is high, then it is necessary to move to the next sequence in the decisionmaking process.

This second phase of the sequential considerations is to identify the sources of the incident and to determine the role the grievant played in it. Having established that a theft occurred, what evidence is there to support the claim that the grievant played a role? Having determined that there was a fight on the plant floor, was the grievant involved? What weight and subjective assessment is to be given to the evidence supporting all possible explanations as to how and why the incident occurred? Again, if the supporting evidence and the subjective assessment of that evidence is quite low that the grievant was involved, this becomes the critical or determining point in the sequence and there is no point in moving to step 3.

If the probability that the grievant could be identified as causing the incident is relatively high, the next questions in the sequence are: how responsible is he/she for the incident? Is the discharged employee totally to blame? Are there some other factors that might be responsible for the grievant's role in the incident?[8]

Examples

From our examination of the briefs and awards from ten discharge cases, from three separate arbitrators, we can illustrate how the decision can be put into the framework of decision trees based on the three sequential steps.

The first example is a relatively straightforward discharge for excessive absenteeism. There was no dispute between the parties that the alleged absence involved the grievant. Thus, the first question is whether the absences violated company policy. Given the long-standing existence of the absenteesim policy and the company's consistent past application of it, it is likely that an arbitrator would assign a high probability to the assertion that the absences were excessive.

This analysis would then force the parties to focus on the second question, which is to identify the causes for the absences. Were the absences controlled by the grievant? Did he have any justification for not reporting to work? Clearly, the union can raise some doubt that this employee is the cause, but it is likely, given evidence of the employee's history of warnings for absenteeism, that the arbitrator will assign a high priority to the employee himself as the cause of the excessive absenteeism. Thus, along this branch, one has the probability that the absences were excessive equal to 1.0 and the subjective probability that the grievant was the major source of the problem at, say, .95. Multiplying them together ($1.0 \times .95$) gives .95. This forces the union to focus on the third critical point, which is to try to reduce the grievant's responsibility for the most recent absence as well as the record of excessive absenteeism by showing that other factors played a role in the incident. This task is difficult, and it is likely that the grievant's record will result in a subjective probability of, say, .95; multiplying this by the previous product gives the probability of .90 that the employer's arguments describe reality, and the arbitrator is likely to find for the company.

Now consider a slightly more complex case where a missing drill was found in the grievant's car. The grievant claimed he was only borrowing the tool. Although the grievant in the past had properly followed company policy on borrowing tools, which included consultation with a foreman, this time he did not do so. The grievant pointed out that his foreman had already departed so he could not notify

[8] Paul Prasow and Edward Peters, "Evidence and Proof," *Arbitration and Collective Bargaining*, Chapter 10 (New York: McGraw-Hill, 1970), p. 185.

him. A security guard observed the grievant leaving the plant with a bulky object under his coat. The decision tree of analysis would look something like the first illustration [on page 510].

Complex Case

Now let us take an even more complex case that involved accusations of poor work by a maintenance man. An abnormal number of breakdowns and excessive machine wear were alleged by the company. A manager and several workers claimed that neglect or poor work by the grievant caused the problem. A spokesman from a manufacturer indicated that the proper routine for maintenance had not been followed and, thus, wear was excessive.

The defense pointed out a wide range of other considerations. The old age of a portion of the machinery could explain some breakdowns. Machine wear should also vary according to the rate of usage which fluctuated greatly with the business cycle. Operator carelessness, or antipathy toward the grievant who was a former foreman, could easily translate into breakdowns.

Notably, not all machines had identical problems. Some supervisors ran the machines as fast as possible, while others tried a slower pace to reduce breakdowns. Therefore, managerial decisions on a local basis could have altered wear and breakdowns. The grievant had received formal training only for roughly a week on one type of machine. He had learned by tinkering with the older machines and was left to fill in the gaps on the new machines. Also, the grievant had operated for several years under a previous manager, but only began to have the observed problem under a new foreman. A question was raised whether procedures had actually been changed under the new supervisor. In this case, a tree provides an economical picture of the numerous possibilities which were brought out by the advocates [see page 511].

A tree of analysis will be only as good as the advocates make it. The arbitrator can only be expected to evaluate the options raised by the advocates. He or she must operate under the assumption that all the possibilities have been brought forth and all the relevant information about each has been provided. Each tree has been constructed without any overlap between options. How the arbitrator evaluates a tree of analysis with complex possibilities now must be addressed. It should be obvious from the previous example that the alternatives that can be generated are not always of equal merit.

Attaching Probabilities

Assigning probabilities to each branch would make an evaluation of the likelihood of a chain of events a relatively simple matter. Consider the illustration modeled from the structure of the last example, which shows the probability assessments for the various branches.

The overall probability can be obtained by multiplying the values of the top chain of events ($.90 \times .90 \times .90$) for a joint probability for this branch of .729. Conversely, the probability of the grievant's innocence is .271, which can be obtained by summing the joint probabilities of all the other options. The arbitrator would compare the probability of guilt to his tolerance level for the risk of discharging an innocent employee in a hypothesis test.[9] It could be that a 27.1 percent chance of making a mistake in firing an innocent man would be unacceptable. However, we will leave the debate over the appropriate cutoff value to others. Perhaps cases involving very grave issues like moral turpitude would have higher critical values.

In multiplying the probabilities of events through the branches of a tree, the independence of each event has been

[9] Drotning and Fortado, cited at note 1.

assumed. Therefore, the existence of an incident (an absence, theft, etc.) must be thought of independently from the identification of the grievant as a possible cause. Even though an employee has been identified as the cause of an incident, it does not necessarily follow that the job description, training, and verbal managerial instructions will make the grievant responsible.

The probabilities attached to the tree can be determined in a number of ways. If the defense offers no alternative explanations or when events are stipulated, a probability of 1.0 is used. The probability that the grievant was only borrowing a drill concealed under his coat and taken without permission is very low.

Accusations of substandard work can be explored through historic records of output or the testimony of experts. By asking knowledgeable experts "What are the odds of this rate of breakage occurring?", the probabilities can be obtained. For example, no mechanic in a case of an employee discharged for improperly installing shocks had ever heard of a case where properly installed shock absorbers shook loose with road vibrations, so that probability would be small. If insufficient or no information is provided to differentiate between plausible explanations of the same observation, the arbitrator must assign equal likelihoods to each possibility. In such an instance, a grievant would almost certainly be reinstated. Therefore, advocates must provide information on all but the most absurd allegations so informed probability assignments can be made. In the case of excessive wear and numerous breakdowns, the company faced a substantial task of discrediting all the other reasonable explanations for excessive wear besides the grievant's involvement.

From the numerical example at the beginning of this section, it becomes apparent that at each junction or critical place in the chain, the outcome proposed by the company was highly likely (.90), yet the overall probability of guilt was much lower (.729). This raises a critical question. Could the defense always suggest a host of very remote possibilities—perhaps some with only one chance in a hundred—so as to cumulatively drain away enough certainty from the company's assertions to gain reinstatement for the grievant? Such situations arise where the existence of an incident is inferred rather than observed and the defense has room to generate numerous "created" explanations for the inferences. However, some alternatives are likely to be so improbable as to lay to rest the fear that a union could significantly dilute a probability figure by generating a host of alternative explanations.

