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Proceedings of the
1976 Annual Spring Meeting

May 6-8, 1976

Denver, Colorado

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Edited by James L. Stern
and
Barbara D. Dennis

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Industrial Relations Research Association
Spring Meeting

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PREFACE

Industrial Relations Research Association Series
Proceedings of the 1976 Annual Spring Meeting

Collective bargaining and the seniority system, topics of long-standing interest to the IRRA membership, were emphasized at the Association's 1976 Spring meeting in Denver. Focus was on the effects of inflation, unemployment, and retrenchment on this year's negotiations in major U. S. industries, in one session, and on current and future bargaining in the public sector, in a second. The third session was devoted to consideration of how affirmative action as a public policy, the Civil Rights Act, and court decisions have affected seniority systems.

The need to make collective bargaining work in the public sector, with the support of "proper statutory" frameworks and commitments by both public management and public organizations, was stressed by Benjamin Aaron, former IRRA president, at his dinner address to the group. At the lunch session, Colorado Governor Richard Lamm, speaking on "Employment and the Environment," noted the difficult problems both the state and local communities face in balancing the needs of the nation for some of the state's natural resources and the interests, both economic and environmental, of the areas that would be affected by development. A panel presented various views on "Working Women: Changing Roles," at the opening workshop session Thursday evening.

IRRA President Irving Bernstein and the Association's staff are grateful to William F. Schoeberlein, attorney, who served as chairman of the Denver arrangements committee, and to his committee members: Jay Dee Patrick, District 4, AFL-CIO; Walter C. Brauer III, attorney; Walter E. Lawrence and G. Dale Meyer, University of Colorado; Kermit L. Darkey, Mountain States Employers Council; and C. Gordon Dickinson, National Farmers Union. Their advance planning and overseeing of the meeting contributed greatly to its success. The editors wish to express their appreciation to the speakers for their cooperation in preparing their papers for publication, and to Elizabeth Gulesserian for her assistance. As in the past, these Proceedings first appeared in the August issue of *Labor Law Journal* and have been reprinted for distribution to IRRA members.

JAMES L. STERN
BARBARA D. DENNIS
Co-Editors, IRRA

Reflections on Public Sector Collective Bargaining

By BENJAMIN AARON

Professor of Law, University of California, Los Angeles.

The Changing Environment

AT THE BEGINNING of the present decade, the outlook for collective bargaining in the public sector was roseate. During the preceding 10 years, government employment had increased 44.1 percent, from 8.8 million in October 1960 to 12.6 million in October 1969, while state and local government had increased from 6.3 to 9.7 million.[1] In early 1970, 24 states had 34 different mandatory statutes requiring either meet-and-confer or collective bargaining relationships; 11 states had 14 permissive statutes, making meet-and-confer or collective bargaining relationships permissible; and 14 states had statutes granting to selected groups of employees only such minimal rights as the right to join a union or to present proposals to the employer.[2]

Organization of public employees had continued to gain momentum. In the period between 1962 and 1968, union and association membership among government employees had almost doubled, from 1.2 to 2.2 million; unions of public employees made membership gains of 135.5 percent, compared to a gain of about 5 percent among private-sector unions.[3]

In a few years, the picture has changed. The current status of collective bargaining in the public sector is uncertain; the immediate future appears bleak. What has happened to the surging, triumphant organizational movement among government employees which swept across the country during the 1960's and which appeared to be surmounting every barrier placed in its path? The answer, my friends, is blowing in the wind—the chill wind of a depressed economy. Although there are a few signs of recovery in the private sector, the situation in the public sector seems, if anything, to be getting worse.

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[1] U. S. Department of Commerce, Bureau of the Census, *Public Employment in 1969* (April 1970), cited in National Governors' Conference, *1970 Supplement to Report of Task Force on State and Local Government Labor Relations* (Chicago: Public Personnel Ass'n, 1971), p. 1.

[2] American Bar Ass'n, Section of Labor Relations Law, *Report of the Committee on State Labor Law* (1970), pp. 94-95.

[3] Harry P. Cohany and Lucretia M. Dewey, "Union Membership Among Government Employees," *Monthly Labor Review*, vol. 93 (July 1970), pp. 15-16.

It is unnecessary to dwell on the highly publicized plight of New York City by way of illustration; indeed, to do so would be misleading. Almost every major city in the country is in financial trouble. Last February, for example, Mayor Coleman Young of Detroit told the Congressional Joint Economic Committee that his city, which has already dismissed 18 percent of its municipal workers, faces financial disaster within a year. Detroit now has a budget deficit of $50 million in the current fiscal year, which could grow to $700 million by 1980 unless federal aid is forthcoming. Young also predicted that Philadelphia, San Francisco, and other major cities could follow Detroit into financial collapse.[4]

Effects of the Crunch

The main theme of a national conference last January in Washington, D. C., on "Public Sector Labor Relations in a Troubled Economy," concerned possible or likely effects of the anticipated financial crunch on various areas of the public sector. Thus, Dean Alan K. Campbell, of the Maxwell School, Syracuse University, stated in part: "The necessary 'holding the line' for public expenditures is also bound to reduce the level and quality of public service. Not only is this likely to weaken the already deteriorating economic base of some jurisdictions, but additionally it will particularly hurt those dependent on public services."[5]

Another speaker, Dr. Donald R. Magruder, executive director of the Florida School Boards Association, declared: "This same economic pinch will affect some collective bargaining laws presently in force, and also . . . any new state legislation to be considered for adoption. Legislators will be more cautious about abdicating final decision-making authority, particularly in the budget area, and serious consideration will be given to the retention of the final budgetary decision to be made by the legislative body . . . ."[6]

Much of the current commentary on economic problems in the public sector assumes, whether implicitly or explicitly, that collective bargaining in general, and the allegedly rapacious demands of some unions in particular, are largely responsible for the present financial plight of state and local governmental jurisdictions. How much truth is there in that assumption?

It is, of course, true that public service is a labor-intensive product, and that the major expense of government is employee compensation, accounting for 75 to 85 percent of governmental budgets. In the years 1970-74 tax collections by local governments increased 40 percent, while city and county payrolls rose 46 percent and 57.7 percent, respectively.[7] Those figures however, are misleading. Payroll increases reflect not only rates of pay, but also increased employment. To illustrate, during this same 1970-74 period the number of employees rose 11 percent in the cities and 20.8 percent in the counties. If one looks at the average earnings of full-time city and county employees between 1970 and 1974, the picture is different; earnings of city employees (excluding teachers) rose by only 34 percent, and those of county employees by only 32 percent.[8]

[4] *Los Angeles Times*, Feb. 26, 1976, § 1, p. 1.

[5] LMRS *Newsletter*, vol. 7 (Feb. 1976), p. 1.

[6] *Ibid.*

[7] Marion Ross, "The Local Government Budget Crisis: Is Bargaining to Blame?," *California Public Employee Relations*, No. 27 (Dec. 1975), pp. 2-12.

[8] U. S. Department of Commerce, Bureau of the Census, *City Employment in 1974* (June 1975), and *County Employment in 1974* (June 1975), cited in Ross, p. 5.

An additional perspective on pay increases for public-sector employees can be gained by comparing those of several key occupational groups—urban public classroom teachers, police, and firefighters—with earnings of production and nonsupervisory workers in the private nonfarm sector. For the five-year period ending 1973-74, the differences were not significant.[9]

These comparisons, and other factors, have led Professor Marion Ross to conclude: "When looked at in conjunction with the eroding tax base and rising interest cost, these bare figures cast doubt on the allegations that collective bargaining in the public sector accounts in large measure for the financial difficulties of cities. Particular wage increases have received so much attention that other reasons for payroll increases have been largely overlooked."[10]

"Square Atop a Tinderbox"

Regardless of the reasons, however, labor costs in the public sector continue to rise at a time of shrinking government revenues and increasing resistance to tax increases. Strikes by public employees are also on the rise. Secretary of Labor Usery, surveying the outlook for 1976 when he was still Director of the Federal Mediation and Conciliation Service, commented pungently: "We are sitting square atop a tinderbox" in the public sector.[11]

The picture in this regard is grim, not only for the general public, but also for the strikers and for the various labor organizations which represent them. In California, for example, most informed observers believe that recent strikes in several cities, especially the current strike of city employees in San Francisco, have aroused such hostile reactions among large numbers of the public throughout the state that even the faint hope for enactment of a comprehensive collective bargaining law for state, county, and municipal employees in the immediate future has been extinguished.

Dismal as the overall situation may be, however, it should not be exaggerated or misread. There is no indication of a reversal in the trend toward increasing resort to collective bargaining in the public sector, although it may be slowing down in specific areas. According to a recent Census Bureau report, 51 percent, or 4.7 million, of the nation's full-time, nonfederal public employees belonged to employee labor organizations in October 1974. This represented a gain of about 10 percent in the previous two-year period. During the same period the number of nonfederal public-sector labor-management agreements rose 21.9 percent, to 23,820, of which 6,659 were memoranda of understanding (MOUs). At local levels, where most of the membership gains occurred, collective agreements increased by 30 percent in the two-year period, compared with an increase of only 9 percent in MOUs.[12]

What we are witnessing, therefore, is not so much a decline in collective bargaining in the public sector, as a period of hard bargaining in an environment of severe economic restraint and increasing public hostility. I propose now to comment briefly on several of the current suggestions for

[9] See U. S. Department of Labor, *Current Wage Developments*, Feb. 1975, p. 42, and *Monthly Labor Review*, vol. 98 (Oct. 1975), p. 93, cited in Ross, p. 5.

[10] Ross, cited at note 7, p. 5.

[11] LMRS *Newsletter*, vol. 7 (Feb. 1976), p. 5.

[12] U. S. Department of Commerce, Bureau of the Census, *Labor-Management Relations in State and Local Governments: 1974*, quoted in BNA *Daily Labor Report*, No. 49 (Mar. 11, 1976), pp. A-1—A-2.

dealing with some collective bargaining issues, as well as on the reactions to those suggestions by the parties directly involved.

Some Current Proposals

Reduction of Services and of Employment. The most obvious, as well as the most logical, response to public complaints against the rising costs of government is to reduce such costs. One way to accomplish this is to reduce the number of services provided, which, in turn, will reduce the number of employees required. Some cities and states have done just that, but the method has its limitations. First, the average citizen's insistence upon eating his cake and having it, too, is well known. Demands for reduction in public services almost invariably emphasize that the services to be reduced are those provided primarily for some other group. Second, the employees who would be affected by reduction of services are quite understandably opposed to that particular method of cutting costs, not only because it hurts them personally, but also because they frequently identify with the needs and aspirations of those special publics that they serve.

Even that modern Savonarola, Governor Brown of California, whose popularity has remained surprisingly high despite his constant emphasis upon the need to "lower our expectations" and to abandon our wasteful and self-indulgent ways, has encountered fierce opposition in his efforts to cut back on the number of employees in some departments of the state government. Then, too, a planned reduction of services is likely to raise issues that have the highest potential for polarizing various elements in a given community. In Southern California, for example, residents of elegant but fire-prone housing areas strongly resist proposals to reduce the number of firefighters on duty during the hours when fewer fires occur, while at the same time demanding that welfare expenditures be cut.

Purely for political reasons, therefore, and without regard to more fundamental issues involving competing equities, reduction of services and of the number of full-time public employees as a means of curbing the rising costs of government has only a limited utility.

Productivity Bargaining. The latest glamour term in the public collective bargaining lexicon is productivity bargaining. It is a phrase that comes trippingly off the tongue; it has a pleasant ring to it; no one denies that it is a Good Thing. It appears to have replaced, at least for the time being, "communications" and "human relations" in the minds of public managers as the primary desideratum in collective bargaining. Let me say, at once, that I have nothing against the concept of productivity bargaining; the problem is that the term, like the others I mentioned, is one of fathomless ambiguity and means different things to the various participating or affected parties.

This observation is clearly illustrated by the way the term has been bandied about in the press and in numerous conferences on employee relations in the public sector. The same point was noted by Robert McKersie and Laurence Hunter in their book, *Pay, Productivity and Collective Bargaining,* in which they offered alternative definitions of productivity bargaining: one focusing on the payment system, i.e., more pay for greater worker output; the other focusing on distribution of cost savings resulting from changes in organization and working methods

according to some previously agreed upon formula.[13] In addition, many persons think of productivity bargaining as a way of getting more work for the same amount of money or the same amount of work with fewer employees. Others conceive of it as a way to improve the quality of the employees' working life, principally through increased worker participation in managerial decisions.

In his recent evaluation of productivity bargaining in the public sector, McKersie notes an increasing interest in that concept in the past few years, but expresses the opinion that "at the county and municipal levels, the idea will never become a fad."[14] His reasons are instructive:

"Most productivity improvement programs initiated in the future [he concludes] will run the 'gauntlet' of collective bargaining. Management will be forced by the realities of increasing union strength and interest as well as the advantages of collaboration to bring their productivity plans to the bargaining table, i.e., to engage in productivity bargaining."[15]

The key word here is "bargaining," as Rudolph Oswald stresses in his essay in the same IRRA volume. Asserting that productivity improvements in the public sector "are peculiarly labor-oriented, rather than technology induced," he continues:

"However, before one can move to productivity bargaining, there must be a strong underpinning of true collective bargaining. Without that base, there is no foundation to build on for future mutual trust. Job and income maintenance guarantees are also prerequisites for achieving employee cooperation to change work methods. Only then can the worker approach the changes secure in the knowledge that the productivity program will not threaten his livelihood."[16]

Here, then, according to Oswald, is part of the problem: In times of financial stress and pressures to cut costs, the resulting actions by management tend to undermine the basic premises of collective bragaining. Nor is that all. As strikes increase and public resentment against government employees continues to rise, public managers become less willing to take responsibility for decisions reached in collective bargaining. This accounts for, among other things, the relatively high incidence in recent weeks of what seem to me idiotic and unworkable proposals to require instant public referenda on all new wage bargains in the public sector before they can be put into effect.

A Prescription for Crisis

In a recent address,[17] Donald H. Wollett, the Director of Employee Relations in New York State, offered his "prescription for crisis," which seems to me to make a lot of sense. In essence, he recommends that public management accept its responsibilities to take the initiative in eliminating waste and mismanagement in its own ranks,

[13] Robert B. McKersie and Laurence C. Hunter, *Pay, Productivity and Collective Bargaining* (London: Macmillan, 1973), pp. 4-5, quoted in Robert B. McKersie, "An Evaluation of Productivity Bargaining in the Public Sector," in *Collective Bargaining and Productivity*, eds. Gerald Somers, Arvid Anderson, Malcolm Denise, and Leonard Sayles (Madison: IRRA, 1975), p. 52.

[14] *Ibid.*, p. 62.

[15] *Ibid.* (Emphasis supplied).

[16] Rudolph A. Oswald, "Bargaining and Productivity in the Public Sector: A Union View," in Somers, Anderson, Denise, and Sayles, pp. 100-01.

[17] Donald H. Wollett, "Public Employee Bargaining in Crisis," an address to the International Personnel Management Association, Albany, New York, Jan. 28, 1976.

and then to persuade labor organizations that certain hard choices must be made if the collective enterprise is to survive.

As he says, responsible unions can and will take "no" for an answer to unacceptable economic demands if, but only if, all other options have been carefully explored and the reasons for their rejection convincingly made. To put the matter in another way, what is needed now is not less collective bargaining, but more. And both sides must be prepared to carry out their responsibilities, not only to protect their own institutional interests, but also to safeguard those of the general public, of which they also are a part.

Naivete or Reality?

I realize that there is a strong temptation to dismiss what I have just said as naive rhetoric, the triumph of hope over experience. But let me put this question: Does anyone in this audience really believe that the problems of maintaining adequate public services at a cost the consumers are willing and able to pay in times of economic restraint or, for that matter, at any time, can be solved by the unilateral action of management or of employees, or by legislative fiat?

The plain fact is that collective bargaining in the public sector is a reality; it is here to stay; it is, I believe, an irreversible process. Our job is not to prevent it, abolish it, or contain it. Rather, our job is to try to make it work better. I shall conclude, therefore, with some observations about the conditions I think necessary in order to make collective bargaining perform more efficiently.

Essential Conditions

Nothing I have to say on this subject is new, but it all bears repetition. First, collective bargaining in the public sector requires a proper statutory framework. Executive orders or administrative regulations are not an acceptable substitute. An adequate statute or ordinance must provide, at a minimum, for the following rights:[18] (1) the absolute right of all government employees at state and local levels to organize and to engage in collective bargaining (as distinguished from meet-and-confer procedures) over wages, hours, and other terms and conditions of employment; (2) the right to an orderly procedure for dealing with all questions of representation, including determination of appropriate bargaining units, conduct of elections, and related matters; (3) the right to negotiate for a provision in collective agreements for the final and binding arbitration of grievances by a neutral third party; (4) the right, in the absence of a legal right to strike, to an impasse procedure leading to settlement of disputes over interests; (5) the right of access to an independent agency with the power and the means adequately to administer all provisions of the statute; and (6) the right to judicial review of any final orders of that agency.

Second, these rights of government employees must be matched by statutory guarantees of public management's right to manage. By this I do not mean that legislative bodies should require that broad management rights clauses be written into all collective agreements, or that the scope of bargaining should be sharply restricted by statute. Such tactics merely serve to frustrate collective bargaining. I am thinking, rather, of provisions that

[18] These rights were first enumerated in Benjamin Aaron, "Federal Bills Analyzed and Appraised," LMSR *Newsletter*, vol. 5 (Nov. 1974), p. 4.

make it possible for government managers to organize strong management teams consisting of persons unhampered by conflicts of interest in the performance of their duties.

Third, because collective bargaining is a relatively new phenomenon in the public sector, both sides, but especially management, need to develop and to maintain training programs in the philosophy and techniques of collective bargaining.

Fourth, we need credible alternatives to the strike and, yes, to the lockout. One of the safest predictions one can make is that, before long, governmental bodies in this country will discover, as their counterparts in Sweden have learned, that the lockout is a feasible and effective weapon in some types of interests disputes. I have never favored strikes by public employees, but our experience over the last 15 years has convinced me that neither statutes nor judicial decisions can prevent their occurrence. I am also convinced, however, that public employees will avail themselves in most instances of any feasible alternatives to the strike.

Providing such alternatives is a very difficult, but not impossible, task. I say "alternatives" because I do not think any one procedure will be adequate for all groups and situations. That is one reason why I oppose a single, preemptive federal law governing collective bargaining in the public sector, and why I favor continuing experimentation within the borders of the separate states.

In respect of impasse procedures, it seems to me unfortunate that some labor and management groups uncritically lump all the various procedures designed to settle unresolved interests disputes into the category of compulsory arbitration, and then damn them indiscriminately because they bear that label. Granted that arbitration works best when it is voluntary rather than mandatory, we ought not to allow the best to become the enemy of the better. There may be instances in which compulsory arbitration is clearly a better way to settle a dispute than is a resort to a strike or a lockout. More important still, some of the procedures which, if allowed to run their course, would culminate in some form of imposed settlement, will themselves engender a willingness in both parties to reach a voluntary agreement at an earlier stage in the process. The Michigan final-offer statute, which covers police, firefighters, and deputy sheriffs, and which applies only to economic issues, is one example of such a procedure.[19]

Commitment

Fifth, we need a stronger commitment by public management and by public organizations to making collective bargaining work. This is the same point made by Wollett to which I referred earlier. Although it may seem parodoxical, public management has lagged most in its willingness and ability to manage within a system in which decision-making is shared in varying degrees with employee organizations. Too many public managers confuse management with dictation; too few of them are willing to accept the responsibility to initiate ideas about reducing costs, increasing productivity, and improving the quality of working life, to defend those ideas in frank discussions with employee

[19] See Charles M. Rehmus, "Is a 'Final Offer' Ever Final?" in *Arbitration—1974, Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators,* eds. Barbara D. Dennis and Gerald Somers (Washington: BNA, 1975), pp. 77-81.

representatives, and to compromise when necessary.

Employee organizations have a responsibility to accept the limits imposed by external conditions, to give up certain guarantees in respect of wages and working conditions that have carried over from the time when there was no collective bargaining, and to refrain from "end runs" to legislative bodies in order to secure through lobbying what they failed to achieve through collective bargaining.

In conclusion, let me remind you that the course of collective bargaining anywhere, like that of true love, never did run smooth. In times of economic stress or of great social unrest, collective bargaining in both the public and the private sectors is apt to encounter difficulties. Although the outlook for collective bargaining in the public sector in the immediate future is fraught with troubles, I am confident that it will survive and continue to spread.

[The End]

SESSION I

Collective Bargaining Strategies in the Context of Unemployment and Inflation

The Economic Context

By MICHAEL H. MOSKOW

Council on Wage and Price Stability

COLLECTIVE BARGAINING STRATEGIES for 1976 have been strongly influenced by national economic developments over the 1973-75 period. Of course, other factors, such as the desire to restore customary wage differentials, internal union and management politics, and government actions, have also shaped the demands of workers and employer responses to those demands. While acknowledging the importance of those other factors to the collective bargaining process, this paper will focus on the economic factors underlying collective bargaining strategies in 1976.

In order to understand collective bargaining strategies and decisions in 1976, it is necessary to examine the experience of labor and management over the past few years. There is a sharp contrast between economic developments during the period covering most agreements expiring in 1976 and economic developments over the past decade as a whole. Over the decade, annual increases in real earnings averaged 1-1½ percent, roughly tracking the average annual increase in labor productivity. From 1965 to 1975, most of the workers negotiating major agreements this year experienced gains in real hourly earnings. Table 1 shows that for six of eight major industries negotiating new agreements in 1976, average hourly earnings rose over the 1965-1975 decade at a greater rate than did the Consumer Price Index. Also, in some industries, fringe benefits have been growing faster than hourly earnings, so that total hourly compensation increases were greater than hourly earnings increases.

After-tax corporate profits—one indicator of the health of employers and ability to pay—rose by roughly 60 percent over the decade, as compared to the 71.2 percent increase in the CPI.

TABLE I

1965-75* Change in Average Hourly Earnings for Workers Negotiating New Agreements in 1976

Industry	*1965 AHE*	*1974 AHE*	*1965-75 % Change*
Contract construction	$3.64	$7.24	98.9%
Trucking and trucking terminals	3.00	6.25	108.3
Women's and misses outerwear	2.03	3.28	61.6
Retail food	2.04	3.96	94.1
Tires and inner tubes	3.59	5.87	63.5
Electrical equipment	2.59	4.61	78.0
Motor vehicles	3.37	6.72	99.4
Meatpacking	2.97	5.62	89.2
Total private nonfarm employment	2.45	4.53	84.9
CPI			71.2%

* July figures

SOURCE: U. S. Department of Labor, Bureau of Labor Statistics

The 1973-75 Experience

The 1973-75 period was marked by an explosion of inflation which did not subside rapidly despite a decline in economic activity that was at first gradual, then precipitous. The inflation brought about a deterioration in real income for millions of Americans, and this decline in real income, caused in large part by food and energy price increases, reduced demand, caused inventories to accumulate, and ultimately reduced production and raised unemployment. Real average hourly earnings—which had risen in each of the previous eight years—were flat in 1973 and fell by 2.5 percent in 1974 as increases in average hourly earnings were more than offset by rising prices of consumer goods. The deterioration in real earnings both caused and was exacerbated by the 6.6 percent decline in real output that occurred between the fourth quarter of 1973, when the recession began, and the first quarter of 1975.

The experience of U. S. households during this period, of course, was not unique. Other industrialized countries also experienced high rates of inflation against a backdrop of stagnating economic activity. Over the 12-month period ending in May 1975, consumer prices rose by 25.0 percent in the United Kingdom, 19.7 percent in Italy, 14.1 percent in Japan, and 12.1 percent in France, as compared with 9.5 percent in the U. S.

What factors contributed to this burst of inflation? First, the oil cartel, which quadrupled oil prices, increased costs throughout the world economy and contributed heavily to inflation. Second, poor harvests in many areas and the time lags associated with an expansion of supply to meet rising demand sent food prices soaring. Increases in food and energy prices together accounted for

62.4 percent of the increase in the Consumer Price Index in 1973 and 36.0 percent in 1974. Third, the removal of price controls in the U. S. in the second quarter of 1974 led to subsequent sizable price increases in many industries.

