INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

Proceedings of the
1987 Spring Meeting

April 29-May 1, 1987

Boston, Massachusetts

OFFICERS of IRRA for 1987

PRESIDENT:
Michael H. Moskow, Premark International

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

PAST PRESIDENT:
Lloyd Ulman, University of California, Berkeley

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

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

EXECUTIVE BOARD MEMBERS:
Thomas Balanoff, International Brotherhood of Boilermakers
Francine D. Blau, University of Illinois, Urbana-Champaign
Clair Brown, University of California, Berkeley
John F. Burton, Jr., NYSSILR, Cornell University
Peter Feuille, University of Illinois, Urbana-Champaign
Eileen B. Hoffman, Federal Mediation and Conciliation Service
Mark L. Kahn, Arbitrator
Joyce D. Miller, Amalgamated Clothing and Textile Workers Union
Janet L. Norwood, Bureau of Labor Statistics, USDL
Leslie E. Nulty, United Food and Commercial Workers International Union
Charles M. Rehmus, Arbitrator
Ernest J. Savoie, Ford Motor Company
William M. Vaughn, The Stop and Shop Supermarket Company
Donald F. Vosburgh, Transamerica Delaval Inc.

NEWSLETTER EDITORS:
Michael E. Borus, Rutgers University
Marjorie A. Lamb, IRRA National Office

LEGAL COUNSEL:
George H. Cohen, Bredhoff and Kaiser

EXECUTIVE ASSISTANT:
Marion J. Leifer, IRRA National Office

Past Presidents of IRRA

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

1986 Lloyd Ulman

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

Proceedings of the 1987 Spring Meeting

April 29-May 1, 1987
Boston, Massachusetts

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, 1987, Issue of

LABOR LAW JOURNAL

Published and Copyrighted 1987 by

Commerce Clearing House, Inc., Chicago, Illinois 60646

Proceedings of the 1987 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

April 29-May 1, 1987 Boston, Massachusetts

PREFACE

1987 Spring Meeting

Industrial Relations Research Association

The Industrial Relations Research Association is 40 years old this year, and our New England chapter hosts chose to mark the event by titling the Boston meeting the "IRRA 40th Anniversary Spring Conference."

To open the program, President-elect Phyllis A. Wallace reviewed a bit of IRRA's history, for the benefit of many of the newer and younger members in the audience who were not around when the Association "spun off" from the American Economic Association in 1947.

Current topics, with an emphasis on some special industrial relations concerns in the New England area, were addressed by the speakers and panel members during the morning and afternoon concurrent sessions—among them job growth, dispute settlement, plant closings, fringe cost containment, privacy issues, and health care.

Special guest speakers were Stephen I. Schlossberg, U.S. Deputy Undersecretary of Labor, and Congressman Barney Frank, who represents the 4th District of Massachusetts.

The 1987 Spring Conference was a cooperative effort of the Boston, Rhode Island, and Connecticut Valley local chapters, and the national organization is grateful to all chapter members who had a part in putting together a fine conference. Special commendations go to Robert McKersie and Thomas Kochan, program committee co-chairmen, and to Nancy Peace and Theodore Role, who headed the arrangements committee. And again we express our gratitude to the LABOR LAW JOURNAL for publishing the Proceedings of our Spring meeting.

BARBARA D. DENNIS
Editor, IRRA

Make Way for Mature Industries

By Peter B. Doeringer

Department of Economics, Boston University

Even the most casual observer of employment trends in the New England economy would quickly realize that there are many different stories to be told about economic change in the region. The economic boom in Massachusetts is rooted in very different causes in high tech Lowell and commercial Boston; the success of the coastal New England corridor has hardly filtered down to the eastern counties of Maine, or to southeastern and far western Massachusetts.

This observation of widespread variation in different parts of the New England region is supported by state and local data on economic change. For example, during the decade of the 1970s when private employment in the national economy grew at an average annual rate of about 3.5 percent, state growth rates in New England ranged from 4.3 to 1.4 percent per year. Within a state such as Massachusetts, the Plymouth Labor Market Area grew at an annual rate of 8.1 percent during this period compared to virtually no job growth in the Wareham Labor Market Area.

My colleagues and I recently completed a study of this diversity in state and local rates of economic growth. In this study, we found a distinction between *visible* influences on growth—wages, energy costs, taxes, and the like—and less-easily measured, *invisible* factors.[1] Using an array of statistical models to determine the extent to which visible factors are important in explaining differences in rates of job growth among states, our study concluded that: (1) Over both long run and short run periods, the interaction between the mix of industry in the state and national trends is the single most important predictor of employment change. (2) Industry mix is sticky, changing only gradually over periods of a decade or more. (3) Energy costs and work stoppages are the principal visible cost factors that affect growth, while other visible factors, such as taxes and wages, appear to have very little effect on changes in employment. Over the long term, industry mix and visible cost factors could explain only about two-thirds of state growth patterns.

At the local level, these visible factors are far less important for growth. In Massachusetts, for example, only industrial mix mattered in explaining variations in growth rates among labor market areas. The expansion and contraction of employment across the state appears either to be random or to be influenced by a set of subtle, locale-specific influences not captured well in simple models relying upon visible costs and industrial mix. It is, therefore, important to "get behind the numbers" to explore further the causes of local growth.

In the case of mature industries, we found that a cluster of invisible factors—corporate strategies, the quality and flexibility of labor, entrepreneurial skills, the effectiveness of management practices, and the labor-management environment—can have decisive influences upon the location and performance of particular industries and firms. We argue that policies targeted at these invisible factors,

[1] For a complete description of the data and methods, see P.B. Doeringer, D.G. Terkla, and G.C. Topakian, *Invisible Factors in Local Economic Development* (New York: Oxford University Press, forthcoming).

and carefully tailored to the circumstances of particular firms and localities, are far more likely to encourage economic growth than are policies relying on subsidies to visible costs. Based on this analysis, we conclude that mature industries offer an important complement to emerging industries as a source of sustained growth in the New England economy.

Case Studies of Mature Industry

To examine the role of invisible factors in local economic development, we selected the Montachusett region—a relatively self-contained area, centered around Fitchburg, Leominster, and Gardner in Northern Worcester County—for in-depth study. While no single area or region can ever be "representative," the economic performance of the Montachusett region mirrors, in many ways, that of other depressed industrial areas across the country.

During the nineteenth and early twentieth centuries, the Montachusett economy prospered in a way that reflected the economist's model of regional comparative advantage. The presence of water power from the Nashua River encouraged the location of a variety of mill-based industries such as shoes and textiles. Water availability and ready access to high quality hardwoods and to pulpwood led to the development of lumber, paper, and furniture industries. Proximity to northeastern markets, and to the port of Boston, further added to these locational advantages. By the mid-twentieth century, most of the region's mill-based industries had been replaced by a second set of industries, plastics, fabricated metals, and non-electrical machinery, that drew upon the skill base established in early industries.

By the 1970s, however, Montachusett was experiencing all the symptoms of mature industrial blight: high unemployment, plant closings, and slow growth. The visible cost advantages for manufacturing that were so important to the region's early industrial development had disappeared. Changes in markets, transportation, and power costs had all worked against the historical locational advantages that first attracted mill-based industries to the region. Similarly, changes in technology in some industries reduced the importance of the region's skilled labor force. By the mid-1980s, many firms in the region reported serious cost disadvantages in their traditional product lines and high technology industry failed to locate in Montachusett to the extent it had in neighboring areas.

Despite these cost disadvantages, segments of mature industries continue to survive and even prosper in Montachusett. Moreover, these industries sometimes out-perform their counterparts in the state and the nation. Even where the record of job loss has been particularly poor, as in furniture or apparel, there are many product lines that show considerable competitive strength.

Field surveys of local businessmen and trade union officials suggest that these mature industry success stories are not random occurrences. Rather there are systematic patterns of invisible factors, cutting across a wide variety of mature industries, that are associated with success and failure. The universal correlate of success is found in shifting from mass production to some form of product specialization. Businesses that have continued to serve undifferentiated mass production markets are invariably in trouble.

The Product Cycle and Industrial Maturity

The experience of the Montachusett region reflects the importance of product life cycles, the evolution of production from innovation and product development, through rapid expansion into large scale markets served by mass production, to reliance on saturated markets beset by

foreign competition.[2] One by one, the region's industries have reached maturity and appear threatened by long-term decline.

Other older communities in New England have been able to recover from the decline caused by a mature industrial base by securing industries that successfully generated fresh product cycles by developing new products. This has been the experience of areas such as Lowell that have replaced mill-based industry with high technology firms.[3] It is also characteristic of a segment of the Montachusett economy that has been able to draw upon some of the invisible factors long present in the region: the availability of skilled labor and general purpose capital equipment and a local proclivity for "tinkering." However, high technology industry has proved in the past to be volatile and somewhat footloose.[4]

The experience of the Montachusett region, however, illustrates an important alternative to high technology innovation—product specialization—as a source of economic revival for mature industries. Business strategies emphasizing product specialization have dramatically changed the character of most mature industries in Montachusett. Some have made the transition from mass production to specialized and customized product lines. Others have become more heavily specialized in the distribution and marketing of goods that they no longer produce; while still others have shifted toward providing a variety of business and technical assistance services—the ability to respond rapidly to fill-in orders, the provision of product design services, and the adoption of special quality control practices—to accompany the products they manufacture. Those industries and firms that concentrate on specialized products find their market niches defensible within surprisingly broad cost limits. Collectively, this experience suggests the possibility of a "post-maturity" phase of the product life cycle, a phase upon which a new prosperity can be built.

The corollary of such specialization in production is that labor and capital must be relatively unspecialized. Strategies of specialization are not possible without considerable flexibility of labor and capital. The capital equipment in the region, as is the case with machine and woodworking tools or plastics fabrication machinery, has always emphasized general purpose applications. The labor force in the region also has a legacy of the kinds of broad skills that have been needed to set up and operate unspecialized machinery. This has aided immeasurably in accommodating the product shifts associated with strategies of specialization.

For less-skilled jobs, the labor market has become structured in such a way as to provide relatively elastic supplies of labor to all but the lowest-paying tier of firms in the economy. For the firms (such as plastics fabricators) in the lowest tier of the labor market, labor supplies have been somewhat more problematic and uncertain, but various labor reserves, youth, female workers, displaced industrial workers, and immigrants, have generally been available to ease their recruitment problems.

Moreover, the labor supply has been noted for its positive work attitudes. These attitudes have also facilitated labor flexibility and have resulted in high levels of productivity, both of which help offset other visible costs.

Finally, the move to customized production in Montachusett has benefited from the prevalence of small- and

[2] For a summary of the product cycle literature see R.D. Norton, "Industrial Policy and American Renewal," *Journal of Economic Literature* 1 (March 1986), pp. 1-40.

[3] See P.M. Flynn, "Lowell: A High Tech Success Story," *New England Economic Review* (Sept./Oct., 1984), pp. 39-49.

[4] See P.B. Doeringer and P. Pannell, "Manpower Strategies for Growth and Diversity in New England's High Technology Sector," in *New England's Vital Resource: The Labor Force*, ed. by J.C. Hoy and M.C. Bernstein (Washington, D.C.: American Council on Education, 1982).

medium-sized firms. Freedom from bureaucratized organization and the presence of personalized and paternalistic labor relations practices that characterize such firms, have allowed the potential flexibility in the labor force and the capital stock to be realized under actual production conditions.

Policies To Strengthen Specialization

In Montachusett, the visible disadvantages of location are legion: high energy prices, long distances to many national markets, and wage rates for unskilled labor that exceed those of its chief foreign competitors in mature industries. Only in a few instances are these disadvantages offset by positive visible benefits, such as central access to the well-established greater New England markets, skilled labor at nationally competitive wages, and close proximity to centers of newly emerging technologies. As a result, many traditional product lines have been shifted to areas promising lower labor and land costs unmatched by any New England locality.

While economic revival based on visible cost factors is unlikely, growth based upon product specialization is now a reality. Of the variety of policies that might be used to encourage further specialization within mature industries, those related to the labor market appear to hold considerable long-term promise for growth.

Skill Development: One of the strongest features of the Montachusett region has been a labor force of skilled craftsmen with a strong mechanical orientation. As the area's mature industries have become economically troubled, however, the skill pool is being disrupted. The younger, more mobile skilled workers have begun to leave the area, while the aging of the labor force in mature industries is leading to a massive wave of retirements of the area's most skilled and experienced workers. This combination of outmigration and retirement not only generates a potential crisis of skill replacement over the next few years, it also threatens traditional training arrangements whereby one generation of skilled workers prepared the next through on-the-job training.

Traditionally, the schools were not expected to play a major role in maintaining the skill base of the Montachusett economy because skill development was satisfactorily conducted through on-the-job training in the factory and informal training within the family. Now that these traditional sources of training are being disrupted, and at a time when retirements and new technologies are already straining the training capacity of employers, local companies are invariably turning to the schools for solutions.

One important way to strengthen the connection between formal education and the shop floor would be to revive a type of training arrangement that once flourished in the area—the industrial apprenticeship. As recently as the early twentieth century, Montachusett had a well-known "Fitchburg Plan" for skill training that involved part-time schooling and part-time work in the machine trades.[5] Mass production and standardization of equipment, however, drove out such industrial apprenticeships. The apprenticeship training model survives today only on a limited basis, primarily in the building trades.

The essence of apprenticeship, however, is to prepare workers with sufficient skills to allow them to produce a wide variety of products. Apprenticeship is particularly well-suited for partnerships between schools and smaller employers that lack the training capacity and continuity of work needed to train their own permanent work forces. Apprenticeship skills are the very kinds required by an economy engaged in specialized and customized

[5] H.D. Wagoner, *The U.S. Machine Tool Industry From 1900 to 1950* (Cambridge, MA: MIT Press, 1968).

production and where employment levels in particular firms are often in flux.

Worker Attitudes: The attitude of the local workforce is one of the region's most important invisible factors. Such positive work attitudes are not unusual in mature economies that have experienced substantial job loss.[6] While these positive attitudes are usually fostered by social institutions, families, schools, and churches, there is evidence from our interviews that recent policies of employers and unions have played an additional role. Some employers in the region have been developing personnel practices to improve career employment opportunities for their workers and to provide other incentives that will encourage positive worker attitudes.

The Labor-Management Environment: The current working relationships between employers and unions in the area demonstrate the advantages of labor-management cooperation. Many mature economies have a tradition of strong unions and militant bargaining. This militancy has often been a deterrent to growth, and to specialization, as traditional product lines have matured. The presence of unions and established collective bargaining relationships, however, can also provide an important opportunity for business and labor to collaborate on promoting economic recovery in ways that ensure that both sides share in the gains from expansion. At the level of the workplace, this sharing of benefits can be encouraged through greater communication and sharing of responsibility for the profitability of the company.

In Montachusett, there were numerous examples of the negotiation of more flexible job assignments and work rules needed to produce more specialized product lines efficiently and to meet rapid response production schedules. Other approaches could involve worker-management committees for studying how to improve both productivity and the quality of work, and the bargaining over new compensation arrangements for ensuring that employees share in business growth.

Mature economies also need to explore ways to improve the business environment at the industry level by fostering labor-management cooperation. Initially, this effort might focus on the development of joint policies directed at strengthening skill development through greater involvement in secondary and post-secondary vocational policy. There may also be opportunities for unions and management to collaborate in improving the economic infrastructure in areas such as transportation and the provision of social services.

Conclusion

The experience of the Montachusett region suggests optimism for those mature industries and mature economies that embark upon growth strategies centered on product specialization.[7] Labor market and industrial relations policies to enhance workplace flexibility can be a major asset for supporting such strategies of specialization. Relying upon specialized production in mature industries, under the right local circumstances, may be a more reliable source of future growth than development strategies based upon high-risk, and often footloose, high technology industries.

[The End]

---

[6] See also P.B. Doeringer "Internal Labor Markets and Paternalism in Rural Areas," in *Internal Labor Markets*, ed. P. Osterman (Cambridge, MA: MIT Press, 1984).

[7] For a further elaboration of this theme of specialization, see M.J. Piore and C. Sabel, *The Second Industrial Divide* (New York: Basic Books, Inc., 1984).

Creative Alternatives to Plant Closings: The Rationale For Notice

By Francis T. O'Brien

Providence College

This article addresses a timely and a challenging topic: "Creative Alternatives to Plant Closings." The alternative to plant closings is, of course, to keep the plants open. To be creative is to be inventive—to devise new strategies to achieve the desired objective. Presumably, a second best objective to keeping plants open is to formulate strategies designed to mitigate the adverse consequences of a plant closing if one becomes inevitable.

A review of the literature reveals that not everyone agrees that outsiders, whether they be academicians or consultants or politicians, should be examining this question. Some argue that it is the company's business; it is a business decision as to whether or not a plant should be closed. Such a view is understandable; it follows from the employer's right to own and manage property. Further, it is often argued that plant closings are a normal consequence of the type of economic system in which we live. Plant closings are a reflection of the competitive nature of the economic environment and a by-product of the process of economic growth. Plant closings have been occurring for virtually as long as the plant form of business organization has existed. When observed in conjunction with the decline of some industries and the emergence of other industries, plant closings may even be viewed as a positive economic signal—a sign of vitality within the economic system.

If plant closings are not a new phenomenon, what accounts for the recent general interest in this issue? Why has the IRRA seen fit to devote one of its sessions to this topic?

The impact of plant closings is more widespread today than in the past. The number of plant closings is increasing, and the closings are not limited to small and medium size firms. In some cases, entire industries or substantial segments thereof are affected. Furthermore, the interdependent nature of production suggest that the impact is not felt solely by the firm that closes its doors. Secondary and tertiary effects often spread throughout large segments of the industrial community.

The face of competition has changed dramatically in recent years. Whereas, historically, competition's driving force came from within the economic system itself, today, much of it is attributable to competition from outside the system. If we were tolerant of the consequences of domestic competition, we may be less so of foreign competition. Finally, our highly developed communications network also serves to make us more aware of the extent of plant closings as they occur.

Thus the problem today is more visible than it was in the past. It is also generally regarded as more serious because of its ripple effect. Its roots lie, at least in part, outside of our own society. These factors probably suggest why we are dealing with this issue at today's session.

Community Involvement

If plant closings are a major issue, is there a foundation for community involvement? Several factors suggest there is.

The economic impact of a plant closing offers a strong case for public involve-

ment. Not only is there an internal impact of a plant closing, as measured by the employees affected; but there is also a community impact. The community impact may be seen both in terms of the effect that a closing has on other firms that maintain a business relationship with the closing firm and, more generally, on the community itself. Typically, the community will suffer because it loses a contributor to its own social and economic development. So, from a social perspective, there is clearly a public interest in the plant closing issue.

A foundation for community involvement may also be based on the plethora of labor standards and labor relations statutes that presently exist. These laws delineate the rights and responsibilities of the parties at the workplace. Plant closing legislation would merely be an extension of these laws. As we are all well aware, the workplace rights of the parties are not absolute. The employer has the right to own and manage property, but the workers have the right to organize, bargain collectively, and engage in concerted activities. As the rights of one party are advanced, the rights of the other party are typically constrained.

The unfolding of the legal process involves a balancing of rights, and this is precisely how plant closing legislation should be viewed: the company's right to close its plant vis-á-vis the public's right to become aware of the company's intent to close its plant. If "creative alternatives" are to have any significance whatsoever, awareness or notice of plant closings is a necessary prerequisite.

Businesses seem to have a natural aversion to notice. In part, this is due to the associated announcement effect. When a company makes known its intention to close, it may incur added costs. For example, the business may lose some of its employees, perhaps even key employees, as they obtain more permanent employment elsewhere. Further, the morale and loyalty of the remaining employees may deteriorate. If so, labor productivity will probably decline.

Additionally, the firm may find that its normal credit arrangements are impaired as creditors lose confidence in its ability to remain a viable concern. It may also suffer a loss of sales as its customers seek more permanent marketing arrangements elsewhere. The announcement costs are real and may be substantial. They cannot be ignored. What they really argue against, however, is not giving notice but rather giving notice in a vacuum.

A notice requirement, if it is to be both fair and effective, must be part of a larger course of action. Adequate notice, under a comprehensive plant closing response program, will, for example, provide the community with an opportunity to persuade the firm to stay or reverse its decision to close, perhaps by offering technical and/or financial assistance. This form of community assistance is not novel. It serves as an extension of long-standing public programs that have as their objective to attract businesses into a community or so-called "plant opening" programs. Plant opening programs offer yet another basis for public interest and involvement in plant closings. Businesses, which have long welcomed and taken advantage of plant opening programs, can hardly, from a basic fairness standard, refuse the assistance of a community sponsored plant closing program.

Through its plant closing program, the community is asking for lead time to determine if the plant can be kept open and, if so, by whom. The alternatives include: the firm itself, should it stay or reverse its decision to close; the employees, who may assume ownership control; a competitor firm; a firm in another industry; or the community itself, which would operate the firm as a public or quasi-public company. Without proper notice, none of these alternatives can be adequately explored.

In essence, the company is being asked to assume the potential announcement costs associated with notice in order to give the community an opportunity to develop a strategy that hopefully will minimize the costs to them of closing the plant or, ideally, avoid these costs entirely. The plant closing program may also address the issue of compensating the company for its announcement costs should they become excessive.

It should not be assumed that because a company has decided to close a plant that the company has made a sound business decision. Its decision may be based on faulty information or on information that has been processed in a faulty manner. It may also be true that the assumptions on which its decision was based are incompatible with acceptable community standards. Thus, the decision to close may be sound from a business standpoint but undesirable from a social standpoint. If so, the community should have the opportunity to respond. A notice requirement will present it with that opportunity.

Response Strategies

The issue of plant closings is a two-dimensional problem. At one level, we seek to devise strategies that will be useful in avoiding plant closings. These may be referred to as our avoidance strategies. At another level, we seek to devise strategies that will be useful in coping with plant closings. These may be called our response strategies.

Put another way, two questions may be posed. (1) What can be done to reduce the probability that a plant may close? "Notice" is the key element in addressing this issue. (2) If a plant closing becomes inevitable, what can be done to reduce the costs associated with the closing? The substance of the plant closing program is the key element in addressing this issue.

We take note that the issue is not can a business close its plant? The answer to that question in our free enterprise system must emphatically be yes. Businesses must retain the ultimate power to close their doors, unless national safety or health considerations dictate otherwise. Yet, it is neither un-American nor undemocratic nor unfair nor unusual to seek to influence their decision-making process through a legislative system of prerogatives and incentives. This is what "creative alternatives" is designed to accomplish.

[The End]

Creative Alternatives to Plant Closings: The Massachusetts Experience

By Michael Schippani

Consultant, Plant Closing Strategies

Developing and implementing the policies necessary to effectively respond to plant closings presents a tremendous challenge that is as international in scope as it is local, as political in context as it is economic. Considerations of space make it impossible to adequately discuss all the complexities involved. This article will present some of the underlying causes of the problem, utilize the Massachusetts experience as a case study, and then outline a number of specific measures that should form the basis of an alternative policy approach.

In order to present a coherent and practical guide to policy alternatives that are necessary to stem the tide of plant closings, it is important to recognize some of the major underlying industrial and structural factors at the root of the plant closing problem. One historical factor has been the movement of capital toward the magnet of cheaper labor costs, particularly from the industrial northeast to the south and southwest. More recently, of course, has been the rapid pace of capital mobility to even cheaper labor regions anywhere in the world. There are virtually no national or international barriers to this activity, and the pace appears to be quickening.

Another American development that has aggravated the problem of plant closings has been the loss of management effectiveness in basic industries. The result has been a change in external strategies from a nation that had developed a host of basic mass production industries producing for a growing domestic market toward a process of cutting direct investments in production and instead creating joint ventures and contracts with foreign firms.[1] Imports, as a result, have been growing enormously, putting greater strain on the domestic production capacity.

Business Week labeled such activity the "hollowing," or deindustrialization, of American industry. This can be attributed to deficiencies in management, poor relationships between labor and management, and ineffective adaptation to new trends in production technology.

These factors of change have not only hurt workers and their communities but have seriously affected the nation's long-term economic stability and performance. Workers' job satisfaction and motivation are declining,[2] the workplace is under increasingly more sophisticated means of control, and management decisions continue to place the emphasis on the bottom line above all else.

