INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

Proceedings of the
1988 Spring Meeting

March 23 - 25, 1988
Cincinnati, Ohio

Officers of IRRA for 1988

PRESIDENT:
Phyllis A. Wallace, Sloan School of Management, MIT

PRESIDENT-ELECT:
Joyce D. Miller, Amalagamated Clothing and Textile Workers Union

PAST PRESIDENT:
Michael H. Moscow, Premark International

SECRETARY-TREASURER:
David R. Zimmerman, University of Wisconsin-Madison

EDITOR:
Barbara D. Dennis, University of Wisconsin-Madison

EXECUTIVE BOARD MEMBERS:
Janice R. Bellace, University of Pennsylvania
Francine D. Blau, University of Illinois, Urbana-Champaign
John F. Burton Jr.,NYSSILR,Cornell University
Harry R. Gudenberg, ITT Corporation
Steven J. Hendrickson, Allied Industrial Workers Union
Eileen B. Hoffman, Federal Mediation and Conciliation Service
Mark L. Kahn, Arbitrator
David Lewin, Columbia University
Janet L. Norwood, Buraeu of Labor Statistics, USDL
Leslie E. Nulty, United Food and Commercial Workers International Union
Ernest J. Savoie, Ford Motor Company
William M. Vaughn, The Stop & Shop Supermarket Company
Paula B. Voos, University of Wisconsin-Madison

NEWSLETTER EDITORS:
Charles T. Schmidt Jr., University of Rhode Island
Rachel Grenier, University of Rhode Island
Marjorie A. Lamb, IRRA National Office

LEGAL COUNSEL:
Lawton & Cates

EXECUTIVE ASSISTANT:
Marion J. Leifer, IRRA National Office

Past Presidents of IRRA

1948 Edwin E. Witte
1949 Sumner H. Slichter
1950 George W. Taylor
1951 William M. Leiserson
1952 J. Douglas Brown
1953 Ewan Clague
1954 Clark Kerr
1955 Lloyd Reynolds
1956 Richard A. Lester
1957 Dale Yoder
1958 E. Wight Bakke
1959 William Haber
1960 John T. Dunlop
1961 Philip Taft
1962 Charles A. Myers
1963 William F. Whyte
1964 Solomon Barkin
1965 Edwin Young
1966 Arthur M. Ross
1967 Neil W. Chamberlain
1968 George P. Shultz
1969 Frederick H. Harbison
1970 Douglass V. Brown
1971 George H. Hildebrand
1972 Benjamin Aaron
1973 Douglas H. Soutar
1974 Nat Goldfinger
1975 Gerald G. Somers
1976 Irving Bernstein
1977 Ray Marshall
1978 Charles C. Killingsworth
1979 Jerome M. Rosow
1980 Jack Barbash
1981 Rudolph A. Oswald
1982 Milton Derber
1983 Jack Stieber
1984 Wayne L. Horvitz
1985 Everett M. Kassalow
1986 Lloyd Ulman
1987 Michael H. Moscow

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

Proceedings of the

1988 Spring Meeting

March 23-25, 1988

Cincinnati, Ohio

Edited by Barbara D. Dennis
Industrial Relations Research Association
Social Science Building, University of Wisconsin
Madison, Wisconsin 53706 U.S.A.

Reprinted from the August, 1988, Issue of

LABOR LAW JOURNAL

Published and Copyrighted 1988 by

Commerce Clearing House, Inc., Chicago, Illinois 60646

Proceedings of the 1988 Spring Meeting

Industrial Relations Research Association

Library of Congress Catalog Card Number: 50:13564

ISBN 0-913447-35-8

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES

PROCEEDINGS OF THE ANNUAL MEETING (May Publication)

PROCEEDINGS OF THE SPRING MEETING (Fall Publication)

Annual Research Volume (Fall Publication)

MEMBERSHIP DIRECTORY every third year

IRRA NEWSLETTER (Published Quarterly)

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

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

7220 Social Science Building, University of Wisconsin

Madison, WI 53706 USA Telephone 608/262-2702

Industrial Relations Research Association Spring Meeting

March 23-25, 1988 Cincinnati, Ohio

PREFACE

1988 Spring Meeting

Industrial Relations Research Association

All IRRA members, of course, were invited by the Greater Cincinnati chapter to come to their city to help celebrate its bicentennial in 1988, and those of us who took advantage of the opportunity were amply rewarded.

The program featured concurrent sessions, both morning and afternoon, so that those attending could choose the topic they found most interesting from among the three or four scheduled for each time period. Among these timely subjects for papers and discussion were plant closings, labor-management cooperation, subcontracting, fair share fees, employment at will/wrongful discharge, employment flexibility—and collective bargaining in major league baseball (appropriate in a "baseball" town like Cincinnati and at a meeting held only a couple of blocks from the home of the Cincinnati Reds). A special treat was the chapter's evening reception at the nearby Contemporary Arts Center.

We thank the Cincinnati chapter members for the invitation, and we congratulate everyone who has a part in preparing the program and making the arrangements—especially Thomas M. Sheeran, program chairman; Donald M. Standriff, arrangements chairman; and Louis J. Manchise, Greater Cincinnati chapter president. And again we express our gratitude to LABOR LAW JOURNAL for publishing the Proceedings of our Spring meeting.

Barbara D. Dennis
Editor, IRRA

August, 1988 Vol. 39, No. 8

The Regional Labor Force in Transition, 1860-1900: From Laborer to Machinist, From Domestic Servant To Clerical Worker

By Nancy E. Bertaux

Xavier University

The nature of the U.S. labor force[1] changed dramatically over the course of the nineteenth century as the nation's economy developed and took new directions. In the process, prevailing definitions of "women's work" and "men's work" also changed. This article addresses the evolution of the urban labor force, by sex, in the latter half of the nineteenth century. In this period, the midwestern region of the country experienced rapid economic development. Therefore, this discussion focuses on the changing labor force patterns of two cities in the midwestern region: Cincinnati, Ohio, and Milwaukee, Wisconsin.

Cincinnati was founded in 1788, and its location along the Ohio River figured prominently in its economic development pattern. The Ohio was one of the chief routes west for post-Revolutionary War settlers from the eastern states. In its frontier days, Cincinnati was an important provisioning center for settlers of the Ohio Valley. As this rich agricultural land was developed, Cincinnati became a major exporter of corn, wheat, and pork products; hence, the city's label of "Porkopolis." By the 1820s, Cincinnati was known as the commercial center of the West, and its exports were transported by the growing fleet of steamboats on the Ohio and Mississippi Rivers. Through the 1840s, Cincinnati's population grew explosively (see Table 1). The city's reputation as a boomtown led to a substantial inflow of European immigrants, primarily from Germany and, to a lesser extent, Ireland. Table 2 shows that during this period, close to half of Cincinnati's population was foreign-born. The immigrants' demand for homes, clothing, and other provisions further fueled the city's economic growth.

Beginning in the 1850s, Cincinnati's commercial preeminence faded. As the agricultural production of the Mississippi Valley increased, cities near the Mississippi boomed and the relative importance of the Ohio Valley diminished. Cincinnati adjusted by shifting its emphasis to manufacturing.[2] Table 3 shows that although Cincinnati's "Porkopolis" era left a legacy of meat-packing as an important Cincin-

[1] I am using the term "labor force" loosely. Nineteenth-century census takers counted "gainful workers." The gainful worker concept was based on occupational status, not employment status, so that a person counted as a gainful worker may have been retired, disabled, or unemployed at the time of the census. Similarly, employed people who felt their employment was temporary might not have identified themselves as having an occupation. See the discussion in U.S. Bureau of the Census, *Historical Statistics of the U.S.* (Washington, D.C., (1975), p. 124). Both the gainful worker and the labor force concepts are male-centered. They count only those workers involved in paid work, thereby making the male norm the universal standard. It is important to remember that a woman entering (or leaving) the labor force is probably not just beginning (or ending) her productive economic activity; she is more likely changing the form of this activity.

[2] In 1880, Cincinnati's population ranked eighth in the nation, but its manufacturing production ranked seventh. In 1890, its population ranked ninth, its manufacturing seventh, and in 1900 the ranks were tenth versus ninth (U.S. Bureau of the Census, *Report of the Manufacturers of the U.S.* (Washington, D. C.: 1880-1900)).

nati industry, other industries of importance in the late nineteenth century included men's clothing, machinery and machine tools, carriages, boots and shoes, and soap.

Milwaukee's location also played a key role in its economic development. The Milwaukee site was originally a native American settlement and fur-trading center. Milwaukee's Great Lakes location was the primary point of arrival for the many easterners who settled in Wisconsin after the native American treaties of the 1830s opened up land sales. As Table 1 shows, Milwaukee's population growth rate peaked in the 1850s (just as Cincinnati's rate was falling), with European immigration dominated once again by Germans and Irish, in that order. Milwaukee's proximity to the upper Mississippi Valley made the city a logical distribution point for the wheat and pork products of the region, particularly after the completion of rail lines from Milwaukee to the Mississippi River in the late 1850s. By the 1860s, Milwaukee was the world's largest primary exporter of wheat, and through the mid-1870s the city exercised a commercial dominance similar to that of Cincinnati in the 1830s and 40s.

By the 1880s, the nation's population had pushed further West and more fertile wheat-growing land was in production. Wisconsin wheat production fell, and Milwaukee's wheat trade declined. Milwaukee, like Cincinnati before it, successfully sought economic growth in manufacturing.[3] Table 3 shows the rapid growth in the last three decades of the century in industries such as brewing, leather, machinery and machine shop products, and iron and steel. Unlike Cincinnati, Milwaukee experienced a second wave of immigration, this time from Eastern Europe, especially Poland. The second wave began in the latter part of the nineteenth century and was reflected in an upward turn in the city's population growth rate and continued high percentage of foreign-born in the population (see Tables 1 and 2).

Occupations of Women and Men

The economic changes in Cincinnati and Milwaukee over the course of the nineteenth century involved major shifts in the labor of men and women workers. Throughout the nineteenth century, women were less likely than men to participate in the official labor force. However, women increased their labor force participation faster than men in the nineteenth century, so that women became a larger and larger minority of the labor force. "Women's work" increasingly meant paid work outside the home. The kind of work performed, and thus the occupational structure of the labor force, also changed significantly for both women and men.[4]

In the frontier stages of the cities' economies, men were typically employed as laborers or artisans, while most women worked on an unpaid basis serving their families and/or their families' businesses. As the cities entered their boom periods as commercial centers, men found additional opportunities in occupations such as traders, dealers, clerks, accountants, and salesmen. Women became more likely to participate in the paid labor force, partic-

[3] In 1880, Milwaukee's population ranked nineteenth in the nation, but its manufacturing production ranked fourteenth. In 1890, its population ranked sixteenth, its manufacturing thirteenth, and in 1900 the ranks were fourteenth versus thirteenth (U.S. Bureau of the Census, Statistics of the Population of the U.S. (Washington, D.C.: 1880-1900)).

[4] It is important to note that definitions of "women's work" varied according to race, nationality, and class. For instance, black Cincinnati women were far more likely than whites to participate in the paid labor market. In both cities, Irish-born women were more likely than German-born women to work for pay, and daughters of immigrants were more likely to join the labor force than immigrant women. Although income data are not generally available for nineteenth century urban workers, there are indications that in all groups, poor women were more likely to join the labor force than other women. The space limitations of this paper prevent a more detailed discussion of these variations. For more information on Cincinnati women workers, see Nancy Elizabeth Bertaux, "Women's Work, Men's Work: Occupational Segregation by Sex in Nineteenth Century Cincinnati, Ohio," Ph. D. dissertation, The University of Michigan, 1987.

ularly as domestic servants and as outworkers in the men's clothing industry. The rapid growth of the ready-made clothing industry (a manifestation of the shift from self-sufficient, home production to capitalist market production) increased the demand for low-paid clothing workers. This demand was largely met by women pieceworkers sewing at home for male merchant tailors. The increased demand for domestic servants reflected the income generated from the cities' commercial success, which allowed wealthier citizens to hire household help. On the supply side, the relatively high male wages that prevailed during the frontier period of labor shortages probably fell when immigrants poured in during the boom period. Women's labor force participation may have been a response to a perceived decline in real family income. The increased market production during this era also implied a higher motivation for paid work, since there was more to buy with cash income. Both sewing and domestic service utilized home-related skills, making the transition from unpaid, home work to labor force participation easier for women.

As the focus of each city's economy shifted from commercial to industrial pursuits, female wage labor was increasingly utilized throughout the economy. For the latter part of the nineteenth century, census data on the urban labor force by sex are available, making it possible to calculate labor force participation rates[5] (see Table 4). In the industrialization phase of both cities' economies, the female labor force participation rate increased substantially, and the proportion of the total labor force that was female grew at a similar pace.

As more women joined the labor force, the occupational profile of women workers changed (see Tables 5 and 6). In both cities, the relative decline in the importance of domestic servitude and the sewing trades was the most dramatic change. By 1900, these two occupations were still prevalent, over 40 percent workers remained in them, but other occupations were gaining ground.

By the end of the century, the clerical and sales trades constituted an important new category of occupations open to women in Cincinnati and Milwaukee. Industrialization meant larger and more bureaucratic business enterprises with more specialized work forces. The increased demand for clerical labor that resulted was frequently met by low-paid, female high school graduates, who were more available due to the rapid growth of public education. This beginning stage of the feminization of office work was often accompanied by routinization and mechanization of office procedures, as well as an end to the upward mobility that male clerks had typically experienced.

In the last half of the nineteenth century, certain manufacturing jobs were also increasingly likely to be labelled as "women's work." During this period, manufacturers began investing in labor-saving technology and designing more efficient production methods. Relatively low-paid women workers were often hired to perform the more specialized tasks of the newly-designed factories. This was especially evident in Cincinnati's large carriage, cigar, and boot and shoe factories. The deep and prolonged economic downturns of the 1870s and 1890s probably increased the tendency for women in lower-income families to seek factory work.

The process of industrialization also had a strong impact on the cities' male workers. The most obvious change for both Cincinnati and Milwaukee was the decline in the importance of common labor and artisanal trades such as carpenters and masons. "New" manufac-

[5] The labor force participation rate for a population is defined as the percentage of the population present in the labor force in a given time frame.

turing jobs such as machinists, manufacturing officials, packers, and iron and steel workers rose in importance, as did clerical and sales jobs.

In general, the occupational categories open to women remained dramatically limited when compared to those of men, an expected result given the similar nature of the U.S. labor market today. A handful of occupations accounted for the vast majority of women workers in Cincinnati and Milwaukee, whereas men were present in an extremely wide range of occupations. One way of illustrating this is to note the percentage of male versus female workers in the "all other" category in Tables 5 and 6. One-third to one-half of male workers, but only one-tenth to one-fourth of female workers, were in this diversified category. The late nineteenth century did witness a trend toward more occupational diversity for both men and women, clearly a result of economic growth and an increased division of labor, and the female labor force diversified much faster than the male labor force during this period.[6] But even though women increased the extent and variety of their labor force activity faster than men, women remained in a relatively low number of occupations compared to male workers.

By the turn of the century, the basic occupational profile of today's women workers was already in evidence. Women who worked for pay, then as now, were highly likely to be employed in one of the following areas: clothing production, personal service, clerical and sales work, factory operatives, teaching or nursing. This brief article has discussed the transition to this occupational profile in nineteenth-century Cincinnati and Milwaukee, during the period in which each city shifted its economic focus from commerce to manufacturing.*

Table 1
Population Growth: Cincinnati and Milwaukee, 1810-1900

	Cincinnati		Milwaukee	
Year	Population	% Change	Population	% Change
1810	2,540			
1820	9,642	279.6%		
1830	24,831	157.5		
1840	46,338	86.6	1,712	
1850	115,435	149.1	20,061	1,071.8%
1860	161,044	39.5	45,246	125.5
1870	216,239	34.3	71,440	57.9
1880	255,139	18.0	115,587	61.8
1890	296,908	16.4	204,468	76.9
1900	325,902	9.8	285,315	39.5

Source: U.S. Bureau of the Census

[6] In research currently under way, I use sex segregation index analysis to look more closely at this formative period of the female labor force in Cincinnati and Milwaukee, as well as other Midwestern cities.

* *References:* Anderson, Harry, and Frederick Olson, *Milwaukee: At the Gathering of the Waters* (Tulsa: Continental Heritage Press, 1981); Hurley, Daniel, *Cincinnati: The Queen City* (Cincinnati: Cincinnati Historical Society, 1982); Ross, Steven J., *Workers on the Edge: Work, Leisure and Politics in Industrializing Cincinnati, 1788-1890* (New York: Columbia University Press, 1985); Still, Bayrd, *Milwaukee: The History of a City* (Madison: The State Historical Society of Wisconsin, 1965).

Table 2

Population Characteristics: Cincinnati and Milwaukee, 1840-1900

Year	Cincinnati % Female	Cincinnati % Nonwhite	Cincinnati % Foreign	Milwaukee % Female	Milwaukee % Nonwhite	Milwaukee % Foreign
1840	47.7%	4.5%	46.4%[a]	43.1%	1.3%	
1850	47.3	2.8	47.2	47.7	0.5	
1860	48.9	2.3	45.7	50.5	0.2	
1870	50.8	2.7	36.8	50.6	0.2	47.3%
1880	50.7[b]	3.2	28.0	49.8[b]	0.3	39.9
1890	51.2	3.9	24.0	50.7	0.2	38.9
1900	51.8	4.4	17.8	50.7	0.3	31.2

[a] Estimate, based on statistics for adult white males
[b] Estimate, based on county statistics

Source: U.S. Bureau of the Census

Table 3

Distribution of Manufacturing Value of Production[a], 1860 to 1900[b]

Industry	Percentage of Total Mfg. Value of Production 1860	1870	1880	1890	1900
Cincinnati					
Men's clothing	13.6%	11.4%	13.2%	11.2%	9.0%
Slaughtering/meat packing	9.6	12.4	11.0		6.0
Soap, candles, and lard oil	6.8	5.4	[c]		
Liquors, distilled	6.0		5.0	5.9	6.0
Furniture and upholstering	6.0	5.7			
Machinery/shop products		4.4	5.4	5.1	7.4
Boots and shoes				3.8	5.9
Carriages and wagons			5.0	4.4	
Total value of manufactured products ($000)	$46,995	$75,655	$105,277	$196,064	$157,807
Milwaukee					
Flour and meal	28.3%	22.3%	9.7%	4.6%	5.1%
Men's clothing	7.7	8.1	8.7		
Boots and shoes	5.6				
Liquors, malt	4.7		9.3	11.1	11.2
Machinery/shop products	3.6			5.7	11.7
Leather		9.9	9.9	8.7	8.3
Iron castings		6.4			
Slaughtering/meat packing			14.3	10.0	
Tobacco		5.8			
Iron and steel					6.0
Total value of manufactured products ($000)	$6,659	$17,542	$43,473	$97,504	$123,786

[a] Only the top five industries for each year are shown.
[b] The data for 1860 and 1870 are for Hamilton and Milwaukee County.
[c] Soap and candles included in the 1880 category "all other industries."

Source: U.S. Bureau of the Census

Table 4

Labor Force Participation Rates by Sex, and Female Labor Force as a Percent of Total Labor Force: Cincinnati and Milwaukee, 1860-1900

Year	Cincinnati Male LFPR	Cincinnati Female LFPR	Cincinnati LF % Female	Milwaukee Male LFPR	Milwaukee Female LFPR	Milwaukee LF % Female
1860[a]	59.8%	15.0%	19.3%			
1870	57.2	15.6	21.9	54.3%	10.9%	17.1%
1880	62.2[b]	17.2[b]	22.2	56.7[b]	13.9[b]	19.5
1890	65.2	20.0	24.3	59.1	15.2	21.0
1900	66.1	22.4	26.7	60.6	18.2	23.7

[a] Labor force figures for 1860 are estimates based on a 5% random sample of Cincinnati taken by the author; not available for Milwaukee.
[b] Figures based on estimates of city population by sex derived from actual figures of county population by sex.

Source: U.S. Bureau of the Census, 1870-1900; Bertaux, 1987

Table 5

Occupational Distribution by Sex[a]: Cincinnati, 1860 to 1900

Occupation	1860[b]	1870	1880	1890	1900
Males					
Laborer	17.3%	14.1%	11.5%	11.4%	8.5%
Clerical and sales	7.4	8.7	9.0	9.5	10.7
Traders and dealers	6.3	7.0	6.0	7.1	6.5
Carpenters	5.1	4.4	2.8	2.9	2.1
Sailors/boatmen	4.3	"	"	"	"
Boot and shoe makers	3.7	2.8	3.1	2.4	3.1
Carmen/draymen/teamsters	3.6	3.6	3.4	4.8	4.7
Tailors, seamstresses, dressmakers	3.5	2.9	2.7	2.3	2.1
Iron and steel workers	2.8	2.3	"	2.3	"
Masons	2.6	2.4	"	"	"
Painters	2.4	2.6	3.0	3.4	3.0
Coopers	2.3	"	"	"	"
Saloon and bartenders	2.2	"	2.5	"	2.3
Blacksmiths	2.0	"	"	"	"
Cabinet makers/upholsterers	"	3.2	2.6	"	"
Hotel and restaurant workers	"	2.7	"	"	"
Cigar and tobacco workers	"	"	2.9	"	"
Domestic servants	"	"	"	2.3	"
Machinists	"	"	"	2.2	3.4
Messengers/packers	"	"	"	2.2	2.7
Printers	"	"	"	2.2	2.1
Hucksters and peddlers	"	"	"	"	2.1
Servants and waiters	"	"	"	"	2.1
Manufacturing officials	"	"	"	"	2.1
All other (less than 2% each)	33.8	40.3	49.9	44.2	41.6
Total male labor force	49,200	60,842	78,170	94,527	103,913
Females					
Domestic servants	40.2%	46.9%	34.9%	29.1%	"
Tailors, seamstresses, dressmakers	32.0	30.5	31.6	28.2	22.6%
Laundresses	13.2	8.4	5.8	6.3	7.9
Hotel and restaurant workers	2.7	"	"	"	"
Teachers	"	2.9	3.4	3.1	3.4
Clerical and sales	"	"	4.0	7.6	9.9
Boot and shoe makers	"	"	3.3	3.0	4.0
Housekeepers	"	"	"	2.4	"
Textile mill operatives	"	"	"	2.3	"
Cigar and tobacco workers	"	"	"	2.0	4.4
Servants and waiters	"	"	"	"	24.0
Stenographers	"	"	"	"	3.4
Nurses and midwives	"	"	"	"	2.0
All other (less than 2% each)	11.7	11.0	16.7	15.4	17.9
Total female labor force	11,780	17,081	22,284	30,410	37,786

[a] Occupations listed contain greater than 2% of the labor force group.
[b] Labor force figures for 1860 are estimates based on a 5% random sample taken by the author.
" Contains less than 2% of the labor force group.

Source: U.S. Bureau of the Census, 1870-1900; Bertaux, 1967

Table 6

Occupational Distribution by Sex[a]: Milwaukee, 1870 to 1900

Occupation	1870	1880	1890	1900
Males				
Laborers	19.4%	17.9%	15.2%	12.5%
Clerical and sales	8.5	8.3	8.5	9.2
Traders and dealers	7.7	5.8	7.3	6.8
Carpenters	6.1	5.7	5.5	3.8
Boot and shoe makers	3.1	2.1	"	"
Railroad employees	2.9	2.9	3.0	2.8
Sailors/boatmen	2.4	"	"	"
Carmen/draymen/teamsters	2.3	2.5	3.6	3.9
Tailors, seamstresses, dressmakers	2.2	2.7	"	"
Painters	2.2	2.4	2.5	2.2
Cigar and tobacco workers	2.1	3.3	"	"
Hotel and restaurant workers	2.1	"	"	"
Iron and steel workers	2.1	2.0	3.2	5.2
Masons	2.0	"	"	"
Machinists	"	"	2.6	3.5
Leather workers	"	"	2.0	2.5
Manufacturing officials	"	"	"	2.1
All other (less than 2% each)	34.7	44.5	46.7	45.5
Total male labor force	19,165	32,924	59,578	85,157
Females				
Domestic servants	61.6%	42.2%	34.3%	"
Tailors, seamstresses, dressmakers	20.6	32.3	25.5	21.7%
Teachers	6.4	4.7	4.8	4.8
Clerical and sales	"	3.5	8.8	10.7
Hotel and restaurant workers	"	2.6	"	"
Laundresses	"	2.3	3.4	4.5
Textile mill operatives	"	"	4.3	4.8
Servants and waiters	"	"	"	24.4
Stenographers	"	"	"	3.4
Nurses and midwives	"	"	"	2.1
All other (less than 2% each)	8.1	12.3	18.9	23.7
Total female labor force	3,954	7,976	15,799	26,399

[a] Occupations listed contain greater than 2% of the labor force group.
" Contains less than 2% of the labor force group.

Source: U.S. Bureau of the Census, 1870-1900

[The End]

Tri-State Manufacturing, 1977-82: Influence of Unemployment Compensation Tax Rates on Employment Opportunities

By Carol H. Rankin

Xavier University

During the 1970s and early 1980s the United States witnessed major shifts in both population and employment migration patterns. In particular, the South and West gained population and employment at the expense of the Northeast and industrial Midwest. In the immediate tri-state, Ohio, Indiana, and Kentucky lost 16.7 percent, 17.1 percent, and 11.1 percent of their manufacturing employment, respectively, while manufacturing employment fell only 4.1 percent in the economy overall in the period 1977-82.

Analyses of these shifts have isolated differences in labor costs across states and regions as a key explanatory variable. One source of these labor cost differences that has received frequent mention but little empirical analysis is the variation across states in the Unemployment Insurance (UI) system.[1]

Since the inception of the UI program in 1935 as part of the Social Security Act, the individual states have established the tax and benefit structures of their programs independently under broad directives given by the federal government. This has resulted in significant variations among the states in terms of tax base, tax rates, benefit eligibility, and benefit levels. Given competition among firms, basic economic theory suggests that firms will be motivated strongly by cost considerations in decisions to expand or contract their use of labor services and in decisions concerning location of new plants or relocation of existing facilities. Variations among the states in terms of UI financing provide a quantitative cost differential that can be analyzed for its effect on changing employment patterns. In this article, a model explaining the variation in the rate of change in manufacturing employment among the states using UI financing differences as a source is developed and its implications for the tri-state economy are discussed.

Although the financing pattern of state laws is broadly influenced by the Federal Unemployment Tax Act, the variations among the states are significant. Effective January, 1985, the federal tax was 6.2 percent on the first $7,000 of earnings. Employers are allowed a 5.4 percent credit against the federal tax for their contributions under approved state laws. Therefore, the actual tax burden placed on employers is influenced by state provisions.

Experience Rating

All states use experience rating systems to determine the employers' UI tax rate. The premise underlying experience rating is that employers who lay off large numbers of workers and make heavy demands on the system's resources should be assigned a higher UI tax since the UI system is, in principle, an insurance system. Experience rating is typically imperfect in the sense that the marginal cost to an employer of laying off an additional worker is often less than the added UI benefits that the system must pay out to a firm's employees.[2] Thus, firms with no history of layoffs typically pay small positive experience rates while the maximum tax rates in many states do not reflect adequately the cost burden to the system of cyclically sensitive industries.[3] For example, under their least favorable rate schedules the tri-states have the following minimum and maximum experience rate: Indiana 1.3-5.4 percent; Kentucky 1-10 percent; and Ohio .7-5.9 percent. Thus, there are obvious differences in the degree to which experience rating is "imperfect" and the amount of subsidization firms that subject their workers to frequent layoffs receive.

[1] For example, in a "Business Climate Update" the *Wall Street Journal* (3/10/87) states "Michigan has been deviled for years by its reputation as an expensive state in which to do business, and a big factor has been the high cost of unemployment insurance to employers there . . . Big differences in the tax rates that states levy on employers, and the wage base on which the tax is applied, are the reason the total unemeployment tax varies so much from state to state."

[2] Robert H. Topel, "On Layoffs and Unemployment Insurance," *American Economic Review*, September, 1983, Vol. 73, No. 4, pp. 541-559; Carl P. Kaiser, "Layoffs, Average Hours, and Unemployment Insurance in U.S. Manufacturing Industries," *Quarterly Review of Economics and Business*, Winter, 1987, Vol. 27, No. 4, pp. 80-99.

[3] See Topel, cited at note 2, for a full discussion of incomplete experience rating and its effect on layoff decisions. He finds that the current systems of UI financing "clearly subsidize the occurrence of unemployment, since most employers are only partially liable for the benefits that their workers receive" (page 554). Stephen G. Bronars, in "Fair Pricing of Unemployment Insurance Premiums," *Journal of Business*, 1985, Vol. 58, No. 1, pp. 27-47, presents a model for deriving "actually fair" UI premiums in a competitive insurance market. He finds "a shift to fair UI pricing would reduce profits and wages in subsidized industries and shift resources to equalize rates of return across industries" (page 40).

In addition to variations in tax rates, more than half of the states have adopted a higher wage base than provided in the Federal Unemployment Tax Act. The taxable wage base ranges from $7,000 in many states to $21,600 in Alaska. Indiana has a taxable wage base of $7000, while Kentucky and Ohio maintain bases of $8000.

The basic model examined in this article to estimate the impact of variations in unemployment insurance financing and changes in manufacturing employment across states is:

%CMANE = f (UITAX, UNRATE, FUNDBAL, VAPEM, %UNION, $EDUC, GRAD%, REGION)

where

%CMANE	= percentage change in the state's manufacturing employment, 1977-82.
UITAX	= measure of the tax liability of manufacturing firms in the state, 1984.
UNRATE	= state's unemployment rate, 1984.
FUNDBAL	= state's unemployment fund balance divided by benefits paid out of the fund, 1984.
VAPEM	= value added per employee in manufacturing divided by the state's average manufacturing wage, 1982.
%UNION	= percentage of the state's labor force that is unionized.
$EDUC	= state's average education expenditure per pupil, 1983-84.
GRAD%	= percent of ninth grade graduating in four years, 1983-84.
REGION	= regional subdivisions as defined by the Census Department with the Northeast used as the control group.

In attempting to explain changes in manufacturing employment, the degree to which the state systems experience rate cyclically sensitive industries is thought to be important. Again, some states have a wide range between minimum and maximum rates, while others have a much narrower range. In the latter case, i.e., where maximum rates are relatively low, there is likely to be less complete experience rating and more subsidization of firms with significant layoff rates. Therefore, a measure of manufacturers' potential tax liability under a state's least favorable rate schedule is used:

LFMNTX = maximum experience rating multiplied by the taxable wage base divided by the state's average manufacturing wage.

This measure of tax liability as a percentage of wages under a "worst case" scenario would be expected to negatively impact changes in manufacturing employment.

Control Variables

The other variables are included in the model to control for factors that are hypothesized to influence manufacturing employment. VAPEM, an index of value added compared to labor cost, is included to control for variations across states in productivity and skill mix of the labor relative to the variations in wage costs. Given the well-accepted union wage differential, the percentage of the state's labor force that is unionized (%UNION) would tend to increase labor costs and, therefore, negatively impact manufacturing employment levels.

The state's unemployment rate (UNRATE) is included to control for cyclical variations in employment unrelated to tax effects. Its hypothesized impact is negative. In addition, a measure of the

state's future ability to finance draws on its unemployment trust fund (FUNDBAL) is included as an indicator of likely changes in financing that may influence employment decisions. That is, a state may currently have a relative low tax rate, but if its FUNDBAL is negative or indicates the ability to finance benefits for only a short duration, expectations will be of rising tax rates and employment decisions could be based on those expectations.[4]

The importance of an educated labor force in attracting and retaining employees is often posited. Education is believed to enhance the productivity and adaptability of the labor force. Here, two variables are included to attempt to capture this impact; $EDUC, the average expenditure per pupil in the state, and GRAD%, the state's graduation rate. Both are expected to be positively related to changes in employment. In addition, a set of regional dummy variables are included to attempt to correct further for such factors as cost-of-living differentials, nonpecuniary factors, variations in other taxes, and the level of government services, etc.

Ordinary least squares (OLS) was used to estimate the model. Equation 1 reports the OLS estimation using LFMNTX, the measure attempting to gauge the extent to which the states engage in more complete experience rating, as a measure of tax liability.

$$
\begin{aligned}
(1)\ \%CMANE = {} & 10.97 - 3.903\ LFMNTX - 1.226\ UNRATE \\
& (.35)\ (-2.37)^{*} \qquad\qquad (-1.91)^{*} \\
& + 1.743\ FUNDBAL + .661\ VAPEM - .726\ \%UNION \\
& (1.22) \qquad\qquad (.12) \qquad\quad (-2.34)^{*} \\
& + .002\ \$EDUC + .172\ GRAD\% - 4.923\ MIDWEST \\
& (1.10) \qquad\qquad (.51) \qquad\quad (-.87) \\
& + 14.9148\ WEST - .663\ SOUTH \\
& (3.22)^{*} \qquad\qquad (-.13) \\
R^2 = {} & .5967 \qquad\qquad SEE = 9.65
\end{aligned}
$$

t – values in parentheses * significant at .05 or lower

Here, a one percent increase in the state's maximum unemployment tax relative to its average manufacturing wage is found to reduce manufacturing employment 3.9 percent, everything else constant. Not surprisingly, increases in unemployment are shown to cause significant decreases in manufacturing employment. The condition of the unemployment insurance fund balance is not found to significantly impact manufacturing employment nor are differences in value added per dollar wage costs.[5] The degree of unionization has a significant, negative impact on manufacturing employment. Variations among the states in educational expenditures and graduation rates were not found to significantly impact manufacturing employment. The only consistent impact from the regional dummies is the large positive effect on Western states with changes in manufacturing employment approximately 15 percent greater than the Northeast, everything else constant.[6]

As mentioned in the introduction, the tri-state was an area that lost manufac-

[4] Although there is the significant possibility for multicollinearity given the obvious interaction between UI tax rates and unemployment rates, the correlation coefficients do not indicate a prohibitive problem. The correlation coefficients of UNRATE with LFMTX is .025. The correlation coefficients of FUNDBAL with LFMTX is .066.

[5] It should be noted that VAPEM did not exhibit a great deal of variation across states. This finding is consistent with competitive labor market conditions.

[6] The regional dummies may not have performed well due to the significant variation in employment patterns within the regions. For example, the Northeast (used for control) included both New England which on the whole fared well over the period studied and the Middle Atlantic States which significantly lost employment over the period.

turing employment at a rate greater than the national average. Using the model to explain the declines in tri-state manufacturing employment yields mixed results as indicated by the following table:

Percentage Decline in Manufacturing Employment

	Actual	Predicted Equation 1
Indiana	17.1	6.94
Kentucky	11.1	13.14
Ohio	16.7	12.10

While the states have certain similarities, there are also strong differences. Indiana, Kentucky, and Ohio had employment shares in the manufacturing sector that were above the national average. Each state had a larger than average percentage of its labor force unionized and unemployment rates that were above the national average. However, while Indiana and Ohio had above average manufacturing wages, Kentucky did not. Similarly, Kentucky had a higher value added per dollar of wage costs than the national average, while Indiana's and Ohio's were below. Kentucky fared relatively worse on the education measures. Ohio, Indiana, and Kentucky had ranks of 27, 37, and 42, respectively, on expenditure per student. Indiana and Ohio had graduation rates in the middle range, while Kentucky's were below average.

With respect to the UI financing variables, Indiana proved to be an anomaly. While its average tax rate and LFMNTX are below average, among all states it has one of the largest declines in manufacturing employment. In addition, contrary to expectations and the results of the model estimation, Indiana experience rated its employers to a lesser degree and had a rather healthy unemployment fund balance compared to similar states due to its status as a low benefit state.

The estimates for Ohio are low but not significantly so. While Ohio has above average UI tax rates, it does not experience rate to the degree of some states and actually has lower than average UI financing costs relative to manufacturing wages because of its status as a high wage state.

Of the three states, Kentucky experience rates its employers to a greater degree and this is found to clearly reduce its manufacturing employment. While it was found to be a southern state with lower wage costs and higher value added per employee than the U.S. average, i.e., factors that would be expected to lead to relative employment growth, Kentucky lost significantly more manufacturing employees than average. Some of this decline can be attributed to its UI financing provisions with the negative impact of LFMNTX found to be 239 and 203 percent greater than Indiana's and Ohio's, respectively.

Overall, the explanatory power of the model was quite good, with approximately 60 percent of the total variation in manufacturing employment explained using the UI tax measure. The results strongly indicate that employment is responsive to UI tax provisions. From a policy standpoint, the results indicate that states that attempt more complete experience rating will be at a competitive disadvantage in attracting industrial firms relative to states that offer a more narrow band of experience rates and more subsidization of industrial employment.*

[The End]

* *Additional References*: Bailey, Martin N., "On the Theory of Layoff and Unemployment," *Econometrica*, July 1976, Vol. 44, pp. 1043-63; Benham, Harry C., "UI Effects on Unemployment: Some Data on Competing Theories," *Industrial Relations*, Fall 1983, Vol. 22, No. 3, pp. 403-409; Bronars, Stephen G., "Fair Pricing of Unemployment Insur-

Fair Share Fees: Theory, Law, and Implementation

By Anna DuVal Smith and John E. Drotning*

Case Western Reserve University

The fair share fee concept is an attempt to resolve the conflict inherent in the legitimate interests of employees deriving benefits negotiated and protected for them by their duly chosen and exclusive representative. For one, collective bargaining produces public or collective goods.[1] Since the union's right of exclusive representation carries with it the obligation to represent all members of the bargaining unit, rational individuals covered by a collective bargaining agreement have no incentive to pay for the union's services because they are received free. Union and agency shops, which compel payment of union dues and fees by all who receive the benefits of the union's work, are solutions to the free-rider dilemma. Where these forms of union security are permitted, the interests of the majority who want collective bargaining override individual interests in getting something for nothing as well as the desires of the minority who prefer a different union or no union at all.

But this solution to the free-rider conflict—compulsory union membership or payment of equivalent fees—creates another dilemma, this of an ideological rather than economic nature. Union objectives may be won or lost either at the bargaining table or in the halls of government. Moreover, what is gained in one arena may be lost in the other. Labor organizations therefore engage in political as well as collective bargaining activities. That they do so raises First Amendment issues when resources are spent on ideological or political activities to which some bargaining unit members object and towards which they must contribute. Thus, agency shop and union shop agreements compelling financial support by all impinge on the interests of individual dissenters from union policies. However, relieving dissenters of their obligation to support their bargaining agent impinges on the interests of the majority who favor the very activity the dissenters find objectionable. The solution to this dilemma of union and agency shops has become the obligatory support of collective bargaining activities and the optional support of ideological and political activities. Where union or agency shop agreements are in force, dissenting bargaining unit members must pay their fair share of the costs of negotiating and administering collective bargaining agreements, but are not required to help defray the labor organization's expenses in connection with political or ideological causes and activities.[2]

(Footnote Continued)

ance Premiums," *Journal of Business*, 1985, Vol. 58, No. 1, pp. 27-47; Carlson, Eugene; "Michigan May Quit the Cellar in One Business-Cost Ranking," *Wall Street Journal*, March 10, 1987; Feldstein, Martin S., "Temporary Layoffs in a Theory of Unemployment," *Journal of Political Economy*, LXXXIV, 1976, pp. 937-958; Hamermesh, Daniel, "Unemployment Insurance and Labor Supply," *International Economic Review*, October 1980, XXI, pp. 517-527; Price, Daniel N., "Unemployment Insurance, Then and Now," *Social Security Bulletin*, October 1985/Vol. 48, No. 10, pp. 22-32; Tannery, Frederick J., "Search Effort and Unemployment Insurance Reconsidered," *Journal of Human Resources*, 1983, XVIII, No. 3, pp. 432-440; Topel, Robert, and Finis Welch, "Unemployment Insurance: Survey and Extensions," *Economica*, August, 1980, XLVII, pp. 351-379; U.S. Department of Labor, Unemployment Insurance Service, *Comparison of State Unemployment Insurance Laws*, 1985 (Revised 1986).

* The authors are grateful for the legal research assistance of Kenneth Wm. Thornicroft, Esq.

[1] Mancur Olson, Jr., *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge, MA: Harvard University Press, 1965), p. 76.

[2] This statement is true for the public sector (as established by the U.S. Supreme Court in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and further developed in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. —; 89 L Ed 2d 232; 106 S.Ct. 1066 (1986)), and for employees covered by the Railway Labor Act (as set forth in *Railway Employees' Department v. Hanson* 351 U.S. 225; 100 L Ed 1112; 76 S.Ct. 714 (1959), 30 LC ¶ 69,961, *International Assn. of Machinists v. Street*, 367 U.S. 740; 6

The fair share fee thus reconciles First Amendment rights of minority members with those of the majority, and simultaneously solves the problem of the free rider.

Several questions arise, however, around the implementation of the fair share fee concept: What is a proper charge? How should the determination be made and by whom? By what procedure must dissenters initiate and sustain their objections? Since *International Assn. of Machinists v. Street*[3] was decided in 1961, case law has been developing answers to these questions, rather slowly at first but recently rather quickly. In view of the rapidly developing legal environment, the authors wondered what impact these changes were having on labor organizations. What, for instance, are collective bargaining associations doing to meet their obligations under the law? To what extent and how is public policy affecting union policy and practice? What impact, if any, does the fair share fee have on the labor organization's ability to represent its constituency?

The answers to these questions are being explored through interviews with staff members and elected officers of a number of labor organizations. We are also reviewing union policies, referee determinations, arbitration awards, and state employment relations board and court decisions. This article, an interim report of that ongoing research, reports on practices being taken to meet the substantive requirements of developing law. Subsequent papers will deal with procedural issues and with the impact of fair share fees on labor organizations and their constituents.