Conclusion

In this article we have attempted to show how a decision-tree model can be applied to discharge cases in order to convert uncertainty into probabilistic alternatives that can lead to decisions that reflect reality. The focus on critical steps forces the brief writers and the arbitrator to identify the critical step(s) and direct testimony, evidence, and their arguments to that end.

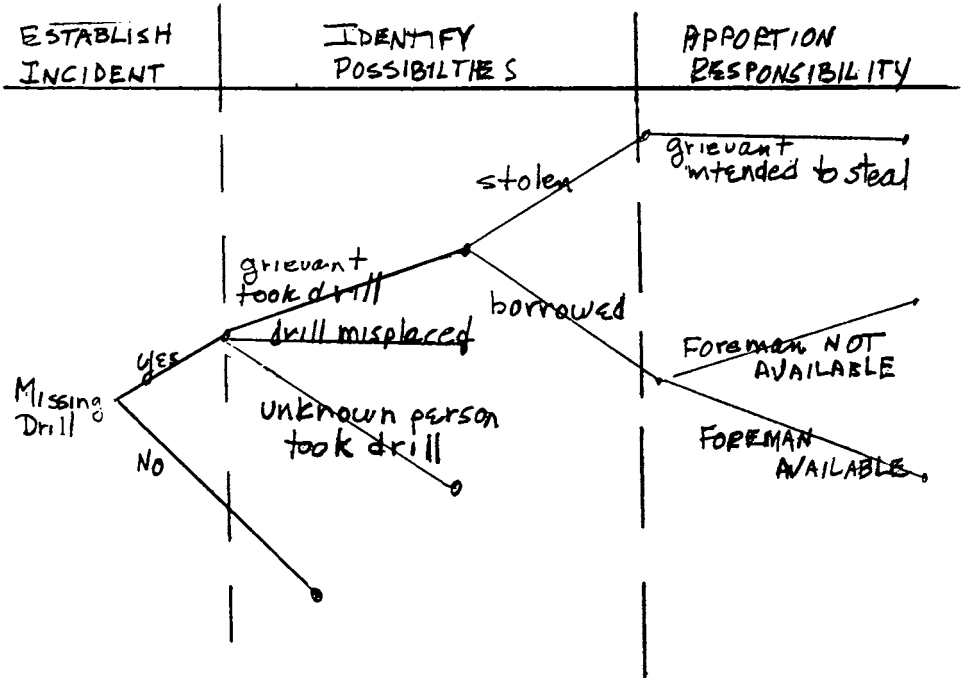
The idea is not foreign to advocacy as shown by a review of the criteria for sustaining discharges for insubordination. In an article in *American Jurisprudence,* Jeffrey Ghent noted that insubordination charges would not be sustained if one or more of the following criteria were present: misconduct not proven; the existence of a pertinent rule or order not shown; the pertinent rule not violated; the employee tried unsuccessfully to comply with the rule; the employee's motive for violating the rule was admirable; no harm resulted from the violation; or the rule was unreasonable or invalid.[10] An interesting point

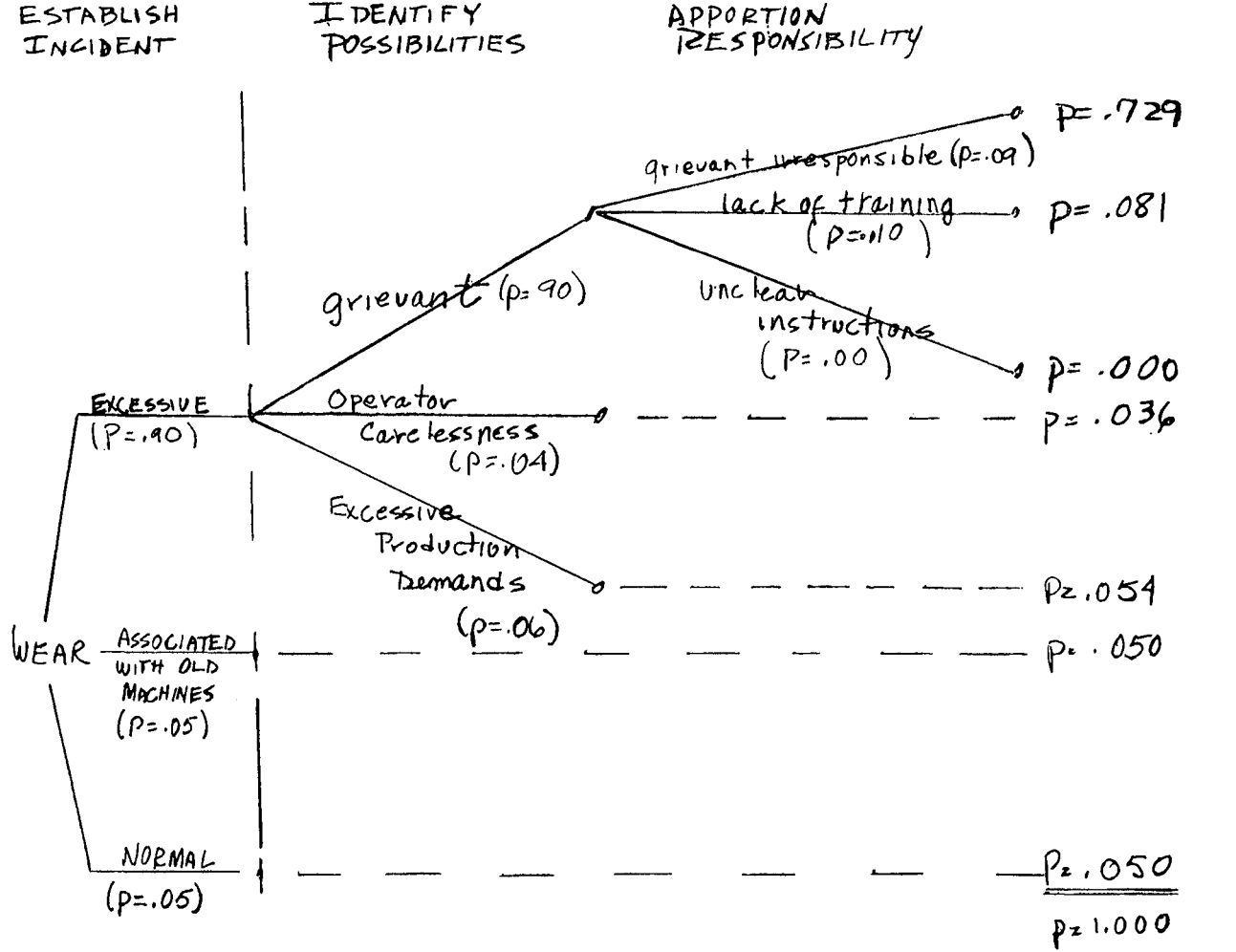
[10] Jeffrey F. Ghent, "What Constitutes Insubordination as Grounds for Dismissal of Public School Teachers," *American Jurisprudence* 3, p. 87.

is that these seven criteria can be allocated to one of the three critical steps identified in this paper. In short, advocates have recognized the notion of a decision tree but have not used the formal model.