The reality of the industrial economy is that job displacement will not abate. Investments in new technology will continue to dislocate workers, and large corporations will continue to relocate and reorganize the workplace. International competition will continue to present problems since cheap labor and national subsidies continue to emanate from increasing numbers of developing nations.

The Case of Massachusetts

Massachusetts was one of the first states to experience the decline of its older industrial base. In the decades following World War II, employment dropped significantly in a number of durable and nondurable goods manufacture. In the 15-year period up to 1978, over 600 plant closings were recorded, and almost 150,000 workers were thrown out of work. While production and employment in the late 1970s and early 1980s continued to show a decline, the Route 128-Boston belt high technology and service industries proliferated. Plant closings during the early 1980s continued uninterrupted, as they do to this day. In 1985, over 160 plant closings were reported affecting nearly 16,000 workers. An equal number were affected by partial closings or mass layoffs. Upon reemployment, dislocated workers received an average 13 percent decrease in wages. The industrial dislocations had a disproportionate impact on organized labor, as nearly two-thirds of all the plant closings in the state were unionized shops.[3]

The recently passed legislation to alleviate "the impact of major dislocations of employment and to assist in the reem-

[1] Leonard Silk, "Japanese View U.S. Industry," *New York Times*, February 18, 1987, p. D2.

[2] Samuel Bowles, David Gordon, and Thomas Weisskopf, "Industrial Policy—Now the Bad News," *The Nation*, June 4, 1983, pp. 700-706.

[3] *Annual Report*, Industrial Services Program, Mass., 1985.

ployment of dislocated workers" can best be described as an alternative to traditional plant closing proposals while providing for a broad array of responses to the problems of industry in transition. The law as written does not pretend to increase state or worker power to stop capital flight and plant closings. Instead, it provides a base of public-sector support for formal labor participation in the general area of reemployment services, industrial change, and economic development.

While there was broad understanding of the human dimensions of the problem and of the consequences of sudden closings for local government, the bill encountered major problems. The first was intense opposition from many segments of the business community. The second problem was that of enforcement. Maine, for example, had very low compliance with its two-month notice law.

The administration made a commitment to organized labor that it would craft some compromise between business and labor and enact it into law in 1984. The Governor's Commission on the Future of Mature Industries was formed to achieve this goal and included representatives from industry, labor, state and local government, finance, high-technology, and community organizations.

In the Commission deliberations, a new solution to the problems of mandatory notice took form. Traditionally, plant closing laws are seen as a mechanism to deal with emergencies. Their provisions take effect after management has already made the decision to close a plant. The demand for prenotification gives the states and the unions the responsibility to combine effective advocacy with the acquisition of technical expertise and the use of information that they seek.

The Massachusetts law attempted to bridge the gap between emergency response and pro-active activity. To begin with, in return for continued access to subsidies offered by Massachusetts quasi-public finance agencies, employers would pledge to meet minimum standards involving combinations of severance pay and advance notice. The suggested minimum was 90 days; however, no penalties were attached to the agreement in the case of default. Further, business interests agreed to support an extension of mandatory group health insurance premiums from one month after layoff to three months. State supplemental unemployment benefits were made available to workers who lost their jobs.

New Initiatives

A rich variety of new initiatives has made its way into Massachusetts policy and programs as a result of the new legislation: Worker buyouts are being explored in several ways. The mature industries legislation gives priority to employees, and to Massachusetts residents, to provide assistance to purchase the assets in cases where a firm is about to be sold.

Also created was the Massachusetts Product Development Corporation, whose purpose was to stimulate and encourage the development of new products for application to the industrial sector. Workers, unions, and communities need to be encouraged to participate in accessing the resources of the corporation. In order to integrate and coordinate the variety of new initiatives, the law created the Industrial Service Program and an Industrial Advisory Board composed of business, labor, community, finance, and government representatives.

A new quasi-public agency, the Economic Stabilization Trust, was created to provide last-resort financial assistance to firms in trouble in order to save jobs. The EST was organized in a way that makes it the only state finance agency in the country that labor jointly administers with business interests and, as a result, requires the use of social criteria to determine the utility of providing assistance to a troubled firm.

The purpose of the Economic Stabilization Trust is to provide last-resort financing needed to implement a change of ownership, a corporate restructuring, or a turnaround plan for a company in trouble that faces the prospects of significant employment loss. The financial participation of the trust is aimed at supplementing other public and private sector financing and is considered to be investing, not on the basis of a direct financial return, but in order to reduce the social costs of a large employment loss.

Ultimately, the distinguishing characteristic of the Economic Stabilization Trust is that genuine labor participation exists at the policy level. Most importantly, unions are provided with technical assistance and a steady flow of information so as to maximize their role and power in this critical transition period.

A Role for Labor in Industrial Planning

Despite the array of available tools and resources that were now going to be made available to plant-closing victims and manufacturing concerns that were in trouble, still lacking was a crucial mechanism to enhance labor's power and ability to pro-actively influence industrial development and planning. The first obstacle that must be overcome involves respect for worker's knowledge. Workers have no say in the long-term decisions which make or break their job prospects. They are expected to devote their time, energy, and physical abilities to making the goods or providing the services that create profits, but they are treated as part of the machinery when it comes to making vital decisions that affect their jobs.

Very often the workers are the first to anticipate the difficulties their company is facing, not only because they have a vested interest in preserving their jobs, but because their skills and experience provide them with precisely the right tools to analyze what is going on. These same skills and ideas hold the key to alternative policies, which could save jobs, develop new products, provide services that society needs, and enhance labor's power to control its economic life.

The task is to provide workers and their unions opportunities to exhibit some control over economic life by developing expertise in economic policy-making at all levels. This goal can best be accomplished only in broad coalition with those who want a better economy and with a public policy that helps communities rebuild their industrial economies by fully utilizing the ideas and skills of the workforce.

Based on this analysis, a project was developed in the needle trades industry in Southeastern Massachusetts that has since led to new projects in other industries and other regions of the state. The Needle Trades Action Project (NTAP), which began in June 1985, brought together local employers, unions, and community representatives to analyze the strengths and weaknesses of the apparel industry locally and internationally. In recent years, international competition, technological changes, and fluctuating demand had dramatically increased unemployment and underemployment in the industry. Approximately 40 percent of the local workforce, which is predominantly female and Portuguese, is still concentrated in the needle trades.

The NTAP Board is composed of both major unions in the industry, the Amalgamated Clothing and Textile Workers Union and the International Ladies Garment Workers Union, as well as several employers, local and state representatives, and community-based organizations. In addition to the Board, there is a sizable Workers Consulting Committee that participates at all levels of the project.

NTAP is currently considering a number of innovative proposals to help strengthen the employment in the industry: (1) exploring the possibility of establishing a pool of low-interest funds for

upgrading the equipment in the industry (The aim is to capitalize a revolving loan fund through contributions from local banks and credit unions.); (2) marketing the strengths of the local industry to the area's labor force, to New York manufacturers, and to other important areas; (3) sharing the costs of needed engineering services that could help firms in every aspect from cost controls to pricing policies to re-designing factory floors; (4) developing multiskill training programs for the vast pool of underemployed apparel workers; (5) providing bilingual child care assistance to the workforce.

The labor and economic planning project is innovative in several important respects. First, by focusing on job retention and creation, rather than post-dislocation service delivery, the project represents a departure from traditional governmental responses to economic and industrial dislocation, which too often result in worker retraining schemes for lower wage jobs. Second, the project is premised on a very high level of genuine workforce involvement. Third, the project represents a creative collaboration at the local level of management, labor, and community representatives and between state and local government.

The significance of the project lies, in part, in the willingness of state and local policymakers and representatives of unions to explore innovative ways to manage economic readjustment and growth. Recognizing that traditional economic development tools such as tax abatements and low interest loans do not meet the job quality standards of labor, the project is proving that economic development strategies must integrate and build upon the skills and experiences of the workforce. Such integration is enabling regions of the state to integrate their traditional industrial recruitment strategy with one designed to stimulate indigenous economic growth.

Many further elements are needed to form a comprehensive alternative strategy to respond to plant closings. What has been attempted in this paper is to show that human resources and social needs have to be the building blocks for future policy alternatives. Workers and communities are resources too valuable and important to be discarded. What is new is the type of problem to be addressed and the new role for government, workers, and communities. This road leads to a reemphasis on the value of labor and community, good jobs and living standards, and more equitable sharing of information and decision-making power. The fundamental reorientation of policies needed to achieve this alternative strategy is unlikely to occur easily or quickly. But it is the direction that the nation, its workers, and communities need to pursue.*

[The End]

---

* Additional references on alternatives to plant closings: Edward J. Blakely and Philip Shapira, "Industrial Restructuring: Public Policies for Investment in Advanced Industrial Society," *Annals of American Academy of Political and Social Science* 475 (Sept. 1984), pp. 96-109; Bennett Harrison, "The International Movement for Prenotification of Plant Closures," *Industrial Relations*, 23, No. 3 (Fall 1984), pp. 387-409; Michael Schippani, "Massachusetts and Mature Industries," *Labor Research Review* (1987), pp. 79-87.

Crisis and Opportunity for Labor

By Charles Heckscher

Harvard University

The crisis of labor is only too apparent, in New England and everywhere else. The statistics are grim enough for the present, but the omens for the future are still worse. The level of unionization among young workers (aged 25 to 34) is scarcely 16 percent, even lower than in the labor force as a whole; and attitudes towards unions among those in the fastest-growing occupations, technical and semiprofessional jobs, remain extremely negative.[1] It seems that something dramatic will be needed to prevent continued decline.

Of course, the labor movement has faced this sort of decline before and has recovered. During the 1920s, most notably, unions lost nearly 40 percent of their membership, then gained back all that and more during the next decade. But what is often forgotten in telling that story is that the recovery involved more than waiting out a bad time; it required deep transformations in the basic structures and strategies of labor. It was accomplished not merely by working harder, nor even by tactical shifts within the AFL, but by the creation of entirely new organizations which became the CIO. Today, as in the 1920s, there is little doubt that employees need strong representation in dealing with employers; the real question is what kind of representation is needed—and whether the existing movement can adapt to fit changing demands.

The difficulty, however, is in defining these "changing demands." There are plenty of explanations for labor's problems. Villains are everywhere: unfair competition from the Japanese, automation, the rise in employer resistance, the recent hostility of the NLRB, or the negative tilt of the press, to name a few. But despite the large number of causes that can be found, none seems to fully explain the crisis; none of them fully matches its depth. The decline of organized labor dates not from Reagan's election six years ago, nor from the opening of international trade of the past ten years, nor from the splurge of illegal employer acts of the past 15 years. It dates back all the way to the late 1950s, and it has continued unrelentingly through all political and economic swings. The specific events just cited are not so much causes as pieces of a long-term unfavorable trend, which has been quite steady over the whole period.

That larger trend is hard to pin down, I believe, because it does not lie within the industrial relations system itself. The problem is not just a matter of mistakes of labor or management or the discovery of new tactics that upset the old balance. Rather, it lies in the way the industrial relations system fits into the wider society. It is true, for example, that corporate management has grown more openly antiunion in the past decade, but that is the least of the problems. Corporate management has been going through a long and painful transformation of its basic structure in response to changing economic conditions, and the antiunion thrust is just an offshoot of this larger trend. The same is true in the political sphere: the hostility of the Reagan Administration is only a symptom of a long-term change.

[1] According to the Bureau of Labor Statistics, union membership among workers aged 25-34 declined from 18.2 to 16.7 percent between 1984 and 1985. For the negative attitudes of technical and professional workers toward organized labor, see Seymour Martin Lipset and William Schneider, *The Confidence Gap* (New York: Free Press, 1983).

The political shift against unions began long before 1980. Any strategy must start from these transformations in the environment.

Pillars of Labor Movement

The current labor movement was built during the 1920s and 1930s on three pillars. The first was the creation of large industrial corporations. These permitted such an unprecedented concentration of power in management hierarchies that large, centralized employee groups were needed to combat them. The second was the growth of a new class of employees—the blue-collar, semiskilled masses drawn from the farms of this country and of Europe. They formed the bedrock of solidarity in the explosive growth of labor. The third was the forging of a new political coalition committed to governmental activism in promoting social welfare. For 30 years, labor was perhaps the central unifying institution in the dominant "New Deal" coalition.

Each of these pillars has now been seriously undermined. Centralized corporate bureaucracies have increasingly given way to more decentralized forms of management focused on flexible production for highly varied markets. This shift certainly has had damaging effects on collective bargaining contracts, but it is not primarily driven by antiunion sentiments; it reflects the maturing of the economy and the decline of mass production.[2] The industrial relations order follows rather than causes this restructuring.

The types of workers who have supported the union movement are also declining in number. Blue-collar operatives are down to 12 percent, and craft workers to 10 percent, of the workforce. Replacing them are several categories, which are still poorly defined, but which are clearly not flocking to labor organizations. Unions have turned their attention chiefly to service workers and to the bottom end of the white-collar sector, particularly clerical and sales employees, whose working conditions are often being transformed into something like traditional factories. But the level of organization among these groups remains stubbornly low. Still more disturbing, however, is the fact that the fastest growing sector of workers, constituting now between a quarter and a third of the labor force, consists of highly trained technical and professional employees, "knowledge workers," who are strongly hostile to the traditional principles of unionism. In New England, with its substantial high-tech sector, these form an especially important category. And cross-cutting these groups is another whose needs cannot normally be met by collective bargaining, "contingent workers," temporaries, part-timers, and contract workers, who now constitute almost 30 percent of the workforce.[3] The needs of these groups are quite different from the needs of those that have been at the center of union action in the past.

Finally, the New Deal political coalition has been under severe pressure since at least the 1960s and now appears to have crumbled or, more precisely, to have fragmented. What has happened is that the growth of increasingly vocal and self-confident pressure groups has pushed labor out of the central, aggregating role it played through the 1950s. Now, unions appear as one among many competing interests rather than as a unifying force for the public good. This fragmentation has overloaded the political system and

[2] On the underlying economic transformation and the decline in mass production, see Michael J. Piore and Charles F. Sabel, *The Second Industrial Divide* (New York: Basic Books, 1984).

[3] By my calculation, clerical and low-level sales employees constitute about 20 percent of the workforce, and their proportion is remaining roughly stable. Service workers add another 10 percent. Semi-professional workers (technicians, nurses, etc.) are about 20 percent. A large part of those classified as "middle managers" also act as semi-professionals now, no longer supervising workers but managing information. Audrey Freedman, of the Conference Board, estimated that 28 percent of the workforce was composed of "contingent" workers (temps, free lancers, part-timers, and contract employees) in 1985.

created the longing for simpler times upon which Reagan has so skillfully played.

Legislatures and Courts Challenge Unions

Largely unnoticed in this political change is a development which particularly challenges the labor movement. During the very period when unions have suffered their greatest declines and have been forced onto the defensive, other interest groups have had startling successes in limiting the power of management over employees. The crisis of labor has not meant that companies have been freed to do whatever they want; they have merely been attacked from a different direction. A wave of legislation has defined broad new employee rights—starting with affirmative action laws in the 1960s, developing at the federal level through protection of the aged and disabled, and spreading through many states to encompass pregnancy, sexual preference, whistle-blowing, privacy, and other categories of behavior. In the past ten years, the legislative stream has been joined by a judicial one: courts in state after state have cut deeply into the old common-law doctrine of "employment at will," which gave managers total freedom to fire their workers. These shifts have had a far greater effect on employer practices in the past 20 years than has collective bargaining. As *Business Week* pointedly notes, "In today's nonunion climate, the courts and state legislatures are becoming the most effective champions of employee rights."[4]

The labor movement has been slow to grasp this development. Certainly the AFL-CIO played an important role in the passage of affirmative action and other social legislation. But many unions have been suspicious of the extension of workplace rights, fearing they would compete with collective bargaining and reduce the motive to join unions. Moreover, until recently, they have rarely made good use of the rights that have been passed; only now is there a growing awareness that the affirmative action guarantees, for example, can be powerful rallying-points for new groups of workers. Labor bodies have sometimes opposed and sometimes supported legislative efforts to broaden employee rights, but they have almost never been the central or driving force behind them.[5]

That ambivalent position is a bad one for any organization. But labor is finding itself there too often. Within its traditional domain, in blue-collar production environments, dealing with stable companies, it remains confident and strong: the rates of membership in those sectors are still quite high. But when one shifts the focus to look at broader trends in employment policy, unions often seem like the group least sure of where they are going. The consequences of the lack of fit between industrial relations order and the direction of social movement are serious: labor has become isolated and on the margins.

These three connected trends—economic, social, and political—have been gathering momentum for the past 30 years. If anything, they are accelerating now. The recent conservative swing is not likely to be permanent, but the shift away from the New Deal assumptions, which underlie the National Labor Relations Act framework, is more fundamental. Even a Democratic administration would be unable to restore that framework without basic changes to reflect new types of workers and economic restructuring.

---

[4] *Business Week*, July 8, 1985, p. 72. For details on legal and legislative developments in employment-at-will, see Jerome B. Kauff and Maureen E. McClain, *Unjust Dismissal 1984* (Atlantic Highlands, NJ: Practicing Law Institute, 1984), and Brian Heshizer, "The New Common Law of Employment," LABOR LAW JOURNAL Vol. 36, No. 2 (February 1985), pp. 95-107.

[5] William B. Gould, who headed a committee of the California Bar on unjust dismissal, has criticized labor for failing to strongly support the pathbreaking due-process legislation proposed by the committee. The state federation did express support, somewhat late, but did not put its full energy into the difficult battle with employers.

Opportunities

That diagnosis implies that solutions to the crisis must involve not just tactical shifts, but deep strategic transformations in the labor movement. Certainly there are immediate battles to be fought: current members must be protected from the devastating impacts of foreign competition, automation, and other symptoms of economic change. Limitations on imports and plant closings, retraining programs, and improved benefits are crucial to this battle. But these are fundamentally defensive moves, attempts to reduce the impact of change; they do nothing to put labor in the forefront of new directions.

In the past few years, there have been increasingly influential calls for far-reaching transformations. The AFL-CIO's 1985 report, "The Changing Situation of Workers and Their Unions," pulled together a collection of such suggestions, many of which touch near the core of the labor movement's traditional identity. A major theme is the need to move beyond the focus on maintaining the collective bargaining contract, to offer a broader array of services and forms of representation. "Associate membership," for instance, one of the report's most controversial proposals, involves signing up members who are not part of a represented bargaining unit. Quality of Work Life, which also received a clear endorsement from the Federation, challenges the contractual focus in a different way. It reaches "under" the usual level of bargaining to represent concerns which are not easily incorporated in written guarantees. The report even raised the possibility of negotiating wage floors as a foundation for individual contracts.

None of these particular ideas can itself reverse the current decline. Clearly, we are at a stage where experimentation is crucial; it will be some time before we can tell what works best. But apart from specific tactics, there are three essential opportunities that must be grasped to bring labor back from the margins.

(1) **Strategic Planning:** Unions tend necessarily, and often consciously, to be reactive organizations. This works well as long as the environment is reasonably stable and the organization's assumptions match it closely. Now, however, the reactive approach has left unions trailing behind the change process.

A few unions have tried to develop a more active view by analyzing the environment and deciding where they want to fit into it. The Communications Workers were among the first to do this with their "Committee on the Future;" the Bricklayers followed with "Project 2000." These responses, along with the AFL-CIO's report just mentioned, were unprecedented attempts to work back to core assumptions and to test their appropriateness for today.

These strategic planning processes take a great deal of time and significant resources. The CWA and the Bricklayers each spent about two years studying before producing recommendations, and several years later they are still in the process of developing an understanding of the conclusions among local officers and members. It is also important to notice that the process itself challenges the power structure. An effective plan cannot come from the top leadership; it must have the commitment and involvement of many different parts and levels of the organization. Therefore, these strategic planning committees cut across the normal hierarchy, involving local officers and decentralizing decision-making in order to create a shared vision.

It is difficult to spend all this time and effort when so many immediate crises cry out for solutions. But strategic planning offers a long-term payoff that "fire-fighting" does not: It can make it possible to change fundamental organizational structures and habits without major internal conflict and splits. The risk of such division in a time of strain like the present is high. It is worth a great deal of time to

develop internal agreement about future directions.

(2) **Forming Coalitions:** As the power of labor organizations declines, there is an increasing need for them to look beyond their boundaries of support. It is somewhat ironic that most of the publicity and enthusiasm of the past few years has centered around alliances with the traditional adversary—that is, around forms of cooperation with mangement. Meanwhile, unions have been relatively unsuccessful in allying with those who more naturally should be their friends: employee associations, women's and minority groups, community activists, and even other unions. The attempt initiated by the Solidarity Day demonstration of 1982 to link with these potential supporters has borne little fruit. It seems to be easier to think about modifying existing relationships with management than about forming new ones.

Often, of course, the sort of coalitions I am talking about bring with them the potential for serious conflict. The claims of women and minorities, for instance, can run counter to unions' interest in preserving seniority. Environmental and community associations may be opposed to projects that provide jobs for union members, such as nuclear power plants, defense projects, or highway construction. But these disagreements are not sufficient reasons for labor to isolate itself. It cannot now afford to turn away from groups that have had, as I mentioned earlier, great political success and growth during the past two decades. In this context, the focus on current jobs becomes a shortsighted one, costing dearly in terms of the long-run influence that is necessary to rebuild labor's strength.

In my judgment, these "quasi-labor" groups, associations that build around specific issues in employment relations, are here to stay. Unions will therefore need to relax their traditional insistence on their "exclusive" relation to employers; they are simply no longer the only form of effective pressure on corporations. It is already difficult, and will become more difficult, to pull all employees under the umbrella of a single organization. Instead, it will be necessary to work in coalitions with technical and professional associations, women's groups, and others who make claims on management in order to build sufficient unity to have an impact.

(3) **Making Use of Rights:** Employee rights do not have to be won through collective bargaining to be valuable. On the contrary, legislative and judicial guarantees can also become a major part of the labor movement's strategy of representation. First, such rights can provide a means of representing workers before winning a majority vote and a contract. By taking on affirmative action and employment-at-will claims in unorganized settings, unions can demonstrate their effectiveness to workers who might otherwise have little reason to trust them. Second, in organized settings, rights can strengthen labor's hand in dealing with the range of issues that are important to members, taking pressure off the bargaining process.

The enforcement of rights need not replace unionism. It has been repeatedly shown that rights cannot be effectively asserted and enforced except with the help of an organized representative body. Court-ordered reinstatement for unjust discharge, for example, has proved very difficult to manage except where a union is present to monitor the process.[6] Similarly, health and safety rights guaranteed through OSHA are ineffective when the government is the sole enforcer but can become powerful tools for improving working conditions in an organized context. In this sense, unions can become the mediating body; without them, extended rights will necessarily lead either to a

[6] See, for instance, Samuel Estreicher, "Law Commentary: Unjust Dismissal Laws in Other Countries: Some Cautionary Notes," *Industrial Relations Law Journal* (Spring 1985), pp. 84-92.

tremendous overload of the courts or to more intrusive government regulation.

European unions have generally had more experience than we have in these areas. Employee rights have been on the rise there since the early 1970s, and they have generally gone farther than here. Labor tended to be suspicious of the trend, but it has found that the new rights have served as an effective tool of organizing and representation.

Conclusion

The focus of unions, especially industrial unions, has traditionally been on building organizational power. The test of sucess has been the ability to unilaterally shut down an employer's operations through a strike. But the trends I have described can be summarized by saying that no single organization now has the power to unilaterally press claims on employers. Companies have grown too flexible and mobile, the workforce too diverse, and the political system too fragmented by the claims of different interests. Therefore, the need is to build unity among various groups—to pull together the growing diversity of interests.

When old tactics do not work, new ones have to be invented. At the moment, the effective forms of employee action are more and more associational; that is, they involve linkages and alliances among groups rather than permanent organizations. The labor movement needs to master more fully the tactics of association: coalition-building, publicity, lobbying, member education, and participation. It can no longer depend on the power of mass action.

The three proposals I have put forward all have to do with this basic restructuring. They reduce the focus on a central, unified contract, and they increase the emphasis on external relations. One further implication, one which should be stressed in the context of this panel, is that labor federations are central to the change. If the power of individual unions is reduced, federations are needed if anything is to be done. The existing state organizations are crucial in building bridges among unions and to other associations and in encouraging the creation of a coordinated strategy and vision of the future. The national AFL-CIO has been taking some unprecedented initiatives in the past few years, especially in the political process and through the 1985 strategy report. That strategy report could well become the core of an educational and discussion process that would build a new level of unity in labor.