A Typology of Union Expenses

In drawing the line between what a labor organization may properly charge dissenters and what it may not, four categories of expenses may be distinguished: (1) those germane to collective bargaining and not for political or ideological purposes, (2) those for political purposes and not germane to collective bargaining, (3) those that are *neither* political nor directly involved with the negotiation and administration of collective bargaining agreements, and (4) those that are *both* political and germane to bargaining. Under the *Street* doctrine, the first category is chargeable and the second not. Thus, expenses incurred in preparing for negotiations, negotiating agreements, strikes, and other economic actions to secure agreements and expenses incurred in contract administration including grievance adjustment and arbitration are chargeable. Not chargeable are expenses incurred in lobbying on gun control legislation, publicizing union endorsements for public office, and contributions to charitable organizations such as the Boy Scouts of America. The labor organizations of this study seem to be making these distinctions fairly easily, for they are quite consistent in their allocation criteria. Difficulties arise in the third and fourth categories of expenditures.

Regarding expenses that are neither directly related to bargaining nor political (essentially institutional in nature such as conventions, social activities, publications, and unbargained-for union benefits), are these chargeable because they are not political? Or are they nonchargeable because they are not directly bargaining-related? *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks* deals with this category and provides the test: Objecting employees may be charged for "undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive represen-

(Footnote Continued)

L Ed 2d 1141; 81 S.Ct. 1784 (1961) 42 LC ¶ 17,009, *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113; 10 L Ed 2d 235; 83 S.Ct. 1158 (1963), and *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435; 80 L Ed 2d 428, 100 LC ¶ 10,939 (1984). The Court is presently considering coverage under the National Labor Relations Act as amended (*Beck v. Communications Workers of America*, 800 F.2d 1280 (4th Cir. 1986)).

[3] 367 U.S. 740; 6 L Ed 2d 1141; 81 S.Ct. 1784 (1961).

tative of the employees in the bargaining unit." [4]

Applying this test to the activities in question, the Court found the following to be chargeable: conventions; social activities that are open to member and nonmember employees; other expenditures that promote closer ties among employees; publication costs pro-rated for space devoted to chargeable activities; litigation incident to bargaining, contract administration, and grievance settlement; fair representation and jurisdictional dispute litigation, and any other litigation "that concerns bargaining unit employees and is normally conducted by the exclusive representative." [5]

These activities were not chargeable to objecting bargaining unit members: organizing members not currently represented and attempts to recruit nonmember objectors in agency shops; publication of articles on nonchargeable activities; and, unless the "bargaining unit is directly concerned," litigation challenging employers' mutual aid pacts, to protect employees of the industry during bankruptcy proceedings, and defense of Title VII suits.

Under *Ellis*, then, there are three kinds of labor organization activities: those that are not chargeable to objectors, those that are, and mixed activities. Partisan political activities are of the first type, grievance adjustment of the second, publishing and litigation of the third. Whether a given mixed activity expense is chargeable depends on its particular purpose and its relation to bargaining unit members: publication space devoted to upcoming contract negotiations is chargeable, space devoted to political endorsements is not; defense of fair representation suits is, defense of Title VII suits is not.

Allocation Problems and Sector Differences

That reasonable people may disagree in applying the *Ellis* test to specific expenses was noted by Justice Powell, who concurred in part and dissented in part.[6] While he agreed with the standard, he disagreed with its application to convention expenses. Convention minutes showed that in addition to governance, time was spent hearing from a number of prominent politicians. Powell concluded that in the absence of a union showing of the relationship of the speeches to collective bargaining, objectors should not be charged for them. Thus, Powell would put the convention into the mixed activity category. A similar problem faced the auditor-referee of one national labor organization in our study.

Between conventions this organization regularly holds meetings throughout the country to inform, train, and hear from its constituents. Social activities are included. Some time at each meeting is spent hearing reports of and discussing state and national legislative activity. Should these meetings be treated like fully-chargeable conventions because of their consultative and policy-formulation aspects, or should they be treated like partially-chargeable publications because of their communications function and inclusion of nonchargeable activities? The auditor-referee of this union, who resolves all questionable items in favor of the objectors, considered them mixed and allocated the expenses of the meetings according to the time spent on each activity type. Allocation criteria provided by other labor organizations generally agreed with this determination.[7]

One type of expense where there was distinct disagreement among the sample

[4] 80 L Ed 2d at 442.

[5] *Id.* at 445.

[6] *Id.* at 448.

[7] An exception was the special master in *Beck* (800 F.2d 1280), who disallowed "Conventions and Related Committees" because the union did not show clear and convincing evidence of chargeable activity. The Fourth Circuit remanded for reconsideration on a preponderance standard of evidence.

labor organizations was organizing. *Ellis* specifically makes organizing expenses "spent on employees outside the collective-bargaining unit already represented" not chargeable, as it does for attempts to convince nonmembers in agency shops to become members.[8] Although the railroad labor organizations in our sample were charging neither for organizing new members, nor for efforts to reduce the number of dues objectors in union shops, they were charging for defending units already organized against raids by rival organizations. Public sector organizations, on the other hand, included all kinds of organizing (internal and external, offensive and defensive) in the activities for which they charged a fair share fee.

That these organizations differ in their substantive rules is not surprising. The situation for unions operating under the Railway Labor Act is much more stable and clearly defined than it is for public sector organizations. *Ellis* deals with the permissibility of certain charges under RLA. Amongst else, *Beck v. Communications Workers of America* considers the issue of allowable charges by unions representing employees under the National Labor Relations Act as amended and applies the *Ellis* standard.[9] There is no comparably specific decision for public employee bargaining associations, although some states seem to allow noncollective bargaining—nonideological expenses. Section 208(3) of New York's Civil Service Law, for example, permits union retention of all but "activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment."

Section 4117.09 of the Ohio Revised Code permits retention of all but "expenditures in support of partisan politics or ideological causes not germaine [sic] to the work of employee organizations in the realm of collective bargaining." Unless *Ellis* is held to apply to public as well as private employees, it appears that public sector labor organizations in these and other states may charge fair share payers for three of the four types of expenses distinguished above. Under this rule, defense of Title VII suits, which is neither bargaining nor political and does not directly concern bargaining unit members—clearly nonchargeable under the *Ellis* standard—is arguably chargeable.

That the line might be drawn differently for the public and private sectors was considered by the Court in *Abood v. Detroit Board of Education*.[10] In discussing the contention that "collective bargaining in the public sector is inherently 'political,' " the Court describes "often-noted differences in the nature of collective bargaining in the public and private sectors" and cites numerous scholars on the subject.[11] It then concludes that, as in *Street*, collective bargaining expenses are chargeable, expenses in support of political or ideological activities unrelated to the duties of a union as exclusive bargaining representative are not.[12] The Court concedes the difficulty of drawing a line between the two activities. Moreover, "in the public sector the line may be somewhat hazier" than under RLA: "The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." [13] However, it declines to define the dividing line in this case.

[8] 80 L Ed 2d at 444.

[9] 800 F.2d (4th Cir. 1986). This case is now before the Supreme Court on whether there are constitutional or statutory limitations on the use of nonmember fees and union dues under the NLRA as has been held for RLA and public employees.

[10] 431 U.S. 209 (1977).

[11] *Id.* at 279.

[12] *Id.* at 282-283.

[13] *Id.* at 285.

Public sector labor organizations in our study have been allocating their expenses consistently with the post-*Abood* Rehmus and Kerner[14] recommendation that nonpartisan political expenditures be chargeable to nonmembers, and some courts agree. In *Robinson v. State of New Jersey*, decided after *Ellis*, the Third Circuit distinguished between union expenditures based upon "the subject matter of the expenditure, rather than the forum." [15] Observing that many mandatory subjects of bargaining under NLRA are, in fact, regulated by New Jersey statute, the court states that "a public employee union unable to lobby the state authority would be severely handicapped in performing its duties as a bargaining representative" and concludes that "the costs of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer" are chargeable under New Jersey law.[16]

The same argument, that chargeability be based on subject matter rather than forum, may also be persuasive in railroading and other regulated industries. Some auditor-referees and dues-objector arbitrators are allowing expenses for representing the members' interests before state and federal bodies that regulate the operations of the railroads, although if the subject matter is remote from wages, hours, and working conditions, the allocation may be difficult to square with *Ellis*. The special master in *Beck*, too, suggested that he may have allowed lobbying on some issues related to working conditions, but the union did not separately identify these costs.[17]

Finally, there are some expenses that seem to defy classification by the collective bargaining-political typology: rent, utilities, office supplies, and compensation of clerical staff are examples. Overhead is a mixed expense (like publications and litigation), but is more difficult to analyze for its nonchargeable component. The method we found generally being used was similar to the way "administrative" expenses were handled in *Beck*: by proportionate allocation on the basis of the time spent on various activities by key staff and officers.

The Ground Moves

The foregoing was essentially the situation as it concerns the substantive matters of fair share fees in the three years between *Ellis* and the summer of 1987. *Chicago Teachers Union, Local No. 1 v. Hudson* was decided in the interim, but it concerned procedural matters.[18] As labor organizations scrambled to adapt their fair-share/dues-objector procedures to their interpretations of the *Hudson* requirements and then to the interpretations of lower courts, procedural issues dominated substance even when substance was involved: development of accounting practices to facilitate calculation of the nonchargeable share at various levels of the organization and to sustain the burden and weight of proof, choice of someone to make the initial determination, and the like.[19]

Then in July of 1987, in *Tierney v. City of Toledo*, the Sixth Circuit took up the "gray area" of expenses that advance neither or both collective bargaining and political matters.[20] Recognizing that a typology dichotomizing union expenses into mutually exclusive categories on these lines must fail for functioning unions, but deferring categorization and

[14] See note 29.

[15] 741 F.2d 598 (3rd Cir. 1984) at 607.

[16] *Id.*

[17] 776 F.2d at 1211 (4th Cir. 1985).

[18] 475 U.S. —; 89 L Ed 2d 232; 106 S.Ct. 1066 (1986).

[19] There has been a wide variety of decision outcomes on who makes the initial determination—union staff or officers, certified public accountants, lawyers and professors are all being employed. This issue is beyond the scope of this article and will be discussed elsewhere.

[20] 125 LRRM 3217 (6th Cir. 1987).

dispute resolution to the independent decision maker required under *Ellis*, the court then holds that the union may not claim full dues covering "*all expenses except those items which are ideological in purpose.* Instead, it may collect only *for those expenses affirmatively related to the bargaining agreement.*" [21] The court makes several other specific references to the collective bargaining "agreement." This suggests that union use of funds collected from fair-share-fee payers is more restricted than had been permitted under earlier decisions: Anything in the "gray area" must be escrowed pending arbitrator satisfaction that they are "fairly attributable to agreement-related purposes." [22]

Discussion and Conclusion

Line drawing and typology creating are not new to labor relations. Defining the scope of bargaining comes to mind as an analogy to defining the scope of fair share activities. By this analogy, labor organization expenses "affirmatively related to the bargaining agreement" may be likened to mandatory subjects of collective bargaining. These expenses are mandatory in the sense that all members of the bargaining unit covered by an agency or union shop must contribute their fair share. Ideological and political activities are permissive or voluntary: represented employees may share in their costs, but doing so may not be the *sine qua non* for continued employment. As with the scope of bargaining, the line between bargaining and political categories will shift over time as economic and political conditions change and, with them, union activities and the contents of collective bargaining agreements. There will also be a peripheral or gray area. The present drift of the courts with respect to the location of the line and consequent chargeability of gray-area items is towards greater First Amendment protection for dissenting employees. But unlike Section 8(d)'s "wages, hours, and other terms and conditions of employment," the bargaining-political dichotomy is not a single dimension and, *Tierney* notwithstanding, there does not yet appear to be consensus on which dimension takes precedence. Moreover, unlike the NLRB which created the bargaining subject categories,[23] no administrative agency appears eager to assume the power to make fair share fee determinations, although there are agencies that might assume the role.[24] Instead, the courts are deferring to "independent decision makers," [25] whose qualifications to make the required decisions are themselves an issue. A patchwork quilt cannot help but result until greater and clearer guidance is provided.

In 1973, Daniel Pollitt [26] referred to the "workable balance" achieved by *Railway Employees' Department v. Hanson*[27], *Street*, and *Brotherhood of Railway and Steamship Clerks v. Allen.*[28] In 1980, Rehmus and Kerner[29] documented the problems seven states were having achieving that balance in the wake of *Abood.* In 1988, after *Ellis* and *Hudson*, Briffault finds the balance shifted and continuing problems in fair share fee interpretation and administration. Not yet having adjusted to *Hudson*, the labor organizations in our study were nearly all trying to come to grips with *Tierney* and deal with ongoing challenges to their fair-share pro-

[21] *Id.* at 3221-3222.

[22] *Id.* at 3222.

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

[24] As suggested by Richard Briffault, "The New York Agency Fee and the Constitution After *Ellis* and *Hudson*," *Industrial and Labor Relations Review*, Vol. 41, No. 2 (January, 1988), pp. 291-93.

[25] 125 LRRM at 3221.

[26] Daniel M. Pollitt, "Union Security in America," *The American Federationist*, Vol. 80, No. 10 (October, 1973), pp. 16-22.

[27] 351 U.S. 225; 100 L Ed 112; 76 S.Ct. 714 (1959).

[28] 373 U.S. 113; 10 L Ed 2d 235; 83 S.Ct. 1158 (1963).

[29] Charles M. Rehmus and Benjamin A. Kerner, "The Agency Shop After *Abood:* No Free Ride, But What's the Fare?" *Industrial and Labor Relations Review*, Vol. 34, No. 1 (October, 1980), pp. 90-100.

cedures before state employment relations boards and the courts. The situation may change again soon for private sector labor organizations when *Beck* is decided later this year.[30] Pollitt's "workable balance" seems illusive. Although some fair share programs have been ill-conceived and sloppily administered, most labor organizations in our study were making what seemed to us good faith efforts to comply with changing and often vague requirements. We agree with Briffault, however, that both unions and objectors would benefit from clearer and more consistent answers to the many questions arising from implementation of the fair share fee concept.

[The End]

The Rise and Fall of the Arbitration Review Board

By Steve Bourne

Concord College

The Arbitration Review Board (ARB) existed in the bituminous coal industry from 1974 to 1981, having been established during the 1974 contract negotiations between the Bituminous Coal Operators Association (BCOA) and the United Mine Workers of America (UMWA). The ARB operated as an industry appellate board designed to hear appeals of arbitration awards, and the decisions of the ARB were contractually mandated as industry precedents requiring arbitrator compliance. Although the parties terminated the ARB in 1981, they have continued to incorporate the precedent decisions in subsequent contracts. This research utilized both a qualitative assessment and an empirical analysis of arbitration decisions to determine the impact of the ARB on the arbitration process in the coal industry.

Structured interviews were conducted with former ARB members, arbitrators, management representatives, and union representatives to gather information to construct a complete historical perspective of the ARB's inception, operation, and termination. A total of 44 individuals were interviewed. The empirical assessment involved a content analysis of 300 arbitration decisions to determine the extent to which arbitrators have adhered to the ARB precedents.

The ARB was established during the 1974 negotiations in the bituminous coal industry as an appellate review board that would review arbitration decisions when requested by either party. The overwhelming majority of those interviewed expressed the belief that the inconsistency of arbitration decisions prior to the 1974 negotiations was the primary factor that caused the BCOA and UMWA to resort to the ARB. The coal industry often found itself in a situation where decisions dealing with the same contractual clause and work situation resulted in diametrically opposite arbitration decisions. Therefore, issues were never completely settled by arbitration. A contributing factor to this incidence of contradictory decisions was the high volume of arbitration cases in the industry, which provided the opportunity for a large number of diverse arbitral

[30] On June 29, 1988, the Supreme Court affirmed the Fourth Circuit's holding that nonmember employees in NLRA-regulated industries may not be required to pay for union activities unrelated to collective bargaining (800 F.2d 1280 (4th Cir. 1986), aff'd 109 LC 4110,548).

views to be expressed on a topic. The trend toward excessive arbitration of grievances began during the 1971 contractual period, and accelerated to the point that approximately 30 percent of the grievances filed under the 1974 Agreement went to arbitration.[1]

In addition to the high volume of arbitration decisions, certain structural defects existed in the coal industry's arbitration process during the early 1970s that heightened the probability of inconsistency in arbitral decisions. Arbitration decisions were not circulated in the industry in any formal manner; therefore, the content of arbitration decisions was normally made known to arbitrators only by advocates attempting to support their position in a case before the arbitrator. Of those interviewed, arbitrators and management practitioners most often cited this factor as a leading cause of inconsistent decisions. Another structural characteristic that magnified the problem of inconsistency was the utilization of the ad hoc method of selecting arbitrators, without the requirement that the American Arbitration Association or the Federal Mediation and Conciliation Service be utilized as referral agencies. Both management and labor practitioners cited the lack of a defined group of experienced coal arbitrators as a factor contributing to variations in the quality of decisions during that period.

Implementation of the ARB

A pattern quickly developed where the inconsistency in decisions and the rising number of arbitration cases fed on one another in such a way as to make it difficult to break the cycle. This destructive pattern required that a radical departure from traditional methods of arbitration be implemented in hopes of establishing consistency in the industry's arbitration decisions. The leaders of the industry chose to accomplish this end by implementing the ARB.

Although the 1974 National Agreement became effective on December 6, 1974, the ARB did not begin its review of appeals until 14 months later in February, 1976. By this time, there were over 400 appeals before the ARB.[2] In an industry that had traditionally placed a premium on a quick resolution process, this overwhelming backlog of appeals seriously impaired the ARB's chances of success. The root cause of this delay was the inability of the negotiators to provide comprehensive operational guidelines for the ARB. The negotiators in 1974 agreed only to the composition of the Board and the implementation of the panel system, with the naming of the individuals to serve on the ARB and the selection of panel arbitrators being deferred. There is an indication in the 1974 Agreement that the parties felt the unsettled details could be quickly dispatched, since there is a reference to a 60-day time frame for the establishment of the ARB (National Bituminous Coal Wage Agreement of 1974). The fact that the 60 days evolved into 14 months is indicative of the complexity encountered in trying to develop an innovative arbitration system.

When one considers the collective time necessary to select a Chief Umpire, panel arbitrators, an ARB staff, and to formulate rules of operation for the entire ARB system, it becomes obvious that the negotiators seriously miscalculated the time requirements for establishing an operational ARB. Since the contract allowed the appeal of any arbitration decision arising under the 1974 agreement rather than delaying the right of appeal until after the Board became operational, this miscalculation proved extremely costly to the parties in the backlog of cases that was generated.

[1] Rolf Valtin, "The Bituminous Coal Experiment," LABOR LAW JOURNAL, Vol. 29, No. 8, August, 1978, pp. 469-476.

[2] Tom Waddington, telephone interview, November 6, 1986.

Following the selection of the three members of the ARB, these members had to decide the ground rules for the operation of the appeals system. Again, this was necessitated by the lack of information in the agreement as to the operational aspects of the Board. The three-member Board had substantial authority in determining several critical aspects of the Board's operation. For example, the determination to hold hearings when the Board deemed necessary rather than rely solely on transcripts in all cases was decided by these three individuals, not the negotiators of the agreement. The Board also decided its own policies on such issues as whether it should write opinions to accompany its decisions, whether there should be dissenting opinions allowed when the vote was not unanimous, and whether the BCOA and UMWA representatives were to serve as advocates of their party's position or as neutrals serving as one of three umpires on the Board. These deliberations by the Board required the use of time that could have been utilized in reviewing appeals had the negotiators provided a more thorough framework for the ARB.

During its period of operation, the ARB rendered 207 decisions, 126 by the "First Board" under the 1974 agreement and 81 by the "Second Board" under the 1978 agreement. The number of decisions by the ARB appears to be relatively small, given the large number of decisions appealed to the ARB. The appeal rate under the 1974 Board was approximately 10 percent of the arbitration decisions rendered by the panel arbitrators. Since the average number of arbitration decisions during this period was 2,500 per year, this yielded approximately 250 appeals per year for a total of 750 appeals under the 1974 agreement.[3] The remainder of the cases beyond the 126 ARB decisions were concluded at the expiration of the 1974 agreement by one of two methods. Many were withdrawn by the parties through a one-time screening process, while 289 were decided by the Interim Board. The Interim Board was established specifically to clear all remaining appeals under the 1974 agreement prior to the beginning of operation of the 1978 Board.

The relatively low output of the ARB can be explained by three developments: 1) the method of review utilized by the Board, 2) the lack of a screening mechanism, and 3) the turnover of Board members. The three members of the First Board (Chief Umpire Rolf Valtin, BCOA representative Tom Waddington, and UMWA representative Robert Benedict) were left to decide the nature of the review process. They ultimately determined that the contract required them to undertake a true review of all appeals, which entailed the reading of the case record as well as the Panel Decision. The Board felt this approach provided evidence to the people in the coal fields that each case was given a fair review on its merits, thus strengthening the integrity and acceptability of the appeal process. In choosing this method, the Board rejected the alternative approach of exercising certiorari power by first determining whether an appeal merited review. This "cert" approach was rejected by the Board because the members felt there was no contractual basis for its implementation.[4]

The absence of a screening body for either party resulted in the Board having to give each case a full review, regardless of the merits of the appeal. Both parties rejected the establishment of screening bodies when establishing the ground rules because they felt there was no legal validity in doing so, given the contractual language that provided the appeal mechanism as a right under the agree-

[3] Valtin, cited at note 1.

[4] Rolf Valtin, unpublished memorandum to the Bituminous Coal Operators Association and the United Mine Workers of America, November 8, 1977.

ment. A screening body could have exercised great discretionary power determining the appeals to be forwarded to the Board, thereby insuring the Board would deal with those cases having significant industry application. The turnover in Board members was primarily the result of union dissatisfaction with the ARB. The parties initiated the alteration of the ARB from its three-member format to a one-person Board under the 1978 agreement, with the union seeking a change of the Chief Umpire; and, the union also moved for the dismissal of the first Chief Umpire of the 1978 ARB. All of these changes required time for the selection process and orientation of the Chief Umpire, thus limiting the Board's capacity for rendering a larger number of decisions.

Termination of the Arbitration Review Board

The termination of the ARB occurred with the expiration of the 1978 National Agreement. The UMWA refused to renew the ARB during the 1981 negotiations, citing the overwhelming desire of their membership for Board termination as the primary factor in their position. The leadership felt bound by the resolution of the 1979 UMWA convention in Denver that called for the termination of the ARB. The union negotiators bargained very strenuously that they could not take a contract extending the Board to the membership. Sam Church, then President of the UMWA, felt the Board had been beneficial to the arbitration process in the industry and had opposed the convention's resolution for the Board's termination. But the political pressure exerted by that resolution, and the position of the 1981 UMWA Bargaining Council in opposition to the ARB, allowed him no flexibility in attempting to modify the Board's operation in an effort to retain the basic concept.[5] This political climate within the union during this era was the most often cited reason for the Board's termination, with 77 percent of the respondents citing this factor.

Another factor cited by 73 percent of the respondents as contributing to the termination of the ARB was the inclination by both parties to appeal sound arbitration decisions to the Board. To some advocates, the Board became just another step in the grievance process and little thought was given to the merits of the appeal. The union district representatives were under greater political pressure to pursue such appeals since their positions were elected offices. The petition for appeal could be used to illustrate to the membership the district representatives' diligence in representation, and any negative feelings by the member toward the decision could be deflected by the district representative toward the Board. Management representatives also were guilty of pursuing unworthy appeals in an attempt to illustrate to superiors their extensive efforts in obtaining a favorable decision.

This lack of maturity in dealing with the Board concept contributed to the large number of appeals brought to the Board and the subsequent dissatisfaction with the long delays experienced in getting a decision from the Board. Some of those interviewed noted the irony that, in many cases, those advocates who so strongly criticized the ARB for its inability to render effective decisions in a timely fashion were the same ones who flooded the Board's docket with appeals of panel arbitration decisions that were clearly consistent with the agreement. In essence, these individuals had exacerbated the Board's problems and then utilized the results as proof that the concept of an industry-wide appellate board was deficient.

A final factor that contributed to the termination of the Board was the lack of communication provided to the union membership in regards to the Board's pur-

[5] Sam Church, telephone interview, January 16, 1987.

pose, operation, rationale for decisions, and the content of Board decisions. The perception held by most of those in leadership positions in the coal industry was that the Board was to function as a quasi-supreme court for the coal industry, hearing critically important issues having industry-wide significance. However, the membership never seemed to grasp this concept, focusing instead on the right to appeal any unfavorable arbitration decision. This lack of understanding as to the primary purpose of the Board created an environment in which Board decisions were critically appraised from the wrong perspective.

Most members were only made aware of the ARB's decision, not the rationale of that decision, since there was very little circulation of the Board decisions among the membership. This also resulted in many members who lacked knowledge of ARB precedents exerting pressure on the district representative to carry the panel arbitration decision through the appeal procedure. Thus, the intended benefit of having the ARB's decision assist the parties at the local level in settling their grievances did not fully materialize.

Impact of the ARB on Arbitration Decisions

To provide an empirical assessment of the ARB's impact on arbitral decision-making, 300 arbitration decisions from the coal industry were randomly selected for content analysis. Sixty decisions were selected from each of five years (1977, 1979, 1981, 1983, 1985) and were analyzed for their degree of adherence to ARB precedents. Selection of these years was predicated upon the desire to assess arbitrator compliance with ARB precedents at various times throughout the ARB experience. Since the Board was terminated in 1981, the years selected represent two full years of Board operation, the year of termination, and two years after termination of the Board.

A set of decision rules was utilized to assist in the content analysis of the arbitration decisions, and four possible classifications existed for each decision. These four classifications were developed to represent varying degrees of adherence to ARB precedents. This classification scheme attempted to span the range of possible degrees of compliance, from the citation of and strict adherence to a relevant ARB decision (Classification 1) to the citation of a relevant ARB decision accompanied by a decision that was directly contrary to that citation (Classification 4). Classifications 2 and 3 represented intermediate degrees of adherence based on the principle of an ARB decision, with no citation of the relevant decision. Assignment of cases into either of these classifications first required a careful analysis of those ARB decisions relevant to the case under analysis and then a determination of the arbitrator's application of the principles from the relevant ARB decisions to the instant case.

In order to assess the reliability of the classification process conducted by the investigator, a subsample of the 300 decisions under analysis were selected for review by a panel of four coal industry labor relations experts. The subsample, selected by using a stratified random sample, consisted of 30 decisions. The strata were based on the overall distribution of cases by classification, with the subsample reflecting the same percentage of each classification as did the overall sample. Each expert classified 15 decisions, independent of any influence from the investigator or one another. There was a high degree of agreement between the classifications of the investigator and those of the reviewers, with agreement occurring in 93.3 percent of the cases. The overall consistency between the investigator and the experts in the classification of the arbitration decisions provided the basis for substantial confidence in the classification process. The interrater reliability of the classification procedures was firmly

established, and high interrater reliability is a standard in determining reliability for content analysis.[6]

Of the 300 arbitration decisions analyzed and classified based on their adherence to ARB precedents, 147 (49 percent) were placed in Classification 1, 128 (42.7 percent) in Classification 2, 19 (6.3 percent) in Classification 3, and 6 (2 percent) in Classification 4. This illustrates an extremely high degree of adherence to ARB precedents by panel arbitrators. An interesting aspect of this adherence is that the level of adherence continually increases throughout the period, showing the greatest adherence in the years 1983 and 1985. Since the ARB was terminated in 1981, the continued adherence to ARB precedents provides evidence of the Board's residual impact in establishing industry precedents for panel arbitrators.

Conclusion

The most significant conclusion evidenced by the information collected in this research is that the ARB fulfilled its objective of providing consistency in the arbitration process in the bituminous coal industry. The vast majority of those interviewed felt that the Board completed its supreme court function exceedingly well in serving as the final authority on disputed issues. Furthermore, the residual impact of the Board during the period since its termination is considered by those in the industry to be substantial, and the empirical analysis of 300 arbitration decisions confirms this belief. Another conclusion to be drawn from this assessment is that the implementation of the ARB was seriously flawed. The lack of attention given to the structural and administrative necessities of the Board by the negotiators of the 1974 agreement created an environment that hindered the possibility of success for the ARB. Future attempts at utilizing an appellate review board in the coal industry or other industries should benefit from the coal industry's experience with the Arbitration Review Board.*

[The End]

[6] Robert Philip Weber, Basic Content Analysis (Beverly Hills Sage Publications, 1985), p. 17.

* *Additional Reference:* Bituminous Coal Operators Association and United Mine Workers of America, *National Bituminous Coal Wage Agreement of 1974.*

Proposed Anti-Dual Shop Legislation in the Construction Industry

By Daniel Dooley

Frost & Jacobs
Cincinnati, Ohio

The terms "dual shop" or "double-breasted" operation in the construction industry refer to the operation of two construction contracting companies under common related ownership or financial control engaged in the same or similar construction business, with one being union and the other non-union. Some federal courts and the National Labor Relations Board have said, with apparent reluctance, that dual shops are "not inherently illegal."

One existing problem for such companies is that, with increasing frequency, unions, through the filing of unfair labor practice charges, contract grievances, and

court actions, have been successfully asserting claims that a union's contract covering the unionized operation applies by its terms and operation of law to the non-union company. The consequences of such a successful claim against a dual shop operation are serious, because the usual remedy is to require prospective application of the union contract to the non-union shop, plus retroactive payment to the non-union employees of the difference between their actual wages and the union contract wages, and retroactive payment of unpaid contributions to the union benefit and pension funds.

There are two legal theories upon which unions base these claims and that arbitrators, the National Labor Relations Board, or the courts use in deciding the validity of these claims. One is called the "single employer" doctrine, and the other is called the "alter ego" doctrine.

The decisions contain a two-part test to determine whether the single employer doctrine applies to a dual shop operation: (1) Do the two companies comprise a single employer? *And*, if so, (2) do the employees of the two companies constitute a single appropriate bargaining unit?

If both questions are answered in the affirmative, the decisions hold that the union contract applies to both companies. The answer to the first part of the test generally turns on the presence or absence of (1) common ownership; (2) common management; (3) centralized control of labor relations; (4) interrelation of operations; and (5) whether there is an arms length business relationship between the two entities. The second part of the test generally turns on the (1) bargaining history, if any, as to the employees; (2) functional integration of operations; (3) similarity of training and skills of the employees; (4) similarity of work performed; (5) the extent of centralization of management and supervision, particularly with regard to labor relations, wages, benefits, and working conditions; and (6) the amount of interchange and contact between the two groups of employees. As to both parts of the test, it is said that no one factor is controlling nor do all criteria need to be present, which has resulted in the outcome of the cases being factually oriented and unpredictable.

Alter Ego Theory

The "alter ego" doctrine began as an inquiry into whether a union company had intentionally set up an alter ego in order to operate while avoiding its obligations under a union contract. These were cases where a unionized company closed, and the owners, or some of them, opened another company to operate the same business non-union.

In dual shop situations involving construction contractors, where both companies operate simultaneously, there has been some confusion and blending of the single employer theory with the alter ego theory, and the recent cases hold that "intent" to evade the union is not necessary to an "alter ego" finding. Consequently, the principal, and perhaps the only difference between the two, is that if the second, non-union company, because of its relationship to the first, is deemed to be an alter ego of the first, the union contract is held to be applicable both retroactively and prospectively, without the necessity of a determination as to whether the employees of the two companies may be or are a single bargaining unit or separate bargaining units. There was and is much confusion in this area, and as the case law developed, more and more requirements emerged that had to be complied with if a dual shop operation was not to be found a single employer or if the non-union company was not to be found an alter ego of the union company.

In the applicable decisions, it was often said that the outcome is to be governed by whether the non-union company is determined to be a "disguised continuance or extension" of the union company. Therefore, the decisions imposed extensive requirements that all aspects of the two

businesses be separated as much as possible, particularly if there is identical ownership, or the two companies have any common owners. For a dual shop operation to have a successful defense, the new non-union company should not acquire its realty, office space, equipment, tools, managers, or supervisors from the union company and there should be no transfer of employees from the union bargaining unit to the second company.

Once the new company is established, there should be no sharing with the unionized company of buildings, equipment, or personnel, including office or clerical personnel. There should be separate bank accounts, payrolls, insurance, and accounting, and the non-union company should be managed and operated as independently as possible, particularly as to labor relations, including hiring, discipline, firing, and determination of wages, benefits, and working conditions. The union company should not subcontract work to the non-union company, nor should both companies bid or do work on the same job. Ideally, they should avoid doing work for the same customer even on different jobs. Even where the union company lost customers and had to access on their work, a takeover of the union company's former customers by the non-union company has been used against double-breasted defendants in some decisions. Both companies should be independently bondable and secure bonds independently of each other. Any transactions between them that do occur, such as sale or rental of materials or equipment, loans of money, or the performance of services, should be arms-length transactions in which the going rate is paid, although the fewer transactions between them, the better. There should be no situation in which either company furnishes materials or fabricated product for installation by the other.

Even if all of the above requirements are complied with, there is one last factor, which is apparently necessary. In many of the decisions, it is said that the two companies have to operate in "totally different economic climates." What this means is not at all clear. Some decisions seem to equate this with a different locale. Others have accepted that there may be a different climate in the same locale, in the form of a union market and a non-union market. The companies that have successfully withstood union contract claims have persuaded an arbitrator, Board, or court that the latter was so. Most of the others have lost.

As difficult as it to comply with the above requirements, it is still possible for a dual shop operation to win a case. Now, Congress appears ready to eliminate that possibility through amendments to the National Labor Relations Act ("the Act") which, unless vetoed by the President, will effectively eliminate most of the dual shop operations in existence.

It would seem that it might ultimately be better for the building trades unions if their union contractors were able to combat the non-union contractors deemed responsible for the shrinking construction market, because if dual shops are eliminated, the non-union construction market will be left exclusively to contractors with whom the unions have no connection or influence. However, the response of the unions (and the legislators who support the proposed legislation) has been to assume that all dual shop operations are, in the words of Robert Georgine, President of the AFL-CIO Building Trades Department, a sham and "corporate shell game" to "enable contractors to walk away from their union contract obligations," and divert work from the union company to the non-union company.

There is a lot of evidence that this is not generally true, and that, in most cases, the union contractors who have set up dual shops have gone to the considerable trouble of doing so in an attempt to recover customers and work lost to non-union competitors because of high costs.

Nevertheless, the unions seem convinced that the solution to a shrinking union market is to prevent union contractors from operating dual shops. Several years ago, some building trades unions began insisting that contractors agree to so-called "work preservation" clauses, which by their terms would extend the union contract to any company in the same trade that was directly or indirectly owned or controlled by the union company or any of its owners.

Proposed Amendments

Now, the unions have something better, in the form of proposed amendments to the Act which would eliminate virtually every existing dual shop. The proposed legislation is contained in bills designated H.R.281 and S.492, 100th Congress. These bills would amend the Act to define a "single employer" as any two or more entities:

performing, conducting, or supervising the same or similar work;

in the same or different geographical areas; and

having, directly or indirectly, (a) substantial common ownership, *or* (b) common management, *or* (c) common control.

This definition would appear to cover every existing dual shop, particularly since direct or indirect ownership, management, or control are referred to in the disjunctive, and the existence of any of them would result in both entities of a dual shop being found to be a "single employer." The bills would also provide that when one part of a single employer has to bargain with a union, the duty to bargain shall include the duty to apply the union contract to all other entities comprising the single employer, within the geographical area covered by the union contract.

Other sections of the bills provide that a pre-hire contract shall impose the same obligations as a contract signed by any employer with a majority union, and that a pre-hire contract may be repudiated only after a Labor Board election in which the employees vote for no union or a different union. These latter sections are intended to reverse a current NLRB decision,[1] which holds that a pre-hire contract must be honored until it expires, but, upon expiration, the contractor may repudiate the bargaining relationship with the union and refuse to sign another pre-hire contract.

Finally, there is a seemingly incongruous paragraph which states that it is the sense of Congress under the Act that violence and coercion are inimical to collective bargaining and that employers and unions "in fulfilling the objectives of the Act should never use or condone violence." It seems apparent that with few, if any, exceptions this legislation would bring every non-union part of a dual shop operation under the union contract of the unionized part of the dual shop operation.

This is because most union contractors who have a dual shop operation have both companies operating in the same geographic area. A few national contractors may have non-union shops in other cities or states outside the geographic jurisdiction of any union contract and they might not be affected. However, Robert Georgine testified in the House hearings that there are 185 national or multi-state agreements with large contractors, and that of the 50 largest contractors by dollar volume, 27 were operating dual shops. Of the top 25, 20 are operating dual shops. Mr. Georgine also testified that the Building Trades Unions have 9,500 local agreements, and dual shops are more common among smaller contractors, although no precise estimates exist.

Obviously, the impact of the legislation will be widespread. Whether this is really a good idea for the unions, or will help the

[1] *John Deklewa*, 282 NLRB No. 184 (Feb. 20, 1987), 1986-87 CCH NLRB ¶ 18,549.

unions to "preserve work" or help union contractors to regain any market share lost to open-shop contractors is open to serious question.

If the non-union sides of dual shops are as numerous, widespread, and successful as the unions have represented to Congress, the remaining open-shop contractors will no doubt rejoice greatly at the elimination of such large numbers of effective non-union competitors.

If union contractors are deprived of the dual shop method of competing with non-union contractors and forced to revert to operating exclusively union, they may pursue various courses of action. It seems probable that most, if not all, dual shops will deactivate or dissolve their non-union operations, rather than continue them under union conditions. Some of those who can operate profitably as a union contractor may do so and give up trying to compete non-union. Others, who were not operating profitably when they started their dual shop may give up completely and go out of business. Neither of these occurrences will provide or regain any work for the contractors or the unions.

However, there also may be a large number of union contractors who will be unable or unwilling to survive by operating 100 percent union without competing with non-union contractors. If they cannot compete through dual shop arrangements, the only other way for them to attempt to capture any of the non-union market will be to cut labor costs.

This may greatly increase the already existing pressure for those union contractors to demand in their next contract negotiations wage and benefit reductions and concessions regarding other working conditions. The unions no doubt recognize this. At least one union witness at the House hearings complained of a union contractor who sought to cope with a drastically curtailed construction market by opening a dual shop, instead of addressing the problem in the "give and take" of negotiations to obtain concessions.

However, one may legitimately wonder how often or how effectively such negotiations will solve the problem. Union construction markets may have improved in some areas, but in many areas the market conditions which impelled the formation of the dual shops still exist. It will take deep cuts in labor costs to put union contractors in a position to compete successfully with open-shop contractors. Those cuts may be deeper than unions or their members are willing to make. There have been, in the last 30 years, many "market recovery" systems involving wage and other concessions agreed to by contractors and unions, but judging by testimony in the hearings on these bills, they have been unsuccessful, because 70 percent of all construction is said to be non-union, and 76 percent of the construction work force is said to be non-union.

In any event, it seems likely that, if the dual shops are eliminated, unions will be faced with widespread demands for deep wage cuts, and perhaps with widespread strikes in the absence of agreement. In such strikes, many contractors may be tempted or determined to permanently replace the strikers, and the contractors with small or medium sized work forces may be readily able to do so. Ironically, one source of replacements may be the workers who became unemployed when the non-union segments of dual shops ceased operations.

Actually, the existence of the dual shops may have avoided, or at least postponed, these confrontations. Although no one can predict how many strikes might result or predict the direction the next round of contract negotiations will take, one possibility is that "market recovery" systems similar to those developed in the past will result. A common system was to agree that on specified classes of construction on contracts below a specified dollar amount, lower wage rates and more liberal work rules would prevail. This would

replace a dual shop with a two tier contract. As noted, these systems have not been successful in the past, apparently because the conditions agreed to were not sufficiently competitive; or they did not cover a sufficiently large segment of the market; or, in some cases, because union tradesmen were reluctant to work for the lower rates. Perhaps these difficulties can be eliminated.

One thing does seem clear. The elimination of dual shops will not cure the economic problems of the union contractors and the Building Trades Unions. It will not, of itself, reverse the market problems or owner attitudes that impelled the formation of dual shops in the first place. The end result of this legislation will be the elimination of competition for non-union contractors. If union contractors are to regain a greater share of the construction market, and thereby provide more employment for union members, they need the help of the unions to enable them to compete against non-union contractors, not legislation that would make that competition impossible.

[The End]

Collective Bargaining in Baseball: Key Current Issues

By James B. Dworkin

Purdue University

Some things never seem to change! When professional baseball players first attempted to unionize in 1885, they were reacting to unilaterally imposed rules on maximum salary and player mobility. Over one hundred years ago, John Montgomery Ward, the first ball player president of the National Brotherhood of Professional Ball Players, stated the goals of his union: "To protect and benefit ourselves collectively and individually." [1]

Through the process of collective bargaining, the modern day ball player has indeed achieved certain protections and benefits, both collectively and individually. The most prominent of said benefits are the salary arbitration and free agency provisions found in the current agreement. A third area that has surfaced as being very important is player drug testing. In this article, I will address these three areas in an attempt to highlight the most controversial of the current key labor relations faced by the players and owners in professional baseball.

Much has been written on the salary arbitration procedure in professional baseball.[2] Readers unfamiliar with the workings of the process are encouraged to consult the references cited above. Rather than describe how the system operates, I want to focus my comments on two things: the recent *outcomes* of the procedure and the *decision making process* employed by the arbitrators who decide these cases.

[1] David Voigt, *American Baseball: From Gentlemen's Sport to the Commissioner System* (Norman, Oklahoma: University of Oklahoma Press, 1966).