The use of the decision-tree concept, even if arbitrators and advocates object to a specific quantification process, is likely to produce highly relevant testimony and evidence and, therefore, more logical arguments in posthearing briefs. This, in turn, will or should allow arbitrators to minimize subjective bias and make rulings that conform to reality.

[The End]




ESTABLISH INCIDENT
IDENTIFY POSSIBILITIES
APPORTION RESPONSIBILITY
WEAR
EXCESSIVE (P=.90)
ASSOCIATED WITH OLD MACHINES (P=.05)
NORMAL (p=.05)
grievant (p=.90)
Operator Carelessness (P=.04)
Excessive Production Demands (p=.06)
grievant irresponsible (p=.09)
lack of training (p=.10)
unclear instructions (P=.00)
p=.729
p=.081
p=.000
p=.036
pz.054
p=.050
pz.050
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Concession Bargaining

By Ben Fischer

Carnegie-Mellon University

The labor relations experience for the next decade and a half will not be more of the same but will take off in directions that are new and hard to even predict. There will not be reversion to the past or a neat extension of the trends dominating the 1970s. Nor will the 1982 to 1984 events turn out to be a mere interruption of the prolonged period of growth and affluence that preceded the 80s. What is more likely is a continuation of patterns that resemble the recession experience despite economic recovery. Furthermore, I do not see a period of economic retreat and disaster. We can rather expect a period of growth, overall prosperity, increased nonmanufacturing jobs, and expanding self-employment. Expansion of small entrepreneurial ventures is almost certain.

Whatever the precise developments, labor relations problems will persist and become more challenging, more complex, and even more difficult. It would be comforting to foresee at least a reasonably consistent pattern of events and trends but there is no reason to expect even that to happen.

The decades preceding the 80s were dominated by union efforts to win more and better wages and benefits, introduce significantly uniform labor patterns, and achieve stabilized relationships. A central thrust of labor relations was toward removal of labor standards from the competitive arena.

Not only was the desire for standardization expressed in particular industries, but it also tended to cross industries. The outstanding example was the pervasive impact of the 1948 GM wage formula. Even if the combination of annual improvement raises and quarterly cost-of-living adjustments was not followed per se, wage settlements in a wide range of bargaining relationships tended to produce like results in industries remote from autos. This went on for more than 30 years.

In nonwage rate areas the impact of patterns has been even stronger. Perhaps younger observers do not realize that health care for workers was a matter of personal concern until the 1950s when employers first took on increasing shares of this burden through collective bargaining arrangements. Now health insurance is virtually universal.

During the same span of years, pensions became established for hourly workers. Previously, pensions for workers had existed only in some craft fields and through ethnic organizations, primarily through mutual, self-help arrangements. Not until the late 40s and early 50s were employer-provided pensions established and have now been extended to millions. Even such now taken for granted items as paid vacations, holidays, shift premiums, and other fringe benefits were extremely rare until the later years of the modern collective bargaining system.

Clearly, the pre-80s were years of innovation and great progress for workers. Constraining trends were beginning to emerge during the 60s and 70s, but not until the 80s did competitive pressures invade the major pace-setting areas of labor relations in a dominant way.

Examining steel experience against this scenario is revealing. The 1959 steel strike brought two factors into focus. The harm the parties inflicted on each other in the 116-day strike proved that the parties could still stand and could also destroy each other. That lesson apparently needed to be learned.

The strike also accelerated the invasion of the American steel markets by foreign producers. The penetration probably would have come anyway, but 1959 helped the process and ironically forged an alliance of the parties aimed at resistance, an alliance still in effect. The 20 years following that strike found the parties striving to make the industry more competitive at the same time that innovative programs were being developed to protect workers against the impacts of foreign competition.

In retrospect, Monday morning quarterbacks consider that the efforts to be competitive were inadequate and the innovative protective programs so expensive in practice—not in anticipation—that they are deemed to have hurt the industry's competitive position. The vantage point of the Monday morning quarterbacks is understandable, but the tendency of some of the people who were calling the plays during the game to join the ranks of the Monday morning quarterbacks is a bit puzzling.

The 1980s saw a new trend in bargaining. Unions and companies were groping to find ways to accommodate traditional union roles to very new economic patterns in a host of major industries. Could the parties convert their skill at dividing up the goodies to equally effective methods for combatting the losses?

Concessions

Unfortunately, efforts to adapt wages, benefits, and working conditions to the newly emerging needs of the firms were labelled as concessions, give-backs, retreats, and defeats. Rather than try to fashion a new relationship designed to address the new economic realities, the media and even the parties distorted the context in which new approaches were being shaped. Somehow the fact that in the major industries the worker holds a major stake in the success of the firm was ignored. Instead, workers were depicted as making concessions to the company.

I have asked my students to identify for me the beneficiaries of these concessions. It has not been management since they tended to make equally or greater concessions. It has not been the stockholders because they have been victims of equivalent retreats. It has not been the customers because it was their freedom to shop elsewhere that helped to bring about the problem in the first place.

Apparently, we still like to live in the days when someone owned companies. The fundamental changes in the structure of corporate life seem to have escaped us. If changes in the company's cost structures are useful to the enterprise, the major advantage gained through that success is likely to accrue to the employees—those whose careers are dependent on the company, to whom seniority is a major asset, people to whom benefit entitlement is crucial. Their basic life style depends on continued employment. Those company executives who have been proclaiming that it is the worker who is the firm's major stakeholder are telling it the way it is.

This long recital is offered because the future bargaining experience in an increasing number of vital industries would be severely disadvantaged if the issue of concessions followed by "now we want it back" became the theme of the remainder of the 80s and even the 90s. The management that tries to solve economic difficulty with a narrow strategy consisting only of demands for concessions will be inflicting harm on itself. Inherent in such strategy is the notion that the workers had their day and now it is time for a reversal because business is bad or the union is weak. The aftermath of that strategy is clear. When business is good and the union feels it is in a strong strategic position, then the game is replayed but in reverse. Some of what is being said in the auto situation gives a hint of things to come.

This roller coaster cannot serve workers, firms, or society. The American econ-

omy is operating in a very new environment. The globalization of the economy, the trend toward deregulation, the increasingly violent impact of technology come together to challenge our way of doing business. No group is more involved in meeting that challenge than labor.

Developing strategies for managing the work force and for labor participation in achieving successful experience takes second place to no other factor in policymaking. Labor cannot be outside that process. Management cannot duck the challenges brought on by the new circumstances or ignore the crucial positive or negative impact workers can make.

Concessions are designed to produce lower costs and therefore more effective competitiveness. The fact is that many factors make for competitiveness. Unit costs, quality, and service are probably the major ingredients governing competition. Unit costs depend on much more than what is paid to the worker in wages and benefits. The size of output is obviously crucial. The degree to which equipment is utilized is decisive. The use of materials, the quantity of scrap, the reduction of inventory, and the reliability of schedules are all big factors in determining a firm's success.

