INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

Proceedings of the
1979 Annual Spring Meeting

April 25-27, 1979

St. Louis, Missouri

Also in the
Industrial Relations Research Association Series

ORGANIZATIONAL BEHAVIOR RESEARCH AND ISSUES

Edited by George Strauss, Raymond E. Miles, Charles C. Snow, and Arnold S. Tannenbaum (1974)

236 pages $6.00

COLLECTIVE BARGAINING AND PRODUCTIVITY

Edited by Gerald Somers, Arvid Anderson, Malcolm Denise, and Leonard Sayles (1975)

194 pages $6.00

FEDERAL POLICY AND WORKER STATUS SINCE THE THIRTIES

Edited by Joseph P. Goldberg, Eileen Ahern, William Haber, and Rudolph A. Oswald (1976)

269 pages $7.50

EQUAL RIGHTS AND INDUSTRIAL RELATIONS

Edited by Leonard J. Hausman, Orley Ashenfelter, Bayard Rustin, Richard F. Schubert, and Donald Slaiman (1977)

281 pages $7.50

PUBLIC-SECTOR BARGAINING

Edited by Benjamin Aaron, Joseph R. Grodin, and James L. Stern (1978)

327 pages $12.50

(Available in hard cover from Bureau of National Affairs, Inc., 1231 25th Street, N.W., Washington, D. C. 20037)

MEMBERSHIP DIRECTORY 1979

(in process for 1979 publication) $10.00

COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE

Edited by Gerald G. Somers (in process for 1980 publication)

Book orders and requests for prices and order forms for other IRRA publications (including Proceedings of the Annual Spring and Winter Meetings and Membership Directories) should be sent to the IRRA office.

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION
7226 Social Science Building, University of Wisconsin
Madison, Wisconsin 53706 U. S. A.

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

Proceedings of the 1979 Spring Meeting

April 25-27, 1979
St. Louis, Missouri

Edited by Barbara D. Dennis

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

Reprinted from the August, 1979 Issue of
LABOR LAW JOURNAL
Published and Copyrighted 1979 by
Commerce Clearing House, Inc., Chicago, Illinois 60646

Proceedings of the 1979 Spring Meeting
Industrial Relations Research Association

Library of Congress Catalog Card Number: 50:13564

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)

Inquiries and other communications regarding membership, meetings, publications, and the general affairs of the Association, as well as orders for publications, copyright requests, and notice of address changes should be addressed to the IRRA publication office: Barbara D. Dennis, Editor; David R. Zimmerman, Secretary-Treasurer; Mrs. Elizabeth S. Gulesserian, Executive Assistant.

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION
7226 Social Science Building, University of Wisconsin
Madison, WI 53706, USA. Telephone 608/262-2762

Industrial Relations Research Association Spring Meeting

April 25-27, 1979 — St. Louis, Missouri

PREFACE

1979 Annual Spring Meeting
Industrial Relations Research Association

Under the general heading of "The Impact of New Issues on Collective Bargaining," topics of particular concern to industrial relations practitioners—inflation and escalator clauses, the new mandatory retirement age law, equal employment, health care costs, and OSHA regulations—were debated by panelists representing government, unions, companies, and the academic community at the IRRA Spring Meeting in St. Louis. Since the program emphasized an informal interchange of opinion, not all panel members prepared papers for publication. However, the papers included in these Proceedings do provide the background as well as the essence of the discussion.

President-Elect Jack Barbash's subject for his Thursday luncheon address was "The American Ideology of Industrial Relations," and in it he stressed "how fundamentally we are moving away from voluntarism and the two-party adversary principle," principles that he had defined as historically governing the American ideology. After noting some of the effects of state regulations on union-management relationships, he urged academic researchers to "take some cues from these profound changes" and to give "greater recognition to the large problems of the adversary principle and voluntarism."

The Association is grateful to the local committee of the Gateway IRRA Chapter of St. Louis, chaired by Gladys Gruenberg, for planning and making all of the arrangements so necessary for a successful meeting, as well as to those program participants who prepared papers for the Proceedings. Our thanks also go to **LABOR LAW JOURNAL** for the initial publication of the papers presented at the meeting.

BARBARA D. DENNIS
Editor, IRRA

August, 1979 Vol. 30, No. 8

The American Ideology of Industrial Relations

By JACK BARBASH

John P. Bascom Professor of Economics and Industrial Relations at the University of Wisconsin-Madison and President-Elect, Industrial Relations Research Association.

THE IDEA THAT I WANT TO GET ACROSS here is that there is an American ideology of industrial relations. But it's an ideology that needs to change with changing circumstances. By ideology, I don't mean anything fancy except a more or less fixed or systematic way of looking at the world.

Ideology is not good or bad in itself. It's good if it provides a perspective, an outlook, or a scheme of values which helps one to understand or interpret complexities—*and* if the ideology is constantly tested against reality and plausibility. This is what I call an *open* ideology.

Ideology is bad if it interposes a screen between the true believer and reality, if it becomes a total secular faith. I call this kind of ideology a *closed* ideology.

The American ideology of industrial relations is not contained in a "great book" of some sort, but that doesn't make it less of an ideology. Even if there is no great book, the American ideology can, nonetheless, be read from how the participants perform in their industrial relations.

By industrial relations, I mean the theory and management of the labor problem under industrial conditions. Industrial relations is not limited to collective bargaining, but collective bargaining undoubtedly sets the pace for dealing with labor problems outside of collective bargaining.

As I see it, two leading principles govern the American ideology of industrial relations: the adversary principle and the principle of voluntarism. I don't claim that these are universal principles. Rather, I stress that the principles grow out of the American experience.

The adversary principle means that the two parties limit their *mutual* interests to the preservation and enlargement of the common pot which finances their respective factor shares. The parties recognize that wages and profits both require a prosperous enterprise. Beyond that, the relationship is dominated by a running dispute over the dis-

tribution of the enterprise's net proceeds between wages and nonwages. Not only is this the way it is, but I think this is how the parties seem to want it.

Management prefers the adversary relationship, because it fears that union collaboration will dilute management authority and thereby impair efficiency. The union prefers it that way, because the adversary relationship is most consistent with the maintenance of the union as a bargaining organization, and bargaining is what the union is all about.

The adversary principle in the American ideology best serves the public or general interest, too. In the ideal form, the logic runs something like this: "adversaryism" via competition in the product market is what keeps costs and prices from getting out of hand. The union's adversary stance in the labor market prevents the employer's exploitative impulse from getting out of hand. For its part, the union cannot press its adversary claims too far without pricing its product, and therefore the jobs and membership that go with it, out of the market.

There emerges the precept that tension among the participants, far from being pathological or aberrant, is normal and, if kept in bounds, even desirable. The assumption is that the parties can only be kept "honest," so to speak, by these countervailing checks and balances.

This benign view of the effects of industrial relations tension is not altogether shared by other disciplines. If I am not mistaken, harmony is the ideal state for organizational behavior and what used to be called human relations.

The adversary principle is workable because it *is* kept within bounds. Give-and-take and live-and-let-live are the ruling maxims of industrial relations. What keeps adversaryism in bounds is this spirit of moderation which deters the parties from stretching tensions to the breaking point.

Tension, I think, is probably a better word than conflict to describe the essence of industrial relations. Conflict implies one side vanquishing the other; tension, on the other hand, implies an equilibrium or balance of forces—which is what collective bargaining and industrial relations are more nearly about.

Tensions are kept within bounds, I am suggesting, by a kind of civilizing or rationalizing process that derives from: (1) the practical, pragmatic, incremental, compromising bent of the parties; (2) the institutionalization of tension; and (3) the ability of the economy and enterprise to pay out wages and profits in some equitable combination.

The parties demonstrate their pragmatism by their willingness to settle for something less than their maximum position and, further, by their willingness to move to their larger goals piece by piece rather than wholesale.

In accordance with the maxim of live-and-let-live, each party concedes the other's right to exist. The union accepts the management's function, and management accepts the union's function, even as both sides jockey to secure maximum advantage from each other—but within the bounds of "mutual survival," as Wight Bakke put it a generation ago.

Paradoxically, it is the strike and other forms of withholding that operate to civilize tensions. The strike is like a stabilizer or governor which warns the parties off extreme positions by confronting them with the costs of intransigence.

The parties make the adversary relationship tolerable by institutionalizing the bargaining game. Bargaining is played according to rules and procedures which, to an increasing degree, are established by the state.

Moreover, bargaining is a game increasingly played by professionals. On the union side, representation is more

and more a function of a full-time staff, replacing the union volunteer who mostly manned the union in earlier times. Professionalization is even more marked on the management side, where a corps of personnel specialists, consultants, lawyers, and associations are the movers and shakers of the industrial relations community.

The professionals operate through bargaining *structures* which establish the organizational channels for the adversary relationship to travel. Multiemployer bargaining, human relations committees, and health and welfare trusts are some of the forms that normalize the adversary relationship.

Industrial relations has not been lacking in visions of more constructive, integrative, cooperative, problem-solving, and trusting relationships—to use the terms that have been variously applied to the "higher" stage of industrial relations development. Nobody has ever really thought that the adversary principle could be supplanted entirely, but many have hoped at the very least to abate action-reaction and thrust-and-parry in favor of more direct collaboration. Indeed, there are interesting experiments going on right now.

That the quest for a "better" way has not been successful—if I am not mistaken—is not due to the lack of trying and experimentation. That the parties to the experiments invariably revert to a "harder" line may be saying something about the seeming fitness of the adversary principle in the American environment.

Voluntarism

Voluntarism is the other great foundation stone of the American ideology of industrial relations. Voluntarism in the American context means that the bilateral parties are given maximum freedom in working out their relationship on their own power.

State intervention, the principle of voluntarism asserts, should be limited to the referee's role, that is, to the function of setting and monitoring the rules but not determining the results. The rules should be focused on the maintenance of a power balance among the parties. Underlying voluntarism is a kind of populist creed that self-determination by the people affected is superior to control from the outside.

For the unions, voluntarism extends historically to keeping the movement free of domination by intellectuals. The late Nat Goldfinger, the AFL-CIO's chief economist and IRRA president, "exposed" (his word) the "macroeconomist mandarins who dominate the economics departments of the leading universities. . . as bankrupt."[1] The British TUC takes this tone, too. Their "mandarins" are the "administrative elite [who] because of their common educational background [can] be objectively described as the Establishment. Theirs is a very different perspective from that of the working people of Britain. . . ."[2]

Seventy years ago, John R. Commons distinguished between the "lower idealism" of the working class with its "demand for rights" and the "higher idealism" of the "transcendental philosophers" which "resurrected man but not the real man."[3] For Commons, the intellectual served better as adviser than as the maker of policy in his own right.

Intervention in the System

By most standards, the adversary principle has worked well enough in

[1] *Proceedings of the Twenty-Seventh Annual Winter Meeting of the Industrial Relations Research Association* (Madison, Wis.: IRRA, 1974), p. 1.

[2] *Trades Union Congress 1967 Report*, p. 382.

[3] *Labor and Administration* (New York: Macmillan, 1923), pp. 49-50 passim.

the private sector. The question now is whether it hasn't lost something in the translation to the public sector. In the private sector, the costs of the adversary principle are borne mostly by the parties. The costs of strikes by firefighters, police, sanitation and hospital workers, and teachers are borne mostly by the public. Indeed, public hardship is deemed part of the game.

Another problem with the adversary principle is that not all of the interests have been fully represented in the formal bargaining. Typically excluded have been the interests of women and the disadvantaged ethnic groups. Nor has the general interest in curbing inflation been sufficiently represented. Also, the dominant money-wage orientation of collective bargaining has, until recently, underemphasized the quality of worklife and occupational health.

To compensate for these defects in the operation of the adversary principle, voluntarism is being subjected to attrition by increased doses of state intervention. More and more, the state is displacing the bilateral parties in shaping the *results* of collective bargaining. Virtually every postwar administration, Democrat as well as Republican, has had a go at wage-price manipulation of some sort. Judicial and administrative interventions are remaking the seniority system. And, it is not unlikely that, when the full scenario is played out, the Occupational Safety and Health Act (OSHA) and the Employee Retirement Income Security Act (ERISA) may turn out to have the most radical impact of all the interventions.

Several facts stand out about state intervention. The state has become a third party in the bargaining process, critically modifying the two-party adversary relationship. It is not accurate any longer, if it ever was, to talk about state intervention which is limited to procedure. The state is now moving in to regulate the results as well as the procedure of bargaining. The point of all of this, it needs to be stressed, is not so much to pass judgment on the merits as to recognize how fundamentally we are moving away from voluntarism and the two-party adversary principle.

Industrial Relations Research

Research in industrial relations, it seems to me, must take some of its cues from these profound changes. It has been a source of great strength for industrial relations research that it has stayed pretty close to practice.

But practice-oriented research has the weaknesses of its strengths. One of the weaknesses frequently referred to is the absence of a Theory, that is, theory with a capital T, which means quantitative-type generalizations at a high plane of abstraction. This is Theory in which the rigor of the method becomes more important than the usefulness of the results.

But capital-T Theory does not come naturally to industrial relations, because its origins lie with problems. My fear is that a major preoccupation with upper-case Theory must come at the expense of a diminishing interest in the live problems that clamor for serious, responsible, and detached inquiry—indeed, for theory with a small t.

I am not, of course, arguing against lower-case theory. Theory is how we make sense out of complex situations. Industrial relations needs theory to understand, appraise, and generalize about the labor problems in its infinite diversity, but it has to be a theory that does not stray too far from the imperfect human beings who populate it.

Quantitative method is indeed one of the essential tools of any theory, but a quantitative mode of theorizing that excludes history and philosophy

does so at the peril of its usefulness and insights. On this point, I want to recall some wise words by J. Douglas Brown who called attention, in his 1952 IRRA presidential address, to the "inherent existence of value judgments in industrial relations research."[4]

"Industrial relations, like all other subdivisions of what we call social science, is truly a branch of the humanities. Social science uses the proper sciences more as a *tool* than as a *determinant*. Industrial relations is the study of a humane art with the use, where relevant, of scientific methodology. Industrial relations is not a science. Rather, it is the study of the values arising in the minds, intuitions, and emotions of individuals as these values become embodied in group organization and action. The understanding and solution of problems of group organization and action can never be divorced from the more basic understanding of the values which determine individual behavior. No matter how useful scientific methodology may be along the way, the goal of industrial relations research and practice lies beyond the 'timberline' of science."

The research agenda has to give greater recognition to the large problems of the adversary principle and voluntarism. I think we can give greater substance to these concepts using the established methodologies of the social sciences. I think we need also to probe the values that underlie these concepts.

The adversary principle in industrial relations operates on the assumption that egoism and aggression are inherent in the human situation and that a system of checks and balances has to be maintained to protect the parties from themselves and from each other and to protect the general interest from joint aggression by both in collusion. This is Douglas McGregor's Theory X of the situation.

Is a Theory Y possible? Is it possible to draw on impulses of altruism and social responsibility? I know that all of this is utopian. But might not this be a time ripe for a dash of *utopian* research and reflection? Isn't this the time to be deeply concerned about (with Alan Fox) "the ever extending network of commercialized relations which pervade[s] every aspect of human existence: the offering of specific service in exchange for specific sums of money; the carefully calculated and jealously guarded reciprocation; the draining from the transaction of all expressive or other extraneous considerations; the quick suspicion of fraud or default; the ever increasing battery of State-initiated protections and penalties designed to control and punish the bad faith that otherwise increasingly accompanied the impersonal specific contract"?[5]

[The End]

[4] *Proceedings of the Fifth Annual Meeting of the Industrial Relations Research Association* (Madison, Wis.: IRRA, 1952), p. 6.

[5] *Beyond Contract: Work, Power, and Trust Relations* (London: Faber and Faber, 1974), p. 365.

SESSION I

Inflation Issues and Industrial Relations

Escalator Clauses Under a Voluntary Pay Program*

By LUCRETIA DEWEY TANNER

Council on Wage and Price Stability

BEFORE DISCUSSING how cost-of-living or escalator clauses are treated under the Council on Wage and Price Stability's current voluntary pay standard, a brief review of this wage-adjustment mechanism may be appropriate. Escalator clauses date back to the printing and clothing industry agreements negotiated after World War I. However, they were short-lived and disappeared until after World War II, when prices began rising rapidly.[1] It was the 1948 agreements in the automobile industry that first incorporated the cost-of-living provision during the postwar period. Interestingly, the auto industry clause provided for wage reductions if the Consumer Price Index fell. The two-year UAW contract provided for an initial 11 cents-per-hour increase and added an additional six cents per hour generated by the escalator clause, but CPI declines took away five cents, resulting in a net gain of only one cent in the second year.[2] Today, few if any contracts call for such reductions if the CPI should fall, but even if they did, the CPI has moved only up in recent years.

Despite the current interest in incorporating escalator clauses into agreements, the proportion of workers covered by them has risen and fallen cyclically over the past 30 years in response to the behavior of consumer prices. In 1950, about 10 percent of all workers under major collective bargaining contracts were covered by some form of clause. By 1959, the number had reached 50 percent, but, as prices stabilized in the early 1960s, escalator clauses lost their appeal and were traded off for fixed money or benefit improvements; by 1966, only 20 percent of workers under major contracts covering 1,000 or more workers were covered.

---

* The author wishes to acknowledge the helpful comments of Sean Sullivan, Assistant Director, Office of Pay Monitoring, and Joe Talbot, Deputy Director, Office of Pay Monitoring.

[1] John Zalusky, "Cost-of-Living Clauses: Inflation Fighters," *American Federationist* (March 1976).

[2] "Industry Wage Patterns and Wage Data—Automobiles," *Collective Bargaining Negotiations and Contracts* (Bureau of National Affairs).

By the beginning of 1975, however, about one-half of all workers under major contracts were again covered by such provisions as consumer prices rose more rapidly, and the Bureau of Labor Statistics estimates that, in 1978, escalator clauses covered approximately 58 percent or about 5.6 million of all workers in major bargaining units in the private nonfarm sector.[3] Obviously, even this underestimates the total number of workers covered by escalator clauses. Contracts covering 1,000 or more workers represent only about one-half of all organized workers and a small fraction of all collective bargaining agreements in the economy. These smaller agreements, plus the Postal and other public sector contracts not included in the survey, might well add another three to four million workers, raising the total to nine to ten million.[4] In addition, wages for several million more nonunion employees are tied to escalator clauses.

Escalated versus Nonescalated Wages

Whether or not to incorporate an escalator (COLA) clause in an agreement is one of the basic questions negotiators face. While the general theory of an escalator clause is the protection of real earnings from rising living costs, negotiated COLA clauses vary greatly in reaching this objective. Douty's study indicated that the average adjustment for all workers under escalator clauses was 4.3 percent, compared to a 12.2 percent gain in the CPI. Three basic factors determine the amount to be recaptured from rises in the index: the formula on which payouts are based, the timing of the payouts, and the average wage rate of the employee group.

Formulas vary considerably, but the most common provides for a one-cent increase for each .3 point rise in the CPI, with payouts made quarterly. With a rate of $6.90, this formula would about keep pace with the CPI (with the All Urban Consumer and Urban Wage Earners and Clerical Workers Index at 207.1 in February). If earnings were $9.00 per hour, however, the formula would have to be revised and call for a one-cent increase for each .23 point rise. Less frequent payouts result in timelags, which also reduce the effective recovery.

Some have argued that COLA clauses lend stability to the economy, since contracts with some form of escalation generally tend to be longer than those without such provisions. The opposite may also be true, since companies with COLA clauses may not be able to predict their production costs. Employers are compensated, however, by knowing that labor peace will assure continued production.

COLA clauses were bargaining objectives in 1976 negotiations in major industries. The Rubber Workers had no escalator provision and, after a four-month strike, won a COLA formula that has improved their relative wage position. The Teamsters and a coalition of unions in the electric equipment industry won the lifting of maximum limits or "caps" on their COLA clauses as well.

[3] U. S. Department of Labor, Bureau of Labor Statistics News Release, *Major Collective Bargaining Settlements 1978,* USDL 79-69 (January 26, 1979).

[4] See Harry L. Douty, "The Impact of Cost-of-Living Clauses on Inflation," Executive Office of the President, Council on Wage and Price Stability, Staff Report, August 1975, reprinted in *Collective Bargaining Negotiations and Contracts* (Bureau of National Affairs). In this study, Douty estimated that 7.7 million workers were covered in the beginning of 1975, or about 10 percent of average employment in nonagricultural establishments including government workers, which is now about 90 million people. Using this 10 percent, an approximate nine to ten million is estimated to currently apply.

There is no doubt that labor negotiators are placing increased importance on the COLA, and data indicate that it is becoming a major factor in compensation. A decade ago, for example, when the total effective adjustment under major collective bargaining contracts was six percent, the escalator provision generated only 0.5 percent. In 1973, when the total wage-rate adjustment was seven percent, COLA money represented about 1.4 percent, and five years later in 1978, when the total effective wage adjustment was eight percent, the escalator clause provided about 2.4 percent.[5]

Despite what may appear to be an obvious advantage to those with COLA clauses, the debate continues as to whether escalator or nonescalator contracts produce more money. Comparisons of settlement sizes with and without COLAs, while difficult, show that in the past five years collective bargaining agreements without escalators have contained greater fixed wage increases over the life of the contract than those with escalator clauses. This indicates that tradeoffs are made by workers accepting fixed wage gains in lieu of COLA protection, although the difference between the two is not great.

A prime example of a tradeoff occurred in the agreement reached in 1978 between the United Mine Workers and the Bituminous Coal Operations Association (BCOA).[6] In exchange for a large cash settlement, the union traded off its existing cost-of-living clause, which was capped at six percent (one cent for each .4 point rise in the CPI). The total wage gain of $2.40 may or may not equal or surpass what an agreement with an uncapped COLA would have provided. Other negotiators also have weighed the potential value of COLA, and, in 1978, COLAs were introduced in 17 settlements covering 45,700 workers and were dropped in 14 affecting 231,000 (about 80,000 in the UMW settlement).

Escalators—Followers or Perpetrators of Inflation?

In his paper "Union Wage Determination: Policy Implications and Outlook,"[7] Dan Mitchell points out that, except for very short periods, it is unclear that escalators add to inflation, since nonescalated union wages and nonunion wages are also influenced by price movements. Furthermore, he points out that eliminating escalator clauses would not break the wage-price link.

One theory currently being advanced is that, since our current rapid inflation rate is being caused by factors outside of policymakers' control, e.g., the OPEC increases and higher farm prices, we are in fact feeding the inflation fires by continuing to tie wage increases to the current composite CPI. Rather, the idea proposed is that a new index be constructed based on cost items entirely within our control, thus excluding the oil and agricultural products items. Obviously this omits one important fact—that rising prices of these commodities still erode real earnings.

The solution we are all seeking is a very simple one—reduce inflation, keep

[5] Taken from Current Wage Developments and U. S. Department of Labor, Bureau of Labor Statistics, news release.

[6] The first year increase was $1.00 an hour with deferred increases of 40 cents due on March 27, 1979, and March 27, 1980, plus 30 cents cost of living on the same dates for a total of $2.40 over the contract, plus a one-time bonus of $100.

[7] Daniel J. B. Mitchell, "Union Wage Determinations—Policy, Implications, and Outlook," *Brookings Papers on Economic Activities*, No. 3 (Washington, D. C.: Brookings Institution, 1978).

unemployment low, and increase real earnings. For many reasons, no simple answers—or even complex ones for that matter—have been found.

Treatment of COLA Under 1971-74 Controls

How much the COLA clause produced of the total wage package was also a question debated during the economic stabilization period of 1971-74. Originally, the 5.5-percent wage standard was intended to cover all increases, including benefits. However, this was modified by Congress, which required special consideration of health, welfare, and pension costs, an amendment which became known as the qualified benefits standard. This permitted an additional .7 percent, so that the actual standard became 6.2 percent.

Increases granted under the COLA clauses were part of the 5.5 percent; however, monies generated were time weighted, reducing the magnitude of the gains. For example, a two-percent COLA increase which was in effect only half of the year was computed as a one-percent increase. In 1972, the Cost of Living Council estimated that COLA adjustments would amount to 2 to 2.5 percent of the total wage gains, but with time weighting the increases on average would be about one percent lower. This permitted an overall wage and fringe increase (excluding qualified benefits) of 4.5 percent plus the one percent for COLA.

During this period it was felt that the economic impact of such provisions would be minimal, because of the relatively low proportion of union contracts containing such provisions (minimizing the overall impact on the economy).

COLA Under Current Voluntary Program

When President Carter announced the voluntary price and pay program on October 24, 1978, the seven-percent pay standard included all wage and benefit increases, including COLA adjustments. Unlike the earlier program, COLA adjustments are not time weighted, a decision made to simplify calculations; thus, the full amount of a cost-of-living payment is charged against the seven-percent standard.[8] The pay standard permits a compound average annual increase of seven percent over a contract term. For example, it is possible to negotiate eight, eight, and five-percent wage and benefit gains and still be in compliance.

The Council allows the parties to assume a six-percent average annual inflation rate over the term of the contract, which back in September of last year was perhaps not that unrealistic a goal. When President Carter prepared his remarks for the October announcement, the August index, which was then available, was 7.9 percent higher than the same month a year ago, and the projected increase over the next 12 months was 7.2 percent.