[2] James B. Dworkin, *Owners Versus Players: Baseball and Collective Bargaining* (Boston, Mass.: Auburn House Publishing Company, 1981); "Salary Arbitration in Baseball: An Impartial Assessment After Ten Years," *The Arbitration Journal* 41 (March, 1986), pp. 63-69.

In thirteen years of operation, the overall record in salary arbitration cases is 150 victories for the clubs to 118 victories for the players. This 56 percent victory rate for the clubs tends to mask the fact that all players who are eligible for arbitration are really "winners." As Table 1 demonstrates, the players who "lost" their cases in arbitration in 1988 actually received *higher* average salary increases than their counterparts who "won" cases this year. Furthermore, as pointed out by Chass,[3] players eligible to employ arbitration for the initial time in 1988 (three to four years of major league service) actually were even bigger winners. Two players in this service category who employed arbitration for the first time were Tom Henke of the Blue Jays and Tim Burke of the Expos. Henke earned $331,000 in 1987. He "lost" at arbitration but his 1988 salary was set at $725,000, an increase of 120 percent. Burke fared even better, albeit he was also technically a "loser" at arbitration. His 1987 salary of $210,000 was increased by almost 200 percent up to $625,000 for the 1988 season. Ten other players eligible for arbitration for the first time but who were able to come to terms with their clubs without the need for a hearing received similar spectacular wage increases. To name just a few with their 1987 salary listed first and their 1988 negotiated salary listed in parentheses: Kirby Puckett $465,000 ($1,090,000); Eric Davis $330,000 ($899,000); Joe Carter $250,000 ($840,000); Vince Coleman $160,000 ($700,000).

My analysis of the outcomes of the salary arbitration cases to date leads me to the following conclusions:

- Salary arbitration has been as important, if not *more* important, than free agency, in helping professional baseball players to achieve the high salaries they enjoy today.
- Most eligible players will continue to file for arbitration because of the "threat effect" this poses.
- Filing for salary arbitration does not chill the bargaining process. For example, in 1988 only 18 arbitration cases were heard out of 111 filings (7 player wins, 11 club wins).
- As expected, the 1985 Basic Agreement which changed the eligibility requirements for arbitration from two to three years of major league service, has had interesting results. Players not yet eligible for arbitration have had their salaries held down through tough bargaining. Once they become eligible for arbitration, these players tend to receive sizable increases to make up for their lack of bargaining power in previous years.
- The arbitration decision making process appears to be a "black box."

I want to now turn to the last point made above, dealing with the decision making process employed by baseball's salary arbitrators. How do these arbitrators decide their cases?

How Arbitrators Decide

For example, let us consider the recent case of Andre Dawson of the Chicago Cubs. Dawson earned $700,000 in 1987 and went to arbitration seeking $2,000,000 in 1988. Arbitrator Stephen Goldberg awarded Dawson the club's figure of $1,850,000. How did he arrive at this decision? The problem is that we don't know how because the salary arbitration procedure in baseball precludes the writing of opinions by the neutrals.

Contrast this approach with the vast experience in labor arbitration in the private and public sectors of our economy. There has always been and always will be heavy interest in the arbitral decision making process. Many articles have been written describing the process that arbitrators employ in reaching their deci-

[3] Murray Chass, "Don't Jump to Wrong Conclusion," *The Sporting News*, February 29, 1988, p. 35.

sions.[4] Recently, there has been much interest in empirically testing various theories of the arbitral decision making process.[5] Additionally, practitioners regularly read published arbitration awards prior to selecting an arbitrator to hear a case. Why do they go to all of this trouble? They simply want to see how this arbitrator has decided cases involving similar issues in the past. What factors were considered in the decision making process? How were these factors weighted? How well did the arbitrator explain his or her decision?

My point is that in baseball salary arbitration cases, the parties, the fans, and other players and clubs really have no idea of how the final decision was reached. Perhaps this is what the owners and players desire! After all, this is the procedure they bilaterally agreed to through collective bargaining. But if this is true, I would like to know why the parties prefer to remain in the dark on these important decisions. Our discussants can address this issue today.

It is my hope (and suggestion to the parties) that they amend the arbitration procedure to provide for written explanations of the decisions handed down. These explanations need not be lengthy, but rather should convey to the parties the essence of the decision making process and the factors employed therein. These decisions should provide the parties and researchers with a wealth of important information on questions such as: Do arbitrators really pay particular attention to the player's seniority cohort and those players with one additional year of experience, as mandated by the labor agreement? Do arbitrators believe in "catch-up" for first time eligible players in order to make up for their lack of salary bargaining power in their first three years? What performance factors are particularly important in the decision making process? It is my opinion that award explanations will lead to a better overall understanding of the salary arbitration process and should enable the parties to make more informed decisions in the realm of arbitrator selection. Finally, researchers in the field should be kept busy trying to model and empirically test the policies of baseball's labor arbitrators. All of these outcomes seem to be quite positive.

Free Agency

I will comment briefly on two aspects of the free agency issue in professional baseball: (1) the recent grievance arbitration rulings in the so called "conspiracy" cases, and (2) the Elias Bureau ranking system employed in the collective bargaining contract. Readers unfamiliar with the free agency process in baseball are urged to consult Berry, Gould, and Staudohar and Lipsky and Donn.[6]

The Major League Baseball Players Association has filed three separate conspiracy cases against the 26 clubs. The first of these grievance cases, covering the 1985 free agents, was recently decided by arbitrator Thomas Roberts. His decision found the owners guilty of collusion in their treatment of free agents after the 1985 season. Further, Roberts awarded seven players a special period of free agency, without the need to relinquish their existing contracts, until March 1,

[4] Harry Dworkin, "How Arbitrators Decide Cases?" LABOR LAW JOURNAL, Vol. 25, No. 4, April, 1974), pp. 200-210; James Gross, "Value Judgments in the Decisions of Labor Arbitrators," *Industrial and Labor Relations Review* 21 (October, 1967), pp. 55-72; Peter Seitz, "Value Judgments in the Decisions of Labor Arbitrators," *Industrial and Labor Relations Review* 21 (April, 1968), pp. 427-430.

[5] Joseph P. Cain and Michael J. Stahl, "Modelling the Policies of Several Labor Arbitrators," *Academy of Management Journal* 26 (No. 1, 1983), pp. 140-147; Henry S. Farber and Max H. Bazername, "The General Basis of Arbitrator Behavior: An Empirical Analysis of Conventional and Final-Offer Arbitration," *Econometrica* 54 (July, 1986) pp. 819-844.

[6] Robert C. Berry, William B. Gould, and Paul D. Staudohar, *Labor Relations in Professional Sports* (Dover, Mass.: Auburn House Publishing Company, 1986); James B. Dworkin, "Professional Sports," in David B. Lipsky and Clifford B. Donn (Eds.), *Collective Bargaining in American Industry* (Lexington, Mass.: Lexington Books, 1988), pp. 187-224.

1988. It is also possible that Roberts will award monetary damages to all or some of the 1985 free agents. Obviously, such a decision could set a precedent for the other two free agency conspiracy grievances currently pending. It will be interesting to watch for the outcomes of these cases. The 1986 free agents had their cases argued before arbitrator George Nicolau and a decision is expected in May of 1988. Finally, on January 19, 1988, the players union filed the third conspiracy grievance covering the 1987 free agents.

While there has been some evidence of a thawing in the free agent market this year (for example, the New York Yankees' signing of former St. Louis Cardinal star Jack Clark), it does seem that the free agency bidding process has changed considerably under the leadership of Commissioner Peter Ueberroth.

Free Agency Negotiations

In my opinion, 1988 will be a very important year in baseball labor relations. In particular, the outcomes of these three conspiracy arbitration cases will go a long way toward shaping the free agency market for years to come. If the players lose these cases, we will probably see a significant and continued slowdown in free agent bidding. On the other hand, major victories for the players coupled with significant monetary penalties could force owners to return to their free spending habits exhibited in the era immediately following the Seitz decision. In either case, the free agency system is destined to be a major issue in the negotiations when baseball's current labor agreement expires after the 1989 season. Free agency has been a strike issue in the past and the bad feelings between owners and players over this issue continue to indicate a high likelihood of yet another strike in baseball in 1990.

As the parties begin their negotiations over free agency, I would like to suggest that they seriously consider revising the Elias Sports Bureau ranking system currently employed to determine which players are the top rated at their particular positions. This rating system is suspect for a number of reasons, including the fact that it really does not take career performance into account as well as its method of treating players who are on the disabled list for part of a season.

The theory behind the ranking of players does seem to make some sense. Player performance over two seasons is compiled to determine the rank of all players eligible to become free agents. The ranking of a free agent becomes important because it then determines the level of *compensation* that will be required if a player signs with a new team. The top 30 percent of players in each group are classified as Type A free agents (requiring the most compensation), while the next 20 percent are classified as Type B, and the next 10 percent are referred to as Type C.

I think both labor and management would agree that the formula could use some improvement. Aside from the problems with the formula mentioned above, I was curious to see how well this formula correlated with player salaries. One would hypothesize (if performance is heavily weighted) that the best rated players should also be the most highly paid players among their position group. What would the data show?

In order to test the above hypothesis, I collected data on 214 professional baseball players. The data I employed were player salary (1987), Elias Sports Bureau ratings, and another popular player rating formula called the Run Production Average (RPA). I used the RPA because, as another measure of player productivity, it should theoretically be highly correlated with the Elias Bureau ratings.

My findings were quite interesting and are summarized in Table 2. Note first that both the Elias and the RPA ratings are significantly related to player salary. The negative correlation between Elias and Salary is as expected because the

lower a player's Elias rating, the higher his performance. For example, for the statistics based on the 1986 and 1987 seasons, Don Mattingly of the Yankees was the highest rated first baseman with a perfect Elias score of 1.0. He received a 1.0 because he placed first in every statistical category used in ranking his position. Thus, if the Elias system is really tapping performance, and if performance is related to salary, we should observe a negative correlation between Elias and Salary. RPA is also significant related to salary. In this case, a higher RPA score is better and, thus, the positive correlation is expected.

Probably the most fascinating aspect of this table is that the correlation between the two rating systems is extremely small and not statistically different from zero. What this means is that these two rating systems, both ostensibly measuring player productivity, are in essence measuring very different things!

I also ran several regression analyses employing salary as the dependent variable and Elias and RPA as independent variables. I performed these analyses because there is a big argument over the issue of whether players are paid based upon performance, seniority, or a combination of both factors.[7] While both Elias and RPA were significantly related to salary, the percentage of variation accounted for in these equations (R^2) was very low, in the neighborhood of five percent. This finding could be interpreted in several ways. First, the omission of other important salary determinants in the equation (such as *seniority*) could have caused the low explanatory power. Second, it is possible that Elias does measure performance accurately and that salary determination is *not* heavily based upon performance criteria. I find this hard to believe. More likely is the third possibility, that is, that the Elias system does not accurately reflect player performance and thus a revision is needed.

Some years ago a colleague and I ran salary regressions for baseball players[8] and reported R^2 values in the range of .56 to .69. Our model employed many performance factors (both career and previous season) as well as seniority. The fact that previous models have had rather good success stands in stark contrast to the results obtained herein relating Elias Sports Bureau ratings to salary. This whole system needs to be reviewed and I suggest that the upcoming negotiations will be an opportune time to consider the ranking of players de novo.

There are many performance statistics that could be considered. To show just how different the results are for different statistics supposedly measuring the *same* thing, *performance,* I have constructed the second part of Table 2. Herein I compare the rankings of American League first basemen using the Elias, RPA, and a third statistic referred to as Total Average. Note how poorly the top rated first baseman under the Elias rankings, Don Mattingly, fares under the RPA and Total Average systems. In case you are curious, the top rated American League first baseman according to RPA was Willie Upshaw of the Toronto Blue Jays, while according to Total Average it was Dwight Evans of the Boston Red Sox. Neither of these players made the top five according to the Elias Sports Bureau ranking system. Clearly, there is much room for improvement here and the parties can take the first step by addressing this issue in the upcoming talks.

Drug Testing

Drug abuse remains a major societal problem. A problem such as this pervades all aspects of our society, so it should come as no surprise that the professional sports industry faces the same kind of

[7] "Seniority, Not Performance, Seems to Determine Pay, At Least in Baseball," *Wall Street Journal,* February 16, 1988, p. 1.

[8] James R. Chelius and James B. Dworkin, "An Ecomonic Analysis of Final-Offer Arbitration," *The Journal of Conflict Resolution* 24 (June, 1980), pp. 293-310.

substance abuse problems that are common in other businesses. A major difference, as pointed out by Hoffman and Jennings,[9] is that professional sports leagues must deal with these problems in the face of *publicity* not encountered in other industries. In his recent book, former baseball Commissioner Bowie Kuhn refers to the two great nightmares of his tenure in office as the strike of 1981 and the problem with drug abuse.[10]

Current Commissioner Peter Ueberroth has also identified controlling the drug abuse problem as one of his highest priorities. Mandatory testing programs have been installed for front-office and minor league personnel. The Major League Baseball Players Association was unwilling to go along with the commissioner's plan. So, some clubs began to insert drug testing clauses in player contracts. An arbitrator ruled against this practice, and thus the parties are encouraged to use the collective bargaining process to devise an acceptable plan.

My own opinions on the drug testing issue can be summarized as follows:

- Drug abuse is a serious problem in our society. A certain proportion of professional athletes are substance abusers.
- The use of drugs can negatively affect performance and will have an impact on the image of the game of professional baseball.
- A program should be established to eliminate the drug abuse problem.
- Such a program should be *bilaterally negotiated* between the parties and should contain the following components: (1) restriction of testing to identify only clearly defined dangerous drugs (e.g., heroin and cocaine); (2) testing for "reasonable cause" and perhaps, for all employees at a pre-specified time period; (3) careful attention to *procedural issues* such as which tests to use, which laboratories to employ, testing procedures, quality control, confirmation procedures, thresholds for reporting positive results, chain of custody, etc.; (4) specification of penalties and treatment options for drug abusers.

In the final analysis, a unionized employer can really choose any one of three paths to follow in the realm of drug testing. Baseball could choose to totally ignore the drug problem and forget about testing. This is highly inadvisable given the number of players who have recently admitted to having drug problems and the poor message this might deliver to younger Americans. A second approach, which has been attempted in the past, is to simply order drug testing without the benefit of a mutually agreed upon policy. This is in effect what Commissioner Ueberroth attempted to do with his "top-to-bottom" plan, and what several clubs attempted to achieve through the inclusion of drug testing clauses in individual player contracts. The problem with this approach, as has been demonstrated recently in baseball, is that unilateral imposition of testing leads to all kinds of problems that can come before an arbitrator.

What we are left with is the third approach, which is to employ drug testing based on a mutually agreed upon procedure that is specified in the collective bargaining contract. Such an approach will reduce the number of grievances filed and should also reduce the need for arbitrators to exercise broad discretion over matters that are best decided upon by the parties themselves. I hope that the parties can reach such an agreement in the next round of negotiations.

Conclusion

Collective bargaining has been a constructive mechanism for resolving all types of employment problems in professional baseball. Today, I have touched

[9] Joan W. Hoffman and Ken Jennings, "Will Drug Testing in Sports Play for Industry?" *Personnel Journal* 66 (May, 1987), pp. 52-59.

[10] Bowie Kuhn, *Hardball: The Education of a Baseball Commissioner* (New York: Times Books, 1987).

upon three areas (salary arbitration, free agency, and drug testing) where the parties continue to have major disagreements. My prediction is that these will be the three major issues that the parties will need to *address* and *resolve* when their current contract expires after the 1989 season.

The bad news is that solutions to these problems will not come easily. The good news is that solutions to equally difficult problems have been reached in the past. The process of collective bargaining has worked for both sides and it is my hope that this trend will continue into the future.

Table 1: Who "Wins" in Salary Arbitration?

Percentage Increase Over Previous Year

	1988	1987	1986	1985
Winners	44	72	145	91
Losers	65	14	40	39
All Arbitrated	57	39	79	63
SPA	65	33	54	72
All Players	63	35	60	70

Source: The Sporting News, February 29, 1988, p. 35.

SPA = Settled prior to arbitration hearing.

Table 2: The Relationship Between Player Ratings and Salary

PEARSON Correlation Coefficients

	Elias	RPA
Salary	−.235*	.150*
Elias		.128

* = statistically significant at the .05 level.

A Comparison of Performance Ranking Systems

First-Basemen (American League)

Player	Elias	RPA	Total Average	Salary
Don Mattingly	1	4	6	1,975,000
Eddie Murray	2	10	10	2,246,887
Wally Joyner	3	9	7	180,000
Alvin Davis	4	2	8	520,000
Kent Hrbek	5	5	3	1,310,000

Note: Elias Sports Bureau rankings are from *The Sporting News,* November 9, 1987. Total Average rankings are from *Inside Sports,* March 1988. Salary data are from *The Sporting News,* November 16, 1987. Run Production Average rankings are from *The Sporting News, December 7, 1987.*

[The End]

Union View: Subcontracting the Work of Union Members in the Public Sector

By Robert W. Sauter*

Law Partner, Columbus, Ohio

Contracting out, or privatization, of government services[1] adversely affects the public interest in the short run and over the long term. This article first highlights several negative aspects of contracting out and then posits that a public employer's decision to contract out is a mandatory subject of bargaining between the public employer and represented employees.

The negative impact of contracting out greatly outweighs any positive benefit. Governmental agencies who push to "privatize" government services do so apparently in the belief that less government is better government.[2] Not only does this effort extend to "proprietary" governmental services, but also to areas of "essential" governmental tasks, such as management of correctional facilities.[3]

The reasons for privatization include: "(1) fiscal squeezes on state and local governments; (2) government agency hiring freezes; (3) an alleged shortage of in-house personnel or a lack of special expertise among public agencies' in-house staffs to perform the desired work; (4) more aggressive contract-seeking by private firms in search of new markets .... (5) a desire by some state and local governmental managers to weaken or "bust" public employee unions; (6) greed for increased political contributions; (7) the Reagan Administration's emphasis on 'privatization.' " [4]

Illusory Savings

Although advocates claim large cost savings result from privatization, the truth is that contracting out often results in increased costs. The time and money spent in drafting, negotiating, and monitoring a contract are costly to the government, since every conceivable contingency must be provided for in the contract, given that a contractor will only be required to do what is specifically mandated by the contract. If unanticipated situations are not addressed in the contract, the government will have to pay extra to meet its unexpected needs.[5] Contractors often "lowball" the governmental agency by winning the initial contract with a very low bid, only to confront the agency with greatly increased proposed costs at contract renewal time. By this time the agency is greatly dependent on the contractor since direct governmental resources have been diverted to other areas or terminated altogether. Obviously, contractors will use this dependency to

* The assistance of Keith C. Celebrezze, a third-year law student at Capital University Law School, in the preparation of this paper is gratefully acknowledged.

[1] Although privatization in a general sense involves the shift from publicly to privately produced goods and services, and can include sale of public assets, financing private provision of services and deregulation schemes, the focus of this paper is on the cessation of public service programs and the substitution of private entity service providers for public entity service providers. See Paul Starr, *The Limits of Privatization*, Economic Policy Institute, 1987.

[2] See e.g., AFSCME, *Private Profit, Public Risk: The Contracting Out of Professional Services* (1987).

[3] See J. Michael Keating Jr., *Seeking Profit in Punishment: The Private Management of Correctional Institutions*. AFSCME, 1985. See also AFSCME, *Does Crime Pay?: An Examination of Prisons for Profit*. (1985).

[4] *Private Profit, Public Risk, supra*, note 2, at 2-3.

[5] See e.g., The President's Commission on Privatization: "Testimony of Linda M. Lampkin, Director of Research, AFSCME," January, 1987.

their financial advantage and to the detriment of the public fisc.[6]

A hidden cost is the expense of having public employees train and oversee the contractor's employees in order to ensure productivity. If the contractor has a high employee turnover rate or reassigns employees during the contract period, training must be undertaken on multiple occasions, while oversight is a constant activity.[7]

When the government lays off employees after contracting out their services, additional costs are incurred. Not only do laid-off workers not generate tax revenues due to their loss of employment, but also unemployment compensation and public welfare programs must be paid for because of their job loss. Out-placement programs also have a cost factor. The morale of remaining in-house governmental staff, and consequently their productivity, may drop due to the fear that their jobs are also on the line.[8] Many of these costs, both real and hidden, are not publicized when an initial "cost saving" contract is signed to privatize public work. What initially appears to be a good deal can turn into a financial nightmare for the government, its displaced employees, and the taxpayers.

Decline in Quality of Services

A problem often encountered after privatizing government services is a decline in the quality of these services. It is in the interest of a private contractor to attempt to reduce costs in order to maximize profits. While cutting costs is not objectionable per se, there is a great danger that the hiring of inexperienced workers (at lower wages and with fewer benefits), the skirting of contract requirements, or the reduction of necessary mid-level supervision will result in poor service to the public.[9] If this happens, the governmental agency will be forced to reassign public employees to correct work which would have been done correctly the first time had public workers been retained.

Another by-product of contracting out may be a decline in the expertise of remaining governmental staff. When government agencies rely more and more on contractors and less on in-house personnel, the advancement, training, and education opportunities for the in-house staff become severally limited and cost-prohibitive. A vicious cycle emerges, as the government is soon entirely dependent on the contractor's work, which is of a lesser quality, causing increased complaints that the government cannot easily remedy.[10]

Accountability

Contractors are not as accountable for their work or as responsive to the public as governmental employees are. When citizens complain about a contractor's work, the governmental agency can only complain in kind to the contractor. Governmental agencies must answer to the citizens. If the agency cannot correct a problem, the complaining citizen has the opportunity to go to elected public officials. If there is no response at this level, the following election may provide the citizen recourse. The ultimate impact of privatization may well be upon elected public officials who face defeat at the polls because they have privatized their employees' jobs.[11]

Further, while public officials, with control over their own employees, have the flexibility to respond directly to emergencies and other unforeseen circumstances, the contractor has the right to refuse to do anything that is not expressly set forth in the contract. Instead of a

[6] See John Hanrahan, *Government for Sale: An Examination of the Contracting Out of State and Local Government Services*, AFSCME, 1986.

[7] *Private Profit . . . supra*, note 2 at 6.

[8] *Id.* at 8.

[9] *Id.* at 8-9.

[10] *Id.* at 9-10.

[11] See e.g., AFSCME, *Passing the Bucks: The Contracting Out of Public Services*, pp. 51-68 (1984).

problem with poor services, there may be no service available when there are no public employees available to respond to an urgent current need.[12]

Corruption has been encountered in the privatization arena. There is an obvious temptation for public officials to use the award of contracts as payoff for political patronage. Where bribery, kickbacks, collusive bidding, conflicts of interest, or charges for "ghost" work occur and are brought to light, the public interest certainly suffers. Moreover, "revolving-door" abuses are also frequently involved when officials leave public service and go to work for contractors to lobby their former employers for contracts.[13]

Impact Upon Women and Minorities

Both in terms of absolute numbers and higher level jobs, public employment provides greater opportunities for women and minorities than does the private sector. Privatization affects these groups of workers at a disproportionately high rate. In short, fewer public sector jobs means fewer hiring opportunities for women and minorities.[14]

Private employers often have only two groups of workers: high level management and laborers. The middle level positions are eliminated to cut costs and increase profit. Since it is these mid-level positions where women and minorities have made great strides, they suffer disproportionately when they seek employment with the private firms after lay-off from government service.[15]

Subcontracting as a Mandatory Subject of Bargaining

It has long been recognized in the private sector that an employer's decision to contract out bargaining unit work is a mandatory subject of bargaining. The United States Supreme Court, in *Fibreboard Paper Products Corp. v. NLRB,*[16] squarely confronted this issue. In that case, the employer and the union were parties to a collective bargaining agreement and were about to negotiate a successor agreement when the employer, without bargaining over the issue, notified the union of its decision to contract out bargaining unit work, as a cost-savings measure. The employer refused to engage in further negotiations, and the union responded by filing unfair labor practice charges based upon the employer's refusal to bargain, in violation of Section 8(A)(5) of the National Labor Relations Act. The National Labor Relations Board ultimately found that the employer's actions constituted an unfair labor practice, citing *Town and Country Mfg. Co.,*[17] for the proposition that contracting out work is a mandatory subject of bargaining since it is within the scope of bargaining as a "term or condition of employment." [18] The NLRB ordered reinstatement of bargaining unit members, with back pay. The court of appeals granted the Board's petition for enforcement, and upon review the Supreme Court affirmed. In addition to holding that contracting out was a mandatory topic of bargaining, the High Court further noted that the holding would effectuate the purpose of the NLRA in promoting "the peaceful settlement of industrial disputes." [19]

In *First National Maintenance Corp. v. NLRB,*[20] the Supreme Court distinguished the situation where an employer unilaterally subcontracts bargaining unit work for the purpose of reducing labor costs from the situation where an

[12] *Private Profit, Public Risk,* supra note 2, at 10.

[13] *Passing the Bucks,* supra note 11, at 69-94.

[14] Marilyn Dantico, *When Public Services Go Private: Not Always Better, Not Always Honest, There May Be A Better Way,* pp. 25-29, AFSCME. 1987.

[15] See "Testimony of Linda M. Lampkin," supra note 5, at 6.

[16] 379 U.S. 203, 57 LRRM 2609 (1964).

[17] 136 NLRB 1022, 47 LRRM 1918, *enforcement granted* 316 F.2d 846, 53 LRRM 2054 (5th Cir. 1963).

[18] National Labor Relations Act of 1935, 29 U.S.C.S. Section 158 (d) (1935).

[19] 57 LRRM at 2612.

[20] 452 U.S. 666, 107 LRRM 2705 (1981).

employer's decision turns upon a change in the business itself, i.e. a partial discontinuation. If the work that is taken out of the bargaining unit still must be performed, bargaining is mandatory; but if the employer is discontinuing the work entirely, such discontinuation is a "managerial decision" and need not be bargained although the *effects* of such decision still must be bargained.

The NLRB adopted the "work discontinuation" concept in the context of contracting out in *Otis Elevator Company,*[21] but narrowed it to situations in which the decision to subcontract "turned not upon labor costs, but instead turned upon a change in the nature and direction of a significant facet of its business." [22] Thus, if labor costs are a significant factor in the decision, if the decision does not effect a change in the business, or if the change is not of a significant nature, bargaining is still mandatory.

There is a strong and growing trend in the public sector that a decision by a public employer to privatize, or contract out goods and services, is a mandatory subject of bargaining.[23] A majority of the

[21] 269 NLRB 891, 115 LRRM 1281 (1984).

[22] *Id.* at 1281.

[23] Evidence of this trend may be found in the following decisions (arranged in chronological order, and alphabetically by state):

A. California—

i. *United Public Employees Local 390 v. City of Richmond,* Pub. Employee Bargaining (CCH) (1977-78 Pub. Bargaining Cas.) Para. 36,318 (Apr. 27, 1978).

ii. *California School Employees Ass'n. v. Arcohe Union School District,* [1983-87 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 43,995 (Nov. 23, 1983).

iii. *California School Employees Ass'n. v. San Mateo County Community College District,* 22 Gov't. Empl. Rel. Rep. (BNA) 2036 (July 31, 1984).

iv. *Professional Engineers in California Government v. State of California [Department of Personnel Administration],* PERB Decision No. 648-S (Dec. 28, 1987).

B. Connecticut—

i. *Matter of City of Shelton and Teamsters Local Union No. 145,* [1977-80 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 40,485 (Feb. 23, 1978).

ii. *Matter of City of Bridgeport and Bridgeport Police Employees Local No. 1159,* [1977-80 Transfer Binder] Pub. Employees Bargaining (CCH) (Pub. Bargaining Cas.) Para. 40,954 (July 7, 1978).

iii. *City of Waterbury and Waterbury City Employees Ass'n.,* [1977-80 Transfer Binder] Pub. Employees Bargaining (CCH) (Pub. Bargaining Cas.) Para. 41,567 (Dec. 7, 1979).

iv. *City of Milford and Local 1565 of Council No. 4, AFSCME, AFL-CIO,* [1977-80 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 41,631 (Jan. 9, 1980).

v. *City of Bridgeport v. Bridgeport Police Employees Local No. 1159,* Pub. Employee Bargaining (CCH) (1981-83 Pub. Bargaining Cas.) Para. 37,368 (Jan. 21, 1980).

vi. *Norwalk Board of Education and Local 1042 of Council 4, AFSCME,* [1980-83 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 43,147 (Jan. 12, 1983).

vii. *Town of Waterton and AFSCME Local 1303-38,* 24 Govt. Empl. Rel. Rep. (BNA) 1505 (Aug. 13, 1986).

C. Florida—

i. *Federation of Public Employees, A Division of District 1, Pacific Coast Division, MEBA, AFL-CIO v. City of Pompano Beach,* [1980-83 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Employee Bargaining Rep.) Para. 43,360 (Feb. 17, 1983).

D. Massachusetts—

i. *Matter of City of Boston and Boston Typographical Union No. 13, ITU,* [1977-80 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 40,100 (Aug. 24, 1977).

ii. *Matter of City of Boston and Boston Police Patrolmen's Ass'n., Inc.,* [1977-80 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 41,119 (June 4, 1979).

iii. *Town of Burlington and Local 532, IBPO,* [1980-83 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 42,188 (Aug. 11, 1980).

iv. *City of Boston and Boston Police Patrolmen's Ass'n., Inc.,* [1980-83 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 43,263 (Apr. 23, 1982).

E. Michigan—

i. *Oceana County Board of Commissioners, Oceana County Sheriff and Fraternal Order of Police,* [1980-83 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 43,310 (May 18, 1982).

ii. *City of Jackson and United Steelworkers of America,* 22 Gov't. Empl. Rel. Rep. (BNA) 2311 (Oct. 10, 1984).

iii. *Detroit Police Officers Ass'n. v. City of Detroit,* 22 Gov't. Empl. Rel. Rep. (BNA) 2343 (Sept. 4, 1984).

iv. *City of Plymouth and Plymouth Fire Fighters Ass'n. Local 1811, IAFF,* 23 Gov't. Empl. Rel. Rep. (BNA) 1785 (Oct. 4, 1985).

v. *Detroit Police Officers Ass'n. v. City of Detroit,* 25 Gov't. Empl. Rel. Rep. (BNA) 899 (Apr. 20, 1987).

F. Minnesota—

i. *General Drivers Union Local 346 v. Independent School District No. 704,* Pub. Employee Bargaining (CCH) (1979-81 Pub. Bargaining Cas.) Para. 36,687 (Aug. 24, 1979).

G. New York—

i. *Matter of Saratoga Springs School District and Saratoga County Education Chapter, CSEA,* [1977-80 Transfer

states that have faced this issue have held that either the decision to subcontract governmental services or the effect of the decision is a mandatory subject of bargaining, given the impact of the decision on employees' working conditions. Generally, the union has a right, and the public employer has the consequent duty, to bargain over any implementation of subcontracting or contracting out.

Certain factors will bear weight in the Board's or court's balancing process. For example, much emphasis is often placed on the issue of whether the public employer is making a "level of services" decision.[24] Such a decision is one in which a change is contemplated in the *nature* or *extent* of the work to be performed. There must be an alteration of the kind or quality of the work. If the public employer is pursuing a "level of services" decision, it acts under the management right to direct and need only bargain over the impact of the action. An example of such a decision would be the elimination or abolishment, as opposed to mere reassignment, of job positions. If, on the other

(Footnote Continued)

Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 40,682 (Apr. 13, 1978).

ii. *South Orangetown Kitchen Workers Ass'n. and South Orangetown Central School District,* Pub. Employee Bargaining (CCH) (1979-81 Pub. Bargaining Cas.) Para. 36,830 (Dec. 3, 1979).

iii. *Hilton Central School District and Hilton School Employees' Ass'n.,* [1980-83 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 43,341 (May 7, 1981).

iv. *City of Poughkeepsie and City of Poughkeepsie Unit of the Dutchess County Local of CSEA,* [1980-83 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 43,304 (May 11, 1972).

v. *Elba Central School District and Elba Non-Teaching Ass'n.,* [1980-83 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 43,256 (Jan. 14, 1983).

vi. *City of Poughkeepsie v. Harold E. Newman,* Pub. Employee Bargaining (CCH) (1981-83 Pub. Bargaining Cas.) Para. 37,869 (July 28, 1983).

H. Ohio—

i. *Communications Workers of America, Local 4501 v. Ohio State University,* Pub. Employee Bargaining (CCH) (1984-86 Pub. Bargaining Cas.) Para. 34,365 (Aug. 1, 1984).

ii. *Communications Workers of America, Local 4501 v. Ohio State University,* 3 Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 34,681 (July 2, 1986).

iii. *Lorain City School District Board of Education,* 3 Ohio Pub. Employee Rep. (Labor Relations Press) Para. 3064 (SERB May 15, 1986).

I. Oregon—

i. *Oregon School Employees Ass'n. Chapter 7* v. *Salem School District 24J,* [1980-83 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 42,730 (Jan. 25, 1982).

ii. *AFSCME Local 88 v. Multnomah County Board of Commissioners,* [1983-87 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 44,019 (May 25, 1984).

iii. *Oregon School Employees Ass'n. Chapter 148 v. Petersburg School District,* 24 Gov't. Empl. Rel. Rep. (BNA) 634 (March 25, 1986).

iv. *Salem Police Employees Union v. City of Salem,* [1983-87 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 44,816 (March 26, 1987).

J. Pennsylvania—

i. *Pennsylvania Labor Relations Board v. North Hills School District,* Pub. Employee Bargaining (CCH) (1977-78 Pub. Bargaining Cas.) Para. 36,107 (May 9, 1977).

ii. *Pennsylvania Labor Relations Board v. Garnet Valley School District,* [1977-80 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 40,541 (Dec. 14, 1977).

iii. *Pennsylvania Labor Relations Board v. School District of the Township of Millcreek,* [1977-80 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 40,947 (June 7, 1978).

iv. *Pennsylvania Labor Relations Board v. School District of the Township of Millcreek,* [1977-80 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 41,006 (Aug. 23, 1978).

v. *Pennsylvania Labor Relations Board v. Phoenixville Area School District,* [1977-80 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 40,643 (Oct. 27, 1978).

vi. *Hazelton Area Bus Drivers School Service Personnel Association/PSSPA v. Hazelton Area School District,* 22 Gov't. Empl. Rel. Rep. (BNA) 520 (Feb. 6, 1984).

vii. *AFSCME Council 13 v. Commonwealth of Pennsylvania, Department of Public Welfare,* 25 Gov't. Empl. Rel. Rep. (BNA) 1249 (July 14, 1987).

K. Washington—

i. *International Ass'n. of Firefighters, Local 1445 v. City of Kelso,* 23 Gov't. Empl. Rel. Rep. (BNA) 222 (Dec. 28, 1984).

L. Wisconsin—

i. *Unified School District No. 1 of Racine County v. Wisconsin Employment Relations Commission,* Pub. Employee Bargaining (CCH) (1977-78 Pub. Bargaining Cas.) Para. 36,111 (Nov. 30, 1977).

ii. *Local 634, Wisconsin Council of County and Municipal Employees, AFSCME, AFL-CIO v. City of Menomonie (Department of Public Works),* [1977-80 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 40,733 (May 3, 1978).

[24] See e.g., supra notes 23(A)(ii), 23(D)(i), and 23(D)(ii).

hand, the decision involves primarily "how" or "by whom" the work is to be performed, bargaining as to the decision itself is mandatory.

The determination of a government's functions is a management right. When the government takes on a new function, it need not bargain over the decision and can direct the implementation of the new function as it sees fit. However, a mere change in location does not constitute a new function, and if the same work is to be performed in the same manner then bargaining is mandatory if the employer wishes to have the work taken out of the bargaining unit.[25]

While state collective bargaining laws may expressly specify that subcontracting or contracting out is a statutory subject of collective bargaining, more often the mandatory nature of the bargaining subject is derived from the recognition that contracting out is a "term or condition of employment" for which mandatory bargaining must occur.[26] Further, the parties to a collective bargaining agreement sometimes specifically provide for the handling of situations involving contracting out. For instance, a union may waive the statutory right to bargain in the contract itself[27] or even in a memorandum of understanding[28] between the parties. To be given effect, such a waiver must be in clear and unmistakable language and specifically refer to contracting out. Even a strong management rights clause is ineffective as such a waiver unless it expressly refers to subcontracting.[29] Likewise, a zipper clause will be insufficient evidence of a waiver if the contract is silent as to subcontracting.[30]

Absent a waiver, the public employer must offer an opportunity to bargain in good faith over any subcontracting decision. The union must be afforded adequate notice of the situation, and some jurisdictions, such as Pennsylvania, impose an affirmative duty on management to seek out the union representatives, give all of the details, and request a counterproposal.[31] Finally, if the decision to subcontract appears to be due to anti-union animus or as retaliation for the filing of charges against the employer, bad faith may be found and actions that might otherwise fall within "management rights" may require bargaining.

The remedies that have been utilized for a public employer's wrongful unilateral decision to subcontract include orders to bargain, reinstatement, reimbursement (i.e., back pay), and rescission of the subcontract and return of work to the bargaining unit. Against the majority trend, only two states do not mandate bargaining over the decision to subcontract government services. These states are New Hampshire[32] and New Jersey.[33] New Hampshire considers the issue to fall under a "managerial policy exclusion" under its state bargaining law, while New Jersey deems contracting out a matter of "managerial prerogative" absent a finding of retaliatory motive.

[The End]

---

[25] See e.g., supra notes 23(A)(iv) and 23(B)(iv).

[26] See e.g., supra note 23(H)(ii) (interpreting the Ohio Public Employee Collective Bargaining Act, R.C. 4117.08(A)).

[27] See e.g., supra note 23(C)(i).

[28] See e.g., supra note 23(A)(i).

[29] See e.g., supra note 23(F)(i).

[30] See e.g., supra note 23(C)(i).

[31] See, supra note 23(J)(v).

[32] See, AFSCME Local 356, 25 Gov't. Empl. Rel. Rep. (BNA) 1426 (N.H. PELRB Sept. 3, 1987).

[33] See, Matter of Local 195, IPTE, AFL-CIO v. State of New Jersey, Pub. Employee Bargaining (CCH) (1979-81 Pub. Bargaining Cas.) Para. 37,136 (Oct. 6, 1980). See also, South Brunswick Board of Education and South Brunswick Education Ass'n. [1977-80 Transfer Binder] Pub. Employee Bargaining (CCH) (Pub. Bargaining Cas.) Para. 42,990 (July 20, 1982).

Subcontracting in the Public Sector: Its Purpose and Limitations

By Robert D. Weisman and Raymond W. Perez

Cloppert, Portman, Sauter, Latanick & Foley
Columbus, Ohio.

The issue of subcontracting has historically created conflict between labor and management in the private sector. Its application to the public sector is being given greater consideration in view of the present economic environment coupled with elected officials' concerns about accountability to the taxpayer. The issue is essentially one of balancing an employer's interests in running a safe, efficient, and economical operation and labor's interest in maintaining job tenure and employment security for employees. These issues take on added significance in the public sector because there often is a constitutional requirement of maintaining a balanced budget and the ever present fear of creating a political spoils system.[1] As a consequence of editorial restrictions, this article will focus primarily on the application of the concept of subcontracting to Ohio's public sector. However, the analysis has application to other jurisdictions.[2]

One of the most significant Ohio decisions affecting subcontracting in the public sector is *State ex rel. Sigall v. Aetna.*[3] In *Sigall,* the Ohio Supreme Court was asked to decide whether a public employer could lawfully enter into a contract with an independent contractor to perform services that could also be rendered by civil service employees.[4] The action was initiated by a taxpayer who sought to enjoin a state university from contracting out a portion of its custodial work. After reviewing relevant legislative and judicial precedent, the supreme court ruled that a public employer may, for reasons of economy, contract out custodial services even though those services could have been performed by civil service employees.[5]

The court noted that the purpose of the merit system as applied to civil service was to eradicate the spoils system by protecting tenured employees from arbitrary discharge and replacement by political appointees. In that connection, contracting out work does not defeat this purpose because the actions are presumably undertaken for reasonable economic purposes. In the *Sigall* case, the subcontracting resulted in a savings of approximately $300,000.[6] Although the court permitted subcontracting in this instance, it indicated that improper motivation would establish a basis for challenging a decision to subcontract out work. However, the burden is on the party opposing subcontracting to prove arbitrary or improper motivation. "In the absence of proof of an intent to thwart the purposes of the civil service system, [a public employer] may lawfully contract to have an independent contractor perform services which might also be performed by civil service employees." [7]

The supreme court in applying the test to the facts in *Sigall* held that the

[1] For an excellent overview of the unique issues surrounding public sector collective bargaining, See *The Evolving Process—Collective Negotiations in the Public Sector,* R. Helsly, J. Tener, & J. Lefkowitz, Eds., 1985.

[2] See *Service Employees International Local Union 316 v. State ELRB,* 153 Ill. App. 3d 744, 505 N.E.2d 418 (1987); *General Drivers Union Local v. Independent School District,* 283 N.W.2d 524 (Minn. 1979); *Unified School District No. 1 of Racine Co. v. WERC,* 81 Wis. 2d 89, 259 N.W.2d 724; *In the Matter of Saratoga Springs City School Dist. v. NYSPERB,* 416 N.Y.S. 2d 415, 68 A.D. 2d 202 (1979).

[3] 45 Ohio St. 2d 308, 345 N.E.2d 61 (1976).

[4] See *Id.* at 63.

[5] See *Id.* at 65.