The labor relations system needs to address every phase of the worker's impact on outcome. There are innumerable ways to make improvements. There are many ways to fashion compensation and benefit systems. The cost of labor includes not only union employees' compensation but takes in the entire work force. To attempt to narrow the whole spectrum of workplace conduct and performance into a small package of so-called concessions is a cop-out.

Clearly it takes two to tango. Many unions would prefer the traditional scenario, something they know. It does not require getting into many new fields of expertise or concern. It is easier to do business as usual.

But unions cannot afford to duck. The members' welfare depends on the firm's success. Therefore, making the firm a success has to be a number one priority item along with protecting the worker's flank along the way.

New Movement

What we are confronting is a reversal of a deeply engrained culture. Our system is based on the British tradition of the master-servant relationship. Managers manage; workers obey. Within that system, unions have sought to protect workers against harsh management practices and have sought consideration for the wishes of workers for improving their own lot.

We are on the verge of not only an economic revolution but a cultural one. Perhaps this represents the triumph of democracy in which the worker will be given the opportunity to have a say about the things he knows best and often at least as well as supervisors. While in other nations unions are achieving decisionmaking powers, but workers are not, here we may see workers increasing their role and power at the workplace but not unions assuming the power to direct the affairs of business.

The movement toward worker participation through Q-circles and the like is a tentative exploration into increasing the involvement of workers. Giving workers shares of stock and instituting profit-sharing schemes are all nods in this direction of involvement. Experiments with work teams that direct themselves or even take part in planning activities are other examples. The entire notion that workers have latent talents to achieve vastly improved peformance relates to these same considerations.

It would be folly to expect a great, diverse, free society to move in neat orderly steps and patterns. Ours never has. At the heyday of union success in collective bargaining, there were defeats and there were retreats and there were

major sources of resistance to any form of unionization. Diversity of experience must be assumed as inevitable.

However, there are major trends, some of which spread over time, but always influencing the direction of our society. Yesterday's bold experiments often become the universal pattern in a relatively short span of years.

In the next few months, important major negotiations will be taking place. It appears that no more crucial item appears on the agenda than the forthcoming auto negotiations. While news coverage may focus on a few simplistic issues, the parties will have no such luxury available to them. How those parties react to suddenly huge profits in an industry still fraught with no end of uncertainties can influence labor relations in America for years to come. How the new leadership of the steel union and the equally new leaders of the industry address the dire problems of the steel industry in the months ahead can greatly influence the direction of other fields in which worldwide disruptions occur.

As one observes what many companies and their unions are actually doing, it is hard to believe that we will not somehow find a host of varied paths to progress. Workers are not primarily looking for a fight, unless it is a fight against foreign invaders. Their overwhelming priority is jobs, job security, job availability, jobs in which they can contribute to advance their own welfare.

It is almost un-American for anyone to have enough money. Yet it is clear that, without denying this universal consensus, workers can take less pay with a job rather than more pay in theory but no job in practice.

Problems

Union leaders have no easy task in this environment. But then, I come from the era of the 30s and 40s when the life of a union leader was far from cozy or luxurious.

Critics tend to overlook the enormous obstacles union leaders face. The membership has diverse interests, increasing frustrations, uncertain goals. People want to better themselves, if they can. Yet workers are not the idiots they are depicted to be. The realities of competition are known to them. Many have felt their own operation would be improved but generally have been given to understand that it is none of their business even though their very existence is at stake.

On the other hand, managers have no easy task. Their competitors are not idle, not waiting for them to catch up. Management's agenda is overwhelming. Yet the extent of its power is vastly misunderstood. The idea that the boss issues a command and the management troops respond with vigor and enthusiasm is at best a myth.

Change—needed change—threatens management as much as it does unions. In fact, just as change and improvement tend to make some workers redundant, so too does change lead to management layoffs in many situations. Just as workers have been restricted in their ability and right to exercise initiative, so too have managers been confined to the duties associated with their position and their layer in the management hierarchy.

Concessions? The management that thinks this is the way to go is often taking the easiest but hardly the most promising road. Perhaps a strategy for progress at a given time and place does require some retreat, but success will depend more on the ability to mobilize the assets of the work force and the firm than on the ability to win or enforce so-called give-backs.

Admittedly, the problems encountered in many firms are enormous. Shrinkage of the work force despite high levels of production and profits strain the capacity of bargainers and managers to develop sound responsive programs. Work practices established in a wholly different environment are not easily brushed aside.

Compensation systems related to a very different technology and management style linger but are often counterproductive. Perhaps most crucial is the lack of certainty of what to do about job security, a bargaining agenda item that looms as increasingly crucial to any appropriate labor relations system.

Not only do firms need to work with their unions to create viable systems for assuring at least a portion of their employees that they have and will have steady jobs (not an easy challenge) but there must be better ways to relocate displaced workers in the sections of the labor market where there is growth. This could mean geographical relocation but applies more to service-type industries where steady expansion continues.

Any strategy that ignores the certain steady shrinkage of the manufacturing work force and the continuing growth of the nongoods-producing sectors will flounder. Labor and management alone cannot handle the job situation; public programs and community planning are essential adjuncts.

Conclusion

We dare not allow the imposing number and complex nature of the problems to intimidate or paralyze us. The past is indeed but the prologue to a future in which we are certain to find that America has not reached the end of its progress and greatness. We are on the threshold of material progress beyond anything we have ever known, thanks to technology and increased knowledge. That progress is certain to be marred by dislocation, disruption, problems of job creation, and income distribution, and the Lord knows what else.

Each of these is an issue unto itself, requiring not only the best that labor and management can offer but the leadership of government, community effort, academic talents, and the attention of the public education system. We will have to face each of these dire problems as challenges that must and can be met, not as if we are witnessing the end of mankind's glory days.

If the labor relations system is to be useful in the years ahead, and if the unions are to remain a positive influence, then the system must be geared to plowing new ground, conquering new heights, and aiding America's continuing growth. The scheduled funeral services for unions and for progress are premature, not by a few years but by generations. Our institutions have a way of adapting, sometimes falteringly, often in unpredictable ways, but nevertheless finding their own appropriate levels. During the rest of the 20th century, this is what will happen and I hope we recognize the wholesome nature of the changes as they occur.

[The End]

Chapter 11 and Collective Bargaining

By F.M. Lunnie, Jr.

National Association of Manufacturers

I appreciate the opportunity to offer some observations on the topic of collective bargaining agreements and Chapter 11 of the Bankruptcy Code, certainly an issue of current interest and one that warrants thorough examination. My purpose in this presentation is to clarify the Supreme Court's recent decision in *NLRB*

v. Bildisco[1] and, more importantly, to distinguish what the Court actually said from what some would have you believe. This last point is very critical because there has been a great deal of confusion on *Bildisco* created by intentional misrepresentation of the Court's holding. In this article I will review the circumstances which have led to successive "standoffs" on pending bankruptcy legislation and briefly sketch out NAM's position on this issue.