Although subject to criticism now, the six-percent inflation-rate figure was arrived at with some degree of precision. During the 1976-77 period, the

[8] In order to determine the seven-percent standard, it is first necessary to calculate the average straight-time hourly rate for the unit, plus the cost of fringe benefits. This produces the base compensation rate. It is on this base that the standard is calculated. Each company has been asked to divide its employees into three categories—union, management, and nonunion nonmanagement. Collective bargaining agreements are reviewed individually and prospectively over the contract term for compliance. This is a simplified definition, however; for full details see the *Federal Register* issued December 28, 1978, January 4, and January 25, 1979.

annual rate of the CPI increase excluding food was 6¼ percent. If each company were to adhere to the CWPS price deceleration standard—which calls for an average price increase during the program year (October 1, 1978, through September 30, 1979), that is, at least one-half of one percentage point below the average annual rate of increase over the 1976-77 period—the inflation rate would be about 5¾ percent. Since not all firms would be able to meet the price deceleration standard because of raw material price increases and previous commitments including preexisting labor contracts, firms could resort to the profit margin exception, which allows unit cost increases to be passed through on a percentage basis up to 6½ percent and on a dollar-for-dollar basis thereafter. Given full compliance, the inflation rate would theoretically be 6 to 6½ percent.[9]

Not unmindful that the six-percent inflation-rate target might not be achieved, however, an incentive to accept the seven-percent wage and benefit increase was proposed in the form of Real Wage Insurance. This proposal required congressional action and for a number of reasons was not enacted. As designed, it provided an incentive for workers to accept average pay increases of seven percent or less, by providing tax credits if the inflation rate exceeded seven percent. Employees in units that complied could receive a tax credit on the first $20,000 of 1979 wages, equal to their income multiplied by the percentage by which the inflation rate exceeded seven percent up to a maximum of three percent. Thus, a worker earning $20,000 could have received a $600 credit if the inflation rate were 10 percent. A number of key reasons can be cited for the failure to enact this proposal. It was not given full and strong support by labor, it was termed complicated and unwieldy, and it was called inflationary in itself—but enough of postmortems.

While the program is voluntary, the Council had hoped to use the real wage insurance as a positive incentive to gain compliance. CWPS also seeks to withhold government contracts from noncompliers as a negative incentive. In its quest for mandatory controls, the AFL-CIO has challenged the government's authority to do this, and the outcome of this challenge may have to be decided in the courts.

Another way of ensuring the effectiveness of the program is to require reports on pricing behavior, pay plans, and collective bargaining contracts. Under the regulations issued by the Council, special investigations can be conducted to examine possible noncompliance. Moral suasion thus far has been a partly successful enforcer, along with the threat of publishing a list of noncompliers; this is not an impressive list of policing actions, but voluntarism should be the call to action in any national effort.

How COLAs Are Calculated

In an effort to clarify, the Council issued a *Pay and Price Standards Implementation Guide* which was reproduced in the *Federal Register* dated January 25, 1979. Appearing in this guide is an example showing how a COLA clause would be costed under the pay standard. If one assumes a six-percent inflation rate over the contract term and increases under an agree-

[9] Testimony by Barry P. Bosworth, Director, Council on Wage and Price Stability, before the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operations, February 7, 1979.

ment are quarterly, based on one cent for each .3 point increase in the CPI (one of the most common formulas), it is likely that about 10 cents would be generated in each quarter. On a base compensation rate of $11.00, this 40 cents represents a 3.6 percent increase during the year, while a remaining 3.4 percent would be available for additional fixed wages and improved benefits. On a base compensation rate of $7.00, the COLA increase would be 5.7 percent, and only 1.3 percent would be available for fixed wages and benefits. These same calculations are expected to be made each year over the contract term.

If, in fact, the Consumer Price Index increases more than the assumed six percent, the negotiated COLA clause continues to operate, and increases based on the formula are allowed to continue and are not chargeable against the seven-percent standard.

The Council will not permit the six-percent inflation assumption to be used for newly negotiated COLA clauses designed to circumvent the seven-percent guidelines by calling for a payment only after the CPI has increased by some minimum amount. Nor can it be used when modifying an existing cost-of-living provision to begin payments after the CPI has increased by some minimum amount or when raising an existing minimum amount. Finally, it cannot be used if the duration of the contract is one year or less.

Some have questioned the wisdom of prohibiting these approaches when a normal COLA clause which operates when the CPI rises above six percent is allowed to be nonchargeable. The answer is that the parties negotiating a new contract are specifically instructed to take the prospective COLA adjustments into their computations before adding more money or new benefits. In the example above, the unit with a $7.00 base rate and a one-cent payment for each .3 point increase in the CPI has only 1.3 percent left the first year. If a trigger COLA clause had been negotiated, employees could have received the full seven percent (or eight percent in a multiyear agreement) and COLA increases on top of that. CWPS has also said that COLAs in nonunion units would be appropriate, if such a plan is to be in existence for more than one year.

Technical Questions

In this, as in previous pay programs, the Council has grappled with a number of technical questions that have come up concerning the general application of the escalator clause provision. A very important question faced early by the old Pay Board was how to treat COLA money generated during the last year of the aerospace contract. Labor members considered it old money, while management representatives considered it new money that should be charged against the pay standard. A similar question surfaced during the recent Teamster negotiations, with the amount in question being 58 cents. Funny how history repeats itself, or maybe we learn lessons from the past, but in 1979, just as in 1972, a decision was made to recognize some merit in the accrued COLA claim at least in part. The previous two years of the IBT contract included a COLA, and although no payment was explicitly called for in the third year of the contract, the parties claimed an implied agreement existed.

The Council agreed to apply the six-percent inflation assumption retrospectively, and it said that 21 cents of the 58 cents that accrued under the COLA clause was not chargeable against the

standard; none of the 58 cents was included in the base, since it was treated as "new" money. This same approach will be applied in other situations where payment of the last-quarter COLA amount is made during the term of the new contract. On the other hand, if payment is due within the term of the expiring agreement, this amount becomes part of the base and nothing is charged against the standard.

Other technical questions have been raised concerning the application of the COLA to other forms of pay. For example, in some cases money generated from an escalator clause is considered an add-on to straight-time rates and folded into the base rate with the effective date of the new agreement. Other wages and fringe benefits paid during the contract, such as overtime premium pay, are not increased by the COLA payment.

At the end of the year, the COLA is folded into the base, and a new straight-time rate is set. Some have suggested that this newly generated money be used in calculating incentives and other wage-related benefits. In response, the Council advises that, if this method was used in the past to calculate pay, then it can be continued. However, if it is now changed to generate additional money, then that money should be charged against the standard.

It would be easy to consider more of the many and varied questions on COLA clauses and other specific union and nonunion pay problems. Our Office of Pay Monitoring, with a limited staff, does just this as well as reviewing requests that are submitted for exceptions to the pay standard.[10] However, I will forgo more specific issues and turn to the important general goal—the need for a continuing inflation fighting program. If we can again harken back to a previous experience, it is quickly apparent that an evolution in the program took place, with four phases of the Economic Stabilization Program.

Hopefully, it will not be necessary to evolve in such a manner again, but if the current program fails, it is possible that this voluntary approach could be Phase I. Rather than face a mandatory program, which is effective on a short-term basis but not in the long run, we are asking that the current program—that is, the entire program of regulatory, fiscal, and monetary policies as well as the voluntary pay and price standards—be given time to work.

The Council, with its monumental bureaucracy of about 200 people, is attempting to find solutions inherent in a program of this kind. Give us some time. In the meantime, all suggestions guaranteed to work are cordially invited.[11] **[The End]**

[10] Exceptions are based on tandem pay-rate changes, pay-rate increases traded for productivity, improving work-rule changes, increases attributable to acute labor shortages, and undue hardship and gross inequities. In addition, employees earning $4.00 or less per hour are exempted from the standard. See the *Federal Registers* cited for details of applying for an exception.

[11] While this discussion centered on the wage standard and specifically the cost-of-living issue, it should not be forgotten that the program has a price-deceleration standard which is monitored. Given the rapid rise in the CPI in recent months, the Council is reviewing the standard to determine if it should be revised. Of the total anticipated CWPS Staff of 233, 89 will be assigned to Price Monitoring.

A Union Viewpoint

By MARKLEY ROBERTS

AFL-CIO

FREE COLLECTIVE BARGAINING and due process are vital parts of the American industrial relations systems. Members of IRRA, therefore, should view deviations from free collective bargaining and due process with great concern. I refer specifically to the current Carter Administration anti-inflation controls program.

I start with a personal and institutional prejudice against the so-called "voluntary pay program" of the Council on Wage and Price Stability. The fact that this program seems to be in the process of self-destruction does not lessen my prejudice. The AFL-CIO has denounced the Administration's so-called voluntary controls program as unfair and inequitable and certainly not voluntary.

My suspicions against this program are strongly reenforced by Sid McKenna's report to this IRRA session that the Business Roundtable was consulted by the Administration in the formulation of the so-called voluntary pay program.

The AFL-CIO has pointed out again and again that employers are "happy enforcers" of any effort to restrain wages and that there is no comparable enforcement mechanism on prices. The AFL-CIO does not agree with the seven-percent pay standard, and we do not agree with a one-sided controls program stacked against workers, free collective bargaining, and due process.

That is why the AFL-CIO and nine of its affiliated unions have filed suit in the U. S. District Court for the District of Columbia to get a court ruling prohibiting the Administration from denying federal contracts to companies which do not abide by so-called voluntary wage standards. We believe this powerful, effective sanction illegally interferes with the process of free collective bargaining and illegally reduces wage increases for workers.

The regulations issued by the Office of Federal Procurement Policy require that *all* workers of a company bidding for a federal contract be covered by an agreement within the pay standard —not just those workers producing the items the government wants to buy. Therefore, the procurement regulations extend far beyond government purchases and also restrict workers providing goods for the private sector.

The President's action in setting a pay standard that must be complied with at pain of being debarred from government contracts is inconsistent with and contrary to the policy of free collective bargaining set forth in the National Labor Relations Act and the Railway Labor Act. It is contrary to the prohibition against mandatory controls in the Council on Wage and Price Stability Act of 1974. And the General Accounting Office has declared that the 1949 Property Act gives no authority for the President to impose wage and price guidelines and that the setting of such guidelines is inconsistent with the competitive procurement process.

The AFL-CIO brief includes a variety of affidavits by union officials about

restrictions and restraints imposed on collective bargaining as a result of the Administration's attempt to enforce pay guidelines with the contract debarment weapon.

Arnold Weber and Daniel J. B. Mitchell, discussing 1971-73 wage controls, claim that "distortions in industrial relations practices, although not totally absent, were minimal." They also assert that "there was little evidence of a profound disruption or suppression of the bargaining process."[1] Needless to say, this is a judgment on Phase II from those who did the controlling and not from those who were controlled.

I cite the Weber-Mitchell comments, not because I think they accurately indicate the effects of wage controls, but because I think they give some background for understanding and evaluating the Tanner-CWPS paper, which seems to be suggesting that enforcement of the present so-called voluntary wage control program is painless. I reject this suggestion, this implication of painless enforcement. I think all the union people who have found CWPS pay policies disruptive to free collective bargaining would do the same.

The AFL-CIO recognizes the seriousness of the inflation situation. That is why we say there must be a mandatory, legislated economic-controls program—full economic controls covering every source of income, including profits, dividends, rents, interest rates, executive compensation, and other forms of income, as well as wages and salaries. We want a fair and effective controls program with equality of sacrifice.

The runaway price raising and profits boom of the last quarter of 1978 and first quarter of 1979 is clear evidence that American business has engaged in cynical price gouging and profiteering in anticipation of more stringent controls on prices and profits in the future. In light of this price-and-profits boom that outraged even top CWPS officials, it is useful to look back at the papers of the April 1978 Brookings Panel on Economic Activity[2] to see how wrong most of the so-called experts have been on the sources of inflation. It's obvious that tax-based incomes policies (TIP) were aimed primarily at holding down workers' wages with almost-zero interest in restraining prices.

For example, Franco Modigliani says frankly, "What we really have to control is wages. But politically it is very difficult to do that without also controlling prices."[3] What about fairness? What about income distribution?

Also, I want to underscore rejection by Congress of the Administration's "Real Wage Insurance" proposal. The AFL-CIO pointed out that it offered only limited protection to a limited number of workers under confusing and inequitable conditions. Congress rightly recognized that RWI could be incredibly costly and would transfer the bite of inflation from the private sector to the taxpayer.

Let me return briefly to the escalator-inflation issue. We don't agree with the CWPS approach to COLA clauses. We don't agree with the lack of time weighting. We don't agree with the failure to allow for general productivity improvements. Any fair and equitable anti-inflation program will have to come to some reasonable terms with COLA escalators and with the fact that COLA

[1] *The Pay Board's Progress: Wage Controls in Phase II* (Washington, D. C.: Brookings Institution, 1978), pp. 377-79.

[2] "Innovative Policies to Slow Inflation," *Brookings Papers on Economic Activity*, No. 2 (Washington, D. C.: Brookings Institution, 1978).

[3] *Ibid.*, p. 515.

clauses are only a part of the total picture of labor-management agreements.

For a number of reasons, escalator clauses for the average worker recapture only half of the buying power lost to inflation. There is a timelag problem. CPI-related wage changes don't account for productivity change. And there are many other issues that enter into collective bargaining which don't appear in the COLA provisions.[4]

From the point of view of the worker and the nation, escalator clauses are not inflationary. They offer workers a partial catchup with higher prices but only after the price increases have occurred. As long as inflation remains a serious problem, workers and their unions will seek protection and improvement of their buying power through a wide variety of escalator clauses and such other means as can be worked out in free collective bargaining. In a broader context, I suggest that IRRA members give serious attention to anti-inflation measures and proposals which undermine free collective bargaining and due process and which undermine that sense of fair and equitable treatment essential to the cohesiveness of a democratic society. **[The End]**

Inflation Issues and Cost-of-Living Adjustment (COLA) Clauses: Research Perspectives

By DAVID W. STEVENS

University of Missouri-Columbia

THIS PAPER OFFERS several suggestions for action within the industrial relations research community, if it wishes to be responsive to the information requirements of government, labor, and management persons who seek a better understanding of the association between inflation and cost-of-living adjustment (COLA) issues in the collective bargaining process and the consequences of this relationship. Before these research suggestions are introduced, it is necessary to examine what should be known in order to engage in a productive dialogue concerning these matters and to review briefly what is known about the issues deemed pertinent.

For the sake of brevity, this part sets forth a series of unsubstantiated statements which are examined more fully elsewhere.[1] (1) COLA clauses are only one (albeit highly visible) way in which changes in the cost of living are reflected in money wages. Other catchup and anticipatory money-wage adjustment mechanisms complement, and exist completely independent of, this formal indexing provision. (2) Limited COLA-clause coverage, less than full compensation for increases in the cost of living, and variation in the timing of money-wage adjustments all contri-

[4] For discussion, see John Zalusky, "Cost-of-Living Clauses: Inflation Fighters," *American Federationist* (March 1976).

[1] Each of these issues is discussed in H. M. Douty, "Cost-of-Living Escalator Clauses and Inflation," Staff Report, Council on Wage and Price Stability (August 1975), 77 pp.

bute to a dilution of the direct link between inflation and money-wage changes.

(3) COLA provisions shift uncertainty from employees to employers; they do not eliminate uncertainty. Little is known about the consequences that should be expected to flow from such automatic money-wage adjustments in the presence of simultaneous chronic inflation and uneven market conditions. (4) COLA provisions spread the inflationary effects of any sectoral shock, e.g., OPEC oil price increases and volatile cattle and grain market performance, with attendant distributional consequences that are examined further in the next section.

Wage-Determination Observations

What pattern of money-wage changes would be exhibited in the absence of COLA clauses? What wage rates would be observed in the absence of a pay standard established by the Council on Wage and Price Stability (CWPS)? Reliable answers to these questions are not available. This does not imply that nothing of interest can be said about these hypothetical situations.

Arthur Ross once noted that "while all wages are related. . . some are more related than others."[2] More recently, Michael Piore observed that "[w]age rates perform certain basic social and institutional functions."[3] Differences of opinion about the propriety and inflationary consequences of COLA provisions and the CWPS pay standard depend, in part, upon how observers define these functions and what importance is accorded fixed relationships among particular wage rates. The industrial relations research community has a role to play in both regards.

Alfred Kahn recently posed this question: "[D]oes anyone on this panel believe that if we can induce the Teamsters (by one device or another) to reduce their wage settlement from 11 percent to, say, 7 percent we will have a shortage of Teamsters?"[4] An unequivocal "maybe" is an appropriate response, in the following sense: productivity serves simultaneous cause and effect roles in the wage-determination process. Some economists ignore the substantial evidence that wages affect motivation, which in turn influences performance.[5] The Teamsters might very well allow productivity to languish in response to a perception of inequitable wage treatment.

The generic issue of simultaneity in the productivity-wage rate relationship has been neglected. Its relevance to a discussion of the inflationary consequences of COLA clauses and the CWPS pay standard is obvious.

Toward an Informed Dialogue

Cumulatively, the issues set forth above demonstrate that there is little agreement about the institutional relationships and economic circumstances within which the inflationary impact of COLA clauses should be investigated. Public postures aside, the theoretical rationale for attribution of inflationary blame to COLAs is exceedingly weak. What role can industrial relations research play in correcting this deficiency?

First, there is an opportunity to provide accurate up-to-date information

[2] A. M. Ross, "The External Wage Structure," *New Concepts in Wage Determination*, eds. G. W. Taylor and F. C. Pierson (New York: McGraw-Hill, 1957), p. 173.

[3] M. J. Piore, "Unemployment and Inflation: An Alternative View," *Challenge*, 21:2 (May/June 1978), p. 25.

[4] See *Weapons Against Inflation* (Washington, D.C.: American Enterprise Institute for Public Policy Research, December 5, 1978), p. 5.

[5] See for example E. E. Lawler III, *Pay and Organizational Effectiveness: A Psychological View* (New York: McGraw-Hill, 1971), pp. 79-201.

similar to Douty's 1975 CWPS Staff Report. This would restrict the strategic license now exercised in the absence of such factual awareness.

Second, we are in a better position than anyone else to determine the extent to which aggregate wage inertia reflects expected inflation versus backward-looking events.[6] This investigation would necessarily involve a substantial commitment to mapping wage relationships among occupations and industries and identification of the sources of "shocks" that disturb traditional wage patterns.

Third, we are qualified to contribute to a clarification of the income-distribution issues involved in the CWPS pay standard and its impact on COLA negotiations. Who pays the higher costs associated with increases in specific components of the Consumer Price Index (CPI)? How do COLA clauses affect this pattern?

Fourth, the industrial relations research community includes persons whose expertise is essential if we hope to unravel the complex simultaneity between pay and productivity. Of course, progress in illuminating the first three research issues will affect the relationship observed in this respect. Finally, we are appropriate participants for what appears to be an urgent need for a forum to debate the relative importance of all forms of indexing, not just money-wage COLA provisions, and the consequences of all forms of economic uncertainty, not just that shifted from employees to employers through COLAs.

Conclusion

Our professional credibility has been brought into question by the very success of our training and experience in launching some of our colleagues into positions of great visibility and influence—roles which on occasion require advocacy that is difficult to align with the theoretical and empirical foundations we have labored to develop. Strategic speculation about the inflationary consequences of COLAs can be expected to continue until adversaries are armed with confounding evidence.[7] This event may or may not have a perceptible effect on the collective bargaining process, but we as industrial relations researchers will have met our professional responsibility. **[The End]**

[6] Cf. G. L. Perry, "Slowing the Wage-Price Spiral: The Macroeconomic View," *Brookings Papers on Economic Activity,* No. 2 (Washington, D. C.: Brookings Institution, 1978), pp. 259-91.

[7] See *Proceedings of the Thirty-First Annual Meeting of the Industrial Relations Research Association* (Madison, Wisc.: IRRA, 1978), pp. 257-79.

SESSION II

Retirement Issues and Mandatory Age Requirements

The Impact of Raising the Mandatory Retirement Age: A Brief Assessment

By LAWRENCE T. SMEDLEY

AFL-CIO Department of Social Security

PRESIDENT CARTER SIGNED into law on April 6, 1978, the Age Discrimination in Employment Act Amendments of 1978. The legislation prohibits mandatory retirement prior to age 70 for most private employees. Collective bargaining agreements are exempt from the provisions of the law for the duration of the contract or until January 1, 1980, whichever comes first.

Estimates have varied as to the impact of the law—ranging from claims that the resulting retention of older workers will be a major factor in solving the economic burden of a growing retiree population to assertions that the legislation will have a minimum impact. The law also will have an impact on hiring, promotion, personnel policies, and fringe benefits—traditional concerns of collective bargaining. Sufficient information is available to attempt some general observations as to the impact in a number of them.

The key issue and a major determinant of the law's impact is how many workers will now stay on the job after age 65. One of the main arguments in support of abolishing mandatory retirement before age 70 was that it would retain large numbers of productive workers in the labor force and would substantially reduce public and private expenditures for retirement benefits. The data indicate that the potential for achieving this objective is small.

There are approximately 8.3 million Americans between the ages of 65 and 70, and only 1.6 million of them hold jobs. Most of those not in the labor force retire voluntarily long before the age of 65 and, in the absence of vastly improved economic conditions, are not going to reenter the labor force. In any event, many of them have health conditions that prevent them from working.

Social Security first began paying actuarially reduced benefits in 1961, permitting men to collect benefits at age 62 instead of age 65 if they were willing to accept permanently reduced monthly benefits. More men retired on reduced benefits than on regular benefits during the first year. The proportion of early retirees has constantly increased so that now roughly two-thirds are retiring on Social Security before age 65. Social Security surveys show that more than two-thirds of them do so for two reasons—poor health and layoff or discontinuance of jobs—and only a very small number because of compulsory retirement prior to age 65. (Social Security research has tended to center on men rather than on all Social Security retirees because the retirement patterns of married women are influenced by factors not common to most retirees.)

One of the best sources of data is the Social Security Administration's Survey of Newly Entitled Beneficiaries.[1] The latest survey was made between 1968 and 1970. Of the total retirees in the survey, 30 percent said their most recent employer had a compulsory retirement policy. Two percent reported a compulsory age below 65, and six percent stated that age 70 was the age for mandatory retirement.

Of the total group (30 percent of the sample) subject to mandatory retirement, roughly 13 percent voluntarily retired before the required age. Of the remaining 17 percent, seven percent retired at the required age and 10 percent were still at work—many of whom would retire in the future prior to the age of mandatory retirement. About half of the seven percent stated that they had wanted to retire at the age of compulsory retirement. Thus, only about four percent of the total were forced to retire against their wishes. If half of the 10 percent at work were similarly affected, then only nine percent of the total group was involuntarily forced out of the labor force. This survey provides a good basis for gauging the impact of the prohibition against mandatory retirement prior to age 70.

Further Studies

These results have been confirmed by two other surveys—the Parnes or National Longitudinal Survey[2] and a survey of Social Security beneficiaries by Professor James H. Schultz of Brandeis University.[3] The Parnes survey was based on an eight-year study of a sample of males aged 45 to 59 first interviewed in 1966 and then in 1967, 1969, and 1971. The final interview in 1971 took place prior to any of the individuals' (then 50 to 64) reaching age 65. (However, 14 percent had already retired by 1971.)

Thirty-two percent of the total sample reported employment covered by a compulsory retirement policy. Only eight percent of them stated they wanted to continue working at their current jobs. Thus, this study indicates that about eight percent of workers would continue to work and be affected by a

[1] U. S. Department of Health, Education, and Welfare, Social Security Administration, Office of Research and Statistics, *Reaching Retirement Age—Finding from a Survey of Newly Entitled Workers 1968-70,* Research Report No. 47 (Washington, D. C.: U. S. Department of Health, Education, and Welfare, November 1975).

[2] U. S. Department of Labor, Manpower Administration, *The Pre-Retirement Years: A Longitudinal Study of the Labor Market Experience of Men,* Manpower Research Monograph No. 15 (Washington, D. C.: U. S. Department of Labor, 1970).

[3] James H. Schultz, *The Economics of Aging* (Belmont, Cal.: Wadsworth Publishing Co., 1976).

prohibition against mandatory retirement prior to age 70.

Professor Schultz's study indicated that 46 percent of his sample of Social Security beneficiaries were in jobs subject to compulsory retirement and about 25 percent of them voluntarily retired prior to age 65. Of the remaining 20 percent, seven percent willingly retired and 10 percent were forced to do so. Of the latter group, health conditions would have prevented three percent of them from working even if they had not been forced to retire. Thus, only seven percent of the group subject to compulsory retirement would have been affected by its prohibition prior to age 70.

Johnson & Higgins, an employee benefit consultant firm, has just released a nationwide survey on attitudes toward pension and retirement sponsored by them but conducted by Lou Harris and Associates.[4] The survey was based on interviews with two separate samples—a national cross section of 1,699 current and retired employees and a representative cross section of 212 employers. Included in the survey were questions relating to preference for employment among retired employees. Twenty-two percent of the sample indicated that they "would have preferred to continue to work full-time at the same job for the same pay as long as possible instead of retiring." This percentage is considerably higher than for the other studies.