[6] *Id.*

[7] *Id.*

employer acted in good faith. First, the court emphasized that the contract was let to the lowest of three competitive bidders. Secondly, the independent contractor performed all of its own hiring, thus eliminating the possibility of political favoritism. Finally, no civil service employees were actually displaced.[8]

Local 4501 Decision

The law remained relatively dormant until 1984 when the supreme court was once again asked to determine the parameters of a public employer's right to subcontract. In *Local 4501 v. Ohio State University*,[9] the supreme court reviewed a case in which the employer imposed a hiring freeze as a result of state budget cuts. As positions became vacant, primarily through retirement or resignation, they were neither filled nor abolished. Rather, the employer entered into contracts with independent contractors to perform the necessary services. These contracts resulted in a substantial savings to the employer. Relying on *Sigall*, the lower court ruled that the employer could subcontract, absent proof of an illegal motive. This decision was affirmed by the court of appeals.[10]

The Ohio Supreme Court, in citing *Sigall*, reached a different conclusion. First, the court stated that claiming an economic advantage would not be enough, in and of itself, to warrant judicial sanction of the public employer's action. "While it is true that the university is seeking, and succeeding in, the cutting of costs by contracting out custodial services, in so doing it is insidiously accomplishing another goal which is totally at odds with the purposes of the civil service system." [11] In its decision, the court noted that the positions were becoming vacant and were not being filled with civil service employees. However, the work was being performed by independent contractors. Therefore, left unchecked, this practice would undermine the primary purpose for the civil service system.

"Slowly and inevitably, the civil service system is eroded and, ultimately, eradicated entirely. The result is that the university obtains a free hand to let out all services on a contract by contract basis without any moderation or restriction by the civil service system. Political activity is no longer restrained and the laudable purpose of the civil service system is sidestepped completely." [12] Accordingly, the court overruled the court of appeals and held that in this instance the subcontracting was illegal.

Following the *Local 4501* decision, a public employer's right to subcontract out work was apparently subject to greater scrutiny and restriction regardless of the motivation. The court claimed to be applying the *Sigall* test, but in reality was focusing only on the end result, not on the actual intent of the employer.[13] In 1986 the supreme court clarified its position when it once again reviewed the *Local 4501* decision on remand.

In *Local 4501 v. Ohio State University*,[14] (hereinafter *"Local 4501 II"*) the trial court held that the employer was permitted to contract with private parties to perform services which could have been performed by its employees and members of Local 4501, if certain conditions were met. These conditions were as follows.

- The purpose of the subcontracting was not to create a spoils system.
- The employer was prohibited from instituting a hiring freeze for the services that were to be subcontracted.
- The employer was experiencing difficulties in maintaining a full staff.

---

[8] *Id.*

[9] 12 Ohio St. 3rd. 274, 466 N.E.2d 912 (1984).

[10] See *Id.* at 914.

[11] *Id.*

[12] *Id.* at 915.

[13] See Justice Brown's Dissent, 466 N.E. 2d at 915-917.

[14] 24 Ohio St. 3d 191, 494 N.E. 2d 1082 (1986).

- There was no classification that would provide the employer the services to be provided in the contract; and
- Finally, any existing contracts could be performed pursuant to their terms provided that they would not be renewed unless the above requirements were met.[15]

The union contested on appeal that the lower court erred when it permitted the performance of the contracts under their existing terms. The supreme court agreed and held that the contracts that were let during the hiring freeze were void and unenforceable.[16] However, this did not completely resolve the issue. It still remained for the court to determine the enforceability of current contracts. The facts established that all of the contracts executed during the hiring freeze had expired by their own terms. Inasmuch as there was no obligation to renew the contracts, the supreme court held that the alleged "renewals" were new contracts with an existence independent of the original contracts executed during the hiring freeze.

Upon closer scrutiny of the facts when considered in conjunction with the implementation of Ohio's public collective bargaining legislation,[17] the court limited its decision to the specific facts before it. The court emphasized in its analysis that prior to 1984 there was no significant legislative control over a public employer's authority to subcontract for services previously performed by its own employees. When public employees were legislatively granted the right to collectively bargain with their employers, the need for the judiciary to initially intervene in the regulation of a public employer's conduct pertaining to subcontracting was substantially cutailed. "R.C. Chapter 4117 thus provides the 'check' on the power of public employers that was absent when C.W.A. first challenged the university's independent service contracts." [18]

In view of Chapter 4117 the court chose to follow the guidelines established in *Fibreboard Paper Products Corp. v. NLRB*[19] and its progeny with respect to a public employer's right to subcontract and the extent of its obligation to bargain over the issue.[20] Civil servants, themselves, are thus in a position to 'protect' the civil service system at the bargaining table; and public employers no longer have a 'free hand' to dismantle a civil service personnel system by enforcing a hiring freeze in conjunction with the letting out of independent service contracts.[21]

Accordingly, the Court indicated that as long as the employer is not improperly motivated to establish a political spoils system, it retains the authority to contract with private parties for services that may have been performed by its employees. Public employees choosing to contest this process may exercise their collective bargaining rights in an effort to protect their interests.

More recently, when considering the issue of subcontracting, the supreme court reaffirmed the need for fiscal responsibility and for flexibility in operating government agencies. In *Carter v. Ohio Department of Health*,[22] civil service employees contested the abolishment of their positions and the subsequent subcontracting of the work previously performed by civil service employees. The record evidence demonstrated that the subcontracting annually saved the employer approximately $140,000. Citing *Sigall*, the supreme court reaffirmed its decision

[15] *Id.* at 1084.

[16] *Id.* at 1085.

[17] Ohio Revised Code Section 4117 *et seq.* (April 1, 1984).

[18] 494 N.E. 2d at 1086.

[19] 379 U.S. 203 (1964).

[20] The specific circumstances which trigger a public employer's duty to bargain over the effects of subcontracting have not been addressed by the Ohio court. It is likely the courts will follow the NLRA precedent. *See Generally, Public Personnel Administration* Labor-Management Relations. Vol. 1 8277. Prentice Hall (and cases cited therein).

[21] 494 N.E. 2d at 1086.

[22] Ohio St. 3rd 463, 504 N.E. 2d 1108 (1986).

in *Local 4501 II.* The court emphasized that subcontracting is improper if its purpose is to dismantle the civil service system, but then added:

However, as the purposes of civil service should not be ignored, neither should substantial savings to the taxpayers of this state. The goal of maintaining the civil service system must be balanced with the goal of fiscally responsible state government.[23]

In view of the above, it is apparent that Public employers in Ohio have the right to subcontract out work absent improper unlawful motivation and/or contractual limitations. Clearly if a substantial financial benefit to the taxpayers can be established, there is adequate lawful justification for subcontracting out work in the public sector. In fact, accountability to the taxpayers may under certain circumstances, almost mandate public employers giving serious consideration to subcontracting out work. The decision may ultimately be the product of balancing competing considerations. Further, while a public employer's authority to subcontract out work may not be severely limited by judicial constraints, public employers must carefully, cautiously, and reasonably protect that authority in the context of the collective bargaining process.

[The End]

Grievance Processing: Non-Union Setting—Peer Review Systems and Internal Corporate Tribunals: A Procedural Analysis

By Douglas M. McCabe

Georgetown University

One of the fastest growing concepts in strategic human resources management, and yet one of the least researched to date, is the processing of employees' complaints and grievances in the non-union setting. There are three major types of procedures for resolving grievances in these firms: non-union grievance arbitration systems; non-union internal tribunals and peer review systems; and non-union open-door policies and formal appeals to higher management.

My article deals with the second type of procedure, a relatively new concept in human resources management, peer review systems and internal corporate tribunals. I can best describe it as an application inside a company of what is called, in courts of law, the jury system.

The essence of this very interesting concept is the statement of management that an employee who is appealing to higher management may, at his or her option, and after appealing to the particular level of middle or top management stipulated as a prerequisite, refer his or her grievance for a final decision to what I like to describe as an "internal tribunal," to distinguish it from such external tribunals as courts of law and arbitration proceedings. The members of the tribunal are management personnel or the appealing employee's fellow employees, or a mixture of both, most commonly a mixture in the case of the companies I surveyed.

[23] *Id.* at 1109.

Types of Review Systems and Internal Tribunals

As a basis for my research I obtained copies of those sections of the employee-relations handbooks and pertinent accompanying corporate archival literature of over 70 leading non-union companies that pertain to the procedures of employees in processing their complaints and grievances. One of the first things I noticed in reviewing the employee-relations handbook sections is that it is obvious that companies generally do not consult with other companies when drafting procedures for the handling of employees' grievances. This observation is based on the absence of similarity in format and diction that could be expected if one company were to use the procedures of another as a guide. I found notable differences even among the employee-relations handbooks issued by the divisions of large and decentralized corporations.

To state the situation differently, there is no settled consensus among non-union companies regarding the details of the procedures available to their employees for the resolving of their grievances. Furthermore, half of the companies which I investigated incorporated in their handbooks the two procedural elements that are the subject of my article, namely, provision for what I call an internal tribunal, with or without "peer review," that is, with some of the complaining employees' fellow workers or "peers" serving as members of the tribunal.

I shall not take your time to recite the numerous different titles companies have assigned to what I call an internal tribunal. An example is "Employee Problem Solving Group." The most common title is "Appeals Board." I would recommend the more descriptive title, "Grievance Appeal Board."

The "Employee Problem Solving Group" which I just mentioned is very exceptional in that there are no members of this tribunal taken from the ranks of management. The complaining employee selects randomly the names of twelve of his fellow hourly employees. Management contacts each of them, in the order listed, without identifying the employee and his or her problem, and asks the person to serve on the tribunal. When six persons have consented to serve, management designates a member of the personnel department as chairman of the tribunal, but that individual will vote only to break a tie. There is another very exceptional provision in this company's grievance resolution procedure. The employee may appeal over the decision of the internal tribunal, which he had requested because he did not like the decision of his immediate supervisor, for a decision by the plant manager, whereas generally a decision by a tribunal is obtained only after higher management has rendered a decision, with the tribunal's decision being final. Moreover, in this particular company, another exceptional procedure is that the employee may appeal over the plant manager's decision to arbitration, and the plant manager, instead of rendering a decision, may invoke arbitration. I mentioned that there are six voting members of the tribunal. The more general and better practice among companies is to have an odd number of voting members.

As is to be expected, many companies prescribe the time limits for an employee to initiate a grievance following the event which caused it, and for the employee's initiation of appeals to higher levels of management, including an internal tribunal, if any. Contrariwise, I was surprised at the number of companies that provide rather liberal periods of time, in my opinion, for the rendering of decisions by various levels of management to which an employee may appeal, including an internal tribunal. My objection to liberal time periods, exceeding the time required if everyone gives priority attention to an employee's grievance, as they should, is that, especially if several appeal steps are involved, the total time consumed can be

a violation of the axiom that "justice delayed is justice denied." For example, one company stipulates that the decision in an employee's appeal shall be within fifteen working days of the tribunal's consideration of the appeal, and, prior to that, the tribunal will consider the appeal "as soon as practical" after the employee initiates it, while time elapses as the employee receives a decision from his supervisor and appeal decisions from higher levels of management.

It should not be assumed that the size of a company is detriment of the need for a formal system of resolving employees' grievances. I have seen systems in very small companies, with less than one hundred employees, which are just as complex as the system in very large companies.

The practice of many companies, which is commendable, is to place a member of the personnel department on the internal tribunal, the advantage being that he or she can properly interpret the company's policies and procedures to the other members of the tribunal, particularly as they apply to the complaining employee's grievance.

Conflict-of-interest obviously should be avoided by management personnel in their participation in decisions involving employees' grievances. An example of such conflict which I observed is where the manager of an appealing employee's department participates in a decision as a member of a committee that reviews the decision of the employee's immediate supervisor, and then, later, that same manager reviews the committee's decision as a member of the internal tribunal. That manager is in the untenable situation of being forced to review objectively his own prior decision.

There is no uniformity among companies regarding the qualifications of members of internal tribunals. While it may be taken for granted, in general, that tribunal members taken from the ranks of management possess minimum qualifications, that may not be the case regarding the complaining employee's fellow workers who serve as his "peers" in a tribunal. One company partially solves this problem by limiting the "peers" to employees with at least five years' seniority in the company, and a few companies have formal training programs for non-supervisory employees who are to serve in tribunals. The opposite of that is the company in which an hourly worker is called off his job, without advance notice, to serve in a tribunal thirty minutes later.

A very unusual provision in one company is that the personnel director may veto an employee's appeal to the internal tribunal. In most companies an employee's privilege of appealing to the internal tribunal may not be cancelled even by top management.

It should be noted that, while there is a lack of uniformity in the grievance resolution procedures of non-union companies, there is definite uniformity in one feature of the employees' handbooks. That feature is the precise spelling out of the types of employees' complaints that may be classified as formal grievances and submitted through the established channels for correction by management, including internal tribunals.

An unusual situation in one very large company is that, if a pending decision by an internal tribunal will have a significant financial impact on the company, the tribunal may "pass the buck" for a decision to the vice president and general manager. It is interesting that, in one company that is sensitive regarding matters of discrimination, an employee who thinks that the internal committee has rendered a discriminatory decision may appeal to the company's director of affirmative action.

The companies I examined have differing opinions as to whether the decisions of an internal tribunal should be confidential. A few companies bind the parties involved, including the members of the

tribunal, to silence, whereas other companies see a benefit in their tribunals' decisions being publicized, perhaps in the hope of avoiding similar grievances in the future.

A very important rule, common to practically all companies, is that the scope of authority of an internal tribunal is limited to conformity with the companies' published policies and procedures, which a tribunal does not have the authority to change. After rendering a decision, nevertheless, a tribunal may recommend changes to top management.

A concession is made by some companies to the frailty of human nature by recognizing that there are situations in which personality conflicts or other causes make it embarrassing for either an employee or his immediate supervisor for the employee's initial presentation of his grievance to be to that supervisor, and provision is accordingly made for a grievance in such a case to bypass that supervisor. Many companies, regarding this same subject, encourage employees who intend to file grievances to approach the personnel department on an informal basis for consultation and advice, and in some instances it is an assigned duty of the personnel department to assist employees in processing their grievances.

An exception situation in one company is that an employee is denied the privilege of processing a grievance inside the company if he or she took the matter to court or to a government agency. Probably all companies agree with that concept even though they do not stipulate it in their employees' handbooks, at least if the thought occurs to them that there may be a problem for the company if its management decision in a grievance case contradicts a prior decision of a court or government agency.

There is a lack of uniformity among companies regarding whether or not a complaining employee and/or his witnesses are to be paid when appearing before an internal tribunal on company time. In one company, management's witnesses are paid, but the complaining employee's witnesses are not paid.

I would like to pause at this point to make it very clear that, in the absence of any employee-relations handbook that I would deem appropriate to present as a model for non-union companies to copy regarding the very important matter of employees' grievances, my method in this article is to submit bits and pieces of the handbooks that I examined, some pieces good and others not so good, with the expectation that the information I am providing will cover the essential features that any non-union company should take into consideration when drafting the grievance resolutions procedure for its employee-relations handbook. For example, each company must decide for itself whether it should have an internal tribunal such as I have been describing, and, if so, whether a majority of its members should be from the ranks of management or from the ranks of the complaining employee's fellow workers, that is, his "peers." There are many other features, and I am analyzing as many as my time permits. Some of the features may be of interest to certain non-union companies but not to others.

For example, there is one company that limits the presentation of evidence to its internal tribunal by management personnel to such management personnel as is directly involved in the matter that is the subject of the grievance. Another example, which is not of interest to all companies, is the company that permits its supervisory and management personnel to utilize the procedure for resolving non-supervisory employees' grievances, including "peers" of the management personnel as members of the internal tribunal. A company, which has an exceptionally comprehensive procedure for resolving grievances, states in its employee-relations handbook that, inasmuch as no established company policy

can anticipate every question or every eventuality, the internal tribunal is empowered to make decisions that are not contrary to the published policy nor specifically excluded by it.

Diversity of Tribunals

I have commented several times about the membership in an internal tribunal, without being very specific. My reason is the considerable lack of uniformity among companies in this matter. I will here analyze in full detail the composition of the internal tribunal in a plant of about 8,000 employees which is a division of a corporation totalling about 80,000 employees. The tribunal consists of a "peer" chosen by the complaining employee, a supervisor or higher level manager from a related department, a "peer" of the complaining employee chosen by the three previously described members, and a fifth member who is the manager either of the employee relations staff or the human resources staff. This fifth member obviously has the function of interpreting the company's pertinent policies and procedures, inasmuch as this member votes only for the purpose of breaking a tie.

I have frequently mentioned the matter of a complaining employee's "peers" serving in internal tribunals. There is not only a lack of uniformity among companies on this subject; it can actually be called controversial. A substantial number of companies give the concept only "lip service." They speak of "peer review" in their employees' handbooks and give an indication that they approve the concept, but in actual practice they generally arrange for a majority of the members in an internal tribunal to be management personnel. One company goes so far as to call its internal tribunal a "Peer Review Panel" and three of its five members are the complaining employee's "peers," but the fact is that if one of the "peers" votes with the two management members, the decision cannot properly be said to be based on a "peer review."

In the case of a company that has aircraft operating personnel, the employee-relations handbook wisely provides that, if one of that group is the complaining employee, the chairman of the internal tribunal must hold a valid applicable FAA license. That tribunal, with much more formality than is customary in internal tribunals, permits the complaining employee to make an opening statement, a rebuttal of management's presentation, and a closing statement. A secret ballot is prescribed, and confidentiality of the proceedings is enforced outside the tribunal. An oddity in this company is the fact that the internal tribunal, called a "Board of Review," consists of the complaining employee's "peers." However, you should not think that they are biased in favor of their fellow employee, because provision is made for him or her when dissatisfied with the "Board of Review's" decision, to appeal to a higher internal tribunal called an "Appeals Board" consisting of the company's president and two other top officials.

An unusual provision in one company is that an appealing employee must comply with management's decision while he or she is appealing it. That may be a good or a bad idea, but it may not be determined by counting the number of companies that incorporate it in their employee-relations handbooks. I have emphasized the fact that companies obviously only rarely consult other companies when designing their grievance resolution procedures, and therefore many good ideas are probably not incorporated in such procedures simply because no one in a company thought about them.

Can you recognize an employee's complaint as being a legitimate grievance when you see the complaint? I have mentioned the fact that employee-relations handbooks sometimes define what items the companies deem to be proper grievances. One company has this definition: "A grievance is an employee allegation of an improper or incorrect interpretation or

application of the Administrative Manual or Employee Handbook." Another company states: "Matters beyond the area of interpretation of an existing policy are not grievable." Reserving management viewpoint in this matter to emphasize employees' viewpoint, the situation is, in effect, one of employees saying of management: "You wrote the rules of your relations with us, we accepted them by accepting employment with you; therefore, if you violate those rules in our opinion, we have a legitimate grievance." However, there is one company that departs from that philosophy by stating: "A grievance is anything at work which you feel is unjust, wrong, or unfair. When an employee takes the problem to the supervisor to get it solved, it becomes a grievance."

I have mentioned a company in which, when a complaining employee selects a "peer"to serve on the internal tribunal, management asks that person to serve but does not insist on it. There is another company that states in its employee-relations handbook that such service is a duty inasmuch as the tribunal is established for the benefit of employees. Management benefits, of course, if the presence of the tribunal increases the morale of the company's employees, which may be the unpublished reason why some companies have internal tribunals.

A peculiar provision in one company is that a complaining employee may waive the presence in the internal tribunal of the customary "peer" employees, whereupon the decision is made by the two management members. It is difficult to determine why an employee would do that, unless the reason is that he thinks the two management members will be more lenient with him or her than the "peer" members would be.

Conclusion

I have stated that there is a substantial lack of uniformity among non-union companies in certain aspects of the grievance resolution process. This is true regarding the membership of an internal tribunal, and particularly in the methods for selecting the members. The selection of the members is heavily influenced by a company's degree of commitment to the concept of "peer review," which can be strong, moderate, or weak.

It is obvious that, in general, management will be hesitant, rather than enthusiastic, in giving an employee's "peers" majority control of an internal tribunal. However, the experience of many companies has demonstrated that there are substantial benefits, outweighing the theoretical risk of management lessening its control of its destiny, in wholehearted acceptance of the concepts of majority control of an internal tribunal by an employee's "peers." It is my research observation, based partly on comments by executives who have had experience in the matter, that a company has far more to gain than to lose by wholehearted acceptance of the concepts of "peer review," as a means for minimizing employees' complaints and formal grievances. Minimization is itself a means to a greater end, namely, the enhancement of employees' morale, which is an asset of a company that is too important to be measured in dollars and cents.

To summarize, I have stressed the fact that there are many legitimate ways to design an internal tribunal and select its members. The governing principle is that a company should not blindly copy what other companies are doing but, rather, should tailor its internal tribunal to fit its own particular circumstances, the basic feature of which is top management's philosophy of employer-employee relations. The organizational structure must also be considered.

It is improper for a company to have an internal tribunal unless it already has a very refined system of appeal steps up through higher management for an employee who is dissatisfied with his or her immediate supervisor's decision

regarding a grievance. The internal tribunal should be the final step in the appeal system.

[The End]

Public Sector Industrial Relations in Canada: The Impact of Restraint

By Mark Thompson

University of British Columbia

Public sector industrial relations in Canada present both contrasts and similarities with systems in the United States. The growth of collective bargaining and unionization in the public sector gained momentum during the 1960s in the two countries. Legislators faced the issues of maintaining essential services and of dealing with strike substitutes in many states and provinces. Union militancy and strikes rose in the 1960s and 1970s on both sides of the border. By the mid-1970s, the transformation of Canadian public sector industrial relations from systems of employer consultation with employee associations to formal collective bargaining was complete. The results of this transformation in Canada differed from those in the U.S., however.

In general, Canadian public sector industrial relations resemble the private sector model more than their counterparts in the U.S. or most other industrialized countries do. Virtually all nonmanagerial employees are free to join a union, which has the right to bargain over a range of issues, including wages and salaries. Approximately two-thirds of all employees of municipal, provincial, and federal employers are members of unions, usually affiliated with national labor centers. Every jurisdiction grants at least some groups of employees the right to strike, and grievances are handled through bilateral systems that resemble the private sector.[1]

The first decade of public sector collective bargaining was in many ways the era of the employee. Not only were new rights won, but also public sector unions negotiated wage increases above those in the private sector. Although these increases initially redressed substandard wages and salaries, compensation occasionally surpassed the private sector.[2]

By 1975, the era of the employee was ending. Late in that year, the federal government imposed a wage and price control program aimed primarily at public sector wages. This program greatly reduced the rate of negotiated wage increases.[3] Although wages did not rise sharply after controls ended in 1978, both settlement and inflation levels rose steadily in 1980 and 1981, and by late 1981 negotiated public sector wage increases generally

[1] Mark Thompson and Allen Ponak, "Canadian Public Sector Industrial Relations: Policy and Practice," *Advance in Industrial Relations*, Vol. 5 (1988).

[2] Morley Gunderson, "The Public/Private Compensation Controversy," Mark Thompson and Gene Swimmer, Eds., *Conflict or Compromise: The Future of Public Sector Industrial Relations* (Montreal: Institute for Research on Public Policy, 1984).

[3] Allan Maslove and Gene Swimmer, *Wage Controls in Canada 1975-78* (Montreal: The Institute for Research Policy, 1980).

outstripped levels in the private sector.[4] Much of the gap favoring the public sector proved illusory, since cost of living allowances were much more common in the private sector, so that gross comparisons of negotiated increases overstated the public sector advantage.[5]

Little of this information was available in 1981-1982, and it is not clear that such data would have changed public opinion materially. There was a public perception that public sector wages were "out of control" and that the economy was in danger of another period with inflation rates above 10 percent. These views, together with resentment at a number of highly-publicized public sector strikes, set the stage for the next round of controls on collective bargaining.

Collective Bargaining and Politics

Having recently extended bargaining rights to public employees, Canadian policymakers acted on the conviction that these negotiations were important sources of inflation. The intellectual bases for restrictions on public sector compensation were familiar to American observers of industrial relations. Stated briefly, the argument was that governments lack the discipline of the profit motive when negotiating with their employees. Instead, restraints on public employers are essentially political. Given the inelastic demand for many government services, their essential nature, management is often under severe pressure to succumb to employee demands.[6] Moreover, public sector unions allegedly can exert political pressure on their employers to gain further advantages in negotiations.[7]

An alternate hypothesis, that public employers can alter the legal framework under which they negotiate with their employees, was discussed less often. This power could offset any public sector union advantages, though labor would resist such unilateral actions.

The conventional theory of bargaining in North America holds that private sector bargaining power is based on economic variables, while public sector negotiations are primarily political. Thus, politically powerful unions should be able to resist political pressures, though their ability to offset economic forces is unclear.[8]

One of the underlying issues in public sector industrial relations, therefore, becomes the extent to which bargaining outcomes are a function of political "markets."[9] If unions can alter the political environment, they should be able to force governments to divert funds to maintain employment or increase compensation or both. Conversely, if government that can impose bargaining results by fiat or legislation, the balance of political power lies with the employer.

Canadian Public Sector Compensation Controls

These issues were sharply defined between 1981 and 1985. The recession of the early 1980s affected the economy severely. The GNP fell 5 percent between 1981 and 1982, while the rate of inflation exceeded 11 percent in those two years and unemployment rose from 7.5 to 11.0 percent.

Faced with these severe economic conditions, governments instituted a variety

[4] Tom Wilson and Peter Dungan, "Impact of Public Sector Wage Controls on Budget Deficits and Inflation," David Conklin, Thomas Courchene, and William Jones, Eds., *Public Sector Compensation* (Toronto: Ontario Economic Council, 1985).

[5] David Wilton, "Public Sector Wage Compensation," W. Craig Riddell, Ed., *Canadian Labour Relations* (Toronto: University of Toronto Press, 1986).

[6] Harry Wellington and Ralph Winter, *The Unions and the Cities* (Washington, D. C.: The Brookings Institute, 1971); Gunderson at note 2.

[7] Richard Freeman, "Unionism Comes to the Public Sector," *Journal of Economic Literature,* Volume XXIV (March, 1986).

[8] Raymond Horton, "Fiscal Stress and Labor Power," Barbara Dennis, Ed., *Proceedings of the 38th Annual Meeting of the Industrial Relations Research Association* (Madison, Wisc.: IRRA, 1986).

[9] Philip Way, "U. K. Government Pay Restraint Strategy in the Public Sector: The Experience under Cash Limits, 1979-83" (Unpublished dissertation, Warwick University, 1986).

of measures. Most of these emphasized restraint on government expenditures.[10] As one element of these policies, the federal government and every province restricted increases in public sector compensation in 1982 and 1983. Five provinces and the federal government imposed controls over public sector bargaining. The remaining provinces announced limits in expenditures, a form of the British "cash limits" system for controlling wages, or agreed with unions to restrict increases voluntarily.

These actions by government offer an opportunity to examine the dynamics of public sector industrial relations. In all cases, governments justified these programs on the grounds of economic necessity, typically to fight inflation or reduce levels of government expenditure.[11] Since the political power of labor and economic conditions differed among jurisdictions, an examination of the results of bargaining in them may indicate how successfully labor could resist economic and political pressures.

This article compares the economic and labor dimensions of four provinces between 1980 and 1986. The provinces were chosen for their differences in political climate and the nature of their restraint programs. Table 1 contains an introduction to the characteristics of each of the provinces. Based on union penetration and overt political action, labor should be strongest in British Columbia. Protests against the restraint program were more vigorous there than elsewhere in Canada.[12] However, British Columbia established the only permanent restraint program with a review mechanism. Conversely, organized labor is considered to be relatively weak in New Brunswick. Not only is penetration low, but the union of provincial government employees in New Brunswick has never joined the national body, which it regards as too militant.

Ontario is the most industrialized province in Canada. During the period in question, a moderate Conservative government was replaced by a coalition of Liberals and New Democrats, anxious to retain labor support in 1986. The Conservative government of Ontario imposed a one-year extension of all collective agreements with a 5 percent increase, followed by a further year of limits on transfer payments of 5 percent. The New Democrats governed Manitoba during most of the period when restraint measures were in place. While union penetration is not high there, labor had close ties with the government. The government attempted to hold expenditures in 1983-1984 to a 5 percent increase and urged all public sector negotiators to observe the same limit.

Based on a public poll in late 1984, pro-labor sympathies were highest in New Brunswick and Manitoba and lowest in British Columbia and Ontario.[13] Provincial government employees were free to strike only in British Columbia and New Brunswick.

Patterns of Restraint

Table 2 presents the results of an analysis of restraint in each of these jurisdictions. Rates of change and net changes in a series of variables are presented. Provincial gross domestic product is the best available measure of economic performance. Unemployment rates should affect labor's bargaining power. Overall govern-

[10] L. R. Jones, "Provincial Restraint Management and Budget Control in Canadian Provincial Governments," *Canadian Public Administration*, Vol. 29, No. 2 (Summer, 1986).

[11] Pradeep Kumar, "Recent Public Sector Wage Restraint Programs: The Economic and Labour Market Rationale?" Bryan Downie, Ed., *Proceedings, 21st Annual Meeting of the Canadian Industrial Relations Research Association* (Quebec: CIRA, 1985); Mark Thompson, "The Future of Voluntarism in Public Sector Labour Relations," Geoff England, Ed., *Essays in Labor Relations Law* (Toronto: CCH Canadian, Ltd. 1986).

[12] Mark Thompson, "Restraint and Labour Relations: The Case of British Columbia," *Canadian Public Policy*, Vol. XI, No. 2 (1985).

[13] Canadian Institute of Public Opinion, 1984.

ment fiscal policy is captured by change in gross provincial expenditures. Change in the number of provincial government employees engaged in general administration is a reflection of government success in reduction of its own size. School boards are elected locally, but typically were affected by restraint programs. Teachers' salaries and pupil/teacher ratios are indicators of the impact of restraint on education. Comparisons of collective agreement settlements in provincial governments and municipal governments with the private sector highlight the extent by which public employee groups were affected by restraint and recession.

An analysis of the results in Table 2 identifies several features of provincial restraint programs. The variation in rates of change in the factors measured is considerable, across provinces and within the same jurisdiction. Given the differences in the impact of the recession, the first finding is not surprising. In British Columbia, where the economy shrank by 6 percent in 1982, the restraint program cut public sector settlements to the 2 to 3 percent range the following year. In Ontario, the economy fell just as sharply, but recovered in 1983, and the reduction in settlement levels was less severe.

Within the same province, the impact of restraint varied almost as substantially. In Manitoba and New Brunswick, for instance, municipal employees received increases averaging about half as great as provincial workers.

In all provinces, the pupil-teacher ratios fell, as the number of students declined more rapidly than the number of teachers. The decline ranged from 4 percent in British Columbia to 9 percent in Manitoba. At the same time, salaries rose in real terms by 13 percent in Manitoba and fell by 1.4 percent in Ontario.

Despite their protestations that restraint was part of an effort to reduce the role of government, every province in the sample increased its budget virtually every year. Between 1981 and 1983, when the recession was most serious, budgets rose 7.7 percent (Ontario) and 20.8 percent (Manitoba). Restraint clearly redirected government expenditures away from labor, without reducing them in real terms.

Conclusions

Apart from the observations above, these data fail to disclose any relationship between union organizational power and public sector restraints. In British Columbia, for instance, where the provincial government employees struck and won the support of other community and labor groups, the government was able to reduce their numbers significantly and hold their increases below the private sector and municipal workers between 1982 and 1985. By contrast, in New Brunswick, another area of alleged labor weakness, provincial government employees nearly matched the private sector increases. Teachers' salaries rose slightly during the restraint period while their workload was falling. A pro-labor government in Manitoba was associated with moderate increases for its own employees and substantial improvements for teachers. In every province, municipal employees received quite different treatment than the other two groups analyzed. It is not clear if restraint programs were intended to work differently for them or if the multiplicity of autonomous bargaining units complicated the administration. Public opinion data collected in the midst of restraint were good predictors of restraint in New Brunswick and British Columbia.

These data cast doubt on any assertions of a concentrated attack on labor. Certainly, there is no evidence of consistent treatment of public sector workers, and some conservative provinces were comparatively generous to labor. By 1985-1986, public employees were winning increases superior to those in the private sector, a sign of union vitality.

TABLE 1

BACKGROUND TO PROVINCIAL RESTRAINT PROGRAMME

Province	Government Party	Union Penetration (%)	Union Popularity (%)[b]	Restraint Program[a]	Comment
British Columbia	Social Credit	40	23.1	Statutory, 1982-1987 Variable guidelines	Strong labor resistance to restraint
Manitoba	Conservative, 1979-1981				
	New Democratic, 1981-1988	30	33.3*	Announced funding restrictions 1983-1984; spending limits thereafter	
Ontario	Conservative	29	20.8	Collective agreements extended one year with 5% increase October 1982 October 1983	Funding increases limited to 5%
New Brunswick	Conservative	32	43.4*	Voluntary wage freeze in return/or no layoffs or reductions in public service	Provincial public sector unions considered especially weak

[a]Source: Pradeep Kumar, "Recent Public Sector Wage Restraint Programs: The Economic Labor Market Rationale?" in Bryan M. Downie, ed., Proceedings of the 21st Annual Meeting of the Canadian Industrial Relations Association. Quebec: CIRA, 1985.

[b]Source: Canadian Institute of Public Opinion National Survey No. 491-1, November 1984. Responses to question: How much respect and confidence do you have in unions? Totals are "A great deal" and "Quite a lot".
* fewer than 20 replies in sample

TABLE 2(a)

Provincial Economics and Restraint*

Province	Year	Change** in GDP	Change** in Budget	Unemployment Rate	Change in Number of Provincial Employees	Change in PTR	Change** in Teacher Salaries	Provincial Government Contract Settlements	Municipal Government Contract Settlements	Private Sector Contract Settlements
	1980	4.1%	9.2%	6.8%	2.1%	-	-0.2%	8.0%	14.7%	12.1%
	1981	0.8	4.0	6.7	3.2	-1.9%	1.1	8.0	15.3	14.0
BC	1982	-6.9	10.5	12.1	2.2	-2.8	2.4	8.2	14.5	10.5
	1983	0.7	2.9	13.8	-6.4	+2.0	-2.4	2.0	3.1	4.6
	1984	1.7	1.5	14.7	1.4	+1.0	-2.0	0.3	2.3	2.7
	1985	5.1	-2.4	14.2	0.9	-2.3	-5.1	1.0	2.4	2.0
	1986	2.7	2.2	12.6	0.7	-	-	2.8	2.1	1.1
	Net Change	3.8%	19.7%		1.6%	+4.0%	+4.1%			
	1980	-1.9	6.0	5.5	1.1			9.5	10.9	11.6
Manitoba	1981	4.8	5.5	5.9	2.9	+0.5	0.2	9.0	-	13.2
	1982	2.5	14.5	8.5	3.5	-0.5	4.6	11.8	13.1	9.9
	1983	1.1	5.5	9.4	-2.5	-0.5	5.1	6.3	-	6.3
	1984	5.9	1.3	8.3	13.4	+0.9	4.8	1.5	3.0	2.3
	1985	4.3	5.1	8.1	3.0	-9.3	-0.5	3.0	-	3.2
	1986	0.2	3.9	7.7	0.5	N/A	-1.3		3.0	2.1
	Net Change	14.3	40.8		+21.8	-9.0	+13.0			

TABLE 2(b)

Provincial Economics and Restraint*

Province	Year	Change** in GDP	Change** in Budget	Unemployment Rate	Change in Number of Provincial Employees	Change in PTR	Change** in Teacher Salaries	Provincial Government Contract Settlements	Municipal Government Contract Settlements	Private Sector Contract Settlements
	1980	1.1%	.2%	6.8%	2.8%		1.7%	8.0%	10.6%	11.6%
	1981	2.0	4.0	6.6	-.9	-1.5%	1.1	9.2	11.9	11.2
Ontario	1982	-6.4	1.1	9.8	.2	-1.5	-.1	10.6	11.4	8.9
	1983	4.2	6.6	10.4	1.9	.7	3.7	4.9	5.7	6.0
	1984	5.5	2.5	9.1	2.5	-1.5	-2.6	5.0	5.1	4.0
	1985	6.7	5.3	8.0	3.0	-4.8	-3.4	4.0	4.9	4.6
	1986	3.7	-1.5	7.0	5.6			5.5	5.1	3.7
	Net Change	15.6%	19.2%		+12.9%	-7.2%	-1.4%			
	1980	-14.0	9.2	11.0	3.9		6.9	7.0	.0	14.0
	1981	2.8	-1.6	11.5	-1.3	-1.1	1.0	12.0	14.8	13.2
N.B.	1982	-.1	18.6	14.0	7.7	1.1	3.9	6.5	-	12.0
	1983	3.8	-2.1	14.8	1.9	-1.5	6.4	-	7.0	7.8
	1984	4.5	2.7	14.9	-.3	.5	1.0	5.0	-	2.8
	1985	5.0	2.3	15.2	2.2	-.8	-3.4	N/A	4.0	2.2
	1986	7.1	2.1	14.4	2.3			N/A	-	2.8
	Net Change	25.3%	+22.7%		+12.8%	-3.0%	+8.9			

* Sources: Statistics Canada, Labour Canada

** Constant dollars

Recent Developments in Federal/Postal Service: Collective Bargaining 1987

By Gregory Giebel

University of the District of Columbia

Labor relations in the federal government during 1987 were largely uneventful compared with the early years of the Reagan Administration under Donald Devine, Director of the Office of Personnel Management. The Office of Employee and Labor Relations reported that, as of 1987, 62 percent of the 1,266,129 federal government employees were in exclusive bargaining units and covered by an agreement.[1] This marked an all-time high, up from 60 percent in 1985. Ninety-three percent of all wage system employees and 54 percent of general schedule employees were included in this category. Approximately three-quarters of the employees covered by the 2,238 exclusive recognitions were in unions affiliated with the AFL-CIO.[2]

The Federal Labor Relations Authority reported in 1987 that there were 80 elections involving petitions for exclusive recognition held during fiscal year 1986, and in 69 elections (86 percent) an exclusive representative was certified. The most noteworthy election involved a nationwide unit of air traffic controllers, who were previously represented by PATCO until decertification on August 1, 1982. In the recent election, the 13,000 air traffic controllers chose the Air Traffic Controllers Association by a better than two to one majority. During the same fiscal year, four decertification elections were held; the exclusive representative was retained in two of the four.[3]

Even though 1987 could be characterized as uneventful, there were a number of important developments. Chief among them, in order of significance, were the new postal service agreement, the continuing troubles of the American Federation of Government Employees (AFGE), drug testing, proposed Hatch Act revisions, and changes in pay. Each of these developments will be considered in order of their significance.

Labor unions representing three of the four largest bargaining units within the United States Postal Service conducted and successfully concluded negotiations with management during 1987. This marked the seventh negotiation since the passage of the Postal Reorganization Act in 1971, which placed postal labor relations under the private-sector National Labor Relations Act, although postal workers are not permitted to strike or to negotiate open-shop provisions. Both the unions, which have represented postal workers since the late 1800s, and management expressed satisfaction with these negotiations and the new agreements. This time the negotiations were far different from the previous round in 1984, when the two sides failed to reach an agreement and thus had to live with a settlement imposed upon them by an arbitrator.

[1] This accounting excludes United States Postal Service Employees.

[2] U.S. Office of Personnel Management, Office of Employee and Labor Relations, *Union Recognition in the Federal Government as of January 1987.*

[3] U.S. Federal Labor Relations Authority, "Eighth Annual Report of the Federal Labor Relations Authority," FY 1986.

USPS Negotiations

Prior to the beginning of negotiations on April 21, 1987, the 250,000 members of the American Postal Workers Union (APWU) chose to return Moe Biller to the presidency with a 9,054 vote plurality over Dave Daniel. During the negotiations, the APWU again joined forces with the National Association of Letter Carriers (NALC). The bargaining climate was characterized by observers as much better than in 1984, despite the existence of a backlog of 40,000 cases in the grievance system. The USPS, with 83 percent of its $30.1 billion fiscal year budget devoted to payroll, pursued an aggressive bargaining strategy. As negotiations started, James Miller, Director of the Office of Management and Budget, began to speculate about the merits of adding the USPS to its list of seven candidates for privatization included in the Administration's fiscal year 1989 budget. A second announcement, also believed to be timed to the opening of negotiations, involved the probability of having to raise postal rates pending the outcome of bargaining. An increase for first class mail to 25 cents received wide circulation and attention.

The issue over which the two sides found their greatest disagreement involved management's proposal to create a new category of part-time workers and to increase the use of "casuals." The 1984 agreement had limited the "casual" category to 5 percent of the work force and to no more than 180 days per year. This time, management proposed to double the days and the percentage of the "casuals," who do essentially the same jobs as other workers but receive $5.25 per hour and no health, leave, or retirement benefits.

As the July 20, 1987, expiration date approached, APWU and NALC members marched upon the USPS headquarters in Washington. The Mailhandlers, who represent 50,000 sorters and handlers, chose to abstain from the demonstration. Shortly afterwards it was announced that they had achieved an accord on July 13, 1987, calling for a 1.6 percent raise and a "me-too" clause granting parity with the future APWU/NALC settlement. The APWU/NALC, which had initially proposed an 8.6 percent increase, cried "foul" and claimed that the Mailhandlers' agreement was predicated upon the USPS's redefining 10,000 clerk positions into the jurisdiction of the Mailhandlers. The APWU/NALC representatives subsequently walked out of the negotiations on July 15, but six days later and 24 hours after the contract expiration, a new agreement was reached.