Thus, the U. S. economy, in which sales, employment, and profits had been growing in the 1972-1973 period while inflationary pressure was pent up but not eliminated by wage and price controls, was subjected to several "external" shocks emanating from agricultural and energy developments as well as the removal of controls. In addition, price increases in other sectors of the economy, such as housing and health care, made important but relatively smaller contributions to the overall rate of change in consumer prices.

In recent months, increases in oil and food prices have tapered off, contributing to the noticeable reduction in the rate of increase in consumer prices. The CPI, which rose by 12.2 percent during 1974, increased 7.0 percent in 1975, and at a seasonally adjusted annual rate of 2.9 percent in the first quarter of 1976.

Although this is encouraging news, we cannot be complacent about inflation. For 5-6 percent inflation, which most experts forecast for 1976, is well above the 1-3 percent rates of the early postwar period, and as the recovery, which is now a year old, gathers strength, the risk of a resurgence of inflation increases. Although the overall rate of increase in prices has abated, there are still pockets or sectors of the economy in which prices are rising sharply.

Recent experience has taught us that inflation is not simply the result of excess demand. We have learned that rapid inflation may flare up in certain sectors of the economy even at relatively low levels of overall resource utilization, and then spread through the rest of the economy until relative prices are restored. This realization does not deny that spending by consumers, businesses, and government is an important factor affecting inflation. But factors such as major disruptions in individual product and labor markets and international economic developments can generate inflationary pressure even when there is substantial idle plant capacity and labor market slack in our economy. Moreover, we have learned that the rules, regulations, and rate-making procedures of the government can make the private economy more inflation prone, and that government programs and policies should be continuously and carefully evaluated to determine whether the benefits they provide justify the costs.

The Impact of Recent Experience on 1976 Bargaining

Neither inflation nor recession were unknown to U. S. workers and firms, but the phenomenon of "stagflation," or the presence of substantial inflation in an environment of stagnating or deteriorating economic activity—which has characterized much of the 1970s—is a departure from the earlier postwar period. The impact of simultaneous inflation and labor and product market slack has caused a peculiar dilemma for U. S. workers and firms. In the case of many workers, it created the problem and challenge of striving to obtain compensation increases that are high enough to preserve purchasing power in the face of inflation, but not so high as to undermine further an already shaky employment situation. In other words, workers as a whole were buffeted by the erosion of purchasing power on one side at

the same time as the threat of job loss loomed on the other side.

U. S. businesses also faced a dilemma. Inflation for them meant rising costs, creating the temptation or incentive to raise prices to maintain profit margins. At the same time, however, a deteriorating sales position, resulting from stagnant demand, meant that price increases would threaten to dampen sales further, so that maintaining profit margins might be achieved at the expense of sales. Thus, firms also were faced with the problem of raising prices enough to cover as much of cost increases as possible, but not so much as to worsen further a disappointing sales performance.

It is important to recognize that these generalizations about the U. S. economy in aggregate terms can be very misleading for particular industries or groups of workers. While the nation as a whole was plagued with the twin problems of inflation and unemployment in the 1973-75 period, some firms and workers were faced by one problem, but not the other, some by both, and different industry and occupational groups suffered these problems to much different degrees. Table 2 gives just a glimpse of the diversity of experiences facing U. S. workers in the 1973-75 period.

In January 1976, the Council on Wage and Price Stability completed a report on 1976 collective bargaining negotiations. This study analyzed recent trends in employee compensation and business profits against a backdrop of economic developments in the major industries in which contracts are expiring this year: automobiles, trucking, electrical equipment, rubber, apparel, retail food, meatpacking, and construction.

The preparation of this report reinforced our awareness of the remarkable

TABLE II

1973-75 Change in Average Hourly Earnings for Workers Negotiating New Agreements in 1976

Industry	*January 1973 AHE*	*December 1975 AHE*	*% Change from Jan. 1973 to December 1975*
Contract construction	$6.42	$7.51	17.0%
Trucking and trucking terminals	5.17	6.38	23.4
Women's and misses outerwear	2.84	3.33	17.3
Retail food	3.20	4.08	27.5
Tires and inner tubes	5.20	5.86	12.7
Electrical equipment	3.80	4.78	25.8
Motor vehicles	5.39	6.89	27.8
Meatpacking	4.64	5.84	25.9
All manufacturing	3.98	5.00	25.6
Total private nonfarm employment	3.77	4.68	24.1
CPI	127.7	166.3	30.2%

SOURCE: U. S. Department of Labor, Bureau of Labor Statistics

diversity of collective bargaining situations in the U. S. It strengthened our doubts about the usefulness of generalizations concerning likely or desirable collective bargaining settlements.

There are several aspects to this diversity within the U. S. labor force. First, about three-fourths of American workers do not belong to labor unions, although many of these workers are affected, directly or indirectly, by the provisions of collective bargaining agreements. Second, among organized workers there are important differences in the nature of collective bargaining between the private and public sectors of the economy. Third, within the private sector, collective bargaining patterns and practices vary widely across industries.

Some industries, such as the automobile industry, have a completely unionized workforce represented almost exclusively by one union. Others, such as the airline industry, are characterized by bargaining between employer groups and numerous different unions. And in some industries, such as construction, there are thousands of employers and almost as many nonunion workers as there are union workers.

Industries are in different states of economic health, and this can be an important determinant of variations in wage and benefit increases. There are both cyclical and longer-term trends in the economic viability of an industry that affect the relative bargaining strengths of labor and management. In the 1973-75 recession, some industries and worker groups suffered much more than others. In the current period of economic recovery, unemployment is unevenly distributed across industries, and as a result, job security is a relatively more important consideration at the bargaining table in 1976 in some industries than in others.

Collective bargaining settlements will also be influenced by such industrial characteristics as whether the industry is regulated, how labor intensive the production process is, and so on. As mentioned at the outset, collective bargaining settlements are also likely to vary with, and respond to, worker attempts to maintain or restore what they believe are customary or appropriate wage differentials, the internal political structure of labor unions and employer organizations, and the role of the government in the workplace—both as regulator and employer.

Varied Increases

With all of these factors at work, it should not be surprising that wage and benefit increases in a given year vary sharply for different groups of workers. Some receive no increase in pay or benefits; some receive very great increases. Most are scattered rather evenly in between these extremes. In analyzing the dispersion of wage and benefit increases, one is struck by the smoothness of the distribution of workers across a broad range of settlement levels.

For example, among those in bargaining units covering 5,000 or more workers—the set of workers belonging to larger unions—there was wide variation in wage and benefit increases in 1975. The average first year adjustment was 11.2 percent, but 12 percent received less than a 6 percent first-year hike in wages and benefits, while 22 percent received increases of over 16 percent. This reveals how deceptive an average—or any single number—can be. What is striking about this broad dispersion of settlement levels is that it occurs among a relatively

homogeneous group of workers: those who are members of large unions. One would expect settlement levels among *all* U. S. workers to be spread over an even broader range.

The use of a single number is misleading not only as an average of many wage settlements, but also as a label on a single collective bargaining agreement. Too often an agreement is characterized as high or low, acceptable or unacceptable, inflationary or noninflationary, on the basis of the single number representing the percentage increase in wages during the first year of a multiyear agreement. But what did workers or employers trade in order to obtain a particular first-year wage adjustment? Were the negotiated increases added to a relatively high or low wage base? Workers may have conceded to work-rule changes designed to improve productivity in exchange for a higher first-year raise. Employers may have improved benefit provisions or agreed to a cost-of-living escalator in return for a lower first-year increase. Thus, it is important to examine all of the provisions of a collective bargaining agreement before reaching any judgment about it.

Because conditions vary greatly from industry to industry, it is difficult to generalize about collective bargaining in 1976; the issues and the outcomes are likely to vary significantly. We can say, however, that "protection" is likely to be a key word for bargaining in 1976.

In industries where heavy layoffs occurred in the 1973-75 period, workers are likely to seek improved job protection through such means as a reduction in working hours (reduced overtime, reduced length of the regular workweek, more vacations), improved unemployment benefits, and so on. Of course, in these industries where the recession-inflation combination hit the hardest, employers are also likely to be concerned with protection—the protection of profit margins that may have been severely squeezed in recent years. This concern is also felt in the public sector, where taxpayers are trying to protect themselves from further major increases in taxes.

Workers are concerned not only with protection against unemployment, but also with protection against future inflation. This concern is being manifested in attempts to obtain or enrich the provisions of cost-of-living escalator clauses. Protection is also at the heart of the issue of employee health costs, as both workers and companies see protection from the full burden of the continually rising costs of health care. And protection is involved in increases in benefits designed to permit compliance with the new pension legislation, the Employee Retirement Income Security Act (ERISA). This involves the protection not of current earnings, but of expected future income after retirement.

These attempts to achieve protection are understandable in view of the experiences encountered by labor and management in recent years. It is important to recognize that all segments of the economy suffered a loss of real income during the recent inflation-recession cycle, and that the best protection for all U. S. households is to be found in an economy that is growing at a steady, sustainable pace. **[The End]**

A Management View

By JOHN J. O'CONNELL

Vice President of Industrial Relations
Bethlehem Steel Corporation

MANAGEMENT'S CONCERN in approaching collective bargaining at a time when the nation's economy has been affected by a high level of unemployment and by a high rate of inflation is the same concern which management has in viewing the troubled state of the economy generally, and that concern is with the basic, underlying causes of unemployment and inflation. Constructive results in collective bargaining are necessary to correct the trends which have resulted in high unemployment and in a high annual rate of inflation. Corrective changes in the federal government's fiscal and tax policies are vital parts of the cure for unemployment and inflation, but collective bargaining results must also contribute to that cure.

Before examining the role of collective bargaining, let us look first at the nature of unemployment and inflation in our economy briefly but in some detail. In 1974 and 1975, we experienced rates of inflation, as measured by the Consumer Price Index, of 12.2 percent and 7 percent, respectively. Current estimates are that we can expect to see a 6 percent annual rate of inflation this year and next year. While a 6 percent rate is an improvement over 7 percent, and is certainly much better than 12.2 percent, it is an entirely too high rate of inflation for an economy that has the tremendous potential for the production of goods and services which ours has.

The 12 percent rate during 1974 was largely influenced by extraordinary increases in energy and food prices but 1974, like 1975 and like this year, was also influenced by a basic, inflation-producing fact; we are taking far more out of the producing side of our economy than we are putting into it. We have been increasingly living beyond our means.

The most dramatic example of our nation's living beyond its means is the literally skyrocketing cost of government. Government is, after all, nonproductive, aside from the furnishing of essential services, and is completely dependent upon the productive capacity of our economy for its support. Here is what has been happening to the cost of government. Public employment now stands at 14.9 million persons; one out of six people employed works for government at some level. In the last 10 years, government employment has grown at twice the rate of employment in the private sector.

In the area of public spending, while the Gross National Product has grown 275 percent in the last 20 years, federal spending has grown 400 percent. And, in that same time span, state and local government spending has grown 520 percent. The federal budget has more than tripled in the last 15 years, from $100 billion in 1962 to $374 billion in 1976. Our national debt will reach $707 billion by the end of fiscal 1977, and 45 percent of that

debt will have been created in only seven years—fiscal 1971 through fiscal 1977.

In the last 10 years, while the Consumer Price Index rose 40 percent, the typical family's total annual tax bill rose 65 percent. Thirty years ago, Will Rogers said, "Just be glad you're not getting all the government you're paying for." It seems to me that that statement is even more true today. As I will note in more detail a little later, while the cost of government has been going up at an alarming rate, we have been doing too little to strengthen and improve the producing side of our economy. If we hope to reduce the annual rate of inflation, there is a clear need to both strengthen the producing side of our economy and control and moderate the cost of government. Improving the productive capacity of our economy is clearly related to both unemployment and to collective bargaining objectives.

The Nature of Unemployment

Turning now to the problem of unemployment, it is necessary to examine briefly the exact nature of the unemployment problem in our economy. Last year, 1975, was a contradictory year in that we experienced a peak unemployment rate of 8.9 percent, the worst we have seen since World War II. But, while we were experiencing that very high unemployment rate, the annual rate of increase in wage and benefit costs was 10.2 per cent, an all-time record high for any one year. Experiencing both a record rate of unemployment and a record rate of increase in wages and benefits is another demonstration of the fact that we are taking too much out of our capacity to produce goods and services and putting too little into that capacity.

The most significant unemployment statistics for our purposes here are those for the first quarter of this year. In March, the rate of unemployment had moderated somewhat to 7.5 percent, its lowest level since December 1974. But, more importantly, in March, there were 86.7 million Americans at work. That was an all-time high number of persons employed. The March employment and unemployment statistics demonstrate that our basic problem is created by the fact that our economy has not been able to create new jobs at a fast enough rate. We are seeing a seriously high rate of unemployment at a time when there are more persons at work than has ever before been the case.

Two frequently offered answers to the problem of unemployment are (1) spreading the employment which is available among more people through devices such as the shorter workweek, and (2) providing work for more people by increasing the number of jobs in public-service employment. Those answers are unacceptable, however, because they add nothing to our productive capacity and they increase the already too high cost of government. Anything which adds to the federal, state, or municipal bureaucracies is ridiculous.

As I mentioned earlier, government employment at all levels—federal, state, and local—reached 14.9 million in 1975, and that does not include 2.2 million servicemen and women. The total payroll for those 14.9 million civilian government employees in 1975 was $136 billion! That means that each government employee is being supported by approximately five nongovernment employees, and that support figures out to roughly $2,000 per year. Any remedy that adds persons to the payrolls of government would

accentuate one of the factors creating unemployment and inflation. Such a remedy would be a step in the same direction we have been going—taking too much out of our productive capacity and not putting enough into that capacity. This is one reason why management is opposed to the Humphrey-Hawkins so-called full-employment bill, which is currently under congressional consideration.

Lagging Productivity Improvement

The real need in our economy today is for increased investment of our wealth and resources in the means of production. The United States has not been returning a high enough proportion of its output to improve and increase its capacity for production. Over most of the last 15 years, we have been in last place among 11 major industrial nations in terms of fixed investment as a share of total national output.

More than 20 percent of our manufacturing capacity is 20 years old or older, and the proportion of newer capacity has been going down, not up. Among 11 major industrial nations, we are in last place in terms of annual productivity improvement. To provide new jobs fast enough, to support the high cost of government, and to moderate the rate of inflation, we need to greatly increase our investment in plants and equipment.

It has been estimated, based on recent surveys, that we will need to create 40 million new jobs in our economy by the year 2000. The creation of that many new jobs will require the investment of tremendous amounts of money because, according to the U. S. Chamber of Commerce, each new job in our economy currently requires an investment of $40,000.

The steel industry is an excellent example of the kind of investment that is required to create new jobs. In order to meet expected increased demand for steel, the industry believes that it will be necessary to build 30 million tons of new capacity by the year 1980. That new steelmaking capacity would create 85,000 new jobs in the industry, and the new capacity would require an annual investment of $5 billion per year.

The ability of our economy to make the very large investments required to produce new jobs is hampered both by the high cost of government and by the declining trend in corporate profitability. Because of the high cost of government, 50 percent of all funds available for borrowing are currently being absorbed by government borrowing.

As a proportion of total national income, corporate profits have declined from 15.6 percent in 1950 to 12 percent in 1960 to 9.2 percent in 1974. The high level of government borrowing that has been necessary, in combination with the competition for remaining funds available for borrowing, greatly inhibits the ability of the private sector of the economy to borrow funds for investment in productive capacity. The steadily declining trend in corporate profits has resulted in greatly restricted ability to reinvest earnings in improved or increased productive capacity and reduced ability to attract additional equity financing for investment.

It might seem that some of the considerations I have mentioned are remote from collective bargaining, but they really are not. The problems of unemployment, inflation, and the high cost of government are inseparable. Coping with these problems requires that we increase our rate of capital formation, and that we increase our investments in new and improved productive capacity. Increased investment

will require changes in federal tax policy to permit greater use of earnings for capital inevstment. It will also require, however, holding collective bargaining settlements within the limits of improved productivity.

The steel industry is an example of our economy's currently restricted ability to generate sufficient funds for investment. I referred earlier to the possible creation of 85,000 new steel industry jobs by 1980. The new capacity from which those jobs would derive would require the investment of $5 billion per year. In 1973 and 1974, however, the industry's two best volume years in history, the industry fell short. As contrasted with the required $5 billion per year, the industry generated only $2.8 billion in net cash flow in each of those two years.

The Cost of Negotiated Settlements

A comparison of productivity improvement and employment costs in the steel industry demonstrates the fact that collective bargaining results are directly related to the ability to generate sufficient capital for needed investments. In 1971, output per man-hour in the steel industry, as measured by an index in which 1967 equals 100, was 104.9 and employment costs in that year, again expressed in terms of an index in which 1967 equals 100, were 131.6. Over the years between 1971 and 1974, output per man-hour in the steel industry increased significantly to 123.4. Over the same time span, however, employment costs increased at a higher rate so that by mid-1974, the index of employment costs stood at 191.1. Although improvements in productivity have been significant, they have not been sufficient to keep pace with the increase in employment costs.

The recent experience in our economy with high rates of unemployment accompanied by high rates of inflation points to the very clear need in collective bargaining for settlements that do not take more out of our productive capacity than we can afford. It is important that collective bargaining settlements should not further inhibit the ability of industry to reinvest earnings in new and improved plants and equipment.

The best solution to the problems of unemployment and inflation is to be found in the increased investment in capital formation that will create new jobs and generate increased levels of national output. Collective bargaining can contribute to that solution by limiting settlement costs to those that can be offset by increased productivity.

In that respect, I do not believe the recent settlement negotiated in the trucking industry between the employers in that industry and the Teamsters union is encouraging. It has been estimated that the cost of the settlement will be about 32 percent over three years. Furthermore, it is important to note that those estimates contain an "if," and that is *if* the annual Consumer Price Index increase is at a rate of about 6 percent. The no-maximum feature of the cost-of-living provisions in the settlement could prove to be much more costly and, therefore, make the settlement even more inflationary, *if* the Consumer Price Index rate of increase goes above 6 percent.

One of the most obvious trends in recent collective bargaining settlements that requires correction is the increasing prevalence of unlimited cost-of-living adjustment clauses. These provisions have had the effect of locking into wage rates the increased adjustment amounts that have resulted from extraordinary short-term increases in

the Consumer Price Index. It is self-evident that open-ended cost-of-living adjustment provisions cannot be reasonably related to the improvements in productivity.

Summary

It is clear that our economy is now at a point at which collective bargaining settlements must contribute to the ability to increase investment in plant and equipment. If we are to find any real and lasting solution to the problems of unemployment and inflation, the solution will come because we have been able to direct a greater share of the output of our economy to increasing and improving our productive capacity. It is equally clear that it is necessary that the parties to collective bargaining recognize the direct relationship between the cost of settlements and the availability of funds for the needed investment.

[The End]

A Labor View

By RICHARD A. LIEBES

Service Employee's International Union

THE DOUBLE hammer-blows of inflation and recession have impacted upon many more activities than just the labor-management scene. From the smallest family unit to the largest arena of international relations, this two-headed crisis has left its indelible mark.

My remarks will deal with some of the effects upon collective bargaining resulting from this strange period of unemployment and inflation. It should be noted that there are those who hold the view that collective bargaining is itself a contributing factor to today's inflation, and more particularly that labor is not a passive victim but rather more of an active villain.

Such a view is demonstrably false. The spendable earnings of production workers today, in 1967 dollars, are less than they were in almost every month of 1971, 1972, and 1973. Even with a slight increase in the buying power of the average worker's earnings since late 1975, it stands today only fractionally higher than in 1971. While most union members under collective bargaining agreements did somewhat better than the average worker, their buying power was also seriously eroded by the economic developments of 1973, 1974, and early 1975.

Inflation has not been caused by excessive wage increases. Secretary of Labor Usery told the Senate Budget Committee last March: "I believe there is general agreement that wages have not been a significant factor in the unusually high rate of inflation of the past three years. I see no signs that this will change."

It is equally evident that inflation is not the result of excessively high employment. I doubt that even the most conservative classical economist today is willing to advance the old thesis that inflation will be controlled by increasing unemployment. The evidence against this supposed tradeoff is just too compelling.

The evidence of the past three years or so also contradicts another piece of conventional wisdom: the idea that an increased supply of labor-unemployment necessarily brings down the price of labor.

Has Unemployment Affected Settlements?

What has been the impact of the jobless on collective bargaining settlements? During the great depression of the '30s, there was a clear correlation between idle workers and starvation wages. This phenomenon is not evident today. In the construction trades, official unemployment figures topped 20 percent for several months in 1975, and even double that in some regions; and yet, the average weekly earnings of employed construction workers kept pace with the earnings of workers in more stable industries.

A few months ago in the San Francisco area a new amusement park accepted applications for some 2,000 unskilled jobs paying only minimum wages. A reported 34,000 applicants sought to register on the designated day, causing a monumental traffic jam. During the same month that this event took place, several unions in the area reported contract settlements with sizable increases.

I am not suggesting that unemployment has had no effect upon wage determination. The effect has been dampened, however, by factors that were absent in the 30's. The extent of unionization is markedly greater. Long-term contracts have become the standard, providing for automatic pay boosts and, to an increasing extent, cost-of-living clauses. The existence of public assistance and social insurance systems, particularly unemployment insurance, have made the jobless a little less willing to take the first low-paying jobs that come along.

Union negotiators must necessarily give greater weight to the inflation factor than to the recession factor in their bargaining. It is axiomatic that any leader, whether a union leader or a political leader, is motivated by personal survival. No labor official will survive very long by advocating or condoning wage cuts. The voices of the employed membership are heard, not those of the faceless unemployed. The active worker wants pay boosts commensurate with increases in the cost of living, better benefits, improved welfare and retirement programs. He does not conceive that any tempering of his very real needs will forthwith solve the larger woes of the economy. He looks to his union for relief from inflationary prices, for greater benefits, and for more job security. And he wants these things now. This attitude can be summarized by remarking that if you have a ticket on the Titanic, you might as well go first-class.

Labor's bargaining strategy in response to the pressures of inflation is, at the minimum, to keep pace with it. Its strategy in the context of unemployment is to give high priority to issues of jobs and job security.

Economic indicators are suggesting that the worst is over. The rate of price increases is slackening, and some encouragement is being read into recent months' figures on the jobless rate. Yet even the "optimistic" Administration forecasts and projections in this election year are grim: an unemployment rate forecast of 6.9 percent in 1977 and a projected unemployment rate of nearly 5 percent as late as 1981. Further predictions from the Administration's budget for fiscal 1977 forecast a 1977 CPI rise of 6 percent, tapering off to 4 percent by 1981.

It is beyond the scope of my remarks here to analyze the accuracy of

this outlook. Certainly there is a valid case for predicting that things will get worse, not better. The AFL-CIO has described the official forecast for next year as "unbelievable optimism." But even at face value the Administration figures would mean some six to eight million jobless for five successive years, with consumer prices continuing to escalate at unacceptable levels.

If it should be the case that we have weathered the worst of the current economic storms, then some guidance for collective bargaining strategies in the coming year may be found in a review of recent settlements. I noted earlier that organized workers have done somewhat better than the unorganized. Major 1975 wage settlements—those covering 1,000 or more workers—averaged 10.2 percent. Most of the settlements were front-loaded in the first year, with average annual pay boosts over the term of the 1975 agreements amounting to 7.8 percent. In the face of inflation, these were moderate gains.

Cost-of-Living Escalators

There is support for the conclusion that unions have exercised considerable restraint in current negotiations. Most workers have a pretty commonsense attitude and are not seeking confrontations. The major demand has been to catch up with rising prices. Together with this effort, there has been a marked resurgence in the negotiation of cost-of-living clauses. A majority of all workers under major agreements are now covered by escalator clauses. As many as eight million workers were estimated to be under such provisions at the end of 1975.

Of course, there are many variables in the way that cost-of-living clauses are drafted, and their effectiveness in keeping pace with inflation varies tremendously. A recent study by the AFL-CIO has concluded that, because of time delays between price changes and wage adjustments, the average worker under the usual cost-of-living clause "really only recovers 50 percent of purchasing power lost to price increases."