I would not underestimate the difficulty of these changes. They threaten many organizational prerogatives and established relations. But, to return to my earlier comparison, the last time the labor movement was in this position, during the 1920s, its revival was very painful indeed. The split between the AFL and the CIO was costly for everyone and difficult to repair. By looking ahead and reaching out to potential friends, even if it involves serious rethinking of familiar ways of doing business, we may be able to spare ourselves a repetition of that turmoil in overcoming the present crisis.

[The End]

Faculty Unionism: A Preliminary Look at the New England Experience

By Charles T. Schmidt, Jr.

University of Rhode Island

The underlying thesis of my observations is that the unionization of academic faculty in the six New England states is somewhat unique, more generally militant than weak, and a derivative of other historical, economic, political, and sociological influences that have shaped higher education generally in the region. I will use the State of Michigan for comparative purposes, but much more to illustrate than to establish any absolute statistical relationships or to support a hypothesis. I will also raise more questions than supply answers in the hope that both the advocates and the scholars on the panel will choose to go much further in their case studies and their economic, political, and historical analysis.

The "State of New England" is an accident of history with no current rational economic reason for its boundaries. However, the current political rationale is both clear and persuasive: that is, the six states yield 12 U.S. Senators while the one state (Michigan) obviously yields only two. In the House of Representatives, the "State of New England," with a total population of about 12.5 million people sends 24 House members to Washington, while Michigan, with a population of slightly over nine million, sends 18. Thus, at least from the perspective of national representation in Congress, the six-state region is clearly in a more advantageous position as to its population than would be a one-state consolidation.

Table 1 indicates that, while the square mile area of Michigan is about 88 percent of that of New England and its population is about 72 percent of New England's population, both New England and Michigan had about one million union-organized workers in 1982. Forty percent of those organized are public-sector employees in New England, while in Michigan the comparable figure is 27 percent. It is interesting to note that the 27 percent figure for Michigan's public-sector organization is roughly equivalent to the national public/private sector organized ratio, while the New England public sector organized ratio is substantially higher—40 percent.

Moreover, Michigan's average annual income of $20,940 is almost $3,000 higher than the weighted average of $17,951 for New England. Some of this average income difference can be attributed to the roughly nine percent greater union organization (especially in the private sector) in Michigan. About 15.4 percent of New England's civilian labor force of 6,555,000 were organized in 1984. In Michigan, 24.7 percent of a labor force of 4,359,000 were organized. In each case, however, slightly in excess of six percent were public-sector employees.

Table 1 also summarizes and compares the number of two- and four-year colleges and universities, student populations, and faculty in New England and Michigan. The number of New England schools is almost three times the number in Michigan, with the enormous private school (two- and four-year) presence accounting for 61 percent of the total number of schools, 49 percent of the students, and 60 percent of the faculty. See also Table 3. However, Michigan far outdistances New England in both the numbers of students and the numbers of faculty in two-year public institutions, but with both areas

enrolling approximately 225,000 students at public four-year schools and taught by an almost identical number (13,000+) of faculty.

On the basis of this information, Tables 2, 3, 4, and 5 are developed to further compare New England and Michigan college and university data, taking into consideration two- and four-year college distinctions and especially the faculty unionization activity. Tables 2 and 3 simply display the comparisons of different groupings. In Table 4, New England/Michigan ratios are calculated for those who may wish to speculate ("dream" might be a more appropriate word) that some remarkable relationships may be imputed between the data in that table and the selected indicators presented in Table 1. Finally, Table 5 is a simple display and breakdown of faculty union organization expressed as a percent of total faculty.

Summary of the Data

Public two-year colleges in both New England and Michigan are heavily organized (92 percent or more of the faculty in both areas) and impact upon 96 percent or more of the total student population. While the absolute percentage of organized public two-year schools in New England is only 84 percent, compared to 93 percent for Michigan, the difference lies in the relatively small size of the unorganized New England schools. The real test of organization is the number and percent of organized faculty and the number and percent of students impacted. However, in New England, two-year public colleges account for only 17 percent of the total number of students and 12 percent of the faculty; they likewise account for less than one third of the total public college faculty organized.

The situation is in some ways reversed in the case of four-year public colleges and universities. Although both New England and Michigan enroll approximately the same number of students in their four-year public colleges (New England 229,763; Michigan 224,371) and the number of faculty for both is slightly in excess of 13,000, in New England these figures account for only 34 percent of all students and 28 percent of all faculty. Four-year public colleges in Michigan, conversely, enroll 48 percent of the total number of students and employ 52 percent of the faculty.

Another significant comparison is that 88 percent of New England's four-year public colleges are organized: a total of 12,160 faculty that impacts upon 90 percent of the four-year public college students. Michigan trails far behind with 60 percent of the four-year public colleges organized: a total of 6,805 faculty that impacts on 58 percent of the students.[1]

Finally, although the figures for the private colleges and universities in all five tables are instructive, they are only one comparatively insignificant part of the total picture. What are critical for future research are individual case studies and the impact of the *Yeshiva* decision. And although only about nine percent of all New England private college faculty (or 8.2 percent of all New England faculty) are organized, the effect of these private colleges may be otherwise significant. With two- and four-year private colleges representing 61 percent of all colleges in the region, enrolling 49 percent of all students, and accounting for 60 percent of all faculty, their social, political, and economic impact on New England public colleges and universities has been profound from both a historical and contemporary perspective and can be hypothesized to indicate a higher propensity for public college faculty to seek union recognition than might otherwise have been the case and a propensity that is generally absent in the Middle West and other areas of the country.

[1] Obviously, much of this can be explained simply by recognizing that in New England, four of six state universities are organized, while in Michigan neither the University of Michigan nor Michigan State University are organized.

When considering the delivery system for higher education in New Englad (as contrasted with Michigan), four sets of data appear noteworthy: (1) Two-year public colleges in New England, while more numerous, are typically individually smaller than those in Michigan, serve considerably fewer students, and have fewer faculty. (2) There are 3.5 times as many private colleges and universities in New England than in Michigan, with 5.5 times the number of students and more than seven times the number of faculty. (3) With similar total numbers of students and faculty at four-year public colleges and universities, 87 percent of the New England faculty are organized, while only 50 percent are organized in Michigan. (4) Public two- and four-year institutions enroll only 50 percent of all New England students and employ only 40 percent of all faculty; in Michigan the public two- and four-year schools enroll 86 percent of all students and employ 84 percent of all faculty.

Many of the possible explanations for these differences are rooted in the historical development of higher education in New England—that is, the early development and expansion of private higher education and the concurrent heavy reliance on these schools by the population and legislative bodies, to the detriment of the development and expansion of public higher education. For example, in 1957, only 30 years ago, the combined student population of the six New England state universities was only about 29,000. At the same time, Michigan had more than 83,000 students enrolled at the University of Michigan, Michigan State University, and Wayne State University alone! Thus, the early expansion of the private colleges in New England (and the perceived prestige of some of them) along with the associated underdevelopment of public higher education created an environment of perceived "second-class status" for public higher education, which in many ways remains today throughout the area.

The fallout from this underdevelopment of public higher education in New England is both fewer and less influential alumni as well as state legislative leaders who were educated at one of the several private colleges and whose loyalty was more often to these schools. In addition, a land-grant service orientation, so important to the Midwestern state-supported schools, was only marginally developed by New England state universities and, with a decreasing agricultural base and little effort to relate effectively to the urban population, the number of their influential supporters remained quite small until recently.

The original academic strengths of most state-supported colleges across the country were in the biological and physical sciences. In the Middle West, these strengths were easily translated into prestigeful state-supported medical schools. Although a similar translation has been made in several New England states, it is of much more recent origin. New England had many very fine private medical schools, and the need, competition, and costs of state university medical schools have always been a subject of intense political debate. In Rhode Island, for example, state support was given to the establishment of a medical school at Brown University rather than at the University of Rhode Island. Similar questions have been raised with regard to state support for law and other professional schools in New England, and when the issue is state support of a master plan, which tightly controls new program development at public colleges and universities, existing programs and plans at private institutions are carefully considered before a new program is approved.

For all of these reasons and others that require further exploration, New England higher education faculty have taken a far more favorable view of unionization than have faculties at the large state universities in the Middle West. In Michigan, for example, the majority of the decision-

makers are "State-U" alumni and the schools of choice and prestige are the University of Michigan and Michigan State University.

Conclusions and Expectations

For New England, we can expect continuing pressures for union organization in the small remaining portion of public colleges and universities that are currently not organized, especially in Vermont and New Hampshire. Their vulnerability to organization may increase as the public four-year college and university systems in Connecticut, Massachusetts, Maine, and Rhode Island, which are organized, attempt to maintain salary and fringe benefit advantages among themselves and with other comparable systems and groups in other regions.

In addition, national labor market competition for certain scarce faculty specialties, mostly at professional schools and colleges, will impel either significant salary differentials within faculties or large salary increases for all. While organized faculty unions are finding it difficult to deal effectively with these labor market forces, collective bargaining thus far has provided a process whereby the market differentials have been studied and, in most cases, resolved to the satisfaction of the faculty majority.

Understanding, resolution, and acceptance is a far more difficult proposition at the unorganized schools. It is likely that differential salaries will continue to be offered to certain faculty groups (a minority) to meet market conditions, with a resulting increase in dissatisfaction of the majority and a corresponding higher propensity to consider organizational initiatives.

With respect to private higher education institutions in New England, I would predict little substantial change from what presently exists. Without a modification of the *Yeshiva* doctrine, organizational efforts are likely to fail, if indeed they are attempted at all. The propensity to organize may very well exist in several major private institutions (e.g., Boston University) and in the "second tier" of the privates (the first tier being the "Ivys" and a few more), and this propensity may be for reasons similar to those of faculties at the public four-year colleges and universities.

Finally, it is possible that several small unorganized private colleges in New England could be the focus of faculty organizational efforts if either they don't qualify for a *Yeshiva*-type exclusion or the faculty and administration at these colleges agree that an organized faculty and a collective bargaining agreement is in the best interests of the college and all concerned. The extent of any such exclusions or agreements is unknown and predictions are problematic.

Table #1

Summary Background Information*

SELECTED INDICATORS	New England	Michigan	NE/Michigan %
Population	12,577,000	9,075,000	1.39
Civilian Labor Force	6,555,000	4,359,000	1.50
Labor Force Participation Rate	52%	48%	1.08
Size (sq. miles)	66,672	58,527	1.07
Population Density	188.6/sq. mi. (weighted)	155.0/sq. mi.	1.22
Average Annual Income	$17,951	$20,940	0.86
Total # Union Organized (Public & Private Sectors)	1,009,600	1,075,500	0.94
Private Sector	612,600	788,100	0.78
Public Sector	397,000	287,400	1.38
% Labor Force Organized (Public & Private Sectors)	15.4%	24.7%	0.62
% Private Sector (of those organized)	60.7%	73.3%	0.83
% Public Sector (of those organized)	39.3%	26.7%	1.47
% Private Sector (of Labor force)	9.3%	18.1%	0.51
% Public Sector (of Labor force)	6.1%	6.6%	0.92
Total # Colleges and Universities (2 & 4 year)	237	83	2.86
2 year Public	50	29	1.72
2 year Private	26	5	5.20
4 year Public	42	15	2.80
4 year Private	119	34	3.50
Total Student Population (2 & 4 year)	684,037	471,307	1.45
2 year Public	117,990	183,303	0.64
2 year Private	13,736	6,288	2.18
4 year Public	229,763	224,371	1.02
4 year Private	322,548	57,345	5.62
Total Faculty (2 & 4 year)	49,947	25,857	1.93
2 year Public	6,020	8,145	0.74
2 year Private	1,300	299	4.35
4 year Public	13,972	13,480	1.04
4 year Private	28,655	3,933	7.29

*See bibliographical sources and statistical notes at Table #5

Table #2

New England-Summary*

Type/School	Schools #	Schools %	Total Students	% All Students	Total Faculty	% All Faculty	# Faculty Organized	% Faculty Organized	No. Schools Organized	% Schools Organized	Impacting on Students #	Impacting on Students %
Total No. Schools	237	100%	684,037	100%	49,947	100%	20,294	41%	96	41%	354,638	52%
Public - 2 yr.	50	21%	117,990	17%	6,020	12%	5,540	92%	42	84%	113,289	96%
Private - 2 yr.	26	11%	13,736	2%	1,300	2.6%	262	20%	5	19%	3,073	22%
Public - 4 yr.	42	18%	229,763	34%	13,972	28%	12,160	87%	37	88%	205,864	90%
Private - 4 yr.	119	50%	322,548	47%	28,655	57.4%	2,332	8%	12	10%	30,640	9.5%

Michigan-Summary

Total No. Schools	83	100%	471,307	100%	25,857	100%	15,475	60%	42	51%	320,243	68%
Public - 2 yr.	29	35%	183,303	39%	8,145	31.5%	7,852	96%	27	93%	177,085	97%
Private - 2 yr.	5	6%	6,288	1.3%	299	1.2%	132	44%	2	40%	3,235	51%
Public - 4 yr.	15	18%	224,371	48%	13,480	52%	6,805	50%	9	60%	129,343	58%
Private - 4 yr.	34	41%	57,345	12%	3,933	15%	686	17%	4	12%	10,580	18%

*See bibliographical sources and statistical notes at Table #5

Table #3

Public/Private Comparisons*

Location/Type School	Schools # (TOTAL)	Schools %	Total Students	% All Students	Total Faculty	% All Faculty	# Faculty Organized	% Faculty Organized	# Schools Organized	% Schools Organized	Impacting upon % Students
NE - Public (2 & 4 yr.)	92	39%	347,753	50.8%	19,992	40.0%	17,700	89%	79	86%	92%
MICH - Public (2 & 4 yr.)	44	53%	407,674	86.5%	21,625	83.6%	14,657	68%	36	82%	75%
NE - Private (2 & 4 yr.)	145	61%	336,284	49.2%	29,965	60.0%	2,594	9%	17	12%	10%
MICH - Private (2 & 4 yr.)	39	47%	63,633	13.5%	4,232	16.4%	818	19%	6	15%	22%
NE - All Schools	237	100%	684,037	100%	49,947	100%	20,294	41%	96	41%	52%
MICH - All Schools	83	100%	471,307	100%	25,857	100%	15,475	60%	42	51%	68%
NE - Pub/Pvt (2 yr.)	76	32%	131,726	19%	7,320	15%	5,802	79%	47	62%	88%
MICH - Pub/Pvt (2 yr.)	34	41%	189,591	40%	8,444	33%	7,984	95%	29	85%	95%
NE - Pub/Pvt (4 yr.)	161	68%	552,311	81%	42,627	85%	14,492	34%	49	30%	43%
MICH - Pub/Pvt (4 yr.)	49	59%	281,716	60%	17,413	67%	7,491	43%	13	27%	50%

*See bibliographical sources and statistical notes at Table #5

Table #4

Faculty Union Organization Activity *

Schools/Faculty/Students Totals - % Within Each Category	New England	Michigan	NE/Michigan %
Total No. of Schools Organized	96	42	2.14
Public 2 year	42	27	1.56
Private 2 year	5	2	2.50
Public 4 year	37	9	4.11
Private 4 year	12	4	3.00
Total % of Schools Organized	41%	51%	0.80
Public 2 year	84%	93%	0.90
Private 2 year	19%	40%	0.48
Public 4 year	88%	60%	1.47
Private 4 year	10%	12%	0.83
Total No. Faculty Organized	20,294	15,475	1.31
Public 2 year	5,540	7,852	0.71
Private 2 year	262	132	1.98
Public 4 year	12,160	6,805	1.79
Private 4 year	2,332	686	3.40
Total % Faculty Organized	41%	60%	0.68
Public 2 year	92%	96%	0.96
Private 2 year	20%	44%	0.45
Public 4 year	87%	50%	1.74
Private 4 year	8%	17%	0.47
Total No. Students Impacted by Organization	354,638	320,243	1.12
Public 2 year	113,289	177,085	0.64
Private 2 year	3,073	3,235	0.95
Public 4 year	205,864	129,343	1.59
Private 4 year	30,640	10,580	2.90
Total % Students Impacted by Organization	52%	68%	0.76
Public 2 year	96%	97%	0.99
Private 2 year	22%	51%	0.43
Public 4 year	90%	58%	1.55
Private 4 year	9.5%	18%	0.53

*See bibliographical sources and statistical notes at Table #5

TABLE 5

Faculty Union Organization Activity*

Organized Faculty as % of Total Faculty	New England	Michigan	NE/Michigan %
(1) Total Faculty	49,947	25,857	1.93
(2) Total No. Organized (4 + 10)	20,294	15,475	1.31
(3) Total % Organized (2/1)	40.6%	59.8%	0.68
(4) Total Public Faculty Organized (6 + 8)	17,700	14,657	1.21
(5) % of Total (Public) (4/1)	35.4%	56.7%	0.62
(6) Total Public Faculty Organized (2 year)	5,540	7,852	0.71
(7) % of Total (Public - 2 year) (6/1)	11.1%	30.4%	0.37
(8) Total Public Faculty Organized (4 year)	12,160	6,805	1.79
(9) % of Total (Public - 4 year) (8/1)	24.3%	26.3%	0.92
(10) Total Private Faculty Organized (12 + 14)	2,594	818	3.17
(11) % of Total (Private) (10/1)	5.2%	3.1%	1.68
(12) Total Private Faculty Organized (2 year)	262	132	1.98
(13) % of Total (Private - 2 year) (12/1)	0.5%	0.5%	1.00
(14) Total Private Faculty Organized (4 year)	2,332	686	3.40
(15) % of Total (Private - 4 year) (14/1)	4.7%	2.6%	1.81

[The End]

* Data Sources:

L. Troy & N. Sheflin, *Union Sourcebook: Membership, Structure, Finance, Directory* (West Orange, New Jersey: Industrial Relations Data & Information Services), pp. 7-3—7-8.

Statistical Abstracts of the United States, 1986, 106th Ed., U.S. Dept. of Commerce: Bureau of the Census.

A.E. Lehman, *Peterson's Annual Guides: Guide to Four-Year Colleges,* 1986, 16th Ed. (Princeton, New Jersey: Peterson's Guide).

A.E. Lehman, *Peterson's Annual Guides: Guide to Two-Year Colleges,* 1987, 17th Ed. (Princeton, New Jersey: Peterson's Guide).

J.M. Douglas, *Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education,* January, 1986, Volume 12. The National Center for the Study of Collective Bargaining in Higher Education and the Professions, BARUCH College, CUNY.

Statistical Notes:

Unlike other statistical studies, there is no attempt herein to support a hypothesis or to establish absolute statistical relationships. Rather, this is preliminary descriptive data intended to provide an understandable "snap-shot" of faculty union activity in New England in 1987. Further, the data reported herein are subject to qualification and refinement as the data bases vary in their integrity, reliability, and timeliness. At best, there is confidence only in the *relative* magnitude and *direction* of both the individual and summary figures. Obviously, the value of presenting these very preliminary observations is to raise the questions that we hope will lead to the development of a more sophisticated data base and to stimulate others to further efforts and studies relative to, inter alia, faculty salaries, benefits, governance, organizing, and related economic, political, and legal consideration. New England is a manageable "laboratory" for intensive further work.

Except for the case of Boston University, the statistics ignore *Yeshiva* decertification actions since the gross data are intended to show the propensity for faculty to organize and the direction of that action, rather than shifting absolutes. Likewise and for the same reasons, the data include *all* of the faculty within an institution and not just dues-paying union members, and do not take into consideration those excluded from bargaining units by unit determination decisions, exclusions for department chairpersons (if any), or other legal or negotiated exclusions. Additionally, the gross figures include both full-time and part-time faculty and students (when given by the data sources) and thus may be

Faculty Unionism: The New England Experience

By Edward C. Marth

American Association of University Professors

"Faculty Unionism: The New England Experience" is a topic that I thought, from my limited experience and observations on the subject, would be fun and easy. The seriousness of the matter and the fragility of the system have changed the nature of the topic for me rather dramatically.

Faculty unionism, especially at the university level, is reflective of a time-honored tradition that curiously reflects the advanced labor relations models extant in various parts of the country and in the free world today. Recent U.S. Department of Labor literature suggests that current U.S. labor law is out of date. The National Labor Relations Act evolved as rules to minimize economic warfare between management and labor. Those rules are designed to accommodate distinctly different interests in what is presumed to be a hostile environment.

While many commentators reflect on the importance of having cooperative ventures in labor relations in industry and the lack of national policy to promote the various versions of industrial collegiality, university faculty are being stripped of the legal protection to bargain simply because university governance has provided for eight centuries what is now prized in the private-sector workplace. University faculty unionism is the area of discussion today. The uniqueness of this subject is that there is no discernible difference between the structure of the private-sector universities and the public-sector universities. In the former, court and NLRB decisions are finding that collective bargaining is not appropriate (according to NLRA definitions), and in the latter a dozen or more years of experience demonstrate the appropriateness and workability of collective bargaining. There are, of course, important differences in the sources of funding and the spending authority for university funds.

The common thread between public and private university faculty roles is what the National Labor Relations Board found in the decertification decision of the *Boston University Chapter of American Association of University Professors*[1] and at *Yeshiva*,[2] "that the faculty has absolute authority over such matters as grading, teaching methods, graduation requirements, and student discipline. Additionally, the faculty is the moving force and almost always effectively controls matriculation requirements, curriculum, academic calendars, and course schedules. The faculty also plays an effective and determinative role in recommending faculty hiring, tenure, promotions, and reappointments." [3]

In language that might apply to the disruptive influence of the courts in academic collective bargaining, one definitive publication described the pre-Wagner Act court role as demonstrating that "[t]he case law afforded a cumulative demonstration that the courts were not institutionally capable of formulating or implementing a workable labor policy." [4] The reference to "institutionally capable"

(Footnote Continued)

somewhat overstated, especially when considering 2-year community colleges.

[1] *Trustees of Boston University and Boston University Chapter, American Association of University Professors*, 281 NLRB 115 (September 20, 1986).

[2] *NLRB v. Yeshiva University*, 87 LC ¶ 11,819, 444 US 672 (1980).

[3] *Trustees of Boston University*, cited at note 1.

[4] Charles J. Morris, ed., *The Developing Labor Law*, 2d ed. (Washington: Bureau of National Affairs, Inc., 1983), p. 3.

is instructive. It has been a favorite pastime to engage in court bashing in the decertification movement, but the problem is not institutionalized. The NLRA is a codification of rules that govern collective bargaining. Employees, faculty in this context, would still be free to engage in economic warfare to gain what the courts and the NLRB are stripping away: recognition of a union to represent the faculty for the purposes of bargaining over terms and conditions of employment. Universities know that such warfare is not likely to happen absent the abolition of tenure and academic freedom.

The modern university and its faculty are locked into a relationship in which each is, to some measure, the other. It is not possible economically to reorder relationships such that there would be a definable layer of faculty eligible for protection under the NLRA as it is now written and interpreted.

Faculty as Managerial

Peer review has evolved over the centuries simply because it made sense to do so. It is not an inefficient, unworkable anachronism. To the courts and the Board it works so well that the high percentage of accepted peer recommendations on such matters as promotion, nonrenewal, tenure, and curriculum has made the faculty managerial rather than managed.

At Boston University, as in *Yeshiva,* it was found that the following differences from "ordinary" labor contracts preclude faculty from protection of the NLRA: faculty determine curricula; faculty grade students; faculty determine admission and matriculation standards; faculty determine class schedules; through admission decisions, faculty control the size of the student body; faculty are instrumental in hiring, tenure, termination, and promotion decisions; and faculty serving as principal investigators in funded research are supervisors of others working on the research and are thus excluded from coverage by definition.[5] On two matters of consequence to faculty, the administrative law judge found that wages were not an issue and that faculty have no role in the sabbatical leave process.[6]

The die has been cast so well that in the most recent case on this subject, at the University of Pittsburgh, the parties stipulated that the faculty "have shared in the governance of the institution in a fashion comparable to those faculties found to be managerial under the principles of *NLRB v. Yeshiva University.*"[7] The only issue left to be resolved was whether the faculty were managerial under the terms of Sections 301(b) and (19) of the Pennsylvania Employee Relations Act. Absent specific inclusion of faculty exercising what were found elsewhere to be managerial functions, the examiner found the faculty to be ineligible to bargain under the protection of the PERA.