There are several possible explanations for this difference. The survey indicated that the median age of retirement for retirees surveyed was 60.6. The Social Security, Schultz, and Parnes studies were made on the basis of retirement prior to age 65. Thus, it is likely that there were many individuals in the Johnson & Higgins survey group who would have retired by age 65 and another significant number who would have developed health conditions and retired by that age. The large percentage of the total retirees (22 percent) who were presumably forced to retire prior to age 65 seems unusually large. Studies have indicated that compulsory retirement prior to age 65 was rare and only an extremely small percentage of retirees were forced to do so prior to that age. The small sample of 391 retirees on which the Johnson & Higgins survey is based may not accurately represent all retirees.

The Johnson & Higgins study also indicated that large numbers of workers would like to continue working—largely at part-time work—at jobs other than the full-time job from which they retired. It is not likely that this group will secure work when the job market is tight for all. Such efforts will work only in a favorable economic framework. The most important factor in increasing labor force participation of older workers is a full-employment economy, not abolition of mandatory retirement.

The U. S. Department of Labor did a "quick" study of the effect of the elimination of mandatory retirement prior to age 70 on the size of the labor market at the time the legislation was under consideration by the Congress. Based on this study, Assistant Secretary of Labor Elisburg, in testimony to the Senate Committee on Human Resources, estimated that the total labor force would increase by approximately 200,000 older workers over the next five years. Marc Rosenblum of the National Commission on Employment and Unemployment Statistics used a labor force participation trend model

[4] Louis Harris and Associates, Inc., "1979 Study of American Attitudes Toward Pensions and Retirement" (February 1979).

to ascertain the law's impact. His estimate was essentially the same as that of the Department of Labor. Thus, two studies, totally independent and using different analytical approaches, reached essentially the same conclusions.[5]

An increase of 200,000 older workers during the next five years is very small considering a civilian labor force of approximately 100 million—an increase of about two-tenths of one percent in labor force participation. The maximum possible impact, assuming that total unemployment among all workers would rise by an equal amount, would be a .2 percent increase in the unemployment rate. This is highly unlikely, ince other vulnerable groups—youth, women, and minorities—are not likely to be qualified to replace many or most of the older workers. In any event, the probable impact on the size of the labor force and employment is extremely small.

The best available evidence indicates a very small impact on labor force participation by workers age 65 and over as a result of the passage of the new law. In addition, the Social Security, Parnes, and Schultz studies are based on data that are around 10 years old. Since they were made, the early retirement trend has accelerated, and the studies probably overstate the impact of the legislation. In any event, if roughly accurate, the results do provide a basis not only for judging the impact of the legislation on labor force participation and employment but also for judging its impact in other areas as well.

Benefits

The estimated number of additional workers who will remain at work is much too small to have a major impact on reducing program costs. Social Security actuaries estimate that the savings resulting from the reduction in benefit payments and increased contributions (excluding Medicare) will total about one billion dollars for calendar year 1984. Benefit payments (excluding Medicare) are projected (1978 Trustee's Report) to total about $165 billion for the 1984 calendar year. Thus, the expected increase in the labor force resulting from the new law will not reduce program costs sufficiently to permit any significant reduction in Social Security cost estimates and scheduled tax rates.

A major concern has been the impact of the new law on pension and fringe benefit costs. The law does not require employers to continue accruing pension benefits for workers in defined benefit plans after the normal retirement age. Even if benefits accrue after normal retirement age, the savings realized by the period of nonpayment of benefits will operate to offset the increased costs resulting from continued benefit accruals. Whether this will represent a cost increase or decrease depends on the individual plan, but, in any event, there is not likely to be either a significant cost or a saving. Similarly, a defined contribution plan (which is not a supplemental plan) can discontinue contributions to the worker's retirement account after the normal retirement age.[6]

[5] Marc Rosenblum, "Employment Discrimination and the Older Worker: An Assessment of the 1977 ADEA Amendments and Current Litigation," *Proceedings of the Thirtieth Annual Winter Meeting of the Industrial Relations Research Association* (Madison, Wis.: IRRA, 1978), p. 405.

[6] Defined benefit plans, which cover about three-fourths of all pension participants, specify that a certain number of dollars or percent of salaries will be paid in benefits. Defined contribution plans provide whatever level of benefits the contributors can "buy" for the worker at the time of retirement.

The law recognizes that certain fringe benefit costs are more for older workers and allows benefit reductions for "actuarially significant cost considerations." The Department of Labor issued proposed regulations in September of last year to implement the amendments to the Age Discrimination in Employment Act (ADEA). The final regulations have not yet been issued, and the January 1, 1979, effective date has long since come and gone. Thus, while awaiting final action, I think we can assume that the Department's proposed regulations will be very close to the final ones adopted.[7]

The cost impact of these regulations, the complexities of which are beyond the scope of this paper, will affect employers in different ways, depending on their employee fringe benefit package. However, the regulations are clearly designed to minimize the cost impact of the law by allowing benefit reductions for workers over 65 to roughly equalize benefit costs so that the actual cost incurred for older workers is equal to that for a younger worker. In short, the law is not likely to result in significant increases in employee fringe benefit costs.

Collective Bargaining

The impact of the legislation on collective bargaining arrangements is likely to be small. As pointed out earlier, the data indicate that relatively few employees will want to continue working. The early retirement trend is less subject to change than the normal retirement experience, because so many who retire early do so because of health reasons or layoff or discontinuance of jobs.

Among employees who have greater options in their retirement decisions, the pension is widely considered to be a primary factor in the decision to retire. Data indicate that there is a strong correlation between retirees who want to retire and higher levels of retirement income. The Social Security study found that workers with a second pension in the age-62 group were two and one-half times more likely to want to retire than those with only a Social Security benefit. Workers covered by collective bargaining tend to have the better pensions and, thus, the number who want to work beyond 65 will probably be even less than shown by the surveys mentioned earlier.

This assessment is supported by surveys of top employers and personnel officers who are responsible for implementing the objectives of the law. The Conference Board did a survey of 41 personnel officers, all of them representing major U. S. firms, on their assessment of its impact on the personnel policies of their firms.[8] The Conference Board's conclusion was that the law would have only a slight impact on most company operations. The Bureau of National Affairs, Inc., did a similar survey of a majority of members of the American Society of Personnel Administrators. The survey concluded that "most employers appear to have little concern about the prohibition against mandatory retirement before age 70 and anticipate that the effect of the 1978 Amendments to the Age Discrimination in Employment Act will be relatively minor."[9]

However, though it will not have a major impact, the law will probably influence collective bargaining situations in a number of ways. For example: unions will object to any attempts by

[7] "Interpretive Bulletin on the Age Discrimination in Employment Act," *Federal Register* (September 22, 1978).

[8] *BNA Pension Reporter,* No. 218 (December 11, 1978), p. A-3.

[9] *BNA Pension Reporter,* No. 213 (November 6, 1978), p. A-10.

employers to stop accruals of pension benefits for employees after age 65 and/or to reduce their fringe benefit protections.

Employers will resort to greater use of medical examinations for older workers and/or performance-evaluation procedures. They will also tend to place greater emphasis on job descriptions specifying in greater detail the skills and requirements for satisfactory performance. These are not new collective bargaining issues, but the number of grievances involving them will probably increase. Unions and employers will negotiate "sweeteners" to a greater degree than in the past to encourage workers to retire before age 70.

Long-Run Effects

The assumptions in this paper are for the short run, and the factors on which they are based may change over the long run. Some experts are predicting that the growth of the American labor force will peak around 1990 and slow dramatically after that. Beginning early in the next century, the baby-boom group born after World War II will be reaching retirement age. As a result of the low birth rates of recent years, there will probably not be enough younger workers to replace them. Thus, some experts are predicting a chronic labor shortage in the future that will result in more hiring and retention of older workers.

Inflation may cause more older workers to remain in their jobs. Only a very small number of private pension plans automatically adjust benefits in accordance with increases in the cost of living. Thus, inflation should be a deterrent to early retirement, since there must be great concern among potential retirees about erosion in the value of their pension benefits. Yet, nothing like this seems to be happening. Social Security actuaries have not observed any recent significant change in the patterns of early retirement within the Social Security program. But, if high inflation rates continue and potential retirees come to believe that inflation is a permanent and not a temporary feature of the economy, many more of them will likely work beyond age 65. Similarly, any increase in the age of eligibility for Social Security benefits would have a significant impact on the labor force participation of older workers.

Retirement data and surveys indicate that the prohibition of mandatory retirement before age 70 will have little effect on the labor force participation of older workers, since most workers retire voluntarily before age 65 for health reasons or because of layoff or discontinuance of jobs. Thus, adaptation to the new law should not be difficult, although there may be some specialized problems. Generally, though the longer-run impact may be more significant, the ADEA amendments of 1978 will have little short-run impact on employment, or on Social Security, pension and fringe benefit costs, or collective bargaining.

ADEA Amendments of 1978[10]

The law strengthens the Age Discrimination in Employment Act of 1967 (ADEA) by increasing the maximum age for protection under the Act from 65 to 70 for most private employees and by removing completely the mandatory retirement age of 70 for most federal employees. Under ADEA, most employers, employment agencies, and labor unions are prohibited from dis-

[10] Source: Conference Report on the Age Discrimination in Employment Act Amendments of 1978.

criminating because of age against persons aged 40-65 in such matters as hiring, job retention, promotions, and pay levels. State and local governments are also covered under the Act. The law increases the maximum age for protection from 65 to 70, effective January 1, 1979, except for delays in effective dates and exemptions noted below.

If a collective bargaining agreement in effect on September 1, 1977, provides for mandatory retirement before age 70, the new upper age limit will not apply to employees covered by that agreement until it expires, or until January 1, 1980, whichever comes first. The application of the new upper age limit to tenured college and university faculty members is delayed until July 1, 1982.

The law permits mandatory retirement between the ages of 65 and 70 of an individual who, for the two years before retirement, is employed in a bona fide executive or high policymaking position, if the individual is entitled to a pension from the employer of at least $27,000 a year. This exemption is meant to cover high-level employees with important executive or advisory duties.

The law directs the Secretary of Labor to study and report to Congress and the President with recommendations on the impact of raising the upper age limit under ADEA to 70, the feasibility of increasing the limit further or abolishing it completely, and the effect of the tenured professor and executive provisions of the law. The Secretary is to transmit an interim report by January 1, 1981, and a final report by January 1, 1982.

The law contains a number of technical changes intended to ease the procedural obstacles to those seeking relief under the Act. A complainant can simply transmit an informal "charge" to the Labor Department rather than a notice of intent to sue. The statute of limitations would be stayed, or tolled, for up to one year while the Labor Department attempts to conciliate the complaint. A jury trial would be guaranteed in civil actions for amounts claimed to be owed under the Act. The authorization ceiling for Labor Department enforcement of the Act would be removed.

Pension Plans

The Supreme Court had interpreted ADEA to permit mandatory retirement within the protected age group if retirement is accompanied by a bona fide pension or similar benefit plan. The law clarifies and restates original congressional intent that no such forced retirement is permitted under the Act.

The law abolishes the present mandatory retirement age (70) for most federal employees, effective September 30, 1978, and establishes a minimum age of 40 for protection of federal employees under the Act. (Federal employees subject to another statutory retirement age would not be affected by the bill. This includes such groups as law enforcement and firefighting personnel, air traffic controllers, and foreign service personnel.) The Civil Service Commission is required to study and report to Congress and the President on the effect of these changes by January 1, 1980. **[The End]**

The Age Discrimination in Employment Act Amendments of 1978 and Their Effect on Collective Bargaining

By HERBERT D. WERNER
with the assistance of
MARTHA W. DEWHURST

University of Missouri-St. Louis

THIS PAPER is an initial attempt to discuss the provisions of the new retirement law and how they affect collectively bargained contracts. The Act, passed with little opposition, banned forced retirement before age 70 for most nonfederal employees and removed any age limit for federal workers. The law, passed in April 1978, amends the Age Discrimination in Employment Act (ADEA). Beginning July 1979, enforcement responsibility will rest with the Equal Employment Opportunity Commission under an executive order designed to consolidate enforcement activities.

In the nonfederal work force, mandatory retirement before age 70 becomes illegal January 1, 1979, with three exceptions. (1) Workers age 65 through 69 who are covered by collective bargaining agreements in effect on September 1, 1977, will not be affected until the agreements terminate or January 1, 1980, whichever is first. (2) Tenured college or university faculty are subject to retirement at age 65 or above until July 1, 1982, when the age limit also becomes 70. (3) Compulsory retirement as early as age 65 will continue to be legal for high-level executives or policymakers who receive a retirement income of at least $27,000.

The Department of Labor made an estimate of the number of people the new law might affect. The range was from a low of 100,000 to a possible high of 2.8 million. In most cases, a figure of about 200,000 possible workers who wish to continue working was cited and accepted.[1] This figure was apparently based upon the number of people who are actually working past age 65 or who had strong feelings about continuing. However, with recent inflation and with the present change in the law, this low figure may rise dramatically toward the much higher figure of over two million. Thus, a small problem which might influence less than one-tenth of one percent of the labor force may have a large potential long-range impact.

The arguments against the old system of mandatory retirement, usually at age 65, are many. It has been claimed that older workers are as productive as younger workers. Studies find that the older worker is competent and able

[1] U. S. Senate, Committee on Human Resources, *Hearings Before the Subcommittee on Labor, Age Discrimination in Employment Amendments* (Washington, D. C.: U. S. Government Printing Office, 1970).

to perform most jobs well beyond the age of 65. Indeed, in many tasks the experienced, older worker performs better. Even in areas where an older worker may decline, as in physical capacity, he gains in job stability and work attitude. The older worker experiences fewer accidents and reports less lost time.

There are, however, physical and mental changes with age. Workers may experience moderate loss of hearing or vision or fine muscular control, and short-term memory may be slightly impaired. Persons will always differ in decision time, response, and memory, but apparently sensitivity is reduced gradually for everyone following the age of fifty, followed by a more extensive decline for some people. Since most tasks are well within a worker's overall mental and physical capacity and other factors intervene, it is often difficult or impossible to measure any loss in output due to age changes alone. It has been noted that there is an increase in reported health problems in the years 50 to 55. By age 64, 40 percent of the workers reported some health problem.[2]

Attempts have been made to measure the speed and accuracy of the worker using a single scale. These tests are done in the laboratory rather than in the field. Measures of capacity for visual and auditory perception are available. Overall quantitative measures using blood pressure, visual acuity, light sensitivity, and other items are summed into one index. A process used by the Industrial Health Counseling Service in Portland, Maine, matches the physical ability of the workers with types of jobs.[3]

In a Netherlands study, Dirken reported over 150 variables taken into account, including visual acuity, reaction time, breathing rate, and accuracy. By calculation of an intercorrelation matrix, eight variables requiring about one and one-quarter hours to measure are used as yardsticks for estimating functional age. The study confirms that aging is controlled by a general process influencing all body functions, but they are affected at different rates. The eight tests include figure comprehension, reaction time, maximum breathing frequency, and expiratory value.[4]

Given the abilities of the older worker, it has been concluded that, with retention and job reassignment, a majority of workers are able to function in most jobs well past the age of 65. MacFarland reported as early as 1943 that older workers could function well if properly placed in jobs.[5]

Although the studies cited above indicate the older worker maintains high productivity, there are several problems regarding the continuation of older workers in the work force. The older worker suffers discrimination in hiring; management rarely hires a worker over age 40, much less 50. Business managements, even those providing good retirement plans, have indicated that they may be forced to reduce the middle management groups. They do not want workers "lingering" to the final retirement day. One business magazine cites the problem of getting rid of the mediocre worker, the deadwood, and the faltering worker.

[2] Elizabeth L. Meier and E. A. Kerr, "Capabilities of Middle-Aged and Older Workers," *Industrial Gerontology* (Summer 1976), p. 149.

[3] *Ibid.*, pp. 152-53.

[4] Johan M. Dirken, *Functional Age of Industrial Workers* (Groningen-Wolters-Noordhoff: Netherlands Institute for Preventive Medicine TNO, 1972).

[5] Ross A. McFarland, "The Need for Functional Age Measurements in Industrial Gerontology," *Industrial Gerontology* (Fall 1973), pp. 1-19.

Given the above, the older worker can have continued productivity beyond an advanced age, if his physical strengths and weaknesses are medically evaluated and he is assigned the proper job. Obviously there is a wide range of judgment in this area; it will certainly affect the collective bargaining agreement.

The decision to retire is not an easy decision to make at any age. Retirement from the job represents a loss of status and income and often results in geographic movement. Past research on the decision to retire indicates the difficulty of isolating the effects of health, income, and family status. Some factors which encourage early retirement include a good potential pension income and health problems. Often, retirement occurs by separation from the job—either by termination or being laid off. These findings were often reported by studies of early retirement of workers. Clearly, employees with high present income and interesting, high-status jobs will be unwilling to retire early from those jobs.[6]

Ideally, the older worker should be allowed to stay in the work force without undue strain on the economy. However, in situations where the employed labor force is already facing reduction, as in the teaching profession, where there are far more qualified teachers currently available than the number needed as replacements, this is obviously impossible. Since there are no organized methods for culling the staff at an early age, teachers tend to stay on. In fact, the older a teacher gets, the more powerful he becomes; thus, the tenure and appointment committees are typically made up of the older, experienced teachers. The net effect of retaining older teachers is clearly to exclude those of younger ages from the profession on a one-for-one basis. The experience of recent inflation will lower the retiree's expected pension income and make him more unwilling to retire.[7]

In discussing the Act's effect on collective bargaining, more questions will be raised than answered. Because of the nature of the law, any appraisal made will be tentative. Collectively bargained agreements typically have over 100 different sections. We might simply state that the only effect on the agreement will be to drop the mandatory retirement age. However, management and unions should be aware that agreements should change in more substantial ways in order to avoid potential problems. For example, in the overtime paragraph, should the older worker be able to secure the advantage of overtime work? In the vacations section, should the older worker have some additional vacation time and pay? Could longer vacations be used as a method of phasing out workers above the age of 60? In the leaves-of-absence section, should the company now encourage leaves of absence for workers over age 50, even to the extent of allowing workers to secure more education and training at an older age? Could the company go so far as to require leaves?

Seniority

Even a cursory examination of the issues of collective bargaining emphasizes the issue of seniority. In many cases of promotion or transfer, the strict seniority rule prevails. Long-

[6] U. S. Department of Labor, Manpower Administration, *The Pre-Retirement Years: A Longitudinal Study of the Labor Market Experience of Men*, Manpower Research Monograph No. 15, Vol. 4 (Washington, D. C.: U. S. Department of Labor, 1970).

[7] Louis Harris, National Survey on Attitude Toward Pensions and Early Retirement, reported in *St. Louis Globe Democrat* (March 3-4, 1979), p. 17A.

term seniority gives the worker a status that protects him from layoff and may confer upon him further rights to a specific job or certain hours. Thus, the older worker is typically laid off last and rehired first. In many cases, according to "strict" seniority rules, promotions are granted to the longest-service worker. In fact, seniority has been a long-established decision rule among the workers themselves for layoffs, promotions, or job transfers. Often, where workers have no confidence that the decision will be made by management on any rational grounds, the rule of seniority is reinforced.

New ways of assignment must be introduced to assign work on criteria other than seniority. The strength of seniority should not be broken, but the collective agreement should recognize that some specific jobs must be assigned without regard to seniority (for medical or limited service reasons) or that workers with functional limitations should not have access to overtime or job bidding. The union and the company will have to work out job assignments on the basis of medical or other limitations of the workers. Specific jobs may be assigned to the older worker, with provisions for lateral transfer or establishment of jobs for certain medically limited workers. Thus the rule of strict seniority will have to be modified. The older worker must be willing to relinquish the higher-paying job at some time and, indeed, be able to move laterally or even down to a lower-paying job after some advanced age.

Assuming that the present seniority system will continue without change, management may set standards excessively high for entry or promotions to ensure that the system will not clog up with older workers. If a relaxation of the rule of seniority is contemplated, management judgment will become vital. The decision to retrain or transfer workers will be more difficult, resulting in a strain on the grievance system. Medical evaluation must be job related, and all jobs will have to be rated in terms of physical and mental stress. With an adequate pension and the prospect of retraining and transfer, the worker may elect to retire. Union-management committees should explore methods to make the retirement decision elective and less of a monetary sacrifice. A more exhaustive specialized grievance machinery may be necessary to review the medical evidence, testing procedures, and retirement decisions.

Pensions

Retirement and the provision for retirement income by setting aside current income is a simple concept. However, many different unrelated systems have evolved which have needlessly obscured this concept and rendered it impossible to administer a rational overall retirement program. Private pension systems, Social Security, the Civil Service pension, and the military pension system are not integrated, thereby weakening the basis of retirement security for the aged.

Ignoring all social welfare schemes, disability payments, and other complicating factors, a worker and his employer set aside a portion of his pay over the employee's working life. Then, at a specific age, he receives a monthly payment including the earned interest in the pension fund. The monthly payments are based upon the expected life of employees. Thus, there is a direct relationship between the amount set aside and the life expectancy of the retired person. Since the average life span is increasing, thereby lengthening the retirement period, the amounts to be paid in must be greater. In prior years, with private plans requiring vestment at 10 years of service, or plans

requiring 20 years of continuous service, payments were established on the basis of the last few years' income, often higher than income over an entire working life. Because of inflationary pressure, retirees have demanded pension incomes far beyond the payments into the fund over their working lives.

The Civil Service retirement system is extremely liberal, providing for retirement at a percentage of the highest earnings during the last three years of continuous service. Optional retirement at full annuity is possible at age 55 with 30 years' service. Thus, at retirement a person can receive almost 80 percent of his highest income. Although the General Accounting Office estimates the normal cost at about 13.6 percent of pay, the actual cost may reach as much as 28.7 percent of pay, given the projected increase in pay and the rise in the Consumer Price Index. Since early retirement causes an increase in the length of pension payments, it costs the taxpayer the difference between the employee's contribution and the actual costs. Since the employee's contribution is about seven percent of pay, there is a subsidy of more than 21 percent of pay. Similar statements could be made about the military retirement system and other governmental systems.[8]

It is necessary for pension calculation that some estimate of retirement age be made. Since a mandatory retirement age is no longer possible, the employer and the union may have to set a planned retirement age. From that age, retirement payments should be larger. All payments should be determined according to a fixed formula reflecting total years of service (no longer continuous service), amount paid in, average income, and the accumulated earnings of the fund. Thus, a person retiring at age 66, with 40 years of service for a company, at an average salary of $12,500 (even though his ending salary may be $20,000 or more) with an employer-employee contribution of 10 percent, would retire at 1.46 x 40 x $12,500 or $7,300 per year. The payments would only increase if more were paid in, pensioners died earlier than anticipated, or potential retirees chose to work longer.

Under present law, we have not reached the point where all pensions provide immediate vesting or are completely portable. We still cling to some rule that vesting should take five or ten years. Pensions are not integrated, and some are paid earlier than the retirement age. For example, the 40-year-old military pensioner is extremely expensive for the taxpayer. Extending our analysis, we might suggest that all pensions include an age requirement, be actuarially reduced before age 70, and be impossible to collect before age 60. Ideally, all pensions should be integrated into Social Security so that multiple pensions are impossible and all pension credits earned over the work lifetime should be carried over from one employer to the other. Regional or industrywide pension plans could cover all employees who might have as many as ten different employers during their work life. For example, the Teachers Insurance and Annuity Association (TIAA) can be cited here as a successful possible model.

Retirement Trends

The percentage of workers who postpone retirement may change in the coming years. Although the current trend is toward early retirement, employers should be prepared to retain older

[8] Frank M. Kleiler, *Can We Afford Early Retirement?* (Baltimore: Johns Hopkins, 1978), pp. 21-23.

workers in their present jobs or transfer them to other jobs.

The labor force participation-rate statistics from 1947 to 1976 indicate a decline in participation in the 55-to-64-year-old age group. In 1947, the labor force participation rate was 89.6 percent, compared to 98.0 percent for the 35-44-year-old male. It fell slowly to 86.2 percent in 1962 and thereafter made a precipitous drop to 74.5 percent in 1976. Based on these trends, the participation rate of 55-64-year-old men will be 56.7 percent in the year 2000. Since there are currently seven million workers in this age classification, the potential labor dropout rate before age 65 involves about 2.3 million job-leavers in the period from 1980 to 2000. An indicator of the impact of the 1978 retirement amendments would be a change in the labor force participation rate of the over-64 worker. Additionally, a reduction in the slope of the labor force participation rate for the 55-to-64-year olds would test the effectiveness of the Age Discrimination law.

The Age Discrimination law does little or nothing to secure jobs for the American worker. If it drives up the cost of employment through greater administrative costs, it may actually reduce the chances of securing jobs. Already there is a tendency to prefer overtime to hiring more workers because of the cost of fringe benefits per worker. Although older workers may have productivity higher than or equal to younger workers, there is a tendency to retire people in their sixties to "make room for younger people." With older workers retaining the higher-paying jobs, it will be increasingly difficult for younger workers to move up to these positions. There may be more tension in the future between the young and old. Older workers may not train younger workers because of the threat of displacement. A manager thus may have a difficult job attempting to retain highly productive younger people in the face of declining promotion opportunities.

The 1978 amendments to the Age Discrimination in Employment Act do not have short-term detrimental effects. However, in the next few decades we shall see the severe impact of the amendments in further employment problems for younger people and continuing adverse labor market conditions for the older worker. Without recognition of the need to increase the number of jobs, the amendments will adversely affect the overall employment situation.