I am making several assumptions, the first of which is that few of you have read the entire decision. It has been my experience that most people—including Members of Congress—have relied on press accounts of the decision, and I believe the press, with few exceptions, has been less than thorough in its reporting on *Bildisco.* Second, most of you have opinions on the decision that I am unlikely to change. However, I hope we will all gain a better understanding of the issue and the reasons for the current debate before Congress on bankruptcy.

There are a number of factors that contributed to the debate over revision of the Bankruptcy Code. The prologue began in 1978 when Congress passed the Bankruptcy Reform Act. Among other things, the Act broadened the jurisdiction of bankruptcy courts, streamlined procedures to make reorganization less difficult and encourage the successful rehabilitation of more debtors, and contained provisions easing requirements for consumer bankruptcy. The Act provided a six-year transition period, expiring March 31, 1984, for moving from the old to the new court system.

In 1982, the Supreme Court ruled in *Northern Pipeline Construction Company v. Marathon Oil*[2] that the authorities conferred on bankruptcy court judges under the 1978 Act were unconstitutionally broad. In that case, the Court held that some of those authorities could be exercised only by Article III courts, whose judges are appointed for life and whose salaries cannot be diminished during their tenure; bankruptcy court judges are appointed under Article I for 14-year terms. The Court directed Congress to enact legislation to accommodate the *Marathon* ruling. Pending that, interim measures were adopted by each of the federal circuits. Several deadlines have come and gone, but no final resolution has been achieved.

The Senate in April 1983 passed S. 1031, which would establish Article I bankruptcy judges, make consumer bankruptcy less attractive, and provide safeguards for farmers with grain in bankrupt elevators. In addition, the bill would add a number of federal judges at the district and circuit levels.

In the House, H.R. 3 was reported by the House Judiciary Committee in February 1983; that bill would provide for Article III bankruptcy judges and nothing more. There was strong sentiment in the House that issues such as consumer bankruptcy should also be addressed, and organized labor was pressing for provisions granting them preferential treatment in Chapter 11 proceedings. While he promised prompt action later, Judiciary Committee Chairman and the bill's chief sponsor Peter Rodino refused to consider other amendments to the Bankruptcy Code until the judges' issue was resolved. This was the case until February 22, 1984, when Chairman Rodino's position changed dramatically.

On the morning of February 22, 1984, the Supreme Court handed down a long-awaited decision in *NLRB v. Bildisco.* As will be discussed later, portions of that ruling were unanimous. Within hours of the Court's ruling, Chairman Rodino

[1] *NLRB v. Bildisco & Bildisco,* 255 NLRB No. 154 (1981), 1980-81 CCH NLRB ¶ 18,093, enf denied 682 F2d 72 (CA-3, 1982), 94 LC ¶ 13,360, aff'd 52 USLW 4270 (US SCt, 1984), 100 LC ¶ 10,771.

[2] 428 US 50 (US SCt, 1982), 1981-1982 BCY TRANSFER BINDER ¶ 68,698.

introduced H.R. 4908, which would reverse *Bildisco* in its entirety and institute far more restrictive requirements than had previously been imposed by any bankruptcy court.

Organized labor and its allies were quick to take the offensive with unsubstantiated allegations of "union-busting" and employer abuses of Chapter 11. I think it has been unfortunate that the media, in many instances, failed to do the kind of thorough research necessary to report on what the decision in *Bildisco* actually said. As a consequence, many of the media accounts were long on the emotional aspects of the decision but short on the facts. Press accounts and organized labor's misrepresentations of the decision added to an already confused situation.

On March 19, Chairman Rodino introduced an omnibus bankruptcy bill, H.R. 5174, that included H.R. 3, H.R. 1800 (consumer bankruptcy), provisions on grain elevators, and H.R. 4908. The next morning, before copies of the measure were generally available—even to Members of Congress—or anyone had a chance to review it, the Rules Committee met to decide on how floor debate on the H.R. 5174 would be conducted.

The Rules Committee hearing was anything but calm, and the normal decorum of such proceedings was not to be found. It was clear that few legislators were familiar with the labor provisions of the bill or the unanimous Supreme Court decision they were being asked to reverse. All this took place less than one month after *Bildisco* was handed down and without a single day of hearings. But, at the conclusion of the Committee hearing, a party-line vote provided for no discussion on the merits of the labor provision on the floor and a single up and down vote on the entire bill.

On March 21, and despite considerable protest, the House of Representatives passed H.R. 5174 by voice vote and sent it to the Senate for consideration. Of this process, Representative Henry Hyde, Republican of Illinois, observed: "It is an embarrassment to the legislative process. It is an embarrassment to the people who belong to this body and love this institution and call it the greatest deliberative body in the world. This is not. This is an exercise of muscle, muscle, muscle. And I commend you [Mr. Speaker] for wielding it so brutally."

During the week of March 29 there were attempts to reach a compromise prior to the March 31 expiration of the authority of sitting bankruptcy court judges. Late on the evening of March 29, Senator Hatch thought one had been reached, but when it was announced the proposed compromise so split business, labor, and the Senate that an extension was granted, initially to April 30 and later to May 25.

Court Decisions

The foregoing is a thumbnail sketch of what has happened to date. If you are not familiar with bankruptcy law and, more importantly, with what the Supreme Court actually said in its ruling in *Bildisco,* then you might appreciate the business community's rationale for opposing the labor provisions in H.R. 5174.

In many ways *Bildisco* was a clarification of existing law. Prior to February 22, 1984, there was no question that labor agreements could be rejected and no one ever disputed that. Similarly, there was consensus among all the courts that labor agreements should be accorded higher status than other executory contracts, the rejection of which is governed by the "business judgment" test where the debtor is required to show only that the contract "burdens the estate." The question that had not been resolved, however, was the standard for rejection of labor contracts.

The Court of Appeals for the Second Circuit in 1975 adopted a "but for" test. In *Brotherhood of Railway, Airline and*

Steamship Clerks v. REA Express,[3] the Second Circuit held that the debtor was required to show that, "but for" rejection, the reorganization would fail and liquidation would result. This standard, however, was not embraced by other circuits and there was no judicial consensus.

The Third Circuit, in *NLRB v. Bildisco,* rejected the "but for" test on the grounds that it placed undue preference on labor contracts rather than the more fundamental questions of successful reorganization and preserving jobs. That court adopted a less stringent "balancing of the equities" standard, as did the Eleventh Circuit, which requires the debtor to show that the labor agreement is burdensome and rejection balances the competing interests of all creditors, including those under the labor agreement.

In ruling on *Bildisco,* the Supreme Court made *two* fundamental rulings. It is important to distinguish between them, for they have been intentionally confused and commingled in an effort to reverse the Court's holding in its entirety.

First, a *unanimous* Court ruled that a burdensome executory labor contract may be set aside only after a careful balancing of all of the equities, including the interests of employees covered by the contracts, other creditors, and the needs of the debtor in connection with its efforts to reorganize the business. In adopting this middle-of-the-road test, the Court specifically rejected the view that labor contracts, like commercial contracts, should be subject to the liberal "business judgment" test for rejection. So, too, the Court rejected the strict "but for" test for rejection urged by organized labor and the NLRB, that is, that labor contracts can be rejected only if the debtor can prove that rejection is necessary to avoid collapse. A *unanimous* Court agreed that this strict standard, derived from the Second Circuit's holding in *REA Express,* was "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 [of the Bankruptcy Code]."