The issue then in university collective bargaining appears to be one that must be dealt with on a policy basis. Is the public policy framed in the depression-rooted National Labor Relations Act in need of revision? Are university faculty unique in the roles they play, or are they on the cutting edge of an evolving labor policy? Is it an accident that American trade woes with Japan and Germany involve polar labor policies? It seems not. The post-World War II federal policy of co-determination in the work process in Germany extends from the shop floor to employee representation on the boards of directors. Japanese workers' involvement in decision-making has ceased to be big news in the United States.

Change is occurring in the American worksites. "A 1982 survey found that at

[5] *Trustees of Boston University and Boston University Chapter, American Association of University Professors,* NLRB Case 1-CA-11061, JD-250-84, Boston, pp. 124-26.

[6] *Id.,* at 113.

[7] *University of Pittsburgh,* Case No. PERA-R-84-53-W, March 11, 1987.

least one-third of the Fortune 500 companies . . . have some form of participative management [programs]," according to the U.S. Department of Labor.[8] As reported in 1985, Ford Motor Company's Employee Involvement Program resulted in employees' offering 1150 work change proposals in design and production, with more than 700 being put into effect.[9]

Using the technique of involvement for results, universities seek excellence in the discovery and dissemination of knowledge, and Ford seeks quality, according to the slogan, "As Job One." Are these not similar goals with similar involvement because it makes sense, not because a labor law frames the relationship?

University Bargaining Relationship

With the several findings and even a stipulation that university faculty perform duties that would in other forms be considered "managerial," it remains to be discussed what the nature of the relationship is where it does exist. It is fair to say that postures and roles of the parties often reflect the underlying relationship. Hostility begets hostility; fairness is met with fairness. Cross-currents in public-sector university relationships include the mutually strong desire to maintain academic traditions, the mixture of traditional grievance procedures with peer review, bargaining where purse strings emanate from different quarters, and the need to compete in the market for students and research projects.

Neither the University of Connecticut nor the University of Rhode Island offers governance and faculty roles that distinguish them from the criteria found to warrant the "managerial" label at Yeshiva, Pittsburgh, or Boston University. The legal test applied to "managerial" status does not require that all faculty actively and consistently exercise their rights in the areas referred to above, but only that they play a "predominant" role in the aforementioned activities.[10]

The absurdity in the whole thrust of the decertification campaign is that the faculty are cast into the position of exercising professional judgment in the interest of the employer as is necessary in a labor-intensive enterprise, and for that they are deprived of the right to organize and bargain collectively over wages, hours, and conditions of employment. Clearly, what has evolved is a predicament similar to the pre-Wagner Act institutional incapability of the courts to fashion labor policy.

The consequences of bargaining, where it exists, deserve discussion at this point. At the University of Connecticut and at the University of Rhode Island, the faculties have chosen to be represented by a local affiliate of the American Association of University Professors. The bargaining relationship has been in place at Connecticut for 10 years and at URI for 15 years. In both instances, the impetus to organize was provided by a state decision not to increase faculty pay.

The leadership is elected annually in both chapters. In each case there is some continuity through the active roles played by a few individuals in various capacities: negotiations, executive committee, or officer status. Each chapter has an executive director, a post I held for 11 years at URI and nearly one year now at the University of Connecticut.

There are differences even as there are similarities. The URI unit is made up primarily of tenured or tenure-track faculty, although a few years ago it was also agreed to include a limited number of "soft money" (research-supported) faculty and some continuing part-time faculty in the unit. At UConn the unit includes a substantial number of nonten-

[8] U.S. Department of Labor, Bureau of Labor Management Relations, *U.S. Labor Law and the Future of Labor Management Cooperation,* Publication 104 (Washington: U.S. Government Printing Office, date?), p. 3.

[9] *Id.*, p. 5.

[10] *Yeshiva*, cited at note 2, p. 23.

ure-track personnel: special lecturers, research associates, research assistants, 4-H agents, and others. URI has the main campus in Kingston and smaller campuses at Narraganset Bay for the Graduate School of Oceanography and in Providence for continuing education and limited service in degree programs. The University of Connecticut has its main campus at Storrs and branch campuses at Hartford, Groton, Waterbury, and Stamford and a shared facility at Torrington. The branch campus system serves principally as two-year "feeders" for Storrs, but some full-degree programs (i.e., MBA) do exist. The law and medical schools are not in the unit. The Rhode Island tax base has improved along with those of other New England states, and the state average income approximates the national average. Connecticut has the highest per capita income in the country.

The bargaining history at the two institutions has followed rather different paths. At URI, the AAUP negotiating team deals with the Board of Governors for Higher Education which also negotiates with the faculty and other units at the Community College of Rhode Island and at Rhode Island College. The Board also negotiates with other nonclassified employees at URI. The Rhode Island Board of Governors has a history of waiting for legislative approval of the salary account before serious negotiations on that subject begin. The overall institutional budgets (until recently) have been kept within growth limits (budget caps) fixed by statute from the previous year's budget.

Taken together, the mix of factors at Rhode Island has led to very rigid pattern bargaining over wages. The Board has been determined to treat all employee contracts alike. Never was that principle driven home better than in 1979 when the Rhode Island College faculty settled their contract before the URI and CCRI faculties went out on strike for two weeks. The salary increases produced by the strike were applied to nonstriking units as well.

In Connecticut the faculty bargain with the Board of Trustees. The negotiated contract is then brought to the legislature for approval and funding.

While union lobbying activity in Connecticut is important for contract ratification, it took on a new dimension in Rhode Island two years ago. After years of pattern bargaining, faculty salaries were at a level that they considered deplorable. Full professors at URI were paid at the national average in 1975. By 1985, 50 percent of the faculty were full professors, and their salaries were in the bottom 20 percent nationally. The AAUP at URI undertook a major lobbying and public relations campaign, enlisting the support of alumni, elements of the business community, and editorial opinion on the subject of faculty pay. A new university president also called for action in support of salaries and other university needs. Support had increased marginally by 1987, enough to reverse the trend.

It should be noted that the Connecticut experience has been one of annual merit pay provisions. No merit pay existed at URI following the strike during the 1979-1981 contract negotiations.

The Rhode Island response to the salary compression that had developed over the years has been to provide for increases beyond the original budgeted figure in the form of "super merit" or "exceptional salary increases." Administration intent apparently is to bolster the "excellence without extravagance" approach adopted by the Blue Ribbon Commission to Study Higher Education Funding, a commission that was a direct outgrowth of the AAUP salary campaign. Merit pay provisions in Connecticut call for each department to establish its own criteria for the following year. Of the two percent allocated to merit, 1.4 percent is assigned to the department level. Merit pay decisions cannot be grieved unless the dean reduces

the department recommendation by more than half. There is no consistent merit arrangement at URI. Chair recommendations are often overruled, revised, or not solicited.

Contrasting Results

These contrasting systems have produced contrasting results. Faculty involvement in merit decisions led to the limitations on grievance access at UConn. Less faculty control at URI has led to frequent resort to grievances.

Faculty contracts at the University of Connecticut and at the University of Rhode Island reflect different approaches to promotion and tenure issues. It should be noted that the history of awards is not a measure of the success of a grievance procedure. Dr. Douglas M. Rosie, the URI Assistant Vice President for Academic Affairs, once observed that in really strong promotion and tenure cases the choice is obvious and decidedly weak cases are usually not pursued. The difficult cases, ones where peer opinion is divided or those supported by faint praise, have been reversed up to 25 percent of the time on appeal to the dean or president.

Promotion and tenure grievances at URI can and have been arbitrated on their merits. Success on appeal is elusive because the criteria call for judgment of teaching, research, and service. In addition, the burden of proof is on the grievant. Of 11 cases involving promotion at URI that went to arbitration, arbitrators ruled for the grievant twice. Given the complexity of the issues and the burden of proof structure, the results are not surprising. The union and administration alike credit the contractual guarantees with creating a process that is fairer than procedures in place prior to collective bargaining.

Promotion and tenure procedures and decisions at the University of Connecticut may be appealed to a faculty committee, as provided for in the university bylaws. The Committee of Three then makes a recommendation to the university president. If the president rules adversely, the grievant's appeal may be taken to the Board of Trustees for final determination. In one case, the AAUP appealed a nonreappointment to arbitration, on procedural grounds, only to have the grievance denied by the arbitrator.

The University of Connecticut chapter has appealed more grievances to arbitration than has the URI chapter, but appeals have been limited to procedural questions, although discipline and discharge are clearly within the scope of arbitration. The limited number of arbitration cases in the experiences of both universities is not a reflection of the total number of grievances filed. No data are readily available on grievance activity, but my personal experience leads me to conclude that promotion grievances usually follow one or two courses: (a) the grievant is promoted following closer review, or (b) specifics of the denial and more concentrated effort lead to the individual's promotion within a year or two.

Denials of tenure are, of course, serious matters. Unusual cases sometimes require unusual remedies. In one case, a faculty member was deprived of the fruits of his research when a fire destroyed his records. On discovery that proper safeguards were not maintained by the university, the union raised the prospect of suit for the insurance fund. The university recognized the reasonable argument that more time was needed to duplicate the research product and an extension was granted. The faculty member subsequently earned tenure with a quality work product.

A collective bargaining agreement in a university cannot possibly address all of the rights of faculty, nor can it serve as a productivity guide. Faculty lives are largely self-ordered. Classes must be scheduled and met, of course, but the degree of preparation is self-determined. Research is expected and required as the prerequisite to promotion and tenure. The

level of research activity in the pre-tenure period of a faculty member's career is a reflection primarily of what professionals demand of themselves and of others. The same is true of the variety of service activities in department, college, and university functions. These demands are the main elements of the peer review process. The process is never completely free from the dark side of personal comparisons: jealousy, carping, pettiness, inflated egos, and unrealistic expectations of others.

Summary

In the main, the process works well. Most faculty engage in their peer review responsibilities in a professional and fair manner. The term *collegiality* often means support as well as fairness.

The role of the union on a campus is largely determined by the style of the leadership and the attitude of the university. The hostility witnessed at Boston University need not exist on a campus. The union's constructive role can be in insisting that obvious elements of bias in reviews be deleted and that procedural guarantees be adhered to. The union can also take an active role.

A faculty member who had gone through a divorce became derailed professionally. The university could have begun building a dismissal case for neglect of responsibilities, but instead the union stepped in as a mediator to help the individual develop a constructive work schedule, self-imposed expectations for research, and an improved but informal feedback system. The professor subsequently adhered to his own schedule, regained momentum, and even was promoted after a few years.

In another case, a faculty member after long years of service had allowed his schedule to become so lax that the dean threatened to dismiss him. Instead of thinking about retiring (he was two years away from that), the individual reacted by asserting that he was going to work until age 70. Neither option was acceptable. We persuaded the dean that a constructive approach would make sense and that the individual needed to be doubled with someone else in the classroom. In turn, the faculty member was encouraged to think about an early retirement. We pointed out to the faculty member that big shots are bought out on occasion, so why shouldn't he be in the same category? Thinking about the matter in that light, the individual responded with a positive attitude and effort. He also retired a year early (with incentive), and a nasty scenario was avoided.

Mediation or interpersonal efforts are important when the peer process looms so large in the system. There are limits to what can be done, but every success story lessens the tension and improves relationships at all levels.

Decertification of a union is not a successful action by any standard other than to litigants. It represents failure to make a complex system work and substitutes rights for wrongs without redress or forum.

There is a massive policy failure in this country in the guise of a labor law that deprives rather than promotes equality under the law simply because involvement has long existed in the academic workplace. University collective bargaining can and does work where people wish to make the effort, to be imaginative, and to instill the best of bargaining with the best of collegiality.

[The End]

Service Unionism: Directions for Organizing

By James Green and Chris Tilly

University of Massachusetts-Boston (Green)
Massachusetts Institute of Technology (Tilly)

Organizing service workers represents a decisive challenge for the American labor movement. Service workers make up a large and rapidly growing majority of the U.S. workforce, including most of the lowest paid workers. With the exception of government employees, service workers tend to have much lower rates of unionization than workers in the goods-producing sectors. But traditional organizing strategies have not proven very successful in unionizing service workers. In this article, we analyze some of the characteristics of service work and service workers that have created stumbling blocks for the traditional strategies. Then we review several new strategies that have been developed in the push to unionize service workers and assess the strengths and weaknesses of these new approaches.

If a nation becomes a "service economy" when over half of the labor force is employed in the service sector, then the United States has been a service economy since 1940.[1] But growth in service employment has accelerated in recent decades. By 1990, service industries will employ 72 percent of the labor force. Even goods-producing industries include many service jobs; in total, service occupations accounted for 90 percent of the net new jobs created in the 1970s.[2]

While the labor movement has lagged behind these economic changes, its composition has changed also. Service and government workers accounted for 58 percent of all union members in 1980 and 62 percent in 1984.[3] However, most of these workers are concentrated in a few industries, most notably government. The 1987 bargaining calendar is indicative of both the new-found weight of service-sector unionism and the uneven distribution of organization among service industries: three quarters of the contracts up for renewal are in nongoods-producing industries, but over half of that amount is accounted for by contracts in trade and government alone.[4] (Of course these lopsided proportions are partly due to the timing of contracts.)

The Need to Organize

If America's labor movement is to survive in the service economy, it must unionize more of the tens of millions of unorganized service workers. While 36 percent of government workers are union members, less than 11 percent of other service workers are—compared to almost 25 percent of manufacturing workers.[5] Services include the least organized industries such as finance, insurance, and real estate (less than three percent unionized).

Do the unorganized service workers want unions? The evidence is that many do. When nonunionized workers were asked, in a recent Harris poll, if they'd like to see their workplaces unionized, about 40 percent of employees in wholesale and retail trade and in services narrowly defined (business and repair services, personal services, entertainment and recreational services, and professional services such as health care) answered yes, compared to 25 percent in manufacturing. Nonunionized workers in transportation, communications, and utilities and in finance, insurance, and real estate

[1] Ronald Kent Shelp, *Beyond Industrialization: Ascendence of the Global Service Economy* (New York: Praeger, 1983).

[2] AFL-CIO, Committee on Evolution of Work, *The Future of Work* (1983).

[3] Larry Adams, "Changing Employment Patterns of Organized Workers," *Monthly Labor Review* (February 1985).

[4] Joan Borum, James Conley, and Edward Wasilewski, "Collective Bargaining in 1987: Local, Regional Issues to Set Tone," *Monthly Labor Review* (January 1987).

[5] Adams, cited at note 3.

desired unionization at a rate that was not significantly different from manufacturing workers (unpublished results from the AFL-CIO/Harris poll).

Indeed, service workers are voting for union representation at a greater rate than are goods-producing workers, in both absolute and relative terms. Only 39 percent of the 100,000 goods-producing workers involved in representation elections in fiscal 1983 were in units that voted *for* union representation. Among service workers, however, the union success rate was 47 percent, corresponding to 47,000 workers. Some individual service sectors, such as education, had phenomenal union success rates—85 percent.[6] A recent American Hospital Association report noted that union membership among health care workers rose from 14 percent in 1980 to 20 percent in 1985.[7]

Still, union organizing has only begun to make a dent in the service industries. We believe that one reason for this limited success is that many union organizers are still operating within an organizing model that was developed for manufacturing plants in a bygone era. At the risk of stereotyping, we would characterize the "traditional model" of union organizing as follows: (1) The strategy is designed for groups of people who already know that they want to be unionized. The organizer targets "hot shops."[8] (2) The organizer appeals to potential union members with the prospect of better wages and fringe benefits—"bread and butter" gains. (3) The organizing strategy is based entirely on workers' identities as workers, and particularly as workers for a particular employer. The organizer does not attempt to relate workers' other identities (as women, blacks, southerners, and so on). (4) Related to (3), the union views organizing ability as strictly a technical skill rather than also as something that grows out of shared experience. Thus, there is no particular reason to cultivate female, minority, or in-shop organizers to organize particular populations. (5) The organizer's main tactics for reaching people are based on the existence of a large, centralized plant with a few gates. The classic tactic, of course, is leafletting the plant gates. (6) Traditional union organizing suffers from what we would call "fetishism of the 51 percent." All energies and strategies are focused on winning the representation election. This means that shops where a quick victory seems unlikely, or where an election has been lost, are largely ignored by unions. On the other hand, once an election has been won, the traditional strategy assumes that the main organizing task is over.

What's Different About Service Workers?

This traditional strategy does not work well with most service workers. The reason is that service work, and service workers, differ markedly from the manufacturing setting that incubated the traditional model. It is dangerous to generalize about service workers since service is defined more or less as a residual category (nongoods-producing) and includes disparate industries and occupations. Nevertheless, we can make a number of statements that describe the bulk of service workers.

First, many service industries are characterized by a very low level of "union consciousness." Workers don't have a very clear idea of what a union does and little sense that a union is appropriate for them. Office, restaurant, and nursing home workers (except in certain geographical areas) have no connection with a tradition of unionism. Futhermore, in many cases, unions in these industries have been unable to make large material gains for

[6] U.S. National Labor Relations Board, *Forty-eighth Annual Report*, 1984.

[7] Cited in "Labor Letter," Wall Street Journal, February 3, 1987, p. 1.

[8] For a critique of this approach, see Peter Brandon, "Strategic Organizing," unpublished paper, 1978.

their members paralleling union gains in manufacturing, so even members do not "sell" the union.

Second, service workers have a different relation to the product and the customer than do most goods-producing workers. Service workers often come in direct contact with the customer and have a greater feeling of accountability. Some service workers have a sense that they are providing a public service, not just in the case of government agencies, but also in other workplaces such as hospitals and universities. Thus, workers may be very concerned about product quality rather than about the usual bread-and-butter issues, even in some of the lowest wage jobs in the economy.

A third fact about service industries is that women represent a much larger proportion of the workforce (52 percent) than in goods-producing industries. A high proportion of women should not be a problem for unions, given that nonunionized women actually desire unionization at a higher rate than men.[9] But the traditional strategy has little to offer women in particular, and it is a time-honored complaint among male organizers that women are difficult to organize.

Fourth, in many service industries, particularly those with the lowest wages, there are large concentrations of minorities and undocumented workers. For example, 10.1 percent of workers in service jobs are black, compared to 8.6 percent in goods-producing jobs. In particular industries (bus service and urban transit, services to dwellings and other buildings), the fraction of black workers is 20 percent or more, and individual workplaces range much higher.

As with women, a large proportion of blacks should not in itself pose an obstacle to unions since blacks are more likely than others to want union representation.[10] Undocumented workers do pose a greater difficulty since employers hold the extra threat of calling in the Immigration and Naturalization Service. However, unions following the traditional model often have not shown themselves to be very sensitive to the needs and aspirations of these groups.

A final part of the picture of service workers is that many work in small businesses, many of which have high turnover rates either because the workers are mobile professionals or because they are moving from one dead-end job to another. The average service establishment has 12 workers, compared to the average goods-producing establishment with 27. In fact, over 70 percent of workers in retail trade and in services narrowly defined work in establishments with 10 employees or less, while less than half of the manufacturing workers are employed by such establishments.[11] We have no direct evidence that turnover among service workers is more rapid than among goods-producing workers, but we strongly suspect that this is the case, especially given the explosive growth of the "contingent" or "marginal" workforce (part-timers, temporary workers, on-calls, contract workers) in the services.[12] A workforce where turnover is rapid, as in small shops, does not fit the traditional organizing model based on a stable workforce in a large plant.

What Can Unions Do?

We now explore four sets of organizational responses to the problems service workers present for unions. We illustrate these responses, all of which depart from

[9] Richard Freeman and Jonathan Leonard, "Union Maids: Unions and the Female Workforce," paper presented at the Conference on Gender in the Workplace, sponsored by the Committee on the Status of Women in Economics and the Brookings Institution, November 15-16, 1984.

[10] Richard Freeman and James Medoff, *What Do Unions Do?* (New York: Basic Books, 1984).

[11] U.S. Department of Commerce, *County Business Patterns*, 1983.

[12] Eileen Appelbaum, "Restructuring Work: Temporary, Part-time and At-Home Employment," in Heidi Hartmann, Robert Brant, and Louise Tilly, eds., *Computer Chips and Paper Clips: Technology and Women's Employment*, Vol. 2 (Washington, D.C.: National Academy of Sciences, 1986).

the traditional union organizing strategy, with a largely local set of examples.

First, what about the problem that so many service workers lack union consciousness or even familiarity with the benefits of unions? Unions of service workers have attacked this problem by mobilizing their own members, including organizing committee members, to raise union consciousness among the unorganized. Such unions have also achieved success by developing a long-term, patient, person-to-person organizing style.

For example, the Hotel and Restaurant Employees (HRE) Local 26, in Boston, is activating its members, in addition to staff organizers, to organize new hotels. These organizing efforts were preceded by and were based on two very successful mobilizations of the members to fight back concessions and win good contracts in 1983 and 1985. The union hopes that these highly publicized contract fights highlighted for nonunion workers the power of unions to win justice and dignity on the job.[13]

To a large extent, Local 26 and its president, Domenic Bozzotto, have borrowed an approach to organizing developed by the HRE locals in New Haven, Conn. Leading the New Haven effort was Vincent Sirabella, now national director of organizing for HRE. Sirabella, who "believes that organizing is a never-ending process that is at the core of unionism," trained HRE Local 34 leaders in New Haven in an organizing practice based on rank-and-file involvement. Using this approach, the local achieved a stunning victory after a $2\frac{1}{2}$-year campaign to unionize service and clerical workers at Yale University.[14]

Departing from the traditional model of industrial union organizing, HRE organizers began the campaign in 1980 on a low key, with no formal announcement and no distribution of union literature. Instead, they started with a face-to-face campaign based on house visits and luncheon meetings. Workers were not asked to sign cards at first, but to attend union social events. Once a core of union converts emerged, they were enlisted in the drive. Union contacts worked hard to win over ambivalent workers. The union refers to this as "pushing," and since it was often fellow workers who were doing the pushing, recruitment could take place on the job on a one-to-one basis. A system of realistic goals and rewards was established so that the "small victories" of the rank-and-filers were acknowledged.

Eventually, the Yale organizing campaign mobilized hundreds of workers. The organizing committee included 500 people, while 60 members were designated as rank-and-file organizers and served as the executive committee. In other words, the members rather than the organizers and union officials owned the organizing drive and had a greater investment in the outcome than is the case in traditionally organized drives. This notion that the union belongs to the members was a key element in the drive's success. As HRE organizer Karl Lechow put it, "Organizers must listen very carefully. What holds workers back is when leaders are nervous about something. When we have faith in what the rank and file want, it usually works out."[15]

In sum, part of the strategy in organizing service workers, who are unfamiliar with the benefits of unionism, is to convince them that they will participate in the organizing drive and its decisions, just as they will in the affairs of the union itself. A majority of workers believe that members have no say in what their unions do,[16] and this claim is a major feature of

[13] "The Hotel Workers: Rebirth of a Union," *Labor Page*, Special Issue No. 7 (February-March 1983).

[14] Rick Hurd, "Bottom-Up Organizing: HRE in New Haven and Boston," *Labor Research Review* 8 (Spring 1986), pp. 5-20.

[15] *Ibid.*, p. 16.

[16] AFL-CIO, The Changing Situation of Workers and Their Unions (1985).

antiunion propaganda. The best time to correct this misinformation is at the start of an organizing drive.

Beyond Bread and Butter

The second obstacle we noted to organizing service workers is their often close relationship with the public—a relationship usually lacking in industrial and construction work. In contract situations, organized public-sector workers clearly benefit from strategies designed to win public support and counter management accusations of selfish special interest group behavior.[17] But we think that this concern also applies to unorganized service workers, public and private, who are targeted for unionization. Many such workers may be relatively cool to traditional "bread and butter" demands.