[The End]

SESSION III

EEO Issues and Employment

The Search for Alternatives—The Need for Research Under The Uniform Guidelines on Employee Selection Procedures

By PETER C. ROBERTSON

Equal Employment Opportunity Commission

I WANT TO DISCUSS with you today recent legal developments dealing with industrial relations and employment discrimination and suggest to you their implications for the Industrial Relations Research Association. These developments involve the enunciation of substantive standards by the federal government; they also involve several recent court cases.

On August 25, 1978, four federal agencies adopted a set of Guidelines on Employee Selection Procedures. These are long and have some technical sections which at first glance may appear to be complex. However, the document is, in fact, simplicity itself. It is easy to understand if one perceives it as a set of guidelines on "discrimination" issued by agencies whose statutory jurisdiction involves an anti-discrimination mandate. The Guidelines were not issued by the Federal Fair Test Commission or the Federal Validation Commission.

These Guidelines carry forward a definition of discrimination which was originally adopted by EEOC in a set of Guidelines in 1966 and consistently adhered to by the government and ratified by both the Supreme Court and Congress. It is a definition of discrimination which shifts our focus away from bias, bigotry, and prejudice on the part of the employer which led to a legal standard of "intentional discrimination." It focuses instead on "systemic discrimination," where the legal standard requires that one identify the impact of an employment system or an employment practice and requires that, if the impact is adverse as to a particular race, sex, or national origin group, the employer must justify it.

This is a definition which was carried forward in Labor Department Guidelines in 1968 and 1971, in EEOC Guidelines in 1966, 1970, and 1976, and in a set of Federal Executive Agency Guidelines in 1976. While each of these documents had minor technical differences, they were consistent in defining discrimination in terms of unjustified adverse impact.

In 1971, the Supreme Court approved a definition of discrimination which focused on unjustified adverse impact, and in 1972 the Congress also approved that definition. Actually, this understates the case. Congress not only approved the systemic definition, it recognized that employers were not voluntarily accepting a systemic definition and gave EEOC enforcement powers, specifically, so that EEOC could enforce the government's definition.

Nature of Justification Under the Selection Guidelines

The standard for justifying an employment practice or system with an adverse impact under federal antidiscrimination law is that it must meet a "business necessity" standard. This standard has two elements. First, it has the normal common sense definition of business necessity which focuses on such things as "safe and efficient operation of the business." Second, it takes the concept of "necessity" and focuses on its true meaning. As one judge so wisely put it, "don't tell me that, if there are *two* ways of doing things, the *one* with adverse impact is necessary." Another judge suggested that the concept of "business necessity," when one is looking at practices with an adverse impact, was limited to situations in which the employer had "no other choice."

Obviously, it is in the interest of the safe and efficient operation of the business to have individuals who are capable of doing the job in question. Thus, a major part of these Selection Guidelines deals with the techniques available to an employer to demonstrate that his selection practices do, in fact, predict the probable ability of people to do the job. These Guidelines recognize that the basic purpose of selection procedures is to predict probable job performance, and they establish ways for determining whether selection procedures do, in fact, predict probable job performance. This is, of course, the idea of "validation" of a selection procedure—that is, studying the procedure to determine whether it is, in fact, valid for the purpose of predicting probable job performance.

Under traditional industrial psychological practices, a validation study indicating that a selection procedure predicts probable job performance would be sufficient. Under the Uniform Selection Guidelines, with the concept of business necessity as part of federal law, this is not sufficient. The Selection Guidelines impose upon an employer a requirement to search for alternative methods of predicting probable job performance and require an employer to identify and utilize the option with the least adverse impact.

The Standards for Selection of Subjects for Systemic Discrimination Proceedings

On June 20, 1978, the Equal Employment Opportunity Commission adopted a set of standards for the initiation of Commissioner charges involving systemic discrimination. Among the standards listed was one which looks at employers where statistical data indicate that employment practices "have an adverse impact on minorities and women and are not justified by business necessity." This includes

such practices as those prohibited by the Guidelines on Employee Selection Procedures.

The Commission announced at the time that it issued these standards that the systemic program pursuant to which Commissioner charges would be initiated was still in its formative stages and that no charges would probably be issued in the, then, immediate future. The press release announcing the standards indicated that the purpose of the advance public announcement was to put employers on notice so that they would conduct a self-audit of their own practices and begin the process of coming into compliance voluntarily—thus avoiding a Commissioner charge.

Affirmative Action Guidelines

The whole enforcement structure of Title VII is based upon the assumption that voluntary compliance is the preferred means. For example, when EEOC issued its standards for systemic cases, it did so to encourage voluntary compliance. When the Supreme Court approved a tough back-pay award in the *Moody*[1] case, it did so with the specific observation that a major policy reason for tough remedies was the reasonably certain prospect that this would encourage employers to engage in self-audits and to adopt voluntary self-remedies.

The EEOC Guidelines on Affirmative Action recognized that, when employers begin to make major voluntary systemic changes in order to eliminate employment systems with an adverse impact, the individuals who previously benefited from those employment systems may be unhappy. Specifically, if an existing employment system has an adverse impact on blacks or females, it obviously has a positive impact on whites or males. When that system is changed to eliminate its adverse impact on minorities and/or females, one also eliminates its positive impact on whites and males. It is totally predictable that some of these whites and males may not like this. This gives rise to the so-called "reverse" discrimination charge. The EEOC Guidelines on Affirmative Action are designed to deal with this situation.

First, the Guidelines recognize that there simply is no such concept as "reverse" discrimination. Discrimination against whites is illegal. Discrimination against males is illegal. The Supreme Court has recognized this in the case of *McDonald v. Santa Fe Trail Transportation Co.*,[2] in which blacks and whites were involved in stealing from a trucking company but the company fired only the whites. The whites brought suit and won on the grounds that this unequal treatment was discrimination against them. Discrimination! Not reverse discrimination!

While this is clearly discrimination and is not legal, there is another type of activity which is clearly *not* discrimination and which *is* legal. That is action taken by an employer voluntarily *to remedy* discrimination. Often these actions superficially appear to constitute discrimination when viewed out of context. For example, if I have previously paid all of my female employees in my machine department $5.00 an hour and all of the men in the same department $7.00 an hour for identical work, I would be wise to observe the admonition of the *Moody* case and enter into a voluntary self-remedy to eliminate this situation before a woman sues me and I get hit with a substantial back pay award. If I conduct

[1] *Moody v. Albemarle Paper Co.*, 422 US 407, 95 SCt 2362 (US SCt, 1975), 9 EPD ¶ 10,230.

[2] 423 US 923, 1072 SCt 2574 (US SCt, 1976), 12 EPD ¶ 10,997.

a self-audit and take voluntary remedial action, that voluntary remedial action, if written on a single sheet of paper, would read "raise only the women $2.00 an hour."

Someone reading this single statement in isolation might perceive it as discrimination against men, for women are treated differently—the basic element of a violation. However, when viewed in its context of the existing fact situation of existing discrimination against women, it is obvious that it is a remedial act and not a discriminatory act in violation of the statute.

What the Affirmative Action Guidelines do, in a nutshell, is to encourage employers to take voluntary remedial action, provide some guidance in distinguishing it from situations which are in fact discriminatory, and provide employers who take voluntary action with some protection.

The Affirmative Action Guidelines have the following elements. (1) They outline a process an employer must follow in taking affirmative action, including a reasonable self-analysis, a reasonable belief that there is a potential violation, and reasonable action to deal with the perceived risk. (2) An employer does not have to admit his own discrimination or wait for court enforcement to take voluntary action. (3) If the plan is in writing (except for the reasonable belief of potential violation) and is entered into in reliance upon the Guidelines, EEOC will make a finding of no discrimination in cases filed by those alleging the affirmative action plan goes too far. In addition, the Guidelines are written with the purpose of giving the employer taking such voluntary action similar protection if a lawsuit is filed against it in court.

Two Interesting Cases

In terms of what the government tried to do with these documents, two recent cases are most interesting—the *Furnco*[3] and *Davis*[4] cases. In *Furnco,* there was a company that hired bricklayers. Traditionally, the company had utilized a recruitment system in which a bricklayer foreman recruited only those individuals known to him. Historically, this type of recruitment or selection system had had a substantial adverse impact on blacks and had been found by all courts considering it to be in violation of the law because it was unjustified by business necessity. The appellate court opinions were full of ten years of law in which a similar recruitment system, having adverse impact, was found to be discriminatorily in violation of Title VII because it could not be justified.

In *Furnco,* the company appeared to be concerned about the adverse impact of this system, and it directed the bricklayer foreman to conduct his recruitment activities in such a fashion as to eliminate adverse impact. He was informed that a specific percentage of bricklayers must be black. He successfully recruited and employed approximately the percentage of blacks that the company instructed him to obtain. He did so in the same fashion by which he had obtained *white* bricklayers, that is, by employing bricklayers personally known to him through a word-of-mouth recruitment system. No one who came to the plant gate was hired.

A black bricklayer came to the plant gate and was told he could not be hired because the company was not recruiting in that fashion. He sued. His lawyer cited all the old cases in which this type of recruitment system had been held to be illegal. The Supreme Court

[3] *Waters v. Furnco Construction Corp.*, 98 SCt 2943 (US SCt, 1978), 17 EPD ¶ 8401.

[4] *County of Los Angeles v. Davis*, 99 SCt 1379 (US SCt, 1979), 19 EPD ¶ 9027A.

not only described this color-conscious activity to remedy previous discrimination as if it were the most natural thing in the world, but it allowed the company to use the success of the process as a defense to this individual's lawsuit. Similarly, in the recent case of *County of Los Angeles v. Davis,* the Court found that the case was moot where, after the filing of suit, the employer had engaged in color-conscious action to eliminate the adverse impact of its previous practices. The Court described, again, as if it were the most natural thing in the world, a process in which the ultimate hiring pool was selected on a color-conscious basis from among those passing a basic entry exam with a pool of 500 consisting of 100 blacks, 100 Hispanics, and 300 whites. Not only did the Court describe this as if it were natural, it allowed the success of the process to moot the lawsuit.

The Selection Guidelines indicate what is expected of an employer—eliminating unjustified systems with adverse impact. The Affirmative Action Guidelines encourage him to do this voluntarily and provide protection for such voluntary action. The systemic standards indicate what will happen if such voluntary action is not taken. The *Furnco* case and the *Davis* case suggest that, if this process is successful, the Supreme Court will find a way to keep hands off.

The Burden of Proof and the Need for Research

In the debates, hearings, and public comments that preceded the adoption of the Uniform Guidelines on Employee Selection Procedures, one of the most disputed points had to do with the burden of proof on the search for alternatives. A previous set of EEOC Guidelines had required the employer to demonstrate that there were no alternatives with lesser adverse impact available—a requirement referred to by its opponents as the "cosmic search" requirement. At the other extreme, a number of employers argued that language in the *Moody* case should be interpreted as requiring employers to deal with alternatives only where the government or the charging party not only has identified an alternative but also can support it with a complete validity study meeting the standards of the Guidelines. The Guidelines took a middle position by requiring the employer, when he conducts his initial validity study, to search for alternatives and provide evidence of the search and by requiring that, where there were two alternatives, he utilize the one with the least impact. It also provided that, when he had utilized such an alternative and eliminated adverse impact, he did not have to engage in validation studies.

Finally, in a so-called "bottom-line" section, it provided that when there was a multipart process or series of alternate processes used together, some of which had adverse impact and some of which did not and all of which combined eliminated adverse impact, the government would generally stay out of the details. That is, it provided that, generally, in most circumstances when the total process has no adverse impact, the government will not examine the question of whether the individual components or alternate subcomponents have been validated.

My challenge to this organization is very simple. What is needed at this time is to end the debate about where the burden of proof on alternatives lies and to begin the responsible process of identifying alternatives that eliminate adverse impact and at the same time meet the legitimate business needs of the employer. This will serve the best interest of the employ-

er, of the protected community, of the government, and of your organization and what it stands for.

Clearly it is in the interest of the employer to identify affirmatively the alternatives. If the employer insists on placing the burden of proof on the government, ultimately the government *will* develop and present alternatives. We bureaucrats are ready to do that. And let me tell you—based upon my bureaucratic experience—they will be alternatives that might be acceptable legally to courts, but the odds are that they will be less acceptable pragmatically to employers in the day-to-day operation of the business. Thus, the employer has a substantial interest in affirmatively taking the initiative either individually or through such groups as the Industrial Relations Research Association in identifying responsible alternatives.

From the point of view of minorities and women, there is a benefit. The government will never be given sufficient resources to initiate enforcement action against all existing systemic discrimination. Therefore, the guarantee of maximum inclusion of minorities and women in the systems which now operate to exclude them is affirmative voluntary action by employers to identify alternative systems that have an inclusionary impact.

From the point of view of the government, the message is equally clear. Administrative agencies are constantly frustrated by attempts to develop expertise in identifying alternatives, and they should welcome active employer participation in the process. The courts have already recognized that employment discrimination cannot be eliminated by suing everybody, and the Supreme Court admonition in *Moody* clearly suggests that it was giving a tough remedy in order to keep other cases from ever reaching it. In *Davis, Furnco,* and *McDonald,* the Court has sent the clear message that, if you eliminate adverse impact, you can be race-conscious in a reasonable fashion as long as you don't discriminate against whites, and the courts will keep hands off.

From the point of view of the Industrial Relations Research Association, the challenge is clear. This organization has been known throughout its history for sponsoring, conducting, and publicizing responsible research designed to improve the functioning of all elements of the industrial relations system. When the Supreme Court adopted the *Griggs*[5] theory of discrimination and focused on unjustified impact, it shifted our attention away from *subjective* information about an employer's intent and focused us, instead, on *objective* information about the impact of employment systems, their necessity, and the existence of alternative systems. Thus, it shifted the focus away from the *human* relations professional and to the industrial relations professional, It is encouraging to see the *industrial* relations professional beginning to pick up this challenge.

What is needed is for responsible industrial relations officials to put their best heads to work on the task of developing alternative employment systems and alternative methods of employee selection which will predict probable job success, which will eliminate the adverse impact that existing systems have on minorities and women, and which equally well (or hopefully better) meet the legitimate busi-

[5] *Griggs v. Duke Power Co.,* 515 F2d 86 (CA-4, 1975), 9 EPD ¶ 10,043.

ness needs of employers. In addition, from a sound business point of view, employers have increasingly recognized that their existing systems are very ad hoc and do not really meet legitimate business needs. The research process which I suggest will probably do more than the phrase "equally well meet the legitimate business needs" suggests. There is much evidence that the process which these Guidelines begin will improve the functioning of the industrial relations system well beyond the gains that will be achieved from eliminating discrimination. I wish you luck in this endeavor. **[The End]**

Arbitration and EEO Issues

By STEPHEN A. RUBENFELD and DENNIS D. STROUBLE

Texas Tech University

ONE OF THE MOST controversial public policy issues of the last two decades has been legislative guarantees of equal opportunity regardless of race, color, religion, sex, or national origin. As the Supreme Court has pointed out in *Alexander v. Gardner-Denver Co.*,[1] "[i]n the Civil Rights Act of 1964, 42 U. S. C. 2000e et seq., Congress indicated that it considered the policy against discrimination to be of the 'highest priority.'" In organizations covered by collective bargaining agreements, debate has continued concerning the use of arbitration as a method of enforcing the goal of nondiscrimination in employment. This paper looks at some of the arguments surrounding this issue and at a number of proposals for achieving a viable solution to the problem of assuring equal opportunity in the industrial setting.

The dilemma concerning the appropriate role for arbitration procedures in the resolution of discrimination complaints is a product of the choice of forums open to the aggrieved party. Besides arbitration, an individual may also file a complaint with the EEOC, other federal regulatory agencies, a federal district court, a state equal opportunity agency, or a state court. In most cases, an individual can pursue these actions concurrently or await a decision which, if unfavorable, can be relitigated in a new action.

The availability of multiple forums, however, does not mean that justice is necessarily being served. In too many cases, the individual does not know of the alternatives, and even if an action is filed, the current backlog of cases may prevent justice. The prime example is the Equal Employment Opportunity Commission (EEOC). During its first year of operation, it had a backlog of 8,000 cases. By 1976, this had increased to over 150,000 cases, thus causing many charges to be in investigation for years with the result being fading of memories and unavailability of records. The effect of this is that many charges are never resolved. The federal court system is also under an ever increasing burden, and state courts and other regulatory agencies have many of the same problems. This is undesirable to all concerned. Employers are exposed to large back pay liabili-

[1] 415 U. S. 36, 94 SCt 1011 (US SCt, 1974), 7 EPD ¶ 9148.

ties and forced to undergo long periods of festering unrest. Employees are denied adjudication of their cases for long periods, and in some instances there is no resolution.

Arbitration under a collective bargaining agreement may offer a desirable alternative to government procedures, but this approach is not without problems. Absorbing Title VII guarantees into the grievance procedure raises a number of policy questions. For example, should the interpretation and enforcement of public law be entrusted to private individuals? David E. Feller discusses this question in light of the views of several prominent arbitrators and academicians.[2] In the industrial setting, when should the arbitrator "implement or follow the rules governing the employment relationship imposed by external law rather than the contract, where the two conflict[?]" He reports that Bernard Meltzer says "never" while Robert Howlett says "always."

Middle positions are taken by Richard Mittenthal and Michael Sovern. Mittenthal would apply the law if the employer cites it in violating the contract. If an employee demands a contract violation so as to comply with the law, then he would look to the contract. Sovern would use external law only in cases where the arbitrator is competent to deal with it and the issue is not under the primary jurisdiction of the courts. Feller feels that these views "seemed to have assumed that the arbitrator should interpret and enforce the contract, and if performance of that function requires him also to interpret and apply the law, he should do so."[3] This, he believes, will cause the process to suffer and undermine the usefulness of arbitration.

Harry Edwards, in commenting on Feller's article, says: "Feller's thesis thus reduces to a grim prediction: arbitrators are damned if they do, and damned if they don't. If they interpret public law, they will lose the confidence of the public law adjudicative bodies and, in time, of the parties. If they don't interpret public law, there will be less and less for them to do."[4]

A subsidiary issue that is raised in the context of arbitration of discrimination suits concerns the adequacy of the arbitration remedies. In the current procedure, the arbitrator is limited as to what remedies he can apply to correct the situation. It has been pointed out that the traditional remedies available to the arbitrator are sometimes inadequate.[5] Another problem is that of insuring rapid and continuing compliance after the award is submitted. The absence of injunctive powers makes the arbitrator impotent where voluntary compliance is not forthcoming and necessitates the injured party to seek enforcement in the courts. Besides being granted injunctive powers, some believe that arbitrators should also have the power to create a monitoring device, change contract language, make adjustments in seniority systems, or expand the class of grievants.[6]

Enter Gardner-Denver

The choice between arbitration and the external legal system has been further clouded by the ruling of the Court in *Gardner-Denver* that an arbi-

[2] David E. Feller, "The Impact of External Law Upon Labor Arbitration," *The Future of Labor Arbitration in America*, eds. Joy Correge, Virginia A. Hughes, and Morris Stone (New York: American Arbitration Association, 1976), pp. 83-112.

[3] *Ibid.*, p. 91.

[4] Harry T. Edwards, "Labor Arbitration of Grievances Involving Racial Discrimination," *Arbitration Journal*, Vol. 27, (1977), p. 70.

[5] Robert Coulson, "Title Seven Arbitration in Action," **LABOR LAW JOURNAL**, Vol. 27, No. 3 (March 1976), p. 150.

[6] *Ibid.*, p. 151.

tration award in a discrimination case is not final and binding. This case, involving the discharge of a black employee, was taken through the grievance procedure; at the final step, the issue of racial discrimination was raised for the first time. Concurrently, an action was filed with the state civil rights commission which later was referred to the EEOC for adjudication. Both the arbitrator and the EEOC ruled against the employee, and an action was then filed in federal district court. This action was dismissed and later upheld in the court of appeals under the theory that the employee had voluntarily elected his remedy and therefore was bound by it when he took his action to arbitration.

The Supreme Court found, however, that a decision in arbitration does not prevent an individual from pursuing his statutory rights in addition to his contract rights, even though both arise out of the same occurrence. The Court unanimously concluded that an individual cannot prospectively waive his or her Title VII rights in the collective bargaining agreement. However, in footnote 15,[7] the Court did say that an individual's voluntary settlement conditioned on a voluntary and knowing waiver would allow an aggrieved employee to relinquish his Title VII rights.

The most important part of the decision with respect to the interface between arbitration the external legal system is footnote 21. "We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties, and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum."[8]

As a result of this decision, the current state of the law is that taking a discrimination grievance through arbitration will not prevent an individual from also exercising his Title VII rights. However, arbitration may be used as the sole forum, with court review, if, after the cause of action arises, the individual voluntarily and knowingly waives his rights under Title VII and the arbitration process meets the requirements of footnote 21: (1) substantial conformance with Title VII, (2) procedural fairness, (3) an adequate record, and (4) an arbitrator with special competence.

A Question of Choice

The decision of whether to rely on the arbitration procedure or the external legal system in questions of discrimination is thus made complex by underlying policy and legal issues. Moreover, this decision is contingent on reconciling the sometimes conflicting interests of the parties. Unions and employers want a speedy and inexpensive resolution of any alleged discrimination. Employers wish to avoid having to litigate the same claim in

[7] *Gardner-Denver*, cited at note 1.

[8] *Ibid.*

several forums. Unions wish to avoid any cries of not fulfilling their duties of fair representation under the National Labor Relations Act. Society and the individual who claims discrimination want a complete remedy and assurance of fair treatment in the future. Finally, the courts and the Equal Employment Opportunity Commission must direct the evolution of public policy and precedent under Title VII.[9]

A number of suggestions have been offered to resolve the conflicts between arbitration and external law. As was previously discussed, some writers feel that arbitration has no place in the adjudication of discrimination claims. They feel that the federal courts or the EEOC are the only proper forums. Others see a limited use but say that arbitration cannot provide a totally effective Title VII forum.

Still others view arbitration as an appropriate vehicle for enforcing the public policy of nondiscrimination in employment. One suggestion calls for such a procedure to be open to all employees, whether or not they are unionized.[10] Several writers have suggested that the arbitration of discrimination cases be placed under the aegis of the EEOC.[11] One step in this direction was taken in September 1977, when the Equal Employment Opportunity Commission announced the creation of the office of Special Projects and Programs, which had as one of its objectives the development of optional "individual worker-employer arbitration."[12]

James Adler calls for the use of arbitration in EEOC adjudication and offers several approaches. First, he says that the courts should defer to the arbitrator's decision concerning disputed facts at least to the extent of *collateral estoppel*. In this situation, once a question of fact has been litigated, neither of the parties to the litigation may challenge the factual findings. He recognizes that, unless the Supreme Court reconsiders *Gardner-Denver*, legislation will be needed to accomplish this. His second approach is to make the arbitrator a special master of the court. The court would then review the award in its role of reviewing the report of the special master. Finally, he says that Congress should consider enacting legislation which would provide for one-step adjudication of issues relating to employment instead of the numerous forums now available. As Adler notes, however, "[s]uch a system is unworkable, confusing, costly, and in the end frustrates the guarantees of equality originally intended."[13]

Resolving the Dilemma: A Proposal

The most promising solution to the arbitration-external law dilemma involves designing a special procedure to arbitrate discrimination issues. By working within the conditions set forth in the *Gardner-Denver* case, the process could be constructed to insure that the likelihood of judicial review would be minimized. At the same time, such a special arbitration procedure would require the voluntary cooperation of all of the parties to the collective bargaining agreement. The elements of

[9] Edwards, pp. 88-89.

[10] Carol Webster, "Arbitrating Title VII Disputes: A Proposal," *Arbitration Journal*, Vol. 33 (1978), p. 26.

[11] Herbert Hammerman, "The Resolution of Job Bias Cases Through Mediation and Arbitration," *Monthly Labor Review*, Vol. 100 (April 1978), p. 43.

[12] Webster, p. 25.

[13] James M. Adler, "Use of Arbitration to Speed EEOC Adjudication," *Monthly Labor Review*, Vol. 98 (May 1976), pp. 38-39.

such a process include the following: (1) enabling contract clauses, (2) limitation to individual complaints, (3) advisory opinions by the EEOC, (4) knowing waiver of rights, (5) procedural fairness, (6) adequacy of the record, (7) clarification of the scope of judicial review, and (8) competency of the arbitrator.

To insure that there is no question as to the arbitrability of the dispute, the contract should have a nondiscrimination clause. A legal supremacy clause would also be included which would direct the arbitrator to defer to external law when the contract is in conflict with existing legislation. This clause could also be broadened to include the rulings of the EEOC and applicable legal principles.

The procedure should be limited to individual complaints. The desire for fast and inexpensive adjudication and the complexity of the issues would suggest that the EEOC or the courts could better handle class action suits. Such suits often involve very complicated legal questions and may involve unidentified individuals or persons who are not employed by the company.

In complex or unsettled areas of the law, the EEOC should issue advisory opinions. These opinions, while not carrying the force of law, should be widely available to provide guidance and uniformity.