This contract calls for a 7 percent raise in salary and seven cost-of-living increases to be paid each six months over the 40-month contract. Other features of the new contract call for the retention of the no-layoff provision for employees with six or more years of service, an increase to eight weeks of leave carry-over, a child-care task force, and the purging from employee files of warning letters more than six months old. The USPS demand for more "casuals" and part-time employees was dropped, but the jurisdiction problems caused by the impact of new technology on the assignment of new jobs remains unresolved.

Each of the three unions voted overwhelmingly in favor of ratifying the new agreements. The National Rural Letter Carriers' Association, representing 75,000 additional USPS employees, was scheduled to begin negotiations on October 1, 1987.

In other developments, the Mailhandlers division of the Laborers' Union, which has quadrupled its size since 1969 and which has 506,000 associate members, announced that the trusteeship which was imposed in 1985 will expire on February 1, 1988, and that Herbert Walker was to be the newly elected national director. At the end of the year the USPS announced that the current Postmaster General, Preston Tisch, would be resigning, and this action will add to the instability of top management created

by the frequent resignations from this position.

AFGE Problems

The year of 1987 was a troubled one for the largest federal sector union, AFGE. The union is the exclusive representative for 1,026 bargaining units and 685,368 employees. This is approximately one-third (excluding the USPS) of the federal government work force represented by unions. Central to AFGE's problems is that only 207,000 of the represented employees belong to the union and thus pay dues. Membership has declined 40 percent during the past 15 years, which has occasioned several crises.

In 1987, the Office of Personnel Management found that during the 1981-1985 period AFGE had used between $600,000 and $1,200,000 from its Health Benefit Plan in its general operations. While OPM allows unions to use a portion of the health premium for administrative purposes, AFGE was clearly misusing this money and was ordered by OPM to repay $1,100,000 to the fund and to provide OPM with monthly statements of the surplus and administrative fund activity. AFGE obtained the money by arranging for a $1,100,000 "bridge loan" from the American Federation of State, County and Municipal Employees (AFSCME). It was AFGE's intent to use the loan to bridge the period until it could arrange for a loan, using its new building in Washington as collateral.

AFSCME has a small representation of 6,500 federal employees in 12 bargaining units and maintains close ties with AFGE from whom it separated in 1936. AFGE President Kenneth Blaylock replaced Gerald McEntee, President of AFSCME, as head of the AFL-CIO Public Employee Department, and rumors persist that the 1.4 million member AFSCME will consider merger possibilities at its August 1988 convention. The Service Employees' International Union is already well positioned in the federal sector following its merger with the National Association of Government Employees (NAGE).

AFGE's problems were further compounded by serious representation challenges by independent unions for several of its key units. Chief among these is the attempt by the National Treasury Employees Union (NTEU) to challenge for the 60,000 employees in the Social Security Administration. NTEU amended its constitution in 1977 to include within its jurisdiction those employees who do similar work at other agencies. At this year's convention, $450,000 was authorized for an inquiry to see if a challenge were feasible, and it is widely expected that a recognition petition will be filed as early as April 1988.

In order to reinforce the barricades, AFGE offered a dues rebate plan to Social Security Administration employees under which members will be entitled to a refund of all their dues when they retire, leave the agency, or die.

Shortly after Christmas, the AFL-CIO responded to a request from AFGE President Blaylock for financial aid to assist in its organizing efforts. AFL-CIO Secretary Thomas R. Donahue arranged for $1,500,000 to be provided in $300,000 units from AFSCME, NALC, SEIU, the Communications Workers, and the AFL-CIO. While no reciprocity was announced, all four unions are viewed as possible merger candidates with AFGE.

Also at the end of the year, AFGE Vice President John Sturdivant announced his decision to challenge Blaylock for the presidency. Whatever the outcome, this challenge, coming at this time, will be certain to contribute to the divisiveness within the organization.

Drug Testing

Controversy surrounding Executive Order 12564 continued in 1987. This Presidential directive could permit drug testing of up to 1.1 million federal employees in jobs considered to be sensitive. Unions have been quick to challenge the order on

many grounds and have won early cases, but where the government has been able to show job-relatedness, the government has fared much better. Battles currently are being waged by the National Foundation of Federal Employees (NFFE) against plans to randomly test between 10,000 and 12,000 civilian employees of the Army; by the NTEU against U.S. Customs Service plans to test employees seeking promotion or transfers to drug enforcement positions; by the postal unions against USPS's attempt to institute prehiring testing; by AFGE against the Justice Department's plan to implement testing in its Bureau of Prisons, Immigration and Naturalization Service, Federal Bureau of Investigation, and Drug Enforcement Administration; and by AFGE against the Department of Transportation.

The battles are being fought on many fronts and over many issues. There is little doubt that they will continue as well as expand and intensify as these cases work their way to the Supreme Court. Issues to be considered include whether the tests are a "reasonable" search not prohibited by the Fourth Amendment, whether a 3 percent error rate constitutes unreliability, whether testing is limited to those individuals who occupy critical positions affecting safety and security, whether there is probable cause, and what constitutes impairment. Other issues being considered are whether the Executive Order violated the Administrative Procedures Act and whether it is inconsistent with the Rehabilitation Act.

Hatch Act

Pressure continued to build to reform the 48-year-old Hatch Act, which was designed to shield federal employees from political coercion. Early in the year, APWU President Moe Biller, NALC President Vincent Sambrotto, and AFGE President Ken Blaylock were given 60-day suspensions by the Merit System Protection Board for violating the Act when they wrote or published articles endorsing Democratic candidate Walter Mondale in the 1984 presidential race. The suspensions were largely symbolic because the three union leaders were on leave without pay from their jobs, but the suspensions did serve to arouse the attention of those calling for reform.

This pressure culminated in the House of Representatives passing a bill, by a vote of 305-112, that would permit government workers to seek political office, participate in political campaigns, and solicit funds for candidates. This would be done on their personal time and away from the workplace. The bill must be approved by both the Senate and then the President prior to the institution of any reform.

Pay and Retirement

Also notable during 1987 was a continuation of the de-emphasis of issues related to pay cuts, benefit cuts, furloughs, and layoffs, which characterized the early years of the Reagan "Revolution" when Democrats did not control both Houses of Congress. However, both white-and blue-collar employees had to settle for a 2 percent pay hike, which was far below the 23.74 percent recommended by the Bureau of Labor Statistics survey of comparable private-sector compensation for the same level of work. The 2 percent was also far below the 8 percent recommended by the Presidential Advisory Committee on Federal Pay or the 3 percent recommended by a joint congressional committee.

The Federal Pay Comparability Act of 1970 allows the President to substitute a lower pay figure if he believes it is required by a national emergency or economic conditions affecting the general welfare. Eligible federal workers will also be given within-grade pay hikes during 1988.

In other developments, the first of ten experimental pay projects was signed by the President, despite his misgivings that

these experiments threaten to fragment the federal personnel pay system. Under this five-year project, pay will be linked to performance for scientists and technical personnel at the National Bureau of Standards to help stem the adverse effects of a "brain drain."

In several closely watched cases involving negotiability of pay, a majority on the Federal Labor Relations Authority ruled that economic issues are subject to bargaining, unless the proposal covers matters already provided by law over which the agency has no discretion or unless the proposal conflicts with a law, government regulation, or agency-wide rule for which a compelling need exists.[4] In one case involving the NTEU and the Federal Deposit Insurance Corporation, an independent corporation, the FLRA accepted a U.S. court of appeals decision which held that the FDIC is not prohibited by law from negotiating pay and that since it adopted its own pay adjustment program for employees who work in high-cost areas of the United States, it must bargain over pay proposals made by the NTEU.[5]

In another case decided late in the year, doubt was raised over FLRA decisions similar to the FDIC case when the Third Circuit Court of Appeals reversed the FLRA's decision that the Navy's Military Sealift Command must bargain with the National Maritime Union on pay practices for civilian mariners paid under a prevailing wage statute. The court accepted the FLRA Chairman's minority opinion[6] that Title VII of the Civil Service Reform Act's ambiguous language and legislative history were too weak a foundation on which to conclude that negotiations over pay are to be permitted.[7]

[The End]

Fact Finding in Ohio Public Sector Bargaining Revisited

By E. Edward Herman and Howard M. Leftwich *

University of Cincinnati

The Ohio Public Employee Collective Bargaining Act (hereinafter called the Act) became effective in 1984. It is comprehensive in scope, regulating many aspects of representation, collective bargaining, and internal union affairs. The State Employment Relations Board (SERB) administers the Act. The statutory dispute resolution procedure includes mediation, fact finding, and for public

[4] *AFGE Local 1897 v. Eglin AFB*, Fla., 24 FLRA No. 41.

[5] 14 FLRA No. 94, 1984; 21 FLRA No. 36, 1986.

[6] *DON, MSC v. FLRA*, CA 3 Nos. 87-3179 and 87-3276, Jan. 12, 1988.

[7] *Additional References: Eighth Annual Report of the Federal Labor Relations Authority*, U.S. Federal Labor Relations Authority (Fiscal Year 1986); *Fiscal Year 1986 Annual Report*, Federal Service Impasses Panel (March 10, 1987); *Government Employee Relations Report*, Bureau of National Affairs, Inc., Vol. 25, No. 1195 (January 5, 1987) through Vol. 26, No. 1245 (January 4, 1988); *Government Union Critique*, Public Service Research Foundation, Vol. 9, No. 5 (January 9, 1987) through Vol. 10, No. 4 (January 1, 1988); *Index of Federal Labor Relations Cases*, U.S. Office of Personnel Management, Office of Agency and Labor-Management Relations (January, 1983); *Labor Agreement Expirations in the Federal Sector*, Personnel Systems and Oversight Group (April, 1987); *Negotiability Determinations by the Federal Labor Relations Authority*, U.S. Office of Personnel Management, Office of Employee and Labor Relations (May, 1987); *Recognition and Agreement in the Federal Service by Agency/Union/Region*, Personnel Systems and Oversight Group (October 22, 1987); *Survey of Productivity Provisions in Federal Labor Agreements*, Workforce Effectiveness and Development Group (April, 1986).

* We would like to express our appreciation for the assistance received from The Members, Administrators, and staff of the Ohio State Employment Relations Board. We are also grateful to Susan Burns for her typing assistance and to Jane E. Medler for her assistance in research.

safety employees "conciliation" (which as defined in the Act means binding, issue-by-issue, final offer arbitration). Other categories of employees covered by the Act are permitted to strike. The dispute resolution procedure is to be administered within a precisely defined time frame. As an alternative to the statutory procedure, the parties may substitute a "mutually agreed upon dispute procedure" (MAD).[1]

SERB is required to appoint a fact finder 30 days before expiration of a current contract or negotiating period where agreement has not yet been reached. The fact finder must investigate the dispute and submit a report of findings together with recommendations for settlement of unresolved issues not later than 14 days after appointment. This deadline may be extended by mutual consent of the parties. Because 14 days are often insufficient time for completion of the fact finding process, such extensions are common. Fact finders are explicitly authorized to attempt mediation at any time during the fact finding process. Not later than seven days after the fact finder's report is issued, his/her recommendations may be rejected by one or both of the parties (Section 4117.14). The voting process will be discussed in more detail in a later section.

The purpose of this paper is to examine and evaluate the utilization of fact finding under the Ohio Act. We begin with a brief sampling of the extensive literature on fact finding. Next we survey experience with fact finding under the Ohio Act to date. We then examine whether fact finding occurs too early in the bargaining process and as a result too many issues are submitted to fact finders. Finally, we examine the implications of the statutory requirements for rejecting fact finder recommendations.

The Pros and Cons of Fact Finding

A number of advantages of fact finding are cited in the literature.[2] The *prospect* of fact finding may generate pressure for the parties to settle on their own. In preparation for the fact-finding hearing, the parties are encouraged to be more analytical and to review their bargaining positions in more depth. The fact-finding report can be a useful base from which to negotiate a voluntary settlement. At times, this occurs after the report is rejected by one or both of the parties. In some cases, fact finding can "create public pressure on the contesting parties to resolve the dispute."[3] Fact finding can also be useful for testing resistance points of the opposition and can provide a face saving mechanism for conceding specific issues. It may "improve the outcome of the bargaining."[4] Moreover, gaining public support is easier with a favorable fact finding report.[5] A neutral may be a convenient scapegoat for the parties where settlement outcomes could produce unfavorable political consequences. This feature may be an important reason why fact finding is a part of the dispute resolution procedure in the Ohio Act. The most important contribution of fact finding in most situations is, of course, the formulation of recommendations for a settlement.

Fact finding also has its critics. Northrup argues that "perhaps a cardinal weakness of fact finding is that the facts are rarely in doubt . . . To assume that the

[1] E. Edward Herman and Howard M. Leftwich, "Mediation and Fact Finding under the 1983 Ohio Public Employee Collective Bargaining Act," *Proceedings of the 38th Annual IRRA Meeting* (December 28-30, 1985), pp. 316-323.

[2] Daniel Gallagher and Peter Veglahn, "The Effect of Statutory Impasse Schemes on the Acceptance of Fact Finding Recommendations: Evidence in Iowa and New York," *Journal of Collective Negotiations*, Vol. 13, No. 2 (1984), p. 124.

[3] Paul Berninger, "Winning in Fact Finding and Arbitration," *Operspective* (Labor Relations Press: May-June, 1984), p. 15.

[4] John Drotning, "RX Impasse: Does Reliance on the Impasse Procedure Have a Narcotic Effect on Safety Forces Negotiations?" *SERB Quarterly*, Vol. 2, No. 3 (Fall, 1987), p. 10.

[5] David Dilts, "An Examination of Fact Finding as a Method of Dispute Settlement Training Grounds for Arbitrators," *Journal of Collective Negotiations*, Vol. 13, No. 3 (1984), p. 253; Berninger, cited at note 3, p. 15.

facts of a case, if known, will settle the dispute is quite naive." [6] Some critics argue that the process reduces the significance of mediation and that voluntary settlements may be harder to achieve because of "position entrenchment by the parties." [7] Some public employers contend that fact finding reports shift "the floor ... from the employer's impasse position to that of the fact finder's recommendation." [8] Dissatisfaction with the content of fact finding awards also has been expressed by the parties.

Experience with Fact Finding in Ohio

SERB statistics provide insights into fact finding experience under the Ohio Act.[9] In Table 1, the use of fact finding in 1986 and 1987 is analyzed by type of employee and employer. Over half of all fact finding cases, 58 percent in 1986 and 62 percent in 1987, involved police officers and firefighters. These public safety employees work for municipalities, which explains why half of all fact finding cases, 51 percent in 1986 and 52 percent in 1987, involve city employees.

Table 1

Fact-Finding By Employee Type—1986 and 1987

	1986	1987
Police Officers	48%	48%
County Employees	19%	10%
Teachers	12%	11%
Fire Fighters	10%	14%
Other Employees	11%	17%

Fact-Finding By Employer Type—1986 and 1987

Cities	51%	52%
Counties	32%	22%
Schools	11%	15%
Other Employers	6%	11%

Source: SERB 1986-87 Annual Report, p. 10; 1987 statistics provided by Mr. G. Thomas Worley, Administrator, Bureau of Mediation, March 9, 1988.

In many instances, the parties reached agreement before a fact finder's report was issued.[10] From 1 April 1984 through 31 December 1986, 1,037 fact finders were appointed, but in only 293 cases was it necessary to issue a report. Thus, in two out of every three cases, the parties resolved their differences through negotia-

[6] Herbert Northrup, "Fact Finding in Labor Disputes: The States' Experience," *Industrial and Labor Relations Review* (October, 1963), p. 114. Source: Edward Bachrach Krinsky, "An Analysis of Fact Finding as a Procedure for the Settlement of Labor Disputes Involving Public Employers" (Unpublished Ph. D. Thesis, University of Wisconsin, 1969), p. 56.

[7] Cited at note 2.

[8] *Ibid.*

[9] *SERB Annual Reports*, April 1984 through 1987. In slightly over half of all contract negotiations, the parties are governed by a MAD rather than the statutory dispute resolution procedure. The data reflect only negotiations in which the statutory procedure was utilized.

[10] The number of fact-finding cases differs from the number of reports. One fact-finding report does not necessarily represent one case. In some cases, a fact finder is able to settle a dispute through mediation, and thus there is no report. Such situations are reported by SERB as cases but would not be reflected in statistics on fact-finding reports. In other situations, one fact-finding report may cover a number of bargaining units. Each unit would count as a separate case and would have to vote separately on the fact finder's report. Thus, it is necessary to distinguish between the number of fact finding cases and the number of reports.

tion. In 1986 and 1987, SERB appointed 1,105 fact finders. In some 60 percent of these cases, a hearing was not required because the parties settled through negotiation. Of the 444 cases that went to a hearing, 101 (23 percent) ended in mediated settlements before the issuance of a report. In 141 cases (32 percent), the parties accepted the fact finder's recommendations, and in 202 cases (45 percent) the recommendations were rejected.[11]

Crucial to the settlement of so many fact finding cases by negotiation is the Act's provision for extending the 14-day statutory fact-finding period by mutual consent of the parties. Fourteen days would not be long enough to allow both further negotiation and a serious fact-finding process. In many cases, the parties ask the appointed fact finder for one or more extensions, or the fact finder may take the initiative and encourage the parties to try to settle their differences through negotiation, at times with the aid of mediation by the fact finder.

During the period 1984-85, 19 percent of cases going to a fact finding hearing were eventually settled through mediation.[12] In 1986, the percentage of cases settled through mediation increased to 22 percent (53 out of 240 cases). In 1987, there was an additional small relative increase, to 23 percent (48 out of 204 cases).[13] One possible reason for these increases may be more experience with the mediation process by fact finders, employers, and unions. Another possible reason may be that as the parties become better acquainted with various fact finders these neutrals gain greater acceptability, respect, and trust. All of these elements are important for successful mediation.

Fact Finding in Ohio: Too Early and Too Many Issues?

The Ohio Act has been criticized for mandating fact finding before the parties have had an adequate opportunity to negotiate. Consequently too many unsettled issues go to fact finding, and some recommendations may constitute a major portion of a proposed contract, which may be unacceptable to the parties.[14] The probability that fact finding reports will be rejected may be related to the number of issues on which recommendations are made.

In 80 percent of the 293 fact-finder reports issued from April 1, 1984, through December 31, 1986, fewer than twenty issues had been presented to the fact finder for recommendations. In the majority of cases, fewer than nine issues remained for the fact finder to resolve.[15]

Two additional points should be kept in mind regarding the number of issues submitted to fact finders. First, the above statistics pertain to the number of issues submitted at the hearing. Significantly, more issues may be unresolved at the time of initial fact-finder appointment. As discussed earlier, many issues are resolved through negotiation after a fact finder is appointed. Second, although the number of issues submitted to most fact finders has been manageable, this is a potential problem area which requires continuing vigilance. An increase in the number of unresolved issues could reduce the usefulness of fact finding in dispute resolution.

[11] *SERB Annual Report 1986-87*, pp. 8-9. Data for 1987 were not yet published at the time of writing. They were provided in a personal communication from G. Thomas Worley, Administrator of the SERB Bureau of Mediation. These data do not distinguish between acceptances resulting from (a) a majority vote of all persons eligible to vote and (b) recommendations being "deemed accepted" under the "three-seven" rule discussed below. Data presented in our discussion suggest that a substantial proportion of acceptances result from the recommendations being deemed accepted.

[12] *PEACE (Public Employment Advisory Counseling Effort) Report*, John Boyle, Chairman (March 1, 1986), p. 12.

[13] *SERB Annual Report 1986-87*, p. 9; see note 11 regarding 1987 data.

[14] Herman and Leftwich, cited at note 1, p. 320.

[15] *SERB Annual Report 1986*, p. 10.

If the number of issues going to fact finding were to become excessive, one potential solution would be to provide economic incentives for a reduction of issues. SERB's payment for fact finding might be decreased by a certain percentage for each issue exceeding some arbitrarily determined number. That is, beyond that number of issues the parties would be required to pay for a larger share of the cost of fact finding.

A recent decision by SERB in *Erie County Care Facility v. AFSCME* [16] may possibly cause some increase in the number of issues going to fact finding in the future. In this decision, the Board stated that "closure on all outstanding issues was achieved when the fact finder's report became final. When the voting period expired with neither party having properly rejected the fact-finding report, all outstanding issues were resolved and, therefore, closure on the entire package was attained." The extent, if any, to which this may result in more issues being submitted to fact finders is a subject for future research.

Implications of the Three-Fifths/ Seven-Days Rule

Several SERB officials stated to the authors that, compared with other jurisdictions, fact finding in Ohio has been relatively successful in resolving contract negotiating disputes. (For relevant statistical data see the previous section). One reason for this is the three-fifths/seven-days rule (hereafter called the three-seven rule). The Ohio Act specifies that rejection of fact-finder recommendations requires (1) a negative vote by a three-fifths of the *total membership* of the union and/or the relevant legislative body and (2) that this vote be conducted and certified to SERB within seven days after the fact finder's report and recommendations are issued.[17] Failure to comply with any element in these requirements results in the fact finder's recommendations being "deemed accepted," i.e., they become binding on the parties. Recommendations may be deemed accepted under one or more of the following circumstances: (1) a timely vote was not held; (2) a majority of those voting (or even of the total membership) voted to reject, but that majority comprised less than three-fifths of the total membership; or (3) the voting results were not certified to SERB within seven days. The three-seven rule biases the system in favor of accepting recommendations. Rejection becomes more difficult than it would be if: (1) only a simple majority of those voting were required for rejection; (2) there were no time limit for voting or a longer period were allowed.

It may be hypothesized that the three-seven rule makes it more difficult for unions to reject fact-finder reports than for employers because it is harder for unions to mobilize their more numerous memberships, particularly in larger bargaining units.[18] Over time, the unions' disadvantage could be reduced, however, as members become more aware of the importance of timely voting and the consequences of failure to comply with the three-seven rule, particularly when rejection is a desired outcome.

The PEACE Commission provided data on experience with the three-seven rule.[19] The Commission analyzed a sample of 214 out of 508 fact-finder appointments "to determine how fact finders were involved in the [dispute resolution] process." [20] In 58 percent of these cases, settlements were achieved during the fact-finding period, including 19 percent through mediation and 39 percent (83 cases) through acceptance of fact-finder recommendations. (Most of the remaining

[16] 87-MED-01-0002, March 14, 1988.

[17] Section 4117.14(c)(6), Ohio Public Employee Collective Bargaining Law and Rules 1987.

[18] Cited at note 12.

[19] *Ibid*, pp. 46-47.

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

42 percent were settled in negotiations after issuance of fact-finder reports rather than through strikes or conciliation.) Of the 83 acceptances, in 38 cases (46 percent of all acceptances) the fact finder's report was deemed accepted. Of the 91 cases in which reports were rejected, 52 (57 percent) were employer rejections; 22 cases (24 percent) were rejections by employee organizations; in 17 cases (19 percent), rejection was by both parties.

There are pros and cons to the three-seven rule. On the positive side, it encourages peaceful settlements and thereby reduces the potential for strikes. It enables legislators to ratify agreements tacitly rather than explicitly, which may help to reduce political barriers to ratification. For political reasons, legislators may sometimes prefer to abstain from voting, which amounts to acceptance of the fact finder's report, rather than go on record as opposing it.

On the union side, the rule also may foster better communication between leaders and members. More information about developments at the bargaining table may be transmitted to the rank and file. Union members are often criticized in the labor relations literature for their passivity and lack of participation in union affairs. Behaviors stimulated by the three-seven rule may encourage more interest by union members in their organizations.

But improved communication could be a two-edged sword. Increased involvement could also mean more pressures from union members on their leaders and might make bargaining, particularly intraorganizational bargaining within the union, more difficult.[21]

The three-seven rule could also lead to problems for employers, particularly where they choose to accept a fact finding report but the union is *compelled* to assent to it because of the three-seven rule. In some of these situations, a significant majority of union members may oppose the fact finder's recommendations. This could contribute to conflict and poor labor-management relations during the life of agreement and adversely affect contract administration. In such situations, many grievances may be generated, which could have an unfavorable impact on future negotiations. Collective bargaining is part of a continuous relationship rather than merely a ritual that takes place only when a new contract must be negotiated. The resolution of disputes because of the technicalities of the three-seven rule rather than through widespread agreement among members of the bargaining unit may undermine good labor relations over time.

In view of this, Anderson's proposal that SERB mediators and fact finders assume a more active role as educators before the parties vote on fact finding reports warrants serious consideration. In his view, one of the advantages of the "unique" Ohio three-seven provision is that it provides "the mediators and the Board with an opportunity carefully to explain and clarify the proposals to be voted upon. Skilled dispute settlers can perform a useful service at this crucial time in the dispute settlement process." [22]

Conclusion

It may seem that by mandating appointment of a fact finder thirty days before the expiration of every contract or negotiating period and specifying that the fact finder's report and recommendations be submitted within fourteen days, the Ohio Act is unrealistic and has introduced undesirable rigidities into the negotiating process. It could be argued that these provisions might well hamper the parties in resolving disputes themselves and encourage widespread reliance on state-

[21] Richard Walton and Robert McKersie, *A Behavioral Theory of Labor Negotiations* (New York: McGraw-Hill Book Co., 1965), pp. 281-351.

[22] Arvid Anderson, "The Ohio Bargaining Procedures: An Outsider's View," *Case Western Law Review*, Vol. 35, No. 3 (1984-85), pp. 374-384.

mandated fact finding or conciliation. Although the possibility of such potential problems cannot be entirely dismissed, two elements of flexibility in the system should be kept in mind. First, if the parties wish to extend the fact-finding period to allow more time for negotiations, with or without mediation, they may do so by mutual consent. Second, if they wish to avoid time constraints or fact finding altogether, they can establish a MAD, and thus by mutual consent they can opt out of the dispute resolution procedure contained in the Act and substitute one which is more to their liking.

Therefore, public sector unions and employers in Ohio are still allowed significant discretion in developing dispute resolution procedures which are best suited to their particular circumstances and needs. Given this flexibility in the system, and in light of experience to date, we agree with Sharpe and Tawil that fact finding has made an important contribution to public sector bargaining in Ohio by advancing "the cause of rationality in bargaining dispute settlement by resolving disputes short of the procedure's terminal step, which in many cases may involve disruptive work stoppages." [23]

[The End]

Affirmative Action in the Late 1980s

By David T. Croall

Frost & Jacobs, Cincinnati, Ohio

We can expect that affirmative action will continue to generate controversy into the late 1980s and beyond. As the Supreme Court has issued guidance on one question, the focus of the debate has shifted to new ones, and the debate continues. The basic question at the center of the storm will continue to be whether an individual who is not proven to be a victim of discrimination properly may receive a sex- or race-based preference in employment.

This article will attempt to review briefly and analyze the significant Supreme Court opinions on affirmative action, with emphasis on the most recent cases. It will also attempt to identify and analyze important judicial developments in the lower courts and the current issues relating to agency enforcement of federal contractors' affirmative action objectives. Finally, the article will discuss briefly several related areas of legislative and judicial activity, including state and local affirmative action requirements and minority contracting set-aside programs.

The current federal affirmative action requirements are based on Executive Order 11246, signed by President Johnson in 1965 and amended in 1967 to include sex as a basis of prohibited discrimination and required affirmative action. In addition to the affirmative action required of federal contractors by E.O. 11246, many public and private employers voluntarily have adopted affirmative action policies and plans. The important early decisions of the Supreme Court involved such voluntary programs.

---

[23] William Sharpe and Linda Tawil, "Fact Finding in Ohio: Advancing the Role of Rationality in Public Sector Bargaining," *The University of Toledo Law Review*, Vol. 18, No. 2 (Winter, 1987), p. 329.

In *University of California Regents v. Bakke,*[1] the Court struck down the University's "set-aside" of a specific number of places in its medical school class for minorities only. However, the Court endorsed the notion that race or sex properly could be considered by the school as a "plus factor" in the admissions process.

In *Steelworkers v. Weber,*[2] the Court upheld a voluntary affirmative action plan that had been adopted by a private employer. The Court held that such a plan is not prohibited by Title VII *if* it is designed to eliminate a "conspicuous imbalance" in the employer's workforce, as long as the affirmative action plan is temporary and does not unnecessarily trammel the rights of non-minority employees. The *Weber* decision has provided the basic analytical framework under which most affirmative action plans have been evaluated by the courts. Until the recent series of affirmative action decisions from the Supreme Court, however, employers had little guidance beyond the broad contours established by *Weber* in adopting or drafting their affirmative action plans.

The 1986 Affirmative Action Trilogy

In *Sheet Metal Workers v. EEOC,*[3] the Court concluded that Title VII permitted a lower court to order race-conscious relief that benefited individuals who were not identified victims of discrimination, but under quite limited circumstances. The past discrimination by the union had been so egregious that Justice White, while writing that the general policy of Title VII would "limit relief to actual victims of the discrimination," joined the majority in permitting relief to non-victims in the circumstances of this case.

The Court's plurality opinion stated that such relief is limited to cases where there has been "persistent or egregious discrimination" in order to "dissipate the lingering effects of pervasive discrimination" and that a court must "take care to tailor its orders to fit the nature of the violation it seeks to correct." The Court also held that the race-based relief was constitutional as a narrowly tailored remedy for past discrimination.

In *Wygant v. Jackson Bd. of Education,*[4] the Court rejected as unconstitutional a public employer's union contract provision requiring the layoff of more senior white teachers to protect less senior black teachers. The stated purpose of the contractual affirmative action clause was to achieve a balance between the percentage of black students and teachers so that the black students would have appropriate "role models."

Most importantly, the Court rejected the "role model" justification for the contract clause and held that layoffs of whites to protect jobs for blacks, in the absence of proof of past hiring discrimination, was too harsh a burden to impose on the non-minority employees. The Court also rejected the argument that an affirmative action plan may be justified on the grounds that it was designed to remedy "societal discrimination." The Court's plurality opinion noted that a public employer must have "convincing evidence that remedial action is warranted" before it grants a race-based preference. Finally, both the plurality opinion and Justice O'Connor's concurring opinion stated that the proper statistical comparison in evaluating affirmative action plans is between the relevant group of employees and the group of qualified individuals in the relevant labor market.[5]

Finally, in *Local No. 93 v. City of Cleveland,*[6] the Court summarized several *unanswered* affirmative action questions and held that consent decrees were

[1] 438 US 265 (SCt, 1978), 17 EPD ¶ 8402.

[2] 443 US 193 (SCt, 1979), 20 EPD ¶ 20,036.

[3] 478 US 421 (SCt, 1986), 40 EPD ¶ 36,204.

[4] 476 US 267 (SCt, 1986) 40 EPD ¶ 36,106.

[5] *See Janowiak v. City of South Bend,* 836 F2d 1034 (CA-7, 1988), 45 EPD ¶ 37,696.

[6] 478 US 501 (Sct, 1986), 40 EPD ¶ 36,200.

equivalent to voluntary affirmative action plans and therefore within the scope of *Weber's* guidance. The Court noted that it had not yet decided: (a) what limits Title VII places on an employer's ability to agree to race-conscious relief that is not part of a consent decree; (b) what showing of possible nondiscrimination an employer would be required to make to defeat a non-minority employee's Title VII challenge to a racial preference; (c) what Title VII and Fourteenth Amendment claims non-minority employees may have against the employer for lost opportunities due to an affirmative action plan.

Johnson v. Transportation Agency

In *Johnson v. Transportation Agency of Santa Clara County, California,*[7] the Supreme Court addressed several issues that previously had been left unanswered by *Weber* and the other affirmative action cases. The *Johnson* case involved a challenge to a public agency's voluntarily adopted affirmative action plan. The plan provided that when making promotions to positions within traditionally segregated job classifications in which women had been significantly underrepresented, the agency was permitted to consider as one factor the sex of a qualified applicant. The plan noted that women were represented in the agency's employment in numbers far less than their proportion of the county labor force and that the plan was intended to achieve a statistically measurable improvement on an annual basis in the hiring, training, and promotion of minorities and women in all major job classifications where they were underrepresented.

It is worth noting that the plan did not admit and was not based on any past discrimination against women by the agency. The plan stated that the underrepresentation of women in the relevant job categories was because either women were not traditionally employed in those jobs or were not strongly motivated to seek such employment and training, in part because of the limited opportunities in those jobs in the past. It is also important to note that under the plan, no specific jobs or number of jobs were set aside for minorities or females.

When a vacancy arose for a promotion to a skilled craft job, seven employees who applied were certified as eligible for the promotion based on scored interviews. Paul Johnson was tied for second with a score of 75, and Diane Joyce ranked next with a score of 73. After another interview, a panel of supervisors recommended that Johnson receive the promotion. The agency director, however, after considering all of the qualifications of the applicants, including considerations of affirmative action, chose Joyce for the position. Johnson brought a Title VII action against the agency, claiming that he was the victim of impermissible sex discrimination.

The federal district court found the agency's plan invalid on the ground that it was not "temporary," as required by *Weber,* but the Ninth Circuit Court of Appeals reversed, holding that the absence of an express termination date was not fatal to the plan. The court of appeals further held that the agency's consideration of the applicant's sex in making its promotion decision was lawful because the affirmative action plan had been adopted to address a "conspicuous imbalance" in the agency's work force and did not unnecessarily trammel the rights of male or non-minority employees, nor did it create an absolute bar to other employees' advancement. The Supreme Court affirmed the Ninth Circuit's decision.

The Court's opinion reaffirmed that a male or non-minority employee bears the burden of establishing that the employer's affirmative action plan is unlawfully discriminatory. The Court specifically

[7] 107 SCt 1442 (1987), 42 EPD ¶ 36,831.

rejected the arguments that an employer's affirmative action plan is an "affirmative defense" or that the employer was required to establish its own past discrimination to justify an affirmative action preference.

In upholding the plan, the Court also held that the "manifest imbalance" required to support a race or sex preference need not be so striking that it would support a prima facie case of discrimination. The Court did *not,* however, define the degree of underutilization or underrepresentation required to support a voluntary affirmative action preference under Title VII. In *Johnson,* none of the 238 skilled craft workers in the agency was a woman. The Court again confirmed that it was appropriate to compare "the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population" only in unskilled job categories.

Finally, while the Court endorsed the agency's consideration of a qualified applicant's sex as one factor in the promotion decision, it stated that the promotion decision would have been suspect if the affirmative action plan had simply calculated statistical imbalances in all job categories according to the proportion of women in the area labor pool and then directed that hiring be "governed solely by those figures."

Practical Affirmative Action Planning After *Johnson*

An employer that wishes to adopt an affirmative action plan should consider carefully the guidance of *Johnson.* The plan itself is a very important document that any reviewing court will analyze critically in determining the validity of any race or sex preference. If an affirmative action plan establishes the existence of a "manifest imbalance," which reflects underrepresentation of women or minorities in a "traditionally segregated job category," then the plan has satisfied the initial requirements of *Johnson.* In establishing the comparison of the employer's work force to the composition of the labor market, it is critical that the employer calculate the percentage of qualified women and minorities for the jobs in question. General population figures should be used *only* for unskilled jobs. Similarly, the employee work force profile should not be compared to the race or sex composition of any other group such as students, customers, or the employees of another employer. Such comparisons cannot support an affirmative action preference.

In addition to establishing a "manifest imbalance in a traditionally segregated job category," an affirmative action plan also should include various other features to fit the model approved by the Supreme Court in *Johnson.* Such features include: consideration of race or sex only as "one factor" for qualified applicants or employees; establishment of short-term annual goals; no quotas or set-asides for hires or promotions of women or minorities; an explicit statement that the plan's purpose is to achieve a balance in the work force but not to "maintain" such a balance.

Other Judicial Developments

Two recent decisions from federal trial courts have permitted employees to use an affirmative action plan as a "sword." In *Fang-Hui Liao v. Dean,*[8] the court held that: "Once the employer is *permitted* voluntarily to adopt an affirmative action plan 'to benefit members of the minority groups for whose protection the statute was enacted,' the employer is then *required* to adhere to its own program."

The trial court found that the employer had violated Title VII when it terminated a female Asian employee during a reduction-in-force. The court concluded that the employer had made the termination decision "without in any way giving Dr.

[8] 658 FSupp 1554 (DC Ala, 1987).

Liao the preferential consideration she was due under the affirmative action plan." [9] The Eleventh Circuit will decide *Fang-Hui Liao v. Dean* within the next several months, and most employers hope that the decision will hold that the trial court misapplied the Supreme Court's affirmative action cases, which endorse a flexible and moderate approach to affirmative action.

Federal Enforcement of E.O. 11246

The Office of Federal Contract Compliance Programs (OFCCP), which is charged with enforcement of the nondiscrimination and affirmative action obligations of federal contractors under E.O. 11246, has been subjected to recent criticism by the majority (Democratic) staff of the House Committee on Education and Labor. The staff report, issued in early 1988, concluded that OFCCP under the Reagan administration has permitted "effective enforcement" of the executive order to "come to a virtual standstill."

The report recommends that the "any difference" rule for evaluating underutilization be incorporated into OFCCP regulations, contrary to the current practice of permitting contractors to use the "80 percent rule" or a standard deviation analysis. In light of *Johnson,* it is difficult to understand how the "any difference rule" supports a finding of "manifest imbalance."

In addition, the staff report recommends that OFCCP return to its earlier practice of requiring contractors to establish annual goals in excess of availability (including "makeup" goals in seriously underutilized job groups) and "ultimate goals." Again, *Johnson* makes questionable any OFCCP practice that would *require* contractors to establish goals in excess of availability. Similarly, the establishment of annual goals of specific numbers of employees (rather than percentages) may make contractors subject to claims that they have set-aside specific jobs for minorities or women, contrary to the Supreme Court's guidance.

The staff report also emphasizes its conclusion that OFCCP has failed to identify and pursue "systematic" or "affected class" discrimination cases. It is likely that contractors can expect increased scrutiny of their "transactional data" (i.e., applicant flow, hiring, promotion, and termination statistics) and payroll data during compliance reviews.

Contract Set-Asides

In examining the constitutional limits of race and sex preferences, employers must also consider *Fullilove v. Klutznick,*[10] in which the Supreme Court upheld the constitutionality of a federal statute providing that at least 10 percent of federally-funded local public works projects be set aside for minority businesses. The Court's decision was based primarily on Congressional authority to fashion a remedy for prior discrimination against minority contractors. The Court found that the set-aside provision was "narrowly tailored" to address the remedial purpose of the statute, and that the statute's provisions were appropriately flexible.

State and local governments, however, have had very mixed results in cases that have examined set-aside programs. Three recent circuit court decisions have found local or state set-aside programs unconstitutional because the programs were not appropriately narrow to remedy past discrimination againt minority contractors.[11] The Supreme Court's decision in *City of Richmond* may provide additional guidance in this difficult area, but for now

[9] See also *Mormon v. John Hancock Mutual Life Ins. Co.,* 672 F. Supp 993 (DC/Mich, 1987); court permitted the plaintiff's claim that the employer had failed to comply with its affirmative action plan; jury returned a $225,000 verdict.

[10] 23 EPD ¶ 31,026, 448 US 448 (1980).

[11] See *Michigan Road Builders Association, Inc. v. Milliken,* 834 F.2d 583 (6th Cir. 1987); *J.A. Croson Company v. City of Richmond,* 822 F.2d 1355 (4th Cir. 1987), *cert. granted* ___ U.S. ___ (1988); *Associated General Contractors of California v. City and County of San Francisco,* 813 F2d 922 (9th Cir. 1987).

state and local governments must exercise extreme caution in adopting race or sex preferences in the contracting area. Any such program must be based on an appropriate factual foundation, must be designed to remedy prior discrimination, and, further, must be narrowly tailored to that purpose.

State/Local Affirmative Action

Many state and local governments have begun to impose some kind of EEO/affirmative action requirements on employers that contract with that government. As the federal rules for affirmative action become more well-defined, it seems likely that some of the "cutting edge" questions may be decided under state law. In Michigan, for example, employers that have failed to file their affirmative action plans with the state FEP agency (as required by state law) have faced claims by male employees that promotions pursuant to the affirmative action plan were per se unlawfully discriminatory.[12]

In addition, some state and local governments are likely to increase their efforts to impose more broad non-discrimination/affirmative action obligations on employers, such as non-discrimination on the basis of marital status, sexual preference or orientation, and affirmative action for individuals with handicaps.

Conclusions

The Supreme Court has in *Johnson* endorsed the broad concept of "affirmative action" the way that most sophisticated employers practice it. The primary question that remains unanswered is: what degree of "underrepresentation" or "underutilization" is sufficient to justify a race or sex preference? It *appears* that a significant or substantial disparity between the minority or female representation in an employer's workforce, and the estimated "availability" of qualified minorities or females in the relevant labor market may support such an affirmative action preference, but there certainly remains room for argument. At the Supreme Court level, at least, the cases that have endorsed preferences have involved disparities that were quite egregious.

The Court's guidance in *Johnson* establishes that the employer's plan document is of critical importance and that the plan is much more likely to withstand or avoid judicial and administrative scrutiny if it: is explicitly temporary; is designed to achieve a balanced work force, as compared with available, qualified females and minorities; is flexible and moderate; and includes clear disclaimers.

It has been suggested that changing demographics within the work force will provide employers with strong incentives and opportunities to emphasize affirmative action. The Department of Labor's *Workforce 2000* report projects that from 1985-2000 women will constitute 64 percent, and minorities or immigrants 42 percent, of entrants into the work force. In addition, the report predicts that the number of low-skill jobs will decrease dramatically and employers will be challenged to provide training opportunities and to compete for well-qualified employees.*

[The End]

---

[12] Compare *Ruppal v. Michigan Dept. of Treasury,* 45 FEP Cases 278 (Mich. Ct. App. 1987), with *Van Dam v. Civil Service Bd. of Grand Rapids,* 45 FEP Cases 196 (Mich. Ct. App. 1987).