The *second* holding in *Bildisco* was rendered by a divided Court. By a five-to-four majority, the Court held that a labor contract is unenforceable against a debtor-in-possession from the time the Chapter 11 petition is filed by the debtor until the time the contract is rejected by the bankruptcy court.

The Conflict

So there were two distinct and fundamental holdings in the Supreme Court's decision in *Bildisco.* It is the second portion of the decision to which organized labor has objected so violently. In the process, however, labor unions have willfully confused the Court's two fundamental holdings in an attempt to ensure legislative reversal of both.

To be sure, organized labor seeks legislative action to ensure that labor contracts cannot be unilaterally abrogated prior to formal rejection by the bankruptcy court. In so doing, however, they are seeking legislative imposition of the very standard for rejection which was *unanimously* rejected by the Supreme Court as being "fundamentally at odds" with the policies of the Bankruptcy Code.

The public interest demands that these two issues be kept separate and distinct and that organized labor not be permitted to lump them together in a way that might cause the unwitting rejection of both elements of the *Bildisco* decision. If the "balancing of the equities" standard for rejection adopted by the unanimous Court is abandoned in favor of a test that is "fundamentally at odds" with the bankruptcy laws, not only will debtors be harmed but employees and the public will be as well.

It should be made clear at this point that it is not the intention of NAM or other elements of the business community to hold H.R. 5174 hostage. Rather, it is

[3] 523 F2d 164 (CA-2, 1975), 77 LC ¶ 11,077.

organized labor and its allies who have seized upon the deadline imposed by the Supreme Court's *Marathon* decision as a means of bypassing the normal "notice and hearing" process. Despite strong protests from the business community, House leadership succeeded in rushing through a labor amendment reversing *Bildisco* in its entirety without a single hearing or *any* meaningful debate. To the best of my knowledge, there is no other example in the history of this republic where Congress has shown such flagrant disregard for a *unanimous* Supreme Court ruling, reversing it without even a transparent appearance of deliberation.

Organized labor was successful in the House in camouflaging its attempt to have all of *Bildisco* reversed by orchestrating its emotional and misleading objections to the Supreme Court's decision. One example of this organized hysteria came from the AFL-CIO's Executive Council immediately after *Bildisco* was handed down: "The Supreme Court of the United States, in accord with its normal pro-business leanings, has now granted employers wide permission to use the bankruptcy laws to destroy collective bargaining."

The Court did nothing of the sort. In the first instance, it is difficult for me to understand how anyone could attribute "pro-business leanings" to a unanimous decision of the Supreme Court, whose members range philosophically from one end of the political spectrum to the other. Further, the Court emphasized in its decision that, prior to any ruling, the bankruptcy court judge must be persuaded that reasonable efforts to achieve voluntary contract modifications had been made but were unlikely to produce a prompt and satisfactory solution. In addition, the Court approval of the rejection does not terminate the bargaining relationship between the debtor and the union, nor does it do away with employee rights. For example, employees retain the right to strike. So nothing in the *Bildisco* decision heralds the end of collective bargaining, as some would have you believe.

As to the allegations of abuse of Chapter 11 by employers as a device to rid themselves of unions, the arguments simply do not make any sense. First, one must understand that filing for bankruptcy is by no means a desirable or enviable state, and no employer in its right mind would lightly scheme, as organized labor would have it, to use Chapter 11 for that purpose. Chapter 11 is an onerous, expensive, and unpredictable procedure that any employer would rather avoid. It results in the court's looking over management's shoulder at every stage—in a creditor's committee wrangling about how the employer's liabilities should be apportioned; in banks and other creditors being unwilling to extend credit and capital needed for survival; in suppliers unwilling to deal with the debtor except on a cash basis; in customers seeking other, more reliable sources of supply; and in skilled management and workers looking for other job opportunities to ensure the security of their futures. Just on the basis of logic, I think no one would accept the premise that an employer would casually file for a Chapter 11 reorganization.

Second, despite labor-generated accusations of abuse, concrete examples are isolated, if they exist at all. In the much publicized case of Continental Airlines, the bankruptcy court specifically rejected union claims that the company filed for Chapter 11 when it was not completely insolvent and that the rejection was a device to undermine unionism. The Wilson Foods example has resulted in renegotiated labor contracts, a continuation of operations and jobs, and no finding by any court that Wilson abused the bankruptcy law in any way. Braniff International, which recently resumed operations, would not be flying today without an infusion of new capital, an infusion which would have been impossible without the rejection of Braniff's labor contracts. It is interesting that organized labor has not

focused on the case of Rath Packing Company. Rath filed for Chapter 11 reorganization and the rejection of its contract with the United Food and Commercial Workers Union has been approved by the bankruptcy court. Rath was an *employee-owned* company at the time it entered Chapter 11 and at the time its labor contract was rejected.

Nothing about these examples suggests a single reason why the "balancing of the equities" test should be abandoned in favor of the strict test urged by organized labor. Nor do these examples argue for a major change in public policy that would, in effect, repeal Chapter 11 for distressed employers with burdensome labor contracts.

In fact, another case demonstrates, I believe, that the present system works well and fairly. Eastern Airlines spoke frankly with its unions about the Chapter 11 alternative if its burdensome labor contracts were not renegotiated. Eastern openly demonstrated its financial situation to its unions. New labor agreements that avoided the necessity for Chapter 11 altogether and permitted the carrier to continue operations were negotiated. It seems prudent, then, that, before enacting a law which would immunize labor agreements from rejection, Congress should ask itself whether Eastern's unions would have been as helpful and willing to compromise constructively if they had been certain that their contracts could not be rejected. It is precisely this incentive to negotiate that organized labor seeks to remove from the Bankruptcy Code in favor of a test that would likely discourage bargaining or postpone it until it was too late to be of any assistance.

The NAM Position

NAM's position, and I believe that it reflects the sentiment of the employer community, is that the Supreme Court's decision in *Bildisco* is appropriate for financially distressed companies seeking to regain economic viability and preserve jobs. The "balancing of the equities" test adopted unanimously by the Court provides the kind of flexibility that is essential to rehabilitation of the debtor. By enhancing the likelihood of successful reorganization, it seems to me that this test is in the interest of *all* employees, whether or not they are covered by a collective bargaining agreement.

The insulation of labor contracts from the effects of reorganization and the threat of rejection, as urged by organized labor, will effectively deprive the bankruptcy system of an important option in effecting the rehabilitation of the Chapter 11 debtor. Even where it was the labor contract in the first instance that drove the debtor into Chapter 11, the labor contract would be immunized by organized labor's rejection standard unless *total collapse* is the only other alternative facing the debtor.