The building trades, perhaps the industry most severely affected by the economic crunch, have addressed themselves to the question of restraint in current negotiations. Late last year the president of the Building and Construction Trades Council cautioned the affiliated international unions to exercise "self-appraisal, self-criticism, and self-examination" in the search for solutions to that industry's problems. A number of 1975 construction industry settlements worked out cost-cutting provisions, the Bureau of National Affairs recently noted, including waivers of wage increases, delays in deferred increases, cuts in existing rates, lowering of overtime premiums, relaxation of work rules, and no-strike pledges.

In 1976 there are more major bargaining agreements expiring than there were in the relatively light bargaining schedule of 1975. Major contracts covering 4.5 million workers are open this year, compared with 1975 reopenings affecting 2.8 million workers.

Much attention is being focused on the auto industry negotiations coming up this summer. The special convention of the UAW adopted a bargaining platform in late March. UAW President Leonard Woodcock urged the delegates to make the broad issue of job security the central theme of the union's platform. The convention adopted a resolution calling for no fewer than ten "approaches" to the general goal of preserving and creating jobs. These approaches include major

demands for reduced overtime and shorter working hours, and include other alternatives of longer vacations and weekends, and retirement incentives for older workers.

How Has the Public Sector Fared?

My remarks would be incomplete without some reference to the special nature of current collective bargaining in the public sector. About one out of five civilian workers are employed in some branch of federal, state, or local government. This huge sector is nevertheless often overlooked when labor relations problems are analyzed.

The nature of labor-management relations is much different in public employment. There have been dramatic increases in the numbers of public workers covered by union agreements. But collective bargaining doesn't work in the same way. There is no single set of rules equivalent to those set by the National Labor Relations Act in private industry. A union shop is generally not achievable, and even lesser forms of union security are typically absent. Some jurisdictions place severe constraints upon the scope of bargaining. Where written agreements exist, they are usually for one year rather than for the longer terms found in private industry. The right to strike, with only a few exceptions, is not legalized. Even exclusive bargaining rights are by no means the general rule at state and local levels. The whole framework of collective bargaining is still very much in a fluid state.

Unemployment has impacted somewhat less severely upon workers in the public sector. But the recession has had a damaging effect on state and local government, and the ravages of inflation have intensified the fiscal crisis that many public agencies are suffering. Public sector collective bargaining has obviously suffered from this crisis as well. What are the current strategies of public worker unions in this complex arena? These organizations face all of the difficulties of their private-sector colleagues, and many more.

One of the most serious problems facing public worker unions is that of impasse resolution. The public employer is not easily defined. Cost pass-through channels are clogged with obstacles that are not encountered in private industry. The strike, as noted above, is generally illegal. In spite of this bar, however, the strike weapon has been utilized with well-known frequency in the public sector. In fact, the very frequency of the resort to strikes is indicative of the lack of meaningful impasse machinery.

The last several years of inflation/recession have not only intensified city and state fiscal problems, they have also hardened the people's resistance to tax increases. These pressures have brought about the novel situation of public worker layoffs, together with new vigorous efforts by public officials to take a tough line on salary adjustments.

The long, bitter, crippling San Francisco strike, which began on April 1 of this year, while it has had many unique facets, has been basically a confrontation between craft unions fighting against large pay cuts and city officials determined to reflect their understanding of the taxpayers' concern with cost-cutting. In other communities with similar problems, there are increasing instances of union restraint in arriving at moderate settlements.

A great danger facing union leadership in these uncertain times, both in the public and private sectors, is that of becoming the whipping-boy. A grow-

ing attack against labor can be anticipated, particularly as the aftermath of such confrontations as in San Francisco. Unions do not get their story across very well. It is easier for the public to focus upon labor's efforts to keep up with inflation and fight for job security than it is to get at the root causes of our present malaise. In the foreseeable future, the major collective bargaining struggles of unions will center more on staying where they are rather than on pioneering in new endeavors. **[The End]**

A Mediator's View

By PAUL YAGER

Federal Mediation and Concilliation Service

THE MEDIATOR, be he civil servant or private practitioner, is viewed by the man-in-the-street as a guardian of the public interest, particularly at times of economic stress such as during a period of high unemployment and inflation. The man-in-the-street equates the public interest with the enforcement of policies and programs which may be intended to reduce unemployment or control inflation. Therefore, before addressing the mediators' view of the challenge to collective bargaining in such a context, I feel compelled to acknowledge the man-in-the-street's view and to state clearly that no mediator should ever encourage defiance of policy or violation of laws while he is performing his prime function—the facilitating of collective bargaining.

However, at times of economic stress, all institutions may be weakened. Strengthening the institutions that provide survival values is a function of the highest public interest. Therefore, mediators who are conscious of their public duty to serve the institution of collective bargaining are likely to be even more zealous about performing their tasks to encourage viable agreements that are mutually satisfactory when the vitality of collective bargaining is sapped by wage and price controls, guidelines, monitors, "phases," and other invitations to the negotiators to abdicate their own responsibilities. In short, then, the mediator is neither a cop nor a bootlegger. He is the standard-bearer of sound collective bargaining when that institution is distressed by economic viruses affecting the community-at-large.

A mediator's view of collective bargaining strategies in any context, let alone unemployment and inflation, is cropped and distorted because he seldom has a full view of the entire labor-management relationship or of a particular negotiation. He never sees the entire performance from the point when the issues are first formulated or anticipated until the final evaluation when the dust has settled. The mediator is a tactician, not a strategist. His tactics flow from the instantaneous procedural decisions which cannot reflect profound problems such as unemployment and inflation. He experiences phenomena external to the specific relationship, such as unemployment and inflation, only as such phenomena are manifested by the conduct and statements of the representatives of labor and manage-

ment. When unemployment and inflation are features on the collective bargaining landscape, the nature of that landscape does influence the parties, their priorities, and the settlements they make, but this influence is subtle and not always clear to the mediator.

The Unemployment Problem

The most familiar problem, of course, is unemployment. The fact of unemployment, or the memory of unemployment, haunts most negotiators because the negotiators of 1976 were either adults or children during the great depression. The stresses of that time are still familiar to them. The employment implications of every negotiated agreement are in the air, even if there is no immediate unemployment problem to highlight those implications.

When there are unemployment problems close at hand, the negotiators must be concerned, and the implications become more manifest. It is at such times as these that the concerns of the older depression generation come alive for the younger union members. In general, however, the negotiators' responsibility is to come to terms affecting those who are at work. Only when unemployment has reached a high level in a particular industry, company, or plant do devices such as work-sharing, early retirement, attrition, wage freezes, fringe-benefit reductions, stretch-outs, and speed-ups surface at the bargaining table. We have seen more of this in the public sector recently, as a result of the layoffs, threatened and real, in New York City.

Simplistic reasoning might suggest that during a period of unemployment, management would have the advantage of mobilizing hungry workers to replace employees not satisfied with management offers. We know, however, that there are various structural, psychological, sociological, and economic factors that severely limit the availability of a pool of unemployed as a weapon against unyielding unionists in the highly organized urban areas. Therefore, most managements in such areas do not view this "advantage" as very useful in bargaining. Nevertheless, the conditions that create unemployment also influence the climate of negotiations and shape management thinking.

Other factors, such as limited opportunity for casual employment, layoffs of one wage earner in two-earner families, shortened workweeks, and the example of city employees on layoff, dampen union militancy and encourage management to be more assertive at the table. Therefore, the negotiating atmosphere is changed. Management has proposals where they had none before. Workforce control issues become focal points of negotiations. Trade-off strategy emerges and a shift in emphasis is observable. Thus, the challenge becomes manifest when union negotiators who have seldom had to deal with "management issues" must adapt themselves to doing so; hawkish management factions tend to ride high and expect to recover, in one negotiation, workforce control that has been negotiated away during the past 20 years.

The Impact of Inflation

The tremendous impact of the recent inflation, which has been attributed to oil price increases, worldwide food and fertilizer shortages, whiplash effects of the Vietnam war financing, etc., was felt at the collective bargaining table at a time when those same forces, and others, were also creating a cyclical downturn in employment. In many instances, our system of collective bargaining responded to these challenges with amazing vigor, flexibility, and stability.

In contrast to the case in many other nations, the unions in the United States do not generally view collective bargaining as a specific means of redistributing wealth. Therefore, we have seen little or no exacerbation of the inflation resulting from union exploitation of the inflation problem to grab bigger and bigger pieces of the pie. In fact, we have many examples of remarkable restraint on the part of many unions in the face of severe pressure. Some of the restraint, for instance, in construction, textiles, and garments can be attributed to high levels of unemployment which have established the credibility of leaders. Some of the restraint can be attributed to the moderation of other union leaders who boldly convinced their members that wage-push inflation benefits no one, and, therefore, they were able to achieve ratifications of settlements that were acceptable, if not glorified.

Another reason we have seen restraint by some unions is that the conventional arithmetic of collective bargaining has favored perceptible improvements in workers' living conditions. Over the last 25 years, particularly since the first UAW—General Motors cost-of-living agreement, a rough kind of calculation pervades most negotiations. These calculations involve three criteria: (1) purchasing power maintenance, (2) living standard improvements, and (3) ability to pay.

The purchasing-power criterion recognizes the workers' interest in maintaining the existing level without penalty due to inflation. The improvement-of-living-standards factor recognizes two features on the economic landscape: first, higher employee productivity in the economy as a whole and in specific industries, as a result of improved technology (capital investment), and, second, the claim of American workers to improve their standards of living in accordance with the implied promises of our economic and social system. The ability-to-pay factor is a plus or minus that explains the differences among and within industries which may or may not also be conditioned by elements of relative bargaining power.

I realize that this is an oversimplified formula. Yet, as crude as it may be, I have found it a satisfactory explanation of the wage changes I have seen since I became a mediator 25 years ago. Such a matrix is readily susceptible to a variety of adjustments that become necessary in a period of high unemployment and double-digit inflation. Thus, in such a period, we have recently seen the cost-of-living clauses become more complex. Caps are donned; corridors are built; front-end/rear-end loading is devised; cost-of-living adjustments are imputed without reference to specific triggers; triggers are offset; wage reopeners become more popular; the imagination and ingenuity of statesmanlike negotiators reach previously unattempted heights as they seek to achieve as much of the target as is feasible for the specific industry, company, or plant in the context of the external realities (unemployment, reduced demand, distorted costs).

Management's Response

In normal times, management usually responds to union initiatives when wage increases are at issue. However, we should examine more closely a corollary effect that is now gaining momentum among management spokesmen. Some of them argue that labor cost increases negotiated with unions cannot be paid indefinitely from increased productivity resulting from increased capital investment or from increased prices. They point out that such increases must also come from negotiated re-

ductions in unit cost which results from the elimination of inefficiencies in operations that have been built into labor-management agreements, or have become ingrained in daily practices, or are attributable to the workers' attitudes and individual and concerted conduct.

Thus, the tradeoff of "productivity bargaining" has become an important feature in the unemployment-inflation context. The ingenuity and imagination of the management negotiators are the measures of the effectiveness of this ploy. Simple speedups and stretchouts are not viable tradeoff material. However, reduction or elimination of structural obstacles to realizable reductions in unit costs can be won, and patient and careful negotiations can result in modifications of burdensome and costly practices.

I emphasize that patience and care are required elements in any negotiations designed to achieve reduced unit costs by elimination of excessive or redundant labor costs. The reason is that unions are so structured that the leadership cannot survive the political process if it can be tarred by the "sell-out" brush. Entrenched practices that may have become vested, at least psychologically, as property rights cannot be given away; they can be sold. Job security and improved economic status is the coin for such transactions. The buyer must be prepared to see the proposed transaction rejected at first. After persistent or even adamant insistence, supported by specific examples of wasteful practices (not by self-serving generalization), union negotiators may admit the possibility that such a transaction might take place. Then, the coin is examined in minute detail.

Since it is not always easy for sophisticated, computer-equipped management to measure the value of particular "improvements" in workforce control, it is impossible for the individual worker, and for most union negotiators, to measure and weigh the effect of workplace rule changes on their lives and fortunes. Therefore, the negotiators are faced with problems of credibility and tactics and strategy that might overwhelm experienced diplomats. Yet, at many bargaining tables, the negotiators for both sides have met and are continuing to meet those challenges.

Internal Political Issues

The mediator who is involved in such negotiations treads as if he is exploring a mine field. Often, the ordinary politics of the labor and management organizations are further complicated at times of high unemployment and inflation. The unions' political problem is usually more apparent and well known, but we should not lose sight of the political burden carried by the management team. Hawkish management elements view the high unemployment level and the inflationary disruptions of the market as opportunities to be exploited; production people excuse their own inadequacies by blaming the management negotiators for failure to recover control of the workforce given away at the workplace; the comptroller tunes up the computer to print a new bottom line; marketing departments complain about prices; and everyone is aware of the white-collar layoffs.

With all the heat that their constituencies could build up on company and union negotiators, their reluctance to deal directly and meaningfully with the issues is understandable. Therefore, the mediator must exercise great skill in preserving a constructive climate for negotiations, establishing a harmonic tone, inviting imaginative solutions, and providing viable alternatives when the negotiators themselves are

exhausted. Perseverance is the key quality in such situations.

To the credit of union, management, and neutral participants in the process, we have seen some interesting developments in recent years which assure us that the American labor-management community is capable of meeting the challenges. Even if the unemployment rate declines and the inflation abates further, the challenge to reduce unit costs will not disappear. It is a concomitance to improving living standards. Therefore, we can expect the drive in that direction to continue on the collective bargaining scene, and we can also expect the challenge to continue to be met.

What are the Costs?

I see yet another challenging context developing in which collective bargaining will be tested more severely than during the recent period of high unemployment and inflation. That new challenge is partly a consequence of the responses to the unemployment-inflation challenge. Indexed wages and productivity formulas will limit the ability of future negotiators to deal with yet unknown phenomena that will shape the collective bargaining landscape in their time. With the rising costs of most existing fringe benefits (health care and pensions, particularly), the choices future negotiators will have in allocating shares in production to labor will be narrowed. At some point in the future, the amount of precommitted charges may absorb all the funds in discretionary accounts now available for distribution through collective bargaining.

This notion is reinforced when we realize that, as a society, we seem to be opting for more leisure and shorter working lives. We enter the labor force later than our parents did and we leave it earlier than they did; while we are in it, we work fewer hours, days, and weeks. Therefore, the costs of wages and benefits must be charged to fewer and fewer hours during each worker's productive life. Will we be able to continue our ritual collective bargaining dance when the piper calls for his pay?

I am suggesting that we may be moving toward so much rigidity in labor cost determination that we may yet see confirmation of the argument that collective bargaining is obsolete. Therefore, thoughtful practitioners and scholars of collective bargaining should consider if the threat to viable collective bargaining is imminent. If my concern is valid, what alternatives should be pursued to minimize the danger?

A premise of that question is that society wants to preserve collective bargaining as a viable institution so that we can continue to enjoy the benefits of that decision-making mechanism of our economy. If not, what are the alternatives and the burdens on our system that can be expected if collective bargaining expires? We mediators and other devotees of collective bargaining are essentially pragmatists; we take each day's problems and opportunities as we find them. However, we should not allow our pragmatism to lead us into an abyss. The same ingenuity and imagination that we bring to solving our problems at the bargaining table should be helpful to us in preserving and strengthening an institution—collective bargaining—the elimination of which would be a severe blow (cause or effect?) to the economic system that we now know and which has been so effective for us as a democratic society.

[The End]

SESSION II

Affirmative Action v. Seniority

Retroactive Seniority: A Remedy for Hiring Discrimination

By DAVID ZISKIND

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NATURALIST Annie Dillard, while walking in a forest, came upon an old snake skin that had been shed by a reptile in the form of a perfect knot. She spent several hours attempting to visualize how the snake rubbing against tree trunks and rocks slithered from its tubular skin and wriggled it into a knot. I find the same intellectual fascination in trying to understand how the United States Supreme Court can come upon a tangled mess of industrial relations and smooth out the knots, leaving complicated interrelated human beings in positions conducive to social harmony.

Since the United States Supreme Court in the case of *Franks v. Bowman Transportation Co.*[1] has recently resolved a very knotty problem of seniority in employment discrimination cases, it is possible to note the law in that area and at the same time to observe the convolutions of thought, known as the judicial process, which established the law.

In *Bowman,* the Supreme Court declared that the appropriate and presumptive remedy for in-hire discrimination is the employment of the discriminatees with full seniority, back to the date of their application for work. In addition to the majority opinion, written by Justice Brennan, there were two minority opinions, concurring in part and dissenting in part.

The Supreme Court disposed of several questions. (1) A class action filed on behalf of discriminatees by an employee who is later dropped from the suit does not become moot as long as other members of the class have a live and justiciable controversy. (2) The

[1] *Franks v. Bowman Transp. Co., Inc.*, 96 S. Ct. 1251 (1976) 11 EPD ¶ 10,777; 495 F. 2d 398 (CA-5, 1974); 7 EPD ¶ 9401; (DC Ga. 1972) 5 EPD ¶ 8497.

exclusionary clause in the Civil Rights Act, preserving bonafide seniority systems, does not bar the granting of retroactive seniority. (3) An award of retroactive seniority is appropriate under the Civil Rights Act. (4) No differentiation should be made between benefit seniority status and competitive seniority status, but on that the Court split. (5) An award of retroactive seniority is presumptively required of all district courts; the members of the Court differed on the degree of discretion left to those lower courts.

In reaching these conclusions, all members of the Supreme Court resorted to well-known doctrines of law, all considered legislative history, and all cited legal precedents. They stressed different words in the Civil Rights Act and in the congressional reports that led to its adoption. They expressed different primary concerns. The majority emphasized the attainment of equal employment opportunity without limitations that might frustrate the accomplishment of that end; the minority emphasized the balancing of equities between innocent parties. They wanted to allocate the responsibilities of trial and appellate courts differently. From their complex of discussion emerged guiding rules of law that should put to rest much, though not all, future controversy.[2]

Essential facts, not in dispute, were that Bowman Transportation Co. had discriminated against black workers in hiring, transfer, and discharge. To circumvent the Civil Rights Act, the company introduced a "buddy system" whereby no new driver would be hired without the sponsorship of a driver who would train him. Blacks were not sponsored, and blacks hired for other jobs were not transferred to over-the-road positions. A collective bargaining agreement with District 50 perpetuated the discriminatory practices.[3]

The Issue of Mootness

The trial court certified the suit as a class action, but the petitioner who represented certain classes was later discharged for cause unrelated to the action. The Supreme Court found that other class members had a continuing personal stake in the outcome of the controversy over seniority. Be-

[2] Unsettled issues in layoffs and preferential remedies are pending before the U. S. Supreme Court in *Waters v. Wisconsin Steel Works,* No. 74-1064, 502 F 2d 1309 (CA-7, 1974) 8 EPD ¶ 9658. Other lower court cases posing factual situations with unresolved seniority questions are *Watkins v. United Steel Workers, Local 2369,* 516 F 2d 41 (CA-5, 1975) 10 EPD ¶ 10,319; *Jurinko v. Edwin L. Wiegand Co.,* 477 F 2d 1038 (CA-3, 1973) 5 EPD ¶ 8567; vacated 414 U. S. 970 (1973) 6 EPD ¶ 8884; *Jersey Central Power & Light Co. v. IBEW,* 508 F 2d 687 (CA-3, 1975) 9 EPD ¶ 9923; *Meadows v. Ford Motor Co.,* 510 F 2d 939 (CA-6, 1975) 9 EPD ¶ 9907; cert. pending No. 74-1349.

[3] Other factual situations constituting discrimination have been dealt with in *Quarles v. Philip Morris Inc.,* 279 F. Supp. 507 (DC Va. 1968) 57 LC ¶ 9101; *Local 189 United Papermakers v. U. S.,* 416 F 2d 980 (CA-5, 1969) 61 LC ¶ 9328, cert. denied 397 U. S. 919 (1970); *United States v. St. Louis-San Francisco Ry.,* 464 F 2d 301 (CA-8, 1972) 4 EPD ¶ 7688; *United States v. IBEW Local 38,* 428 F 2d 144 (CA-6, 1970) 63 LC ¶ 9463, cert. denied 400 U. S. 943 (1970) 3 EPD ¶ 8049; *United States v. Jacksonville Terminal Co.,* 451 F 2d 418 (CA-5, 1971) 3 EPD ¶ 8324; *Rodriguez v. East Texas Motor Freight,* 505 F 2d 40 (CA-5, 1974) 8 EPD ¶ 9811; *Pettway v. Amer. Cast Iron Pipe Co.,* 494 F 2d 211 (CA-5, 1974) 7 EPD ¶ 9291; *Robinson v. Lorillard Corp.,* 444 F 2d 791 (CA-4, 1971) 3 EPD ¶ 8267; *United States v. N. L. Industries, Inc.,* 479 F 2d 354 (CA-8, 1973) 5 EPD ¶ 8529; *United States v. Bethlehem Steel Corp.,* 446 F 2d 652 (CA-2, 1971) 3 EPD ¶ 8257; *Long v. Georgia Kraft Co.,* 328 FSupp 695 (DC Ga. 1971) 2 EPD ¶ 10,208, 450 F 2d 557, 455 F 2d 331 (CA-5, 1972) 4 EPD ¶ 7647; *Vogler v. McCarty,* 451 F. 2d 1236 (CA-5, 1971) 4 EPD ¶ 7581.

cause it was a live controversy, in an adversary context, and in a form capable of resolution through the judicial process, the Court retained jurisdiction over the classes even though the action had become moot for their representative.[4]

The Exclusionary Clause

The only explicit reference to seniority in the Civil Rights Act is found in an exclusionary clause. That clause, Section 703(h) reads as follows:

"Notwithstanding any other provision . . . it shall not be an unlawful employment practice for an employer to apply different standards . . . pursuant to a bonafide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. . . ."

Before the lower courts, *Bowman* argued that a discriminatory refusal to hire does not affect the bonafides of a seniority system; hence its bonafide system was excluded from the Civil Rights Act and should be left untouched. Before the Supreme Court, it was conceded that the petitioners were not asking for a modification or the elimination of the seniority system. They sought that seniority status within the system they would have joined but for the discriminatory refusal to hire them. That was not affected by the exclusionary clause.

The Supreme Court interpreted the exclusionary clause in the light of its legislative history and logical meaning. There was no mention of seniority in the original Civil Rights Act of 1964 or in congressional committee reports. Some senators had argued the bill would destroy existing seniority systems. Others responded with an interpretative memorandum and a Justice Department statement, the former saying that the Act would be prospective, not retrospective, and the latter stating that the Act "would have no effect on seniority rights existing at the time it takes effect."[5] Later a new version of the bill was introduced with the exclusionary clause; there were no committee reports on it. Senator Humphrey, one of the conferees on the bill, said the clause was not designed to alter the meaning of Title VII and merely clarified its present intent and effect.[6]

On the basis of that legislative history, the Court found the exclusionary clause "only a definitional provision" and said, "it is apparent that the thrust of the section is directed toward defining what is and what is not an illegal discriminatory practice in instances in which the post-act operation of a seniority system is challenged as perpetuating the effects of discrimination occurring prior to the effective date of the Act." There was no intent to have the section modify or restrict relief otherwise appropriate when discrimination occurs after the effective date of the Act. The minority justices agreed.

Appropriateness

The Civil Rights Act of 1964 does not expressly prescribe seniority as a form of relief for employment discrimination. It deals with the remedies available to discriminatees in general terms. Section 706(g) sets forth the broad base upon which courts

[4] *Sosna v. Iowa*, 419 U. S. 393, and *Board of School Commrs. v. Jacobs*, 420 U. S. 128 did not hold the contrary. The issues in *De Funis v. Odegaard*, 416 U. S. 312 (1974) were not raised.

[5] 110 Cong. Rec. 7207 (1964).

[6] 110 Cong. Rec. 12,723 (1964).

may take affirmative action. It states a court may "order such affirmative action as may be appropriate, which includes, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other relief as the court deems appropriate."

The district court, and to a lesser extent the circuit court of appeals, saw in that language no mandate to award retroactive seniority. The *Bowman* decision found and defined the extent of such a mandate. It did so in reliance upon principles declared in other civil rights cases, upon legislative history, and upon the precedent of decisions under other statutes.