In response, some service unions have put quality of service squarely on the agenda. At Boston City Hospital, Service Employees International Union (SEIU) Local 285, which already represented clerical and technical employees at the hospital, won the nurses away from the Massachusetts Nursing Association in 1979 by winning a debate over "professionalism." The MNA maintained that professionalism rests in nurses' advanced training and distinct status and precludes militancy or solidarity with other workers. Local 285 countered that professionalism, above all, means a commitment to good patient care. Good patient care, in turn, depends on adequate staffing, supplies, and other resources; winning these resoures depends on militant action and cooperation with other workers and the community. The nurses at City Hospital, keenly aware of the shortages at the hospital, chose Local 285.

Local 285 has emphasized the importance of patient care in other hospital drives. Management antiunion campaigns at hospitals invariably castigate the "outsiders" who have no interest in good health care. Local 285 has turned the issue around by pointing to situations where management has cut corners and arguing that workers are the ones who really care for and about patients.

Another service union response to service workers' reluctance to make wages and fringes the main demands is to stress "fairness" demands: respect and dignity, no race and gender discrimination, pay equity. Boston's Local 26 hopes that the success of its "justice and dignity" appeal and its contract language prohibiting sexual harassment and racial discrimination[18] will attract nonunion hotel workers whose pay scales have already been increased to meet the threat of unionization. District 65 in Boston also used this approach to organize Boston University clerical and technical workers, emphasizing issues like sexual harassment, authoritarianism, and health and safety.[19]

Sex, Race, and Organizing

A third barrier to the traditional union strategy is the fact that service workers are disproportionately female, black, and Latino. Successful organizing strategies have acknowledged these facts and developed their appeals accordingly. As we have just noted, some unions raise fairness issues designed to reach out to female and minority workers. At Yale and Boston University there were already unions of white male maintenance workers that focused on traditional wage and benefit issues. But unions seeking to organize largely female office and service staffs found it necessary to adopt quite a different issue orientation.

AFSCME Council 93 made a similar discovery in its 1974 campaign to organize state workers in Massachusetts. District Council Director Joseph Bonavita recalled, "The 12,000 clerical workers were considered the toughest. No one

[17] Paul Johnston, "The Promise of Public Sector Unionism," *Monthly Review* 30 (September 1978), pp.1-17.

[18] *Labor Page*, cited at note 13.

[19] Massachusetts History Workshop, *They Can't Run the Office Without Us: 60 Years of Office Work* (Cambridge, MA: Massachusetts History Workshop, 1985).

thought they would go for it. They were considered the toughest nut to crack because they were so close to management. They were the kind of people who brought a brown bag, ate it at noon, and loved it all. When they voted for the union, it was the surprise of surprises. It was a strange phenomenon. It didn't have to do with salary. It had to do with promotions and comparability of worth, a lot of things traditional unions don't see. And there was the increase of minorities, women, and the disabled. These were all nuances that people didn't see." [20] We now know that these "nuances" can be crucial features in the success of an organizing drive among service workers.

For over 15 years, the consciousness-raising activity of the women's movement (and the publicity, legal advocacy, and cultural sensitivity it created) have had an effect in the workplace. A changed consciousness and receptivity to unions has led to the creation of 9 to 5, followed by SEIU Local 925 and national District 925, to the revival of the Coalition of Labor Union Women, and to the emergence of women's issues in collective bargaining.[21] Independent women's activity in the courts has also had an impact, notably in the recent Supreme Court case sustaining affirmative action.

But to what extent have union organizing strategies drawn upon this consciousness? A 1980 study by the Coalition of Labor Union Women concluded that women still lacked adequate representation in leadership and that unions tended to address women's issues at the national level rather than at the local level, leaving many women members feeling divorced from their local unions. Although the AFL-CIO's 1985 report, *The Changing Situation of Workers and Their Unions,* does not recognize these problems, some state federations have begun to address them with programs for women leaders (for example, the Women's Institute for Leadership Development being sponsored in Massachusetts this summer by CLUW, the AFL-CIO, and the university labor education programs). And some local unions are addressing women's issues. In successful union drives, like the ones at Boston University and Yale referred to earlier, organizers have based their organizing drives on women's issues and built on the consciousness raised by the women's movement, so that female workers did not feel that they were, in the words of the CLUW (1980) report, "absent from the agenda" of organized labor.

We can draw several insights about collective work and concerted activity from the labor movement. First, women service and clerical workers are not attracted to hierarchical, male-dominated organizations that are already a problem for their lives as unorganized workers.[22] An oral history of office workers in Boston shows that at Boston University and Harvard women workers consciously looked for accessible unions relatively free from hierarchical domination.[23]

Second, women's issues may be different from those of traditional bread-and-butter unionism, as Joseph Bonavita pointed out. It is important for unions seeking service and clerical workers to recognize the significance of associations like 9 to 5 in identifying and addressing women's issues on the job.[24] Identifying and "cutting" the issues to reflect women's concerns seems crucial to organizing efforts and may effectively *precede* unionization. Jackie Ruff of SEIU District 925 notes that in 1981 unions

[20] Sally Jacobs, "Solidarity How Long?" *New England Business* 5 (October 3, 1983), pp. 25-26.

[21] Roberta Lynch, "Organizing Clericals: Problems and Prospects," *Labor Research Review* 8 (Spring 1986), pp. 91-101.

[22] Maryellen Kelley, "Building New Labor Organizations: A Response to The Changing Situation of Workers and Their Unions," unpublished paper presented to the University and College Labor Education Association, New Orleans, November 27, 1986.

[23] Massachusetts History Workshop, cited at note 19.

[24] Cindia Cameron, "Noon at 9 to 5: Reflections on a Decade of Organizing," *Labor Research Review* 8 (Spring 1986), pp. 104-109.

attempting to organize significant numbers of women won 59 percent of the elections in which women's issues were emphasized, compared to an overall success rate of 49 percent.[25] We think that the work of the Office Technology Education Project in Boston, which does education and network-building focused on the dangers of VDT use, will contribute to union consciousness and receptivity. It is a bit more difficult to identify issues that cut across all the categories of female service work, but affordable, quality day care is a leading concern. A coalition of unions promoting (or better yet, providing) day care would highlight the benefits of unionism.

Third, research on attempts to organize female service workers underlines the significance of horizontal support networks among women workers. These networks do not conform to the occupational lines and bargaining units that determine the boundaries of union organizing. Professor Maryellen Kelley of the University of Massachusetts-Boston (1986) reports that women organizers themselves tend to benefit from local networks like CLUW which "foster communication and promote cross-fertilization of ideas about organizing strategies and tactics." The same insight may apply to unorganized women service and clerical workers who often do not engage in as much associational activity outside of church and home as male workers do. Women's receptivity to the collectivist message of unionism can be fostered by pre-union associations like Boston Area Day Care Workers United, which helped unionize a number of day care centers, or like 9 to 5, which spurred the organization of women-oriented local unions.

Racial Pride and the Community Connection

Many of our comments about women service workers apply equally to workers of color whose special concerns need to be addressed in organizing drives. Indeed, the impact of the civil rights movement on black workers, male and female, is a major factor in their high level of support for unions.[26] Now that the vestiges of Jim Crow in public accommodations have been prohibited, black workers have their eyes on another prize: economic opportunity and social justice at work. During the late 1960s, unions like District 1199 organized workers in cities such as Charleston and Memphis, and even in New York, by consciously appealing to black pride and the consciousness raised by the civil rights movement. The United Farm Workers combined the same appeals in organizing Chicano, Filipino, and Arab migrant workers with tactics that may have some relevance to the organization of service workers.

However, in a workforce where blacks and Latinos are in a minority, and particularly in the hostile racial climate of the 1980s, organizers often feel that appeals to people of color will alienate white workers; this is a central dilemma for U.S. labor. Organizers differ on whether or not to address the issue of racism in organizing, how to respond when an employer uses race-baiting, and whether or not to appeal to race price.[27] This is a particularly sensitive issue because racial divisions often correspond to occupational divisions.

In a multiracial setting, HRE Local 26 has tried to make discrimination an organizing issue that touches all workers: black, immigrant, female, and white male (in the latter case by recalling earlier forms of ethnic prejudice and current age

[25] Richard Moore and Elizabeth Marsis, "Will Union Work for Women?" *The Progressive* 47 (August 1983), pp. 28-30.

[26] Mary Frederickson, "Four Decades of Change: Black Workers in the Southern Textile Industry," in *Workers' Struggles Past and Present: A Radical American Reader*, ed. James Green (Philadelphia: Temple University Press, 1983).

[27] Kimberly French, "Hospital Workers on the Critical List," *The Progressive* 47 (August 1983), pp. 31-34.

discrimination). In this way, the union hopes that racial pride and antiracist feelings can be harnessed in the organizing drive without making white workers unnecessarily defensive and hostile.

Some service unions have made special appeals to workers of color by drawing upon important community institutions that represent these workers. Building labor-community coalitions has been advocated as a way of appealing to the primary loyalties and support networks of Asian, black, and Latino workers, but such a coalition carries with it a round-trip ticket. In return for their support, institutions in communities of color will want union support for their concerns, which often include equal access to jobs and evidence of leadership for workers of color in union drives and subsequent union activities. This kind of coalition with groups such as the NAACP and SCLC led to striking successes for the United Auto Workers at Ford in 1941[28] for the United Packinghouse Workers in Chicago, Kansas City, and Boston in 1955, and more recently for AFSCME in Memphis (1968) and 1199 in Charleston (1969).

Sometimes community-based agencies have actually initiated the organizing of service workers. Asian Neighborhood Design, a San Francisco community-development corporation, unionized Asian restaurant workers. Cesar Chavez and Fred Ross started organizing farm workers in California by forming a "community union" that addressed service needs of farm workers (e.g., legal problems with immigration) long before actual unionization.[29] In Boston, community-development corporations in the black community that wanted to hire construction workers from the neighborhood encouraged the formation of United Community Construction Workers (UCCW) in the late 1960s. In the 1970s, the UCCW evolved into the Third World Jobs Clearing House, which demanded minority access to construction jobs across the city. And in the 1980s many of the same activists formed the multiracial Boston Jobs Coalition, which demanded a fair share of Boston construction jobs for Boston residents, people of color, and women, and won a city policy mandating these shares.

In Chicago, Boston, and other cities, Alliance of Communities to Organize Reform Now (ACORN) community organizers adopted a strategy of "building an organization first" among women of color in the home care industry and then proceeding with unionization. As Keith Kelleher reports on the experience of ACORN's United Labor Union (ULU) in Chicago, "Because of the sophistication of modern union-busting consultants, we realized when we first started that traditional union organizing methods would not work. We realized that the best way to organize for our purposes was *to build an organization* first. We knew that we had to build an organization that could sustain itself through a one- or perhaps two-year campaign that it often takes to get a signed contract."[30]

Instead of tipping management off by passing out cards or putting the workers off with an aggressive sales pitch, the ULU organizers relied on the "basic Build the Base" principles that made ACORN a successful community organization in many parts of the country, principles very similar to those adopted by HRE Local 34 at Yale. As a result, ULU successfully organized poor black women in the home care industry in California, Illinois, and Boston (where the union later affiliated with SEIU).[31]

---

[28] August Meier and Elliott Rudwick, *Black Detroit and the Rise of the UAW* (Oxford: Oxford University Press, 1979).

[29] Joan Ecklein, ed. *Community Organizers* (New York: Wiley, 1972).

[30] Keith Kelleher, "ACORN Organizing and Chicago Homecare Workers," *Labor Research Review* 8 (Spring 1986), p. 37.

[31] Kelleher, cited at note 30.

Unions have much to learn from community organizing strategies and much support to gain from community-based groups. However, to take full advantage of these alliances, unions will have to make some structural changes, develop leadership of color, put the issues of minority workers high on the agenda, and learn how to build coalitions with community groups and how to think horizontally—across occupational and employer-defined lines.

Unions and Associations

Finally we consider the problem of service workers who are employed by small firms such as restaurants, gas stations, and laundries and/or in high turnover jobs. The AFL-CIO's 1985 report proposed "associate memberships," mainly for workers who have lost collective bargaining benefits through plant closings and for "free riders" in agency shops. Associate memberships could also aid organizing by giving benefits to workers who vote for the union in lost elections. IBEW Local 103 has adopted this approach in Boston, but of course an electrician who votes for the union in a losing election on one job site can then carry a union card to work at a site operated by a union contractor. This would not work in high-turnover service sectors such as restaurants, at least not until there is a large enough unionized section in these industries.

Still, the concept of associate membership might attract itinerant workers by promoting the old IWW notion that union membership exists even without a contract; it is a visionary way of promoting the kind of union consciousness service workers seem to lack.[32] This method has been used effectively in organizing by the United Farm Workers and the Farm Labor Organizing Committee. The National Writers Union is starting out as an association with many members and few contracts, in a structure that parallels the building trades in some ways. And in Boston in the mid-1970s a craft-based group called the Guild of Art Models briefly flourished and won a city-wide wage increase despite the fact that modeling jobs usually last an hour or two and that models almost invariably work alone.

Perhaps most effective would be alliances between unions and associations, akin to 9 to 5, that address the needs of service workers not under contract. Service workers would probably value access to union-supported day care and health care plans more than low-cost credit cards and life insurance. Unions might also ally with unionized human and legal service professionals to provide needed services to unorganized service workers under union auspices. Wrongful termination is a big problem for these workers, as are problems with immigration, unemployment benefits, and workers' compensation. And as 9 to 5 has shown, education on workplace issues and workers' rights can be an important drawing-card.[33]

In fact, as Aronowitz[34] suggests, organizing of service-sector workers may often take "the form of small professional, feminist, and civil rights groups before trade union organization becomes possible" because these workers might at first find alternative kinds of association more congenial to their conditions than the highly public organization of a labor union. Professional groups of public employees like teachers and nurses have taken this route, but so have less professionalized public servants like police officers, firefighters, and licensed practical nurses.

There are obvious problems for unions in relating to these independent associations. Unions are reluctant to extend benefits to workers who are not under

[32] Jeremy Brecher, "Crisis Economy: Born-again Labor Movement?" *Monthly Review* 35 (March 1984), pp. 2-18.

[33] Cameron, cited at note 24.

[34] Stanley Aronowitz, *Working Class Hero: A New Strategy for Labor* (New York: Pilgrim Press, 1983), p. 167.

contract and are not paying dues, especially when the associations providing the services are not controlled by the unions. These are the same kinds of obstacles that make it hard to work cooperatively with community groups that are not "officially" part of organized labor. But if the AFL-CIO is going to address the problem of jurisdictional disputes *among* its member unions (certainly a problem in service-sector organizing), it should also consider how to work more closely with community groups, service agencies, and independent worker associations. The benefits in organizing service workers could be large.

Indeed, the notion of "associate memberships" might be expanded to include "joint memberships" with organizations and associations that already represent service workers. This kind of associational overlap was crucial to the success of the CIO industrial unions 50 years ago. For example, Steel Workers Organizing Committee organizers worked closely with ethnic associations; the Packinghouse Workers Organizing Committee in Chicago formed the Back of the Yards Council to ally with churches and spur community organizing. Such associational connections, the kind of horizontal organization that helped make Solidarity so strong in Poland, could promote a new wave of organizing among the fastest growing group of workers in the country.

We doubt that any organizing strategy can by itself lead to a breakthrough with service workers. We recognize that even the best strategies can be frustrated by the NLRB, the courts, and union-busting firms. Until these antiunion weapons are spiked, all organizing will face tough going. And surely we need the kind of improvements *The Changing Situation of Workers and Their Unions* prescribes: the mediation of jurisdictional disputes, the cooperation necessary to form multiunion organizing committees (as the SEIU has done in Massachusetts), the more effective use of the media, and so on. But we still conclude with an appeal for an innovative, affirmative action approach to organizing service workers and a serious revision of the traditional model of union organizing used in goods-producing industries.

Such a new approach is premised on recognizing the need for new organizing issues based on social justice, equality for women and workers of color, and opposition to the kinds of discrimination these workers face. It also has to be based on the need these workers have expressed for union organizers and leaders of their own kind. This approach calls for the adoption of strategies developed in community organizing, for the forging of labor-community coalitions, and for the adoption of associate memberships including some based on new kinds of cooperation with the other organizations representing service workers. Future growth of the labor movement depends on finding new ways of appealing to this rapidly expanding group of low-wage workers.*

[The End]

* Additional References: Coalition of Labor Union Women, *Absent from the Agenda* (New York: CLUW and Women's Center for Labor Education, 1980); Mel King, *Chain of Change: Struggles for Black Community Development* (Boston: South End Press, 1981).

Retiree Insurance Benefits: Enforcing Employer Obligations

By Leonard R. Page**

Associate General Counsel, UAW

Health care expenditures consume ten percent of our Gross National Product. In recent years, health care premiums have been growing at an annual rate of more than seven percent. The cost crisis has been particularly devastating to fixed-income retirees who see Medicare as covering less and less of their health care needs. The number of retirees covered by health care plans is expected to double in the next 10 years, according to a Louis Harris survey released in January 1987.

Until recently, the Administration's response to the problem was to propose Medicare cutbacks and to recommend medical IRAs. But the retiree health care problem has become even too much for this Administration to ignore. A variety of bills are now being proposed to provide improved catastrophic health care for the elderly. While such legislation will help, the ultimate solution must and will be some form of national health insurance.

A February survey of American public opinion published by Hearst Corporation in February 1987 asked about possible changes in the U.S. Constitution. Three out of four American's support a Constitutional amendment, *not just a law,* guaranteeing "every citizen's right to adequate health care if he or she cannot pay for it."

The current retiree litigation avalanche has been triggered by a rather cavalier attitude toward the vested rights of retirees. Employers are seeking to limit their liability for retiree insurance benefits by claiming that the benefits should last only as long as the duration of the collective bargaining agreement. For its unorganized workers, employers argue that insurance benefits are, in effect, gratuities subject to unilateral modification or elimination. The problem often comes up when plants close or when employers go bankrupt.

More recently, litigation has been triggered when the employer imposes cost containment programs based on co-pays and deductibles. In reality, such programs are often just cost-shifting to that link of the health care chain least able to afford the increased health care costs. However, if health insurance benefits are vested for life, then *any* modification that reduces coverage is subject to challenge. Unions and retirees have been quite successful in suing employers under a lifetime benefit theory.

According to a survey report entitled Post-Retirement Medical Benefits, conducted by the Washington Business Group in June of 1985, retiree insurance lawyers will be busy. The survey covered 200 Fortune 500 companies: 66 percent of the companies responded, of whom 98 percent offered medical benefits to retirees; *83 percent planned to introduce or had introduced "cost containment" to the retiree group; and 81 percent felt they had the right to amend or terminate health plans for past retirees.*

In my opinion, unless an employer can point to *crystal clear and unambiguous language specifically limiting the duration of the retiree insurance promise,* a court, arbitrator, or jury will usually resolve any ambiguity in favor of the retirees to find a lifetime benefit duration. Moreover, attempting to negotiate or unilaterally impose changes in the durational language is *extremely dangerous,* given the fact that the union may not have the legal authority to bind the retirees. Thus, to suggest a change is to "red flag" the whole question and invite litigation.

If an employee benefits director wants to introduce deductibles and co-pays to

** The views expressed herein are the author's. Mike Nicholson, of the UAW Legal Department, and Bill Payne, of the United Steelworkers of America Legal Department, made significant contributions to this article.

past retirees, he or she should weigh the consequences carefully. Rather than saving several thousand dollars per year in health care costs, such an action could well lead to a multi-million dollar judgment against the employer equal to the present value of all retiree health insurance obligations.

Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), permits breach of contract actions against employers who cease providing life and/or health insurance benefits to retirees as required by the collective bargaining agreement. Section 502(a) of the Employee Retirement Income Security Act of 1974 [ERISA], 29 U.S.C. § 1132(a), permits actions by a participant or beneficiary to enforce or clarify rights under an employee welfare plan.

In *Pittsburgh Plate Glass,*[1] the employer altered health care benefits for past retirees at mid-contract. The union filed an unfair labor practice charge claiming bad faith bargaining and contract repudiation. The NLRB upheld the complaint but the Supreme Court reversed and held that *PPG* had not committed an unfair labor practice.

This seminal Supreme Court case made several key holdings. (1) Retirees are not employees within the meaning of the NLRA and cannot be joined with active employees in a collective bargaining unit. (2) Unions are not the exclusive bargaining representatives of retirees under § 9(a) of the NLRA. (3) Benefits for past retirees are a *permissive,* not mandatory subject of bargaining; thus, neither party can use economic weapons to force negotiations over changes. (4) Altering permissive terms in contracts does not constitute an unfair labor practice. (5) Retiree benefits may not be changed without the retiree's consent, but the remedy is not under the NLRA:

"This does not mean that when a union bargains for retirees—which nothing in this opinion precludes if the employer agrees—the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. The retiree, moreover, would have a federal remedy under § 301 . . . for breach of contract if his benefits were unilaterally changed."[2]

Enforcement Actions By Retirees

Retirees seeking judicial protection of their retirement rights have the choice of several legal alternatives, with differing advantages. Suits alleging only ERISA violations will avoid the many roadblocks and procedural headaches associated with Section 301 litigation. Questions on arbitrability, exhaustion, and the like will be avoided.

On the other hand, ERISA claims do not provide the right to trial by jury, which can be a considerable advantage (see below). For this and other reasons, "hybrid" complaints alleging separate counts under ERISA and Section 301 are the most common.

The Arbitration Option

Unions often have the option to grieve the failure to provide benefits as a violation of the collective bargaining agreement.[3] On occasion, you may have a choice of forums: arbitration or court. The most crucial factor in making your selection is the caliber of the arbitrator or judge making the decision. Arguments in favor of the court route include: the avail-

[1] *Allied Chemical v. Pittsburgh Plate Glass,* 404 US 157 (1971), 66 LC ¶ 12,254.

[2] *Id.* at footnote 20.

[3] *American Standard Inc.,* 57 LA 698 (Warns, 1971); *Wellman Dynamics,* AAA No. 5430 0505 72 (Summers, 1973); *Black, Sivalls & Bryson, Inc. and Tec Tank, Inc,* 80-1 ARB ¶ 8277 (Goetz, 1980); *Roxbury Carpet Co., 73-2* ARB ¶ 8521 (Summers, 1973); *Scott & Williams, Inc. v. USW,* 574 F.Supp. 450 (D.N.H. 1983) (confirming the award); *Occidental Chemical Corp.,* Case No. 82K-28262 (Howlett, 1984); *Mioni v. Bessemer Cement,* 6 EBC 2677, (W.D. Pa. 1985) (confirming the arbitration award); and *Johnson Group and Whitehead & Kales,* AAA No. 5430 1381 84 (Cole, 1986). The question of arbitral authority in this area, however, may not be entirely settled.

ability of discovery; the right to a jury trial; possible exemplary damages; attorney fees; [§ 502(g) of ERISA]; the right to appeal; and the possibilities of preliminary relief.

Arguments in favor of arbitration include: (1) low cost; (2) relative speed, since employer defense tactics in court emphasize delay through discovery and motion practice (i.e. class action issues, statute of limitations defenses, failure to exhaust grievance procedure, numerous depositions etc.); (3) relative finality; (4) limited basis for judicial review.

No Requirement That Retirees Exhaust the Grievance Procedure

Generally, employees wishing to assert breach of contract claims must attempt to use the contract grievance procedure agreed upon by the employer and the union as the means of seeking redress.[4] However, most courts have held that retirees, because they are no longer within the bargaining unit, are not required to exhaust the grievance procedures outlined in the collective bargaining agreement before bringing suit for benefits provided by the agreement.[5] In any event, the language of the plans may be decisive, and many agreements specifically exempt insurance disputes from the scope of arbitral authority. Some permit *pension disputes* over eligibility issues to be decided by a board of administration that provides arbitration to resolve deadlocks.

While most courts are following this rule, it is not universal. In an unpublished opinion cited by the arbitrator, a court found that retirees must follow the grievance procedure provided in the contract before suing the former employer for breach of contract in terminating the benefits.[6] The presumption of arbitrability, however, is generally *not* extended to retirees.[7]

Furthermore, a requirement of arbitration, and even an unfavorable award, need not be fatal to retiree litigation, because ERISA can be construed as an "independent statutory right."[8] The Court, in *Weimer v. Kurz-Kasch,*[9] ignored an arbitrator's award limiting benefits to the contract's duration and found for a lifetime benefit. This approach is especially viable when the ERISA right is genuinely independent, as with its anti-discrimination provision, for example.