* *Additional Reference:* Douglas S. McDowell, *Affirmative Action After The Johnson Decision: Practical Guidance for Planning and Compliance* (National Foundation for the Study of Employment Policy, 1987).

Employment At Will: A Survey

By Michael W. Hawkins*

Dinsmore & Shohl, Cincinnati, Ohio

A survey of recent employment-related caselaw reveals the employment-at-will doctrine continues to spawn a plethora of litigation as courts struggle with the thrust and scope of this embattled employment doctrine. The employment-at-will-doctrine, however, appears to be weathering this ongoing litigious assault and continues to be a viable employment principle. Under this traditional doctrine, the employer is free to end the employment relationship with or without cause, at any time, and for any reason that is not contrary to law.

The cornerstone of this doctrine is the principle that parties to an employment relationship should have complete freedom to fashion whatever terms, with regard to job security, they desire. Thus, they could contract for a specific duration (*e.g.*, one year), simply have no contractual understanding regarding such duration, or could agree the employee can only be terminated for good cause. While this doctrine generally has been applied by courts throughout the United States, it has been criticized by some legal scholars and courts. These criticisms have led numerous terminated employees to attempt to carve out exceptions to their at-will status.

These attempts primarily encompass three theories, including: (1) a breach of an implied covenant of good faith and fair dealing which allegedly underlies the employment relationship; (2) a retaliatory discharge allegedly violative of a state's public policy; and (3) a breach of an alleged implied contract limiting the employer's right to terminate only for good cause. The following discussion focuses on various courts' recent treatment of these theories.

Implied Covenant of Good Faith

In more recent years, a small minority of courts have found that a discharge not founded in good faith or just cause violates an implied covenant of good faith and fair dealing in the performance and enforcement of every employment contract. This nebulous at-will exception is premised upon the theory that parties to contracts, like those in commercial transactions, must act in good faith toward one another. Accordingly, several courts, led by California, have implied the "good faith/fair dealing" concept into employment relationships.[1]

In those few jurisdictions that have found an implied-in-law covenant of good faith and fair dealing in employment contracts, the application of the rule has been far from uniform. For example, the Arizona Supreme Court disagreed with the California rule that the covenant created a duty to terminate only for good cause. Rather, it held that in Arizona the covenant would be breached only by a discharge that contravened public policy.[2] In *Magnan v. Anaconda Industries, Inc.*,[3] the implied covenant only could be breached when the discharge contravened public policy.[4] Given the somewhat erratic judicial treatment of this doctrine, the vast majority of courts have continu-

* The author wishes to acknowledge the assistance of Jeffrey S. Shoskin, an associate at Dinsmore & Shohl.

[1] See *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443 (1980) (finding that this implied covenant precluded the discharge of an employee without good cause).

[2] *Wagenseller v. Scottsdale Memorial Hospital*, 710 P.2d 1025 (Ariz. 1985).

[3] 479 A.2d 781 (Conn. 1984).

[4] Other jurisdictions similarly limit the application of the implied covenant into employment relationships. *See, e.g., Cort v. Bristol-Myers Co.*, 431 N.E.2d 908 (Mass. 1982), (implied covenant apparently applies only if discharge results in clearly identifiable lost wages which are related to the employee's past service, such as future commissions based on prior sales); *Milford v. de Lasala*, 666 P.2d 1000 (Ala. 1983) (purportedly following the Massachusetts analysis); *Dare v. Montana Petroleum Marketing Co.*, 687 P.2d 1015 (Mont. 1984) (covenant cannot be implied in law but may be implied in fact on case-by-case basis); and *K-Mart Corp. v. Ponsock*, 2 IER Cases 56 (Nev. 1987) ("bad faith discharge" applied on case-by-case basis).

ally declined to inject a covenant of good faith and fair dealing into employment relationships.[5]

Public Policy

The public policy exception to the at-will doctrine has gained widespread acceptance by a majority of courts. This exception recognizes retaliatory discharge claims based on the theory that dismissal of employees for reasons violative of a particular "public policy" should be actionable. Sources of "public policy" may include constitutional provisions, legislative enactments, administrative rules and regulations, and judicial decisions.[6] Disgruntled employees have asserted a myriad of alleged unsavory employer conduct that purportedly violated "public policy." [7]

Accordingly, those courts adopting this theory tend to recognize a cause-of-action chiefly when the discharge is premised on the employee's: (1) refusal to act in an unlawful manner (e.g., engage in price-fixing); (2) attempt to perform or exercise a statutorily prescribed duty or right (e.g., filing a workers' compensation claim); or (3) performance of an important public obligation (e.g., serve on jury duty).[8] In so doing, these courts, however, have interpreted this exception very narrowly.

Indeed, most courts, while adopting the exception, emphasize that the purported "public policy" must be clearly defined and well established. One court cautiously forewarned that "the public policy [exception] is not imported into every [employment] agreement as a limitation on the terms of the contract," in *Hunnewell v. Manuf. Hanover Trust Co.*[9] Moreover, a review of recent "public policy" cases aptly illustrates various courts' reluctance either to adopt this at-will exception or to unduly broaden its scope.[10]

Implied Contract

Finally, an increasing number of jurisdictions have lent credence to the "implied contract" exception to the at-will doctrine. Under this theory, courts have given contractual effect to language contained in an employer's handbook of policies, procedures, and practices in order to limit its ability to discharge at-will. In so doing, the courts reason that the policies impliedly become part of an employment contract, thus barring an

[5] See, e.g., *Perry v. Sears, Roebuck & Co.*, 508 So.2d 1086 (Miss. 1987); *Morriss v. Coleman Co.*, 2 IER Cases 845 (Kan. 1987); *Hillesland v. Fed. Land Bank Assoc.*, 2 IER Cases 321 (N.D. 1987); *Engstrom v. Nuveen & Co.*, 2 IER Cases 1205 (E.D. Pa. 1987); *Salazar v. Furr's Inc.*, 2 IER Cases 696 (D. N.M. 1986); and *Mers v. Dispatch Printing Co.*, 2 IER Cases 1031 (Ohio 1985).

[6] See, *Forbes v. Hotel Intercontinental Maui*, 2 IER Cases 833 (D. Hawaii, 1987).

[7] See, e.g., *Ambroz v. Cornhusker Square LTD.*, 2 IER Cases 1185 (Neb. 1987) (refusing to take statutorily prohibited polygraph examination); *Krein v. Marian Manor*, 2 IER Cases 1188 (N.D. 1987) (retaliation for filing a workers' compensation claim); *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3d Cir. 1983), *reh. denied*, 115 LRRM (BNA) 2426 (3d Cir. 1983) (applying Pennsylvania law) (refusing to support "No-Fault Reform Act" and for privately expressing opposition to the legislation); and *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal., 1980) (refusal to participate in price-fixing scheme).

[8] See, e.g., *Hehman v. AMF Inc.*, 2 IER Cases 1047 (S.D. Ind. 1987); *Ambroz v. Cornhusker Square LTD.*, supra; *Owens v. Amer. National Red Cross*, 2 IER Cases 1145 (D. Conn. 1987); *Stilphen v. Northrop Corp.*, 2 IER Cases 957 (Ill. Ct. App. 1987); and *Miller v. Sevamp, Inc.*, 2 IER Cases 1202 (Va. 1987).

[9] 2 IER Cases 933, 936 (S.D. N.Y. 1986).

[10] See, e.g., *Perry v. Sears, Roebuck & Co.*, supra (refusal to adopt public policy exception); *Phung v. Waste Management, Inc.*, 23 Ohio St.3d 100 (1986) (refusal to adopt exception); *Morast v. Lance*, 2 IER Cases 1230 (11th Cir. 1987) (applying Georgia law) (refusal to adopt exception); *Adler v. American Standard Corp.*, 2 IER Cases 961 (4th Cir. 1987) (no public policy exception in Maryland where employee claims he was discharged for intending to "blow the whistle" on illegal activities condoned by his supervisors); *Owens v. American National Red Cross*, supra (no public policy claim in Connecticut where employee discharged for attending unemployment compensation hearing during working hours without permission); *Hehman v. AMF Inc.*, supra (no Indiana public policy claim for ADEA litigant who claims employer violated state statute against age discrimination since statute did not apply to ADEA-covered employer and ADEA provided ample relief); *Miller v. Sevamp, Inc.*, supra (no Virginia public policy claim for employee purportedly discharged for utilizing company's grievance procedure); and *McCarthy v. CyCare Systems, Inc.*, 2 IER Cases 680 (N.D. Ill. 1986) (no state public policy exception for "blowing the whistle" on violation of federal law).

employer from violating its own policies and procedures in discharging an employee. The line of cases interpreting this "implied contract" theory can be placed generally in one of three categories.

The first line of cases treats a company handbook, which does not establish employment for a definite term, as a gratuitous, unilateral expression of the employer's position, which is not bargained for, lacks consideration, and does not become part of an employment contract.[11] A second line of cases holds that if an employee continues to work after a new or modified manual has been circulated, his continued employment supplies the necessary "consideration" and that the benefits to the employee have been "bargained for" and become part of an employment contract.[12] A third line of cases holds that an employer's handbook or policies can be given contractual effect without any evidence that both parties agreed the handbook or policies would create contractual rights.[13]

Disclaimers

A growing number of courts, however, have ruled that an employer may effectively negate a wrongful discharge claim based on the "implied contract" theory by requiring employees to execute an agreement that acknowledges their at-will status. Accordingly, one court reasoned, "[i]f an employer wishes to issue policies, manuals, or bulletins as purely advisory statements with no intent of being bound by them and with a desire to continue under the employment at will policy, he certainly is free to do so. This could be accomplished merely by inserting a conspicuous disclaimer or provision into the written document." [14]

These seemingly "ironclad" disclaimers, however, are not foolproof. Indeed, subsequent verbal and written communications should not conflict with an employee's understood at-will status. In *Ohanian v. Avis Rent A Car System, Inc.*,[15] the court found subsequent *oral* contract superceded written and signed letter acknowledging at-will status thereby finding employee could only be terminated for cause.

Conclusion

In future years, this doctrine will continue its development through the courts. Throughout this development employers will be more cautious in establishing and terminating their relationships with employees.

[The End]

---

[11] See, e.g., *Graves v. Anchor Wire Corp.* 118 LRRM (BNA) 2750 (Tenn. Ct. App. 1985); *Smith v. Monsanto Co.*, 119 LRRM (BNA) 2109 (N.C. Ct. App. 1984); *Troutman v. Travenol Laboratories*, 118 LRRM (BNA) 2716 (N.C. Ct. App. 1984); *LaRocca v. Xerox Corp.*, 118 LRRM (BNA) 2314 (S.D. Fla. 1984); and *Caster v. Hennessey*, 115 LRRM 3452 (11th Cir. 1984) (applying Florida law).

[12] See, e.g., *Johnson v. Panhandle Co-op Assn.*, 2 IER Cases 1080 (Neb. 1987); *Hoffman-LaRouche v. Campbell*, 2 IER Cases 739 (Ala. 1987); *Small v. Springs Indus., Inc.*, 2 IER Cases 266 (S.C. 1987); *Duldulao v. St. Mary of Nazareth Hospital Center*, 505 N.E.2d 314 (Ill. 1987); and *Toussaint v. Blue Cross and Blue Shield of Michigan*, 292 N.W.2d 880 (Mich. 1980). *Cf. Brumbaugh v. Ralston Purina Co.*, 2 IER Cases 877 (S.D. Iowa 1987) and *Blair v. CBS, Inc.*, 2 IER Cases 478 (S.D. N.Y. 1987) (continuing in employment not enough to supply consideration).

[13] See, e.g., *Mursch v. Van Dorn Co.*, 627 F. Supp. 1310 (W.D. Wis. 1986); *Pelizza v. Reader's Digest Sales and Services*, 624 F. Supp. 806 (N.D. Ill. 1985); and *Fletcher v. Wesley Medical Center*, 585 F. Supp. 1260 (Kan. 1984).

[14] *Small v. Springs Industries, Inc.* 2 IER Cases 266, 268 (S.C. 1987). See also, *Dell v. Montgomery Ward Co.*, 1 IER Cases 1489 (6th Cir. 1987) (applying Michigan law); *Duldulao v. St. Mary of Nazareth Hospital Center, supra; Samples v. Hall of Mississippi Inc.*, 2 IER Cases 799 (N.D. Miss. 1987); *Miller v. Sevamp, Inc.*, 2 IER Cases 1202 (Va. 1987); *Forbes v. Hotel Intercontinental Maui*, 2 IER Cases 833 (D. Hawaii 1987); *Leathem v. Research Foundation*, 2 IER Cases 684 (S.D. N.Y. 1987); *Cutter v. Lincoln National Life*, 794 F.2d 352 (8th Cir. 1986) (applying South Dakota law); *Bailey v. Perkins Restaurants, Inc.*, 1 IER Cases 1327 (N.D. 1986); and *Catiglione v. John Hopkins Hospital*, 517 A.2d 786 (Md. 1986). *Cf. Morriss v. Coleman Co.*, 2 IER Cases 845 (Kansas 1987) (court discounts disclaimer in supervisory manual where there is no evidence that it was brought to personal attention of its employees or that it was intended to create an unqualified at-will relationship in lieu of other provisions and oral statements).

[15] 779 F.2d 101 (2nd Cir. 1985).

An Employer's Right to Test for Substance Abuse, Infectious Diseases, and Truthfulness versus An Employee's Right to Privacy

By J. Alan Lips and Michael C. Lueder

Taft, Stettinius & Hollister,

Cincinnati, Ohio

Private and public employers are justified in testing their employees, under appropriate circumstances and in appropriate ways, for illegal drug use, alcohol abuse, infectious disease, and truthfulness. Testing can assist an employer in the following respects: to assure the safety of workers, customers and the public; to improve worker productivity, accuracy, morale, and customer relations; to lower employee absenteeism and turnover, health insurance costs, workers' compensation costs and general liability insurance costs; to discourage employee theft (to support drug habits), drug selling, and other criminal activities; to deter employee disruptions in the workplace (panic due to the discovery of AIDS or other infectious diseases); and finally, to reduce the potential for catastrophic error. Inappropriate testing can be argued to invade the privacy of an employee through unwarranted intrusions (investigations) and exposure (publication) of confidential information.

The right of personal privacy in employment is not yet generally protected by discreet legal doctrine, but is in the process of being shaped from a collage of overlapping legal principles incorporated in constitutions, statutes, common-law causes of action in tort and contract, and arbitration decisions. It is likely employee privacy rights will be more clearly defined, but they should not be given preeminence over the employer's higher duty to protect the health and welfare of all employees and citizens and the job security of the workforce. In balancing employer business needs with employee privacy needs, prudent employers should avoid unnecessary intrusion into employees' privacy.

Employers have inherent management power to require employee testing for the use of illegal drugs, the excessive use of alcohol, the spread of infectious diseases and employee untruthfulness, absent specific contractual, statutory, or constitutional restriction. An at-will employee who either tests positive or refuses to be tested could be discharged.[1]

The knowing and voluntary consent of an employee to submit to testing is not generally considered against public policy. Consent to be tested can be given individually or by a collective bargaining representative. Such consent should defeat most causes of action at common law, so long as the testing was limited to the consent.[2] Section 301 of the Labor Management Relations Act has preemptive power to support collectively bargained drug and alcohol control programs including testing.[3]

[1] See, e.g., *Phung v. Waste Management, Inc.*, 23 Ohio St. 3d 100 (1986); *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100 (1985); *Greco v. Halliburton Co.*, 1987 D.L.R. 240:A-5 (D. WY 1987) (at-will plant warehouseman lawfully discharged for refusing drug test required of all employees).

[2] Restatement (Second) of Torts 625 F. Comment b.

[3] 29 U.S.C. § 185. *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985) (employees may not resort to state tort or contract privacy claims in substitution for their rights under grievance procedure); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253 (4th Cir. 1987) (invasion of privacy claim preempted by LMRA); but see *Keehr v. Consolidated Freightways of Delaware, Inc.*, 825 F.2d 133 (8th Cir. 1987).

Improving safety in the workplace justifies employee testing. In the Occupational Safety and Health Act, Congress declared its purpose and policy "to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources." [4] The "general duty clause" of the Act provides: "Each employer shall furnish to each of his employees employment and a place of employment which are *free* from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." [5]

Drug and alcohol abuse *on or off the job* has a huge impact on workplace safety. A study by Firestone Tire & Rubber Co. found drug users four times more likely than non-users to be in a plant accident.[6] As noted in the United Auto Workers policy on drug testing adopted September 17, 1986: "Dependence on alcohol or other drugs is a major contributor to the deterioration of family life, impaired job performance, morale and disciplinary problems, increased insurance rates, workplace accidents, increased absences, and the rising rate of crime." [7] Testing is the way such abuse can most easily be revealed so as to improve employee safety and health.

Likewise, controlling infectious diseases has been held to constitutionally justify the subordination of individual privacy rights in the public interest.[8] OSHA has announced plans to develop regulations that would protect workers from blood borne diseases, like HIV virus (AIDS) and hepatitis B. Some testing would be an essential element of such regulations. It remains to be seen if OSHA's mandates would preempt contrary state or federal law. Although OSHA's "general duty clause" has been supported,[9] its preemptive reach has been limited.[10]

Constitutional Restrictions on Employee Testing

The Fourth Amendment of the United States Constitution protects the employees of *public employers* against *unreasonable* searches and seizures by testing; but private sector employers are not so restricted.[11] In most cases, testing can be conducted if the public employer has a "reasonable suspicion" of *on-the-job* drug or alcohol use or influence.[12] The Supreme Court had agreed to review *National Treasury Employees Union v. Von Raab*,[13] and consider for the first time whether mandatory drug testing of public employees without prior individualized suspicion is constitutionally permissible. "Reasonable suspicion" might include

[4] 29 U.S.C. 651(b).

[5] 29 U.S.C. 654(a)(1) (emphasis added).

[6] Drug Abuse and Alcoholism Newsletter, Vol. XII, no. 6 at 1 (Aug. 1983); *Economic Cost to Society of Alcohol and Drug Abuse and Mental Illness*, Research Triangle Institute (1984).

[7] *Testing Resource Manual: Drug Testing*, Employment Testing: A National Reporter on Polygraph, Drugs, AIDS, and Genetic Testing, D:4 (1987).

[8] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccinations to prevent the spread of contagious diseases may be required); *Reynolds v. McNichols*, 488 F.2d 1378 (10th Cir. 1973) (prostitutes may be tested for venereal disease); *School Board of Nassau County Florida v. Arline*, 107 S.Ct. 1123 (1987) reh. denied 107 S.Ct. 1913 (1987) (risk of contagion in the workplace can justify removal of a teacher from the classroom).

[9] See *UAW v. General Dynamics Land Systems Div.*, 815 F.2d 1570 (D.C. Cir. 1987), *cert. den.* 108 S.Ct. 485 (1987).

[10] *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) *reh. denied* 465 U.S. 1074 (1984) (no preemption of state punitive damage action even though a purpose of Atomic Energy Act was "to encourage widespread participation in the development and utilization of atomic energy."); *Mfrs. Assoc. of Tri-County v. Knepper*, 801 F.2d 130 (3. Cir. 1986), *cert. den.* 108 S.Ct. 66 (1987) (OSHA preempts parts of state right-to-know statute); *Ohio Mfrs. Assoc. v. City of Akron*, 801 F.2d 824, 834 (6th Cir. 1986) *cert. denied* 108 S.Ct. 44 (1987) (invalidating local "right to know" ordinance); *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Dev. Comm.*, 461 U.S. 190, 203-04 (1984).

[11] *New York City Transit v. Beazer*, 440 U.S. 568 (1979); *O'Connor v. Ortega*, 107 S.Ct. 1492-1503 (1987) (plurality opinion) *on rem.* 817 F.2d 1408 (9th Cir. 1987).

[12] *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir., 1976) *cert. denied*, 429 U.S. 1029 (1976); *Taylor v. O'Grady*, 669 F.Supp. 1422 (N.D. Ill. 1987); *Capua v. City of Plainfield*, 643 F.Supp. 1507 (D. N.J. 1986).

[13] 808 F.2d 1057 (5th Cir.), *cert. granted* 56 U.S.L.W. 3582 (1988).

peculiar behavior, unexplained accidents, complaints, supervisors' observations, law enforcement agencies' tips, excessive absenteeism, change of physical appearance and activities, identification of illnesses commonly associated with the abuse or disease, or admissions by employees.

Two recent circuit court decisions require that a public employer demonstrate a "*nexus*" between the test and the employer's reason for testing. Since no test available identifies a *present impairment* due to drugs, no test predicated solely on the prevention of on-the-job impairment can pass constitutional muster in these circuits.[14] These decisions would not affect testing for *current* effects of alcohol or infectious diseases.

Privacy Restrictions on Testing

A number of common law causes of action threaten employers who test employees:

Tortious invasion of privacy is the most frequently invoked common-law remedy by aggrieved testees in the private non-union employment sector. Jury verdicts against employers for invasion of privacy have increased 2000 percent in the last three years and now average $316,000.[15] In *O'Brien v. Papa Gino's*,[16] the First Circuit affirmed a jury award of $448,200 for invasion of privacy, defamation, and wrongful discharge of manager discharged for drug-related reasons which surfaced during polygraph tests.

Different forms of this tort have been recognized; the two most applicable to employment are: (1) "publicity to private life" and (2) "intrusion upon seclusion." [17] An employer is liable for "publicity to private life" if he gives publicity to a matter, whether or not true, concerning the private life of another about which there is no legitimate public concern.[18] Publicity announcing an employee was disciplined for substance abuse or alcoholism or is a carrier of HIV virus or is afflicted by AIDS *when there is no demonstrable safety risk* could constitute such an actionable invasion of privacy.[19]

An employer is liable for "intrusion upon seclusion" if he intentionally intrudes, physically or otherwise, upon the solitude or private affairs of another and if the intrusion would be highly offensive to the reasonable person.[20] "Intrusion upon seclusion" involves *seeking* information, including questioning of employees on personal topics, secret observation or searches of "private" employee areas such as the body, purses, lunchboxes, desks, and lockers. It could include mandatory testing without sufficient justification.

Intentional infliction of emotional distress is a type of privacy action generally said to require intentional "extreme and outrageous" conduct that results in a debilitating injury. In *Moniodis v. Cook,* an employee terminated for refusal to submit to an unlawful polygraph examination was entitled to recover from employer for intentional infliction of emotional distress.[21]

Negligent infliction of emotional distress is recognized in some states. In *Kelly v. Schlumberger Tech. Corp.,* an employee holding a responsible position on an oil rig off the coast of Louisiana alleged that producing a urine sample (pursuant to random selection) was a traumatic experience, and though the sample proved posi-

[14] *Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987); *Railway Labor Executives' Assoc. v. Burnley*, 839 F.2d 575 (9th Cir. 1988).

[15] *Workplace Privacy*, BNA Report, Aug. 1987.

[16] 780 F.2d 1067 (1st Cir. 1986).

[17] *Jackson v. Playboy Ent.*, 574 F.Supp. 10, 12 (S.D. Ohio 1983); *Struther v. Dispatch Print. Co.*, 2 Ohio App. 3d 377, 378 (Franklin Co., 1982).

[18] Restatement (Second) of Torts 652 D; *Penwell v. Taft Broadcasting Co.*, Ohio App. 3d 382 (Fayette Co., 1984).

[19] *Bratt v. I.B.M. Corp.*, Mass. 508, 467 N.E. 2d 126 (1984).

[20] Restatement (Second) of Torts § 652B; *McCormick v. Haley*, 37 Ohio App. 2d 73 (Franklin Co. 1973).

[21] Restatement (Second) of Torts 46; 494 A. 2d 212 (Md. App. 1985).

tive for marijuana the jury awarded a verdict of $125,000.[22]

Defamation/libel actions are intended to protect an individual's private *reputation* from the publication of *false* information. In *Houston Belt v. Wherry,* a company doctor tested a worker for drugs and reported a "positive" result to management, which turned out to be wrong. The worker recovered $200,000.[23] In *O'Brien v. Papa Gino's of America Inc.,* a $50,000 defamation award was upheld when employer *falsely* claimed an employee was discharged for drug use only.

Employer Defenses

While invasion of privacy actions seem threatening, the law provides defenses for employers, which if applicable would defeat most privacy based challenges. A properly administered program is essential to the avoidance of liability for testing. The program must provide for due process regarding the decision to test and the administration of the test; the requirement for the test must be reasonable under the circumstances; a reputable lab and tester must be used; the chain of custody for any sample must be meticulously recorded and protected; testing methods and standards for analyzing urine specimens must be exact; the test results and applicable disciplinary policies should be written down and followed to the letter.[24] Maintaining strict confidentiality of test results from publication to those who have no need to know is essential.

The compelling need of a public employer to test, coupled with a properly administered program, should defeat an action for invasion of privacy based on the Constitution. In *Shoemaker v. Handel, random* breathalyzer and urine tests of race horse jockeys were upheld because the state's interest in maintaining horse racing's integrity outweighs a jockey's privacy interest.[25] *American Federation of Government Employees v. Dole* upheld Executive Order 12564 requiring mandatory *random* drug testing of federal employees holding "jobs concerned with public health, safety, national security, and law enforcement."[26] *American Federation of Government Employees v. United States Department of State* upheld mandatory testing of blood of all Foreign Service employees for presence of HIV virus.[27] *Tarrant County Hospital v. Hughes* determined that compelling a hospital to identify donors of blood given in transfusion to a hospital patient who contracted AIDS was not impermissible violation of the donors' constitutional right to disclosural privacy.[28] In *South Florida Blood Service v. Rasmussen,* the court ruled that a compelling or reasonable need would help the private employer's defense too.[29]

A private employer with a reasonable business need to test has a "qualified privilege" to make a reasonable intrusion upon an employee's privacy.[30] The privilege will not protect employers who reveal test results to those who do not "need to know" those results.[31] An employer may have a qualified privilege to tell to those who might be infected by HIV virus in

[22] D. Mass. Case No. 85-4795-2 (9/9/87); cross app. pending (1st Cir. Nos. 87-1933, 1943).

[23] 780 F.2d 1067 (1st Cir. 1986).

[24] See e.g., *Lovvorn v. City of Chattanooga,* 647 F. Supp. 875 (E.D. Tenn. 1986).

[25] 795 F.2d 1136 (3rd Cir. 1986), cert. den.; 107 S.Ct. 577 (1986).

[26] 670 F. Supp. 445 (D.C. D.C., 1987).

[27] 662 F. Supp. 50 (D.C. D.C., 1987).

[28] 734 S.W. 2d 675 (Tex. App. Ft. Worth, 1987).

[29] 467 So.2d 798, 802 (Fla. D.C.A., 1985), affirmed 500 So.2d 533 (Fla., 1987).

[30] *Cort v. Bristol-Myers Co.,* 431 N.E.2d 908 (1982); Restatement (Second) of Torts §652G (1979); Decker, *Employee Privacy Law and Practice* 140-141 (1987).

[31] *Levias v. United Airlines,* 27 Ohio App. 3d 222 (1985) (flight attendant's supervisor and appearance supervisor had no need to know why weight limits were waived for particular employee when they had no authority to act upon that information).

the workplace.[32] He may even have a duty to warn employees endangered in the workplace by an employee.

Estoppel by wrongful concealment may prevent an employee from claiming invasion of privacy, if he wrongfully concealed the information in the first place. In *Schmuckler v. Ohio Bell Tel. Co.,* defendant was found not liable for invasion of privacy arising out of phone tap when plaintiff had defrauded company in the first place.[33] In *South Florida Blood Service v. Rasmussen,* the dissenting opinion was the HIV virus infected blood donor has waived any constitutional privacy interest in concealing the fact of infection, since initial donation of infected blood was wrongful.[34]

Official immunity from tortious invasion of privacy actions is enjoyed by public officers acting within their proper scope of authority, even though public employers have more exposure to constitutionally based privacy claims than do private employers.[35]

State and Federal Statutory Restrictions

There are no federal statutes and few state statutes requiring protection of privacy. Specific grants of privacy rights are found in statutes regulating testing for specific purposes.[36]

The Federal Rehabilitation Act of 1973, applicable to federal employers, prohibits handicap discrimination, but excludes from its protection the "current use of alcohol or drugs [which] prevents [an] individual from performing the duties of the job." [37] The Act also applies to all recipients of federal funds in all areas of operation, not just the program or activity that receives funds.[38] The Supreme Court has ruled in a case brought by a grade school teacher with tuberculosis that "the contagious effects of a disease [cannot] be meaningfully distinguished for the diseases' physical effects" and therefore may be protected by the Act, depending on the nature, duration, and severity of the risk and its transmittability.[39] Likewise, discrimination because of the physical disability caused by HIV virus is prohibited; and probably so is discrimination because of the mere presence of infectious HIV virus.[40] These cases do not prohibit testing where appropriate to prevent the spread of infection. The Center for Disease Control has acknowledged the need to test employees for infectious diseases where circumstances warrant it.[41]

Some state handicap laws declare that alcohol and/or drug *addiction* are protected "handicaps" which must be "reasonably accommodated".[42] The Ohio Civil Rights Commission has concluded disability due to HIV virus and its "supposed communicability" also constitute protected handicaps.[43] Some states' handicap laws exclude from coverage alcoholism, drug addiction, and/or "communicable" diseases.[44] More state legislation can be expected to regulate AIDS related activity.

---

[32] *Knecht v. Vandalia Medical Center,* 14 Ohio App. 3d 129 (Montgomery Co. 1984) (mother may warn her son that he may have been infected with VD by fellow employee/plaintiff).

[33] 116 N.E. 2d 819 (Cuyahoga Co., 1953).

[34] 467 So. 2d 798, 804, 807 (Fla. D.C.A., 1985).

[35] *Sustin v. Fee,* 69 Ohio St. 2d 143 (1982).

[36] See Mass. Ann. Laws Ch. 214, § 1B (1986); Va. Code § 2.1-377 (1979); Ind. Code § 4-1-6 (1981).

[37] 29 U.S.C. § 706(7)(B).

[38] *Civil Rights Restoration Act* (effective 3/22/88).

[39] *School Board of Nassau Cty. v. Arline,* 107 S.Ct. 1123, 1128 (1987), reh. denied 107 S.Ct. 1913 (1987).

[40] *Chalk v. United States District Court Central District of California,* 56 U.S.L.W. 2502 (9th Cir.) (court banned job discrimination against teacher with AIDS because of concern for contagioun on the ground it violated the civil rights of this handicapped person).

[41] CDC Morbidity and Mortality Weekly Report (Aug. 20, 1987).

[42] *Hazlett v. Martin Chevrolet, Inc.,* 25 Ohio St. 3d 279 (1986) (alcoholism and drug addiction are protected handicaps); *Babcock & Wilcock Co. v. Ohio Civil Rights Comm.,* 31 Ohio St. 3d 222, 224, 510 N.E. 2d 368 (1987).

[43] "Policy Statement on the Treatment of Charges Alleging Discrimination Based on [AIDS]", (March 25, 1987).

[44] Ky. Rev. Stat. § 207.140(2)(b) & (c).

Specific Prohibitions

A number of cities and states have enacted legislation specifically prohibiting drug and HIV virus testing under most circumstances, and more may be enacted in the future. Most permit an employer to require incumbent employees to take urine or blood tests if *reasonable grounds* exist to believe the employees' faculties are impaired on the job.[45]

The Employee Polygraph Protection Act, H.R. 1212, passed by the House of Representatives on November 4, 1987, prohibits most employers from directly or indirectly requiring, requesting, suggesting, or causing any employee or prospective employee to take or submit to any lie detector test. The Senate version of the statute, S. 1904, passed on March 3, 1988, prohibits lie detector tests of any employee or prospective employee except by governmental employers and by private employers for specific purposes, including if: "[T]he test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business . . . the employee had access to the property . . . the employer has a reasonable suspicion that the employee was involved . . . and . . . the employer . . . has [made] filings with certain agencies." The Senate bill specifically permits testing prospective employees for drug usage.

Many states already regulate, or entirely prohibit, employment-context polygraph testing, but Ohio, Kentucky, and Indiana do not. The federal statute, if finally adopted, would at least partially preempt inconsistent state law on polygraph testing, but may not prevent more strict regulation by the states.

The LMRA's duty to bargain collectively prohibits the unilateral implementation of compulsory testing programs because they are mandatory subjects of bargaining.[46] However, absent employee consent or clear need, an employer need not, and should not in most cases reveal test results to the union.[47]

Arbitrators have found management has an inherent right to implement testing programs under appropriate circumstances.[48] However, unsympathetic arbitrators can wreak havoc with drug and alcohol programs.[49] The courts can not set aside such awards because of public policy considerations, except: "*[w]here the contract, as interpreted, would violate some explicit public policy that is well defined and dominate*, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of *supposed public interest*." [50]

To maximize defense of an employee-testing program in arbitration, an employer should be able to demonstrate it has provided all the safeguards suggested in *Lovvorn v. City of Chattanooga*.[51]

Conclusion

An employer is justified in testing employees for substance abuse, infectious diseases, and truthfulness and disseminat-

[45] *See, e.g.*, San Francisco, Cal. Ordinance 527-85 (1985); Connecticut P.A. 551, L. 1987 (effective 10/1/87); Iowa HF 469, L. 1987 (effective July 1, 1987); Minnesota Section 181.977 (effective 9/1/87); Rhode Island, 28-6-5-1(A) to (G) as amended by Ch. 540, 1. 1987 (effective July 1, 1987).

[46] *NLRB Advice Memo GC87-5*, 1987 DLR 184:D-1; *IBEW Local 1900 v. PEPCO*, 121 LRRM 3071 (D.C. D.C. 1986) (enjoined an employer for unilaterally implementing a drug-testing program); *Medicenter Mid-South Hospital*, 221, N.L.R.B. 670 (1975) (polygraph testing).

[47] *Johns-Manville Sales Corp.*, 252 N.L.R.B. 368 (1980); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

[48] *Sanford Corp.*, 89 L.A. 968 (Wies, 1987) (right to direct the work force and maintain a safe work place support employer's ordering employee to submit to drug test following on-the-job injury).

[49] *Mallinckrodt, Inc.*, 80 L.A. 1261 (Seidman, 1983) (arbitrator opines that in 2/3 of cases in which employees are discharged for drug abuse, the discipline is excessive); *Smith's Food King*, 66 L.A. 619 (Ross, 1976) (reinstating an employee shown to have used drugs on the job).

[50] *United Paperworkers v. Misco, Inc.*, 56 U.S.L.W. 4011 (12/1/87) (emphasis added).

[51] 647 F. Supp. 875 (E.D. Tenn. 1986). *See, e.g., Phoenix Transit System*, 89 L.A. 973 (1987) (authenticity of test called into question because of shoddy chain of custody records); *Union Plaza Hotel*, 88 L.A. 528 (McKay 1986) (a reasonable amount of privacy and dignity must be preserved during urinalysis to uphold discharge for refusal to submit to test).

ing the results when it is determined the information being sought is relevant and necessary and its use is appropriate. Otherwise, there is a high risk that mandatory testing could be viewed as an invasion of the employee's privacy protected by some constitution, statute, or common-law cause of action. Even when an employer has a business reason for seeking personal information from an employee, it is risky to test when less invasive investigatory procedures can suffice. The prudent employer will base testing decisions on reasonable needs, rather than economic power to require it, and keep the information confidential.

[The End]

American Cranes Fly South

By Gene Daniels

Ohio State University

Plant closings in the United States are commonplace. Numbers of plants closed and the ensuing economic, social, and psychological impacts have been and are continuing to be studied and reported. Plant closings are such a part of our life that many Americans are probably becoming insensitive to the many issues surrounding the public policy that permits the pursuit of increased profits via plant closings. Yet, while plant closings often seem to be routine, except to those workers faced with their workplace closing, not all closings go as planned. Not all closings achieve greater profits when such profits are part of management's plant-closing goals. And not all plant closings are done legally. One instance is the story of American Hoist & Derrick's closing of its St. Paul, Minnesota, American Crane Division plant. Within two years of this closing, Amhoist was found guilty of illegally using federal funds to relocate American Crane Division production jobs to Wilmington, North Carolina, it ceased its 105-year crane-making business, and it watched as the $2.8 million in federal funds which it was required to pay back to the federal government was returned to St. Paul in the form of retraining funds earmarked specifically for 850 former Amhoist union and nonunion employees.

The migration south of the American Crane Division began officially in July, 1984, amid a massive Amhoist restructuring strategy. The company, once a Fortune 500 performer with annual profits of $21 million on sales of half a billion dollars and 40 consecutive years of annual profits, was rocked by changes in the global economy during the early 1980s.[1] Amhoist, which at one time boasted 43 products in 12 production lines spread over four product groups and relied on its world position in mid-sized oil, railway, and construction cranes, began divesting and restructuring in 1982 until it was reduced to six product lines in three production groups in 1985.[2] As always, the American Crane product lines were the heart and soul of the firm because they produced between 60 and 70 percent of the company's total sales and as much as 80 percent of earnings.[3]

[1] "Fortune 500," *Fortune*, 1969-1987; Securities and Exchange Commission Form 10K, American Hoist & Derrick Company, 1980 and 1985.

[2] *Annual Report*, American Hoist & Derrick Company, 1981-1985.

[3] *Annual Report*, 1970, 1985.

But the crane and related crane hardware production groups lost $60 million from 1982 to 1984. Amhoist closed crane plants in Duluth, Minnesota, Indiana, and Michigan, as the demand for Amhoist's tremendously profitable large cranes dropped to one-fifth of what it used to be. The company's new look still hinged on cranes, and in the summer of 1984 the only crane plant left was the founding and flagship plant in St. Paul. Overall, the company went from 21 production facilities to 10 in 1985 and from almost 8,000 employees to just 3,000.[4]

Production employees at the St. Paul crane plant and foundry were represented by six unions, with the pattern-setters being the Machinists union. Their last contract was negotiated in 1983 and the company made only a token push for job classification consolidation and wage/benefit concessions. The unions, accepting a wage freeze, conducted their last of six strikes since 1966, this one for 107 days. A plant closing was never seriously threatened by management negotiators, nor did the unions believe themselves to be in danger. They knew business was bad and they took a wage freeze. Never did the workers believe that one year later they would be reading about the impending loss of their jobs to a federally funded move to North Carolina. No one in the union counted on the company's closing the single remaining American Crane plant in favor of another production site not yet purchased.[5]

The rumors of a possible plant closing became headline news in August, 1984, when Amhoist workers in the Twin Cities read that their company was conducting a plant move feasibility study. Wilmington, North Carolina, residents had learned in July that their city had applied for a UDAG grant to enable Amhoist to move its crane production to a vacant facility at its seaport. By December, 1984, the grant was reality and by January, 1985, official notice of the March closing was posted in St. Paul. The announcement of the closing of the foundry did not come until later. By August, 1985, except for a few parts people, all union and more than 100 salaried people had lost their jobs. The figure given is 850 lost jobs. Meanwhile, in Wilmington, 450 nonunion people were working in the federally subsidized crane plant producing the same model cranes that had been produced in St. Paul.[6]

Originally, the unions seemed to accept their fate. They were prepared to bargain over the effects of the closing: pensions, severance pay, outstanding workers' compensation claims, etc. However, the spectre of $4 million in federal tax dollars being used to haul their machinery south and some additional $16 million in loans being used to make the Wilmington plant suitable sent some of the Machinists into a frenzy. They contacted U.S. Congressman Bruce Vento. This use of UDAG funds to relocate St. Paul jobs from his district to Wilmington did not sit well with him. Vento went to work. He, along with a continued poor world crane market, undid the grand design of Amhoist's management.[7]

In fact, Vento had already been involved. Before the announcement of the grant, he had visited with the president of Amhoist and left with what he felt to be assurances that most of the crane production jobs would remain in St. Paul. Indeed, the grant application mentioned only the voluntary transfer of 22 people,

[4] *Annual Report*, 1981-1985.

[5] Paul Burnquist, Shop chairperson and chair of the negotiating committee, International Association of Machinists, Local 459, personal interviews during May, 1985; Wayne Wangstad, "Amhoist Looks for Greener Pastures," *St. Paul Pioneer Press Dispatch*, August 17, 1984, pp. 1A and 5A.

[6] U.S. General Accounting Office, "HUD Review of Urban Development Action Grant to Wilmington, North Carolina," February, 1986; Richard Meryhew, "St. Paul Plans to Aid Former Amhoist Workers," *Minneapolis Star and Tribune*, January 14, 1988, p. 38; Wangstad, cited at note 5.