The Court found in its major civil rights cases two guiding principles: (1) the "highest priority" for equal employment opportunity, and (2) the principle known as "make whole" relief. It found in the legislative history of the Civil Rights Act a third precept, "the most complete relief possible."

From prior civil rights cases, the majority opinion reiterated the principle of "highest priority"—highest priority for the public policy of outlawing discrimination based on race, religion, sex, or national origin. The Court had declared such a priority in several cases. In each case there were other principal determinations, such as: an adverse arbitration award does not bar suit under the Civil Rights Act,[7] a person who engaged in an unlawful blockade of a plant can still claim that was just a pretext for not hiring him,[8] the requirement of schooling or the passing of a general intelligence test making a disproportionate number of Negroes ineligible is prohibited by the Civil Rights Act,[9] or the winning party in a civil rights action is entitled to collect attorneys' fees.[10] However, in each of these diverse cases the Supreme Court had held the policy of the Civil Rights Act (to eliminate discrimination and to invite and encourage actions seeking that objective) was entitled to highest priority consideration.

In addition to the policy of "highest priority" for the protection of civil rights, the Supreme Court noted the "make whole" objective enunciated in its other decisions[11] and in legislative reports.[12] One of the central purposes of the Act it had said, and it repeated, was to make persons whole for injuries suffered on account of unlawful employment discrimination.

The legislative history of the Act added to these policies of "highest priority" and "make whole" a congressional intent for "the most complete relief possible." The Conference Report accompanying the Equal Employment Opportunity Act of 1972 stated: "The provisions of Section 706(g) are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. . . ."[13]

The majority Court found further precedent for its position in earlier National Labor Relations Act deci-

[7] *Alexander v. Gardner-Denver Co.*, 415 U. S. 36,44 (1974) 7 EPD ¶ 9148.

[8] *McDonnell Douglas Corp. v. Green*, 411 U. S. 792,800 (1973) 5 EPD ¶ 8607.

[9] *Griggs v. Duke Power Co.*, 401 U. S. 424,429-30 (1971) 3 EPD ¶ 8137.

[10] *Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968) 2 EPD ¶ 9834.

[11] *Albemarle Paper Co. v. Moody*, 422 U. S. 405 (1975) 9 EPD ¶ 10,230; *United States v. Georgia Power Co.*, 474 F 2d 906 (CA-5, 1973) 5 EPD ¶ 8460; *Bowe v. Colgate-Palmolive Co.*, 416 F 2d 621 (CA-8, 1972); *Head v. Timken Roller Bearing Co.*, 486 F 2d 870 (CA-6, 1973) 7 EPD ¶ 9420; *Vogler v. McCarty Inc.*, 451 F 2d 1236 (CA-5, 1971) 4 EPD ¶ 7581.

[12] 118 Cong. Rec. 7168 (1972).

[13] 118 Cong. Rec. 7166 (1972).

sions.[14] Customarily, the National Labor Relations Board has ordered employers to reinstate victims of unfair labor practices with full seniority or without loss of any seniority. No differentiation has been made on the basis of the types of seniority, nor were orders modified to preserve the seniority or expectations of other employees. The Court found that the affirmative action called for by Title VII of the Civil Rights Act has no lesser reach.[15]

The minority opinion found the analogy with National Labor Relations Board decisions unconvincing. Those decisions had not discussed the relative equities of victimized and other workers.[16]

The Supreme Court found that "adequate relief may well be denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application." To the majority justices it seemed that, "It can hardly be questioned that ordinarily such relief will be necessary to achieve the 'make whole' purposes of the Act."

To this general conclusion, namely, that it was appropriate to grant seniority relief, there was no dissent. The Court split on the extent of seniority to be awarded and on which court was to determine that.

Benefit and Competitive Seniority

The Court acknowledged that seniority systems and their entitlements are of vast and increasing importance in employment. It referred to the writings of economists and legal scholars on the importance of seniority, quoted a long list of benefits that rode with it, and observed that seniority is used both to allocate scarce benefits and to compute noncompetitive benefits. That differentiation between what it called benefit-type seniority and what it called competitive-type seniority was the dividing line between the majority and minority justices.

All of them recognized the right of discriminatees to be awarded some seniority relief. They parted company, however, on the types of seniority that discriminatees should receive, and the distinction they made was between benefit and competitive seniority rights.

Some seniority rights benefit all who enjoy them without hurting others. The rights to have length of vacation, amount of pension payments, leaves of absence, training opportunities, higher pay, and similar benefits based on seniority do not deprive fellow workers of similar benefits; hence the Court

[14] *Phelps Dodge Corp. v. NLRB,* 313 U. S. 177, 187 (1941) 4 LC ¶ 51,120; *NLRB v. J. H. Rutter-Rex Mfg. Co.,* 396 U. S. 258, 263 (1969) 61 LC ¶ 10,518; *Local 60, United Brotherhood of Carpenters v. NLRB,* 365 U. S. 651, 657 (1961) 42 LC ¶ 16,887; *Nevada Consolidated Copper Corp.,* 316 U. S. 105 (1942) 5 LC ¶ 51,140; *United States v. Georgia Power Co.,* cited at note 11; *Pettway v. American Cast Iron Pipe Co.,* cited at note 2; *Atlantic Maintenance Co. v. NLRB,* 305 F 2d 604 (3d Cir. 1962), enf'g 134 NLRB 1328 (1961) 1962 CCH NLRB ¶ 11,119; *NLRB v. Lamar Creamery Co.,* 115 NLRB 1113 (1956) 32 LC ¶ 70,786; *Golden State Bottling Co. v. NLRB,* 414 U. S. 168, 187-8 (1973), aff'g 467 F 2d 164, 166 (CA-9, 1972) 69 LC ¶ 12,972. See also, *Emporium Capwell Co. v. Western Addition Community,* 95 S. Ct. 977 (1975) 76 LC ¶ 10,657.

[15] *Franks v. Bowman Transp. Co. Inc.,* cited at note 1, at 1267.

[16] *Ibid.* at 1280. They did not involve spokesmen for the workers on the job, and in any event, they resulted from an exercise of discretion by the Board (not appellate courts) which the minority Justices regarded as a trial tribunal occupying the same place as a District Court. They thought the Board's equitable discretion should be allowed the district trial court.

referred to their enjoyment as a benefit seniority status. On the other hand, the right to be retained while others are laid off, to bump junior employees out of their positions, to have priority in rehiring, to get one of limited parking spaces or a preferred place in a punch-out line on the basis of seniority implies that someone else may be denied that benefit because of the preferment, and is therefore competitive. The entitlement to those rights the court referred to as competitive seniority status.

At the Bowman Transportation Company, both types of seniority rights existed. Seniority determined the order of layoff and recall of employees competitively. Job assignments for over-the-road drivers were posted, the workers bid for the assignments they desired, and the man with the highest seniority prevailed—also competitive. Since over-the-road drivers were paid on a per-mile basis, earnings were to some extent a function of competitive seniority. On the other hand, the seniority date of hire determined the length of an employee's vacation and the amount of his pension benefits as noncompetitive benefits.

The entire Supreme Court was of the opinion that discriminatees at Bowman were entitled to benefit seniority status. The majority justices thought the same should also apply to competitive seniority status. Even the minority justices did not rule out the possibility of discriminatees getting competitive seniority status. They were unwilling to have that made mandatory or absolute, and they were of the opinion that the trial court should grant or deny the respective rights based upon an evaluation of equities between innocent white employees and discriminated blacks. The reasoning of all the justices proceeded from a base of equitable and established precepts.

The majority stressed the principles of "highest priority" for the elimination of racial discrimination, the "making whole" doctrine of relief, the legislative declarations for "affirmative action," and the fashioning of the "most complete relief possible." On the basis of those fundamental propositions, they found that a district court's denial of any form of seniority must be viewed in terms of its effect on the attainment of the Civil Rights Act objectives; and they arrived at the conclusion that a denial of any form of seniority is "permissible only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination . . . and making persons whole for injuries suffered through past discrimination."[17]

Justice Brennan, speaking for the majority, concluded their reasoning by saying, "Where racial discrimination is concerned the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[18] Hence to that end, the granting of seniority, even retroactive competitive seniority status, is a presumptive right of the discriminatee.

Injury to the Innocent

The dissenting opinions of Chief Justice Burger, and Justice Powell joined by Justice Rehnquist, took issue with the majority opinion on the ground that innocent workers would be injured by an order of retroactive

[17] *Ibid.* at 1267, quoting from *Albemarle Paper,* cited at note 11, at 421.

[18] Quoting from *Albemarle Paper,* cited at note 11, at 418.

competitive seniority, and equity forbids injury to the innocent. Chief Justice Burger expressed the belief that competitive type seniority "can rarely, if ever, be equitable." In every respect, said he, "an innocent employee is comparable to a holder-in-due course of negotiable paper or a bonafide purchaser of property without notice of any defect in the seller's title." He characterized the majority opinion as "robbing Peter to pay Paul."

Justice Powell criticized the majority opinion as an absolutist view of the make-whole objective. Nothing in the Act or legislative history suggested to him that rectifying economic losses from past wrongs requires the district courts to disregard "normal equitable considerations." The Act speaks of "such affirmative action as may be appropriate" and "such equitable relief as the court deems appropriate." His emphasis was placed on *equitable* considerations and on what the court deems *appropriate* action rather than on *affirmative* action to attain the Act's objectives.

The majority opinion rejected the charge that it was applying an absolute remedy or even a complete remedy. It noted that employees who had obtained jobs, open because there was discrimination excluding others, were not being deprived of any benefits flowing from their in-hire dates. Blacks given retroactive seniority as of the dates they were denied employment or transfers might still be subordinated to a number of employees who would not have been there but for the discrimination. The effect of the decision in the *Bowman* case was regarded by the majority as "a sharing of the burden of past discrimination." They found it "entirely consistent with a fair characterization of equity, particularly when considered in the light [of] the attainment of a great national policy. . . ."

There was precedent for that in civil rights and other great national policies. The quotation about the attainment of a great national policy was taken by the Court from one of its National Labor Relations Act decisions.[19] The Court referred also to the Veterans Reemployment Act and to its decisions awarding seniority status that workers would have acquired but for absence in military service.[20] ". . . [E]mployee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest."[21] In the area of great national policy, the Court found that equity "must not be confined within the narrow canons for equitable relief deemed suitable . . . in ordinary private controversies."

Moreover, seniority expectations of the persons deemed innocent were not seen as an absolute contract right. The Court found that employees have no "indefeasibly vested rights conferred by the employment contract." Private collective bargaining agreements may be amended from time to time, even though to some extent detrimental to the expectations acquired by others under a previous agreement.[22] The Court recognized that labor-management amelioration of past inequities often has the effect of disturbing individual expectations.

[19] *Phelps Dodge Corp. v. NLRB,* cited at note 14, at 188.

[20] *Tilton v. Missouri Pacific Railroad Co.,* 376 U. S. 169 (1964) 48 LC ¶ 18,747; *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U. S. 275 (1946) 11 LC ¶ 51,232.

[21] *Franks v. Bowman Transp. Co. Inc.,* cited at note 1, at 1271.

[22] *Ibid.* at 1271, citing *Ford Motor Co. v. Huffman,* 345 U. S. 330 (1953) 23 LC ¶ 67,505. See also, *Pellicer v. Bro. Ry. & Steamship Clerks,* 271 F 2d 205 (CA-5, 1954) 27 LC ¶ 68,270, cert. den. 349 U. S. 912 (1955); *United States v. Bethlehem Steel Corp.,* cited at note 3.

It appears that the majority Court had an overriding concern for the attainment of the statutory policy to eliminate race discrimination in hiring. To distinguish between benefit and competitive seniority in fashioning relief for discriminatees might frustrate the central statutory purpose of eradicating discrimination and would fail to make the victims of discrimination whole for the injuries they suffered through past discrimination. The minority justices had a greater concern for white workers who might suffer thereby.

Discretion of District Courts

The Justices differed also on whether the balancing of black and white equities should be done by the Supreme Court or left to the district courts. All the Justices acknowledged discretionary authority in district courts to exercise equitable powers, particularly when Congress has spelled out that authority to effectuate the purposes of a statute.[23] The only difference of opinion was over the extent to which district court decisions are subject to review by the higher courts and whether there are mandatory guidelines which the district courts may not overstep.

Justice Powell had no quarrel with the Supreme Court setting a presumption that discrimination victims should be granted benefit seniority status. He said, "[N]ormally this relief . . . will be equitable." But competitive-type seniority disadvantages "perfectly innocent employees." Equity requires a consideration of both the claims of discrimination victims and incumbent employees, in a balancing process. The balancing of equities may go either way, for or against discriminatees or incumbents; however, that balancing should be done by the district courts because in his judgment Congress mandated that.[24]

Justice Brennan, speaking for the majority, stated that Congress vested discretion in the district court not to authorize the court's "inclination,"[25] but to invoke its judgment; and the court's judgment must be guided by sound legal principles. The discretionary power of district courts was not intended to limit appellate review, "but rather to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case";[26] and a denial of seniority was permissible only for reasons which, if applied generally, would not frustrate the central statutory purposes of the Civil Rights Act.

[23] *Franks v. Bowman Transp. Co. Inc.*, cited at note 1, at 1267.

[24] *Ibid.* at 1276-7. He argued the majority decision went too far in making discriminatees whole: ". . . [C]oncern to effectuate an abstract conception of make whole should be tempered by concern over Congressional intent." He resorted to two expressions of congressional policy which did not apply to the case before the Court but which he thought carried a caution. (1) Congress had validated existing seniority plans, and (2) the Civil Rights Act prohibited preferential treatment based on underrepresentation of a minority in employment when compared with its representation in the community or in the available labor pool. Both of these provisions of the Act, Justice Powell acknowledged, were not applicable to the facts of the *Bowman* case; but they constituted restraints, and he thought they should give the Court pause before it imposed a duty on district courts to grant relief that constituted another type of preference.

[25] *Ibid.* at 1267, quoting from *Albemarle Paper*, cited at note 11, at 2371.

[26] *Franks v. Bowman Transp. Co. Inc.*, cited at note 1, at 1267.

[27] *Ibid.* at 1268-69. The majority opinion illustrated the pitfalls in the district court exercise of discretion by refuting its reasoning on two aspects of the *Bowman* case. (1) The trial court denied class relief because the petitioners had not filed adminis-

(Continued on next page.)

The denial of competitive-type seniority generally would frustrate the central statutory purposes.[27] In the interest of maintaining judicial consistency throughout the land, the majority set down a presumptive remedy for district courts to follow, namely, the grant of full retroactive seniority, both benefit-type and competitive-type seniority.

In a significant footnote, Justice Brennan explained how the district court must proceed. They "should take as their starting point the presumption in favor of rightful place seniority relief and proceed with further legal analysis from that standpoint," and "such relief may not be denied on the abstract basis of adverse impact upon the interests of other employees, but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases."[28]

Under the collective bargaining agreement at Bowman, full seniority was deferred until completion of a training or apprenticeship program and other preliminaries required of all new hires. This was permissible, and to determine the facts concerning individual qualifications, the case was remanded to the district court.

Comment

The Supreme Court having spoken, trial courts will undoubtedly follow its guidance, and most employers, unions, and employees will attempt to act in compliance with the law. The Court itself, however, said only certain issues were being decided by it and certain matters were not before it. It did not consider the possibility of an injunction ordering the employer to "hold harmless" all employees in a layoff, nor the possibility of awarding money damages or "front pay" in favor of each employee, discriminatee and incumbent; nor did it deal with the propriety of remedial action against a guilty union.[29]

Other open questions may be enumerated, but I prefer to evaluate what the Court did. In my judgment the end result of the Bowman decision, setting a presumption that racial discriminatees should be employed with full retroactive seniority, is correct, legally and socially. Congress established sound public policy of equal employment opportunity, still far from being attained; to effectuate that purpose, it is necessary to give discrimination victims the benefits they would have enjoyed were it not for the discrimination—as fully as possible.

Some benefits like the initial joy of being hired or promoted can never be fully recreated. Nor can the humiliation and emotional trauma of discrimination be completely obliterated. Some injury will remain even to the blacks given retroactive seniority. If, in the process of doing justice to discriminatees, innocent persons are deprived of benefits, we must analyze their rights and expectations and treat them also as justly

(Footnote 27 continued.)
trative charges with the Equal Employment Opportunity Commission. That holding was rejected by the Supreme Court, as it had been by the circuit court, because Congress decided not to require an exhaustion of Equal Employment Opportunity Commission remedies when it enacted the Equal Employment Opportunity Act of 1972. (2) The district court held that to establish a claim for a transfer, the applicant had the burden of proving there was a vacancy for which he was qualified. This position was also deemed untenable in that once race discrimination was established, the burden of showing the lack of a vacancy for a transfer or the existence of personal disqualification shifted to the employer. The Court disposed of those grounds for denying relief as abuses of the district court's discretion. It then went a step farther.

[28] *Ibid.*, footnote 41 at 1271.

[29] *Ibid.*, at 1270.

as possible. It does not follow logically or necessarily that we must deprive innocent blacks of benefits they may enjoy to preserve all the benefits innocent whites may enjoy.

I believe it is possible to protect both groups—in a variety of ways. Theoretically, it would be possible to give two employees equal seniority and to require the employer not to lay off either until the need for both of them no longer exists, or to require the employer to recall them both at the same time after a layoff, or conceivably even to promote them both to higher paying jobs. That might result in overstaffing or impose other financial hardship on the employer, but we are assuming that the employer was guilty of race discrimination and the penalty is justifiable. There would be other complications in equal or dual seniority, but it would be equitable.

I believe employers and unions are very resourceful, and if told that racial discriminatees must be accommodated under an established seniority system, they will devise ways of avoiding or minimizing great hardship to other individuals. In some plants, seniority is not triggered very often, and in others adjustments are made from day to day with substitute compensations. When faced with the necessity of making accommodations, the collective bargaining parties generally find ways to do so. Perhaps too often one of them is obdurate, and arbitrators or courts are needed. But the ingenuity of management and labor, when under the pressure of law, to reduce a court-imposed hardship to a minimum is almost miraculous. Many consent decrees remodelling seniority practices attest to that.

The *Bowman* decision is obviously not the be-all and end-all of seniority or race discrimination problems. Other remedies are available. There is even another Civil Rights Act. The Civil Rights Act of 1866 is a separate and distinct statute that may supplement the Civil Rights Act of 1964. The Supreme Court did not deem it necessary to comment on that Act in *Bowman;* yet it may be invoked in other cases.[30]

There are administrative regulations and enforcement procedures in the Department of Labor, the Department of Justice, and the Equal Employment Opportunities Commission that govern and affect a wide range of private employment (and public employment) relations, including seniority. Suits filed by these agencies and consent decrees obtained have often had a much more sweeping effect than private actions. There are state Fair Employment Practices acts that have a lesser but similar import.

In each area, there are special rules and applications of the law of equal employment opportunity. All are subject to the principles established by

[30] *Tillman v. Wheaton-Haven Rec. Assn.,* 410 U. S. 431 (1973); *Sullivan v. Little Hunting Park Inc.,* 396 U. S. 229 (1969); *Jones v. Mayer Co.,* 392 U. S. 406, 416,20 (1968); *Gresham v. Chambers,* 501 F 2d 687, 690-1 (CA-2, 1974) 8 EPD ¶ 9613; *Young v. International Telephone & Telegraph Co.,* 438 F. 2d 757, 759-60 (CA-3, 1971) 3 EPD ¶ 8118; *Brown v. Gaston County Dyeing Machine Co.,* 457 F 2d 1377, 1379 (CA-2, 1972) 1 EPD ¶ 9964, cert. denied 409 U. S. 982 (1972) 1 EPD ¶ 9975; *Sanders v. Dobbs Houses, Inc.,* 431 F 2d 1097, 1101 (CA-5, 1970) 3 EPD ¶ 8019; cert. denied 401 U. S. 948 (1971) 3 EPD ¶ 8127; *Caldwell v. National Brewing Co.,* 443 F 2d 1044, 1045 (CA-5, 1971) 3 EPD ¶ 8241; cert. denied 405 F 2d 916 (1972); *Long v. Ford Motor Co.,* 496 F 2d 500, 503 (CA-6 1974) 7 EPD ¶ 9290; *Waters v. Wisconsin Steel Works of International Harvester Co.,* cited at note 2; *Brady v. Bristol-Myers Co.,* 459 F 2d 621, 623-4 (CA-8, 1972) 4 EPD ¶ 7808; *Macklin v. Spector Freight Systems, Inc.,* 478 F 2d 979, 993-4 (CA D of C, 1973) 5 EPD ¶ 8605; *Johnson v. Railway Express Agency,* (U S S Ct 1975) 9 EPD ¶ 10,149.

the Supreme Court. *Bowman* offers the guiding principles that (a) "highest priority" must be accorded the public policy of eliminating employment discrimination, (b) discriminatees must be made whole, (c) Congress intended "the most complete relief possible," and (d) the trial courts must not invoke standards which, if applied generally, would frustrate the purposes of the Civil Rights Act. In time, other decisions and many of these additional resources will fill out the effective law of civil rights.

I do not want to close my presentation leaving the impression that law is an abstract structure of logic and disputation. Laymen all too often regard legal analyses as the talk of old men merely going through the same doors from which they have just emerged. That is not so. The process of legal argument—the use of established principles, legislative history, case precedent, and logic—and the pitting of dissent against decision helps assure us that the end of legal maneuvering is a more just arrangement of human behavior. The debate of judges, in the *Bowman* case and others, is the wrestling of men's minds and hearts; it is the agonizing of souls, ever seeking the betterment of the lot of man.

[The End]

The Affirmative Action Position

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THE RECENT recession put in sharp focus the conflict between seniority provisions in labor-management contracts and national labor policy contained in Title VII of the 1964 Civil Rights Act. Specifically, organizations representing minorities and women claim that layoffs under last-hired, first-fired seniority provisions negated gains made under Title VII in the late 1960s when employment was expanding.

In the face of layoffs induced by decreased demand, what rights do minorities and women have? Is it lawful to invoke codified seniority provisions as a basis of layoff where their application has a disparate impact on blacks, women, and other minorities? The affirmative action position is: "After a decade of litigation under Title VII, it is absolutely clear that seniority provisions in union contracts that perpetuate the present effects of past discrimination are illegal. The Supreme Court in *Griggs v. Duke Power* established that intent is irrelevant, and that neutral principles which have the effect of continuing discriminatory patterns must be substantially modified or eliminated."[1] Just as courts have ordered ". . . fundamental changes in initial hiring practices, as well as in seniority systems affecting job assignment and promotion, . . . it seems

* I wish to thank Dan Bertozzi, Jr., Esq., James Lau, and Leonard Seaman, Esq., for reviewing an earlier draft of this paper.

[1] Herbert Hill, address before the First Annual Conference of the American Association for Affirmative Action, Lyndon B. Johnson Center, Austin, Tex., April 12, 1975, p. 12.

reasonable to assume that Title VII also covers furlough and dismissal."[2] Groups supporting the affirmative action position thus rely on the law to redress collective grievances regarding last-hired, first-fired layoffs.

At the same time, the employment relationship for about 25 percent of the work force is covered by the collective bargaining agreement that the Supreme Court has recognized as calling ". . . into being a new common in the labor agreement, the seniority law—the common law of a particular industry or of a particular plant."[3] With-provision is articulated with care because it is a controlling or significant factor in determining both the order of layoff and recall from layoff.[4] In collective bargaining agreements in effect in 1973, for example, seniority was one of several factors in determining layoffs in 85 percent of the agreements, and the sole factor in 42 percent.[5] Three years earlier, seniority was the exclusive consideration in 30 percent of the agreements,[6] and in 1965, 25 percent.[7] These figures imply that seniority must be viewed as a desirable method for determining layoffs; indeed, it is a mandatory bargaining subject.[8] Furthermore, a seniority system cannot be racially discriminatory. The Supreme Court has already held that such a system would violate good faith bargaining requirements of the Taft-Hartley Act.[9]

Why then have seniority layoff provisions been under attack? Because under certain conditions, layoffs reflect original discriminatory hiring. For example, in formerly all-white plants or departments, a seniority system can effectively deny job security to blacks, women, and other minorities. In addition, a review of the legislative history of the 1964 Act and various court decisions by Joseph suggests that seniority expectations of employees do not have the status of a vested property right.[10] Joseph concludes that ". . . 703(h) means that last-hired, first-fired seniority is not bona fide as a matter of law but is subject to scrutiny under the liability standards of the Act."[11]

It should be noted, however, that the affirmative action position does not require abolishment of the seniority system as a layoff determinant. Rather, awarding of constructive seniority is implied by the following congressional directive: ". . . persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination."[12]

[2] *Ibid.*

[3] *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, (1960) 40 LC ¶ 66,629, 363 U. S. 574, 579.