A Union May Sue On Behalf of Retirees

If a union is party to a collective bargaining agreement providing benefits to retirees, it has *authority* to sue to enforce such rights on behalf of retirees.[10] The Supreme Court has specifically held that a union has standing to sue on behalf of its members.[11] At the same time, the union has no statutory *duty* to sue on behalf of retirees, because it is not the exclusive bargaining representative of retirees.[12] In strictly ERISA-based claims, however, the union is not a proper plaintiff.[13]

---

[4] *Republic Steel Corp. v. Maddox,* 379 U.S. 650, 85 S.Ct. 614 (1965), 51 LC ¶ 19,458.

[5] *Anderson v. Alpha Portland Industries,* 752 F.2d 1293 (8th Cir. 1985), 102 LC ¶ 11,314, cert. denied, 105 S.Ct. 2329 (1985) 102 LC ¶ 11,341; *Weimer v. Kurz-Kasch,* 773 F.2d 669 (6th Cir. 1985) 103 LC ¶ 11,664. See also *UAW v. Yard-Man,* 716 F.2d 1476, 1486, n.16 (6th Cir. 1983), cert. denied 104 S.Ct. 1002 (1984); *Hazen v. Western Union Telegraph Co.,* 518 F.2d 766 (6th Cir. 1975) 77 LC ¶ 10,967; *Rutledge v. Dayton Malleable,* 20 Ohio App. 3d 229, N.E.2d 757 (1984); *USW Local 2728 v. Bessemer Cement Co.,* 120 LRRM 2819 (W.D. Pa. 1984); *Air Line Pilots Associations v. Northwest Airlines, Inc.,* 627 F.2d 272 (D.C. Cir. 1980).

[6] *Johnson Group & Whitehead & Kales,* AAA No. 5430 1381 84 (Cole, 1986).

[7] See *Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364, 104 S.Ct. 1844 (1984), 100 LC ¶ 10,922; *Apponi v. Sunshine Biscuits, Inc.,* 124 LRRM 2494 (6th Cir. 1987).

[8] Cf. *Alexander v. Gardner-Denver,* 415 U.S. 36, 94 S.Ct. 1011 (1974), 7 EPD ¶ 9148.

[9] Supra.

[10] *Steelworkers v. Canron Inc.,* 580 F.2d 77 (3d Cir. 1978), 84 LC ¶ 10,701; *UAW v. Acme Precision Products,* 515 F.Supp. 537 (E.D. Mich. 1981), 94 LC ¶ 13,490.

[11] *UAW v. Brock,* 91 L.Ed 2d 228 (1986).

[12] *Pittsburgh Plate Glass, Schneider Moving,* supra.

[13] *Utility Workers v. Consumers Power Co.,* 453 F.Supp. 447 (E.D. Mich. 1978), aff'd 637 F.2d 1082 (6th Cir. 1981), vacated 451 U.S. 1014 (1981), rev'd 663 F.2d 1074 (6th Cir. 1981); *UAW District 65 v. Harper & Row,* 576 F.Supp. 1468 (S.D.N.Y. 1983).

Who Is a Retiree?

Often the language of the plan or agreement is vague on the definition of which class of retiree is eligible for health care benefits. There are several different categories of retirees: normal, early, disability, and deferred-vested. The latter category refers to former employees who separated from employment with a vested pension entitlement before retirement age. And yet, the promise may be stated as applying to "retirees." At least one court has interpreted the phrase to provide for lifetime benefits to all categories of retirees, including deferred-vested.[14]

Certifying Retirees as a Class

It is often more efficient for retirees to proceed as a class in suing a former employer. The normal prerequisites to a class action, set forth in Federal Rule of Civil Procedure 23(a), should be followed. In general, Rule 23(a) should be liberally construed in order not to undermine the policies underlying the class action rule.[15]

A case in the District of Maine provides a detailed analysis of the certification of a group of employees suing their former employer. In *Lessard v. Metropolitan Life,*[16] the employees were required to return to the company benefits received under the company disability plan after they received Social Security disability. Cases that deal with certifying a *retiree* class include: *Mamula v. Satralloy,*[17] *Bower v. Bunker Hill,*[18] and *Musto v. American General Corp.*[19] In *Musto,* the Court found that the retirees met the requirements for maintaining a class action: numerosity, commonality, typicality, and adequacy of representation.

The union may advise retirees of their rights and provide retirees with legal counsel.[20] However, attorneys who often represent plaintiffs' union should be wary of accusations of unethical solicitation or conflict of interest, which might affect Rule 23's "adequacy of counsel" requirement. Class certification may be of mutual benefit where the settlement has received court approval and some retirees later complain.[21]

Who Is the Appropriate Defendant?

Retirees can sue the actual "plan," but this may present practical difficulties if there is no title or address of such an entity.[22] Retirees should sue the employer and its key representatives as plan "fiduciaries." A fiduciary may have personal liability. The term "fiduciary" is broadly defined to include anyone exercising "discretionary authority or discretionary control respecting management of [the] plan."[23]

If there is a danger that the employer is judgment-proof, any "deep pocket" entity responsible for the decision to deny benefits should be joined as a defendant. The parent company may be sued as a "fiduciary," or under Section 301, using the traditional "piercing the corporate veil" theory. The latter approach makes a broad range of company financial records relevant for discovery purposes.[24] Moreover, if the employer is the plan fiduciary, then *all communications* between it and its attorneys may be the property of the

[14] *Bower v. Bunker Hill,* 124 LRRM 2483 (E.D. Wash. 1986).

[15] *Weathers v. Peters Realty Corp.,* 499 F.2d 1197 (6th Cir. 1974).

[16] 103 F.R.D. 608 (D. Me. 1984).

[17] 578 F.Supp. 563 (S.D. Ohio 1983).

[18] 124 LRRM 2483 (E.D. Wash. 1986).

[19] 615 F.Supp. 1483 (M.D. Tenn. 1985), appeal pending (6th Cir. Case No. 85-5865).

[20] *United Transportation Union v. Michigan Bar,* 401 U.S. 576, 91 S.Ct. 1076 (1971); *UMW v. Illinois Bar,* 389 US 217, 88 S.Ct. 353 (1967); *Wolkenstein v. Reville,* 539 F.Supp. 87 (W.D.N.Y. 1982).

[21] *Laskey v. UAW & Houdaille,* 638 F.2d 954 (6th Cir. 1981).

[22] 29 U.S.C. § 1132(d)(1).

[23] 29 U.S.C. § 1002 (21)(A). See, e.g., *Genter v. Acme Scale and Supply Co.,* 776 F.2d 1180 (3d Cir. 1985); *Monson v. Century Mfg. Co.,* 739 F.2d 1293 (8th Cir. 1984); *Donovan v. Mercer,* 747 F.2d 304 (5th Cir. 1984). Failure to follow plan documents is a breach of fiduciary duty. *Thonen v. McNeil-Akron Inc.,* 7 EBC 1971 (N.D. Ohio 1986); *Blau v. Del Monte Corp.,* 748 F.2d 1348 (9th Cir. 1984), cert. denied 106 S.Ct. 183 (1985).

[24] See, e.g., *UAW v. Cardwell Mfg. Co.,* 416 F.Supp. 1267 (D. Kan. 1976).

plan and are not protected by the attorney-client privilege.

Right To Trial By Jury

The right to a jury trial may be essential where there are disputed issues of fact and the possibility of exemplary or mental distress damages. The prospect of a sympathetic jury by itself should be enough to convince more employers to settle the dispute. *There are no reported adverse jury verdicts in this area.*

On remand from the 9th Circuit, in *Bower v. Bunker Hill,*[25] the jury awarded lifetime benefits to both regular and *deferred vested retirees* (employees who severed employment with a vested pension claim). In determining that a jury trial was required to hear the breach of contract claims under LMRA, Section 301, the court stated: "Plaintiffs style their claim for damages as a breach of contract under action arising under Sec. 301 of the LMRA . . . They assert that the breach of contract claims are traditionally legal and thus the Seventh Amendment guarantees them the right to a jury trial on this issue. I agree. Section 301 of the LMRA provides that an employee may bring an action for damages against an employer for breach of a collective bargaining agreement. . . . A suit for breach of contract seeking damages was traditionally an action at law and thus triable by a jury under the Seventh Amendment. Thus, the plaintiffs have a right to a jury determination of not only whether the contract has been breached and the extent of damages if any, but also just what the contract is."[26]

While a jury trial is generally available in a Section 301 action, it is generally not available under an ERISA claim, unless the ERISA issue is essentially a contract claim. However, combining the causes of action may be a basis for striking a jury demand, although the cases are mixed.[27]

The Norris-La Guardia Act Does Not Apply

Because an injunction ordering employers to comply with the collective bargaining agreement and provide insurance to retirees is not the type of "strike benefit" Section 4(c) of the Norris-La Guardia Act sought to protect from injunction, § 4(c) does not apply in suits by retirees for breach of contract.[28] A number of courts have enjoined employers from changing retiree benefits, sometimes under a reverse *Boys Markets* theory, which is only available where arbitration is also sought.[29]

While Federal Rule of Civil Procedure 65 states that a bond must be posted for injunction, this should not be a barrier. Various courts have held that extenuating circumstances, such as indigence or the enforcement of federal rights, override this provision.[30] In *International Brother-*

[25] No. C-82-412 RJM (E.D. Wash. Feb. 9, 1986).

[26] *Bower v. Bunker Hill,* slip op. at 22-23, quoted in 2161; *Haytcher v. ABS Industries, Inc.,* 7 EBC 2158, (N.D. Ohio 1986) See, also *Smith v. ABS Industries,* C.A. No. C85-3180 (N.D. Ohio June 10, 1986).

[27] *Hechenberger v. Western Electric Co. Inc.,* 570 F.Supp. 820, 822 (E.D. Miss. 1983), aff'd, 742 F.2d 453, cert. denied, 105 S.Ct. 1182 (1985); *Blau v. DelMonte Corp.,* 748 F.2d 1348, 1357; *Wardle v. Central States, Southeast & Southwest Area Pension Fund,* 627 F.2d 820, 830 (7th Cir. 1980) cert. denied, 449 U.S. 1112 (1981). Contra, *Bugher v. Feightner, 722* F.2d 1356, 1360 (7th Cir. 1983), 99 LC ¶ 10,717, cert. denied, 105 S.Ct. 98 (1984); *Bower v. Bunker Hill Co., supra.*

[28] *UAW v. White Farm Equipment Co.,* 119 LRRM 2878 (D. Minn. 1984); *Local 2750, Lumber & Sawmill Workers Union v. Cole,* 663 F.2d 983, 987 (9th Cir. 1981); *Briggs Transportation Co. v. International Brotherhood of Teamsters,* 739 F.2d 34 (8th Cir. 1984), 101 LC ¶ 11,122, cert. denied, 105 S.Ct. 295 (1984), 101 LC ¶ 11,210.

[29] *UAW v. White Farm Equipment Co.,* supra, *USW v. Canron, Inc.,* supra, *Steelworkers v. Fort Pit Steel Castings* (active employees), 598 F.2d 1273 (3rd Cir. 1974); UAW Local 645 v. GM, 112 LRRM 3344 (C.D. Calif. 1982); *Textile Workers v. Columbia Mills,* 471 F.Supp 527 (N.D.N.Y. 1978); *Bettron v. Meyers,* 677 F.2d 1317 (9th Cir. 1982); *Whelan v. Colgan,* 602 F.2d 1060 (2nd Cir. 1979), 86 LC ¶ 11,389; *District 29 UMWA v. Royal Coal,* 6 EBC 2117 (S.D. W. Va. 1985); *Musto v. American General,* supra; *Mamula v. Satralloy,* supra; *International Brotherhood of Teamsters, Local 414 v. Food Marketing Corp., 7* EBC 2465 (D.C. Ind. 1986), *Keffer v. Cannons Steel Co.,* C.A. No. 84-3137 (S.D. W. Va. 1986); *Schultz v. Teledyne* C.A. No. 87-39 (W.D. Pa. 1987).

[30] See, e.g., *Crowley v. Local 82, Furniture and Piano, Etc.,* 679 F.2d 978 (1st Cir. 1982), rev'd on other grounds, 104 S.Ct. 2557, 467 U.S. 526 (1984); *Wayne Chemical, Inc. v. Columbus Agency Serv. Corp.,* 567 F.2d 692 (7th Cir. 1977).

hood of Teamsters Local 414 v. Food Marketing Corp.,[31] the Court ordered a bond of $5,000 to cover possible attorney fee expenses to be incurred by the employer, if it could be proved that the injunction was improperly granted. The employer's demand for a bond equal to premium costs was rejected.

What Standard Governs in Judging Employer Conduct?

Employers often argue—with some surprising success—that a deferential "arbitrary and capricious" standard applies in judging employer conduct, even for *non*-Taft-Hartley plans. Under this standard, the fiduciary's interpretation of plan eligibility will not be deemed a violation of plan documents unless it is "arbitrary and capricious." If the fiduciary's action is "reasonable," it will be sustained even if the reviewing court would have reached a different result had it interpreted the plan in the first instance.[32]

Analysis of ERISA's text and purpose, however, shows the fallaciousness of this interpretation. Section 404,[33] imposes a very strict standard of care, requiring the fiduciary to act "solely in the interest of participants . . . for the exclusive purpose of providing benefits." Accordingly, a line of precedent—including Supreme Court decisions—simply ignores the "arbitrary and capricious" standard and applies a very strict standard instead.[34]

This latter approach is more consonant with ERISA's mandate that courts develop a "common law" of employee benefits based on traditional principles of trust and contract law, when appropriate. At common law and under Section 301, a plaintiff suing on a contract never had to meet the heavy burden which the "arbitrary and capricious" standard imposes.

The deferential standard is especially inapplicable where the fiduciary is in a conflict-of-interest situation. When the fiduciary and the beneficiaries have conflicting interests, the fiduciary is best advised to step aside, especially when a course of action, such as modification or termination, would directly advance the interests of non-beneficiaries. In the typical retiree insurance case, of course, the conflict-of-interest is inherent.[35]

Because of the fiduciary relationship, broad discovery of company materials is permitted. Plaintiffs can also successfully move to compel disclosure of communications between the company (the plan fiduciary) and its counsel regarding the retiree cutback decision; theoretically at least, the attorney's advice is for the ultimate benefit of participants.[36]

Relief

The failure to provide continuing health care benefits represents an anticipatory repudiation which permits a judgment equal to the present value of the *total* lifetime obligations of the retirees. This can amount to $30,000 to $60,000 per retiree, depending upon level of benefits and age of the retiree. Actuarial assistance will be required to calculate such present values.

Another remedy is disgorgement, whereby the employer must restore the profits gained by the fiduciary breach even if the participants and plan suffer no out-of-pocket loss. The burden of proof in regard to such remedial questions rests

[31] 7 EBC 2465 (N.D. Ind. 1986).

[32] *Blakeman v. Mead Containers*, 779 F.2d 1146, 1149-50 (6th Cir. 1985); *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983); *Moore v. Reynolds Metals Co.*, 740 F.2d 454, 457 (6th Cir. 1984), cert. denied, 105 S.Ct. 786 (1985).

[33] 29 U.S.C. § 1104.

[34] See, e.g., *Massachusetts Mutual v. Russell*, 105 S.Ct. 3085, 3097-98 and footnotes 6-8 (1985) (Brennan, J., concurring); *Central States, etc. v. Central Transport Inc., et al.*, 472 U.S. 559, 105 S.Ct. 2833 (1985); *Leigh v. Engle*, 727 F.2d 113 7136-37 (7th Cir. 1984).

[35] See, e.g., *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir. 1982), cert. denied, 495 U.S. 1069 (1982); *Struble v. N.J. Brewery Emp. Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984).

[36] See, e.g., *Washington Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 543 F.Supp. 906 (D.D.C. 1982).

with the breaching party.[37] In these circumstances, the court might have to establish a plan "fund" from which to distribute the illegal "profits." In other cases, the employer may be removed as fiduciary and an independent administrator appointed.[38]

Prevailing plaintiffs may recover attorney's fees under 29 U.S.C. § 1132(g). The standard for determining the amount of such recovery is that used in civil rights cases. While the Supreme Court has recently limited the availability of exemplary damages in these cases, "pain and suffering" damages may remain available under 29 U.S.C. § 1132(a)(3), and Justice Brennan's concurrence, joined by three other Justices, supports the availability of "extracontractual compensatory relief."[39]

Settlement

Retiree insurance cases, given the *all* or *nothing* alternatives of coverage for the retirees, are ripe for settlement. Given the strong likelihood of success, most settlements have provided for lifetime coverage at approximately 80 percent of the prelitigation benefit levels. At the same time, settling for something less than full coverage generally necessitates a class action settlement to protect the parties.[40]

Early discussions are suggested at which the following should be emphasized: a) jury trial; b) exemplary and punitive damages; c) attorneys fees; d) immediate payment of total present value of retiree claims based on anticipatory repudiation; e) disgorgement; f) personal liability of fiduciaries; g) disclosure of retiree debt liability;[41] h) mention jury trial one more time. On the plaintiff's side of the settlement discussion, a principle question is collectability.

Can the retiree group accept some reduction in coverage or accept co-pays and deductibles in exchange for a guaranteed lifetime promise? *It is usually more important to obtain adequate security for the benefit promise.* Will the employer establish a trust fund or provide an adequate security interest to guarantee future coverage? Given collectability problems with small employers, you may have to trade off benefits for security.

Interpreting the Plan Documents

Breach of contract actions under Section 301 are essentially traditional contract enforcement cases. Courts look at the language of the retiree promise and other parts of the collective bargaining agreement with duration clauses, extrinsic evidence, and bargaining history. Absent clear language limiting the duration of the insurance, always argue that the parties intended insurance benefits to be part of the retirement package and to last as long as the pension benefits.

Examining Plan Language

Most courts are inclined to construe the insurance language liberally in favor of the retirees: (a) "[T]he Company will continue to cover such eligible retired employees with $2000 life insurance."[42] (b) "The Company shall pay the cost of all group insurance premiums . . . as long as such Employee remains retired and unemployed, either by the Company or by anyone else."[43] (c) "*The Company will continue to provide,* at its expense, supplemental medicare and major medical

[37] See, e.g., *Leigh v. Engle,* supra; *Donovan v. Bierwirth,* supra.

[38] See, e.g., *DelGrosso v. Spang and Co.,* 769 F.2d 928 (3d Cir. 1985), *cert. denied* 106 S.Ct. 2246 (1986).

[39] *Massachusetts Mutual v. Russell,* 105 S.Ct. 3085, 3089, n.5 (1985) (Brennan, J., concurring). For cases permitting such additional damages, see *UAW v. Federal Forge, supra,* and *Haytcher v. ABS Industries, supra; Hechenberger v. Western Electric Co.,* 570 F.Supp. 820 (E.D. Mo. 1983), *aff'd,* 742 F.2d 453 (8th Cir. 1984), *cert. denied* 105 S.Ct. 1182 (1985).

[40] See *Laskey v. Houdaille and UAW,* supra.

[41] Financial Accounting Standards Board, FAS No. 81, requires disclosure of retiree debt liability. Does the employer want total present value of the retiree debt disclosed as a long-term liability in its annual report?

[42] *Upholsterers' International Union v. American Pad & Textile Company,* 372 F.2d 427 (6th Cir. 1967).

[43] *Weimer v. Kurz-Kasch, Inc.,* 773 F.2d 669, 673 (6th Cir. 1985).

benefits for pensioners aged 65 and over."[44] (d) "This booklet describes a Program of Hospital and Physicians' services ... which continues until December 31, 1977, and thereafter, subject to negotiations between the company and the union."[45]

In other cases, courts have found that the language of the agreement links it to the duration of the underlying collective bargaining agreement.[46] Obviously, the parties can negotiate for benefits that survive the contract's duration.[47]

The Underlying Collective Bargaining Agreement

Courts examine the collective bargaining agreements that contain the insurance promise. Is the insurance described as part of the retirement package, thereby linking it to the pension benefit's duration? In several cases, the courts have relied upon the contract with the specific durational clauses for other benefits to imply a lifetime duration.[48]

The Summary Plan Description and Letters to Retirees

ERISA emphasized the central importance of "requiring the disclosure and reporting to participants and beneficiaries of financial and other information." 29 U.S.C. § 1001(b). Participants must be furnished summary plan descriptions which, among other things, spell out the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." [29 USC § 1022(b)]. See also 29 C.F.R. § 2520.102-3(1). Employers are often lax in fulfilling their duty of disclosure, sometimes even engaging in misrepresentation and concealment. Congress was alert to and concerned by the danger of false expectations and dashed hopes that such employer behavior might induce. On this basis, courts have applied estoppel theories to preclude benefit terminations where employers have breached their duty of disclosure.[49]

The standard for measuring employer conduct is confused, however, and some cases have allowed incomplete disclosure. It is thus vital to examine the various documents presented to employers—summary plan descriptions, letters of explanation to individual retirees, retirement papers, and so on—and gauge their accuracy and completeness. Where the employer has obfuscated, misrepresented, or concealed, the retirees will have another weapon.

Extrinsic Evidence

When the language of the collective bargaining agreement is ambiguous, courts turn to extrinsic evidence to determine the intent of the parties.[50] Wherever possible, it is advisable to file affidavits from retirees and bargainers to show that: (a) the retirees received letters, summary plan descriptions, booklets, etc., which either promised "continuing" or "lifetime" coverage or at least failed to specify a more limited duration and/or (b) the original bargainers understood the language to mean lifetime.

---

[44] *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 612 (6th Cir. 1985), *cert. denied* 106 S.Ct. 1202 (1986).

[45] *Mioni v. Bessemer*, 6 EBC 2677 (W.D. Pa. 1985).

[46] *Anderson v. Alpha Portland Industries, Inc.*, 7 EBC 2534 (E.D. Mo. 1986); *UAW v. Roblin Industries, Inc.*, 561 F.Supp. 288, 300-01 (W.D. Mich. 1983); *Turner v. International Brotherhood of Teamsters, Local 302*, 604 F.2d 1219, 1225 (9th Cir. 1971); *District 17 v. Allied Corp.*, 735 F.2d 121, 130 (4th Cir. 1984), *cert. denied* 105 S.Ct. 3527 (1985); *District 29, UMW v. Royal Coal Co.*, 768 F.2d 588, 592 (4th Cir. 1985) on remand, see *District 29 UMW v. Royal Coal*, 6 EBC 2117, 2119-20; *Struble v. New Jersey Brewery Employees Welfare Trust Fund*, supra.

[47] See e.g. *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *USW v. Midvale Heppenstall Co.*, 94 LC ¶ 13,528 (W.D. Pa. 1981), *aff'd*, 676 F.2d 689 (3rd Cir. 1982).

[48] *UAW v. Yard-Man*, supra; *Upholsterers v. American Pad*, supra; *Local 150-A, UFCW v. Dubuque Packing*, 756 F.2d 66 (8th Cir. 1985); *Bower v. Bunker Hill*, supra.

[49] See, e.g., *Zittrouer v. Uarco Inc. Group Benefit Plan*, 582 F.Supp. 1471 (N.D. Ga. 1984); *Hillis v. Waukesha Title Co., Inc.*, 576 F.Supp. 1103 (E.D. Wis. 1983); *Terones v. Pacific States Steel Corp.*, 526 F.Supp 1350, 1353-54 (N.D. Cal. 1981), *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180 (3rd Cir. 1985). *Bower v. Bunker Hill*, 725 F.2d 1221, 1224 (9th Cir. 1984).

[50] *IAM v. Sargent Industries*, 522 F.2d 280 (6th Cir. 1975).

Courts will look to statements by the parties, both written and oral, to find the intent of the parties as to the term of the insurance promise. The courts examined what was said to the retirees when they applied for retirement in *Bower v. Bunker Hill,*[51] *UAW v. Cadillac Malleable Iron Co., Inc.,* [52] and *Local 150-A United Food and Commercial Workers v. Dubuque Packing Co.*[53]

The conduct of the parties is also considered to determine their intent. Inconsistent behavior may be particularly relevant. For example, the employer may have provided benefits during a strike or after the collective bargaining agreement expired: *UAW v. Cadillac Malleable, Bower v. Bunker Hill, UAW v. Yard-Man,* and *Musto v. American General Corp.*[54]

Federal Common Law of ERISA

In re: White Farm Equipment v. White Motor Corp.,[55] the court reversed a district court holding that the "federal common law" precluded termination of retiree benefits as having "vested" at retirement, notwithstanding a reserved contractual power of termination. Thus, the question of the duration of the benefits must arise under the plan documents.