The simplest way to overcome the multiple-forum problem is to give the employee the option to use the special arbitration procedure and knowingly waive his other rights. To determine the effectiveness of such a waiver, the Court in *Gardner-Denver* said that the trial court would have to determine at the outset that "the employee's consent was voluntary and knowing." In practice, this waiver may not even be necessary because of the bars that are imposed if charges are not filed within prescribed time limits. For example, in *Electrical Workers, Local 790 v. Robbins and Meyers, Inc.*,[14] the Supreme Court held that the filing of a grievance under the terms of a collective bargaining agreement will not toll Title VII's 180-day limitation period. Thus, with the average time to complete an arbitration being in excess of 240 days, unless a grievant receives an expedited determination, the EEOC complaint would not be timely and would be subject to dismissal.

Another area of concern is procedural fairness. Specific steps must be taken to insure that individual rights are protected. The employee must be allowed to have counsel at the proceedings, and it is imperative that he be given every opportunity to be heard, to prove his case, and to be informed of the consequences of all actions. If at any time there appears to be a conflict of interests between the union and the employee, some provision must be made to assure that the individual has independent representation. This could be provided for by the government or by a special fund set up in the collective bargaining agreement.

Adequate records of the arbitration hearing should be kept. In addition, arbitration awards should be in writing and contain a complete statement of the findings of fact and conclusions of law. In order to keep arbitration a fast and inexpensive procedure, the record of the hearing could be made by tape recording and transcribed only at the arbitrator's request or if the case is to be reviewed in court.

Another area which must be addressed is the scope of judicial review of the proceeding. The best approach

[14] 429 U. S. 229, 97 SCt 441 (US SCt, 1976), 12 EPD ¶ 11,256.

seems to be to follow a procedure much like that in use in the Administrative Procedures Act. Under the Act, any action is set aside if it is unsupported by substantial evidence on the record as a whole. This would limit the situations in which a trial de novo would be available. Such a limitation would require legislative enactment.

Finally, the Court stated in *Gardner-Denver* that a factor to consider in reviewing the arbitration hearing is the special competence of the arbitrator. This has touched off another controversy over whether arbitrators have the technical expertise to decide job-discrimination issues under Title VII. There have been many suggestions either to identify and select expert arbitrators or to have training programs to educate and certify them. While it makes sense to want the best trained and most knowledgeable arbitrators for these cases, it would seem that the parties themselves could continue to act as the screening mechanism. There still exists the safeguard of review and, as has been pointed out by a number of authors, arbitrators are often as competent to decide Title VII issues as are federal judges.

Conclusions

From a pragmatic viewpoint, the question is not whether to arbitrate discrimination complaints but rather how to arbitrate them. Currently, the other forums available to the employee who is discriminated against are not capable of providing a swift remedy. In addition, arbitration provides a number of advantages that other systems do not. Labor arbitration is an expeditious and inexpensive means to resolve a dispute which does not conflict with Title VII. Unlike an action in the other forums, arbitration allows the parties to select the decisionmaker. This enables them to pick someone who may reach a more appropriate decision than someone who is unfamiliar with the industrial world.

Arbitration also has therapeutic value in that it allows the individual to participate in the process of self-government within the organization. The fact of being heard may be enough to satisfy the individual even if he or she loses. The arbitration process also avoids the adverse publicity of a Title VII suit and keeps the issue private. This may be desirable from the viewpoint of both parties. Finally, "[p]roviding the employee with the option of submitting a Title VII complaint through the grievance procedure—a procedure negotiated, maintained, and administered by the parties—would also tend to minimize any possible disruptive influence between the parties and the individual resulting from first resorting to those outside of the industry for assistance."[15]

There is another compelling reason for permitting the arbitration of discrimination grievances. Several authors have pointed out that if, without legislative direction, we exclude grievances alleging discrimination from the arbitration process, then we have denied a privilege or condition of employment (the right to pursue a grievance) based on a discrimination classification.[16] In addition, this means that, if we adopt the special arbitration procedure, then we must also allow the employee the option of using the regular arbitration procedure for any grievance. While this would add to the number of forums, with the adoption of a special procedure the regular arbitration procedure

[15] *Ibid.* See also S. P. Herman and J. A. Lawrence, "Using Arbitration to Handle Discrimination Grievances," *Personnel Journal*, Vol. 57 (1978), p. 637.

[16] Marvin Hill, Jr., and Anthony V. Sinicropi, "Excluding Grievances from Grievance and Arbitration Procedures: A Legal Analysis," *Arbitration Journal*, Vol. 33 (1978), p. 18.

ceases to be a realistic alternative for discrimination claims.

The time for debate has passed. While the participants of arbitration are disagreeing among themselves and debating alternative proposals, the individual worker is being denied civil rights. The arbitration process works in discrimination suits, and with modification it can be made to work better. As our society becomes more complex and different social policies are formulated, all of our institutions must adapt. Arbitration is no exception; it must not lose its voluntaristic and flexible character. Arbitrators must take the initiative to maintain the advantages of arbitration as our society evolves. The emphasis must be on insuring fair and equal treatment for employees in the workplace. Arbitration is the best hope for achieving it. [The End]

Overview of Uniform Selection Guidelines: Pitfalls for the Unwary Employer

By THOMAS G. ABRAM

Vedder, Price, Kaufman & Kammholz

I WILL NOT ATTEMPT, in my allotted time, to recapitulate the provisions of the New Uniform Selection Guidelines, nor will I attempt to discourse on proper testing methods. That analysis is more properly left to the industrial psychologists and related professionals, although I note in passing that whether or not certain Guideline provisions entail accepted psychological principles is still being hotly debated. Rather, I would like to point out some pitfalls for the unwary employer which are present in the Guidelines and to illustrate what I believe to be the fundamental failing of the Guidelines—that is, the failure to provide a clear and realistic blueprint for the formulation of personnel selection practices.

But first, let me explore briefly the legal significance of the Guidelines. The Guidelines constitute the first uniform statement by the four federal agencies charged with EEO enforcement: the Departments of Labor and Justice, the Civil Service Commission, and the EEOC. But the Guidelines' legal, if not practical, significance differs among the agencies. Only the Civil Service Commission and the Department of Labor have formally "adopted" the Guidelines pursuant to their rulemaking powers. The Department of Justice has adopted the Guidelines as a "statement of policy," whatever that means. The EEOC does not have any formal rulemaking power.

Therefore, the Guidelines are necessarily only statements of policy. The difference in the nature of the Guidelines as between the various agencies could affect the ease with which the agencies may modify or amend the Guidelines and the degree of deference to which they are entitled in court. We should also keep in mind that the legal effect of the reporting provisions of the Guidelines is currently in doubt, because of the alleged failure to obtain the required approval of the Office of Management and Budget prior to the Guidelines publication.

Having attempted to describe the ambiguous legal nature of the beast, let me move on to the second, more difficult question of what the Guidelines say. As I mentioned, the Guidelines are the first statement on validation of employee-selection procedures to which all four agencies have been able to agree. Before adoption of the Guidelines, government policy in this area was a welter of agency dispute, contradiction, and confusion. In the Uniform Guidelines, four government agencies have finally managed to speak with a single voice. Unfortunately, what they are saying is not very clear. The Guidelines are a product of negotiation and compromise, and, perhaps even more than most compromises, they tend to be ambiguous and to hedge on important issues. Thus, they are filled with perplexities and pitfalls for employers.

The fundamental question facing an employer in attempting to comply with the Guidelines is under what circumstances must the employer validate or abandon an employee selection procedure. Quite obviously, a validation study is a task not to be undertaken without good reason. For instance, several years ago, the Equal Opportunity Coordinating Council found that the median cost for criterion-related validity studies was about $100,000, with some studies running as high as $400,000.[1] Unfortunately, the Guidelines are not free from ambiguity in providing guidance to employers as to when they may have to incur the costs of a validation study.

In brief, the Guidelines state that an employer is required to validate a selection device only where the entire selection procedure results in adverse impact with respect to protected groups. That is the so-called "bottom-line" concept. Under this concept, presumably an employer is not obligated to validate, say, an aptitude test given to all applicants if there is no adverse impact in the employees' actual hiring, even though the test itself may screen out a disproportionate percentage of minorities. However, there are at least three principal areas in which the Guidelines may mislead the unwary employer. The first is the manner in which the term "adverse impact" is defined; the second is the application of the concept of the bottom line; and the third is the obligation of an employer to seek alternative selection devices which have less of an adverse impact than the device currently in use. I will explore these problem areas in turn.

Adverse Impact

Nowhere do the Guidelines expressly define the term "adverse impact." Rather, they state that, where the selection rate for any race, sex, or ethnic group is less than four-fifths or 80 percent of the rate for the group with the highest selection rate (usually white males), this will generally be regarded as evidence of adverse impact. The Guidelines, however, set out a number of caveats to this rule of thumb. Thus, smaller differences among selection rates will be regarded as evidence of adverse impact where such differences are significant in both statistical and practical terms or where the employer's actions have discouraged applicants disproportionately on grounds of race, sex, or national origin. Conversely, the Guidelines state that differences in selection rates larger than 80 percent may not be regarded as evidence of adverse impact where the numbers involved are not statistically significant or where special recruiting or other programs

[1] Daily Labor Report (December 5, 1978), p. D-4.

cause there to be a disproportionately large number of female or minority applicants.

I do not question the practical benefit of the four-fifths rule of thumb. What I do want to point out, however, is that this rule is not totally consistent with what the Supreme Court has indicated is acceptable prima facie statistical evidence of discrimination and that an employer cannot be assured that, simply because it meets the four-fifths test, it is immune from charges of discrimination.

Thus, the Supreme Court indicated in *Teamsters*[2] that a "gross" statistical disparity might constitute prima facie proof of discrimination. And in *Hazelwood*,[3] the Court stated that only statistically significant disparities in work force data would be accepted as evidence of discrimination. Unfortunately, the four-fifths test, as the government itself recognizes, does not coincide with notions of statistical significance. Indeed, the questions and answers make clear that, for large employers with large numbers of applicants, an employer should also consider whether its selection procedures result in statistically significant disparities in the employment of protected classes.

Moreover, an employer could read and reread the Guidelines and never know that any of three other measurement concepts might be used to determine the effect of his employment practices. Thus, the Guidelines are written as if applicant flow were the only relevant measure. This is far from true. The Supreme Court has defined adverse impact in three quite different ways. In *Griggs*,[4] the Court assessed the effect of employment practices by impact on general population. In *Dothard*,[5] the Court examined the effect of the practices on the relevant applicant pool. In *Hazelwood* and *Furnco*,[6] the Court looked at the qualified labor force in the area of recruitment.

Although it is true that, under the Guidelines an employer will not be obligated to validate its selection procedures if it meets the four-fifths rule, the current state of the law is such that an employer cannot be sure that in so doing he will be immune from all challenges. Parenthetically, it will be interesting to see whether the courts in future litigation will hold the government to its four-fifths rule as a statement of statutory interpretation entitled to due deference. If courts do seize upon the four-fifths rule as an authoritative statement of government interpretation, what may have started out as an expression of administrative convenience by the agencies may become a rule of evidence as to what constitutes a showing of discrimination.

There are other problems with the four-fifths rule. Thus, the Guidelines' statement on adverse impact is chock full of qualifiers. One of the caveats to the general four-fifths rule is that the rule may not apply when an employer's practices have disproportionately discouraged or encouraged female or minority applicants. The Guidelines, however, do not specify the degree or nature of evidence of reputation, rumor, feeling, or impression which may induce an agency to proceed against an

[2] *Teamsters v. United States*, 431 U. S. 324, 97 SCt 1843 (US SCt, 1977), 14 EPD ¶ 7579.

[3] *Hazelwood School District v. United States*, 433 U. S. 299, 97 SCt 2736 (US SCt, 1977), 14 EPD ¶ 7633.

[4] *Griggs v. Duke Power Co.*, 401 U. S. 424, 91 SCt 849 (US SCt, 1971), 3 EPD ¶ 8137.

[5] *Dothard v. Rawlinson*, 433 U. S. 321, 97 SCt 2720 (US SCt, 1977), 14 EPD ¶ 7632.

[6] *Furnco Construction Corp. v. Waters*, 98 SCt 2943, 57 LEd2d 957 (US SCt, 1978), 17 EPD ¶ 8401.

employer in spite of the lack of statistical showing of discrimination.

The agency's discussion of employers whose reputations may have discouraged applicants from particular groups is on shaky legal ground in any event. The Supreme Court accepted the concept of "chilling" effects in principle in *Teamsters* but demanded very strict proof of the alleged discouragement of applicants. Agencies would be well-advised to move with caution when they seek to base an adverse-impact finding on little more than rumor and unsupported assertions by latecoming witnesses as to the chilling effect of an employer's reputation, especially when the employer's statistics meet the four-fifths rule.

It should also be noted that the Guidelines recognize that an employer's good reputation, as well as a special recruitment campaign, may produce an "abnormal" group of applicants. Unfortunately, nowhere do the agencies indicate what they consider to be a "normal" applicant pool, and they offer little assistance in defining the term "applicant." Clearly, the definition of an applicant as one who expressed an interest in a job will include within its scope persons who lack colorable qualifications for the job in question. Consequently, the presence of such nonqualified persons in an applicant pool may seriously distort the representativeness of the pool.

The Bottom-Line Concept

Similarly, the Uniform Guidelines' approach to the bottom-line concept raises as many questions as it resolves for employers. Certainly the resolution of the issue of whether employment practices should be judged on a component-by-component or bottom-line basis represents one of the hard-fought compromises in the Guidelines. Prior to adoption of the Guidelines, the EEOC had insisted that each component of a selection process had to be examined individually for adverse impact, while the Departments of Labor and Justice and the Civil Service Commission had taken a bottom-line approach.

The new Uniform Guidelines do not address the issue of which approach is legally correct. Rather, they purport to adopt the bottom-line approach as a matter of administrative and prosecutorial discretion. In the large majority of cases, the enforcement agencies will not proceed against an employer on the basis of the adverse impact of a single component. Where their entire selection procedure yields no adverse impact, the agencies, however, reserve the right to act with respect to a single selection device. The Guidelines give two examples of when the agencies may do so.

The first situation is where the selection procedure is a significant factor in continuing patterns of assignments of incumbent employees caused by prior discriminatory practices. The second example is where the weight of court decisions or administrative interpretations has held that a specific component of the hiring process, such as height or weight requirements or no-arrest record policies, is not job related.

The appropriateness of both these examples is questionable. The agencies' first example of a component which perpetuates a pattern based on prior discriminatory practices is disturbingly vague. The agencies do not state what standards will be used to determine the existence of initially discriminatory job assignments. Moreover, the existence of such past discrimination does not relate in any direct or meaningful way to the bottom-line effect of the current operation of the selection procedures. If the bottom line is "clean," the impact of the components on minorities or females, let alone on

specific persons who may have been discriminated against in the past, will be unknown. In addition, the objective of remedying past discrimination is simply outside the proper scope of the Guidelines. Accordingly, the inclusion of the first bottom-line exception is questionable.

The second exception to the bottom line is equally questionable. Agencies will ignore the bottom line where a component, such as a height requirement, has been declared unlawful in other situations, apparently largely on the basis of general population statistics. How this analysis jibes with the Guidelines' general focus on applicant-flow statistics and the four-fifths rule is unclear. Moreover, where a selection component is declared unlawful in other situations because it has adverse impact and is not job related, this "unlawfulness" is not transferable except to situations involving similar jobs. Accordingly, this second exception to the bottom-line approach is ambiguous and likely to be improperly implemented.

Finally, the Guidelines' treatment of the bottom-line approach as a matter of prosecutorial discretion is open to serious legal question. Two circuit courts have squarely considered the issue of whether an employer may be guilty of discrimination, even if there is no adverse impact reflected in its bottom-line statistics.[7] Both the Sixth and Tenth Circuits have held that employers cannot be held liable on the basis of a single component where there is no net adverse impact in their hiring process. Thus, insofar as the Guidelines purport to give the agencies the discretion to proceed against employers on the basis of the adverse impact of a single component, they may not accurately reflect the current state of the case law.

Another potentially serious problem for employers is that the bottom-line approach, like the four-fifths rule, may lull them into a false sense of security. An employer who believes that the various components of its hiring process will balance each other out and thus eliminate the need for validation or assuring the job relatedness of the process may have a rude shock if an individual plaintiff challenges the hiring process as discriminatory. Bottom-line statistics will not protect employers from the need to show the job relatedness of a component of the hiring process which is claimed to have excluded a single applicant from a job.

Thus, the Guidelines do not immunize an employer from allegations of a *McDonnell Douglas v. Green*[8]-type of discrimination, that is, disparate treatment involving elements of intentional discrimination as opposed to the *Griggs*-type of allegations of disparate impact of employment practices. As I have suggested, no employer can hope that his bottom-line showing will relieve him of the necessity of showing job relatedness if a component of his practice is challenged by an individual plaintiff as having discriminatorily denied the plaintiff employment.

Alternative Procedures

A final trap posed for the unwary employer by the Guidelines is contained in the requirement that the employer search for alternative procedures having no adverse impact instead of performing expensive validation studies. There is an element of self-incrimination about this suggestion, as it requires

[7] *EEOC v. Navajo Refining Co.*, 593 F2d 988 (CA-10, 1979), 19 EPD ¶ 9050; *Smith v. Troyan*, 520 F2d 492 (CA-6, 1975), 10 EPD ¶ 10,263, cert den 426 US 934, 96 SCt 2646 (US SCt, 1976), 12 EPD ¶ 11,032, reh den 429 US 933.

[8] 411 U. S. 792, 93 SCt 1817 (US SCt, 1973), 5 EPD ¶ 8607.

an employer to determine not only whether its procedures have an adverse impact but also whether procedures with less adverse impact exist.

There is no assurance that an employer's discovery of a second, less adverse procedure will not be considered by the agencies as evidence that the first procedure was discriminatory. An employer who would rather switch than fight to prove the validity of his employment practices may find that his success in avoiding validation of the procedure has led an agency to conclude that the original procedures had created an affected class. Furthermore, the Guidelines' treatment of this issue illustrates the lack of clear instruction for employers in the Guidelines.

Thus, I direct your attention to the answers to questions 52 and 53 of the recently issued Questions and Answers, which provide conflicting advice as to whether an employer with a valid selection procedure must nevertheless seek out alternative procedures. In any event, the requirement that any validation study include this search for alternative procedures is a new obligation which is unsupported by the professional standards and one which I find very questionable.

Moreover, the agencies appear to accept uncritically and even to advocate the employer's deliberate "modification" of selection procedures to avoid the need for validation. It is true that some courts recently have appeared to sanction such modification. Thus, dictum in the recent Supreme Court decision of *County of Los Angeles v. Davis*[9] suggests that five court members were satisfied to accept a quota hiring mentality as a substitute for validation of a written examination, and the Tenth Circuit in *Navajo Refining* appeared to approve the use of a lower passing score for minority test-takers. Similarly, the Second Circuit has lately spoken with approval of a suggestion that adverse impact be eliminated by lowering the passing grade on a firefighter's examination in *Bridgeport Guardians, Inc.*[10]

But none of these cases actually passed upon the lawfulness of deliberate modification of selection procedures in order to reduce the number of successful whites and/or males. Indeed, many Second Circuit cases suggest the inappropriateness of such modification where the victims are identifiable, and, of course, both *Bakke*[11] and *Weber*[12] raise serious questions about such conduct, unless it is a part of a remedial action in response to a clear finding of discrimination. Thus, an employer who abandons or changes its existing procedures for the sole purpose of reducing the percentage of successful whites and/or males, without attempting to show that the new procedure is job related, may be exposing himself to charges of "reverse discrimination." Accordingly, an employer must approach with caution the "option" offered by the Guidelines of avoiding the need for validation by adopting alternative procedures and adopt only those procedures which are job related and defensible.

I think my discussion up to this point should have served to eliminate any lingering hope that the Guidelines offer clear, definitive answers to em-

[9] *County of Los Angeles v. Davis*, 99 SCt 1379 (US SCt, 1979), 19 EPD ¶9027A.

[10] 19 EDP ¶8985 (CA-2, 1979).

[11] *Regents of the University of California v. Bakke*, 98 SCt 2733 (US SCt, 1978), 17 EPD ¶8402.

[12] *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F2d 216 (CA-5, 1977), 15 EPD ¶7935, cert granted 47 USLW 3408 (1978).

ployers as to how to structure their recruitment, testing, hiring, and promotion policies. To the contrary, the Guidelines are fraught with peril from employers who are led into thinking that they offer any easy answers. The best advice I can offer to employers is to proceed cautiously and to continue to present good-faith efforts to comply with federal EEO law.

Safeguards

There are, however, some additional observations one can make. For instance, the Guidelines' emphasis on the use of applicant-flow statistics in determining the existence of adverse impact makes it more important than ever before for employers to ensure that their applicant-flow statistics are not distorted by the presence of casual and unqualified "applicants."

Because the Guidelines leave the definition of an "applicant" to the employer, the first safeguard which employers may consider is adopting a careful companywide definition of "applicant" with the aim of preventing an agency from concluding that adverse impact exists on the basis of a pool, which includes people who walk in off the street to make casual inquiries or people who have no colorable qualifications for available jobs. One solution to this problem may be to define an "applicant" as one who has completed an application. Walk-ins could be given applications to complete in the personnel office or to mail in. This should confine the applicant pool somewhat more to persons with a genuine interest in obtaining the job.

A second safeguard might be to accept applicants only when there are actual job openings. Would-be applicants could be advised as to what jobs are actually available, thus avoiding the problem of accumulating a pile of applications from persons seeking a job when their qualifications do not match the jobs for which a company has openings.

Incidentally, one of the large petroleum companies has begun to show movies describing its jobs to persons who express an interest in working for it. Apparently, a large percentage of would-be applicants are no longer interested once they have seen the movies. I am not sure that I would characterize that as a successful recruiting device, but it may safeguard against distortions of the company's applicant pool. A word of caution, however: an employer must guard against using any methods which will "chill" protected group members from applying for jobs or which will give an unfair advantage to friends and relatives of incumbent employees.

Conclusion

Thus far, what I have said may lead you to believe that I think that companies should be beating jobseekers away with sticks. That is not the impression I mean to convey. Because of the Guidelines' emphasis on bottom-line statistics, an employer's practices will be less likely to be challenged if it manages to attract a larger pool of qualified minority and female applicants. To accomplish this, employers may wish to step up their efforts to attract qualified minority and female applicants. Obviously, some care must be taken to avoid the applicant-pool distortion resulting from large numbers of unqualified applicants. This will require employers to select carefully their means of recruitment. Drives which are aimed at trade schools and colleges, especially those with a large number of minorities or women, is one available option, as is careful selection of the newspapers, trade journals, or magazines in which employment ads

are run. Recruitment of qualified candidates has not been easy in the past and may well become more difficult in the future. However, it is an effort which should be made.

Lastly, I have one final major criticism of the Guidelines. As opposed to previous Guidelines, the new Uniform Guidelines do show a greater appreciation that criterion validation may be impossible for most employers, because few employers have a sufficiently large applicant pool to yield statistically significant results. A logical response by employers to this problem is to turn to standardized tests which have been validated by the companies which issue them or to sharing data with other employers who use the same tests for similar jobs. However, the rigid technical standards and documentation requirements of the Guidelines make it extremely difficult, if not impossible, to achieve portability of tests, and the "checklist" approach to enforcement will undoubtedly add to the Guidelines' rigidity.

In conclusion, it is undisputable that the new Guidelines represent an improvement over previous efforts. Unfortunately, there remains a pervasive antitest sentiment throughout the Guidelines, and lack of clarity in their provisions will, I am afraid, lead to a new round of litigation in an attempt to clarify an employer's obligation under them. **[The End]**

SESSION IV

Health Care Issues and Welfare Plans

Impact of Hospital Cost Review on Industrial Relations

By PAUL A. WEINSTEIN*

University of Maryland-College Park

PRICE AND COST CONTROL in the health industry appears to be a force whose time has come. We not only have experimentation in a number of states, including Maryland, but also considerable interest in the Congress and from the Executive in establishing a mechanism for controlling the cost of health care. Despite the increased feeling that regulation, as practiced since the 1880s, may be counterproductive and should be reduced, there is a new wave in the opposite direction. The development of implicit cost control and price regulatory practice has been gaining popular support and may be the wave of the future.

There already has been some discussion of the procedures and legal and administrative practices in hospital cost review.[1] In the State of Maryland, which has already had some years of experience with a cost-review process, it appears useful to analyze the procedures employed in the control of medical cost, as well as to explore the relation of this process to collective bargaining.

Prospective price and cost control is generally without precedent, except in wartime, outside traditional public utilities. While few would argue with the serious need to control hospital and medical costs, the specific background is noted in Section I. It is unclear that, in controlling a labor-intensive industry, the controllers are entering uncharted and dangerous waters.

In this paper, the regulatory criteria employed by the authorities will be presented and evaluated in Section II. Our concern is to determine how the regulatory strategy presumes the labor market to behave

* I would like to express my appreciation to Ann Mooney for her aid and assistance in the preparation of this paper.