[4] Sumner H. Slichter, James J. Healy, and E. Robert Livernash, *The Impact of Collective Bargaining on Management* (Washington: Brookings, 1960), Chs. 5, 6.

[5] Bureau of National Affairs, "Basic Patterns in Union Contracts," in *Collective Bargaining Negotiations and Contracts*, No. 785, 60:1 (Washington: April 24, 1975).

[6] *Ibid.*

[7] "Employment Discrimination and Title VII of the Civil Rights Act of 1964," *Harvard Law Review*, Vol. 84, 5 (March 1971), p. 1156.

[8] *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342 (1958).

[9] *Syres v. Oil Workers Union*, (1955) 29 LC ¶ 69,550, 350 U. S. 892.

[10] Ellen R. Joseph, "Last Hired, First Fired Seniority, Layoffs, and Title VII: Questions of Liability and Remedy," *Columbia Journal of Law and Social Problems* Vol. 11, 3 (Spring 1975), pp. 390-393.

[11] *Ibid.*, p. 401.

[12] *Equal Employment Opportunity Act of 1972—Conference Report, Cong. Rec.*, Vol. 118, Part 6 (March 2-9, 1972), p. 7168. See also "Last Hired . . ., " cited at note 10; George Cooper and Richard B. Sobol, "Seniority and Testing Under Fair Employ-

(Continued on next page.)

The Supreme Court, for example, noted explicitly in the celebrated *Franks* case: "Petitioners do not ask modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire."[13]

Why Seniority?

Why should the seniority rule govern layoffs? Seniority provides an objective criterion in lieu of an ad hoc, subjective method for layoffs. Furthermore, it is an equitable method to give long-service employees job security, a fundamental desire of *all* workers.[14] Implicit in seniority is the doctrine that the worker need not fear getting older. The human capital literature makes explicit the point that age is an inherent depreciation phenomenon. As age advances, the gross investment a worker makes through schooling, training, and mobility may be outstripped because life is finite, incidence of illness increases, and skills accrued with one employer may or may not be salable to another. Specifically, a long time is required to collect the return on human capital; further, human capital is not a liquid asset and cannot be sold as collateral on loans.[15]

Both the NLRB and various courts have recognized the critical importance of this human capital concept. In *Ozark Trailers,* the Board said: ". . . just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer."[16]

More recently, in a concurring opinion regarding a last-hired, first-fired seniority plan affecting female police officers in New York City, Judge Kaufman emphasized that a wide range of benefits flow from a properly functioning seniority system as it frees long-term employees from fear of unemployment, permits long-range personal planning, and rewards those who do not job-hop.[17] In sum, a properly functioning seniority system contributes to labor peace, eliminates capricious industrial relations practices, and recognizes the security needs of workers with the largest amount of human capital investment. Further, the latter positive aspect of seniority reinforces existing national labor policy in the Age Discrimination Act of 1967.

What the Courts Say

Despite these positive effects of the seniority system, the message by the courts in developing case law is clear; namely, that in this transitory period from unequal to equal employment opportunity where previous hiring practices have affected minorities and women, national labor policy embodied in the 1964 Civil Rights Act, as amended

(Footnote 12 continued.)
ment Laws: A General Approach to Objective Criteria of Hiring and Promotion," *Harvard Law Review,* Vol. 82, 8 (June 1969); and Caroline Poplin, "Fair Employment in a Depressed Economy: The Layoff Problem," *UCLA Law Review,* Vol. 23, 2 (December 1975).

[13] *Franks v. Bowman Transportation Co.,* (US 1976) SCt, 11 EPD ¶ 10,777.

[14] In Maslow's hierarchy of needs, security ranks second only to physical needs. See A. H. Maslow, *Motivation and Personality* (New York: Harper, 1954), Chs. 6-8.

[15] Gary S. Becker, *Human Capital,* 2nd ed. (New York: National Bureau of Economic Research, 1975), and Jacob Mincer, *Schooling, Experience and Earnings* (New York: National Bureau of Economic Research, 1974).

[16] 161 NLRB No. 48 (October 28, 1966).

[17] *Acha v. Beame,* 11 EPD (10740), at 7084 (CA-2 February 19, 1976).

in 1972, takes precedence over private collective bargaining contracts.[18] Federal district courts have broad discretion to order necessary remedial relief to make victims of unlawful employment discrimination whole, and three Supreme Court decisions regarding this charge make clear that affirmative steps must be taken to accomplish this goal.

In *Griggs v. Duke Power* the Court declared that practices either neutral on their face or neutral in intent cannot be maintained if they "freeze" the status quo of prior discriminatory employment practices.[19] In *Albemarle Paper* the Court added: "It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. . . . [W]here a legal injury is of an economic character, . . . and the law gives a remedy, the compensation shall be equal to the injury."[20] The Court noted that Title VII has a back-pay provision modeled after Section 10(c) of the NLRA that can be applied to achieve the "make whole" purpose of the law. This emphasis on back-pay awards implies that "jawboning" is not sufficient to achieve national labor policy; rather, financial incentive is required to ensure elimination of discriminatory practices.

Relying on *Albemarle's* holding as to the "make whole" purpose of Title VII, the *Franks* case adds the "rightful place" doctrine as an intended objective of Title VII by Congress.[21] The Court in *Franks* declared that hiring the class victim of discrimination falls short of the "make whole" remedy. Without an award of seniority dating from the date on which the person applied for the job but was discriminatorily refused, the over-the-road truck driver ". . . will never obtain his rightful place in the hierarchy of seniority according to which various employment benefits are distributed."[22] Hence, the Court awarded retroactive seniority to identifiable black nonemployee applicants.

Even before the *Franks* case, the Second Circuit provided reasoned opinions accepting the "rightful place" doctrine for seniority cases and the concept of limitation of relief to identifiable victims of discrimination. In *Chance v. Board of Examiners*[23] retroactive, constructive seniority was granted to any minority supervisors working for the Board of Education who had failed an examination that had been invalidated as discriminatory. In accordance with the "rightful place" directive, those who had been discriminated against in this way were given seniority based on the date of appointment that represented the mean appointment date of those passing the invalidated test.

Acha v. Beame, a sex discrimination case, has the same message.[24] In *Acha,* half of all the women police officers, who in June 1975 accounted for 2.62 percent of all police officers in New York City, were laid off on June 30, 1975, in accordance with a last-hired, first-fired concept under Section 80 of the New York Civil Service Law. The women argued that prior discriminatory hiring practices had prevented them from gaining necessary seniority to survive the layoffs. The Court agreed that constructive seniority back to the date when they would have been hired is the appropriate remedy. Retroactive seniority here was granted to that *limited group* of female police officers

[18] See the law review articles cited at notes 10 and 12.

[19] 401 U. S. 424, 430 (1971).

[20] *Albemarle Paper Co. v. Moody,* (US 1975) SCt, 9 EPD ¶ 10,230.

[21] Cited at note 13.

[22] *Ibid.*

[23] 11 EPD (10633) (CA-2, January 19, 1976).

[24] Cited at note 17.

who had been hired after the defendant had ceased discriminating. The Court noted it was ". . . not invalidating or altering portions of the seniority system at all. We are merely putting plaintiffs in their rightful place in it."[25]

These two cases as well as *Franks* suggest that *"rightful place"* is now doctrine with respect to dealing with existing seniority systems, as is granting relief to *identifiable* victims.[26] The emerging law is consistent with a precedent case in architectural law where the court specified that a surveyor was liable for negligence because the liability affected a *limited* group to a *limited* extent.[27] This decision is analogous to the retroactive seniority decisions that provide constructive seniority to identifiable persons back to an identifiable date.[28]

Constructive Seniority

Under constructive seniority that places the wronged groups in their rightful place in the seniority hierarchy, whites who move lower on the list could be bumped out of jobs. A burden must now be borne by identifiable whites. It is this aspect of affirmative action versus seniority that sees passions aroused. In *Franks,* the dissent is critical of this effect because it affects innocent third parties who are not wrongdoers.[29] But, the affirmative action position is that seniority expectations held by such whites do not have the status of property right.[30] Besides, the Supreme Court ". . . has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering strong public policy interest."[31]

At this juncture, then, there are conflicting interests of two identifiable groups: those who, absent discrimination, could have had more seniority, and those who had been hired without discrimination and so had accrued seniority. Should the latter group bear the entire burden? The majority in *Franks* asserts: ". . . a sharing of the burden of the past discrimination is presumptively necessary. . . ."[32] Two theories regarding burden prevail in this situation. In *Franks,* the majority view implies that white workers backed discriminatory policy. The dissent in *Franks* and the *Waters* Court put the discriminatory burden on the employer.

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[25] *Ibid.,* at 7083.

[26] In *Watkins v. United Steelworkers of America, Local No. 2369,* 516 F. 2d 41 (1975), the employer hired blacks who were new high school graduates in order to remove discriminatory practices. Layoffs in this group were disputed, but the 5th Circuit reversed the district court which held that there was no remedy as these blacks had not been discriminated against. In particular, the ages of the blacks who would be reinstated in preference to the whites ranged from approximately 2 to 7 years old at the time the whites who would be denied recall were first hired.

[27] *Rozny v. Marnul,* 250 N. E. 2d 656 (Ill. Supp. Ct. 1969).

[28] I am indebted to Leonard Seaman, Esq., for bringing this analogy to my attention. Consistent with this application is the fact that courts in the seniority cases have not given relief to unidentifiable applicants for indeterminate periods. This is analogous to forestalling application of the liability principle in *Ultramares* because it involved "liability in an indeterminate class." See *Ultramares Corp. v. Touche, Niven and Co.,* 255 N. Y. 170 (1931). A recent case dealing with the issue of identifiability is *EEOC v. Local 638, Sheet Metal Workers,* 11 EPD (10757) (2d Cir. March 8, 1976).

[29] Cited at note 13, at 4368.

[30] Joseph, p. 392.

[31] Cited at note 13, at 4365.

[32] *Ibid.* The *Waters* court rejected burdening white employees because of past discrimination created not by them but by their employers. See *Waters v. Wisconsin Steel Workers of Int'l. Harvester Co.,* 502 F. 2d 1309 (7th Cir. 1974). Decision to grant certiorari in this case is pending before the Supreme Court.

The crux of the affirmative action versus seniority problem thus comes down to who will bear the burden of past discrimination. On the assumption that a seniority system is an equitable method in the event layoffs occur, the question becomes: Can remedies be fashioned that can minimize costs to incumbents and at the same time provide relief to minorities and women when layoffs must, of necessity, take place?[33]

Because of the complexity of labor markets, it seems clear that remedies cannot be general. Rather, they must take account of many variables, such as the number of minorities or women affected, the number of white incumbents, the age of the affected persons, economics of the industry, availability of alternatives, tradition, technology, availability of SUB plans, degree of product mix, job skills, method of wage payment, wage structure considerations, and geographic proximity of plants (if there are more than one).[34] In sum, the remedy must be concerned with the facts and the actual problems involved in individual cases.

Alternative Proposals

Among proposals made so that the identifiable minority and nonminority groups would share the burden are alternative layoff systems and work-sharing plans. Work-sharing proposals include reduced workweeks and a corresponding pay cut for all employees, elimination of overtime, payless workdays, payless holidays, temporary shutdowns, and compulsory sharing of jobs. Work-sharing programs, however, lost favor among unions by the late 1950s, although they were popular prior to that time.[35] In 1973, according to a BNA survey of contracts, 20 percent of the sample contracts had some work-sharing program as an alternative to layoff, with variance among industries ranging from none in the lumber industry contracts to 67 percent of the contracts in furniture.[36]

Alternative layoff systems includes rotational or alternating layoffs, layoff by lot, voluntary layoffs, layoffs of senior employees who are paid nearly full wages during their absence (inverse seniority), and placing employees on layoff rosters by race or sex and then laying off persons in proportion to their presence on the work force. Inverse seniority, for example, is now incorporated in some collective bargaining agreements. According to the Bureau of Labor Statistics, almost one-fourth of a sample of 364 contracts studied in 1970-71 permitted layoffs of senior workers.[37] A recent study of this method shows that comprehensive inverse seniority plans, although rare, exist in three industries —agricultural implements, construction machinery, and, to a lesser extent, rubber products—which are characterized by supplementary unemployment benefits and complex job struc-

[33] Judge Cassibry, in *Watkins* (cited at note 26), ordered Continental Can to recall several laid-off black employees so that racial balance of the plant could not be substantially altered. In addition, no incumbents could be laid off, and available work would be allocated among all employees at wages for a normal 40-hour week until employee attrition or an increase in production returned the work force to efficient size. See 8 EPD (9766) (E.D.La. 1974), appeal docketed No. 74-2604 (5th Cir. 1975). This action comes into question as a general remedy as it assumes that the firm can afford the higher resultant labor costs despite reduced business activity.

[34] Slichter, Healy, and Livernash, Ch. 6.

[35] *Ibid.*, p. 152.

[36] Bureau of National Affairs, cited at note 5.

[37] U. S. Department of Labor, Bureau of Labor Statistics, *Layoff, Recall and Work-sharing Procedures,* Bull. 1425-13 (Washington: Government Printing Office, 1972), pp. 44-45.

tures.[38] Obviously, there is no dearth of alternatives to layoffs based on the last-hired, first-fired principle. However, can reasonable and fair proposals be developed that are pragmatic and yet able to balance equity between two identifiable groups? Further, who should design needed remedies?

Creative Collective Bargaining

When considering this issue that is fraught wtih tensions, it seems to me that the time has come for creative collective bargaining. Where past discriminatory hiring practices have occurred, the employer and the union should voluntarily modify the last-hired, first-fired seniority system rather than have the courts or a government administrative agency impose a system. On the premise that the advantages of seniority as an objective criterion for layoffs outweigh disadvantages for *all* workers, regardless of race or sex, a plan to meet a national labor policy goal of highest priority can, in my judgment, best be tailored by the two parties most familiar with all the variables that need consideration.

This proposal is consistent with the Supreme Court's rationale regarding the importance of the labor arbitrator. "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts."[39] This Court recognized that the ablest judge cannot bring the same experience and competence to bear because collective bargaining agreements serve specialized needs.[40] I believe, too, that these two parties must develop the plan in consultation with those who will be affected, as high and specific personal costs are involved. The union and management should work toward developing a viable consultative process designed to elicit alternatives.[41]

A recent consultative procedure that alleviated the effects of proposed layoffs provides an instructive example. A layoff of 18 workers was pending in the Santa Barbara, California, Welfare Department. Local 535 (SEIU) had in a prior negotiation sold the concept of creating up to 15 half-time positions as an alternative to layoffs. Had these half-time jobs gone to those receiving layoff notices, at least seven high seniority workers would have been terminated. In a series of meetings the union convinced the Welfare Department to offer the half-time jobs on a volunteer basis. This action, combined with the availability of five positions through attrition, saved 15 persons from layoff.[42]

Indeed, labor-management cooperation that provides employees with a chance for more participation and greater insight into decision-making is already taking place. Edgar Weinberg reports that since 1971 there have been several significant developments in labor-management cooperation and

[38] Sheldon Friedman, Dennis C. Bumstead, and Robert T. Lund, "The Potential of Inverse Seniority as an Approach to the Conflict Between Seniority and Equal Employment Opportunity," in *Proceedings of the 28th Annual Winter Meeting, Industrial Relations Research Association* (Madison, Wis.: The Association, 1976), pp. 67-74. See also, by the same authors, "Inverse Seniority: Timely Answer to the Layoff Dilemma," *Harvard Business Review,* Vol. 56, 5 (September-October 1975).

[39] Cited at note 3, at 581.

[40] *Ibid.,* at 582.

[41] Arnold S. Tannenbaum, "Systems of Formal Participation," in *Organizational Behavior, Research and Issues,* eds. George Strauss *et al.* (Madison, Wis.: Industrial Relations Research Association, 1974), pp. 77-105.

[42] Social Services Union Local 535, *Newsletter* (March-April 1976), p. 3.

joint consultation on issues of mutual interest not usually covered by written agreements.[43] To sum up, just as creative collective bargaining met the challenge of automation in the 1960s,[44] so too should it be able to meet the challenge of social problems in the work place in the balance of the 1970s.[45]

Using traditional channels of collective bargaining supplemented by worker participation in the decision-making process in order to assure that those who have been discriminated against assume their rightful place on the seniority roster has merit for the following reasons: (1) It is a pragmatic approach consistent with tested industrial relations practices that are rooted in each worker's desire for job security. (2) It is a realistic approach as it recognizes that those who must share the burden will have an input in the design of the plan. (3) It is a necessary approach for it takes account of the Supreme Court's series of decisions that place priority on eliminating the work force that is unbalanced both by race and sex because of prior hiring discrimination. Indeed, prudence requires creating viable alternatives, designed by the parties involved, to the last-hired, first-fired principle. **[The End]**

Seniority Is Healthy

By BEN FISCHER

United Steelworkers of America

SENIORITY AS USED in labor-management affairs is a major benefit greatly prized by workers, especially industrial workers. The current economic downturn has emphasized the value of seniority in the eyes of workers. However, some non-labor elements, in panic over layoffs, are advocating devices to gut seniority, substituting race and sex quotas to govern layoffs. This whole effort is founded on very shallow awareness of the facts. In fact, for many years the chief weapon to combat employment discrimination in major American industries has been some system of union-promoted seniority, governing layoffs, recalls, promotions, transfer, job assignments, etc.

Now, after ten years of court-mandated and government-inspired demands for broadening seniority, we are confronted with an antiseniority backlash. The proposals being made by some professional civil rights practi-

[43] Edgar Weinberg, "Labor-Management Cooperation: A Report on Recent Initiatives," *Monthly Labor Review,* Vol. 99, 4 (April 1976), pp. 13-22.

[44] See, for example, James J. Healy, ed., *Creative Collective Bargaining* (Englewood Cliffs, N. J.: Prentice-Hall, Inc., 1965).

[45] Obviously, these alternatives are short-run remedies to unemployment if the full employment goal is not achieved. The need to explore alternatives to layoffs has already been the subject of a working conference sponsored by the New York City Commission on Human Rights. The conference report abounds in insights and is required reading on the issue of affirmative action vs. seniority. See Edith F. Lynton, "Alternatives to Layoffs," report based on conferences held April 3-4, 1975, with preface by Eleanor Holmes Norton (unpublished manuscript, September 1975).

tioners to substitute race and sex quotas in making layoffs have no significant union or worker support. The advocates themselves are not subject to the consequences of what they propose. Policies developed in panic can make bad law, and in this instance could seriously weaken the long-range prospects of achieving effective equality of opportunity for minority and female workers.

It is axiomatic that seniority provides advantages to longer service employees and therefore is detrimental to new employees until they accumulate enough seniority to begin becoming its beneficiaries. An employee with only a few years service quickly learns the value of his seniority and how to use it to his own advantage and in pursuit of his own career. In factory-type mass production and industry (as well as many others), seniority is a prime goal.

However, the popular notion that seniority necessarily means last-in, first-out is an exaggeration and overgeneralization. Seniority is not a single system; there are many variables. In large establishments, it is not uncommon to have several systems operating side by side. Often seniority is applied narrowly—perhaps only within a unit or department, measuring service on a job or an operation but ignoring length of service in the plant. Lesser service employees can work in one department while longer service people are laid off. In many plants, transfers from one unit to another are made only at management's will, and the employee starts anew with zero seniority. If an operation is abandoned or diminished by technology, the employees under narrow systems have no rights or start with zero seniority in some other department or unit if jobs are available.

These kinds of seniority systems have been very common in American industry. While simpler, broader, plant-wide systems frequently are in effect in smaller plants, they have been much less prevalent in the large operations that provide the bulk of employment opportunities for industrial workers and particularly for black workers.

Many unions have fought long and hard for broader, more meaningful seniority systems. Generally, this means greater reliance on total plant service rather than narrower measures; my own union, the Steelworkers, has always been engaged in this struggle.

Workers Favor Seniority

Workers place so much store in seniority because it is the only viable and equitable known method for resolving employee competition. Here are some of the reasons:

(1) Length of service does reflect experience, and experience is an asset to those who must manage or direct the work process as well as to the worker seeking advancement.

(2) Seniority systems provide employees with reasonable opportunities to plan their careers based on some judgment of personal preference and projected potentials. Thus, an employee can plan to achieve jobs or types of work which appear to suit him, taking into account the relative seniority of others who are potential competitors.

(3) A proper seniority system should also permit persons who are victims of job, process, or operation abandonment to choose a new career with consideration given for past service and for the advantage of his general work experience.

(4) As a worker grows older, there is a tendency for his immediate economic needs to increase; seniority

tends to dovetail with this general condition. As a worker grows still older, his needs tend to peak, but in many establishments his last years of employment determine the amount of his pension. A higher base during his preretirement years often generates higher pensions and even determines the level of surviving spouse benefits.

(5) As a worker advances because his standard of living tends to increase, the impact of pay reduction or layoff creates economic hardship. The alternative for the older worker—planning his life around the minimum plant rate—would be unrealistic indeed.

(6) An older worker tends to lose mobility. Many factors discourage older workers from moving. They cannot learn new ways so easily. Work and social habits become fixed. If changing jobs means changing residence, then the departure from a well-established place in a community or neighborhood becomes more difficult as a worker (and his family) age. Thus, his dependence on his place of employment tends to grow.

(7) In balance, management does better with a stable work force. Retraining entails significant cost for management. Most training is not some formal process, but usually comprises exposure to the job, the nearby jobs, the specific work process, the safety hazards, and countless work practices. Seniority systems that are well conceived tend to give reasonable weight to stability factors.

A Way of Life

Any suggestion that workers recently hired should be retained during depressed periods and that longer service employees should be laid off would attack a whole way of life. The son would be bringing in the pay check while the father sat at home fretting and fuming. A youngster recently out of school would be employed, and presumably obtaining promotions, while his or her neighbor with long years of service and extensive financial obligations would be standing in long lines signing up for unemployment compensation, if his rights for such had not yet expired. Such a concept would fly in the face of concepts of common justice that are part of our culture.

In basic steel, most workers believed in the principle that last-in should be first-out even though individual beneficiaries of narrower systems did not reject the favorable impact of narrower systems on their personal situations. It was not until 1962, however, that the basic steel industry negotiators agreed to a modified last-in, first-out system; not until 1974 was plant seniority substituted for all narrower systems of measurement.

Our experience demonstrates that "last-in, first-out" is not something freely granted by employers. In the steel industry, massive efforts had to be made before such a principle could be established. (Significant loopholes still exist and remain on the union's agenda of clauses that should be improved in future bargaining.)

Industries of which I have personal knowledge have experienced histories similar to that of steel in dealing with seniority. In their periodic efforts to negotiate new contracts, it has been common for most unions to seek greater reliance on broad seniority and common for management to resist.

The worker seeks to strengthen seniority because it is his way to seek security within the limits of available jobs, to advance his career, to choose where in the plant he would like to

work, to obtain choice vacation times, to select shifts, and even in some cases to choose work assignments.

When this array of options is seen from the individual worker's viewpoint, it should be obvious that seniority is most important to him. It is easy enough for a college professor, a lawyer, an economist, a government official, or a civil rights professional to sneer at seniority, at the jealousy with which it is guarded, and at the zeal with which it is sought. The professional has skills which have appeal in the marketplace, but the worker only has his union and his established rights to fall back on. He rarely has a college degree or even a skill easily marketable in the industrial complex. If he happens to be a craftsman, this may be less true, but even then changing employers can jeopardize or eliminate vacation and pension rights and other worker benefits of great and irreplaceable value. Thus, the worker's security and upward mobility are closely linked to the effectiveness of his seniority system.