Other Theories Used To Find Lifetime Benefits

The Sixth and Eighth Circuits have recognized that retiree benefits are "status" benefits in that they carry an inference that they continue as long as the status of retirement is maintained. The presumption works on a contract theory—that the parties have bargained for this result.[56]

Deferred Compensation

Other courts have found the promise of lifetime benefits inherent in agreements with retirees on a theory of deferred compensation. Employees have completed their part of the "contract" by working long years for an employer, and the employer has had the benefit of a stable workforce. In exchange, the employer must come through with the agreed-upon benefits as its half of the bargain.[57]

Retiree Benefits As "Vested"

The court in *Pittsburgh Plate Glass* stated that "under established contract principles, vested retirement rights may not be altered without the pensioners' consent."[58] This statement has led several courts to consider retirement benefits as "vesting" upon retirement. "Vesting" does not mean "lifetime." You can have a vested entitlement to a benefit of limited duration.

Vesting means simply that there are no more conditions precedent to the enforceability of an employer's promise to provide benefits. At retirement, the promised benefits became non-forfeitable, *because each retiree* "has satisfied all the conditions required of him."[59] The prevailing view is that retiree insurance benefits vest when the employees retire, since

[51] 124 LRRM 2483 (E.D. Wash. 1986).

[52] 728 F2d 807 (6th Cir. 1984).

[53] Supra.

[54] Supra.

[55] 788 F2d 1186 (6th Cir. 1986).

[56] *UAW v. Yardman,* supra; *UAW v. Cadillac Malleable,* supra; *Weimer v. Kurz-Kasch, Inc.,* supra; *Policy v. Powell Pressed Steel,* supra; *Local 150-A UFCW v. Dubuque Packing Co.,* supra.

[57] *Hurd v. Hutnik,* 419 F.Supp. 630, 656-57 (D.N.J. 1976); *IAM v. Lodge 1194 of Sargent Industries,* 522 F.2d 280, 283-84 (6th Cir. 1975); *Roxbury Carpet Co., 73-2* ARB ¶8521 (1973, Summers); *District 29, UMWA v. Royal Coal Co.,* 6 EBC 2117, 2120 (S.D. W. Va.); *UAW v. Yard-Man,* supra, *Rochester Corporation v. Rochester,* 450 F.2d 118, 120-21 (4th Cir. 1971); *Hoefel v. Atlas Tack Corp.,* 581 F.2d 17 (1st Cir. 1978), *cert. denied* 440 US 913 (1977), *In re Erie Lackawanna Railway Co.,* 548 F.2d 621 (6th Cir. 1977).

[58] 404 U.S. at 181.

[59] See McGill, *Language of Pensions, Textbook for Welfare, Pension Trustees and Administrators,* 147 (1986). See also, Black's Law Dictionary, Revised Fourth Edition, which defines vested rights: "Rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare."

employees have fulfilled all conditions precedent.[60]

Promissory Estoppel

Employees reasonably close to retirement may have a promissory estoppel claim. They continued to work for the employer on the promise that when they retired, certain benefits would be provided.[61] This is a problem of individual proof for each employee. The facts must show a holding out from the employer; *reliance* by *each* prospective retiree and a detriment to that retiree.[62]

While detrimental reliance was not discussed, two cases have questioned whether employers can invoke a so-called "reversed rights" clause commonly set out in unilaterally established plans to permit termination. These cases are *Musto v. American General Corp.*[63] and *In re: White Farm Equipment.*[64]

The general rule, as noted by 43 Am. Jur. 2d §271, is that terms in an insurance policy which are ambiguous, equivocal, or uncertain to the extent that the intention of the parties is not clear are to be construed strictly and most strongly against the insurer, and liberally in favor of the insured, so as to effect the dominant purpose of indemnity or payment to the insured.[65]

Impact of Employer Bankruptcy on Retiree Insurance

Some companies may file a Chapter 11 petition solely to *avoid* retiree insurance claims. One management attorney has advised employers to consider "pulling a 'John's Manville' " and filing for bankruptcy to "protect" themselves from the claims of retirees if those claims become too great.[66]

LTV Corporation took this advice by treating its 78,000 retirees as unsecured creditors and terminating *all* coverage. (Coverage was reinstated several weeks later after the Steelworkers went on strike).

In *Century Brass Products, Inc. v. UAW,*[67] the employer bargained with the UAW in an attempt to get the union's consent to retiree insurance cutbacks. The UAW refused to bargain on the issue, relying on *Pittsburgh Plate Glass.* Century then petitioned the bankruptcy court for relief under Section 1113 of Chapter 11. The Second Circuit held that Century's proposal for rejection was defective, because, based on the facts of this case, there was a conflict between the interests of the active workers and the retirees. Thus Century never attempted to negotiate with a proper representative of the retirees and therein failed to comply with the procedural requirements of Section 1113. More recently, A.H. Robins (the makers of the Dalkon Shield) and Kaiser Aluminum have also sought to reduce retiree insurance levels under Chapter 11. Congress has decided to resolve any ambiguities about the permissibility of such treatment.

Some employers argue against the principles laid down in *Pittsburgh Plate Glass* regarding the vested nature of retirees' benefits and the prohibition on unions

---

[60] *Thonen v. McNell-Akron,* 7 EBC 1971 (N.D. Ohio 1986); *Eardman v. Bethlehem Steel,* 607 F.Supp. 196 (W.D.N.Y. 1984); *Local 150-A, United Food and Commercial Workers v. Dubuque Packing Co.,* supra; *Weimer v. Kurz-Kasch, Inc.,* supra; *Policy v. Powell Pressed Steel,* supra; *UAW v. Yard-Man,* supra; *UAW v. Cadillac Malleable,* supra; *Upholsterers Int'l Union v. American Pad & Textile,* supra.

[61] *Sutton v. Weirton Steel Division of Nat'l Steel Corp.,* 724 F.2d 406 (4th Cir. 1983), cert. denied 104 S.Ct. 2387 (1984); *Hoefel v. Atlas Task,* 581 F.2d 1 (1st Cir. 1978) cert. denied, 99 S.Ct. 1227 (1979).

[62] *Apponi v. Sunshine Biscuits,* ___ F.2d ___ 124 LRRM 2494 (6th Cir. 1987).

[63] 615 F.Supp. 1483, 1500 (M.D. Tenn. 1985) appeal pending (6th Cir. Case No. 85-5865).

[64] 788 F.2d 1186, 1193 (6th Cir. 1986).

[65] See *Bush v. Metropolitan Life Insurance Co.,* 656 F.2d 231, 233 (6th Cir. 1981); *Connecticut General Life Ins. v. Craton,* 405 F.2d 41, 49 (5th Cir. 1968). *In the Matter of Erie Lackawanna Railway Co.,* 548 F.2d 621, 627 (6th Cir. 1977).

[66] Thomas J. Barnes and Charles S. Mishkind, "Retiree Health and Welfare Benefits: Controversy over Their Duration," 10 *Employer Relations Law Journal* 584, 610.

[67] 795 F2d 265 (CA-2, 1986), cert. denied 55 USLW 3335 (1986).

negotiating reductions. While this argument is invalid, unions and retirees have had less success convincing bankruptcy judges to interpret contracts to provide lifetime benefits so that the benefits are deferred compensation. In a 1983 case, an Ohio judge specifically found that, even though there was a lifetime promise, the retirees' right to payment of insurance premiums was not unpaid compensation due under the bankruptcy code.[68] In another case, a bankruptcy court found that agreements to provide insurance benefits to retirees are *executory* contracts and therefore may be rejected.[69] However, there is no reason why the principles set down in the other federal courts should not apply to the bankruptcy court.

Problems for Unions Representing Retirees in Bankruptcy

There is, admittedly, certain tension in arguing that, while the union is not the exclusive bargaining representative of retirees, the union may represent retirees' interests on a creditors' committee. However, the union has the *authority* to enforce its collective bargaining agreements, to negotiate impovements in those contracts that increase or supplement the vested benefits of retirees, and to act as a voluntary membership organization in order to protect the concerns of all its members in a reorganization proceeding (i.e. Creditors' Committee). Thus, the union is able to "represent" retirees in such ways. A recent major case, however, has held that the potential conflict between union and retirees requires a special independent representative for retirees to protect their interests adequately.[70]

However, the union does *not* have the obligation or authority to represent retirees in the very particular role as their collective bargaining representative with full authority under § 9(a) of the NLRA.[71] Because the union is not the exclusive representative of retirees, it may not collectively bind retirees by agreeing, absent their individual consent, to employer demands that retirement benefits be eliminated or reduced.

Traditional Principles of Labor Law Apply in Bankruptcy

There is no indication in the principles developed by the federal courts regarding retiree insurance benefits that these benefits are not equally applicable to bankruptcy situations. First, even though a union is by law permitted to negotiate benefits for retirees if the employer consents, this does not mean that the union thereby becomes the exclusive bargaining representative of the retirees under § 9(a) of the NLRA or that either the union or the employer may thereafter be forced to bargain over any proposed changes in retiree benefits.[72] The Supreme Court held in *Pittsburgh Plate Glass* that the union which bargains for retiree benefits is not "thereafter . . . obligated to negotiate in behalf of the retirees again." A union which has won contract promises by the employer to provide benefits to those who retire cannot by that very act be thereafter forced to negotiate over the elimination or reduction of those benefits after they vest.

Second, action by a union to enforce such previously negotiated retirement benefits through litigation or arbitration does not subject such benefits to mandatory collective bargaining or make the union the exclusive bargaining repre-

[68] *In re: Cortland Container Corp.*, 30 B.L.R. 715 (N.D. Ohio 1983).

[69] *In re: White Farm Equipment Co.*, 23 B.L.R. 85 (N.D. Ohio 1983) and see same case at 783 F.2d 1186 (6th Cir. 1986).

[70] *Century Brass Products, Inc. v. UAW*, 795 F.2d 265, 275-76 (2d Cir. 1986), cert. denied 55 USLW 3335 (1986).

[71] *Pittsburgh Plate Glass*, supra.

[72] *Pittsburgh Plate Glass*, 404 U.S. at 181; *Anderson v. Alpha Portland Industries, Inc.*, 752 F.2d 1293, 1296 (8th Cir. 1985) (en banc), cert. denied 105 S.Ct. 2329 (1985) ("[t]hese cases do not establish that a union which does bargain for retirees becomes their exclusive representative").

sentative of the retirees.[73] As the Supreme Court stated in *Pittsburgh Plate Glass,* the union's "interest [in enforcing the contract rights of retirees] is undeniable." But the union's "representation" of retirees in enforcing those rights does not alter its role. As the Court stated in rejecting that claim, "the question presented is not whether retirement rights are enforceable, but whether they are subject to compulsory bargaining." Labor and management have had little difficulty in distinguishing between contract administration and enforcement on the one hand and contract negotiation on the other. Of necessity, vested retirement benefits are at some time negotiated into existence and at times they must be enforced. But these facts do not, in the words of the *Pittsburgh Plate Glass* Court, "subject [the benefits] to compulsory bargaining."

Third, unions may, within the limits of *Century Brass,* supra, ask for placement on a creditors' committee in order to help it to enforce the claims of its members, both active and retired, and to help ensure that the estate is not administered to their prejudice. Again, such action does not have any effect on collective bargaining. A creditors' committee is simply not a forum for collective bargaining between labor and management. Collective bargaining takes place at the collective bargaining table; that the union assumes creditor committee membership to help protect and enforce the contract and other rights of all of its members no more subjects vested retirement rights to mandatory collective bargaining than does litigation by the union to enforce those rights.

"Representation" of retirees in contract enforcement is not of the same type as the right and duty of exclusive representation established by § 9(a) of the NLRA. When acting as exclusive representative in the negotiation of a contract, a union is given by statute the right to collectively and exclusively bind active employees—but only active employees—in such bargaining with their employer. But this statutory power does not give a union the authority to collectively and exclusively bind retirees by agreeing to reduce or eliminate their vested benefits without their individual consent.[74]

Rather, some employers nonetheless argue that these principles are inapplicable when an employer is operating under the Bankruptcy Code. It strains common sense to argue—without any support from the statute or its legislative history—that Congress in passing § 1113 intended to expand statutory union duties and responsibilities so far beyond the limits clearly expressed in *Pittsburgh Plate Glass.*

Only Necessary Modification of Collective Bargaining Agreements

The Bankruptcy Code provides limitations on a debtor or trustee's power to reject a collective bargaining agreement. Under 11 USC Section 1113, a debtor or trustee must offer the authorized representative of the employees a proposal for *necessary* modifications of the contract and confer in good faith with the representative to reach mutually satisfactory modifications. The contract may only be rejected if the authorized representative of the employees rejects the proposal without good cause, and the balance of equities favors rejection. This provision for bargaining in good faith is written in terms very similar to those in the National Labor Relations Act, § 8(a)(5) and 9(a), requiring employers to bargain collectively with the authorized representative of the employees.

Only after the standards of Section 1113 have been met, may a debtor or

[73] See, e.g., *Anderson,* supra; *Steelworkers v. Canron, Inc,* 580 F.2d at 580-81; *Textile Workers Local 129 v. Columbia Mills,* 471 F.Supp. 527, 530-31 (N.D.N.Y. 1978).

[74] *Hauser v. Farwell Ozman, Kirk & Co.,* 299 F.Supp. 387, 393 (D. Minn. 1969); *Hurd v. Hutnik,* 419 F.Supp. 630, 654 (D.N.J. 1976); *Shatto v. Evans Products,* 728 F.2d 1224, 1227 (9th Cir. 1984); *Local 150-A v. Dubuque Packing,* 756 F.2d 66, 70 (8th Cir. 1985).

trustee reject a collective bargaining agreement. Thus, an employer proposal to modify a contract under the Bankruptcy Code may be improper and therefore properly rejected by the union if it includes cutbacks in vested retirement benefits.[75]

Legislative Proposals

In February, 1987, legislation was proposed in both the House (H.R. 1186) and Senate (S. 548) to deal with the LTV/Century Brass problem. The proposal would: 1) establish a mechanism (Section 1114) similar to Section 1113 for modifying retiree insurance benefits; 2) prohibit unilateral reductions without prior court approval; 3) provide for court appointment of an exclusive representative of the retirees, where the union elects not to so serve; 4) permit modifications which are necessary for the debtor to reorganize and assure that all creditors and all other affected parties are treated fairly and equitably. LTV, members of the bankruptcy bar, and most creditor groups (banks and insurance companies) oppose the bill. Passage is therefore uncertain.

[The End]

First Contract Arbitration in Canada

By Jean Sexton*

Laval University

First contract arbitration is neither a new idea nor a new practice in Canada. It was first discussed at the federal level by the Prime Minister's Task Force on Labour Relations in the late 1960s.[1] British Columbia was the first legislature to incorporate provisions for first contract arbitration in its Labour Code in 1973.[2] Subsequently, Québec introduced somewhat different provisions in 1977,[3] followed by the federal government in 1978,[4] by Manitoba in 1982,[5] and by Ontario in 1986.[6] Let us note that these jurisdictions cover approximately 80 percent of the Canadian labour force.

First contract arbitration is in essence an exceptional device. It is a form of interest arbitration designed to resolve a dispute in the case of the negotiation of a first agreement.[7] The basic idea is to assist, by the intervention of a third party (either a labour board or a single arbitrator), in a bargaining process characterized by a union recognition dispute. This third party can decide to impose a first collective agreement in order that the parties might learn to live together during the duration of the contract. Weiler has described this process as a trial marriage,[8]

[75] *UAW v. Century Brass*, supra.

* My colleagues, Professor Gérard Dion, Professor Esther Déom, and Professor Gregor Murray, and Claudine Leclerc have made useful suggestions on an earlier version of this text delivered at the Department of Industrial Relations of Laval University in Quebec City. I thank them, and I retain the sole responsibility for remaining faults.

[1] Prime Minister's Task Force on Labour Relations, *Canadian Industrial Relations*, Privy Council, 1968, 250 pages. This information was supplied by Gérard Dion, a member of the Task Force.

[2] *Labour Code*, R.S.B.C. 1979, c.212, ss 70-72. Let us recall that competence over labour relations in Canada rests primarily with the provincial governments. The federal labour code covers less than 10 percent of the Canadian work force.

[3] *Code du travail*, L.R.Q., c.C-27, art. 93.1 à 93.9.

[4] *Code canadien du travail*, S.R.C., 1970, c. L-1, partie V, art. 171.1.

[5] *Labour Relations Act*, R.S.M., c. L-10, s. 75.1 (7).

[6] *Labour Relations Act*, R.S.O., 1980, c. 228, s. 40a.

[7] P. Weiler, *Reconciliable Differences: New Directions in Canadian Labour Law* (Toronto: The Carswell Company Ltd., 1980), p. 53.

[8] *Id.*, p. 53.

and the President of the Canada Labour Relations Board (CLRB) qualifies it as being a transplant operation.[9]

This form of third party intervention clearly occurs in messy situations where the integrity of access to statutory representation appears threatened by anti-union behaviour. As Weiler suggests, "The law does have to be concerned about a different first contract history, one which poses a major threat to the integrity of the statutory representation scheme. There are stubbornly anti-union employers who, in spite of the certification, refuse to accept the right of their employees to engage in collective bargaining. They simply decide to fight the battle on a different front, to go through the motion of negotiations and to try to talk the union's bargaining authority to an early demise."[10]

The objective of this article is to present and assess the experience of first-contract arbitration in Canada. Before explaining briefly how this device functions and examining its principal results, an answer must be provided to the contention that first contract arbitration is an attack on the principles of free collective bargaining.

This paper draws on three sources: the literature, research that I have conducted,[11] and my personal experience as a first contract arbitrator in Québec since 1978. The limitations of this paper are numerous. First, to try to summarize such a vast experience in this limited space obviously entails leaving out interesting material. Secondly, this paper depicts the Canadian experience, which is by no means transferable to the U.S. Finally, information on the real outcomes of this process remains incomplete in many jurisdictions. Caution is therefore recommended.

An Attack on Free Collective Bargaining?

Canada and the United States have much the same industrial relations system and a similar framework of labour law. The right of association is openly recognized, and the duty to bargain is imposed. All sorts of remedies have been introduced for breach of this affirmative duty to bargain, but they are far from being overwhelmingly successful. Their relative failure or inefficiency has been underlined, especially in the case of first contract negotiations. "The major shortcoming of the NLRB lies in its failure to adopt adequate and realistic remedies in those cases where the employer has unmistakably demonstrated a continuing intent to frustrate the Act."[12] Similar conclusions have been drawn in Canada by Solomon[13] and Muthuchidambaram.[14]

If the intent of the law is to be respected, then additional remedies are needed, not as regular processes but rather as exceptional devices to be used only in these cases "of egregious bad-faith bargaining with a newly certified bargaining unit."[15] But is a remedy, such as first contract arbitration, contrary to the prin-

[9] Radio MUTUELLE Reasons for Decisions, no. 675-78, October 20, 1978.

[10] P. Weiler, cited at note 7, p. 50.

[11] J. Sexton, "L'arbitrage de première convention collective au Quebec: 1978-1984," *Relations industrielles/Industrial Relations,* Laval University Press, Vol. 42, No. 2, 1987, forthcoming.

[12] Ross, "Analysis of Administrative Process Under Taft Hartley," 1986, *Labor Relations Yearbook* 299 at 300, quoted in Backhouse, "The Fleck Strike: A Case Study in the Need for First Contract Arbitration," *Osgoode Hall Law Journal,* 1980, Vol. 18, No. 4, p. 501.

[13] N. Solomon, "The Negotiation of First Agreements in Ontario: An Empirical Study," *Relations industrielles/Industrial Relations,* Laval University Press, Vol. 39, no. 1, 1984, pp. 23-34; N. Solomon, "The Negotiation of First Agreements under the Canada Labour Code: An Empirical Study," *Relations industrielles/Industrial Relations,* Laval University Press, Vol. 40, no. 3, 1985, pp. 458-470.

[14] S. Muthuchidambaram, "Settlement of First Collective Agreement: An Examination of the Canada Labour Code Amendment," *Relations industrielles/Industrial Relations,* Laval University Press, Vol. 31, no. 3, 1980, pp. 387-408.

[15] P. Weiler, "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation," 98 *Harvard Law Review,* December 1984, p. 405.

ciples of free collective bargaining underlying our labour relations systems?

My answer is negative to the extent that such arbitration is used in an exceptional manner. I entirely agree with Weiler's arguments to the same effect.[16] Arbitration here is not a right nor is it intended to replace collective bargaining almost automatically. It is another remedy, and a pretty efficient one as I will conclude, for "contravention of the statute."[17]

One may even argue that the presence of such a remedy is necessary to prevent illegal behaviour and to ensure that the content of the law is respected. Some of the Canadian experiences presented below will support this view. "Quite simply, first contract arbitration offers the strongest hope of adding the teeth that have long been lacking from the enforcement of the duty to bargain in good faith."[18]

Obviously, the exceptional character of this remedy has to be maintained. This is one of the challenges for its administrators.

First Contract Arbitration

It is not my intention here to offer an extensive presentation of the first contract arbitration schemes of each Canadian jurisdiction. Others have already done it in a very satisfactory manner.[19] I will rather summarize each approach and bring some previously published material up to date following legislative or other changes.

British Columbia (BC) was the first legislature to enact first contract provisions. According to the Labour Code of British Columbia (sections 70-72), upon the request of either party, the Minister of Labour has the discretion to direct the Labour Relations Board to inquire into the dispute, and if the Board considers it advisable, to settle the terms and conditions for the first collective agreement which becomes binding on the parties. In establishing these conditions, the parties are to be given the opportunity to present evidence and make representation and the Board may take into account, among other things, the extent to which the parties have, or have not, bargained in good faith and the terms and conditions of employment negotiated through collective bargaining for comparable employees. The agreement imposed by the Board cannot be for a period exceeding one year.

In the words of the President of the Canada Labour Relations Board, the Canadian Federal provisions for first contract arbitration adopted in 1978 were a replica of BC legislation.[20] However, as will be seen later, this does not mean that its administration and application have followed the same patterns.

Québec basically borrowed the BC approach but in a modified form. Upon the request of one of the parties at the bargaining process, the Minister of Labour has the discretion, after conciliation has failed, to refer the dispute to a single arbitrator who in turn, after having made the necessary mediation, has the

[16] *Id.*, pp. 407 sq.

[17] *Ibid.*

[18] *Id.*, pp. 411-412.

[19] For British Columbia, see Weiler (1980), pp. 44-55; P. Weiler, (1984), pp. 405-412; C. Backhouse, pp. 501-513; D.J. Cleveland, *First Agreement Arbitration in British Columbia: 1974-1979,* Master thesis, Faculty of Commerce and Business Administration, University of British Columbia, 1982, 162 pages. For the Québec experience, see M. Girard and Y. St-Onge, *Etude sur l'arbitrage des premières conventions collectives,* Québec Department of Labour, Québec City, July 1982, 137 pages and Appendices; J.P. Deschenes and M. LaPointe, "Le processus de la négociation collective et l'arbitrage obligatoire d'une première convention collective," *Le Code du travail: 15 ans après,* Proceedings of the 36th Annual Meeting of Industrial Relations, Laval University Press, 1979, pp. 145-170; J.Y. Durand et M. Girard, "L'arbitrage de la première convention collective," *La loi et les rapports collectifs du travail,* 14e Colloque des relations industrielles, Montréal, Université de Montréal, 1983, pp. 50-65; C. Backhouse, pp. 546-551; J. Sexton, cited at note 11. For the federal experience, see C. Backhouse, pp. 529-546; J.P. Deschenes et M. LaPointe, op. cit.; S. Muthuchidambaram, op. cit. For the Manitoba experience, see J.M.P. Korpesho, "First Contract Experience in Manitoba," paper presented to the Annual Meeting of the Canadian Industrial Relations Association, Winnipeg, June 1986, 5 pages.