[1] A discussion has already taken place before the Industrial Relations Research Association by a member of the Commission, Carl J. Schramm, "The Role of Hospital Cost-Regulating Agencies in Collective Bargaining," **LABOR LAW JOURNAL**, Vol. 28, No. 8 (August 1977), pp. 519-25. See also Carl J. Schramm, "Containing Hospital Labor Costs—A Separate Industries Approach," *Employee Relations Law Journal*, Vol. 4 (Summer 1978).

and what impact its regulations have and will have on equity in the labor market, the health production function, and the character of services produced. Needless to say, one can ask how this process will affect the employer-employee relationship. There is also a need to determine how the assumptions square with the empirical data that is available (Section III).

While the health industry appears as the leader in control, it is not absolutely so. Bank regulators have been dabbling at determining the appropriate level of wages for some time. As long as some industries appear to need control, the controllers will control no matter what the consequence may be. If the economy is to control wages and labor costs, then considerable care must be exercised. It may be that such care is, in fact, difficult, which is not unlikely. A control strategy may be designable with these limitations accounted for in its blueprint. I believe that the initial experience in Maryland should make one wary of moving into cost control or containment in an ad hoc fashion too quickly. There are valuable lessons to be learned, particularly by labor, which is adjusting a lot more slowly than either management or its natural ally, the controllers.

I. The Commission Origins, Methods and Accomplishments

The Maryland Health Service Cost Review Commission was established by law in 1971. Its jurisidiction extends to all hospitals and health care-related organizations. Its mission as derived from the legislative intent is stated in part: "The purpose of this subtitle is to create a commission which will, beginning July 1, 1971, cause the public disclosure of the financial position of all hospitals . . . and the verified total costs actually incurred by each such institution in rendering health services . . . and after expiration of 3 or 4 additional years as hereinafter set forth, will also review and certify, as to reasonableness of the rates established by institutions . . . . From and after July 1, 1974, an additional responsibility of the Commission is to assure all purchasers of health care hospital services that the total costs of the hospital are reasonably related to the total services offered by the hospital and the hospital's aggregate rates are set in reasonable relationship to the hospital's aggregate costs. . . ."[2]

The General Assembly did, however, limit the Commission's jurisdiction of power in section 568V. It stated: "The Commission may not substitute its judgment for the judgment of the State Comprehensive Health Planning Agency as to the quality and quantity of hospital facilities or services the latter agency deems necessary or appropriate in the discharge of its statutory planning function. The Commission does, however, have the authority to monitor the operation of the hospital, as an adjunct to its rate setting power, and it retains the power to adjust hospital rates."

The impetus for the legislation, and the impact it has had, can be gleaned from Table 1. The increase in hospital costs was identified as a problem for the individual citizen as well as the state, which through its own social service programs was a major health service consumer. It indicates that the problem of escalating health care was greater in Maryland than the average of all cities. The impact of the Commission can be seen after 1974. The salutary effect on medical costs coincident with the Commission's activities can be seen in Table 2, which focuses on the medical-care component of the CPI.

[2] Maryland Code, Article 43, Section 568H.

While hospital charges comprise only about 20 percent of the total medical-care cost, as measured by the Bureau of Labor Statistics, the figures do indicate that the increase in charges in Baltimore are substantially below the national average. All of these figures indicate that the rate of inflation in hospital charges in Maryland, and in Baltimore in particular, was substantially below the national average.

The methods employed by the Commission have not been static. Its original and dominant strategy is to announce prospectively rate changes that it will approve without investigation. Each hospital is then left to accept or challenge this. Within the guidelines, the employer may pay whatever wages it wants, as long as the changes do not exceed the guidelines, that is, this is the passive control policy. The Commission has made some comments about the wage policy of hospitals, stating what it should be paying its employees. Where a hospital has been out of line, say as a result of a historic contract, the Commission will either approve a rate change with the admonition that it will not approve changes thereafter or argue that the hospital must tighten up by reducing staffing or other costs. Last, it intervenes by suggesting that the production function should be adjusted. The recent employment of industrial engineers by the Commission only suggests that it intends to move more directly into hospital operations and, therefore, to insert itself explicitly into the traditional employer-employee relationship.

II. The Assumptions of Control

The following is an interpretation of the assumptions employed by the cost regulators in the State of Maryland. They are deduced from the presentations made by the Commission staff in a matter involving the University of Maryland Hospital, as well as discussions with staff. As indicated above, there was no legislative definition of standards, and so the standards that are employed must, in fact, be gleaned from the Commission's writings, as well as from other more casual sources of data, such as interviews. The following are the assumptions and, as noted, some of their limitations.

(1) There exists one homogeneous labor market across industries and employers. The Commission accepts the Fuchs study that, historically, hospital labor may have been behind in pay but has caught up.[3] This catching-up process is assumed to hold true for all groups in the work force. Consequently, equity and wage imbalance issues are dismissed. This can be viewed in the dimension of inappropriate occupational wage differentials, as well as the concern that there may be some specific hospitals which may not be able to resolve market or internal equity problems.

Related to its classical homogeneity assumption is the assertion that the market wage rate, that is, the average wage in a particular geographic labor market, is the standard of Paretian efficiency. It presumes either of two things: that there is no discrimination in the labor market or that the noncompetitive forces are too small to affect substantively the equivalency that should exist between wage rates, as determined by surveys, and the equilibrium value of the marginal product. This assumption dismisses the question that the hospital work force, particularly the lower skilled work force as found in Maryland or Baltimore, is predominantly female and nonwhite. This assumes that the wage rates for both nonwhites and females

[3] Victor R. Fuchs, "The Earnings of Allied Health Personnel—Are Health Workers Underpaid?" *Explorations in Economic Research*, Vol. 3 (Summer 1976), pp. 408-28.

in the market do not exhibit any impact of discrimination and "crowding."

In fact, the Commission, while acknowledging that the proportion of females might be a relevant variable and is used in the studies of Feldstein, finds no reason to consider race a variable. Such obtuseness at this point in time suggests how the exclusive regulatory mission of controlling, i.e., reducing cost, dominates any analytical validity for considering the character of discrimination in labor markets.

The Commission also argues that there is a single representative wage characteristic for an entire metropolitan labor market. There is inconsistency in its presentation because it chose the average wage for services, arguing that health is a service industry and, therefore, the relevant market for comparison. It argues that manufacturing should be excluded, because one immediately observes that the wage rate for an occupation, say clerical worker, found across the economy differs substantially and significantly, whether it is in services or manufacturing.

Studies of local as well as national labor markets indicate that statistics other than a single average need to be examined. As will be shown later, there is considerable variation within the Baltimore labor market. This should come as no surprise to anyone who has studied labor markets. Different firms choose a specific labor market position as part of a global strategy encompassing quality and quantity of output.

(2) The Commission implies that all labor is homogeneous. This position is developed through a number of questionable points. It follows from the Commission analysis above that it searches for a single wage rate representative of each occupational group, that is, clerical personnel, housekeeping personnel, and even technical service workers such as computer programmers. The Commission indicates very strongly in its analyses that turnover is an irrelevant problem, and it uses a turnover rate (24% for nurses) as an indication of wages being too high. It is essentially saying that recruitment is costless and that experience has no productivity value within hospitals. It dismisses the effect of experience or on-the-job training on either the cost of operations or the quality of service. Thus, when it looks at the housekeeping staff, it considers that all unskilled labor is homogeneous and looks at the lowest quality of labor in the labor market as the benchmark group.

The Commission ignores research indicating that training which is required may be a complementary input of the increasingly advanced technological environment of hospitals. Its education wage-analysis variable relates to education prior to labor market entry, excluding subsequent education. This dismisses all the more recent analysis on search cost, human capital, and discrimination. These variables affect the cost of production and quality of service and should not be dismissed.

(3) The wage analysis is considered independent of characteristics of the work force and specifics of the employer-employee relationship. In the first category, as indicated above, the Commission's recommendations are independent of age, years of experience, and embodied human capital of the work force. In this simplistic model, no one becomes more productive by having been employed in the health industry. This flies in the face of work done by management as well as the institutions controlling the hospital industry.

At another level, the Commission analyzes wages independent of other characteristics of the compensation package. For example, there is no indi-

cation that variables such as pensions may affect turnover. The Commission acts as if all jobs are equal or that all employers have reached an equilibrium in compensating advantages and disadvantages of jobs. Even in the limited Baltimore labor market, there is considerable variation between private and public and voluntary hospitals and little to indicate equilibrium. There are many variables affecting turnover problems, and they should not be assumed away.

The Hospital Cost Review Commission's assertion is that wages should be kept low to increase turnover and that this will not affect the services performed by the hospital. It is highly unlikely that this is true; therefore, this assumption requires further investigation.

While the HCRC spends considerable time developing its accounting framework for the hospitals, virtually no effort is expended to develop data that will shed light on staffing size, distribution, quality of labor, and quality of service that the hospital desires. Even new survey data do not answer or attempt to answer basic questions that need to be addressed if a sophisticated and coherent wage policy is to be developed. The Commission Director acknowledges the problems but, absent outside pressure, shows no interest in resolving them.

III. The Commission's Evidentiary Record

The Commission staff has selectively and in some cases incorrectly analyzed statistical material on both national and local labor markets. It does not acknowledge the general conclusions that hospital costs are not elastic with respect to wage rates. That is, much of its argument is probably irrelevant to its main purpose, but it is easier to undertake an attack on wages than to apply pressure on hospital management, the medical community, or the financial mechanism for paying health costs.

The staff accepts the general statement of Fuchs, as well as Feldstein and Taylor, that nationally, hospital workers are no longer underpaid. However, they disregard Fuchs's own caveats,[4] based upon differences in the character of the health work force, with respect to education and training. They then apply the analysis of Feldstein, which suggests that Baltimore as well as some other SMSAs had very rapidly rising wage rates through the early 1970s.

In making wage comparisons to show that the national phenomenon of overpayment is true in Baltimore, the Commission applies some interesting techniques. It compares a wage survey conducted by the Maryland Hospital Association with a Bureau of Labor Statistics survey of wages in Baltimore, limiting the comparisons to nonmanufacturing wages and making no adjustments for such variables as size of establishment or the demographic and human capital peculiarities of the health work force. In correcting for the timing of the BLS survey and the local survey, with known changes in the pay scale in hospitals, the Commission shifts the analysis from one of wage rates to measuring total income per employee over the period for different occupations. The reasoning is specious on almost any ground. That neither management of the hospitals nor employee representatives attacked this line of analysis only suggests the low level of discourse before the Commission.

The Commission also used data to compare the University Hospital with

[4] *Ibid.*, p. 423.

Johns Hopkins Hospital, the only other one in the state with a medical school. It introduced a survey conducted for Hopkins in its own proceedings before the Commission. This was a nonrandom sample of 21 employers within the Baltimore area, covering both public and private sectors. The analysis did not make adjustments for firm size, and essentially what was involved was a ranking of the unadjusted entry and high wage for a number of occupations.

This survey indicated that the University was out of line with the median employer in the sample and higher than Hopkins for the category Secretary I. The lowest paying firm had a range of 13 cents per hour which was approximately 10 percent of the average range, a factor indicating something rather peculiar. Inspection of the sample shows that, while some employers like the hospital had a Secretary I embedded in a structure running from low-grade clerks to executive secretaries, the representative firm had only a Secretary I.[5] One can deduce that the employer firm was rather small in size and probably had almost no specialization or vertical mobility. This was the application by the Commission of the homogeneity assumptions discussed above.

There was some sentiment not to challenge these data because it would have placed prior proceedings before the Commission in a peculiar light. Consequently, the adversary proceedings were partially subverted in the single-minded attempt on the Commission's part to keep wages low. This was coupled with a disjointed management performance and nothing from labor.

To nail down its case even further, the Commission staff introduced turnover rates as an indication of a high-pay policy. It compared the turnover rate for nurses in the University, 24 percent, with Hopkins, 36 percent, and Massachusetts General, 42 percent, and concluded that the University had a pay scale that was much too high, that it should not be raised, and that, if possible, it should be lowered. This conclusion was reached without an analysis of the working conditions, age of the work force, and other parts of the compensation package which are known to affect quits. More importantly for the hospitals, it neglected total costs and the character of patient care. The analysis assumed that turnover is costless.

A recent study indicates that total costs are positively correlated with turnover and that a lowering of turnover by 12.5 percent would reduce patient day costs some 5.4 percent.[6] This result is not surprising and conforms to studies of turnover elsewhere. Informally, the Commission recognizes that turnover is not desirable. Its conceptual framework for control—of the homogeneous labor force with no search or training costs—leads it to its formal conclusion. The desire to hold down wages forces the Commission to stick to the point, though it is demonstrable that the effect of a lower wage policy would be to raise costs and adversely affect services.

The Commission has been making an annual survey of hospitals, requesting

[5] After correcting for occupational structure and employers who did not have the position at all, there were only 13 observations.

[6] Richard U. Miller, Brian E. Becker, Edward B. Krinsky, and Glen G. Cain, "The Impact of Collective Bargaining on Hospitals: A Three-State Study," final report to the Department of Labor under a grant to the Industrial Relations Research Institute, University of Wisconsin. The authors summarized their results in "Union Effects on Hospital Administration: Preliminary Results from a Three-State Study," **LABOR LAW JOURNAL**, Vol. 28, No. 8 (August 1977), pp. 512-19.

data by hospital on wages and hours of employees categorized by occupational groups. Data derived from the 1978 survey are displayed in Table 3. A comparison of the University of Maryland Hospital with other hospitals in the Baltimore area indicates that the Commission's assumptions and conclusions were faulted. In most of the occupations, the University was located below the median of hospitals; this cuts across both the nursing and housekeeping services. The public employer, rather than being benevolent as charged, is frugal. The charge that nurses are overpaid, given levels of payment for nurses, is clearly in error. Whether the nurses and associated staff are being paid more than their productivity might indicate, though possibly true, is unproven.

What may be most discouraging is the failure of the Commission to generate data that would allow it, or any interested party, to analyze these questions properly. As was suggested by an attorney active in the field, I was trying to place the problem in a rational framework, and the activity was essentially political with a cover of smoke. Neither efficient resource allocation nor good industrial relations is the likely outcome of this strategy.

Summary and Conclusions

The regulation of hospital charges has been successful. In a period of rapidly rising health costs, the State of Maryland had the lowest increase in charges of any state. The Commission has been a force that has applied pressure on hospital management to tighten up its practices. On one level, it provides support for management to have a tough stand toward unions in collective bargaining. It has been the natural ally of management and will be able to extend its aid vis-à-vis unions as its own technical ability expands. At a second level, it can use its influence to have hospitals reduce patient cost by lowering the number of days of stay; in this, it moves in the direction of confronting the physician, which may be the most important element in the inflation picture but one that is harder to fight.

The choice of strategy for controlling costs has a certain logic to it. Hospital costs are strongly affected by labor costs. The Commission staff reasoned that, with an inelastic demand for services and a payment system that reinforces that inelasticity, there would be no incentive for control. The government would be a force for increasing the inflationary pressure. The assumption that government is a price polluter is no doubt true at the federal level, but the cultural impact of "Proposition 13" has forced state and local governments to be extremely tight with costs, including labor costs. The Commission's choice of the University Hospital for its most formal and complete attack on wages was based upon the public sector's being the weakling in management. Its formal argument suggests the same naivete as its focus on the perfectly competitive model in the analysis of standards.

It is unlikely that the control would have gone this way if labor had been astutely represented. While three organizations are involved—the Hospital Workers 1199E, AFSCME, and the Maryland Nurses Association—none has been able to position itself to deal with the control mechanism. Whether this represents a fundamental weakness of organized labor vis-à-vis the Commission-employer alliance or a failure of leadership to adapt to a new environment is difficult to discern. It is likely that leadership will have to adapt and become more effective, or face a serious long-run decline.

Management has already been able to position itself to deal with this new force. The evolution of Commission strategy into the health care-production process suggests that the array of subject matter considered in collective bargaining will increasingly become part of the Commission concern. Issues of staffing, job structure, work rules, etc., will join wages and gross staffing as proper subjects for control. It is unlikely that this development will cement the tie between management and the regulators.

This scenario, while developed in the context of one state, has a wider meaning. There is general agreement that Maryland is out front and is the model to follow. The model may not be restricted to health activities. It could be a generic guide for activities where inflation is aggravated. Should that occur, traditional industrial relations would most certainly be transformed. This development is still very new. The formalization of standards and a different reaction by labor could alter the scenario in the future. As of the moment, the tide is moving with this control; for as any observer can see, it has had the desired effect on hospital cost, and that makes it about the only game in town. **[The End]**

TABLE 1

Annual Percentage Change in the Hospital Daily Services Component of the Consumer Price Index 1972-1977

	Baltimore % Change	U. S. City Average % Change	Increase in Balt. as a % of U. S. City Increase
December 1972–73	5.3	4.3	123.3
December 1973–74	11.5	14.2	81
December 1974–75	3.8	13.0	29.2
December 1975–76	10.7	11.4	93.9
December 1976–77	2.9	10.4	27.9

Source: Maryland Health Service Cost Review Commission, *Annual Report to the Governor* (Fiscal year 1978), p. 66.

TABLE 2

Medical Care Component of the Consumer Price Index 1975-1978

	United States	% Change	Baltimore	% Change
June 1975	168.1		180.5	
June 1976	187.7	9.2	190.0	7.7
June 1977	201.8	9.8	207.6	6.7
June 1978	219.0	8.5	216.7	4.4

Source: Maryland Health Service Cost Review Commission, *Annual Report to the Governor* (Fiscal year 1978), p. 67.

TABLE 3

University of Maryland Hospital Absolute and Relative Wage 1978

Occupation	Univ. of Md. Wage	High Wage	Low Wage	No. of Observations	University Rank from Highest Wage
Maintenance carpenter	5.03	6.24	4.58	9	8
Hospital cleaner	4.02	4.58	3.59	15	14
Billing clerk	4.92	5.19	3.85	19	4
Dietician	6.88	10.00	6.18	9	6
Food service helper	4.08	4.74	3.46	19	17
Lab. technician	5.72	5.72	4.29	14	1
Medical record tech.	5.13	5.44	3.96	14	4
Medical social worker	7.22	9.20	4.99	12	4
Medical technologist	6.92	7.78	5.92	17	9
Nursing aid I	3.24	4.92	3.24	16	16
Nursing aid II	4.95	5.43	3.87	18	6
General duty nurse	6.93	7.53	6.24	20	9
Licensed practical nurse	5.51	6.50	4.99	20	16
Supervisor of nurses	8.28	11.38	7.11	18	14
Physical therapist	5.64	7.95	5.64	12	12
Radiological technician	5.77	6.78	4.49	19	10
Surgical techn. n. cert.	5.28	5.72	4.52	15	6
All others	6.17	7.47	4.52	20	8
GRAND TOTAL	5.92	6.44	4.75	20	12

Source: Maryland Health Service Cost Review Commission, *1978 Wage and Salary Survey* (December 12, 1978).

A Discussion

By WILLIAM STODGHILL

Service Employees International Union

FIRST OF ALL, I would like to thank the national officers and the planning committee of this IRRA meeting for inviting me today as a participant in the health care panel. My comments will be based on the fact that, as president of Service Employees International Union, Local 50, I represent about 1300 health care employees in Missouri and Southern Illinois out of a total membership of 7000. My international union has approximately 375,000 health care workers out of a total membership of 600,000.

SEIU is the largest health care employees' union in the United States, as we devote much of our time and resources toward representing employees in both public and private health care facilities. We even have a full-time health care specialist on our international staff working exclusively on health-related problems in our Washington office. With this background, I would like to provide you with some comments about the subject Professor Weinstein has raised.

Even though health care cost-containment laws are a relatively new phase in the bargaining situations in which we are involved, they have become particularly important. As of May 1978, 15 states have enacted voluntary or mandatory containment programs. These are: Arizona, California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, Virginia, Washington, and Wisconsin.

It is impossible to generalize quickly about how much the plans have affected us, but they are a factor in negotiations, since most of them try at least to review health care budgets and, in some cases, the rates charged by health care facilities within their jurisdictions. All of these states have designated agencies, such as a state board of health or a health care commission, to carry out these voluntary or mandatory reviews. In one state they even have the state hospital association involved, and in another the Blue Cross representatives from that area are involved. Since the agencies reviewing the hospital and health care costs vary, as do their powers, it is difficult to tell you in a few minutes where we have had problems and where we feel we have been able to represent our members fairly and adequately under these laws.

One question we have encountered is whether rates can be reviewed after a labor contract has been signed. Recently, in a health care conference held by our international union and another union with which we work closely—the Hospital and Health Care Workers Union 1199, AFL-CIO—the fact was brought out that, until 1976, after labor contracts were settled in New York, rates could be reviewed to make some equitable change for the increased labor cost. Similar problems exist in other states, but with the emphasis now

shifting to a possible passage of a national cost-containment bill, I would like to discuss it briefly.

As a union, many of whose members are in the health care field, we are well aware of skyrocketing hospital costs. In this country, we spent over $162 billion on health in 1977, nearly nine percent of the gross national product. If this trend continues, the present forecasts are that we will spend $323 billion in 1983, unless Congress makes an effort to pass some type of national health care cost-containment plan. Under the present system, hospitals are part of a "nonindustry" where each hospital exists on its own, like a feudal baron who provides many services at the highest prices.

You are probably unaware of what we are doing about this. We will push for the passage of the Administration's present plan that would keep health care costs beneath a mandatory ceiling in 1980, if the facility does not keep its price increases under the possible figure of 9.7 percent this year. Those hospitals that stay under the ceiling this year will be allowed to use a higher-than-average ceiling in the year that follows. Of course, those that exceed the limit will be penalized by having the following year's ceiling reduced. Those ceilings will take into account increases in wages, goods, and services, and the population being served, as well as new services provided by the facility involved. Ceilings will be readjusted each year.

If this bill is not enacted, health care costs will continue to spiral upward like all other costs, and we will continue to find that our members will suffer greatly, since at the present time their wages are lagging behind those paid in other industries. Through a national hospital health care cost-containment plan, everyone will benefit, and hospitals would be forced to control waste, mismanagement, and the duplication of services. **[The End]**

SESSION V

OSHA Issues and the Work Environment

Regulatory Reform and OSHA: Fads and Realities

By BASIL J. WHITING, JR.

Occupational Safety and Health Administration

"INFLATION, REGULATORY REFORM, economic impact, and OSHA" may not be quite the terms to send people into the streets, as perhaps more stirring phrases did in the sixties and early seventies. However, they certainly represent some of the most controversial domestic issues of the day and ones that are clearly at the top of the agendas of both the executive and legislative branches.

This is an entirely appropriate forum to discuss such matters. We are a band of professionals from labor, management, and government; we encompass both practitioners and thinkers and, thankfully, those who are frequently enough both. We are dedicated to making American industrial—and postindustrial—institutions function effectively; we define "effectively" as encompassing both efficiency in the economic sense of the term and equity, justice, and a sense of respect for the rights of those who labor in these institutions. I mention these considerations—efficiency, equity, justice, and rights—because they are each central to the issues we shall discuss today.

That regulatory reform is an issue whose time has come is clear. The plethora of regulatory agencies at the federal, state, and local levels, each pursuing its individually worthwhile ends, may not have succeeded in binding our economic Gulliver to the ground, as some would have it, but there are certainly enough overlaps, duplications, contradictions, inefficiencies, and unnecessary and wasteful burdens to have generated a high degree of exasperation in at least some important parts of the body politic. Correction is needed, and this Administration has taken some early, significant, and successful steps.

We are probably all aware of the effectiveness of Chairman Kahn's deregulation efforts in the airline industry. We may be less aware of the innovative "bubble" proposal of the Environmental Protection Agency that would allow considerably more flexibility to industry to reduce pollutants in a more effective manner. I hope you are aware of the reforms we have initiated in OSHA to delete unnecessary regulations; to revise others into a leaner and more performance-oriented format; to produce new, cost-effective standards addressed to the most serious occupational safety and health hazards; to redirect our enforcement efforts to a concentration on such hazards; and to emphasize voluntary compliance mechanisms. Perhaps even more important than these particular accomplishments will be the coordinating efforts being initiated by the new Regulatory Council and the changes envisioned in the President's proposed regulatory reform legislation.

We seem to be a nation, however, that governs itself in fits and fads, with giant swings of the political and policy pendulum. This has given rise to grave concern on the part of those of us involved with environmental, safety, and health regulation—including latecomers like me—about certain aspects of the regulatory reform debate. The subject clearly has become a fad in some intellectual circles. Elsewhere, we see some scapegoating of regulation as "the," or at least "a," cause of a host of problems besetting the nation. (We may not know how to get at the real cause of these problems, but we can at least get at the regulators!) And, of course, there is the distressing but familiar tendency of some who should know better to substitute hyperbole for thought (a failing unfortunately not limited solely to the opponents of regulation). Mainly, however, we sense a widespread mood of cynicism and weariness in which the pendulum may, as we see it, swing too far. There are certainly those pushing it hard in hopes that it will—with the result that environmental, safety, and health concerns will be increasingly returned to the tender ministries of the marketplace.

It is vitally important that the nation not lose sight of the important and beneficial goals at the root of much modern environmental, safety, and health regulation. To switch metaphors, there is a baby in the bathwater here. (1) For every "snail-darter" controversy that lends itself so easily to caricature, there is a Love Canal—and now we are finding there are hundreds of "Love Canals." (2) For every hard and controversial decision that must be made over saccharin, there are dozens of Thalidomides or cancer-causing substances that clearly ought not to be in our food, drugs, consumer products, air, water, or the earth itself.