[7] Mike Meyers, "Amhoist Cuts 500 St. Paul Jobs," *Minneapolis Star and Tribune*, January 12, 1985, p. 1D; Wangstad, cited at note 5.

largely management, to Wilmington where the company intended to produce components for larger and, in some cases, newer cranes.[8]

With the announcement of the complete closing, Vento sent a letter in January, 1985, to Housing and Urban Development Secretary Samuel Pierce complaining that Amhoist officials had misled him, Wilmington officials, and HUD officials. Specifically, he argued that since the company already planned to build in Wilmington 27 cranes of the same model built in St. Paul, the company was in violation of the anti-pirating clause of the 1974 Housing and Commercial Development Act. This clause prohibits the use of UDAG money to facilitate the relocation of industrial or commercial plants or facilities from one area to another. Vento wanted HUD to investigate the matter. HUD complied—slowly.[9]

Nothing much had been done by mid-March. Vento, charging that the HUD investigation was "incomplete and slanted to produce a final report that would justify its initial approval of the $4 million grant award," [10] requested that the General Accounting Office review HUD's UDAG approval of the Wilmington grant.[11]

HUD, however, was not finished. In April, 1985, it reaffirmed the grant, but added a proviso that barred Amhoist from building or preparing for shipment in the HUD-supported Wilmington plant any cranes like those built in St. Paul. The company agreed to the proviso and then leased nearby facilities with non-UDAG funds in order to continue building the 27 cranes formerly built in St. Paul. By this time, the St. Paul plant was closed. As school started in the fall of 1985, the foundry closed.[12]

The GAO issued its review of HUD's decision to award UDAG funds to Wilmington during February of 1986. The report confirmed that Amhoist had made bad faith promises to Vento and that its Wilmington facility was a runaway plant from St. Paul. The report concluded, "[I]t is our opinion that this project is a relocation within the context of section 119(h)." [13] As a result of this finding, HUD froze the remaining $1.2 million not yet used of the original $4 million grant pending its own continuing investigation.[14]

But some others were also investigating the situation. The Housing Development Subcommittee of the House Committee on Banking, Finance and Urban Affairs conducted an oversight hearing during March of 1986. At this hearing, GAO's associate director testified that HUD's review of the grant application was inadequate and that Amhoist was in violation of federal law. This testimony was followed by HUD's general counsel who stated that Amhoist had breached the grant's restrictive covenant and reported that his agency had requested from the Justice Department (1) a declaratory judgment stating that Amhoist was in breach of its restrictive covenant and that this constituted a default and (2) a permanent injunction to restrain Amhoist from further breach of the covenant.[15]

In answer to these charges, Amhoist's general counsel argued that his company's

[8] GAO Report, cited at note 6; "Amhoist Promise on Job Levels Told," *St. Paul Pioneer Press Dispatch*, January 15, 1985, pp. 1A and 5A.

[9] Associated Press, "Evidence Outlined Against Amhoist," *Minneapolis Star and Tribune*, February 10, 1985, p. 4B; Robert M. Nassau, "Amhoist Chief Explains Layoff Reasoning," *St. Paul Pioneer Press Dispatch*, January 18, 1985.

[10] David Phelps, "Vento Criticizes HUD Chief at Hearing," *Minneapolis Star and Tribune*, March 14, 1985, p. 1A.

[11] ___ "GAO Plans Inquiry of Amhoist," *Minneapolis Star and Tribune*, March 18, 1985, pp. 1A and 18A.

[12] Debbie Norton, "Amhoist Accepts Restriction," *Wilmington Morning Star*, April 19, 1985, p. 4B.

[13] GAO Report, cited at note 6.

[14] Julie Anne Hoffman with Dane Smith, "HUD Freezes Amhoist Grant," *St. Paul Pioneer Press Dispatch*, March 4, 1986, pp. 1A-2A.

[15] John Luke, Associate Director, U.S. General Accounting Office, testimony given before the House Subcommittee on Housing Development, March 20, 1986, p. 13; John J. Knapp, General Counsel, U.S. Department of Housing and Urban Development, testimony given before the House Sub-

move to Wilmington was an expansion, not a relocation; that Amhoist had decided to terminate manufacturing cranes in St. Paul prior to the grant; that only 200 jobs were lost in St. Paul due to the opening of the Wilmington plant; that no significant and adverse impact resulted in St. Paul because the Twin Cities' unemployment rate was under 5 percent, in contrast to a national level of 7.2 percent; that Amhoist needed a larger on-site production facility and a deep-water port; that Amhoist had complied fully with the HUD restrictive covenant; and that HUD officials always understood Amhoist's intentions.[16] The hearing was adjourned and everyone awaited the outcome of the Justice Department's activities.

In the meantime, Amhoist lost $70 million and 500 more employees in 1985. Again, cranes were the culprit. Wilmington was not as productive as management had hoped, and the crane market was one-sixth of what it once was. So, in February of 1987, Amhoist sold its Marine/Energy crane lines to a U.S. subsidiary of AMCA International, Ltd., of Canada.[17] It was on these cranes that Amhoist had staked its future. It was these cranes that the company declared it needed to go to Wilmington to build.

Finally, in July of 1987, Amhoist sold the remaining crane production lines to the privately held Ohio Locomotive Crane Company of Bucyrus, Ohio, for $40 million. The last 475 American Crane jobs were gone. American Hoist & Derrick no longer makes cranes or derricks or booms. (It sells wholesale hardware supplies, vacuum coating equipment, metal scrap recycling machinery, and water control devices—fire hydrants.) The company promised to repay the $2.8 million in federal funds and $83,000 in interest by 1988 from the $40 million it received from the sale of the crane production lines. With money in hand, the Justice Department dropped its pending suits against the company.

A postscript to this story, if there is one, is that in January of 1988 the city of St. Paul announced that it had received $2.8 million in federal funds to retrain 850 Amhoist workers. The money will come from the grant awarded in 1984 to Wilmington on the behalf of Amhoist.[18]

In reality, no plant closing is routine. Each one is special because of the causal circumstances and the effects. The American Hoist & Derrick case deserves special attention for at least four reasons:

(1) Amhoist management knew it was going to completely close its facility, but decided not to reveal the full decision to employees, union officials, city and state officials, federal officials, and at least one Congressman.

(2) Amhoist did not seek, with the unions, to keep the production in St. Paul. This could have been done during the 1983 contract negotiations.

(3) HUD did not fulfill its role in the grant process. Not until the GAO review did HUD officials seriously deal with the ramifications of the grant. Also, HUD's requested actions of the Justice Department were minimal. The grant default was a procedural penalty, not criminal.

(4) Amhoist's management failed to properly gauge the economic effects on their products caused by the collapse of the world oil economy as it operated prior to 1975. They repeatedly stated their support of President Reagan's economic poli-

(Footnote Continued)

committee on Housing Development, March 20, 1986, pp. 15-19 and 30-31.

[16] Scott W. Johnson, General Counsel, Amhoist, testimony given before the House Subcommittee on Housing Development, March 20, 1986, pp. 19-23, 29, 32-33, and 47. Personal interview on July 2, 1987.

[17] *Annual Report*, 1986, cited at note 2; Susan Feyder, "Amhoist Sells Marine Division," *Minneapolis Star and Tribune*, February 11, 1987.

[18] Mike Langberg, "Amhoist Agrees to Sell Crane Operation," *St. Paul Pioneer Press Dispatch*, June 19, 1987; Larry Oakes, "American Hoist to Repay Grant," *Minneapolis Star and Tribune*, July 26, 1987, p. 1B; Meryhew, cited at note 6.

cies. And while the company had product diversity, cranes were the dominant product. This combination of management errors spelled doom for the American Crane Division.

America's working men and women have a right to consider the salient points of plant closings, as illustrated by the Amhoist case, and ask employers and lawmakers why U.S. public policy allows human dignity to be tossed aside, as it was in St. Paul. The study of plant closings will always be crucial until these public policy issues are met head on.

[The End]

The Role of Labor-Management Cooperation in Economic Development

By Janet C. Goulet

Wright State University

Labor-management cooperation plays a singularly important role in economic development. While economic development involves a host of factors, the labor force and its associated characteristics are of prime importance to decision makers in business firms when they consider changes in the scale or location of their operation.

The term labor-management cooperation is the generic name for the several types of activities that involve workers in decisions about the work they perform or their work environment. The concept is becoming more popular because of the many benefits that accrue to both labor and management through these processes. There are also external benefits to the community as a whole. States such as Ohio have the image of a "bad labor climate." Much of this image is based on perceptions and not the reality of labor relations in the state. Cooperative work programs help to change those negative perceptions and thus to retain firms (jobs), attract new firms, and encourage the expansion of existing firms.

Our economy has experienced major changes both from an external international perspective as well as from the internal transformation of our labor force. The external international pressures on markets have resulted in structural transformations in industries and a global sourcing of production. Internally, the labor force has changed dramatically over the past twenty years due to the changing demographics of the worker and changes in values, attitudes, and work behaviors. The new labor force is made up of more highly educated and affluent men and women workers who expect the job to provide satisfaction through involvement in the work process, as well as a large paycheck. This is in sharp contrast to the Depression driven work ethic of the older worker. Yet, many firms still cling to the tenets of an industrial relations system that was developed under those very different economic and social conditions.[1]

The current system of collective bargaining took hold after the passage of the National Labor Relations Act in the mid-1930s. In the time period from the

[1] John R. Stepp and John L. Bonner, "States Tie Economic Development to Improved Labor Relations Climate," *Journal of State Government*, Vol. 60, No. 1, Jan./Feb. 1987.

end of World War II to the late 1970s, the United States experienced consistent economic growth with relatively mild cyclical fluctuations as compared to the previous pre-World War II cycles. This was a period when the communications and transportation industries were highly regulated, and thus protected from market pressures. Also, the product markets in this country were domestically driven, rather than globally competitive as they are today. Consequently, the industrial relations system operated in a fairly controlled environment.

As trade barriers were removed and the trucking and airline industries were deregulated, American firms began to experience competition as never before. These changes had serious implications for corporate performance and firms began looking to their industrial relations system as a vehicle for improving corporate performance.[2] Companies needed to increase their efficiency, and one method is to expand the level of employee and union involvement in the decisions that affect the workplace in order to develop a flexible work force.

The New Industrial Relations

The NUMMI Motors facility is an example of a new approach to labor relations in an international setting. This facility, which resulted from the joint venture of General Motors and Toyota, has a productivity of 30 percent above other GM plants even after discounting for the robots and other advanced technology. The NUMMI plant produces the Chevy Nova which has earned the highest customer satisfaction ratings and lowest warranty cost of any GM car. Two reasons that are cited for this are an increased emphasis on quality and a positive labor-management relationship.[3]

The labor-management relationship which exists is fostered by the Japanese philosophy of business management, not an altruistic view of the worker. According to Michael K. Evans of Evans Economics, Inc., labor-management cooperation is the basis for international competition in the future.

This plant serves as a training point for many GM managers. Hundreds from around the country have been there and return convinced that NUMMI's team method of "managing workers can do more good for GM than all the world's lasers and robots."[4] Ross Perot emphasized this point when he said that "brains and wits will beat capital spending ten times out of ten."[5]

As you know, the team concept found ready acceptance in Japan and effective team operation led to positive labor-management relationships. Team members (labor and management) work in tandem rather than as adversaries. The team concept eliminates the need for multiple layers of management and lays the groundwork for workers taking responsibility for the quality of the products that they produce.

While the Japanese imported the quality team concept, many experts said that it would not work here. Not so! Honda will build cars in this country and ship them back to Japan for sale in that market. Honda uses American labor and the team concept to produce a high quality cost competitive automobile ("world class" is the term) in this country. This is a prime example of how labor-management cooperation leads to economic development.

---

[2] Richard N. Block, Morris M. Kleiner, Myron Roomkin, and Sidney W. Salsburg, "Industrial Relations and the Economic Performance of the Firm: an Overview," *Human Resources and the Performance of the Firm* (Industrial Relations Research Association Series, 1987).

[3] Michael K. Evans, "Inside the Economy," *Industry Week*, February 9, 1987.

[4] Stepp and Bonner, cited at note 1, p. 41.

[5] Fisher, Anne B. "GM is Tougher Than You Think" *Fortune*, November 10, 1986.

Studies of Labor-Management Cooperation

In the late 1970s and early 1980s, many firms embarked on labor-management cooperative ventures ranging from joint union management committees to autonomous work groups, with mixed results. An extensive study by Michael Schuster[6] of 38 organizations used 10 measures of performance to evaluate the impact of union management cooperation. There were six different types of cooperative plans studied: three were gainsharing plans and the other three were quality circles, joint labor-management committees, and quality of worklife projects. This research yielded many important results, however, our discussion will be limited to those below. The reader is directed to Dr. Schuster's book: *Union-Management Cooperation*[7] for a complete exposition.

Dr. Schuster studied 23 organizations and found that union-management cooperation led to improvements in productivity in 11 out of 23 sites observed. However, in 10 of those cases productivity was unchanged, yet, 16 out of 23 of these organizations paid bonuses to employees more than 50 percent of the time. It seems that companies and unions have much to gain from these processes and that there is very little downside risk involved. Also, unions can supplement contractual wage gains through labor-management cooperation and gain sharing. Another finding relevant to our thesis is that employment in these firms tends to follow industry trends. However, in the firms where industry employment dropped and site employment remained stable, the cost containment realized by the cooperative process helped them remain competitive and thus retain jobs. These processes were economically beneficial; concurrently, they significantly improved the relationship between labor and management as greater trust was established and problem solving interaction occurred.

In 1982, the New York Stock Exchange realized that there was a scarcity of information on labor-management cooperation. They set about correcting this by surveying a sample of firms with 100 or more employees. The results indicated that about 25 percent of American industries use some form of joint labor-management activity. Other surveys, with a much lower response rate, indicated that about 13 percent of American industries have participative programs. The data suggest that these employee involvement programs are in a growth phase.

Government at the state and national level has recognized the need to revitalize workplaces and has established agencies to support this vital activity. Governments have an interest in employee relations practices to the extent that these practices impair the efficiency of firms within their jurisdictions. To the extent that firm level industrial relations affect economic performance and jobs, they have an impact on the public and therefore are of appropriate interest for policy-makers.[8]

A series of studies by the United States General Accounting Office point out the importance of this subject and criticize the Department of Labor for not providing sufficient leadership to encourage worker productivity improvement in the private sector. The GAO found that productivity sharing plans had a positive impact on output per worker and also improved labor-management relations, and reduced absenteeism, turnover, and grievances.[9]

Government Programs

The federal government and many states have taken the initiative and started programs to stimulate and sup-

[6] Michael H. Schuster, *Union-Management Cooperation* (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 1984).

[7] See note 6.

[8] Block et. al., cited at note 2.

[9] Schuster, cited at note 6.

port labor-management cooperation. For years, government dollars have supported the development of high-tech resource centers and other forms of research and development. Yet we know that 70 percent of productivity gains in this century are attributed to the ideas and suggestions of the work force.[10] The argument has been advanced that the greatest returns on a state's economic development dollars can be derived from using that money to advance new forms of work organization that create a partnership between labor and management.[11]

The U.S. Department of Labor established a Bureau of Labor-Management Relations and Cooperative Programs, subsequent to the GAO study, which serves as a national repository of information and technical assistance for employers, unions, and educators. The Federal Mediation and Conciliation Service also provides technical assistance and other programs, through their commissioners, to firms wishing to establish participative activities.

Thirteen states have funded a variety of programs; among them are Pennsylvania, West Virginia, Kentucky, Illinois, Indiana, Tennessee, and Ohio. The Ohio program is the most ambitious and far reaching. The legislature appropriated $1.6 million through the Department of Development to fund university based centers throughout the state, as well as area labor-management committees. The university based centers are developing programs to meet the needs of the region that they serve. They work with industry, as well as public sector organizations and their unions to assess their needs and assist them in developing cooperative work processes. The centers also conduct research, publish newsletters and case studies, and facilitate area labor-management committees. The state programs all have the common goal of helping companies to remain competitive through encouraging labor-management cooperation, thus retaining jobs and possibly increasing employment.

Labor Management Cooperation and Economic Development

One important aspect of economic development is attracting new firms to an area. While the focus of economic development issues may be regional, private firms make their location decisions at the local level. They use multiple sources of information when making a decision on plant location. They look to government sources, as well as private research firms for objective information. One of their prime areas of interest is information on the labor force. Many research firms do studies of cities, states, and regions of the country, which are in turn used by domestic companies and foreign investors to make decisions on where to locate new facilities. An important element of these studies, which the research organizations are still trying to quantify, is "labor climate." Labor climate is the perceived quality of labor-management relationships in a given area or work setting. While climate is a perception, it is nonetheless a set of publicly held beliefs and attitudes and represents a concrete reality that can have a powerful impact on economic well-being of the area or firms that it describes.[12]

A study[13] of the general manufacturing climate, done by Grant Thornton in 1987, rated the Great Lakes states the least attractive in general manufacturing climate. An index constructed to measure "manufacturing climate" gave this region low scores for wages, tax effort, energy

[10] Saloman Fabricant, *A Primer on Productivity* (New York: Random House, 1969).

[11] Stepp and Bonner, cited at note 1.

[12] William R. Morgan, *Ohio Labor Climate Study: A Report to the Office of Labor-Management Cooperation*, Ohio Department of Development, January, 1988.

[13] Grant Thornton, *General Manufacturing Climate of the Forty-Eight Continguous States of America* (Grant Thornton, 1987).

cost, cost of living, and unionization. Two of the five measures (wages and unionization) deal with labor and labor relations issues. The study uses these factors to construct an index to measure "labor cost." (This represents their effort to measure labor climate.) Unionization is an important element of labor cost in that study and is measured by taking unionized manufacturing employment as a percent of total manufacturing employment.

The study also considers changes in unionization over time by computing changes in the unionized manufacturing workforce over five years. The "labor cost" element has a weighting factor of 24 percent, and unionization had a factor weight of 6.81 percent in 1986. Thus, "labor cost," according to the Grant Thornton study is the single most important factor out of the five factors that they use to determine the state and regional ranking of general manufacturing climate.

While other factors undeniably affect economic development, there is no doubt that "labor cost" is one of the key elements. We could term it a necessary, but not a sufficient, condition for the economic development of a state or region in this highly competitive global economy.

While we can criticize the surveys and the measures used to capture the labor climate variable, they tend to be accepted by the business community. It is somewhat ironic that a state or region can be downgraded because of perceptions and, possibly, because a large percent of the manufacturing labor force is organized while the productivity of that same labor force is ignored. For example, between 1982 and 1986 real manufacturing output in Ohio rose 34.7 percent while output at the national level grew only 30.4 percent over the same period. This difference was due to the fact that labor productivity and the growth rate of labor productivity was greater in Ohio than in the rest of the nation. A 1984 census revealed that Ohio workers produced roughly 8 percent more per worker than is produced nationally and that the growth rate of this productivity was 4 percent more than the rest of the nation.[14] To contrast the productivity information provided by Bryan and Day above, note that the Grant Thornton study ranked Ohio 46 and 44 in wages and unionization respectively (out of 48) in 1986.

[The End]

Can Improved Industrial Relations Improve Competitiveness?

By Roger L. Adkins

Marshall University

The question we are addressing is straightforward. Namely, "Does the industrial relations system have an important role to play in the competitiveness position of the United States?" I suspect that most industrial relations specialists would respond in the affirmative to the above query. My response, on the other hand, is "Perhaps." In what follows, I

[14] Michael F. Bryan and Ralph L. Day, "Views from the Ohio Manufacturing Index," *Economic Review*, Quarter 1, 1987, Federal Reserve Bank of Cleveland.

shall try to give some basis for my less than flat conclusion.

Before proceeding to the heart of the topic, several points should be discussed. First, at what level are we examining competitiveness? Is it at the level of the firm, the industry, or group of industries, or the national economy? I will argue that the effectiveness of an improved industrial relations environment will diminish as we move from the firm to the level of the overall economy.

Secondly, what do we mean by competitiveness? Without becoming enmeshed in a technical debate, one definition advanced recently will suffice for the discussion at hand: "[N]ational competitiveness refers to a country's ability to create, produce, distribute, and/or service products in international trade while earning rising returns on its resources." [1]

Thirdly, the title of this article implies an acceptance of the proposition that the U.S. does have a competitiveness problem. A good deal of evidence suggests that beyond a few industries (namely steel, auto, and textiles), we really do not have a significant problem. In fact, one recent study found that, after accounting for the industries cited above, the foreign sector actually resulted in a net creation of 64,000 jobs in 1982.[2] So at the outset, I want to state that I am not ready to concede a competitiveness problem in the U.S.; however, for the purpose of this article it is useful to assume the U.S. suffers from competitive decline.

The industrial relations system in the United States has always had its critics. The level of criticism has escalated in the last decade as the economy and the industrial relations system have been subjected to greater strain because of a number of developments in addition to increased international competition. Alleged shortcomings have been identified and remedies suggested. And while consensus has not been achieved with respect to these faults and shortcomings, most would agree that improvements in U.S. industrial relations are desirable. Yet it would be dangerous to leap to the conclusion that enhanced industrial relations will lead to a significant improvement in the competitiveness of our economy with respect to our major trading partners.

Avoiding details, I will briefly comment on what I mean by "enhanced industrial relations." Essentially, this involves programs designed to reduce the adversarial relationship in unionized firms and to improve the work setting in union and nonunion settings alike. Such programs may be conveniently labelled as participatory, recognizing that a wide range of specific formats are possible. In short, measures directed toward the labor force that promote productivity and/or product quality will qualify as an improved industrial relations environment.

Framework for Analysis

The methodology of economics can be fruitfully applied to the problem at hand. Competitiveness difficulties may be measured by the change in the U.S. share of world exports which can be symbolized by Δ (US) where the Greek letter Δ stands for "change in." Given the topic at hand, we would obviously select a variable measuring the impact of industrial relations (represented by IR). If one examines the literature on competitiveness generated by the management discipline, several aspects of management behavior also are identified as being responsible for the poor performance of our economy in the international arena. One of the many sources of difficulty cited is the industrial relations system. For purposes of analysis, the remaining management attributes thought to impact on competitiveness will

[1] Bruce R. Scott and George C. Lodge, Eds., *U.S. Competitiveness in the World Economy* (Boston: Harvard Business School Press, 1985), p. 3.

[2] New York Stock Exchange, *U.S. International Competitiveness: Perception and Reality* (New York: 1984).

be summarized by a variable we will call management policies (MGT-POL).

But what about the impact of government policies that influence budget deficits, exchange rates, interest rates, inflation, and so on? This variable we label (G-POL) for government policies. Other suggestions for competitive problems include declining research and development (R&D) and a less effective educational system (ED). We can add others but let us stop here. Space limitations permit discussion of only the variables, IR, MGT-POL, and GOVT-POL.

Since an actual estimation of this problem is not of concern, we can ignore the difficulties associated with the measurement of our variables and, instead, examine the general nature of our resulting equation which is: $\Delta X(US) = f(IR, G\text{-}POL, MGT\text{-}POL, R\&D, ED)$. Now, if we had the data for our variables and no important variables excluded (and a host of other econometric assumptions were met), then we would have estimates of the impact of each factor upon our changing share of exports. In particular, we would know which of our factors had the greatest power to explain the dependent variable ΔX. Lacking such information at this point, we will attempt to suggest some tentative conclusions with respect to the three variables we wish to focus upon.

As I have read about the topic of competitiveness over the last several years, what has impressed me the most is this: A person writing from the perspective of his or her discipline tends to place emphasis almost exclusively on elements emanating from that person's field of expertise. This is not surprising. We all view what we do as important. In a world where information multiplies with amazing rapidity, we have difficulty staying abreast within our own areas of specialization. To understand and appreciate developments in specializations beyond our expertise is an impossible task. Hence, a tendency exists to overstate the importance of what we know and to understate what we do not know.

I first encountered this situation when comparing the critical views of an early twentieth century economist, Thorstein Veblen, regarding management with more recent critiques. What was most interesting was the types of individuals who echoed Veblen's sentiments. Practicing managers, management consultants, and academics from the schools of business (collectively, these can be termed the management discipline) directed sharp attacks on management itself as the major factor behind our competitiveness decline. I have argued that management has been overly critical of itself on this point.[3] However, the management discipline has not been alone in singling out one factor to explain the source of our international economic difficulties.

Thus, in terms of the equation given above, commentators show a strong tendency to select their field of expertise as *the* explanation for declining competitiveness at either the exclusion or minimization of other explanatory variables. What we must come to appreciate is that competitiveness is determined by a broad range of factors, not by a single variable. Also, the relative importance of these factors should not be expected to remain unchanged over time and place. Suppose we consider competitiveness at the industry or firm level. The relative importance of variables may show considerable shifting from industry to industry. New variables may have to be added for some industries and firms. For instance, we would never consider using a variable for "location of plant site" to explain the competitiveness of the total economy. Yet such an element could be very important in explaining the health of a particular firm. An economist seeking to explain the

[3] Roger L. Adkins, "Competitive Decline: Views of Two Disciplines," *Journal of Economics Issues* 21 (June, 1987), pp. 869-76.

difficulties of textiles, steel, and automobiles over the last 15 to 20 years would not be expected to be able to write the same account to cover all three instances. While one or more factors may be common to each, special circumstances for each industry are undoubtedly present. Industrial relations in steel and autos are similar, but very different from textiles. Hence, in explaining the competitiveness problems of these industries and others, we would give different weight to the variable IR from case to case.

Comparative Advantage

Let us try to gain some perspective on some of the variables that we suggested earlier have an impact on competitiveness. Recall my position on the relative importance of industrial relations on competitiveness. Namely, that the importance of competitiveness would diminish as we moved from the firm to the overall economy. To see this, assume that the U.S. economy were to experience a situation where the exchange rate remained stable against our trading partners over time. Domestically, productivity and growth increased at a constant rate. While many other variables enter the picture, could we then expect our share of world imports and exports to remain constant? The first response is that our trade position does not reflect how we perform alone; rather, the performance of our trading partners matters as well. Thus, as other countries are able to use more advanced technologies (and with typically lower labor costs), they will, over time, reduce imports from more advanced countries and later become a net exporter to those same countries. If the advanced countries (such as the U.S.) keep their economic structures unchanged, their exports will fall and imports will rise. Hopefully, a country such as the U.S. will move into more technologically advanced products. Hence, while its share of world exports and imports might remain essentially unchanged, the composition of those items will have been altered.

What we have just described is nothing more than shifting comparative advantage. A natural and welcome process that nonetheless means hardship on some as adjustment occurs. Implementing the best management and industrial relations policies can slow the effects of a changing comparative advantage but cannot stop it. Only protectionist policies will work in this instance. Let me emphasize that I am not advocating a complete "surrender" of firms in mature industries to the forces of comparative advantage; instead, I believe an orderly retreat to be more appropriate where firms in declining industries can find a "niche" for themselves.

Take another case where we have industries ranked from those suffering from significant import penetration to those that export heavily. Now the dollar, for whatever reasons, increases sharply in value for a prolonged period. Exports become expensive to foreign buyers so they reduce consumption of U.S. goods but Americans increase their purchases of foreign goods causing imports to increase (a trade deficit appears). What can better management and/or industrial relations do to offset the movement of exchange rates? Truthfully, little can be expected in this regard. Industries already hard hit will contract leaving only the most efficient to survive. Some industries that were net exporters will become net importers. Still other industries will discover a falling share of world exports. Lower profit margins will spread with the rising volume of imports.

In broad terms, under what circumstances can management and industrial relations experts bring about improved competitiveness on the part of their firms? The answer is actually rather straightforward. Where firms are currently highly efficient, there is little to be done. (The assumption of efficient firms was implicit in the two cases examined above.) Essentially, the well-managed organization can only adjust to the sum of

forces outside the organization (such as shifting comparative advantage and movement in exchange rates). In the short-run, such adjustments will be limited to price and output decisions. Over the longer haul, searches for improved technologies are possible. However, where "slack" exists, firm level policies potentially can be effective. The greater the degree of inefficiency, the more important industrial relations initiatives and/or management policies will be. However, once inefficiency has been eliminated, the firm will find that its market share will be dependent on forces over which it has no direct control (in effect, national and international structural changes as well as governmental policies).

Conclusion

I have presented a framework within which we are able to evaluate the potential success of an industrial relations initiative or a more general set of management policies to enhance competitiveness. I argued that policy changes can be fruitful when the firm is being operated inefficiently; however, the well-managed firm, at least in the short-run, can only adjust to market forces unless government can be induced to intervene on behalf of the threatened firm or industry. In effect, government must erect protectionist barriers. The difficult task revolves about how we can determine when significant slack exists.

If industrial relations policies will have only a marginal impact on competitiveness, what are the sources for promoting enhanced productivity? Given space limitations, we can make only a few observations. Firstly, both economic growth and long-term competitiveness require high rates of productivity growth. Productivity gains in turn depend upon high levels of savings and investment, improvements in the quality of the labor force (education and training), and appropriate levels of spending for research and development. These factors are obvious, yet others could be added.

In short, we should not ask the industrial relations system to accomplish more than it is capable of doing. To do so will bring undue frustration with a system already suffering from the strain of other adjustments. To paraphrase a well known prayer, the industrial relations expert and other management personnel should approach the competitiveness problem with the serenity to accept the things they cannot change, courage to change the things they can, and the wisdom to know the difference.

[The End]

Employment Flexibility: A U. K. Perspective

By Phillip B. Beaumont

Case Western Reserve University (Visting Professor)

If there is a single word to describe what many individuals view as both the inevitable and desirable line of development in the operation of the labor market in the forseeable future it is flexibility. The term is, however, in some danger of becoming "all things to all people" with different individuals emphasizing different measures and causes of labor market rigidity that need to be eliminated or minimized. Such differences in definition and meaning are apparent both between and within individual national systems of industrial relations. In the U.K., for example, individuals have variously cited excessive job security guarantees, industry level wage floors, heavy reliance on quantity as opposed to price adjustments, and limited intra-organizational movement of workers between different job grades as major dimensions of labor market inflexibility.

These (and other) views of the nature of labor market rigidities have led individuals to talk of *numerical, functional,* and *financial* flexibility when considering the U.K. position. This particular categorization will be used here to: discuss the incentives for flexibility; provide some figures on, and examples of, recent moves in this direction; and highlight some of the key issues raised by, and involved in, attempts to increase the flexibility of U.K. labor market operations, for obvious reasons the nature of union responses will receive particular attention here.

There is a strong *universalist* perspective in much of the discussion as to why employers are increasingly seeking labor market flexibility.[1] For example, developments in numerical flexibility (e.g., increased part-time employment) are held to be closely associated with advanced industrialized economies becoming increasingly service sector dominated, while employer moves toward functional flexibility (e.g., increased team based working) are viewed as being stimulated by general (non-system specific) trends in the product market. In the latter case, it is typically argued that an increasingly interdependent, competitive product market environment, with much shorter product life cycles, is causing individual organizations to seek to develop specialist market niches as a competitive strategy. These shop floor level developments in functional, and to some extent financial (e.g., profit-sharing schemes), flexibility can be viewed as an integral part of larger organizational moves towards an *organic,* as opposed to a mechanistic, management system; the aim being to achieve a closer individual employee-organization identification process, this being necessitated by operating in an environment characterized by relatively rapid product market and technical change.[2]

However, the growth of service sector employment and individual employer responses to a changed product market environment are only part of the story in the U.K. This is because the present con-

[1] M.J. Piore and C.T. Sabel, *The Second Industrial Divide* (New York: Basic Books, 1984).

[2] T. Burns and G.S. Stalker, *The Management of Innovation* (London: Tavistock, 1959).

servative government has been particularly prominent in trying to stimulate system-wide moves towards financial flexibility. The nature of these initiatives (1) reflects the government's view that Britain's poor macro economic performance in the 1970s was a result of a variety of labor market rigidities, and (2) stems from an explicit rejection of developing macro level, tripartite, or "corporatist" labor market arrangements as a desirable and feasible way of eliminating such rigidities; real wage moderation is to be sought at the level of the individual organization rather than via national level wage settlement arrangements (the latter being the favored approach in Europe of the 1970s). It is relevant to note here that existing research does not support all of the government's views concerning the strength of labor market rigidities. For example, unfair dismissal legislation does not seem to have been a particularly significant factor in the rise in unemployment through time in the U.K.[3]

Numerical Flexibility

A number of individual statistics may usefully illustrate the flavor of developments under this particular sub-heading. For example, full-time employment in the U.K. fell by some 1.2 percent in 1979-85, whereas part-time employment increased by 5 percent, with the result that the share of part-time employment in total employment was some 21.2 percent in 1985, compared to an average of 15.7 percent for OECD countries. Secondly, self-employment (with or without employees) rose from 7.7 percent of the total working population in 1975 to 9.5 percent in 1985. The growth of part-time self-employment and the use of temporary workers (together totalling 34 percent of all employment in 1985, a 16 percent increase from 1981) is very much associated with the rapidly growing service sector industries of business services, hotels and catering, wholesale and retail distribution (nearly two-thirds of all net new jobs in the U.K. in 1985-90 are estimated to be in private sector services), with these industries being heavily represented in the southeast, southwest, and east anglia regions of the country. These particular regions are the relatively nonunionized areas of the U.K. (although this is not solely or mainly due to their industrial structure) and, as a consequence, a number of individual unions, most notably the general and municipal workers (one that has lost some 16 percent of its membership since 1979) have recently initiated organizing campaigns to try and recruit part-time and temporary workers; individual local areas have identified their own particular target groups, although a stated general emphasis is on trying to provide for the protection of individual employee rights in the absence of formal collective bargaining arrangements. The success of such campaigns will clearly be of considerable interest to the current Trades Union Congress (TUC) internal review of the sort of organizing strategies and tactics that may help reverse the overall decline of union membership (a loss of nearly 3 million members) since 1979.

In Britain, conceptual discussions of flexibility in organizations have frequently referred to the notion of a small *core* of permanent employees being surrounded by a number of rings of larger sized groups of more peripheral workers. The 1984 workplace industrial relations survey,[4] which covered more than 2,000 employment establishments, reported that some 45 percent of establishments had made some use of one or more categories of *non-core workers* (i.e., fixed term contract, temporary, and home workers) in the previous 12 months, but generally it has been concluded that "although the

[3] D. Metcalf, "Labor Market Flexibility and Jobs," *Centre for Labour Economics, LSE Discussion Paper No. 254*, October, 1986.

[4] N. Millward and M. Stevens, *British Workplace Industrial Relations 1980-1984* (Aldershot: Gower, 1986).

observed changes are widespread, they did not cut very deeply in most of the firms, and therefore the outcome was likely to be marginal, ad hoc, and tentative, rather than a purposeful and strategic thrust to achieve flexibility." [5] In short, developments in numerical flexibility would appear to be extensive, but not equally intensive in nature due to short-term, cost-saving considerations dominating management thinking on the matter.

Functional Flexibility

Functional flexibility as a homegrown or organic phenomenon is likely to be disproportionately associated with greenfield sites and new plants in most national systems of industrial relations. In the highly publicized Nissan-Engineering union agreement for a new auto plant in Northeast England in the mid-1980s, for example, there are only two job descriptions for manual employees (technical and manufacturing staff), while case studies of individual greenfield site operations have highlighted their general tendency to give work teams responsibility for a relatively broad range of job-related tasks and duties. In seeking to organize greenfield sites and new plants (which have an above average probability of being nonunion in the U.K.), individual unions have sought to negotiate single union recognition agreements in which there is an explicit commitment to operate with flexible working practices. The most well known of these arrangements are the "no-strike" package agreements associated with the electricians union. In mid- to late-1986 there were some 21 of these agreements in place, variously estimated to cover between 5,000 and 9,000 employees, although the contents and manner of introduction of such agreements have generated inter-union controversy out of all proportion to their actual numbers and coverage.

At the other end of the product life cycle (i.e., the mature or decline stages), there have been *proposed* or *actual* functional flexibility provisions in a number of recent union-management agreements. Table I lists some illustrative examples in this regard. Even this small list of examples indicates that functional flexibility changes are far from homogeneous in content or implications so that it is difficult to talk about typical developments here. Nevertheless, information contained in CBI's wage data bank (which is orientated towards larger, unionized, manufacturing sector plants) reveals that approximately one in three of all wage agreements since 1980 have contained "significant" functional flexibility provisions. There have certainly been some strikes over the proposed introduction of flexible working practices (e.g., 239,000 working days lost in several Austin Rover plants in April, 1980, and a 36-week strike in 1986 by 400 computer staffers in the Newcastle area of the department of health and social security), but in general such disputes have been few relative to the number of functional flexibility provisions appearing in recent agreements.

What factors have facilitated or contributed to this state of affairs, given that functional flexibility provisions are so fundamentally different to the detailed regulation of individual jobs via traditional collective bargaining arrangements in Britain? Is it simply the fact that employees and unions have accepted the inevitability of change due to the strong pressure of external economic events, or has there been "skillful" bargaining on both sides of the table with significant *quid pro quos* (e.g., information disclosure, employee participation, and job security) being negotiated?

The necessary research to answer such questions has not as yet been undertaken in the U.K., although (1) some survey

[5] J. Atkinson and N. Meager, "Is Flexibility Just a Flash in the Pan?" *Personnel Management* (September, 1986), pp. 24-26.

evidence[6] suggests that union and employee opposition to such changes is considerably less when they are linked with the introduction of new technology (possibly due to the employee belief that this will enhance future job security prospects) and (2) particular organizational examples (of a negative or positive nature) point to a greater union acceptance of a step by step negotiating approach. For example, the difficulties involved in the British shipbuilders negotiations of late 1983-early 1984 indicated that interchangeability *within* job groupings and grades can be more readily attained than flexibility *between* grades and groups.

Financial Flexibility

As mentioned earlier, the present conservative government has been particularly prominent in seeking to encourage (in both its legislative and employer roles) systemwide moves towards financial flexibility. In this regard, it has removed certain wage floors traditionally provided by collective bargaining arrangements (e.g., the Employment Act 1980 repealed Schedule 11 of the Employment Protection Act 1975), government contractors no longer have to pay the industry level, collectively bargained wage and the content and coverage of legally enforceable minimum wage provisions has been reduced via the Wages Act 1986 (e.g., coverage no longer applies to workers aged below 21).

Secondly, it has helped shift the terms of the industrial democracy debate from the emphasis on union representation on the board of directors of the 1970s to one emphasizing lower level, individual-employee-centered developments in consultation, information provision, and profit sharing. In 1986, for instance, it outlined proposals for possible legislation to encourage (via tax relief) profit-related pay arrangements on the grounds of alleged *micro* (i.e., increased individual employee-company identification) and *macro* level benefits (i.e., pay more responsive to business conditions and reduced pressure on employers to lay off workers). The latter benefits are very much those sought by Weitzman's[7] profit-sharing proposals, although he maintains that the benefits of such schemes will only be fully realized in non-collective-bargaining situations; in fact profit-sharing schemes are significantly and positively associated with unionized establishments in Britain.

Moreover, employer representative organizations accorded the details of the government's profit-related pay proposals a relatively cool reception, expressing concern that they might, for example, result in an escalation of union demands for the disclosure of company information. Most recently, the government has been highly critical of the practice of annual wage negotiations, particularly those involving industry and company-level collective bargaining structures. These particular forms of bargaining structure are alleged to have limited the extent to which inter-regional wage differentials reflect inter-regional differences in labor market conditions, and hence have been a source of system-wide inflation and job loss (by transmitting wage levels originally negotiated in high demand areas to the low demand areas). Again employer representative organizations have responded to these government criticisms of industry and company level bargaining structures in a relatively unenthusiastic manner, although 1987 did see the virtual end of industry-level bargaining in the banking industry, and the government has stated its intention to try and set an example in the public sector (which is the major home of industry-level collective bargaining) by seeking to introduce more regional variation in wage settlement levels; nevertheless, the present tendency in bargaining

[6] W. W. Daniel, *Workplace Industrial Relations and Technical Change* (London: Pinker, 1987).

[7] M.L. Weitzman, *The Share Economy* (Cambridge: Harvard University Press, 1984).

structure in Britain is away from that favored by the government, being towards company-level bargaining.

Some Final Issues

An obvious question to pose here is whether there is the sort of *consistent*, system-wide move towards flexible working arrangements in the U.K. that would satisfy the most vocal and passionate advocates of such a move. The answer is almost certainly *no* as a number of internal oddities and inconsistencies have already been noted: extensive, but not intensive, numerical flexibility moves; profit-sharing schemes disproportionately concentrated in unionized establishments; and moves towards company (and away from plant) level bargaining structures to mention a few. However, with some one in three of the work force in non-core employment and information provision/profit-sharing schemes being the growth component of more recent employee involvement initiatives, it is difficult to dismiss labor market flexibility as simply another short-term fad.

These developments potentially pose some awkward issues for the union movement. The question of how to recruit part-time and temporary workers may in fact be the least of the union's concerns if, as seems likely, such developments (1) increase the extent of variation in the terms and conditions of employment of members of individual unions and (2) enhance the possibility of conflict between the different hierarchical levels of individual unions. A number of commentators have already argued that shop stewards in Britain depend more on management-provided resources than on external union-provided ones to carry out their basic tasks, and flexibility moves could well add significantly to the potential role conflict of shop stewards by increasingly posing questions concerning their basic source of identity—employees in the individual plant or the larger union? And if flexibility moves signficantly add to the intra-organization difficulties of unions the results and implications of such difficulties will undoubtedly be of concern to more than simply the union movement in the U.K.

Table I: Proposed or Actual Functional Flexibility Provisions in Recent Negotiations in the U.K.

Industry	Site	Year	Proposal or Provision
Shipbuilding	John Browns (Clyde)	1986	Reduced grades and partly eliminated job demarcations
Chemicals	Shell Carrington	1985	Removed 14 craft groups and combined 3 grading structures into one
Coal mining	New pit at Margam in South Wales (British coal are seeking similar changes in pits in North East England)	1987	Flexible shift patterns
Engineering	National negotiations	1987	Jointly agreed proposal that working week be reduced from 39 to 37.5 hours, with costs to be covered by local negotiations to eliminate demarcations and other restrictive practices
Post Office	Counter staff agreement	1986	Less rigid rotas and more flexible interpretation of barriers between grades

Autos	GM Van manufacturing plant at Luton	1987	To sell to joint venture company sought framework agreement in which number of grades and job descriptions reduced

[The End]

New Developments in Employment Flexibility

By Philip K. Way

University of Cincinnati

Employers operate in a changing and uncertain environment. Product demand is rarely stable. It is often difficult to predict with any degree of accuracy. The relative cost and productivity of alternative production methods are also prone to change as labor market conditions change, new wage contracts are negotiated, and technical change progresses. As a result, if organizations are to function effectively, employers have to be able to vary the level and composition of labor input, among other things. Such employment flexibility can take many forms, ranging from using the permanent work force more or less intensively to accessing or cutting non-permanent employees. Indeed, over the past 25 years employment flexibility in the U.S. has undergone a number of metamorphoses.