Most of the current advocates of departing from the principle of last-in, first-out say that layoff systems should be changed in only certain limited situations. In the main, these advocates are far removed from the workplace and from the responsibility of representing or supervising workers. However, the initial suggestions that departure from seniority be confined to limited fact situations are already getting out of hand and are developing their own momentum. The limits are being broadened. The applicable fact situations are being stretched. The vanguard is even attacking seniority entirely, inevitably working toward substituting measurements of race, sex, and relative merit for rights based on length of service.

The Problems

Against such a background, it is appropriate to examine some of the questions that arise in connection with weakening or abandoning seniority.

First, it is folly to suggest that this nation can solve the overriding social problem of discrimination in the context of an economic depression, dividing up woefully insufficient job opportunities. It is unthinkable to accept the Ford Administration's estimate of years of widespread unemployment. America has the manpower, the resources, the managerial skills, and the consumer needs (both personal and public needs) to justify programs that will put people to work.

Can we afford it? Of course, we can! A depressed America becomes a poor America, and every level of government will reflect this poverty. An America at work will create the public revenues and the private economic activity that can end poverty—both private and public. This may be too simple for government economists to accept, but it is fairly obvious to sound-thinking Americans whose good sense can be mobilized to obtain programs that can overcome depression.

Second, while it is not true that "last-hired, first-fired" is the rule in America's workplaces, where this is the rule, let's see how true is the common charge that the blacks were the last-hired.

The facts are that in many major American enterprises, blacks have long years of seniority. Millions of blacks have experienced fairly stable careers as members of the work force. These persons have often been in the forefront of the struggle for broader and more comprehensive seniority. They know firsthand the usefulness of the seniority process.

Overwhelmingly, these blacks will oppose any weakening of or deviation from seniority principles. If layoff is to be governed by quotas, will the senior blacks be protected by seniority but the senior whites denied such protection? This rudimentary dilemma has not even been seriously addressed and cannot be solved in the context of layoff by quota.

If the answer is that where blacks were traditionally hired, seniority remains intact, we are immediately confronted with the problem of what is an acceptable precondition. How many blacks must have been hired and when must they have been hired to justify continuation of seniority rules? Who will decide? Will the criteria become fixed or will it change depending on what government agent is on hand at the time?

If blacks were hired but not given equal opportunity within the establishment, then what layoff rules will be appropriate? If blacks have seniority but have not achieved their "rightful place," how would that affect quota layoff concepts? Would certain blacks be given preference to resist demotions or layoff into a pool? Just how far would the deviation from seniority be carried?

Would narrow seniority be retained if it benefited blacks, some blacks, or a majority of blacks? Would "last-hired, first-fired" be imposed if narrow rules adversely affected blacks? Just how can those judgments be made as a practical matter?

After all, labor and management have grave responsibilities. Unions have a duty to effectively represent their members. This duty requires unity and some certainty as to what unions may lawfully seek and what they may lawfully defend against management demands for change. Seniority also affects management's planning. Management must know what rules it can depend on if it is to operate the establishment successfully and for a profit.

Both parties become severely handicapped if they are floundering in a legal sea without compass or light. Collective bargaining at best is a difficult exercise in industrial democracy. No nation has done as well with labor-management relations as we have. But still, our course is not an easy one. New insurmountable difficulties, we do not need.

Are Guidelines The Answer?

To saddle labor and management with government-dictated layoff rules would require an impossible series of projections and speculations and would create an impossible compliance problem. If such guidelines were to be used by enforcement agents and the courts, then one must look at the abilities of the federal agents (and in some cases, state and local agents). The prospects are frightening when one considers the inadequacy and the lack of skill of many of the current enforcers. The federal agencies themselves, at the top level, cannot possibly provide adequate administrative guidance because the inevitable added load would surely further paralyze action on an already mounting backlog of unresolved cases.

If one attempted to write guidelines which the parties themselves could use with some reasonable certainty, the anticipated contingencies and variables would be beyond any drafting group that attempted such a herculean task.

Some leading advocates of the anti-seniority lobby are quick to state a narrow purpose, namely, to apply new guidelines only in those situations where the companies had failed to hire any or enough minorities but in relatively recent years started to do so. Last-in,

first-out, it is claimed, frustrates these belated equal opportunity programs in the light of the deep recession.

A leading advocate of the proposed federal guidelines assures me that the steel industry, for instance, would not be involved because steel has always hired minorities. I doubt whether his assurance is worth much in the light of the momentum that an antiseniority breakthrough would produce.

I do not question the sincere intentions of those who advocate a narrow, proscribed application of departure from seniority in layoffs. But the roads to hell and confusion are both paved with good intentions. There are three major problems with these intentions:

(1) Once guidelines are established, potent interests begin to move for their expansion by revision or by implementation. Some feel impelled to make such efforts because of their beliefs; some react to specifics and lose sight of the overview.

(2) The facts do not fit preconceived definitions. For example, if a plant always hired blacks from the labor market area and then the government redefines the area, a plant suddenly finds it underutilizes minorities by virtue of the redrawing of the geographical boundaries. It then launches special efforts to hire blacks to comply with the ratios in the newly defined area. Subsequently, who gets laid off? Older whites who are victims of a technical redefinition? What about older blacks? Are they to be sheltered while whites in the same circumstances are not? How does one define "older"? Does a black with 10 years seniority benefit from this technical redefinition, or only those hired subsequent to the change in the area?

We can pose the same questions and dilemma where the minority hiring is accelerated because blacks have recently migrated into an area in sufficient numbers to alter the current definitions of how many blacks fairly reflect the area population. If "last-in, first-out" seniority arrangements were abandoned in narrowly specified fact situations, the next steps would follow logically. Why not alter layoff from desirable departments or jobs governed by plant seniority even if the hiring at the gate historically did include a fair reflection of minorities? I suggest the same pressures could lead to serious efforts to govern layoff from individual jobs by quotas instead of by seniority. In fact, in my state, proposed guidelines provided exactly that.

Our point then is that proposed guidelines, narrowly defined, could and would quickly be used by some as a wedge to weaken and destroy the seniority system step by step. To the extent such efforts were to succeed, the loss of support for the civil rights struggle would be severe. Success in establishing equal opportunity will not be achieved for the many without stronger, more comprehensive, and broader seniority systems. Minorities will have obtained their full place, their rightful place, when they have been hired throughout our economy (which means there must be jobs) and have made secure the employment they do achieve by virtue of strong unions, a healthy economy, and fair and equal seniority systems.

(3) The notion that white workers should be victimized by destroying their bona fide seniority rights to continued employment because of past discriminatory hiring patterns imposed by management punishes the innocent, not the guilty. Especially in the industrial situations, the area of hiring has been exclusively a management function, excluded from collective bargaining. To now suggest that white employees pay for management sins is callous, inequitable, and arbitrary in the extreme.

Short-Term vs. Long-Term Goals

Of course, there are bona fide reasons for the fear that seniority can interfere with the short-term effectiveness of an affirmative action program in specific situations. Many companies did first begin hiring minorities in recent years; before such new employees had accumulated significant amounts of seniority, the companies reduced operations and laid off these persons. The reaction is understandable. The progress made toward achieving equal opportunity and overcoming past policies of discrimination is abruptly cut off. This appears to be a setback in the struggle for civil rights. But the culprit is not the white worker. The culprit is the employer as well as the economic policies that have created an unnecessary depression.

Destroying seniority is not the answer. Destroying workers' standards or benefits is not the answer. One cannot isolate and insulate the plants in which civil rights advances have suffered a setback. Pitting workers against each other would be a tragic response to economic adversity.

It is essential that there be a balanced overall view. Short-term gains for relatively few blacks would not begin to outweigh the harm done to worker unity and to the very forces that afford to blacks the best assurance of future opportunity and security. Only solidified unions and comprehensive seniority can achieve these goals.

The notion that government, the courts, or outside organizations of lawyers and other professionals can somehow assure blacks job security and day-to-day dignity at the workplace is most unrealistic.

Anyone confronted with worker representation at the workplace on a daily basis knows what a massive task this is at best. Management largesse holds out no substantial hope for black workers and is not desired by those who seek to rely on their own strength. The degree to which effective unionism brings dignity and a workable industrial justice system to the worker is virtually beyond the comprehension of those who have not seen or experienced unions in action.

Well intentioned as the antiseniority advocates may be, they are on the wrong track. They are not representing the real interests of workers—either black or white workers. **[The End]**

SESSION III

Collective Bargaining in the Public Sector

State Government—Strategies for Negotiations in an Austere Environment: A Management Perspective

By DONALD H. WOLLETT

Director of Employee Relations, State of New York

WHEN I WAS PRACTICING law in New York City, largely on the management side, my colleagues and I used to jest about typical marching orders from chief executive officers which usually sounded something like: "Don't give them anything, but for God's sake, as well as the corporation's, don't have a strike." The Governor of the State of New York does not talk this way, but in the 14 months that I have spoken for him in negotiations with unions representing 180,000 state employees, the bottom line of his instructions could be translated into about the same words.

This is not lightly given counsel. The Carey administration is committed to the proposition that collective bargaining is the best way to resolve conflicts of interest between employees and employers and solve problems of the workplace, in both the private and public sectors. Nor is this an easy injunction to follow at a time when real earnings have been severely eroded by a rising cost of living and employee expectations are high.

Assume the following facts: Inflation has sent the costs of government up; recession has impaired the growth of revenues; the tax base has shrunk; hidden legacies of past mismanagement have been uncovered. In fiscal 1975-76 there was a serious budgetary gap between income and expenditures. The projected budget for 1976-77 is balanced, but precariously. Salary and fringe-benefit demands cannot be met without drastically curtailing services to the public or seeking major increases in a severely burdensome tax structure. Given these fiscal realities, state management's objective at the bargaining table is to yield nothing or next to nothing without provoking job action.

This has been the setting for negotiations in New York State. In the hope that our experiences may have general and instructive value, I propose to tell you how we operated.

Our strategies have been predicated upon two articles of faith. First, collective bargaining is a flexible instrumentality that can be made to work in an austere environment. Second, trade unions and the employees whom they represent will take "no" for an answer provided they are persuaded that (a) the economic crisis is "real," (b) they have a stake in the solution of the economic problems of the governmental enterprise, and (c) they are not being singled out, not being discriminated against—that sacrifice is being shared by all, not fastened upon a few.

Management Must Act Like Management

In the private sector, the chief executive officer is accountable to the owners of the enterprise, not to its employees. In the public sector this is not wholly true. Employees in the enterprise are also among its owners—the voting, taxpaying constituency. The chief executive officer of a government is both a manager and a politician. Public-sector union pressures are directed toward evoking his responses as a politician. But, if collective bargaining is to work, the chief executive officer must act first as a manager, although he understands that hard choices, if they are politically unpalatable, may ultimately drive him from office.

Absent collective bargaining, the terms and conditions of state employment are fixed in the main by legislation—special self-interest bills that public-employee organizations can manipulate through the political process. Collective bargaining is intended largely to displace this way of doing business. But it works only if all parties—the governor, the legislature, and the unions—recognize that public-sector collective bargaining becomes a sham if it is politicized. Unions should accept the legitimacy of management's acting like management.

But it is unrealistic to expect them to forgo the use of conventional political pressures to achieve their economic ends unless management has the courage to demonstrate their futility. This means that public management must not permit the unions to collect political debts at the bargaining table. It also means that management must resist efforts by the unions to end-run the bargaining process by taking to the legislature proposals that they have lost at the table.

I do not wish to push the logic of this position too far. Some problems endemic to the workplace have such overriding and general social significance that they may be better dealt with legislatively, *e.g.*, industrial injury and disease, health and safety, sexual and ethnic discrimination.

Management Self-Discipline

The operational and structural arrangements should be similar to those that obtain in the private sector. The dimensions of the chief negotiator's authority should be derived directly from the governor. The sole responsibility to deal with the unions and the authority within those dimensions to make agreements should be fixed in the negotiator. End runs should be prohibited. The governor must set the tone. His door should be shut to the unions; only the chief negotiator's door should be open. This rule should apply to all top gubernatorial aides and agency heads.

Management must also maintain internal discipline. Let me give a per-

sonal example. On February 2, 1976, Albany was hit by a blizzard. Many employees were unable to get to work. The Director of State Operations decided that state offices in the Albany area should be shut down. The question then arose as to whether or not the day of absence should be counted against employee leave accruals, specifically five-day personal leave. Historically, so-called snow days have been counted, time off has been recorded as personal-leave time, and employees who manage to get to work are not entitled to compensatory time off. This time one of the governor's key advisers, in the belief that reversal of past practice would redound to the governor's political advantage, persuaded him to take that position.

Since we had a proposal on the bargaining table to reduce the five days' personal leave time to three days, and since the effect of the governor's decision was to add a day, our position at the bargaining table on this matter was fatally undermined. Happily, this was the only breakdown in discipline that occurred, and the damage was not irreparable. Indeed, its occurrence may have served to tighten ranks as we moved toward the critical days of negotiations.

A Total Strategy

Management must keep in mind at all times the impact of agreements with one union on the political imperatives of other unions. The twin phenomena of "me-too-ism" and "one-ups-manship" belong in the forefront of the bargaining strategy. State police troopers will not accept less money than prison guards; prison guards will want some advantage over maintenance workers; registered nurses will want more than licensed vocational nurses; and university professors will want the world.

In New York State we are substantially advantaged in dealing with these problems by our nonproliferated unit structures. We have five broad horizontal units that cut across agency and departmental lines:

Administrative Services Unit, 40,000 employees; represented by the Civil Service Employees Association (CSEA); communication equipment operators, examiners, office support staff, such as secretarial and clerical personnel.

Institutional Services Unit, 47,000 employees; represented by CSEA; employees providing therapeutic and custodial care to persons in state institutions, *e.g.,* therapy aides.

Operational Services Unit, 25,000 employees; represented by CSEA; craft workers, maintenance and repair personnel and machine operators.

Professional, Scientific, and Technical Services Unit, 39,000 employees; represented by CSEA; employees who are primarily licensed professionals, *e.g.,* engineers, cartographers, kosher-food inspectors, bursars, psychiatrists.

Security Services Unit, 9,000 employees; represented by Council 82, American Federation of State, County and Municipal Employees; prison guards and security personnel other than state troopers, such as narcotic correction officers, lifeguards, and park and parkway patrolmen.

We have three vertical units:

State University Professional Services Negotiating Unit, 18,000 employees; represented by the United University Professions, Inc., affiliated with the American Federation of Teachers, AFL-CIO; all faculty and nonteaching professional staff of the State University system, including faculty, librarians, bursars, guidance counselors, environmental health and safety officers, museum curators, and pharmacists.

State Police Troopers, 3,300 employees; represented by the State Police Benevolent Association; all noncommissioned officers, investigators, and troopers of the Division of State Police.

State Police Officers, 100 employees; represented by CSEA; all captains, lieutenants, and majors in the Division of State Police.

By contrast, Los Angeles County, for example, has approximately 50 units covering over 60,000 employees. Obviously, the problem of devising a strategy to blunt me-to-ism and one-ups-manship is much more difficult in a Los Angeles County type situation than it is in the one in which we operate in the State of New York.

Management must reduce employee expectations to realistic levels, thus making it possible for union representatives to take acceptable positions and survive politically. This is a subliminal strategy that requires a public relations campaign designed to implant in the public subconscious the fiscal setting of the negotiations. Despite its obvious importance, most public managements lack the capacity to execute a full-blown public relations strategy. We in New York are not an exception. We do our best with limited resources. Again let me personalize.

Our theme was austerity—belt-tightening and survival. We were benefited by the continuous financial crisis in New York City with its fall-out impact on the state's fiscal situation, as well as such threatening events as a 3 percent reduction in force at the start of the fourth quarter of the fiscal year. Obviously, these events were not a part of any plan, but were fortuitous circumstances that worked to create a climate hospitable to low-cost settlement. However, we arranged for frequent repetition of the theme by as many sources as we could reach.

Other things happened that we did not expect. For example, Senator Warren Anderson, majority leader of the Republican-controlled State Senate, responding to Governor Carey's call for legislation imposing a wage freeze, said that the employees had the right to have the governor's representatives say "no" at the bargaining table, rather than to have the legislature say "no" by enacting a freeze. This was interpreted as a signal that an appeal by the unions from our position at the bargaining table to a legislative hearing, which is the final step under our statute for resolution of a bargaining impasse, would be unproductive.

We did two other things: First, we developed a set of affirmative management demands, utilizing the labor-relations directors of state agencies to set forth the felt needs of their operational people. We carefully sifted these, resolved inconsistencies, removed ambiguities, and excised all demands except those which could be justified by compelling operational problems or by a desire to return specified state benefits to comparable levels in the private sector. We initiated negotiations instead of waiting for the unions to come to us, and we publicized them in the media at the outset, making such statements as:

"The State has presented a set of proposals to eliminate employee benefits which exceed those found in the private sector. A report from the Division of the Budget demonstrates that some employee benefits are excessive. For instance, in the first year of State service a new employee is entitled to 42 days of leave with pay, including five days of personal leave. In 1974-75 paid leave, not including time off for union business, cost the State $384 million.

There can be some dollar savings in this area and some increases in productivity by recapturing 14 million manhours of work without increasing the number of State employees who presently work 37½ hours a week to 40 hours a week. Our proposals will save the State $28½ million in out-of-pocket costs."

Finally, we gave public exposure to unrealistic positions taken by the unions where we felt that it was warranted. Thus, when the Civil Service Employees Association proposed salary increases ranging from 25 to 36 percent at an aggregate cost to the state of $460 million per annum, we did not hesitate to issue a critical press release, pointing out that these demands could not be met without raising taxes by that amount or laying off over 40,000 employees (or some combination of the two). Without exception, mass media editorial comment urged CSEA to abandon these unrealistic positions and adjust to the realities of the bargaining environment.

Risks

Management must be prepared to take risks. First, there is the risk of unpopularity. The execution of these strategies will not be greeted with universal acclaim. For example, I received a letter from one employee in which he said, among other things.

"Your attitude in the present negotiations of no salary increase and your insistence of [sic] taking away fringe benefits already enjoyed from previous contracts sounds like the ravings of a very sick person . . . . Your tactic of negotiating through the press and looking for public sentiment is one of the dirtiest deals ever imposed upon the state employees. . . . I sincerely hope that the Governor and the public see you for what you really are and that you eventually will be dismissed in complete disgrace."

The Governor's fan mail was equally unenthusiastic. One employee wrote:

"Why your vicious attack on state civil service employees, even before the election ballots were cold? What happened to all those surplus funds those bums in Albany were sitting on, according to your campaign oratory? Regretfully I believed you, and for the first time in 38 years wish I could recall my vote."

Another employee wrote: "I would like you to know that I voted for you, but I would vote for my pet dog for governor before I would vote for you again."

A second risk is legal. The execution of strategies which are conceived to be sound from a labor relations point of view should not be inhibited by legal doctrines of doubtful validity. For instance, the New York Public Employment Relations Board has held that the failure of a public employer to continue, during negotiations for a new agreement, terms and conditions of employment established by an expired contract or by past practices constitutes a refusal to negotiate in good faith.[1]

The employer, according to this decision, must maintain the *status quo* unless and until either (a) the union agrees to discontinuance or (b) statutory impasse procedures, including a legislative hearing, have been exhausted. This doctrine prevents a public employer, even where it has given the union notice and has bargained to an impasse, from unilaterally modifying matters within the mandatory scope of bargaining.

The *Triborough Doctrine,* as it is known, has not been tested in the courts.

[1] *Matter of Triborough Bridge and Tunnel Authority,* 5 PERB 3064 (1972).

In our view it will not survive judicial scrutiny because the statute is not intended to deprive an employer of the benefits of the bargain made with respect to the contract expiration date. Accordingly, we decided to ignore *Triborough*. We advised the unions that the benefits generated by the collective bargaining agreements would, if we were at impasse at the time of their expiration, be terminated. This gave us leverage that a more cautious strategy would have lacked.

Finally, if public management is to pursue aggressive strategies, it must take a hard look at the possibility of strike action and be prepared to take a strike if bargaining objectives cannot otherwise be attained.

The New York statute, the so-called Taylor Law, contains the most severe strike penalties in the country. Strikers are automatically placed on probation for one year; they are subject to discipline, including discharge; they are docked two days' pay for each day they are on strike. The strike is subject to injunctive relief, which the New York courts grant with regularity, and a noncomplying union may be severely punished by fines and jail sentences for the leaders. Furthermore, the union may lose its right to have dues deducted from the employees' salary checks.

These sanctions are of course no guarantee against strike action. What they do is increase the cost to the employees and to the unions of strike action. This means, theoretically, that since the price is up, the number of strikes will be down. But strikes will and do occur where the employees feel strongly enough about the issues to pay the higher price. Accordingly, if public management pursues an aggressive strategy, it must prepare for strike action.

Strikes by public employees are weapons of political embarrassment. They do not typically inflict significant economic harm, except on the strikers. The question in each case is whether or not interruption of the service provided will generate political pressures on the chief executive officer that will move him toward settlement.

Thus, for example, a strike by the faculty of a state university is of little consequence. Failure to maintain the service may make ripples, but no waves. It is not necessary or even desirable to get hard-nosed at the bargaining table to the point of stressing that strike action may do the employer more good than harm since it will save money.

Exactly the opposite is true of a state correctional system. A strike in penal institutions is a grave matter. Operations must be maintained, and a union representing prison guards must be made to understand that you have the will and the ability to do precisely that.

Realistic Expectations

Management must prepare to meet employee expectations that are realistic. Management should identify those areas of significant employee concern about which something can be done, thus creating feasible trade-offs without violating fiscal constraints or crippling operations. Three illustrations drawn from our recent New York experience make the point.

(1) A long-standing grievance of the members of the Operational Services Unit stems from the practice of discriminating against labor-class employees who are laid off. Employees in other classes have the right, after one year of credited service, to be laid off pursuant to seniority rules and to be placed on a preferred rehiring list. Labor-class employees do not acquire these rights until they have five years of credited service. The reason for the discrimination is political—a management desire to be free to lay off and rehire

on the basis of patronage considerations.

(2) Some members of the Administrative Services Unit felt sorely abused when the New York State Lottery was abruptly closed last December because of defects in the conception and management of the "game plan," and all the employees were laid off with three weeks' notice.

(3) The correctional officers in the Security Services Unit have jammed our grievance docket with cases claiming that work directly affecting the health, safety, or security of inmates has improperly been assigned from time to time to civilian personnel, thus depriving prison guards of overtime opportunities and, according to their allegations, creating hazardous conditions.

A management that is pushing for a no-cost settlement must be prepared to make concessions with respect to matters of this sort.

Timetables

Where multiple sets of negotiations are in progress, management must work to a timetable. What should be the order of settlement?

In orthodox whipsaw strategy, you would go after the weakest adversary first. But this will not work here because patterns established with weak unions are not likely to have any impact on strong unions. What is needed is agreement with a union that has clout.

In our case we turned to the PBA, representing the State Police troopers. There were four reasons for this. First, PBA had just stood off an election challenge to its status as the bargaining representative by a three-to-one margin. As a consequence, it was secure. Second, PBA has strong, effective, and realistic leadership. Third, the State Police have a proud history of rising to emergencies. Fourth, they have a strong professional (no-strike) tradition and are held together by the amalgam of a nomadic and hazardous job.

The choice proved to be a wise one. The agreement with PBA established a pattern of extending the operative provisions of the present agreement, with no increase in the salary schedule or in fringe benefits. The only economic benefit was to service the present salary schedule by paying increments to eligible employees (which amounts to an increase in the aggregate payroll of about 1.25 percent).

The Memorandum of Agreement with PBA was signed February 9, 1976. The pattern was extended to the four units of 147,000 employees represented by the Civil Service Employees Association on March 12, and was accepted by Council 82 of AFSCME, representing the 9,000 members of the Security Services Unit, on April 29. Thus, the pattern is now established in six of the eight units (160,000 employees) with whom we have collective bargaining relationships.