We recognize, however, that the Court's majority holding is not universally embraced. As a consequence of this recognition and the desire to clarify the Court's holding in *Bildisco,* NAM president Alexander B. Trowbridge wrote to all Members of Congress shortly after the decision was handed down. In addition to summarizing what the Court said and urging hearings to receive the comments of all parties, he invited them to a NAM breakfast briefing on Capitol Hill to explain bankruptcy law and its treatment of collective bargaining agreements, focusing on *Bildisco* in particular, and to defuse the misleading statements and misrepresentation on the Court's ruling.

As we all know, our efforts to have hearings scheduled in the House so that all parties—not simply organized labor—with an interest in changes in *Bildisco* might have an opportunity to protect their interests were unsuccessful. The House leadership abandoned its customary "notice and hearing" process and in less than one month succeeded in reversing a unanimous Supreme Court decision.

The Future

Congress is faced with a May 25 deadline to enact bankruptcy legislation that constitutionally establishes bankruptcy court judges and to resolve the current stand off over a labor provision. Despite the dire predictions of organized labor, we have not witnessed a flood of employers filing for bankruptcy to abrogate their labor contracts, nor have we seen any evidence of the employer abuses that have been alleged.

NAM has worked and will continue to work with the Congress, organized labor, and all other parties in an attempt to arrive at a reasonable compromise which is equitable to all parties. We are willing to discuss constructive changes concerning the majority decision and unilateral abrogation of labor contracts. However, NAM will continue to strongly oppose any effort to summarily reverse *Bildisco* in its entirety. Any change of that magnitude must first be preceded by a deliberative process of hearings in which all parties have the opportunity to voice their concerns. As Representative John Erlenborn observed, "When legislators act in haste, they almost always do mischief."

During the debate on organized labor's amendment, the business community has found some unusual allies. One such example is the *Washington Post,* whose editorials are frequently in conflict with our positions. In this case, however, the *Post* has been very much in the business community's corner. One recent editorial that followed the House vote observed that, "if union contracts are enforced inflexibly and the company goes under, then the workers will have made a point and lost their job."

I am hopeful that an accommodation may be reached, although it is my belief that organized labor will not be satisfied with simply addressing the five-to-four portion of the decision. Thus, compromise may not be possible. I do not know how this situation will be resolved except to say that no one will be entirely happy with the outcome.

[The End]

The Effect of Chapter 11 on Collective Bargaining

By Rudy Oswald

AFL-CIO

"This being 1984, the year in which Ignorance is Strength, War is Peace, and Freedom is Slavery, it should come as no surprise that the Supreme Court ruled that Bankruptcy is the Way to Prosperity and A Labor Contract is Not Worth the Paper it is Printed On.

"If an employer has signed a union contract and subsequently decides he was too generous to the help, he can simply file for bankruptcy and toss out the contract, the Court said. And he can stay in business, paying his employees whatever he chooses. He does not have to wait for a bankruptcy judge to agree that he was in danger of going broke. He does not even have to be in danger of going broke.

"Suppose the contract has a clause that says its terms must be enforced even in the event of bankruptcy. Forget it. As soon as the company files for bankruptcy, it can tear up the contract. The contract

ceases to exist. If there is no contract, there is no enforcement clause." [1]

These conclusions drawn by a journalist from the Supreme Court's *Bildisco* decision[2] describe the disbelief that gripped unionists following the February 22, 1984, decision. This five-to-four decision dealt with a New Jersey building materials distributor that signed a contract with the Teamsters. Subsequently the firm stopped paying its agreed-upon health and pension contributions on behalf of its employees and refused to turn over union dues that it had deducted from workers' paychecks. Later the firm filed for bankruptcy under Chapter 11, which allows for continuing operations during a reorganization of the firm.

The company refused to pay the raises that it had agreed to under the contract and refused to negotiate with the union representing its workers concerning wages and conditions of work. The company just unilaterally established new terms, in spite of the requirements of the National Labor Relations Act designed to give workers a voice in the determination of these conditions.

In the past, the courts have held that a labor contract can be rejected only if it is obvious that the company cannot survive any other way. The National Labor Relations Board, in keeping with this tradition, found the Bildisco Company guilty of unfair practices for breaking its contract. However, the NLRB decision was overturned by the Third Circuit Court of Appeals. When the *Bildisco* case was heard recently by the U.S. Supreme Court, it chose to ignore a more favorable finding in the Second Circuit Court of Appeals[3] and sided with the company.

"Surely, one might think, Bildisco did wrong." [4] But not according to the Supreme Court. It blessed the firm's actions and allowed the company to do almost anything provided it cried "wolf" and filed for bankruptcy. The Court ignored the basic rights of workers to have a part in determining their wages and working conditions.

The collective bargaining system, as a matter of national policy and in the context of harsh reality, tries to create a labor market balance between the power of management and its employees. That balance requires the stability of an agreement between the parties. To allow "debtors-in-possession," generally the management responsible for the bankruptcy in the first place, to repudiate that agreement destabilizes this market-place balance. In the past the parties to these agreements have been able to adjust to market-place conditions by mutual agreement. Many contracts have been renegotiated because of the extreme financial bind of a corporation. Sad to say, few firms want to renegotiate when a company's financial condition is much more favorable than anticipated.

In practice, it is only labor contracts that would be unilaterally reduced in a bankruptcy proceeding. The "debtor-in-possession" cannot unilaterally set new lower terms for its electric and gas utilities, or for its material supplies, or for its rental or lease payments. The firm can get out from under such onerous contracts by just not receiving any more supplies, etc., that is, layoff the supplies just as it can layoff the worker. But the worker faced with unilaterally imposed lower wages has little choice. He has no alternative job in a practical sense. He does not have other buyers as the utilities, or suppliers, or landlords do. While the "debtor-in-possession" can try to negotiate lower

[1] Lars-Erik Nelson, "Unions Get You Down? Try a Little Bankruptcy," *Miami Herald* (March 2, 1984).

[2] *NLRB v. Bildisco & Bildisco*, 255 NLRB No. 154 (1981), 1980-81 CCH NLRB ¶ 18,093, enf denied 682 F2d 72 (CA-3, 1982), 94 LC ¶ 13,360, aff'd 52 USLW 4270 (US SCt, 1984), 100 LC ¶ 10,771.

[3] *Brotherhood of Railway, Airline, and Steamship Clerks v. REA Express, Inc.*, 523 F2d 164 (CA-2, 1975), 77 LC ¶ 11,077, cert denied 423 US 180 (US SCt, 1975), 78 LC ¶ 11,180. Applied to the Railway Labor Act.

[4] Nelson, cited at note 1.

utility rates, or lower supplier fees, or lower rents, the debtor cannot set those unilaterally, nor is it likely that lower rates will be accepted by these suppliers. On the other hand, if the debtor deals with the banks for a new loan, he most likely will have to pay even higher fees—since he is a less credit-worthy customer.

Because of the special character of the labor market, Congress has set forth the desirability of collective bargaining as the means to determine wages, hours, and conditions of employment.

Bildisco Doctrine

Normally, the holder of a commercial contract is not singularly dependent upon the performance of the contract in the same way that workers covered by the labor agreement are dependent upon it. In fact, lenders are insured, their interest rate and other terms take into account a bad debt factor, and the loss not only is deductible but can be sold in some situations to other firms.