(3) For every foolish OSHA regulation promulgated in the past—like the height of fire extinguishers or the shape of toilet seats—there are real and deadly dangers in the workplace like Kepone, like explosions in grain elevators, like the tragic tower collapse last year in West Virginia, and like whatever caused the dozen or more cases of a rare form of brain tumor we are now finding in industrial facilities in and near Houston. (4) And beyond these spectacular, headline-generating incidents are the day-by-day accidents that result in 2000 or more amputations per month and 4500 or so deaths a year and exposures to toxic materials that lead to serious and irreversible impairment of the health of thousands of workers per year.

These are extremely complex issues combining economic, scientific, and technological matters along with those con-

cerns I mentioned earlier—equity, justice, and rights—in a context where time, psychology, politics, and institutional characteristics are very important variables. Such matters don't yield to simplistic approaches like incentives alone or to limited intellectual tools designed for other purposes, like cost-benefit analysis as it is usually narrowly defined.

I would like to devote the bulk of my time with you to a brief review of certain aspects of the current debate as a prelude to the discussion to follow. These are: (1) myths associated with the nature and impact of OSHA standards; (2) the role of economic analysis in devising environmental, safety, and health regulations, especially the role of cost-benefit analysis; (3) serious problems not sufficiently focused on in the current debate; (4) the role of the intellectual community in these neoconservative times; and (5) the fundamental *political* problem that all this is.

Myths Associated with the Nature and Impact of OSHA

Listening to the current debate, one would believe that OSHA standards usually decrease economic growth, productivity, and employment, increase cost, drastically warp investment decisions, and seriously restrict innovation, research, and development, among other ills they impose. But the facts suggest a more complicated picture.

Many new jobs are being created in the emerging pollution control and health and safety industries. An Environmental Protection Agency study of its employment impact between 1971 and 1974 showed that 20,000 jobs were lost due to EPA regulations. But a National Academy of Sciences study in 1974 found that 678,000 jobs had been gained through the burgeoning pollution control industry.

Experience in Western Europe demonstrates positive economic impacts from such regulation. The Interior Minister of West Germany recently told a U. S. audience that expenditures for pollution controls have contributed decisively to the growth of the West German economy and that such expenditures have created or maintained hundreds of thousands of jobs each year.

There are substantial profits accruing to many of the firms who may claim to be adversely affected by environmental, safety, and health regulation through their manufacture and marketing of healthier substitute products and of pollution abatement and health and safety equipment. For instance, Dupont, which is a major producer of Tetrachloroethylene, is also the developer of the potential (and potentially more efficient) substitute chemical in dry cleaning, Valcener. Dupont also sells air pollution devices to 70 textile and nitric acid plants. Boeing's Environment and Energy Division grew from $30 million in 1976 sales to $58 million in 1977, with over $100 million expected in 1978. Environmental products accounted for approximately 30 percent of these totals. Exxon and Shell, for instance, make chemicals to clean up oil spills.[1] In such circumstances, cost concerns in relation to regulatory impact take on a very different twist.

As industry has recognized the reality of health, safety, and environmental regulations, it has applied creative forces toward identifying and developing new technologies that are innovative and less costly and also meet compliance requirements. In an increasing number of instances, in small and large

[1] Margot Hornblower, "Industries Discover Profits," *Washington Post* (April 3, 1978), p. A2.

firms, for deadly hazards and for serious but less critical risks, compliance methods are being developed that increase productivity and lower cost.

The story of Vinyl Chloride is well known among followers of OSHA regulations. A study by the Congressional Research Service of the Library of Congress in 1977[2] compared the industry cost estimate made for Vinyl Chloride with a retrospective follow-up analysis of the actual costs of compliance done by MIT. The following are some of the telling comparisons.

Effects on production: industry said all production would cease and all OVC production plants would close. What happened? According to MIT, after an initial decrease of 10 to 15 percent while compliance equipment was still being developed and installed, production returned to pre-1974 levels. Subsequent annual growth is projected at 8 to 11 percent. Only two of 23 plants closed.

Effects on cost: industry said that if the standard closed down production, it would cost the society $65 to $90 billion. What happened? Production did not cease; the cost of compliance to users was $300 million and the cost to producers only $25 million to $35 million. Initial estimates were 200-fold overestimates.

Effects on benefits: industry, typically, did not estimate benefits; yet in addition to the technology that has led to the production of a more cost-effective product, hundreds, perhaps thousands, of lives have been saved. Along with substantial savings in medical bills, the quality of working life as well as the quality of life in general for thousands of workers has been enhanced.

Another example of "cost-effective" regulatory response comes from the copper industry, where new technology may be able to meet environmental and health standards and also decrease costs as well. Several experiments are currently under way in pilot plants.

According to *Metals Week,* one innovation developed by Cyprus Mines for potential use in a new plant near Bagdad, Arizona, involves a new hydrometallurgical process by which wire bars are manufactured directly from copper concentrates, thereby avoiding entirely the production of blister copper. The process is pollution-free. According to a study by the Jacobs Engineering Group of Pasadena, California, this process would make it possible to build a new Cyprus processing plant at Bagdad for $73 million, which is less than half the price of a conventional smelter and refinery. In addition, operating costs would be approximately half of the company's current costs for smelting and refining. Additional increases in productivity and profitability may derive from the potential of the process to recover other metals—molybdenum, silver, lead, zinc, and gold.[3]

Finally, clean techniques for producing coke exist in the USSR and Japan, where closed pipeline systems are used to charge the ovens with coal, thus eliminating the major source of employee exposure. Further, instead of quenching the hot coke by pouring water on it in the open, the coke is cooled slowly in closed chambers that trap much of the heat and reuse it for power generation. United States steel

[2] Mary Jane Bolle, *Benefits and Costs of the Occupational Safety and Health Act: A Review of the Available Evidence* (Washington, D. C.: Congressional Research Service, January 28, 1977).

[3] *Metals Week* (New York: McGraw Hill, September 5 and October 10, 1977).

companies have thus far shown little interest in this approach.[4]

As such examples suggest, regulation may have important side effects beneficial to industry. A 1975 study by MIT's Center for Policy Alternatives (of health and safety regulations in five industries in five countries) concluded that "forcing firms to implement product or process changes oftentimes incidentally shocks them out of a rather inflexible production system and thereby provides the catalyst which is necessary for innovation to occur."[5]

The Role of Economic Analysis

Unlike the Interstate Commerce Commission, the Federal Trade Commission, the Civil Aeronautics Board, and other agencies that regulate marketplace behavior of industries or firms, certain of the newer "social" regulatory agencies like OSHA, the Environmental Protection Agency, and the Consumer Product Safety Commission deal rather directly with very broad economic and social externalities with which we have had very little regulatory—or analytical—experience. It is, indeed, as a result of severe externalities and numerous intangible and/or indirect costs and benefits that the society has determined that regulation is needed in the areas of environment, health, and safety. The traditional market mechanism simply does not adequately protect citizens, workers, or consumers from environmental, health, or safety risks.

Both Alfred Kahn and Barry Bosworth of the President's Council on Wage and Price Stability have publicly recognized this point; yet some forces in the society, notably representatives of certain professional and interest groups—and among these especially certain economists and business leaders—continue to insist on traditionally executed quantitative cost-benefit analysis as the major determinant of regulatory decisionmaking regarding environmental, health, and safety hazards. However, the simple balancing of costs and benefits over time, discounted according to the opportunity costs of capital, is not a methodology that can, or should, determine policy decisions (not to mention that, in relation to occupational health and safety, such devices explicitly violate the terms of the OSH Act).

The issue is not whether agencies should attempt to estimate, to the extent possible, the costs and benefits of proposed regulatory actions. They should. The issue is rather the terms in which those estimates are expressed and what is done with them, whether the costs are put on one side of a scale and the benefits on the other, and the resulting tilt determines the degree of protection. I want to spend the bulk of my time with you today exploring the reasons why such an approach is profoundly unwise.[6] Finally, the OSH Act and numerous others allow cost-benefit analysis, where not overly encumbered by methodological and other

[4] Daniel Berman, *Death on the Job* (New York: Monthly Review Press, 1978), p. 150.

[5] Center for Policy Alternatives, MIT, *National Support for Science and Technology: An Examination of Foreign Experience*, CPA 75-12 (1975).

[6] The appropriate consideration of costs and of benefits in regulatory decisionmaking is a complex matter subject to varying statutory requirements. The argument of this paper is that rigid cost-benefit analysis—the weighing of monetized estimates of benefits—to determine the *level* of protection provided in a regulation is inappropriate, because such analysis has serious methodological deficiencies and is frequently philosophically unwise. Some statutes, however, allow the use of cost-benefit analysis; others require it. Similarly, some statutes allow or require a consideration of costs in setting the level of protective requirements in a regulation. The OSH Act, on the other hand, requires the level of exposure to a haz-

(Continued on the next page.)

difficulties, to provide useful insights for choosing among various candidates for regulatory action. At the outset, let me summarize the two streams of the argument.

First, industry can, and usually does, put deceptively firm estimates of operating and capital costs on one side of the scale. The benefits of regulation, however, are dispersed and spread over time; they are often not expressable in monetary terms and even more often are not quantifiable at all in any useful way. The perils of *not* regulating are not usually dealt with.

Second, justice and equity are equally as important considerations in the determination of public policy as economic efficiency. There are *value* judgments. Justice and equity for workers, for instance, are among the most important unmeasurable benefits of OSHA's efforts, and they are not always commensurate with capital cost considerations. As with the Emancipation Proclamation or child labor laws, the society frequently makes decisions that would not pass a cost-benefit test.

Given the present—and any likely future—state of the art, rigid cost-benefit analysis has an inherent tilt, or bias, against the goals envisioned by the Congress when it passed environmental, safety, and health laws. Elevating such a narrow, mechanical technique to the determinant of public policy in complex arenas like these is not an act of wisdom. In such circumstances, there is no substitute for the judgment of elected and appointed officials made in consonance with public health and other statutory goals. Better assessment of costs and benefits can inform that judgment; it should not determine the decisions.

Charles Schultze, Chairman of the President's Council of Economic Advisers, put the matter well in a recent appearance before the Senate Government Affairs Committee.[7] "The evaluation of costs and benefits in regulatory analysis should not be a simple-minded attempt to measure benefits in dollar terms, to measure the costs, and then make some mechanical decision on the basis of comparing the two sums. Rather, it should help improve the effectiveness of the regulations and minimize their costs by examining the very complex interaction between a wide array of regulatory goals and social gains on the one hand and economic consequences on the other."

In the narrower area of occupational safety and health, cost-benefit analysis is neither methodologically feasible to perform, nor, with respect to setting standards, is it consistent with either the OSH Act or with considerations of justice and equity. The following is a review of the major methodological and philosophical problems associated with applying rigid cost-benefit equations to OSHA regulations.

Cost-benefit analysis involves comparing all of the discounted benefits (direct and indirect) of an action with the sum of the discounted costs; if the ratio of benefits to costs is greater than 1.0, then the action is assumed to be worthwhile. This measure of efficiency is usually not feasible for OSHA to engage in because, among other things: (1) the effects of standards are difficult to quantify; (2) monetary

(Footnote 8 continued.)
ard to be set mainly on the grounds of public health and feasibility, with costs being considered only in determining an industry's capacity for response and the time frame allowed for compliance.

[7] Charles Schultze, Testimony before the Senate Government Affairs Committee (April 6, 1979), p. 6.

values are even more difficult to assign to nontraded, unpriced health, safety, and environmental effects (therefore, benefits may be underestimated while costs of compliance are overstated); and (3) even if dollar representatives for health effects could be developed, there is no logical choice of a social discount rate for long-term health benefits.

Uncertainty involved in assessing the health benefits of regulations renders precise cost-benefit analyses impossible. In regulating carcinogens, for example, health effects for humans frequently are extrapolated from animal tests. While animal carcinogenicity data are very important in identifying cancer-causing substances, it would be difficult to quantify an exact degree of cancer risk for humans from animal data. The absence of precise human dose-response data precludes accurate estimates of how much morbidity and mortality are avoided by each incremental reduction in exposure to a toxic substance. In addition, a time lag of 15 to 40 years often exists between exposure to a toxic substance and the resulting onset of disease. Benefits associated with OSHA regulations may thus accrue in the future and therefore be difficult to calculate.

The cumulative, psychological, and symbolic effects of regulations may also be striking. For example, the setting of a standard for one hazard may induce voluntary and relatively inexpensive risk-reducing actions aimed at hazards that are not yet regulated. Or, there may be a gradual restructuring of technology and industry toward greater responsiveness to occupational safety and health concerns. Thus, indirect benefits may accrue from pressure on industry to innovate and find ways of maintaining safer and healthier workplaces. However, such benefits are rarely identified and virtually never assigned monetary values, if indeed they could be monetized.

Although the costs of regulation may be more easily identified and quantified than the benefits, the estimated cost of compliance with an OSHA standard is still highly speculative. As noted earlier, traditional analysis of compliance costs assumes that the technology needed to comply with a standard is static. This ignores industry's capacity to learn and innovate, thereby reducing the cost of meeting regulatory requirements based on current technology. Industry balance sheets are most often used to assess the costs of compliance, and these records exclude most of the costs external to production (environmental and occupational disease, lost productivity traceable to impaired workers, etc.). In addition, a balance sheet does not allow for the identification of expenditures for regulation apart from those for capitalization, operation, and maintenance. Thus, all costs above essential expenses for production and operation may be allocated by industry to government regulation. Some studies are even based on samples weighted toward companies and industries most heavily affected by a regulation. In such cases, the cost of compliance would obviously be overstated.

Overestimation of costs also results when the costs of not regulating are not subtracted from expenses associated with implementing a standard. Failure to reduce workplace hazards results in significant costs in terms of workers' compensation, disability, medical expenses and health insurance, lost productivity, and worker turnover; but it is not feasible at this time to make a reasonable association between types of accidents or illnesses and subsequent costs. Some intangible benefits —such as decreased pain and suffering

or improved community and family life—can never be quantified or assigned a monetary value as can the cost of capital. There is evidence, moreover, that such benefits may be more highly prized in an affluent society than quantitative productivity.

A final and very telling methodological problem derives from the fact that the costs and benefits of such regulation are dispersed over long periods of time. Hence, even if all costs and benefits could be both quantified and monetized, they must be discounted to a present value to allow comparison. *Any time a positive discount rate is used, events occurring in the future are treated as less important than events closer to the present, clearly an intergenerational value judgment.* Beyond this easy-to-overlook value issue is the fact that the choice of any positive discount rate is critical, because the level chosen can determine whether benefits exceed costs or vice versa. The opportunity cost of capital is usually used as the discount rate in such exercises, but there is no logical reason why that should be so, given the mix of goals and values represented by environmental, safety, and health legislation. *To subject such goals and values to a discount rate based on the cost of capital is itself a nonobjective value choice, subordinating such goals and values to an economic criterion based upon current demands for capital.*

All of these factors—from the difficulty of projecting health benefits that may not accrue for 30 years to the bias of the discount rate chosen by the analyst—often result in underestimation of benefits and overestimation of costs when economic equations are applied to health and environmental regulations. Consequently, it is not possible, given present methodology, to assess OSHA regulations precisely via rigid cost-benefit analysis.

Beyond these methodological and technical limitations to cost-benefit analysis, there are serious philosophical and value-oriented objections. First, workers should not be viewed as mere "human capital." They are human beings with nonquantifiable values, personal needs, and feelings. Neither their health nor their lives should be determined by the outcome of a dubious mathematical equation.

Second, one of the most serious deficiencies of cost-benefit analysis is its exclusive focus on economic efficiency. That is, benefits, as uncertainly estimated and monetized, must exceed costs, as also uncertainly estimated and monetized, for the contemplated action to be deemed worthwhile. Other issues —equity and justice—are thus overlooked, unless one believes such values to be fully and fairly represented by economic criteria and fully and fairly served by economic decision mechanisms, a barbaric assumption in my view. Equity and "efficiency" are not always compatible, and the benefits of regulation should be as equitably distributed as fallible human judgment will allow, even though some workers may be protected more "efficiently" than others. The society frequently makes decisions on value grounds that are not economically "rational"—and I believe it should, though it should do so with care.

One example of the value problems involved here in the fact that *different individuals* bear the burden and receive the benefits of regulating or not regulating; as mentioned, these may be *widely separated* in time. Cost-benefit techniques merge these parties to come up with a presumed measure of net social welfare, a doubtful procedure from an equity standpoint.

Third, cost-benefit analysis, and especially cost analysis alone (which is so frequently done by industry and other critics of regulation), generates decep-

tively solid numbers. Despite the uncertainties and limitations of these techniques, the numbers sound firm and carry unfair weight in the debates on these issues.

In sum, decisions on the levels allowed by many regulations in the environmental, safety, and health arena involve qualitative judgments on numerous matters that cannot be adequately quantified or monetized for accurate cost-benefit purposes. Nor in many respects should the attempt be made. Under present law, such judgments usually must be made on public health or other statutorily determined grounds by politically accountable public managers. Those who find these grounds, or this process, troublesome have the burden of establishing workable and desirable alternative decision criteria and processes. Querulous complaints that present modes of operation are insufficiently "rational" may make good political hay, but they don't offer acceptable alternatives. I doubt it can be done.

One of the major concerns giving rise to cries for cost-benefit analysis is the question of the technical and economic feasibility of a standard. OSHA, for instance, by law may not promulgate standards that cannot be attained, and it is not our task to put employers out of business and jobs out of existence. (In a large and complex society, the potential for some of the latter exists, was envisioned by the Congress, and has been affirmed by the courts in relation to "laggard firms." The public health tradition, which is the proper context from which to view such agencies, also affirms this possibility.)

Enter now *time* as the key variable. An industry need not respond instantly to most requirements of a standard, nor need a firm abate a hazard instantly upon an inspection. OSHA conducts careful studies—which can be made more thorough and we are so doing—of both the technology of the industry and its economic circumstances. The present general guidelines are that a standard must not be "massively disruptive" of the economic health of an industry but need not be restrained by the level of current technology. Instead, in the latter instance, a standard may be "technology forcing"—pushing an industry into developing technology now only on the edge of the drawing boards. Utilizing *time* is of paramount importance here, and it is too often overlooked by critics. OSHA's recent standards (cotton dust and lead especially) display this flexibility, treating industry sectors differently and providing compliance time frames *of up to a decade*. Similarly, time is important in inspections of particular firms in relation to setting abatement dates that take into account that firm's particular economic and technological circumstances.

The central concept here is that this law is designed by Congress to foster change—to put safety and health higher on the agendas of economic organizations and to make safety and health a central factor in decisions from the board to the foreman. Forced change often appears Draconian to those required to change; sadly, in their complaint, they tend to overlook the flexibility and adjustments also inherent in the law.

There are two additional matters to touch on briefly here. First is the question of the contribution OSHA makes to inflation. Regulations like OSHA's are attempts to make the frequently hidden, dispersed, and postponed costs of *not* regulating visible, to internalize them back into the workplaces where they are generated, and to enable them to function there as incentives for greater safety and health. This internalization

of the true costs of production represents a shift in the way costs are accounted for and of who pays for them, a shift of society's balance sheet to the corporate balance sheet. Prices may rise (even on net, after considering the offsets discussed above), but such increases do not necessarily reflect true increases in cost to the society and are not necessarily inflationary. The nation's best economists—including those in the highest councils of government—agree. A study by Chase Econometrics, for example, asserts that, while price rises will average about eight percent for the years between 1970 and 1983, the gross cost of *all* environmental regulation during that period, including health and safety regulation, will account for no more than one-fifth of one percentage point.

The second question has to do with the role of economic analysis in determining priorities for regulatory action among various unregulated hazards. Given the necessarily limited resources of society available for any given set of investments, the argument runs, shouldn't OSHA choose its regulatory targets in accord with a calculus that requires scarce resources to be devoted first to dealing with those hazards where the marginally applied dollar buys the greatest reduction in risk, or illness, or death? Isn't it wasteful, indeed inequitable, to do otherwise?

A first level response might be, "in the abstract, yes." But, as we have seen, the "abstract" in these matters borders on the ephemeral. The question is more theoretical than realistic. It implies the ability of a public agency to stop, array all reasonably likely actions before it, conduct risk, cost-benefit, cost-effectiveness, and/or marginal-utility analyses on them, and rank them appropriately for action.

In the real world, problems don't come at you that way. They come at you serially or in clusters, laden with public health, scientific, technical, economic, institutional, political, psychological, equitable, emotional, precedential, and symbolic factors, driven by different pressures and restrained by considerations of contract funds available, staff workload and competence, and legal tactics and strategy. The decisions made among such choices are not casual, they are not careless, they are not hunches; neither, however, are they mechanical. Again, they are judgments by politically accountable public managers who, in relation to priorities, ought to, and do to the extent they can, consider costs and benefits in their decision.

I don't believe the process of decision making can, or should, be otherwise under our system of government. Nor are they "inefficient" in any appropriate (and not just theoretically economic) sense of that term. I believe OSHA's choices of major regulatory initiatives over the past two years—Benzene, DBCP, Acrylonitrile, Cotton Dust, Arsenic, Lead—are entirely defensible.

This does not mean, however, that this approach to priority setting is so inappropriate in narrower realms, like choosing among an array of hazards that are presented pretty much at once to an agency. For instance, implementing OSHA's proposed cancer policy might appropriately involve a careful and comparative analysis of various factors, including the number of workers exposed, the degree of exposure, the potency of the substances, the technical and economic feasibility of reduced exposure limits, and the comparative cost-effectiveness of various choices to the extent that reliable data can be reasonably generated on such matters.

Other Regulatory Problems

The furor over the appropriate role of economic analysis in environmental, safety, and health regulations has un-

fortunately obscured a number of other issues, issues that some might well feel to be more important. I have neither space nor time to review these in depth, but they should be entered into the discussion here.

The first of these issues is the matter of coordinating the government's regulatory activities. Business, as the regulated party in most environmental, safety, and health matters, has the right to expect the government's left hand to know what its right hand is doing. This Administration has made some promising beginnings in this area. The Interagency Regulatory Liaison Group, formed almost two years ago by OSHA, EPA, FDA, and CPSC, has substantially improved cooperation and coordination among these four environmental, safety, and health agencies. The new Regulatory Council, consisting of 35 executive branch and independent agencies, has issued the nation's first regulatory calendar and is initiating a number of promising studies and projects aimed at some of the most pressing problems and valid criticisms of present regulatory efforts. These efforts need more public support and attention.

A second issue, deserving more of the right kind of attention, has to do with the problems of small business. The complaint by small business people that they are overwhelmed by complex and burdensome regulations promulgated by literally dozens of agencies at the federal, state, and local levels has merit. But the tack taken by small business representatives — exemption from regulation, at least from OSHA's requirements—is certainly not the proper response the society should make to their plight. While the overall injury rates in small businesses are lower than in medium-sized and large businesses, some of the nation's most dangerous hazards exist in small businesses. The Kepone disaster, I would remind you, occurred in a small business, and the bulk of the increase in workplace fatalities that occurred last year occurred in small businesses. Workers in small businesses have as much right to a safe and healthful workplace as they do in larger enterprises. The proper response, I submit, should be some amalgam of increased and innovative approaches to education, information, consultation, and financial assistance. OSHA has taken some important steps to aid small businesses, but we in the government and the society as a whole need to apply more creativity and attention to this problem.

Finally, there is the question of making qualitative improvements in the regulatory process. How can we increase, make more effective, and equalize access to information about regulated problems and regulatory requirements? How can we make regulations themselves more flexible and effective? What kind of incentives can be devised to utilize marketplace mechanisms to the fullest in the pursuit of the goals sought through regulation, without creating additional problems or subverting the congressional intent? What is the proper and most effective balance between such incentives and enforcement? What are the most effective enforcement modes? What new and innovative approaches can be devised to stimulate voluntary compliance? How can we enhance mechanisms in the workplace that should be the first line of defense against workplace hazards? How can we best expand the infrastructure of awareness, concern, and competence in the professions, in business, in labor, and in the universities?

These are not glamorous issues; they are unlikely to catch headlines. But they are the issues that need to be addressed if the job is to be done. More positive progress will be made

on "the regulatory problem" by devoting energy to these matters than to the carping criticisms we now hear or to efforts to force complex problems into simplistic economic formulations.

The Role of the Intellectual Community

Members of the intellectual community, whether they work in academia, think tanks, the media, the arts, or the offices of government, business, and labor, bear special responsibilities in times like these (indeed, in any times). Ideas are powerful; trained intellectual talent is rare. Yet, superior competence to the contrary notwithstanding, intellectuals are just as subject to the fads of the moment as is the rest of humanity.

In my previous life as a program officer of a major foundation located in New York City, I watched what I take to have been the development of the neoconservative movement among a group of disenchanted liberal intellectuals around Norman Podhoretz at *Commentary* magazine. Since much of the nation was clearly disturbed by what many perceived as the excesses and failures of the sixties and early seventies, it is arguable whether this group stimulated or merely articulated this development. Be that as it may, both Watergate and Vietnam sealed the matter by injecting a powerful note of cynicism about the honesty and competence of government; neoconservatism is clearly the mood of the moment.