The price for these settlements was to meet some of the employee concerns which neither pierced our fiscal ceiling nor crippled operations. Thus, we agreed to nondiscriminatory treatment of labor-class employees; to give notice of closedowns of agencies, facilities, and major departments; to create a committee to deal with labor-displacement problems patterned after the Armour Automation Committee established in the meat packing industry in 1959; to give permanent employees preference over provisional and temporary employees in layoff situations; and, except in emergencies, to assign correctional officers' work in the prison system to members of the Security Services Unit.

Do These Strategies Work?

This question cannot be answered categorically.

It is clear, as far as our experience in New York State is concerned, that we complied with our marching orders and achieved our objectives: no increases in salary schedules or fringe benefits; some concessions in areas of special concern to employees, concerns which could be met with little or no cost; no job actions, with our collective bargaining systems alive and well.

It is not clear that these strategies were a *sine qua non* of ending up on target. Perhaps we were just lucky. I'm sure many observers will say so. On that point I am reminded of the 1962 World Series between the New York Yankees and the San Francisco Giants. With the series tied at three games apiece, the seventh and final game in Candlestick Park moved to the bottom of the ninth, with the Yankees leading one to nothing, the tying and winning runs on base, two out, and left-handed Willy McCovey at bat. McCovey hit a vicious line drive, which Bobby Richardson, the Yankee second baseman, who was positioned 30 feet to the right of second base, caught off his shoe tops. Thus, the Yankees won their 20th World Series since 1921. If Richardson had not been playing out of his normal position, the game and the series would have gone the other way. So the familiar cry went up, "The damned Yankees are lucky." But the late Branch Rickey was fond of saying, "Luck is the residue of design." I find it ego-gratifying to believe that Mr. Rickey was right.

Nor can one accurately assess the long-range consequences of pursuing these strategies. In this business there is always next year, and the question remains: "Did we pay too high a price in terms of employee morale and attitudes?" It is axiomatic that sometimes a deal is too tight and results in consequences that cost more than the agreement is worth. My judgment is that the price was about right. My evidence is the ratification-vote results, which were as follows:

Sixty-three percent of the State Police troopers approved the agreement.

In the four basic CSEA units, one agreement was ratified three-to-one, another two-to-one, a third five-to-two, and the final one seven-to-five.

The Security Services Unit agreement has not yet been ratified, but the 24 members of the negotiating committee approved it unanimously, suggesting that it has broad-based political support.

These data are by no means conclusive, but I find them reassuring, as I do the fact that our relationships with the union leaders seem to me to have been improved by our experiences in the crucible of hard bargaining.

There is also the question of the political cost to the first Democratic administration in New York State in 16 years. I do not feel competent to answer this question, although it does seem clear to me that our negotiations next year must turn to more constructive and dynamic directions than we have managed in the past two years of fiscal crisis.

There is one conclusion with which I do feel comfortable. Collective bargaining is not an alchemic vehicle. It will not transmute tin into gold, rain into sunshine, or chicken excrement into chicken a la king. The function of collective bargaining, as I understand it, is to protect and advance the interests of employed occupational groups. Within those limitations, it can be made to work in any kind of environment to prevent injustice, to keep compensation levels at or close to comparability standards, to maintain due process in the shop, and to keep management on its toes. **[The End]**

Local Government—Bargaining and the Fiscal Crisis: Money, Unions, Politics, and the Public Interest

By ARVID ANDERSON

Office of Collective Bargaining, City of New York

"THE MONEY is in Washington, the power is in Lansing, and human problems are at the local level of government."[1] So stated Detroit Mayor Gribbs in 1970. The truth of his remarks has been underscored daily during the 1970s as major cities and smaller local governments have struggled with fiscal and labor problems.

My message is written from the deck of the Titanic while it is listing and still afloat. Now I know what happened to the Titanic, but I believe that rescue efforts have improved in the last 60 years, and New York and other cities are hoping to avoid the fatal iceberg of bankruptcy in the second half of the 1970s. While New York has stayed alive in 1975, it will not be out of the fix in 1976, and it is unlikely to be out of it for several more years without continued and substantial help from governments with the money and the power—Albany and Washington.

In this paper I will examine some of the developments in New York City's fiscal crisis and their effect on collective bargaining. The impact of the crisis on the city was brought to national attention last October by the President's speech to the National Press Club, which the *New York Daily News* headlined as: "FORD TO CITY: DROP DEAD." Happily, the President changed his mind after originally opposing aid to New York City, and the Congress authorized loans that have enabled the city to work toward a rational solution of its problems.

Clearly, the fiscal crisis in New York has chilled the public's attitude there and in other large cities toward public employee unions and collective bargaining, and it has prompted a reexamination of the collective bargaining process as opposed to the traditional political role of the legislature and executive in determining conditions of employment for public employees.

One sign of the fiscal impact has been the reassessment of the strike as a weapon to deal with bargaining impasses. At the conclusion of last September's teachers' walkout in New York City, Al Shanker stated, "A strike is a weapon you use against the boss who has money. This boss has no money."[2] The realization that an effective New York City transit strike would have a destructive effect on the city's economy and also deal a crippling political blow to New York's effort for fiscal stability has had a major inhibiting effect on strike talk during the transit negotiations. But a strike possibility still exists since the problem is not yet resolved.

While New York City did experience a three-day wildcat sanitation strike to protest substantial layoffs, there has been no repetition of such incidents in spite of the fact that 15

[1] GERR, No. 361, B-12, Aug. 10, 1970.

[2] *The New York Times*, Sept. 17, 1975, p. 28.

percent of the city's workforce, comprising more than 45,000 employees, have been laid off, retired, or separated from the workforce during the past year.[3] However, a major New York City municipal hospital strike has been authorized for May 24, 1976, to protest hospital closings and cut-backs in service.

Emergency Financial Controls

The fiscal crisis in New York brought about the Financial Emergency Act, which in turn created the Emergency Financial Control Board, a unique combination of elected officials and appointed private citizens: the mayor, governor, state comptroller, city comptroller, and three private businessmen appointed by the governor.[4] The most important assumption in the city's new fiscal plan mandated by the new law is that there would be no wage increases above the 1975-76 levels for municipal employees for the duration of the plan. The effect is, at least implicitly, to freeze wages and prohibit wage bargaining for the next three years. These actions have put a damper on the city's collective bargaining process and have raised the question of how viable the bargaining process will be for the next three years for the city and also for the State of New York.

Although this legislation provides that "nothing contained in this act shall be construed to impair the right of employees to organize or to bargain collectively," the reality is that there now exists substantial limitations on the city's financial and legal ability to negotiate. During the teachers' negotiations and strike last September, both the New York City Board of Education and Mr. Shanker pleaded for the "real" employer to please stand up. Since the strike settlement, the Emergency Financial Control Board definitely has stood up and has initially rejected the terms of the teachers' contract, requiring the parties to renegotiate its terms. One of the critical factors in determining whether that contract ultimately will be approved concerns the issue of whether increments in a teaching schedule are to be included in the cost of settlement. Apparently, they have not been counted, but clearly, no budget can ignore the impact of annual increments.

On May 18, the Emergency Financial Control Board also returned the transit settlement to the Transit Authority and the Transport Workers Union for renegotiation on the ground that the Transit Authority had not demonstrated that the settlement (which has been described as modest, providing only for a cost-of-living adjustment on the basis of one cent for each 0.3 change in the Consumer Price Index) was in compliance with the wage-freeze provisions of the Financial Emergency Act.[5] The Emergency Financial Control Board directed the parties to renegotiate the agreement and to clearly condition any cost-of-living increases on productivity savings so as to self-finance and also to possibly defer payment of any such increases.

One of the salutary benefits of the fiscal crisis is the increasing attention to productivity and productivity bargaining in public employment. Thus, the Emergency Financial Control Board has had a direct impact on two of the largest bargaining units in New York City, the teachers and the transit workers. Although neither are strictly speaking city employees—the Transit Authority being a state agency and the school boards being a separate employer (under the Taylor Law)—they are fiscally de-

[3] *The New York Times*, May 17, 1976.

[4] New York State Law, Ch. 868 of the Laws of the 1975 Session.

[5] *The New York Times*, May 1, 1976.

pendent upon the city. The wage patterns ultimately established by the Emergency Financial Control Board in the teacher and transit negotiations will influence all future city negotiations with its 200,000 other employees.

Wage-Deferral Agreements

Most municipal unions in New York City, as a result of emergency legislation, voluntarily entered into agreements deferring contractual wage increases that were to have been paid during fiscal 1975-76. The expectation is that such wages will be paid in 1978. In consideration of such wage-deferral agreements, the city pledged not to exercise its right to lay off or terminate, for economic reasons, full-time per annum permanent employees covered by the agreements for the period from September 1, 1975, to August 31, 1976, except in the event of "extreme necessity." Nevertheless, the continued fiscal crisis raises the possibility that further layoffs may be required.

However, the mayor's projected budget for 1976-77 contemplates that the (deferred) increases will be paid commencing in September 1976. The city maintains it has no funds to pay increased wages beyond that point, although this week it announced increases for a number of key budget personnel, not subject to collective bargaining, who have not had increases for a number of years.

Whether the city will be able to maintain a hard wage freeze for the duration of the fiscal emergency is open to question, especially in light of the substantial wage increases we have witnessed in the private sector. Federal pay policies and those of many local governments are based on comparability with private-sector rates, and by the fourth year, New York City could be confronted with pressures for significant catch-up increases that would, in turn, affect its financial position in 1978 and thereafter. In the interim, the wage freeze, by removing incentives for improved employee performance, may adversely affect productivity as well as the city's ability to remain competitive in the labor market.

Other Efforts

In addition to the legislative wage-freeze and wage-deferral policies, the city has adopted a policy of attrition, meaning that if an employee leaves because of retirement, resignation, or is otherwise separated, he is not replaced except in the most urgent cases.

Another example of the change brought about by the fiscal crisis has been the bargaining away of existing benefits. New York City unions agreed not to oppose the expiration of state legislation requiring the city to pay one-half of the employee's share of pension contributions. The effect of this has been that most city employees found their take-home pay reduced from 2 to 2.5 percent as of April 1, 1976.[6] It is possible that there may be a reduction of an additional 2 to 2.5 percent on July 1, 1976, if the state legislature does not act.

To deal with the overwhelming fiscal crisis, unions "have given at the office." Employee and city pension fund trustees, pursuant to new state and federal legislation protecting such actions, voted to commit some $3.7 billion worth of pension trust investments toward the purchase of city and state securities.[7] More than one billion of that sum represents direct employee contributions to pension funds.

[6] *The Public Employee Press*, Vol. XVII, No. 21, Dec. 5, 1975, p. 2.

[7] *The Public Employee Press*, Vol. XVIII, No. 9, May 7, 1976, p. 4.

Union decisions to make such investments were based on the simple premise of self-preservation. They realized that the failure to invest would undermine the pensions and job security of all persons now employed at the price of giving uncertain protection to the pension benefits of those persons now retired. It is worth noting that when the public employer needs the assistance of municipal labor union leaders to secure approval of the investment of pension funds in municipal and state securities, no arguments about management rights are being raised about such bargaining. As is often the case, political and fiscal realities override legal rights.

Individual unions have modified their agreements and yielded particular benefits secured during more affluent days. For example, the summer-hours clause whereby employees were dismissed an hour earlier during two summer months has been given up in bargaining. Firemen, who received an extra day off for the donation of blood, gave up that benefit. A reduction in the number of men on a truck has occurred in the fire department.

There also has been a severe limitation on overtime work and pay for all city employees, as well as a virtual freeze on promotions and a delayed payment of employee obligations already accrued. All this has meant not only a reduction in employee benefits, but, of course, also reduced services to the public. Sanitation pickups are less frequent. Schools, hospitals, libraries, fire stations, and police precincts have been closed.

Another example of how the bargaining game has been changed is the effort of the city to recapture 18 additional days from the work schedule of police in New York City. More than two years ago, at the city's insistence, the patrolmen's tours of duty were increased from eight to eight-and-a-half hours per day, which resulted in an average decrease of 18 workdays per year for each patrolman. Because of recent reductions in the police force caused by layoffs and attrition, the city wants to revert to the prior work schedule, which would enable it to put more policemen on the streets. That matter is now before an Office of Collective Bargaining impasse panel.[8]

Legal Challenges

It must also be noted, in the litany of what has been taken away, that the city has given the required two-year notice of its intention to withdraw from the Social Security system, a measure vigorously opposed by city unions and even by another mayoral pension commission.[9] This proposal for unilateral withdrawal from the Social Security system has been attacked as violating the city's duty to bargain changes in wages, hours, and conditions of employment. No legal action concerning this issue has been commenced, but the constitutionality of the debt moratorium and the wage-freeze legislation has been challenged in New York courts. The legality of the debt moratorium has been upheld by the appellate division and will undoubtedly be appealed to the state's highest court and possibly to the United States Supreme Court.[10]

The constitutionality of the wage-freeze legislation also has been sus-

[8] Office of Collective Bargaining, Patrolmen's Benevolent Association and the City of New York, Case # I-124-75.

[9] *The Chief*, March 26, 1976, p. 1, col. 4.

[10] *New York Law Journal*, May 6, 1976, Vol. 175, No. 88, p. 1, *Flushing National Bank v. Municipal Assistance Corporation for The City of New York.*

tained to date, but further appeals are pending. The views of the appellate courts in New York have caused great concern over the viability of collective bargaining agreements. The Appellate Division, First Department, in a ruling affecting the City of New York and the Uniformed Sanitationmen's Association, rejected the union's claim that a clause in the labor agreement, providing a pay rate based on annual days of work, was a work-guarantee clause.[11]

After making that dispositive factual ruling, the court then engaged in very extensive dicta to the effect that a municipal employer could not by a labor contract limit its right to abolish positions or to lay off employees. The court cited with approval the following language of another appellate ruling:

"Even were we to accept the concept that a public employer may voluntarily choose to bargain collectively as to a nonmandatory subject of negotiation, the public interest or welfare in this case demands that the public employer's job abolition power remain unfettered. Regardless of fault the fact remains that the fiscal crisis facing the City of Long Beach threatens its very ability to govern and provide essential services for its citizens. The city must not be stripped of its means of survival."

These determinations were also influenced by the fact that the state legislature had declared that the city was in a state of financial emergency.

The Patrolmen's Benevolent Association, in an attack on the constitutionality of the wage-freeze legislation in another proceeding, has argued that while the state clearly has the right to declare a fiscal emergency and thus to impair the obligation of contracts despite the provision of Article 1, Section 10, of the United States Constitution, the state and the city have not equitably applied the contract-impairment concept to all of their creditors.[12] The PBA argued that a wage deferral in the case of the PBA amounts to a permanent loss of a 6 percent wage increase, which means that the police would be receiving 94 percent of their contractual obligations while other creditors, such as the utility companies and bondholders, would be receiving 100 percent payment on their contracts.

The point argued by the PBA is that labor contracts must be given the same credence as all other contracts of a municipal employer and may not be derogated on the ground of fiscal emergency while other creditors are paid in full, even if some payments are delayed or interest reduced. The final word of the courts has not been spoken on the issue of whether a collective bargaining agreement has less claim to constitutional protection than that afforded other contracts, whether for debt service, contractors, or suppliers. A major decision concerning this issue is expected next month from New York State's highest court.

Who Is Responsible?

Are public employees, public employee unions, and collective bargaining settlements responsible for the fiscal crisis and the threat of default in New York and other cities? Certainly wage costs and bargaining settlements are a substantial part of any

[11] *New York Law Journal*, March 10, 1976, Vol. 175, No. 47, p. 1, *DeLury v. City of New York*, 370 NYS 2d 600 (NY 1975) 77 LC ¶ 53,760.

[12] Appellate Division, First Department, *Patrolmen's Benevolent Association against The City of New York*, Index No. 10012175.

municipal budget—at least 50 percent and in some instances 70 to 80 percent, depending upon the nature of the service. Obviously, substantial increases in wage costs add to municipal budgets. The Conference Board, a respected management research agency, in its January issue of the *Conference Record,* rejects as "wishful thinking" the notion that New York City can solve its problems by eliminating "waste and extravagance in the employment area."[13]

The statistics analyzed by the Conference Board are taken from the Bureau of the Census and the Bureau of Labor Statistics and reveal that New York City per capita expenditures for local government services, while high, are lower than those of Boston, San Francisco, and Miami, and approximately equal to those of Philadelphia, Atlanta, and Washington. Other statistics developed from the Department of Commerce, the Census, and BLS indicate that New York City municipal salaries rank fourth among the first 13 cities of the nation, and when adjusted for the high cost of living in New York City, rank tenth. Among nonteaching employees, New York City salaries rank eighth, and when adjusted for the cost of living rank 16th.[14]

Similarly, wage increases for municipal workers over a period of time indicate that New York City settlements have not been significantly in excess of those granted in either the public or private sector. For example, in the fiscal years 1971 to 1976, the average salaries of nonuniformed New York City employees increased by 44.7 percent and of uniformed employees by 48.5 percent.[15] During a similar five-year period, the average annual increases in major collective bargaining agreements in the private sector throughout the country totaled 43.5 percent. Similar settlements were made for New York State employees. The statistics show that New York City settlements have been based upon comparability with persons doing like work in public and private employment.

Thus, these and other figures indicate that the rise in public-sector wages has not been very different from that in the private sector and cast doubt on the allegations that collective bargaining in the public sector accounts in large measure for the financial difficulties of cities. What has happened is that *particular* wage increases or unusually high pay scales, as those for certain San Francisco craft workers, have received so much attention that other reasons for public payroll increases have been largely overlooked.

If the high cost of labor or labor settlements is not adjudged to be solely responsible for the fiscal crisis, what are the other causes? The January *Conference Record* refers to a "culture of poverty," concluding that New York, which has approximately 3 percent of the nation's population, contains roughly 10 percent of the nation's welfare load.[16] These numbers mean a direct city budgetary burden of about $1 billion, including welfare and medicaid. When the total annual costs related to providing services of all kinds for the poor are computed,

[13] *The Conference Board Record,* Vol. XIII, No. 1, Jan. 1976, "New York Is Really Something," p. 3.

[14] U. S. Department of Commerce, Bureau of the Census, *City Employment in 1973* (Washington: May 1974); see also *City Employment in 1974,* GE 74, No. 2 (Washington: June 1974), and *Local Government Employment in Selected Metropolitan Areas and Large Counties,* GE 74, No. 3 (Washington: Aug. 1975).

[15] Office of Labor Relations, New York City.

[16] *The Conference Board Record,* cited at note 13.

they come close to $2 billion, according to the Conference Board. This clearly places an unfair burden on New York City as compared to the rest of the nation.

Recent statistics demonstrate that 63 percent of the city's welfare mothers were not born in New York: 34 percent were born in Puerto Rico and 29 percent in other states.[17] New York State legislative efforts to enact residency requirements, as a means of barring federally mandated welfare claims, have been held by federal courts to be unconstitutional. To further illustrate the New York welfare dilemma, I ask you to visualize a federal law that would mandate the suburban ring of Maryland and Virginia, which surrounds Washington, D. C., to assume a substantial share of the welfare costs of the nation's capital.

Clearly, New York City and New York State taxpayers are bearing a very large percentage of everyone's burdens. With such crushing welfare costs, no matter how efficient New York City government might become, additional aid from the state and federal governments is needed to help balance the city's budget. As for charges of welfare rip-offs and bungled administration, both New York City and New York State administrations have made clear that they would be overjoyed with a federal takeover of the entire program.

What Impact?

What are the conclusions to be drawn from the impact of the fiscal crisis on bargaining in New York? One is that the adversity of the fiscal crisis established the conditions for the application of collective bargaining principles by which city and state government officials, in cooperation with union, banking, and commercial interests, joined together to stave off default, to win financial assistance and time for a new fiscal plan, and to secure aid from the state legislature and loans from the federal government. The New York City labor unions are represented on the Emergency Financial Control Board by a labor observer.

William Ellinghaus, a Control Board member and former Big MAC chairman, is quoted as saying, "I have found the municipal labor unions to be the most practical people in this crisis. They understood the problem more quickly than the city administration." Felix Rohatyn, Big MAC chairman, declared, concerning the role played by labor in holding off default, "It could not have happened without Vic Gotbaum."[18]

The above references are made not to give singular praise to the leaders of organized labor, but to emphasize the spirit of cooperation between all of the interest groups—banks, labor unions, and political leaders—who realize that they each have much more to lose if they do not cooperate. This is not to suggest that there will not be a renewal of the political battles between the city and state officials and the legislature, or confrontations between any of the participants. What has happened to date is a demonstration of statesmanship or, if you prefer, enlightened self-interest to prevent default. In sum, what has happened to date is a recognition of the effectiveness of the collective bargaining process as a tool to deal with major fiscal crises.

We also see that the fiscal crisis and the legislature have imposed substantial limitations on bargaining with respect to wages and pensions for

[17] *The New York Times,* Nov. 16, 1975.

[18] *The New York Times.*

some time to come. Collective bargaining has also been struggling to cope with some of the fiscal problems, but, unfortunately, most of the major economic problems are beyond solution at the collective bargaining table and beyond the resources of New York City and other large cities. They require, as has been demonstrated, fiscal and political decisions at the state and national level. Clearly, until the federal government takes effective action to deal with the problems of inflation, recession, unemployment, and unequal distribution of services, burdens, and responsibilities that it mandates to be provided at the local level, there will be continuing struggles over money, layoffs, and service cutbacks.

The failure of the federal government to deal with urban problems will not mean that the issues will go away; rather, it will mean that many city and state employees, instead of working and earning a living from tax dollars, will collect unemployment compensation, welfare, food stamps, and medicaid from those tax dollars. Unfortunately, they will not be providing any useful public services to an ever-dwindling number of taxpayers.

The public reaction toward unwise, untimely, and illegal public employee strikes and related union political actions have differed from jurisdiction to jurisdiction. Mayor Wes Uhlman of Seattle successfully rebuffed firefighter efforts to recall him from office because of his opposition to their bargaining proposals.[19] San Francisco voters changed the local law and the criteria for determining police and fire salaries, and also the method for fixing the wages of prevailing-rate employees, following police and fire strikes last year in that city. The result was wage cuts for the highest paid craft employees, followed by a strike. Their calls for a general strike fell on the deaf ears of their fellow, lower paid municipal trade unionists and private-sector union members.[20]

These events may be evidence of only a temporary public reaction to public employee unions and collective bargaining, but I am not sure. The jury is still out as to whether there will be a widespread turn-away from the process for establishing employment conditions for public employees. It is my hope that in the long run the majority of the public will realize that it is not in the public interest to again politicize the bargaining processes and that it is wiser to adopt comprehensive and effective collective bargaining laws for resolving the employment problems for state and local employees.

Even with comprehensive bargaining laws, the failure to use them properly may invite unwise legislative action. For example, Mayor Abraham Beame is now faced with the process of totally reordering his fiscal plan and laying off as many as 8,000 additional employees as a result of a state legislative override—the first in 104 years—of a governor's veto of a bill requiring the city to spend at least 20 percent of its budget for education.[21] The success of the teachers union in lobbying for such a measure, despite the New York fiscal crisis, has induced police and fire unions to seek similar state legislation barring further layoffs from their ranks.

The city has taken the position that the state law is unconstitutional as a violation of home rule, and a court test has begun. The teachers say that

[19] GERR, No. 613, July 7, 1975, p. B-4.
[20] *Wall Street Journal,* April 15, 1976, p. 34.
[21] *The New York Times,* April 15, 1976.

they are employed by a separate governmental entity and thus not subject to the home-rule provisions of the state constitution. We cannot predict the outcome of this conflict, but can only hope for a reasonable compromise.

Whatever the ultimate decision as to the best means for determining employment conditions for public employees, the message of the 1970s for local governments and particularly for urban America is clear: "The money is in Washington, the power is in the State Capitol, but the human problems" must still be dealt with by local governments. **[The End]**

Public Schools—Multi-Unit Common Bargaining Agents: A Next Phase in Teacher-School Board Bargaining in Michigan

By HY KORNBLUH

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RECENTLY, there have been some significant movements in the direction of broader-based teacher bargaining in Michigan. The reasons relate to a general tendency toward centralization of the bargaining function and to specific developments in the history of teacher negotiations and the public sector law in Michigan.