Workers, on the other hand, are dependent on their work for their livelihood. Their labor agreement sets forth their wages, insurance and pensions, job security, etc. If a firm does close down in bankruptcy and workers are unemployed, they frequently lose not only their jobs but their income and maybe their home and autos. They may lose part or all of their pensions and their hope for old age as well as lifetime plans for their children's education.

Workers and their unions are frequently kept in the dark about the financial details of a firm's operations, but bank lenders on commercial contracts generally have detailed access to information about the firm. Credit is extended based on the information provided the lender by the firm, and false statements are actionable in fraud.

By contrast, workers have only the most general information about the firm's financial condition and have no basis for action when misled. In fact, during negotiations the employer is obligated to provide financial information only when arguing inability to pay. Most employers have become very skilled in saying "no" to contract proposals without uttering the key phrases that would require him to share financial information with his workers. The result is that workers have little information about how the firm is doing until it is too late. Employers have fought proposals to require more financial disclosure to workers even though such information is likely to affect the workers' employment.

Under the new *Bildisco* doctrine, the reorganizing employer purports that the contract is a burden. Surely any cost is a burden, and any given wage rate is more of a burden than a lower wage rate.

The Supreme Court did not require a showing that the wage level was the cause of the firm's financial problems. Instead, the Court just required that the debtor show that "the collective bargaining agreement burdens the estate and that, after careful scrutiny, the equities balance in favor of rejecting the labor contract." The cause of the firm's financial difficulties is not addressed. Nor does one need to look for a cause in order to reject a collective bargaining contract.

The financial problems of the firm may be related to external economic factors such as the rapidly increasing value of the dollar in comparison to other currencies. Firms affected by international trade are suffering as a result of the dollar's 50-percent climb against other major currencies over the past four years. Should this be the basis for a firm to unilaterally cut wages by 50 percent?

Difficulties

A firm's financial condition may be affected by today's high interest rates, increasing substantially the costs of new investments, inventories, and other uses of borrowed funds. A firm's financial problems may be related to the policies of management, usually the same manage-

ment operating under Chapter 11, where the firm overextended itself, failed to modernize, or failed to reinvest in the industry. The problem may have been poor marketing, or a lack of advertising. The problem could be a change in taste or desire for a particular product or service.

Yet, regardless of whether any of these factors are the cause, the employer may devise a remedy that takes it out of the hides of workers. They may not be the cause, but they have just been made a convenient remedy.

But, even if the problem is related to production costs, production costs or even labor costs are not the same thing as wage rates. Labor costs depend upon productivity—the level of output per hour of work—as well as the level of wages. If higher wages bring about higher productivity, labor costs may actually be lower than at lower wages and lower productivity. A number of writers have analyzed differences between union and nonunion productivity and found that unionized workers are generally more productive than nonunion workers.[5]

Is the bankruptcy court going to analyze all these factors and allow the abrogation of the union contract only when that is clearly the cause of the financial problem and when it can also be shown to be the cure?

Unions have traditionally shown their willingness to bargain with employers over means of keeping a firm viable. The workers generally have more invested in the firm than the so-called owners, who frequently are nameless shareholders who simply buy and sell the stock on the stock market often for tax losses or gains having little to do with the operation of the firm. The workers, on the other hand, usually have a long-term commitment to that employer and frequently have their whole life tied to that job. Human capital is generally specific to the firm within the community. So it generally is in the workers' interests to find a means to maintain a firm in business. But they want their conditions of work to be determined at the bargaining table and not unilaterally by the employer.

Many examples of unions renegotiating contracts to aid financially troubled firms exist. Such negotiations have been going on for years, but two recent management approaches to unions on this issue are a lesson in contrast and results. Both Continental Airlines and Eastern Airlines have been having financial problems. Continental filed for Chapter 11 bankruptcy and refused to come to any agreement with the unions involved concerning changes in the labor contracts. Instead, it just ripped up the agreements.

On the other hand, Eastern negotiated with its unions and developed some very special arrangements. The negotiated labor agreement remains intact and a separate agreement defers 18 percent of wages into a company stock purchase plan. There is also an agreement that productivity improvements will not result in job losses. The deferred wage payments are used to purchase 25 percent of the company's stock by the end of the year. The workers have the right to elect four members to the 18-member Board of Directors. The 13,500 IAM, 5,800 TWU, and 3,900 ALPA members will elect one board member each, and the nonunion workers will also have a member. These board members will have a voice in corporate plans for major capital expenditures and expansion of subsidiaries and affiliates.

The new agreement does not simply deal with the issues of wage deferral, stock purchase, and members on the board of directors. It includes employee involvement programs throughout the

[5] Charles Brown and James Medoff, "Trade Unions in the Production Process," *Journal of Political Economy* 86 (1978), p. 368; Kim B. Clark, "Unionization and Productivity: Microeconomic Evidence," *NBER Working Paper No. 330* (March 1979); and Steven G. Allen, *Unionized Construction Workers Are More Productive* (Washington, D.C.: Center to Protect Worker Rights, 1979), p. ii.

organization. It calls specifically for semi-annual reviews of employee relations policies.

Today Eastern is not only competing with other airlines, it is expanding into new markets, while Continental has contracted and given up markets. The employees at Eastern have a new voice and a new stake in their company. The employees of Continental are on the picket line, and untrained scabs are trying to operate on airline, with many a reported mishap. The differences between these two approaches are stark and clear. They provide the challenge to those who wish to support the nation's commitment to collective bargaining as the basis for providing workers a voice in determining their wages and conditions of employment and those who want to repudiate that commitment—those who want to destroy unions and collective bargaining.

Congressional Action

The issue is demonstrated by the actions of Congress. The House of Representatives reviewed the Supreme Court's decision in *Bildisco* and quickly set about fashioning a remedy.

On March 21, the House overwhelmingly adopted H.R. 5174, providing that a trustee or debtor-in-possession must abide by a collective bargaining agreement in force pending a judicial determination approving rejection of the agreement, for an expedited procedure for the consideration of applications for the rejection of such agreements, and for a process pursuant to which the trustee proposes modifications in the agreement needed for the reorganization and endeavors through collective bargaining to reach a meeting of the minds with the union on such modifications. It also provides a standard for determining whether rejection should be allowed, stating that the court must find that the trustee has complied with his bargaining obligation, and "absent rejection of such agreement, the jobs covered by such agreement will be lost and any financial reorganization of the debtor will fail."

However, when the Senate was about to adopt similar language, Senator Hatch of Utah blocked the legislation, delaying a remedy. In spite of the general public commitment to collective bargaining, Senator Hatch, with the aid and support of a number of renegade employers and employer associations, is trying to undercut that commitment—and if possible even abrogate it.

Conclusion

I believe that the country faces a grave challenge to its fundamental beliefs in the bankruptcy issue now before the Senate. The Senate is being asked by workers and their unions to reiterate their commitment to collective bargaining and the granting to workers of a voice in the determination of their wages and conditions of work. The Senate should readily recognize a basic distinction between collective bargaining contracts and basic commercial contracts for utilities, materials, and supplies.

[The End]

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ISBN 0-913447-27-7

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION
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