The primary objective of this article is to investigate the character of the currently emerging mode of flexibility. The arguments are based on analyses of published statistics and over thirty case studies. Initially, a conceptual framework is provided within which flexible employment policies can be analyzed. In order to highlight the distinctiveness of the new developments, they are contrasted with two previous generations of employment strategies. An attempt is then made to explain the reasons underlying the change of emphasis apparent in the third generation of policies. Finally, the prospects for the wider diffusion of the new approach to flexibility are examined.

Labor input can be altered through manpower policies involving the variation of productivity levels, the number of hours worked by each employee, and the number of individuals engaged in the organization's business. Flexibility may be achieved simply by changing the intensity of supervision, work scheduling, and hiring and firing activity, for example. Alternatively, variations in compensation rates, structures, and systems are possible.

Since the manpower and compensation policies can be used in conjunction with each other, a matrix of strategic approaches can be generated, as Table One illustrates. Employment flexibility is generally greater when strategies are chosen from the southern and eastern sectors of the matrix because larger units of labor input are being varied and the compensation system is being used in a more flexible manner.

Manpower Flexibility	Compensation Flexibility		
	None	Possible	Likely
Productivity	Hoarded labor	Discretionary rates	Pay for performance Knowledge-based pay
Hours	Short time Job sharing	Overtime Part-time work	Peak-time pay
Individuals	Layoffs Hiring Subcontracting Outsourcing	Leased labor	Temporary labor Market-related pay

Employment flexibility has progressively increased over the past quarter-century. Recent developments are most clearly seen in the context of previous strategies adopted by employers. The approach to flexibility in the 1960s, what might be called "first-generation" employment flexibility because it was the forerunner of more sophisticated strategies, focused mainly on productivity and hours of work. Labor was hoarded in slumps and worked harder in booms. Corroborating this, changes in full-time employment were less than half the changes in real output over the period 1963-68, while hourly productivity growth was more than half that of output between 1963 and 1972. This was made possible partly by financial incentives, especially for manual workers and those under discretionary pay systems. Also, the number of hours worked was varied through paid and unpaid overtime and by putting workers on short time as circumstances dictated. Concurrently, employers placed increased reliance on the so-called "secondary" or "peripheral" work force, particularly voluntary part-time workers, whose numbers were expanded slightly faster than full-time employees.

Manpower Policies

Second-generation employment flexibility, which dominated the 1970s, was more far-reaching, involving a downward move in the strategy matrix. There was a switch of emphasis away from altering productivity and hours in response to product and labor market conditions, to a policy of manipulating the number of workers and their hours. Layoffs and hiring became more significant. Unlike the earlier period, full-time employment nearly always changed at a rate greater than half that of real output between 1969 and 1980, while changes in productivity were generally less than half of real output changes between 1973 and 1980.

In the secondary sector, temporary and part-time employment combined with lower rates of compensation became increasing sources of flexibility. The annual growth of agency help far surpassed output growth rates (except in 1975). In fact, in the upswing of 1976-78, agency temporaries grew more than 20 percent each year. Part-time employment continued to expand faster than full-time employment, not because workers voluntarily wished to work part-time, but because employers chose to staff positions with part-timers, especially in periods of slow growth. While some part-time jobs became full-time as conditions improved, there was a ratchet effect, employers preferring to retain a larger part-time workforce.

The new developments since the early 1980s, which comprise the third generation of employment flexibility, can be interpreted as a further southward and eastward movement in the matrix towards strategies promising maximum employment flexibility. In the first place, a growing emphasis has been placed on reacting to the economic environment through manpower policies involving vari-

ations in the number of workers. In particular, the peripheral work force has borne relatively more of the adjustment, although the extent of this must not be exaggerated.

Temporary workers employed through agencies have generally continued to grow faster than output, although not usually at the rate of the 1970s, so that now they form close to one percent of the work force. It is also evident from primary research that "in-house" temporary workers recruited directly by the organization, often from sources such as ex-employees, who are homemakers or have retired, have grown substantially in number.

A new variant of temporary help to have sprung up is employee leasing. Like agency temps, leased employees are rented for a fee from a lessor who then pays the workers, sometimes at the rates permanent full-timers would earn, sometimes differently. However, in contrast to temps, leased employees are often recruited by the user organization before being turned over to the leasing agency. Further, the term of employment with the user is often longer. The lessor may also be responsible for supervision and discipline. The number of individuals is still small whatever unofficial estimate is used, but the fact that leasing is a growing part of employment flexibility is undeniable. According to medium-range estimates, leased employees have risen from 4,000 in 1981 to 250,000 in 1987.[1]

Organizations have also apparently been subcontracting and outsourcing to an increasing extent, although no data are available. Thereby, the (external) level of employment has been altered.

In the primary work force, hiring and layoffs have continued to be significant, albeit less than in the 1970s. In only three of the six years between 1981 and 1986 did employment change by more than half the rate of growth of real output.

While manpower policies have been focused primarily at the level of the individual worker, slightly greater flexibility in hours of work has been evident. Employers have continued to increase the proportion of the work force that is part-time after accounting for cyclical effects. There was also an upward trend in short time and work sharing as several states adopted short time compensation schemes in the 1980s.[2]

Complementing the manpower strategies have been compensation policies designed to promote greater flexibility in terms of productivity, hours, and employment. Perhaps most significant has been the spread of pay for performance. According to a survey of members of the American Compensation Association and the American Productivity Center, individual incentives existed in 28 percent of firms in 1985, their growth having doubled in the previous decade, while small group incentives were seen in 14 percent of firms and gainsharing in 13 percent, with more schemes being implemented during 1980-85 than in the previous twenty years.[3] Knowledge-based pay systems, whereby pay depends on the number of skills mastered and therefore induces greater flexibility and hence productivity, were found in five percent of firms, two-thirds having been introduced in the 1980s. Causality is difficult to prove, but it is perhaps not surprising that hourly productivity growth was relatively greater than in the 1970s, exceeding half the rate of output growth every year except one between 1981 and 1986.

Also more widespread has been the tendency of organizations to relate compen-

[1] James R. Redeker and James O. Castagnera, "The Legal Nightmares of Employee Leasing," *Personnel Journal* 64 (February, 1985), pp. 58-61; Harry Bacas, "Fire Them All?" *Nation's Business* 87 (February, 1988), pp. 62-63.

[2] Kim Watford, "Shorter Workweeks: An Alternative to Layoffs," *Business Week* 2941 (April 14, 1986), pp. 77-78.

[3] Carla O'Dell and Jerry McAdams, "The Revolution in Employee Rewards," *Management Review* 76 (March, 1987).

sation levels and raises to market-related factors such as labor supply and demand, the ability to pay, and productivity, rather than the cost of living and comparability.[4] In part, the intention has been to allow employers to be more flexible in the management of the sizes of their work forces as market conditions change.

The other new development in compensation strategy has been peak-time pay for part-time workers. In essence, workers receive higher premium rates as the length of their average workday and the number of days worked each week decrease. Although many banks have introduced peak-time pay to attract workers for peak demand periods only, it has not spread very widely.[5]

In sum, the third generation of employment flexibility has been marked by an attempt to achieve more flexibility of labor input, and, accordingly, a broader and more sophisticated panoply of manpower and compensation policies has been seen. Attention is now turned to an explanation of the peculiarities of third-generation flexibility.

Causes of the New Nuances

Labor market theory shows that the mix of factors of production employed by cost-minimizing organizations, including temporary help, leased employees, and workers on various payment systems, depends on their relative prices and productivities, subject to supply constraints and institutional factors. Case study research indicates that these factors have been relevant in practice.

The newer modes of flexibility are generally less costly than those dominant in earlier generations, such as hoarding and hiring and firing permanent full-time workers. First, savings are usually made in hourly compensation costs. The fee paid to a temporary help service or the compensation of an in-house temporary is frequently less than the compensation of a permanent full-timer because fewer benefits are customarily offered. Leased employees are also attractive because of lower benefit costs. The Tax Equity and Fiscal Responsibility Act of 1982 formally recognized "safe-harbor" leasing, whereby organizations could make retirement plan savings by leasing employees and giving them less lucrative pensions than regular employees. The law merely required the leasing company to contribute 7½ percent of salary to employee pensions, with immediate participation and vesting. Apart from such possible savings, small employers gain from the ability of leasing companies to provide benefits at lower cost, made possible by taking advantage of lower group insurance rates. Part-time workers also often receive fewer benefits; those on peak-time pay in most cases receive none at all. Further savings are also made where peripheral workers do not receive the same promotion and longevity raises as regular employees.

Second, the fixed costs of employment are frequently lower than when regular workers are employed. In particular, hiring and firing costs tend to be less. Temporary and leasing agencies usually already have workers on their books when organizations are hiring, and, when cutbacks are made, the employees are simply transferred or made inactive rather than fired. This is reflected in the fee. In-house temps are similarly cheaper. This argument does not apply to part-time workers as much because the organization hires and fires them in much the same way as permanent full-timers, yet the cost is spread over fewer hours.

Certain growing worker categories are also more productive than those historically more prominent. This appears to be the case especially with workers under pay-for-performance systems and knowledge-based pay schemes.

---

[4] Conference Board, *The New Look In Wage Policy and Employee Relations* (New York: Conference Board, 1985).

[5] *The Peak-Time Employer Letter* 1 (Summer, 1986), p. 1.

Organizations have been provoked to take advantage of the cost savings by several factors. One is changes in the supply of primary and secondary workers. The number of agencies supplying peripheral workers has mushroomed, making the new forms of flexibility feasible. At the same time, the growing labor shortage of the 1980s has increased the cost of recruiting permanent full-time workers. It has been increasingly economically rational for organizations to employ other types of labor, to use other recruitment techniques such as taking on temps with a view to hiring them for permanent positions, and to stimulate the productivity of incumbent primary workers.

In conjunction, organizations have faced mounting pressures to contain costs. International and post-deregulation competition has heightened. Costs have also received greater attention due to the need to increase profits to raise stock market values to avoid takeovers, changes in the exchange rate, and administrative policies such as the ceilings imposed on government payments for medical treatment under Medicare.

Noneconomic motives have also played a part. Some companies have decided as a matter of personnel policy to increase the job security of the permanent full-time work force, in part in reaction to the unpleasantness of the layoffs in the recessionary years of the second generation of employment flexibility. This has necessitated the creation of a buffer work force of peripheral workers which can be varied in accordance with market conditions.

Certain organizations have also sought to use the new types of flexibility to remain union-free or weaken incumbent unions. It is believed that peripheral workers, especially those with high turnover rates and paid by third parties, do not think it worthwhile to support union organizing efforts. Also the National Labor Relations Board is generally expected to exclude such workers from the definition of the appropriate bargaining unit because they do not share a community of interest with the permanent work force. Where unions have gained recognition, the existene of outsourcing, leasing, and temporary employment, among other devices, is seen as a threat to union power.

Prospects for Growth

Third-generation employment flexibility has exhibited remarkable growth, but certain component stategies still do not cover a large proportion of the work force. While they can be expected to continue to spread as long as there are unit-cost, supply-side, and institutional pressures of the kind seen in the 1980s, widespread coverage is likely to be retarded by a number of factors which are already apparent.

The unit cost savings are not obvious to all employers. A common complaint made by users of agency temps is that productivity is often lower than that of permanent workers. Leased employees became less attractive after the Tax Reform Act of 1986, which reduced potential benefit savings by requiring leasing companies to contribute 10 percent of salary and to extend the user-company's plan to leased employees where more than 20 percent of workers were leased. In any case, if the IRS considers the lessor and lessee as joint employers because the lessee is meaningfully involved in the control of the leased employees, the user's plan has to be extended to the leased employees. Also, large companies may not see any administrative savings in leasing due to already-existing personnel specialization and low group rate benefits.

Financial savings may be offset by the side-effects of a larger peripheral work force. In particular, morale and hence productivity may deteriorate due to the greater inequity of rewards and job security. Management may also find it has less control over the work force to achieve its goals.

The achievement of the objective of freedom from unions may also be frustrated by a large peripheral work force,

especially if their job tenure is long and compensation relatively low. They may sign authorization cards. Leased employees and agency temporaries may also vote in a representation election if the NLRB determines that the agency and the company are joint employers and that there is a community of interest.

Finally, there may be resistance to new types of flexibility from incumbent unions. An analysis of reported strikes shows that an increasing proportion concern issues such as outsourcing. Organizations may not believe that the added flexibility is worth the transaction costs.

[The End]

Industrial Restructuring Following Plant Closings and Phasedowns

By Charles Craypo

University of Notre Dame

Between the mid-1950s and the mid-1980s, South Bend, Indiana, lost half of its manufacturing jobs.[1] A majority of them were in large-sized establishments owned by absentee parent corporations in transportation equipment and other durable goods industries. They were "primary" labor market jobs: unionized, high pay and benefits, reasonably secure. To that extent, South Bend was "deindustrialized."

At the same time, thousands of new manufacturing jobs were being created. These involved mainly smaller establishments in both durable and non-durable goods manufacturing. But the new jobs do not share the "primary" labor market characteristics of the displaced jobs. To this extent, South Bend manufacturing has been restructured.

The purpose of this article is to outline deindustrialization and restructuring in South Bend from 1961 to 1986. It also cites data on qualitative changes in area manufacturing employment and raises questions about the costs and benefits to a community of this kind of reindustrialization.

Basic manufacturers like Studebaker, Bendix, and Uniroyal gave South Bend the appearance and reputation of a factory town, despite its historic and sizable employment in retail trade, finance, health care, and education. In 1961, manufacturing in South Bend accounted for 42 percent of area employment, compared with a 30 percent ratio nationally. During 1961-1987, however, at least 32 manufacturing plants were closed in South Bend. As Table One shows, an estimated 13,000 manufacturing jobs were displaced at the time of the closings and nearly 36,000 when recent peak employment levels are calculated.

[1] The South Bend labor market consists of St. Joseph County, Indiana, and includes South Bend and the adjacent city of Mishauaka, the two major manufacturing centers within the Metropolitan Statistical Area.

Table 1

Manufacturing Plant Closings in the South Bend Labor Market Area, 1961-1986

Years	Number of Plant Closings	Job Lost At: Closing	Job Lost At: Peak	Closings and Jobs Lost In: Durable SICs	Closings and Jobs Lost In: Non-Durable SICs
1961-1970	9	11,220	28,400	6 (10,775)	3 (445)
1971-1980	7	1,395	3,815	2 (820)	5 (575)
1981-1986	16	781	3,376	10 (436)	6 (345)
Total	32	13,396	35,591	18 (12,031)	14 (1,365)

Sources: Closings as reported in the South Bend Tribune, various issues; Charles Craypo, "Deindustrialization of a Factory Town: Plant Closings and Phasedowns in South Bend, Indiana, 1954-1983," in Donald Kennedy, Editor, *Labor and Reindustrialization: Workers and Corporate Change (University Park, PA: Department of Labor Studies).*

To the extent that South Bend was deindustrialized by plant closings, this occurred during 1961-1970. Less than one-third of the closings but more than 80 percent of the immediate job losses occurred during 1961-1970. In addition to Studebaker, which alone accounts for about half of the total jobs lost to closings, the shutdowns centered upon large transportation equipment and heavy industry plants owned by diversified national corporations. Major reasons cited for the closings were inefficent plant and equipment and inability to compete in product markets. Labor costs were not blamed, although these were unionized plants covered by labor contracts patterned after Big Three auto settlements.[2]

But in the 1970s South Bend's large basic manufacturing sector gave it a comparative employment advantage among the Great Lakes states and nationally due to the growth in durable goods consumption.[3] Fewer closings occurred during this decade than in the 1960s and most involved small producers in food processing and clothing. Nevertheless, one of the two shutdowns in durable manufacturing did account for more than half the number of displaced jobs. Firms again cited plant inefficiencies and problems in product markets rather than labor costs as major reasons for the shutdowns, except in one case involving a bakery.

The greatest number of plant closings took place during 1981-86. A majority were in machine tools, auto (Avanti) and transportation equipment, industrial products, and fabricated metal. Average size of the closed establishments, judging from the number of workers displaced, was much smaller than for those closed during 1961-80. Many were victims of the deep industrial recession in South Bend during 1981-1983. This time its disproportionate manufacturing base put South Bend at a competitive disadvantage nationally and regionally.[4] (Kochanowski, Bartholomew, and Joray, 1987). Moreover, firms now cited high labor costs as responsible for closings, especially in the machine tool shops and other unionized durable goods industries. It should be noted, however, that unions invariably made concessions when asked to do so even though the plants eventually closed anyway; in other cases unions offered to negotiate givebacks prior to closings but were turned down.[5]

Two of every three plants were closed in order to relocate rather than to terminate production. Nearly nine of every ten

[2] Charles Craypo, "The Deindustrialization of a Factory Town: Plant Closings and Phasedowns in South Bend, Indiana, 1954-1983," in *Labor and Reindustrialization: Workers and Corporate Change* Donald Kennedy, Editor, (University Park, PA: Department of Labor Studies, 1984).

[3] Paul Kochanowski, Wayne Bartholomew, and Paul Joray, "Employment Changes in St. Joseph County, 1972-1984," *Indiana Business Review*, November, 1987.

[4] *Ibid.*

[5] Craypo, 1984, cited at note 2.

were closed by absentee rather than local owners. During 1961-1970 parent companies terminated auto- and vehicle-related production employing more than ten thousand workers; during 1971-1987 absentee owners relocated production in 15 closings and terminated it in four others.[6] Firms closed South Bend plants in the 1960s because they had failed in the product market and lower labor costs and local taxes elsewhere would not solve their problems. They closed them in the 1970s and 1980s in order to transfer production to places where they could pay lower wages, avoid unions, and enjoy a better "business climate."

Despite the focus on shutdowns, considerable manufacturing employment disappeared because of long-term plant phasedowns rather than abrupt closings. Sudden plant closings make newspaper headlines and raise the collective consciousness about social wages and business incentives, but gradual operating phasedowns, which often precede complete shutdowns, can take a greater toll in lost jobs and incomes. In 1953, the eight largest South Bend manufacturers employed 43,136 workers; by 1983 the same firms employed 7,957 persons, an 82 percent decline. Three of the eight had been closed and the remainder phased down to shadows of their peak employment levels. By 1988, two more had closed and the other three employed less than half the number they had in 1983: two of them were threatening to halt production altogether. No such core manufacturing plants remain in South Bend.[7]

Restructuring Manufacturing

South Bend manufacturing was restructured during and following its deindustrialization. Manufacturing employment declined in the 1960s because of the plant closings but rose in the next decade and peaked at 29,130 in 1979. It dropped sharply during the recession of the early 1980s (which started earlier and lasted longer in South Bend than nationally). After recovering somewhat in 1984 it declined again to 23,707 in 1986. During 1979-1986 South Bend lost an average 2.7 percent of its manufacturing jobs annually. This happened despite a 13 percent increase in the number of manufacturing firms and net employment gains in several industries.

Table 2 identifies the major areas of job losses and gains between 1979 and 1986. Employment improved overall in the nondurable industries, but the gain represents only about two percent of current manufacturing employment. Durable manufacturing sustained severe losses mainly in non-electrical machinery and transportation equipment, industries that are in structural decline both in South Bend and nationally. Simultaneous increases in the number of firms in these industries simply reflect a restructuring away from large primary firms and toward small, tertiary suppliers. For all durable goods industries except instruments, 6,495 jobs were lost and 35 firms gained during 1979-1986.

---

[6] Local firms relocated production in two cases and terminated operations in two others, although two of them were local only because the owners of small conglomerates resided in the South Bend area at the time. Absentee corporations owned 28 of 32 closed plants, and relocated production in 20 of the closings. In 15 of the 20 production relocations, absentee owners had recently acquired the South Bend plants.

[7] Two medium-sized employers are constructing plants in South Bend: a U.S.-Japanese joint-venture in continuous steel casting and a British manufacturer of engine pistons. Together they represent several hundred new production jobs. These additions suggest that perceptive durable goods manufacturers are prepared to locate new facilities in a state that promotes its low social wage and near a historic factory town that boasts an experienced industrial work force and whose unions have been tamed. This could mean a partial return of metal fabricating now that the unions have to be more concerned with jobs per se than in their terms and conditions.

Table 2

Changes in Manufacturing Employment and Firms, South Bend Metropolitan Statistical Area, 1979-1986

	Employment						Firms
	1979-83		1983-86		1979-86		
Industry	Jobs	%	Jobs	%	Jobs	%	1979-86
All Nondurable Mfg.	137	2	376	5	513	7	17
Printing, Rubber & Plastic	349	8	391	12	740	16	24
Chemicals	402	115	−245	−33	157	45	−1
Apparel, Paper, Leather	−396	−35	−11	−1	−407	−36	−6
Other	−218	−18	241	25	23	2	−0−
All Durable Mfg.	−5901	−27	444	3	−5457	−25	39
Non-electrical Machinery & Transportation Equipment	−4821	−29	−1189	−10	−6010	−37	25
Primary and Fabricated Metals & Electrical Machinery	−1246	−26	1012	28	−234	−5	12
Other	166	22	621	134	787	103	2

Source: Based on data compiled by Kathy Zeiger, Labor Market Analyst with the South Bend Office of the Indiana Employment Security Division of the Department of Employment and Training Services.

The restructuring of South Bend manufacturing from basic durable goods production to smaller-sized establishments in tertiary and nondurable goods industries occurred against the backdrop of rapid expansion in a much larger nonmanufacturing sector. By 1986, manufacturing accounted for just 23 percent of area total employment. Trade and services, the fastest growing industry groups, each employed more South Bend workers than manufacturing. Together they represented 57,000 jobs and 54 percent of area employment. By the end of 1987, jobs in trade and services had increased by more than 3,000 while those in manufacturing had risen by less than half as much.[8]

Costs and Benefits of Restructuring

Questions need to be asked about the quality of jobs in addition to the quantity of jobs being lost and created. Do the benefits from a restructured local industry offset the costs associated with a deindustrialized traditional heavy manufacturing sector, when costs and benefits are defined in terms of area payroll, individual and family employment and earnings, and conditions of work?

The shutdown of a local brewery in 1972 with the loss of 253 production jobs, for example, cost the displaced employees and the South Bend community an estimated one million dollars annually in direct payroll, based on subsequent job and earnings experiences of the displaced workers.[9] Did the replacement of these jobs with 253 nonmanufacturing jobs leave the area better or worse off?

A study of wage and employment gains and losses in Indiana for a one-year period during 1985-1986 indicates it did not improve the area. The state gained jobs (mainly nonmanufacturing) at a 4.6:1 ratio but payroll dollars at only a 2.4:1 ratio. In other words, it took nearly two new jobs to match the earnings of one lost job. This is because average weekly wages for the jobs lost (mainly in steel, transportation equipment, and non-electrical machinery) were $471, in contrast to $318 for the jobs gained (mainly in trade, service, and finance).[10] If this trend continues, the author of the study concludes,

[8] Indicative of trends in the new service economy is that the fastest-growing source of jobs in one nonmanufacturing industry classification in South Bend is lawn care services; in another it is travel agencies.

[9] Charles Craypo and William Davisson, "Plant Shutdown, Collective Bargaining and Job and Employment Experiences of Displaced Brewery Workers," *Labor Studies Journal* (Winter).

[10] The exception was construction, a high wage nonmanufacturing industry which gained 12,400 jobs statewide and raised the average weekly wage figure for all of nonmanufacturing.

"Two incomes from service jobs will be required to provide the same life-style that one manufacturing job allowed." [11]

South Bend also experienced this kind of disproportionate income loss in the course of its industrial restructuring. One study finds that the loss of 50 percent of South Bend's primary manufacturing jobs during 1956-1984 resulted in a 7.9 percent reduction in real earnings locally compared with an 18.6 percent rise nationally. Manufacturing pay in South Bend increased 19.3 percent but was more than offset by an 11.8 percent earnings decline in the larger and faster growing service sector.

Payroll per worker in South Bend in 1956 was 16 percent above the national average. From 1956 to 1970, average real earnings rose both nationally and in South Bend but increased faster nationally, especially during 1962-1970, when South Bend's major plant closings occurred. Between 1970 and 1979, real earnings fell in both, but dropped faster in South Bend, until by 1979 the national average exceeded that locally. After 1979, real earnings fell even faster in South Bend but rose at a modest pace nationally.[12]

The importance of women in the South Bend labor market and of gender-based differentials in earnings and employment helps explain these income trends. According to data compiled by a South Bend women's organization, during 1970-1980, women workers filled 85 percent of the new jobs in South Bend, compared to 60 percent nationwide. Total female employment rose 36 percent in contrast to 5 percent for men (compared with national increases of 39 and 14 percent respectively). In 1979, when the industrial restructuring of South Bend was well under way, full-time women workers earned 11 percent less locally than nationally, although equivalent males earned 8 percent more, about $1,000 annually in each instance. South Bend women made 54 cents for every dollar made by South Bend men, compared to the national average of 63 cents.[13]

As South Bend lost its traditional jobs in basic industry and restructured its manufacturing into nondurable goods production and its service and trade sectors were being greatly expanded, the structural demand for labor was transformed. The labor force readily conformed to this new demand, mainly because an ample supply of women workers was culturally and institutionally prepared to fill the lower paying, role-defined, nonunion jobs being generated by reindustrialization.

Not only were these restructured jobs entirely different, but so were the workers who took them. This can happen in industrialized countries where labor markets are highly segmented according to gender, race, unionization, and social distinctions. Actual differences in abilities and capabilities among workers are greatly exaggerated, workers are paid different wages for doing similar work, and deep seated social barriers prevent the disadvantaged among them from competing in labor markets on an equal footing.[14]

Thus, the shift from "primary" to "secondary" employment in South Bend and the corresponding reduction in relative earnings and community payrolls by national standards can be explained by the following trends and conditions: (1) the historic concentration in South Bend of high paying basic industries together with the ability of militant local unions, especially at Studebaker and Bendix, to negotiate large pattern settlements; (2) the subsequent dismantling of union

[11] Jerome N. McKibben II, "Job Gains versus Wage Gains—Indiana's Deindustrialization Continues," *Indiana Business Review*, Vol. 62, No. 2 (May 1987), p. 7.

[12] John Peck, "Structural Evolution in Midwestern Local Economies: The Case of South Bend, Indiana, 1956-1984," Paper presented at the Eastern Economic Association, Washington, D.C., March, 1987.

[13] Teresa Ghilarducci and Ann Clark, Editors, *South Bend Women: Life, Work and Family* (South Bend, IN: Working Women's Coalition, 1986).

[14] Frank Wilkinson, Editor, *The Dynamics of Labor Market Segmentation* (New York: Acadamic Press, 1981).

structures through plant closings and phasedowns and the break-up of industry wide bargaining patterns; (3) the interaction between industrial restructuring and gender-based differentials in earnings and employment opportunity; (4) the persistence of gender discrimination and other forms of local labor market segmentation. This interpretation differs fundamentally from one that explains deindustrialization in terms of variations in factor prices and from one that argues that reindustrialization based on expansion of trade and service employment leaves workers and communities as good as or better off than they were before the event.

[The End]

Worker Responses to Plant Closings

By Harry R. Targ, Robert Perrucci, Carolyn Perrucci, and Dena Targ

The Labor Studies Research Group

Purdue University

Thirty-two million jobs were lost in the United States in the 1970s due to plant, store, and office shutdowns and runaway shops.[1] Over eleven million jobs were lost due to plant closings, relocations, and production cutbacks from 1979 to 1984.[2] More than one-half of the eight million new jobs created between 1979 and 1984 paid less than $7,000 per year,[3] and among all workers there has been a 25 percent increase of part-time jobs between 1975 and 1985.[4]

These and other facts suggest that over the last 20, the U.S. economy has experienced economic stagnation, massive plant closings and shutdowns, decline of manufacturing jobs, decline in wage levels, an increase in service jobs, an increase in the percentage of the work force engaged in part-time work, and corrolary to all of this declining numbers and influence of trade unions in the work force.[5] Researchers have only begun to assess the impacts of these structural economic changes on American workers. Very few studies have gone beyond an analysis of the physical health, psychological, and economic impacts of plant closings to study worker attitudes, changing political consciousness, and political behavior resulting from job loss. Clearly, such knowledge would be helpful in building political coalitions to protect the interests of American workers and their communities from the negative effects of the radical restructuring of the U.S. economy.

This study begins that process by assessing worker cognitive responses, or beliefs, that may have resulted from job loss due to different kinds of plant or store closings. The cognitive responses are a series of measures relating to (1) confidence in political and other major American institutions; (2) explanations for high unemployment; and (3) attitudes toward

[1] Barry Bluestone and Bennett Harrison, *The Deindustrialization of America: Plant Closings, Community and the Dismantling of Basic Industry* (New York: Basic Books, 1982).

[2] Office of Technology Assessment, *Technology and Structural Unemployment: Reemploying Displaced Adults* (Washington: Congress of the United States).

[3] *New York Times*, "Low-Paying Jobs Found Rising," December 16, 1986, p.18.

[4] William Serrin, "Part-time Work, New Labor Trend," *New York Times*, July 9, 1986, p.1.

[5] Carolyn Perrucci, Robert Perrucci, Dena Targ, and Harry Targ, *Plant Closings: International Context and Social Costs* (New York: Aldine, 1988).

the role government should take to mute the effects of unemployment. These cognitive responses will be compared among (1) unemployed workers with a control group of employed workers; (2) workers from different closing settings in which the extent of worker-manager conflict ranges from low to high; (3) workers from factory and retail store closings; and (4) workers in closing settings with varying degrees of attachment to their unions.

The Plant and Store Closings

The data analysis below was derived from worker responses in studies of two unionized plants and one unionized store closing, and a non-union company that maintained normal operations (i.e., no layoffs or closure). The least conflictful closing setting occurred in Frankfort, Indiana, at the Peter Paul Cadbury plant. In April, 1983, the company told union officials from Retail, Wholesale, Department Store Union (RWDSU) Local 1976 that it would be closing in November, 1983, laying off 250 workers. Management stressed that the closing was not the result of unions, nor the fault of the work force. Over the course of the next several months, the company worked out a closing agreement with severance pay, continuation of health and life insurance benefits, and provided some workshops on job searching and other related skills. While the company (as part of a multinational corporation owned by Cadbury) was consolidating its U.S. operations and moving solely for profit reasons, it did attempt to ease the workers' transition to unemployment *compared with other plant closing scenarios.*

A second plant, making RCA television cabinets in nearby Monticello, Indiana, announced in July of 1982 that it would be closing in December, 1982, laying off about 800 workers. The local union, the United Brotherhood of Carpenters and Joiners (UBCJ) Local 3154, offered substantial concessions to keep the plant open. RCA was the town's largest employer and after a month of publicity in Monticello about the closing and mobilization by local politicians and business people to plan to purchase the plant from RCA, the company announced it was suspending plans to close.

One month later, after talk of a company buyout had ended, the company again announced to its workers and the community that it was closing its operations in December, as previously planned. Company and union leaders negotiated a closing contract that involved severance pay and extensions on insurance coverage. RCA provided no transitional job search or other services to the workers before the closing as did Peter Paul Cadbury.

The third and most precipitous closing in this study was of three Kroger grocery stores in and around Greater Lafayette, Indiana, employing 183 unionized workers. A company representative announced on January 17, 1983, that the three stores (one was less than a year old) would close on February 26, 1983, because of the faltering economy, inadequate profit margins, and "non-competitive labor costs." Several workers told the local newspaper that Kroger was trying to break the union and some indicated that they wanted their union local, the United Food and Commercial Workers (UFCW) Local 25, to negotiate concessions with the company.

On February 1, a company spokesman stated that if workers took concessions, Kroger stores would stay open for at least one year. Proposed concessions included cuts in wages up to $2.70 per hour, loss of five personal holidays and sick days, loss of one week of paid vacation, cuts of 60 percent of health and welfare benefits, and an end to overtime pay. The company said the workers had until February 11, to respond to the offer. Some workers urged in a meeting that the union authorize a vote on the offer. Union officials argued that the offer meant such drastic cuts in worker wages and benefits that they could not recommend a vote. In mid-February

William Wynn, International President of the United Food and Commercial Workers (UFCW), sent a communique to the headquarters of Kroger in Cincinnati, Ohio, saying that he would allow the local in Lafayette to vote if the February 26, closing deadline was rescinded.

Beginning in the third week of February, the company and the union local worked on severance pay and other issues such as transfer rights and seniority lists for those who would be entitled to find work in other Kroger stores in central Indiana. The company did not change its closing date however. Finally, on Friday, February 25, the company arranged an in-store vote on its concessions package without the authorization of the union local. Workers voted against accepting the concessions 88 to 41. Two days later, the Kroger stores closed and management claimed that it was the workers' decision that led to the closing. Compared to Peter Paul Cadbury and RCA, the Kroger closings represented more *worker-company conflict* and more mixed feelings about *the union role in the closings.*

Worker Responses

The analysis below is based upon questionnaire responses about workers' attitudes toward governmental institutions, causes of unemployment, and what government should do to end unemployment. Questionnaires were received from 75 Frankfort workers in April of 1984 (of 200 sent), 328 RCA workers in July of 1983 (of 686 sent), 29 Kroger workers in August of 1983 (of 72 sent). Also 42 workers in a continuously operating factory in central Indiana responded to the questionnaire in August of 1984 to provide a comparison with those who lost their jobs in the three other sites.

Table I provides a summary of responses of workers from each of the two plant closings, the combined store closings, and the continuously operating plant on three sets of beliefs relating to confidence in institutions, reasons for the high rate of unemployment, and the role government should play in responding to workers' needs. While the data do not measure change from before to after the closings, causal inferences can be drawn from differences in beliefs between the varying groups of workers. An ideal test of impacts of plant closings on workers' beliefs and attitudes would require some kind of pre- and post-closing examination, difficult to carry out without pre-closing notification.

Table I: Impacts of Plant Closings on Workers' Beliefs

	Displaced From			
	Kroger	RCA	Peter Paul	Continuously Employed
Confidence in Institutions				
(% with "great deal of confidence")				
1. Labor unions	10.3	22.0	22.8	2.4
2. Big business	10.3	3.1	8.7	4.8
3. Congress	6.9	2.1	4.4	2.4
4. Supreme Court	27.6	10.1	14.0	21.4
5. Presidency	20.7	10.1	15.2	35.7
6. State legislature	6.9	3.7	4.3	7.1
7. Governor	6.9	5.5	10.9	14.3
Reasons for High Unemployment				
(% selecting each as the number one reason)				
1. Unions	17.2	6.7	9.7	14.3
2. Big business	13.8	11.6	11.8	4.8

3. Foreign competition	27.6	51.7	39.8	50.0
4. Government	20.7	11.9	21.5	9.5
Role of Government Should Be				
(% agree)				
1. cut size of government	17.2	18.7	19.2	33.3
2. hire any who need a job	27.6	40.7	27.3	14.3
3. see that families have enough income	44.8	63.9	45.5	26.2
4. tax rich to redistribute wealth	27.6	55.0	45.5	52.4

Employed vs. Unemployed Workers: Comparing workers' confidence in institutions suggests that unemployed workers may have less confidence in them than those still working. The continuously employed workers had more confidence in the President and the governor than did the unemployed. Further, not surprisingly given their nonunion status, the employed workers had much less confidence in unions than did those in unions. However, contrary to expectations, the employed workers had less confidence in big business than two of the three groups of displaced workers. Perhaps the low degree of confidence in big business among the employed workers resulted from the statewide and national magnitude of plant closings, giving respondents a sense of pessimism about their own futures. It is interesting to note that in a 1984 national sample, Americans were much more likely to be confident in big business (19 percent), Congress (28 percent), the Supreme Court (35 percent), and the Presidency (42 percent) than any of our four groups of workers. Only 12 percent of Americans had a great deal of confidence in labor unions, a figure higher than both the nonunion and Kroger workers reflected.

As to reasons for high unemployment in the United States, the continuously employed workers were less likely than any of the displaced workers to blame big business and government. They, and the displaced Kroger workers, were more likely to consider unions to be responsible for unemployment than the former RCA and Peter Paul Cadbury workers.

Finally, regarding the role of government, the employed workers were less willing than any group of unemployed workers to have government provide income and job supports, and they were far more eager than the other groups to cut the size of government. Contrary to expectations, the employed workers were in agreement with most of the unemployed on the idea of taxing the rich to redistribute wealth.

Level of Discord in the Closing—Store vs. Factory Closing and Attachment to Union: The three case studies of Indiana closings indicated that Peter Paul Cadbury was most sensitive to the problems of workers during the transition to joblessness, and Kroger was least so. Also, as noted earlier, the Kroger experience concerned retail stores, RCA and Peter Paul Cadbury, manufacturing facilities. Finally, accounts of the closing scenario at the three Kroger stores indicated more worker criticisms of their union, either local or international, than did either the RCA or Peter Paul Cadbury cases. While it is difficult to disentangle the most important elements of any differences in workers' beliefs due to these events, the first task is to see if such differences exist.

Kroger Workers' Attitudes

Table I suggests that on several beliefs the Kroger workers differ from the other work groups. For example, the Kroger workers had considerably less confidence in labor unions than did the two other groups of displaced workers and somewhat more confidence in big business than

all the other workers. They also retained more confidence in the Supreme Court and the presidency than the other displaced workers' groups. In open-ended responses on our questionnaire and in responses to questions in the local newspaper, some outspoken Kroger workers charged the company with trying to destroy the union and drastically reducing workers' wages, while other Kroger workers leveled harsh attacks at the union for not allowing the Local to vote early in the conflict for concessions in the existing contract. Perhaps this mix of anger at the company and disenchantment with the union explains some of the differences between the Kroger and other displaced workers.

The joint disenchantment with Kroger and the local union may explain the reasons for national unemployment identified by the Kroger workers. These workers selected both unions and, to a lesser extent, big business more often than the other three groups of workers. However, the Kroger workers were much less likely than the other groups to identify foreign competition for the cause of unemployment, probably because from the vantage point of retail trade in food, such a factor is not nearly as potentially correct an explanation as for those in factories. Finally, the Kroger workers tended to cluster around the RCA and/or Peter Paul Cadbury workers on opinions of what the government's role should be, with one exception: They were less likely than either of those groups to endorse taxing the rich and redistributing wealth.

Assessments of the impacts of plant closings and unemployment on workers' beliefs requires more study. The data reported above give some sense of differences in beliefs that may be attributed to difference in work status, intensity and extent of conflict in a closing setting, the level of support the union international and local provide for workers being displaced, and whether the workers come from factories or retail stores.

The data showed differences between the employed and unemployed workers as to confidence in institutions, the role of big business in causing unemployment, and the role government should play in ameliorating the effects of unemployment. Also, the data indicated that the conflictful labor-management dispute at the Kroger stores and parallel anger with the union undercut a developing critical posture on government and business noted among the RCA and Peter Paul Cadbury workers and left the Kroger workers more critical of unions than the other displaced workers.

[The End]

You are invited to become a member of

THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

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

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

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

Dues for 1989 calendar year membership are listed below.

Canadian and Foreign payments must be made in U. S. dollars by cashier's check or international money order—plus $6.00 to cover postage.

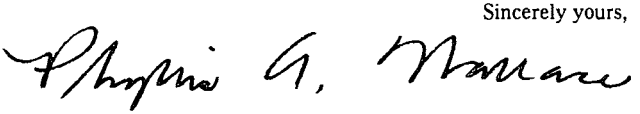
Regular Membership	$ 40.00
Family Membership (at same address, no additional publications)	4.00
Contributing Membership	100.00
Retired Membership (if a member for at least 10 years and not now gainfully employed)	16.00
Student Membership (Full-time)	16.00
Institutional or Library Subscription	40.00

Some members also make additional tax deductible financial contributions to the Association.

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

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

Sincerely yours,



IRRA President 1988

Also in the
Industrial Relations Research Association Series

INDUSTRIAL RELATIONS RESEARCH IN THE 1970'S: REVIEW AND APPRAISAL

Edited by Thomas A. Kochan, Daniel J.B. Mitchell, and Lee Dyer

374 pages $15.00

THE WORK ETHIC—A CRITICAL ANALYSIS

Edited by Jack Barbash, Robert J. Lampman, Sar A. Levitan, and Gus Tyler

261 pages $15.00

INDUSTRIAL RELATIONS IN A DECADE OF ECONOMIC CHANGE

Edited by Hervey Juris, Mark Thompson, and Wilbur Daniels

407 pages $15.00

WORKING WOMEN: PAST, PRESENT, FUTURE

Edited by Karen Shallcross Koziara, Michael H. Moskow, and Lucretia Dewey Tanner

408 pages $35.00

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

MEMBERSHIP DIRECTORY 1987

$15.00

HUMAN RESOURCES AND THE PERFORMANCE OF THE FIRM

Edited by Morris M. Kleiner, Richard N. Block, Myron Roomkin, and Sidney W. Salsburg

343 pages $15.00

PUBLIC SECTOR BARGAINING (2nd Edition)

Edited by Benjamin Aaron, Joyce M. Najita, and James L. Stern

325 pages $27.00

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

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

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

ISBN 0-913447-40-4

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION
PROCEEDINGS OF THE 1988 SPRING MEETING, CINCINNATI, OHIO
7226 SOCIAL SCIENCE BUILDING, UNIVERSITY OF WISCONSIN
MADISON, WI 53706 USA

Address Correction Requested