The bargaining relationship is well advanced in Michigan compared to most other states, and this new phenomenon may represent the beginnings of a new stage in this relationship when viewed in historical perspective. Therefore, it may be beneficial to trace the development of teacher bargaining in the state, record what is happening in these moves toward centralization of the bargaining function, and attempt to assess the problems and the realized and potential impact of this thrust.

Background[1]

Michigan was one of the earliest states to pass a Public Employment Relations Act (PERA). Comprehensive in nature, the 1965 law is closely modeled after the National Labor Relations Act; it covers all public employees in the state with the exception of state civil service employees, and mediation and fact-finding with recommendations, as impasse-resolving steps, are built into the legislation. (Later amendments substituted compulsory final-offer arbitration for the fact-finding step in impasses in public safety employee negotiations.) The law contains a strike prohibition, but, through judicial interpretation, there exists a de facto limited right to strike for most groups other than police and firefighters.

In Michigan, bargaining units are by school district, with teacher groups under collectively bargained contracts in all but four of the 536 districts. Of these, local affiliates of the Michigan

[1] This background section relies in part on a paper by Ben Munger, "The Evaluation of Multi-Unit Bargaining in Michigan" (1975, unpublished).

Education Association (MEA) are the bargaining agent in 505 districts, while Michigan Federation of Teachers (MFT) locals hold the bargaining rights in 20 of the districts (including Detroit).

Teaching bargaining units have been in the forefront of public employee groups using the strike weapon to enforce their demands. An average of 4.7 percent of the school districts have faced teacher withdrawal of services each year since 1967. The high occurred when teachers in 9.6 percent of the school districts were on strike at some time during the 1973-74 school year.

After passage of the law, teachers came to the bargaining table much better prepared than were the school boards at the time. Through already well-established state organizations, they were able to seize the initiative in bargaining and coordinate efforts in influencing developments in regard to administrative law and litigation. Negotiating in the framework of a strong economy with its consonant availability of public dollars in a period of expanding school populations and a favorable teacher labor market, they achieved significant gains at the bargaining table.

By 1970, however, when the number of pupils entering schools was leveling off and the economy was beset by the war-generated inflation that led to the wage-price freeze, the rate of gains made through bargaining slackened. The MEA deployed a staff of 80 Iniserv Directors (service staff) throughout the state at the same time that many boards of education began to use more aggressive and experienced bargainers. In addition, the Michigan School Boards Association made available a staff of experienced bargainers to smaller school districts that requested them. Two years later, in 1972, the wage freeze was on, public dollars were relatively less available, a teacher surplus was developing as student enrollments declined, and the relative bargaining power was shifting in the direction of the boards.

The movement toward coordinated bargaining in specific geographic areas began at about this time.[2] Associations of school-board bargainers and administrators started to exchange information more systematically in Wayne County (which includes Detroit) and Oakland County (suburban Detroit). Some teacher organization representatives have charged that the Oakland group attempted to get constituent boards to sign an agreement binding them to certain bargaining guidelines. Both MEA- and MFT-affiliated organizations also began to coordinate their efforts, particularly in Wayne County and a few other sections of the state.[3]

[2] As used in this paper, "coordinated bargaining" is cooperation between bargaining units ranging from exchanging information to coordinating bargaining for a common set of goals; "multi-unit bargaining" is a number of associations linked together for a common purpose; "multi-employer bargaining" is a number of employer units bargaining through a common bargaining committee for a master contract or similar separately signed contracts. The article by Cyrus F. Smythe, Jr., "Public-Private Sector Multi-Employer Collective Bargaining: The Role of the Employer Representative," in *Proceedings of the 1971 Annual Spring Meeting, IRRA,* (Madison, Wis.: The Association, 1971), pp. 498-508, and Abraham Cohen, "Coordinated Bargaining and Structures of Collective Bargaining," LABOR LAW JOURNAL (June 1975), p. 375, have very good discussions of these relationships in the public and private sector.

[3] The resurgence of rivalry between the two teacher organizations has interfered with coordinating efforts across organizations. The efforts of the MEA affiliates, the larger organization in the state, are addressed in this paper.

The development of economic adversity and determined expert negotiators on both sides of the table led to much harder bargaining. The fall of 1973 saw the nation's longest continuous teachers' strike in the city of Detroit; a bitter strike occurred in the small Detroit suburban school district of Garden City in 1974, and some 160 teachers were discharged early in 1975 during an economic strike in another suburban school district, Crestwood, after protracted negotiations and two lengthy withdrawals of service. Although this was not the first time in the state that a group of teachers had been fired while on strike, it was the first to involve a substantial number of teachers and the first to occur in the more highly unionized population center of the state.

The terminations were eventually sustained by the Michigan Supreme Court on the grounds that PERA takes precedence over the Tenure Act and that teachers could be legally dismissed after notice but without a prior hearing. Attempts to gain support for the Crestwood strikers from teachers in other school districts through the relatively loose Wayne County coordinated bargaining organization of MEA affiliates met with little success, at the very least because most of the individual teacher-school board collective agreements had already been signed in these districts.

Thus, currently, the bargaining climate is characterized by a continued relative decline in money available for public education, substantial layoffs of teachers as the financial facts intertwine with a continued decline in student enrollment, a surplus teacher market, and the "chilling effect" of the Crestwood firings.

The discharge of the Crestwood teachers has become one of the main motivations for increasing the interest and activity by Michigan teachers' organizations in bargaining on a broader basis than the individual school district. It has intensified the search for more integrated and broadened bargaining structures so that teachers in small or medium-sized school districts are not exposed to similar sanctions during an economic strike. The MEA itself is now more actively fostering movements on the local level toward broader-based bargaining arrangements by giving financial backing to the development and implementation of such plans.

Within the MEA there has been a limited amount of experience with these arrangements. In 1973, twelve locals in the geographically large but thinly populated Upper Peninsula of the state formed the Upper Peninsula Education Association (UPEA); a county-wide association in the middle of the lower portion of the state in Jackson County has been in operation for a similar length of time. These, together with the earlier attempt at coordination in the Wayne County area, an abortive attempt at a multi-unit—multi-employer bargaining structure in an outlying county, and some local area pooling of resources to employ more experienced negotiators, have been the precursors to the new units now forming.

There has been very little literature analyzing what happens on the employee side of the table in this kind of an arrangement, particularly in the public sector. The following is a preliminary analysis of some of the issues and problems involved in fashioning these broader-based bargaining structures.[4]

[4] This is a preliminary analysis based on a number of interviews with leaders in the field. A broader study is under consideration.

Goals of the New Structures

Although the goals vary in some instances--some are stated and some are implicit—they nevertheless appear to usually include the following:

(1) A long-run goal of one master contract for the districts covered by the multi-unit bargaining agent, negotiated through a multi-employer bargaining arrangement.

(2) Short of a multi-employer bargaining arrangement, a common bargaining front so that in the event of a strike in one district, the number of strikers or potential strikers will exceed the number it would be feasible to fire and replace.

(3) All local associations in the area (usually a county) to become part of the multibargaining arrangement.

(4) Availability of more expertise for the bargaining process through broader based support for more experienced and professional bargaining teams.

(5) Stabilization of the bargaining team membership, since the turnover among bargaining committee members in many of the local associations is enormous. In some cases there is a 100 percent turnover from one bargaining year to the next, which results in relatively inexperienced members.

There is some talk about an area-wide preferential hiring arrangement for teacher members who are laid off in one school district while new hiring is going on in another district.

Since the boards have been reluctant to enter into formal multi-employer bargaining arrangements, the basic pattern emerging at the present time is a *multi-unit common bargaining agent,* which attempts to coordinate the bargaining of similar contracts with individual school boards. The local associations go through formal representation elections for choosing the new common bargaining agent and adopt a constitution governing the new organization. The function of the new organization is to set policy for bargaining, to develop common goals, to supply trained negotiators, and to coordinate negotiations across districts.

Problems and Issues

The organization of the new bargaining agent presents the union with three problem areas: (1) representation, (2) member cohesiveness, and (3) movement to multi-employer bargaining for those groups that want to move in that direction.

Representation. In forming the structure of the new organization, the important problems of decision-making have to be faced on organizational matters, strike votes, and contract ratification.

How are different locals to be represented, particularly if they vary in size? Are smaller locals going to have disproportionate representation so that they are not dominated by larger locals? If so, will it discourage the larger locals from joining? How will strike votes (if any) be taken? By whom? Who will make decisions on contract ratification?

The pattern emerging appears to be proportional representation, based on local membership strength, in the governing body. Strike votes are taken by each local association relating to its own contract negotiations. Ratification is by both the common bargaining agent and the local association affected, although the common bargaining agent appears to be the legally recognized agent in most of the new organizations that are developing.

Cohesiveness of the Membership. MEA units have a tradition of local

organizational autonomy in bargaining and other matters. If, indeed, as is commonly true, there is a thrust toward achieving conformity of major contract terms over a period of time, decisions must be made in any one round of negotiations as to realistic and feasible goals, including how they relate to continued differential ability to pay on the part of many of the school districts.

Larger, or "lighthouse," locals may not necessarily have the same goals as some of the smaller or weaker locals. Smythe has pointed out that employees in average ability-to-pay communities want comparable pay with those in higher ability-to-pay communities,[5] and "where a single union represents the same class of employees in different communities, the union is under constant membership pressure to attain: (a) higher than average wage levels for employees in the higher paid communities than those attained in other communities; (b) wage levels equal to the average in communities with low ability to pay."

The job leadership in this instance is to convince all the teacher groups involved that it is to their interest to come together and develop some feasible common goals. These leaders have to deal with such situations as teachers from one district deciding that an offer at the table, though not sufficient to meet the common goals, is nevertheless satisfactory to them.

Potential for Multi-employer Bargaining: The Legal Issues. Locals can band together and choose a common bargaining agent under the Michigan law. (As stated previously, the law is very similar to the National Labor Relations Act, with some modifications in the area of strike legislation and the status of supervisory bargaining units.) The bargaining unit for teachers is the school district. Thus, under these circumstances, the question of employers moving to multi-unit bargaining is essentially one of "consensual" agreement to bargain through a master contract covering all teachers in the bargaining units (which may present some legal problems) or the equivalent of a master contract signed as a separate agreement by each school board.

What if school boards do not want to come to the table on a multi-employer basis, as has happened so far? Some opinion in the MEA supports an attempt to change the law, through legislation, to allow bargaining on a master contract on a nonconsensual basis. The outcome is perhaps problematic. If there is not true multi-employer bargaining, orchestrating the bargaining arrangements on the union side to achieve close to common contracts becomes a more difficult process, both tactically and organizationally.

The Results So Far

In one or both of the two MEA units that have had bargaining experience under a multi-unit arrangement, some of the results that have been reported are:

(1) Significant movement toward standardization of fringe benefits. (Nevertheless, the attempt is to keep new fringe benefits bargained in some of the contracts as pattern-setters.)

(2) More experienced and continuous bargaining expertise brought to the table, with greater continuity in bargaining-team membership.

(3) Prevention of early, low settlements that otherwise would exert downward pressure on the other negotiations.

(4) Greater consistency in salary bargaining.

[5] Smythe, cited at note 2, p. 502.

(5) Equalization of noneconomic contract provisions. For example, the teachers have increased the number of contracts now containing arbitration as the last step in the grievance procedure and containing the agency shop from 7 to 10 out of the 12 units. In one of the units, the calendar in a number of the districts has been reduced from 191 to 183 days, bringing it in line with those districts that already had a shorter calendar.

(6) Greater use of mediation and fact-finding to promote settlements.

(7) Greater use of attorneys to bargain for school boards and less direct involvement of school superintendents at the bargaining table.

(8) More explicit and more standardized language pertaining to some of the noneconomic areas that is more convenient and easier to enforce.

Thus, some of the advantages listed in the literature for multi-employer bargaining is taking place in Michigan teacher negotiations on a multi-unit bargaining basis. Rehmus has listed convenience and expertise, stability of the bargaining personnel, and uniformity of fringe benefits and some of the arguments given by proponents of multi-employer bargaining.[6] Since teachers appear to have achieved similar advantages from multi-unit efforts, it appears that benefits inhere to whichever side is willing to combine with other units—or to both, if both do so.

Implications

Though one is chary of predicting the future, it appears that, at the very least, the local bargaining arrangements for MEA affiliates in significant sections of Michigan will change to broader based structures and will employ more experienced, increasingly professionalized bargainers. These negotiators will be more systematically attuned to hammering out, in multi-district geographic areas, individual teacher union—school board contracts that are more closely aligned with each other, based on commonly agreed-upon noneconomic goals such as school calendar and grievance procedures; perhaps there will be some narrowing of the gaps between districts in salary scales and fringe benefits. It is problematical that a "consensual" acceptance by very many school boards of a formal multi-employer bargaining arrangement will take place, but some districts will increase the bargaining expertise they bring to the table.

This is not to say that, over time, consensual arrangements will not develop in the less urbanized areas where the structure of bargaining on a teacher multi-unit agent—individual school board basis has narrowed the differences in existing contracts enough to make multi-employer arrangements more attractive and more feasible for the employers. In one of the areas in which the teachers have been bargaining through a county-wide common bargaining agent for the last three years, the school boards went so far as to vote on whether or not to hire a full-time professional to work with them all in responding to the teachers' thrust.

Although the idea was rejected initially, it may be significant that it was even given much consideration. The role of such a representative, over time, might turn into fashioning a multi-employer bargaining relationship. The desire to preserve local autonomy is very strong on both sides of the table, but many of the school districts, subject to the continuing relative decline in financial resources that shows no

[6] Charles W. Rehmus, "Multiemployer Bargaining," *Current History* (August 1965), p. 94.

sign of abating, may take a closer look at the relative costs of collective bargaining and follow Davey's hypothesis that pocketbook considerations often overcome principles in a financial crunch.[7]

What other strategies might make it attractive for school boards to bargain on a multi-employer basis? Smythe described the approach used in the Minnesota Twin Cities Metropolitan Area Managers Association—Local 49 Operating Engineers relationship in which both parties started to negotiate on a multi-employer basis in a very limited way.[8] As the relationship grew, in successive negotiations they expanded the number of issues covered by the master contract. Perhaps this strategy will work in some areas of Michigan.

Some multi-unit organizations at a later date may adopt a hard bargaining strategy to convince school boards that they would be better off bargaining through a common bargaining team. Such a strategy may or may not work. To the extent that they attempt to bargain equalized teacher compensation, this bargaining approach probably cannot succeed if school boards involved have significant disparities in financial resources. The early 1970s saw the thrust of bargaining in education, coupled with the legal and moral pressure exerted for equal educational opportunity, resulting in reform of the distribution of state aid to Michigan public schools.[9]

Experience with the current educational finance structure in Michigan has not fulfilled the implied promise of the legislation that each child would share more equally in the revenue expended in public education. One consequence of the emerging bargaining arrangements may well be to force the state to confront this question again as more systematic pressures develop on the low ability-to-pay districts. The dilemma faced by the state in finding the revenues to bring lower ability-to-pay districts up to the more well-to-do districts (the only politically viable approach) in the current public-finance situation may beg solution for some time to come.

One observer has suggested that as long as there is a "lack of a mutually acceptable and workable impasse resolution procedure in the law" and a ". . . continuation of a type of bargaining which makes success dependent on the amount of power held by the parties, . . . multi-unit bargaining will continue to be a persistent desire of Michigan teachers. . . . [I]f given an equitable situation at the bargaining table, Michigan teachers would prefer to bargain at the local level [not unlike school boards]. Given the trend, this seems unlikely."[10]

To the extent this is true, one final caveat is called for. Tidiness in the form of easily administered uniform contracts is not necessarily godliness. In an age of popular reaction to centralized institutional decision-making, it is perhaps incumbent on any institution that is moving in the direction of centralization to ask "Why?" and

[7] Harold W. Davey, "The Structural Dilemma in Public Sector Bargaining at State and Local Levels: A Preliminary Analysis," *Proceedings of the 26th Annual Winter Meeting, IRRA* (Madison, Wis.: The Association, 1974), p. 67.

[8] Smythe, cited at note 2, pp. 504-505. Smythe's article is an excellent analysis of approaches to and considerations to be satisfied in a public-sector multi-employer bargaining relationship.

[9] Michigan school district revenues primarily rely on local property taxes, general state aid based on an "equalization" formula, categorical state aid, and some federal funds.

[10] Munger, cited at note 1, pp. 7-8.

"How much?" The institution of collective bargaining is no exception.

Concerns

Collective bargaining structures are often a trade-off between increased power, efficiency, and equitable effects of uniformity, on the one hand, and the benefits of more localized decision-making on the other. Two concerns flow from this.

First, the trend in education today is toward more flexibility and opening up the system. Education as a human-service industry has the teacher-student relationship and the learning process itself at the core of the work situation. Different school districts have differing pupil constituencies with varying needs. Change in education through experimentation or innovation, though often quixotic or faddish, is nevertheless an important ingredient. A change in one district may engender more resistance when it has implications for deviation from contractual arrangements covering 10 districts instead of one.

Perhaps George Brooks was speaking before his time when he questioned the centralization of the bargaining function going on in private-sector unions 16 years ago: "Nor is there any necessity, having acknowledged the force of comparison in collective bargaining, to make a vitrue of 'pattern bargaining,' or of uniformity in working conditions. We ought at least to do what we can do to produce the maximum amount of differentiation, flexibility and local decisionmaking in the structure we have."[11] Particularly because they are in education, educational bargainers would do well to bear his plea in mind.

Second, the vitality of and the leadership-development process in local unions is intimately related to the distribution of decision-making inherent in the structure of collective bargaining. If this movement toward multi-employer bargaining, to make a virtue of 'pattern the whole area of meaningful two-level bargaining in education will have to be examined closely. Perhaps the removal of some of the tough, hard decisions from the district level will have the salutary effect of eliminating some of the negative effect on the day-to-day relationships it has had in some districts. Some of this energy may be used constructively in imaginative local contracts relating to meaningful working conditions and educational concerns.

Brooks' eloquent concern about the sources of vitality and leadership in unions with centralized bargaining structures is worth noting here: "Leadership does not grow spontaneously in unions, any more than in any other organization. It does not grow simply because the union constitution provides for elections. It grows when decisions have to be made that seem worth making, and when the authority and opportunity to make them are ready at hand. The creation of the maximum number of such opportunities must be our main concern."[12] **[The End]**

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[11] George W. Brooks, *The Sources of Vitality in the American Labor Movement,* (Ithaca: NYS School of Industrial and Labor Relations, Cornell University, 1960), p. 45.

[12] *Ibid.,* p. 47.

A Discussion

By THOMAS L. WATKINS

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THE THEME developed in all of the presentations concerns the adaptations of public-sector collective bargaining to severely constraining financial conditions. Arvid Anderson's insightful analysis of New York City sounds the keynote: unions' traditional desire for "more" has changed abruptly to a concern for income and job security, a protection of the status quo.

One result of the fiscal crises in New York and other major cities has been a public reassessment of the collective bargaining process and the appropriateness of the strike as an effective negotiating catalyst. Toward the first point, Mr. Anderson reminds us that three-fourths of our states now have legislation providing for collective bargaining for at least some public employees. But it is also noteworthy that no such laws have been added in 1976, a fact reflecting the public's reevaluation.

Seven states now provide for the right of some public employees to strike under certain conditions, but five of these states join seventeen others in also providing for interest arbitration under some circumstances. If there is a trend here, it is toward strike "substitutes" rather than toward increasing strike authorization.

But the slowdown in legislative change, so dramatic when compared to the 1960s, is not as important as Mr. Anderson's other area of focus: the modifications that occur in the negotiating process when one party is a bankrupt—but still functioning—entity. There is no doubt about the prophetic position of New York City, and we are reminded that what is happening there is a portent worth our scrutiny.

Mr. Anderson notes the city's freeze on economic demands, which results in a shift toward security-oriented issues. The willingness on the part of unions to accept longer hours, reduced overtime, smaller crew sizes, restraint on promotions, nonreplacement of separated workers, and greater flexibility in management rights clearly demonstrate the change in the way municipal bargaining may have to operate in the years ahead. "Economy through attrition" has become a byword of financially troubled municipalities. "What we are seeing is that some public labor settlements are being self-financed by layoffs, by work sharing, by attrition and in some cases by strikes endured long enough to finance the remainder of the term of the contract."

But Mr. Anderson also takes care to demonstrate that the crisis in the cities cannot be attributed to overzealous union monetary demands of the past. He documents this by comparing average pay gains in the public sector with those in the private sector. While it is certainly true that welfare payments and other large commitments contributed to the New York City crisis, it seems equally true that to determine whether employee costs

contributed disproportionately to financial disaster one must compare costs to income and to other costs rather than to other sectors of the economy.

Cooperation

The reality of the next quarter century is that a spirit of cooperation at the bargaining table is incapable of dealing with the enormity of municipal monetary crises. Increasingly, answers will lie only with state and federal political decisions.

In that regard, however, Donald Wollett's remarks provide little comfort. Mr. Wollett firmly believes that collective bargaining is capable of operating in an austere environment; but it is axiomatic that if the state's fiscal position is as difficult as he suggests, little state relief for the cities is likely to be forthcoming.

In an effort to improve prospects at the state level, Mr. Wollett suggests that management spokesmen adopt a realistically tough line in bargaining, "telling it like it is" and raising no false hopes. It is argued that the public employer must take the affirmative in negotiations with a positive set of its own demands. This aggressive stance, of course, increases the bargaining risks and the likelihood of strikes.

This latter possibility worries Mr. Wollett little since he believes that in economic crises strikes are at worst a mixed blessing: they invariably work to the economic benefit of the employer even though also to its political detriment. Thus, strikes will be undertaken for political embarrassment, which must be balanced (from the perspective of the employer) against the monetary savings.

Mr. Wollett contends it is a prospect which need not loom excessively large if the employer deals openly and fairly with the employees. He recognizes that such strategy will not solve the economic difficulties of public jurisdictions; but rather that with it the governmental unit can improve upon its chances of making collective bargaining a continually meaningful method of determining the conditions—and price tag—of work.

In brief, it is evident that bargaining structures will need to go through some change if the process is to survive current pressures. It is precisely this phenomenon that Hy Kornbluh has noted in his remarks. The evidence gained from the study of public schools in Michigan suggests that many factors are contributing toward a centralization of the bargaining: decreased revenues, enrollment decline, layoffs, excessive supplies of teachers, and wholesale dismissals.

It has become accepted practice for geographically proximate public employers to develop common strategy. This can in general be traced to a feeling of mutual vulnerability. The impetus is the same for public employee organizations which, at least in Mr. Kornbluh's cases, face the reality of extinction at the negotiating table. In an effort to minimize adverse effects, the teacher organizations are joining together, usually at the county level, to form a multi-unit common agent which attempts to coordinate bargaining individual contracts with school boards.

Positive Gains

Among the teacher groups which have been operating in this form, Mr. Kornbluh is able to point to a number of positive gains—some for the union itself, and some for the bargaining process.

A positive result certainly is the increased professionalism of the bargain-

ers themselves, which over time will presumably decrease the implicit costs of bargaining. Indeed, explicit costs will also decline if the matrix of parties ultimately negotiate only through a single spokesman for each side.

However, linking the study into the theme of our conference, one is struck by the fact of higher settlements (especially in the fringe benefits area) arrived at through longer (and thus initially more expensive) negotiating procedures. Escalation to wider-impact bargaining is no doubt increasingly likely as state government assumes a larger role in subsidizing local governmental entities, especially in public education where frequently only a single union exists in the first place.

All of this converges easily with Arvid Anderson's thesis that less and less can really be done at the local level through traditional collective bargaining relationships. More sophisticated structures may stave off immediate disaster, but their ability to cope with the longer run problems is no greater than it was with the original configuration.

One does not go away from these three papers with a feeling of confidence in the continued viability of the collective bargaining process as we have known it: productive, flexible, and very local. Rather, one senses that as a vehicle for coping with public employment issues, the negotiating process may be capable of positive contributions only when there is something to negotiate about.

Wollett remarked that we are increasingly faced with problems that demand *more* bargaining rather than less. The truth of the matter might well be that we will need more dialogue, not necessarily confrontation; more realistic solutions, not necessarily settlements; and a greater willingness to collectively come to grips with the government crises that affect us all.

[The End]

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