One may argue that this development is a necessary corrective, that the liberal ideas that had reigned since the thirties had run aground and a cleansing critique was needed. There is a degree of merit to this view, but things needn't have gone so far as they have. I am disturbed by so many intellectuals jumping on board the neoconservative bandwagon or standing silently by. Neoconservatism, as I see it, is basically pessimistic about human nature, elitist in tone and content, and willing to place heavy reliance on *mechanisms* to run the society—mechanisms like the "invisible hand" of the marketplace or technocratic formulations like those whose limitations we have discussed today. But this nation is a custodian of the democratic hypothesis, an optimistic sensibility that sees society more as an organism than a mechanism. It is hopeful about the ability of people to make difficult decisions if they are but properly structured and presented, and it recognizes the barbarism of technique insufficiently alloyed by values. These two tendencies reflect a dichotomy that has existed in this nation since at least the *Federalist Papers,* each side of which has produced notable angels and sinners (the former invariably acclaimed by their own side as noble statesmen, the latter dismissed by the other side as cynics or romantics). What is distressing in these times is the apparent attraction of neoconservatism to so many intellectuals when what is needed is a new ark of ideas for the progressive impulse.

Since intellectuals' skills are mainly analytical and critical, they need to be applied concertedly to issues like those we are discussing today but with an eye to the large value questions these issues reflect. What purpose is served, for instance, when some industry and academic studies that deal with costs alone go relatively unchallenged? There is no intellectual justification for estimating gross costs rather than net costs; doing so serves, either deliberately or unconsciously, one side of the American political equation. To reverse the image, as one commentator has stated, it is rather like "attacking GM for costing shareholders $52 billion a year

and neglecting to mention that it also produces $55 billion a year in revenue."[8]

Most such cost studies use the same inflating assumptions: costs without benefits, current level technology only, retrofitting of equipment rather than use of new engineering controls, and implementation of responses to a standard in one instant in time. These are just a few of many simplifying yet unrealistic assumptions—assumptions that make everything a cost and in which there is no room for the development of such clear cost savers as net technological breakthroughs and creative adaptions. As noted above, such studies create and sustain myths, cloud the real issues, and carry unfair weight in public debates.

On the other hand, where are the studies of the benefits of regulation and the costs of not regulating? Who is developing new methodologies for regulatory analysis that can deal with the economic and social externalities discussed earlier? New analytic approaches—or at the very least novel twists on old ones—are desperately needed in the social policymaking arena.

We must develop new and creative approaches to measuring both social costs and benefits, for that, at least, will be demanded of us. We must find appropriate ways of considering costs and benefits that do not do violence to unquantifiable equity considerations. We must develop a proper frame of analysis for costs and benefits that is sensitive to intertemporal problems.

We have a long way to go before a methodology that fits the specific needs of social policy in 1979 and beyond is in place. When EPA began its efforts to develop the capability for environmental impact statements in the 1960s, there were no sound and/or accepted methodologies to adopt. Likewise, we are now at a stage with respect to economic impact methodologies where creative efforts need to be focused not so much on trying to cram new circumstances into old methodologies as on molding new methodologies for the policy needs of today. This is a proper challenge for the intellectual community.

Political Sets of Issues

Even though we need to develop new analytic tools and use them with care, the issues here are not economic; they are political. The Occupational Safety and Health Act, with its declaration of the right of workers to workplaces that are as safe and healthy as is feasible, requires profound changes in attitudes, behavior, and institutions. The Act constitutes an attempt to establish a degree of democratic control over the impacts of technology; its complaint provisions shift power from employers to workers, and its standards internalize costs now borne elsewhere. Who gets, who pays, and who controls are the fundamental political questions.

In a larger sense, the question is to what extent, and in what time frame, the nation wishes to devote its limited resources to environmental and health and safety issues versus other needs before it, such as rebuilding our inner cities, completing the equal opportunity agenda, providing a fully adequate array of social services to all citizens, updating our national defenses, adopting national health insurance, modernizing an aging industrial plant, etc. That tradeoffs exist among these goals is clear. But the tradeoffs are not easy to assess analytically, because some issues, like national health insurance

[8] Mark Green, "The Trouble with Murray," *Washington Post* (January 21, 1979), p. C5.

and modernization of our industrial plants, have impact on OSHA goals as well. There is no doubt that regulatory budget advocates are groping for a way of addressing at least a part of this question, but even if they succeed, the matter remains political.

There are those who would like to see pursuit of as many of these goals as possible left to the private marketplace, citing greater efficiency because bankers and businessmen allocate funds on the basis of the greatest return on investment. Others point out that this may not lead to the maximum social returns or the optimum social mix of investments. Surely, at this level of decision, it should be clear that a technocratic or mechanistic solution to such questions is a forlorn hope. More important decisionmaking tools than invisible hands, whether or not attached to technocrats' arms, may be sound ideas about justice, fairness, and human dignity and a pragmatic sense of how individuals and institutions respond to given situations.

Decisions on such difficult questions should be made mainly on the basis of deeply rooted social and political values working through the political process, which establishes the general value orientation of a government administration, and through the judgments of accountable elected or appointed officials consistent with applicable legislation. That judgment should be as informed as possible and should include *appropriate* consideration of costs and benefits. It should not be bound by an inherently inaccurate and inappropriate mechanical manipulation of them.

The question of how and from what wealth will be generated and to what use wealth will be put is a profoundly political one. The current attacks on regulation are thus more than just efforts to force badly needed reforms in regulation; they are attempts to shift decisionmaking from government to other mechanisms and, in relation to environment, safety, and health, to shift the allocation of society's resources to other purposes. To see these issues clearly, one has to ask, even of those critics without bias or personal interest, what would happen if they had their way? *Who* would *decide* such issues? On what *terms*? Who would *gain*? Who would *lose*? And, the ultimate political and value question: are these results *desirable*?

The lesson to be derived from the current controversies by those supporting environmental, health, and safety programs is that the battle does not end with the pasage of landmark legislation. Many of us have been content to say that "the Congress has answered that question" when the priority of health and safety in comparison with other societal needs has been questioned. But the Congress is forever passing landmark legislation declaring apparently absolute rights and goals that are in conflict. Winning the battle to have the right to a safe and healthful workplace ensconced in legislation does not secure that right; it does not determine the course of subsequent decisionmaking on resource allocation—either to OSHA or to safety and health in general.

Safety and health professionals know that maximizing safety and health in the workplace requires constant vigilance over workplace conditions and activities. Keeping safety and health —and the environment—high on the national agenda similarly requires constant *political* vigilance and constant *political* effort. Can that be done, successfully, in these times? **[The End]**

Four Questions for OSHA

By MURRAY L. WEIDENBAUM

Washington University

IN EXAMINING THE ROLE of the U. S. Occupational Safety and Health Administration, it may be helpful to focus on four key questions. (1) Has OSHA carefully examined the basic causes of job-related illnesses and accidents? (2) Has OSHA carefully examined the alternative ways of reducing job-related illnesses and accidents? (3) Has OSHA carefully chosen the most effective ways of reducing job-related illnesses and accidents? (4) Has OSHA had a significant impact in reducing job-related illnesses and accidents?

It is my sad duty to report that the Emperor (or in the case of OSHA, perhaps the term should be Empress) has no clothes. The answer to all four of the questions, in my judgment, is a simple and straightforward "no." We must acknowledge that, despite the importance of the task and the magnitude of the resources devoted to it, the OSHA approach has not worked.

According to the Bureau of Labor Statistics, days lost due to work-related injuries have been rising since OSHA started. Days lost rose from 51 per 100 workers in 1973 to 60 in 1977, a rise of 17 percent. More recent statistics are far from reassuring. Fatalities rose 20 percent, from 3,940 in 1976 to 4,760 in 1977. The number of reported occupational injuries and illnesses rose from 5.0 million in 1975 to 5.2 million in 1976 to 5.5 million in 1977. The rate of job-related illnesses and accidents rose slightly, from 9.2 per 100 workers in 1974 to 9.3 in 1977.[1] It is these sad statistics, rather than green eyeshade analysis of dollar amounts, that are the heart of the economist's dissatisfaction with OSHA.

What OSHA has done is to provide cartoonists, columnists, and comic strip writers with a seemingly endless supply of raw material for poking fun at bureaucratic nonsense.[2] Unwittingly, to be sure, the performance of OSHA has not only inhibited its effectiveness in achieving its mission, it also has badly hurt the image of regulatory agencies as a whole. You or I may or may not think that is fair, but it is the truth.

We hear so much about Kepone. That truly was a sad case. But where was OSHA? I do not recall that it was OSHA that blew the whistle on that horrible situation. Were they too busy checking on the size of toilet seats and the cleaning of spittoons?

Likewise, the grain elevator explosions are another awful case. So far, the regulators seemed to have ignored the obvious. Those explosions have taken place *since* the Environmental Protec-

[1] "BLS Reports on Occupational Injuries and Illnesses for 1977," *U. S. Department of Labor News* (Washington, D. C.: U. S. Department of Labor, November 21, 1978).

[2] See Art Buchwald, "Santa in Bad Form: No. 1098," *St. Louis Post-Dispatch* (December 22, 1976), p. 7D; James J. Kilpatrick, "OSHA Suffers Double Loss," *St. Louis Globe Democrat* (March 3, 1976), p. 10A; George F. Will, "A Frustrated Party," *Washington Post* (August 22, 1976), p. C-7.

tion Agency issued regulations that ignored the need for workplace safety—a sad and classic case of the conflict among and stupidity of regulators.

What can be done to improve the situation? Personally, I have refused to join the effort to eliminate OSHA. Although I sympathize with the complaints of the agency's opponents, I do believe strongly in its end purpose—to provide safer and healthier working conditions.

The Causes of On-the-Job Hazards

For starters, I would go back to my four questions. First of all, let us examine what we know about the causes of job injuries and illnesses. From the studies I have seen, it seems clear that inexperienced workers have high accident rates. The same applies to tired workers on long or varying shifts. Some of the statistics are noteworthy. Over the period 1942-1970, a one-percent decline in the unemployment rate tended to generate a one-quarter of one-percent rise in the work-injury rate. On reflection, those results should not be surprising.

At slower rates of output, there is more time for maintenance and repair of equipment. During expansions, in contrast, there is more pressure on workers to produce and less time for maintenance of machinery. Moreover, new hires tend to be less experienced, or their skills may be rusty if they have been out of work for some time.[3]

Under the circumstances, there would seem to be an important role for training. And here OSHA may have been counterproductive. We should not forget that many companies have had professional safety departments long before the Occupational Safety and Health Act was enacted in 1970. In practice, OSHA may have diverted much of the focus of these safety units from their traditional task of training workers in safer procedures to following bureaucratic procedures—studying the regulations, filling out the forms, meeting with the inspectors, responding to their charges, and so forth.

Alternatives

Let us now turn to the second question, to examining the alternative ways of dealing with the job safety and health problem. Standards, we must realize, are only one approach. Moreover, a number of state-level studies show that most accidents on the job do not involve violating standards. Even if full compliance was achieved, large numbers of job-related accidents would still occur.[4]

It is naive to expect that any group of mortal men and women sitting in Washington, or anywhere else, can develop standards that will apply sensibly all over the country. The present OSHA approach of relying on standards, inspections, and sole sanctions on employers just is not working. The sensible answer is not to redouble an ineffective approach. Instead, the emphasis in OSHA regulation should be shifted to performance, to the achievement of the desired end results.

[3] Michael Gorham, "Bum Rap for OSHA?", *FRB SF Weekly Letter* (Federal Reserve Bank of San Francisco), (January 19, 1979), pp. 1-3.

[4] Walter Y. Oi, "On Evaluating the Effectiveness of the OSHA Inspection Programs," May 15, 1975, processed, pp. ix-x; James R. Chelius, "Expectations for OSHA's Performance: The Lessons of Theory and Empirical Evidence," March 1976, processed, pp. 22-23. See also National Commission on State Workmen's Compensation Laws, *Compendium on Workmen's Compensation* (Washington, D. C.: U. S. Government Printing Office, 1972), pp. 287-88.

That is the general conclusion that flows from the analyses that have been made by a variety of analysts. Albert L. Nichols and Richard Zeckhauser of the Kennedy School of Government at Harvard concluded that "OSHA . . . has become a prominent symbol of misguided Federal regulation. It accomplishes little for occupational safety and health yet imposes significant economic costs."[5] President Carter's Interagency Task Force on Workplace Safety and Health reported that "OSHA knows little more about what works to prevent injury today than it did in 1971."[6]

Exactly how a safe and healthy work environment is achieved is a managerial matter. Some companies might reduce job hazards by buying new equipment. Others might install new work procedures. Still others might provide financial incentives to their employees—paying them to wear the earmuffs instead of spending much larger sums on so-called engineering noise containment.

In this vein, a recent U. S. District Court barred OSHA from preventing Continental Can Company's use of "personal protection devices" instead of the more expensive engineering controls. The judge noted that the company's current program of earplugs and earmuffs was more effective than OSHA's preferred alternative.[7]

Another example of the kind of thinking that results from this "managerial" concept in contrast to the standards approach is the findings of Donald L. Tasto, a clinical psychologist who was director of the Center for Research on Stress and Health at SRI. According to Dr. Tasto, "the data are very clear that people who rotate shifts have significantly more accidents than those who work permanent shifts."[8] They reported more stomach problems, cramps, colds, chest pains, fatigue, menstrual problems, nervousness, alcohol consumption, and use of sleeping pills and stimulants. Standards, we must acknowledge, just do not deal with this type of work-environment problem.

Choosing the Most Effective Alternatives

In evaluating performance, we need to turn attention to the third question, which deals with economics. OSHA's new general carcinogenic proposal is a fine example of the wrong approach.[9] Ironically, OSHA seems to be embracing a variant of the zero-risk concept just as that outmoded notion is becoming so widely discredited in the area in which it has traditionally been used. I am referring to the FDA's experience with the Delaney Amend-

[5] Albert L. Nichols and Richard Zeckhauser, "Government Comes to the Workplace: An Assessment of OSHA," *Public Interest* (Fall 1977), p. 39.

[6] Philip Shabecoff, "Job Safety Changes Are Sought," *The New York Times* (December 19, 1978), p. D3.

[7] "Judge Issues OSHA Noise Decision," *Insight* (August/October 1978), p. 10.

[8] "Shift Workers' Health Suffers," *Investments in Tomorrow*, Vol. 8, No. 3 (1978), p. 7.

[9] U. S. Occupational Safety and Health Administration, "Identification, Classification, and Regulation of Toxic Substances Posing a Potential Occupational Carcinogenic Risk," *Federal Register* (October 4, 1977), pp. 54148-54247. See also American Industrial Health Council, *Preliminary Estimates of Direct Compliance Costs and Other Economic Effects of OSHA's Generic Carcinogenic Proposal on Substance Producing and Using Industries* (Scarsdale, N. Y.: American Industrial Health Council, February 27, 1978); U. S. Council on Wage and Price Stability, *Occupational Safety and Health Administration's Proposal for the Identification, Classification, and Regulation of Toxic Substances Posing a Potential Occupational Carcinogenic Risk* (Washington, D. C.: U. S. Government Printing Office, October 24, 1978).

ment on food additives. As we have seen in the case of nitrites, a simple-minded application of the lowest possible risk would indeed eliminate the carcinogenic threat posed by nitrites—but the ban also would likely result in losing far more lives because of the greater danger of botulism.

Voltaire may have said it all: "The best is the enemy of the good." The emphasis surely should be on the serious, lethal health hazards and not on the minute trace quantities that present the most hypothetical and remote risks to worker health. Such a commonsense statement would seem to be superfluous. But OSHA's performance to date, under several different administrations, just does not inspire much confidence about the abundance of good judgment at that agency. As has been documented so well, OSHA shows all of the shortcomings of the bureaucratic mentality at its very worst.[10] As an ex-bureaucrat, I feel obliged to make note of that, hopefully to evoke some badly needed change.

Conclusion

The basic reason for criticizing OSHA's current approaches is not economic. It is to get a more positive answer to my fourth question—to reform OSHA so that it can indeed have a significant impact in reducing job-related illnesses and accidents. Surely that will take a fundamental overhaul of the basic OSHA statute—such as shifting the focus from standards to performance, extending sanctions to employees as well as employers, etc. That difficult task is worthy of very considerable attention—on the part of labor, management, government, and academic researchers alike. The drafters of new job safety and health legislation should learn from the sad OSHA experience. The problem is not to punish employers for not meeting standards. Rather, the need is to identify those approaches that will provide maximum incentives to workers and employers alike to achieve and maintain a safer and healthier work environment. **[The End]**

[10] See Murray L. Weidenbaum, *Government-Mandated Price Increases* (Washington, D. C.: American Enterprise Institute for Public Policy Research, 1975), Ch. 5; Murray L. Weidenbaum, *Business, Government, and the Public* (Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1977), Ch. 5; Murray L. Weidenbaum, *The Future of Business Regulation* (New York: Amacom Press, 1979).

You are invited to become a member of*

THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

The Industrial Relations Research Association was founded in 1947 by a group who felt that the growing field of industrial relations required an association in which professionally-minded people from different organizations could meet. It was intended to enable all who were professionally interested in industrial relations to become better acquainted and to keep up to date with the practices and ideas at work in the field. To our knowledge there is no other organization which affords the multi-party exchange of ideas we have experienced over the years—a unique and invaluable forum. The word "Research" in the name reflects the conviction of the founders that the encouragement, reporting and critical discussion of research is essential if our professional field is to advance.

In our membership of 5,000 you will find representatives of management, unions, government; practitioners in consulting, arbitration and law; and scholars and teachers representing many disciplines in colleges and universities in the United States and Canada, as well as abroad. Among the disciplines represented in this Association are administrative sciences, anthropology, economics, history, law, political science, psychology and sociology as well as industrial relations. Membership is open to all who are professionally interested and active in the broad field of industrial relations. Libraries and institutions who are interested in the publications of the Association are also invited to become members, and therefore subscribers to the publications.

Membership dues cover publications for the calendar year, January 1 through December 31, and entitle members to the *Proceedings of the Annual Winter Meeting, Proceedings of the Annual Spring Meeting,* a special research volume *(Membership Directory-Handbook* every six years), and quarterly issues of the *Newsletter.*

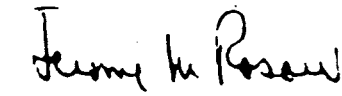
Dues for membership on standing order are:

Regular Membership	$24.00
Family Membership (At same address, no additional publications)	2.00
Contributing Membership	65.00
Citizens of Countries Other than U.S. & Canada Living Abroad	7.50
Retired Membership (If a member for at least 10 years and not now gainfully employed)	7.50
Student Membership (Full-time)	7.50
Institutional or Library Subscription	24.00

If you are not already a member,* we invite you to join by sending your membership application and dues payment. Inquiries regarding membership, meetings and publications should be addressed to the IRRA Office.

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION (608/262-2762)
7226 Social Science Building, University of Wisconsin, Madison, WI 53706

Sincerely yours,



IRRA President 1979

** If you are already a member, please pass this mailing along to a colleague or friend who might be interested in joining IRRA.*

IRRA PROGRAM FOR 1979

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION MEETINGS

Annual Spring Meeting, April 25-27, 1979, St. Louis, Bel Air Hilton Hotel. The program, arranged by President Jerome M. Rosow and Local Arrangements Chairperson Gladys Gruenberg in cooperation with the Gateway Chapter, will be announced in the IRRA Newsletter in February. Central theme of the meeting will be "New Developments in Collective Bargaining—What Practitioners Need to Know and How Researchers Can Help Them Plan for the Future."

Thirty-Second Annual Meeting, December 28-30, 1979, Atlanta. President Jerome M. Rosow and the Program Committee will announce the program in the IRRA Newsletter in September.

Spring Meeting, April 16-18, 1980, Philadelphia. President-Elect Jack Barbash, in cooperation with Gladys Gershenfeld and the Philadelphia Chapter, will be in charge of the program.

Future IRRA Annual Meetings (with ASSA):

December 28-30, 1979 — Atlanta
September 5-7, 1980 — Denver
December 28-30, 1981 — Washington
1982 — New York City

International Industrial Relations Association (IIRA)

Fifth World Congress of the IIRA, University Dauphine, Paris, 3-7 September 1979. For membership ($5) and Congress information: IIRA SECRETARIAT, ILO, LEG/REL Branch, CH-1211 Geneva 22, Switzerland.

IRRA Publication Schedule for 1979

Annual membership dues for the calendar year January 1 through December 31 cover the cost of publications for 1979:

Proceedings of the Thirty-First Annual Meeting, August 29-31, 1978, Chicago (Publication Spring 1979).

Proceedings of the 1979 Annual Spring Meeting, April 25-27, 1979, St. Louis (Publication Fall 1979).

IRRA Membership Directory, David R. Zimmerman, ed. (Publication Summer 1979).

IRRA Newsletter, Issued Quarterly to the membership (no separate mailing list). Prices and order forms for single copies of past IRRA publications are available on request.

Officers of IRRA for 1979

PRESIDENT
Jerome M. Rosow, Work in America Institute, Inc.

PRESIDENT-ELECT
Jack Barbash, University of Wisconsin

SECRETARY-TREASURER
David R. Zimmerman, Mathematica Policy Research

EDITOR
Barbara D. Dennis, University of Wisconsin

EXECUTIVE BOARD MEMBERS:
Bernard E. Anderson, University of Pennsylvania
Jean Boivin, Laval University
Gladys Gershenfeld, Philadelphia College of Textiles and Science
Marcia L. Greenbaum, Arbitrator
Robert D. Helsby, New York State Public Employment Relations Services
James E. Jones, Jr., University of Wisconsin
Charles C. Killingsworth, Michigan State University
Raymond W. MacDonald, Industrial Workers of America, AFL-CIO
Jerome A. Mark, Bureau of Labor Statistics, USDL
Bertram McNamara, United Steelworkers of America
Lois A. Rappaport, University of Pennsylvania
Markley Roberts, AFL-CIO
Bernard L. Samoff, University of Pennsylvania
Donald Vial, California Department of Industrial Relations
Donald H. Wollett, University of the Pacific

Past Presidents of IRRA

1948 Edwin E. Witte
1949 Sumner H. Slichter
1950 George W. Taylor
1951 William M. Leiserson
1952 J. Douglas Brown
1953 Ewan Clague
1954 Clark Kerr
1955 Lloyd Reynolds
1956 Richard A. Lester
1957 Dale Yoder
1958 E. Wight Bakke
1959 William Haber
1960 John T. Dunlop
1961 Philip Taft
1962 Charles A. Myers
1963 William F. Whyte
1964 Solomon Barkin
1965 Edwin Young
1966 Arthur M. Ross
1967 Neil W. Chamberlain
1968 George P. Shultz
1969 Frederick H. Harbison
1970 Douglas V. Brown
1971 George H. Hildebrand
1972 Benjamin Aaron
1973 Douglas H. Soutar
1974 Nat Goldfinger
1975 Gerald G. Somers
1976 Irving Bernstein
1977 Ray Marshall
1978 Charles C. Killingsworth

OFFICERS OF IRRA FOR 1979

PRESIDENT:

Jerome M. Rosow, Work in America Institute, Inc.

PRESIDENT-ELECT:

Jack Barbash, University of Wisconsin

SECRETARY-TREASURER:

David R. Zimmerman, Mathematica Policy Research

EDITOR:

Barbara D. Dennis, University of Wisconsin

EXECUTIVE BOARD MEMBERS:

Bernard E. Anderson, University of Pennsylvania
Jean Boivin, Laval University
Gladys Gershenfeld, Philadelphia College of Textiles and Science
Marcia L. Greenbaum, Arbitrator
Robert D. Helsby, NYS Public Employment Relations Services
James E. Jones, Jr., University of Wisconsin
Charles C. Killingsworth, Michigan State University
Raymond W. MacDonald, AIW, AFL-CIO
Jerome A. Mark, USDL, BLS
Bertram N. McNamara, United Steelworkers of America
Lois A. Rappaport, University of Pennsylvania
Markley Roberts, AFL-CIO
Bernard L. Samoff, University of Pennsylvania
Donald Vial, California Department of Industrial Relations
Donald H. Wollett, University of the Pacific

PAST PRESIDENTS OF IRRA

1948 Edwin E. Witte
1949 Sumner H. Slichter
1950 George W. Taylor
1951 William M. Leiserson
1952 J. Douglas Brown
1953 Ewan Clague
1954 Clark Kerr
1955 Lloyd Reynolds
1956 Richard A. Lester
1957 Dale Yoder
1958 E. Wight Bakke
1959 William Haber
1960 John T. Dunlop
1961 Philip Taft
1962 Charles A. Myers
1963 William F. Whyte
1964 Solomon Barkin
1965 Edwin Young
1966 Arthur M. Ross
1967 Neil W. Chamberlain
1968 George P. Shultz
1969 Frederick H. Harbison
1970 Douglass V. Brown
1971 George H. Hildebrand
1972 Benjamin Aaron
1973 Douglas H. Soutar
1974 Nat Goldfinger
1975 Gerald G. Somers
1976 Irving Bernstein
1977 Ray Marshall
1978 Charles C. Killingsworth

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION
PROCEEDINGS OF THE 1979 SPRING MEETING, ST. LOUIS
7226 SOCIAL SCIENCE BUILDING, UNIVERSITY OF WISCONSIN
MADISON, WI 53706 USA

Address Correction Requested

Non-Profit
Organization
U. S. Postage
P A I D
Madison, WI 53706
Permit No. 1034