[20] J.P. Deschenes and M. LaPointe, p. 166.

discretion to determine, or not, the terms and conditions of employment if he feels that the signing of an agreement by the parties is impossible within a reasonable delay. Once this decision is taken, the arbitrator must inform the parties and the Minister. At this stage, any strike or lock-out must stop. He then hears the evidence and representations by the parties. The arbitrator is bound by any agreement already reached by the parties on any part of the collective agreement. In deciding on the outstanding issues in the negotiations, he may take into account the terms and conditions of employment of comparable employees. The arbitrator's decision is binding on both parties and constitutes an agreement of not less than one year and not more than two.

Many differences should be noted between the Québec and BC approaches. First, Québec chose not to refer the dispute to the Labour Board or its equivalent but rather to a single arbitrator. Before the 1983 amendments to the Québec Labour Code, such a dispute was referred to a tripartite arbitration board. A problem of delays led to a break with this pattern. Secondly, the Labour Code explicitly indicates that any strike or lock-out must cease when a decision is taken to determine the terms and conditions of work. Finally, the collective agreement resulting from this process can be of a longer duration than in BC.

In 1982, Manitoba became the fourth Canadian jurisdiction with provisions for first contract arbitration in its legislation. Although at the outset the Manitoba approach was similar to that of BC and federal legislations, amendments in 1984 eliminated the role of the Minister of Labour. Thus, either party to the negotiations could make application directly to the Labour Board where certification had been granted, notice to bargain had been given, a conciliation officer had been appointed, 90 days had expired from the date of certification, and a collective agreement had not been concluded.[21] Moreover, strict time frames are imposed. Let us note in addition that the Manitoba statute eliminated Board discretion to decide whether or not to impose a first collective agreement upon the parties. Bad faith bargaining is therefore not a prerequisite in determining if a first collective agreement will be imposed. It would seem that this approach was adopted in the belief that once certification has been granted the parties were entitled to a first collective agreement, whether it was reached through the normal collective bargaining process or the imposition of a first collective agreement by the Board.[22] The length of such first agreement is of twelve months.

Ontario, the most recent Canadian province to include first contract arbitration in its statutes, did so in 1986. As in Manitoba, either party may apply to the Board to direct the settlement of a first contract by arbitration when such parties are unable to effect a first agreement and when the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board.

The Board then has thirty days to decide if it will direct the settlement of a first contract to arbitration. The law provides four guidelines for such a decision. The parties then have the choice to have their first contract settled by a tripartite arbitration board or by the Board itself. Parties can present evidence and make representations. Similarly to Québec, any strike or lock-out must stop once the Board has directed the dispute to arbitration. In addition, however, the statute imposes reinstatement of all striking or locked-out employees in the employment they had at the time such action started. Rates of wages and all other terms and conditions of employment are to remain

[21] J.M.P. Korpesho, cited at note 19, p. 166.

[22] *Ibid.*

unaltered from those existing at the time the Board directed the dispute to arbitration. Finally, a first contract imposed by arbitration is effective for a period of two years.

Then, since the enactment of the BC provisions for first contract arbitration in 1973, four other Canadian jurisdictions have followed a similar path. Except for the federal statute, all others vary from BC's original approach. The tendency seems to be towards a more liberal application of the idea and a trial marriage of longer duration. Limits on space constrain me from presenting further details here. The next logical step is to examine the results of these experiences.

Results of First Contract Arbitration

The objectives of the initiator of first contract provisions were twofold: first, "to put an end to the current dispute"[23] and, second, to "allow the parties to get used to each other and lay the foundations for a more mature and enduring relationship."[24] Evaluation should therefore be on the basis of these objectives.

Experiences have been different, as have their results. In British Columbia, an important fact must be underlined at the outset. No single dispute has been referred to the Labour Relations Board since 1979, most likely for political reasons. BC's experience was therefore very limited since only 12 disputes were resolved by the Board.

In examining this arbitration experience in British Columbia both Weiler[25] and Cleveland[26] came to somewhat pessimistic conclusions. My main point here is that BC's experience contains too few cases (n-12) to draw any firm conclusions, whether pessimistic or optimistic. This is not to say that some lessons cannot be drawn, but they cannot have the status of firm conclusions. In the light of the Québec and Manitoba experiences, I would suggest that an adequate evaluation can only be completed when the remedy has had a real chance to produce the desired effects. May I suggest that such a take-off point was not reached in British Columbia. However, both Weiler and Cleveland agree that the main result has been that these first contract provisions have acted as a deterrent to union recognition conflicts. This point finds further support in my discussion of the other experiences.

At the federal level, a similar conclusion can be reached. Between 1978 and 1986, the Board intervened in only 10 cases and has imposed a first agreement in only six.[27] Again, so few cases prohibit any firm conclusions. Moreover, one must add that the CLRB has chosen to apply these first contract provisions in a somewhat punitive manner so that the parties are reluctant to seek Board intervention.

The Québec experience is totally different. First contract provisions have been regularly applied since they came into force in February 1978. I conducted a study of this experience with a special emphasis on what happened after the imposition of a first agreement in all of the cases where an award was rendered before December 31, 1984 (n-88).[28]

Between February 1, 1978, and December 1984, 376 requests for first contract arbitration were addressed to the Minister of Labour. From these, 205 were granted (54.5 percent), 165 were refused (43.8 percent), and six were still under investigation at the time these data were compiled. From the 376 requests, 85.6 percent came from unions, 13.5 percent from employers, and 1.3 percent from both. In only 19.1 percent of these requests was there a strike or lock-out.

---

[23] P. Weiler, cited at note 7, p. 53.

[24] *Ibid.*

[25] *Ibid.*

[26] D. Cleveland, cited at note 19.

[27] An undating of these data was kindly supplied by the President of the Canada Labour Relations Board, Mr. Marc LaPointe, on March 16, 1987.

[28] J. Sexton, cited at note 11.

The fact that 205 cases were referred to arbitration by the Minister of Labour does not mean that 205 agreements were imposed. Only 88 arbitration awards were rendered, since in 63 cases the parties signed an agreement before the arbitration board completed its work. In 12 cases the board decided not to intervene. Union certification was cancelled in eight cases and the union withdrew its request in 13 other cases. There were also eight plant closings, and, in one case, the arbitration board declared itself without jurisdiction.[29]

I therefore decided to include in my study all 88 cases where there was an award.[30] A structured questionnaire was administered by telephone. The parties were reached in 72 of the 88 cases (81.8 percent).

In 49 of these 72 cases, the imposed agreement had not yet come up for renewal. Sixteen awards were still in force, bargaining was under way in four cases, union certifications were revoked or in the process of cancellation in 16 cases, and there were 10 plant shutdowns. These figures suggest that in 22 of the 88 cases, nothing followed the imposition of a first agreement.

The main results of this research are as follows. Only one-third of the arbitration boards also acted as mediators through all the process. In the large majority of cases, the arbitration board did not impose the entire collective agreement, but only some provisions such as wages, hours of work, and seniority, to mention the most important. In 23 cases, the agreement was renewed at least once.[31] Let us note that five cases had experienced two renewals of their collective agreement, and in four cases there had been three such renewals. Of these 23 cases where at least one renewal of agreement was signed, 17 never used the conciliation, mediation, or arbitration services of the Ministry of Labour.

In total, there were 36 renewals of agreement. Only four strikes occurred, and there were no lock-outs. Bargaining for renewal was relatively expeditive. In only eight cases was four months or more necessary, and in 12 cases it took less than a month. Nearly half the firms have seen grievances brought to arbitration. For these, between one and five grievances were arbitrated. The major disagreement during renewal bargaining was over wages (26 out of 36 cases). A comparison of the contents of imposed first agreements and freely bargained agreements suggests that arbitrators are more conservative on monetary provisions and more liberal on non-monetary issues. One exception must be noted: the length of the agreement is longer for freely bargained contracts than for imposed. This confirms the conclusions of Girard and St-Onge in their 1982 study.[32] The labour climate was assessed by respondents in 26 of the renewals. Management described it as from good to excellent in 24 cases, while unions shared this view in only 14 cases. Both agree, however, that the climate has improved over time and that they have learned to speak to one another and to come to agreements.

The Québec experience is especially interesting because it has been mostly concentrated in small bargaining units. This tends to contradict Weiler's conclusion that "if the agreement is to have any chance of enduring, the bargaining unit must be large."[33] The examination of the Québec experience supports, at least in part, Weiler's view that "the agreements that the parties will write on their own,

[29] In the remaining 12 cases, arbitration was underway.

[30] The number of employees per employer in those 88 cases was: smaller than 25, 58 cases; 26-50, 16 cases; 51-100, 7 cases; more than 100, 7 cases.

[31] Let us recall that 16 awards were still in force and that bargaining for renewal was underway in four cases.

[32] Cited at note 19.

[33] Cited at note 15, p. 411 and note 7, p. 54. In Backhouse, cited at note 12, p. 511, Weiler refers to units of 100 or more employees.

under the pressure of a strike, are likely to be much better than those that could be imposed by an outside government agency,"[34] The data collected indicated that this was the case for monetary issues only.

Since the enactment of the first agreement provisions in Manitoba, there have been 25 referrals or applications filed with the Board. Of those, the Board rejected one application, two were withdrawn, eight, with the assistance of the Board, entered into voluntary collective agreement, eleven resulted in first contract being imposed, one is still pending before the Board, and one is presently before the courts. Let us note moreover that, of the seventeen cases where first agreements have expired, ten have resulted in subsequent collective agreements either being signed or currently in negotiation.[35]

As for Ontario, first contract provisions were included in the law in May 1986. It is too soon to complete any real evaluation.

Conclusion and Policy Implications

First contract arbitration has been shown to be a useful and necessary remedy in those Canadian jurisdictions where it has been given sufficient use. The Québec and Manitoba experiences suggest that, as more time passes and the greater the number of cases referred, the more successful this remedy will be not only in terms of putting an end to a current dispute but also in terms of getting the parties used to each other and into a more mature and enduring relationship.

The deterrent effect is surely noted. But it is still greater when first contract arbitration is known and used. In Québec, no one from either management or unions requested that these provisions be eliminated from the Labour Code or that they be made ineffective.[36] The efficiency syndrome seems to apply here: first contract arbitration provisions are used because they seem to be efficient and they seem to be efficient because they are used.

Two further points should be stressed. First, there has been a tendency, first in Québec and then in Ontario, not to systematically refer cases of arbitration to their Labour Boards or their equivalent but to use arbitrators. I would tend to endorse this approach for reasons of flexibility and efficiency. Moreover, in difficult and very publicized cases, a decision of a Labour Relations Board could affect its credibility and even its perceived neutrality. Finally, most arbitrators are less prone to be as legalistic in approach as the Labour Boards.

Secondly, the initiator of the idea in BC decided that the imposed agreement should be of one year. Weiler agrees that there should be a two year agreement in which to engage in visible administration of the contract in order to demonstrate the value of collective bargaining in action.[37] Québec and Ontario have followed this path. Bearing in mind this same objective, I suggest going even further. I see no reason why an imposed first agreement could not be as long as the maximum duration of a freely bargained agreement (three years in Québec). Surely, this would be in keeping with the objectives of first contract arbitration.

First contract arbitration does not go against the basic philosophy of our labour relations system. It can be a very useful device. It must however remain exceptional. The real challenge therefore rests on the administrators of this remedy. It remains an exception to the law whose objective is to safeguard the intent of the law.

[The End]

---

[34] *Ibid,* p. 404.

[35] These data were kindly supplied by Mr. J. M. P. Korpesho, Chairperson of the Manitoba Labour Board, on March 5, 1987.

[36] Such a conclusion can be drawn from the examination of the briefs presented before a Commission on Inquiry on the Labour Code whose report was filed in October 1985, Québec.

[37] Weiler (1980), p. 54; C. Backhouse, p. 511.

COMMENT on "First Contract Arbitration in Canada" (Jean Sexton)

By P.B. Beaumont

Department of Social and Economic Research

University of Glasgow

What I propose to do here is to make a number of comments on Jean Sexton's article, using as my reference point some analysis and findings of the experience with statutory union recognition (representation) provisions in Britain. Briefly, statutory recognition provisions have operated in Britain in two periods of time, namely 1971-74 and 1976-80. And in both cases the relevant legislation, anticipating some problem of employer non-compliance with third party recommendations for recognition, provided the unions with an arbitration based remedy. This was a *unilateral* right to arbitration whose resulting awards (following a prior attempt at conciliation/mediation) would require the employer to incorporate terms and conditions into the relevant employees' *individual* contracts of employment. It is important to note here that only the individual, as opposed to collective, contract of employment is directly enforceable in law in Britain, although the latter obviously constitutes a major component of the former in unionized settings. The limited deterrent effect (and, as we shall see, usage) of this remedy on *both occasions* was revealed by the fact that follow-up investigations of those *published* third party reports that recommended recognition (admittedly only a minority of all relevant cases, as the majority were settled by conciliation/mediation prior to holding an employee ballot and publishing the results and recommendations) found that more than 50 percent of them were not in fact implemented; i.e. no first collective agreement resulted.

A detailed analysis of the experience of the years 1976-80 revealed two further points worthy of note. First, that the "non-complying employers" were overwhelmingly small (the typical bargaining unit size = 36), single independent establishments (i.e. the firm = 1 plant), in which claims for the recognition of manual or blue collar workers had been put forward. Interestingly, but ironically for the unions, these were the most rapidly settled and "well won" claims with, on average, two-thirds of the bargaining unit being in favor of union representation. In contrast, employer opposition (typically involving delaying tactics) at the initial, campaign/employee ballot stage of the proceedings was disproportionately associated with larger (the typical bargaining unit size = 100), multi-plant companies where claims for non-manual or white collar employees had been lodged. These differences indicate that the nature of employer opposition to recognition involved quite different firms and claims at the two essential stages of the proceedings, suggesting that the two basic forms of employer opposition (i.e. delaying tac-

tics and non-compliance) were *substitute,* rather than complementary strategies.

Interestingly, this particular finding appears to differ from the experience in the U.S. as indicated by the work of people like Richard Prosten and Bill Cooke. The disproportionate representation of *small plants* among the non-compliers with third party recommendations for recognition is a particularly worrying phenomenon for the unions given that the small firm sector is so prominent in the creation of new jobs in Britain at the present time (e.g. firms with less than 20 employees created 36 percent of all new jobs in 1971-81 in Britain, and these were the only firms to create *net* new jobs in these same years).

The second point I wish to highlight from the British experience of the years 1976-80 concerns the *substantial numerical divergence* between (1) the *reported* extent of employer non-compliance (as revealed by a headcount of the number of union complaints of this occurrence) and (2) the *full* extent of employer non-compliance (as revealed by follow-up studies). The 1980 Annual Report of the Advisory Conciliation and Arbitration Service (ACAS), for example, noted that more than 100 out of 158 employers had failed to comply with their recommendation for recognition, but only 50 complaints of such were received from the unions.[1] This sizeable difference has been attributed to the relevant arbitration body (the Central Arbitration Committee) interpreting their role in the larger context of the recognition provisions as a *remedial* one, as opposed to their adopting the alternative approaches of sanction or enforcement. Specifically, the *content* of the resulting arbitration awards reflected their attempt to remedy the absence of a bilateral bargaining relationship, although in practice this was interpreted to mean only bargaining over wages and hours matters. There was, for instance, no account taken of the fact that the unions as organizational entities à la Arthur Ross, had suffered from the fact of employer non-compliance. In short, I interpret the limited number of complaints of non-compliance from the unions as an indication of their disillusionment with the limited substantive content of the arbitration awards and, secondly, their belief (probably a correct one) that third party decision-making bodies in the industrial relations arena have relatively limited inclination and ability to pressure small, non-union firms (as opposed to the IBMs and Motorolas of this world) into compliance with decisions stemming from laws and regulations of which they do not approve. This experience arguably provides a useful footnote to empirical research in the area of labour law more generally, in that it emphasizes the limited (i.e. interesting, but certainly not representative) insights that come from any analysis restricted to only formal complaints and published awards and reports associated with any particular piece of legislation; specifically, the published arbitration awards, following union complaints of non-compliance, split approximately 50-50 between blue-collar and white-collar claims, but in reality non-compliance was overwhelmingly a feature of the former claims.

Accordingly, in the light of these findings from Britain, I would offer the following comments on the methodology, findings, and interpretations of Jean Sexton's article. Firstly, I would urge that any study of first contract arbitration should not treat the subject as a discrete, self-contained exercise. This is because it is important to relate and integrate the usage (and outcome) of this remedy to the nature of the employer attitudes and behavior that were apparent in the original recognition claim. This methodological point is not simply a matter of academic nicety, but derives from the natural interest and concern of unions and policy makers to know whether there is some *prior*

[1] Pp. 89-90.

capacity to identify and predict situations where this particular remedy will be of most potential use. For example, if union officers know the relevant characteristics of original claims where recognition is awarded, but where there is a relatively high probability of a first contract not coming about, then they are in a much better position to monitor and assess the full extent of compliance and thus refer relevant cases to the appropriate authorities.

Secondly, Jean Sexton has stressed the relatively limited usage of first contract arbitration in a number of Canadian jurisdictions. The absolute numbers he cites are small, a fact which he interprets in a relatively favorable and positive light, as indicating (1) the explicitly designed, "exceptional" nature of the remedy (i.e. for use against obvious "bad faith" bargainers, as opposed to "hard bargainers") and (2) the high deterrence value of the remedy. I think there is some danger here in necessarily concluding that "small is beautiful"; certainly in recent years we have come to realize in a number of countries that the relatively small number of formal complaints under minimum wage legislation and regulations, for example, does not automatically indicate a high level of policy compliance. An alternative, rather less optimistic interpretation might be that only a relatively small proportion of the full extent of no first contract situations is actually being brought to the attention of the labour boards and arbitrators. This is a possibility that can only be investigated through conducting surveys of union officers involved in all claims where recognition was awarded in a given period of time. Through such means one might well find that particular features of certain employee-management relationships have inclined the unions to pursue the first contract arbitration route, whereas in other situations they have apparently accepted the inevitability of a no-contract position, at least at that particular point in time.

To pursue this point a little further, Jean explicitly notes that the Quebec experience is particularly interesting because first contract arbitration has been concentrated among small bargaining units (i.e. some two-thirds of the 88 cases involved bargaining units of less than 25 employees). This fact may reflect the particular industrial structure of Quebec; i.e. a relatively high proportion of small plants may mean that a bargaining unit size that is worth pursuing (from the union point of view) through the first contract arbitration route in Quebec would not be so in other settings. Alternatively, it could be that the small-sized units involved in first contract arbitration in Quebec do not appear quite so small when placed alongside those units (that I have suggested to exist) where no first contract results, but this fact is not brought to the attention of the relevant authorities. And yet another possibility is that other situation specific factors have offset the apparent disadvantage of small size to the extent of inclining the union to take the case through the first contract arbitration route.

Finally, Jean makes a number of observations on the substantive content of the first contract arbitration awards. An attempt to more fully and precisely measure (perhaps using ordinal, scaling techniques) the scope of these awards would seem a worthwhile exercise. This is because the content of the first arbitration award would seem a potentially important determinant of the likelihood of contract renewal. Interestingly, it is somewhat unclear, at least a priori, whether the more comprehensive the scope of the first award, the greater or the lesser the likelihood of subsequent contract renewal. Clearly, one can envisage potentially offsetting influences from the union and employers' sides here. Again this is a matter which should be of considerable practical interest to labour boards and arbitrators who would presumably like to find themselves in a position of knowing

the optimum scope of a first award for the purposes of maximizing the probability of subsequent contract renewal.

In conclusion, let me turn to one of Jean's introductory remarks, namely his statement that the Canadian experience with first contract arbitration is not being put forward as something that can, or should, be directly transferable to the U.S. This comment accords well with the traditional view of industrial relations researchers, which has been highly skeptical of the capacity to successfully "export" policies (across countries) and hence of the value of comparative research for the purposes of drawing policy lessons. Such a view is typically, I would argue, more an article of faith than the result of well designed comparative research projects, which still await to be conducted. The various points made in Dick Peterson's paper, which reviewed the quality of comparative industrial relations research, at the December 1986 meeting of the Association, are highly relevant here. However, what is so exciting and interesting about the whole Canadian experience with statutory recognition (representation) provisions is that they have increased the heterogeneity of content of such policies across countries and in doing so have, most importantly of all, suggested that the *common* problems experienced with such provisions in the U.S. and Britain (i.e. substantial time delays and no first contracts) are not problems *inherent* in the nature of such legislation. For this reason alone, the Canadian experience should be of more than passing interest to industrial relations researchers and practitioners in both the U.S. and Britain in the present period of time.

[The End]

New Issues in Testing the Work Force: Genetic Diseases

By Mary P. Rowe, Malcolm L. Russell-Einhorn, and Jerome N. Weinstein

Massachusetts Institute of Technology (Rowe)

Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., Boston (Russell-Einhorn and Weinstein)

Employer testing of employees and job applicants will prove one of the most difficult and explosive workplace issues over the next ten years. Many examples of this phenomenon are already in our midst. We have begun to witness computer monitoring of employee productivity and of time spent on the telephone or in the bathroom (a computer clock can show when an employee was working). Various preemployment psychological tests have reappeared. One hears discussion, again, of lie detector tests. Drug testing issues abound. Punishment of drunk driving, on the basis solely of a breath test, has provoked a major outcry in at least one state, but various employers have apparently quietly considered the merits of using such a test at work. Employers, insurance companies, and state legislatures continue to debate the pros and cons of blood tests for seropositivity to HIV (the AIDS virus).

The newest topic, genetic testing, may prove to be one of the most controversial. Genetic testing has important, specialized

uses. Used forensically, it can, for example, affirm or disaffirm the identity of a person accused of rape. Genetic testing may also make possible the early identification of people who will get, or who are predisposed to get, a wide variety of diseases (there may be as many as 3,000 genetic diseases). Over the next decade, we may be able to identify persons at risk (or at increased risk) of developing certain types of heart and kidney disease and many types of cancer. The same is true of familial Alzheimer's disease, manic-depressive illness, Huntington's disease, Duchene's muscular dystrophy, cystic fibrosis, sickle cell anemia. The list of diseases that have been studied by geneticists lengthens every year. Metabolic disorders, including diabetes, alcoholism, panic disorder, and some types of schizophrenia, are among the diseases where there is evidence supporting the importance of hereditary factors.

Moral and Legal Issues

Genetic techniques are either now available or may soon become available that can help screen applicants for employment, and employee and managerial candidates for promotion. Employers may have a strong stake in being able to ascertain who will be able, healthy, and safe workers in the future, not only for job performance purposes but also to reduce health insurance burdens. A potentially enormous number of Americans in the work force are critically affected by these developments, probably far more than are currently implicated by current AIDS or drug and alcohol testing, and the specter of genetic testing on a wide scale raises serious moral and legal issues. Thus, to take an example, because the furnishing of family health records to employers will make such screening even more reliable, one can imagine the great potential for unscrupulous use of such records, particularly in a one-company town or by a company attached to a major health maintenance organization (HMO).

To a large extent, the workplace issues surrounding this topic resemble those involved in AIDS and drug testing. Accordingly, society will have to address many of the following problems in the near future:

(1) The tests, even properly performed, are not infallible, due to the nature of the tests and of the conditions tested (not everyone who tests positive will develop a given disease or become seriously ill even if the disease does appear).

(2) Laboratories are clearly not infallible.

(3) People who are tested may substitute the blood of others, through a variety of subterfuges.

(4) Correlations between positive tests and disability or imparied performance may vary widely for various genetic diseases, for different employees, and even, over time, for the same employee.

(5) The rights and responsibilities of employers who learn of positive test results of their employees are not at all clear. Must employers therefore tell employees of the results? May employers refuse to hire some employees who test positive and not others?

(6) The specter of employers being held "vicariously" liable for the actions of impaired employees looms large. Will an air carrier be held to have known, for example, that a pilot of a crashed plane had a heart condition, the predisposition to which could have been revealed in a genetic test? If an employer does *not* use such tests, could it become by default, a haven, and therefore an insurer, for those who are more likely to develop expensive genetic diseases?

At present, genetic diagnosis for most of these diseases is in the research phase, relatively expensive and time-consuming. But the ordinary blood test, roughly ten or twenty milliliters of venous blood drawn from the arm is sufficient for DNA (genetic) analysis. People whose blood would now reflect antibodies to HIV (i.e.,

who are AIDS-seropositive), may comprise one-half to one percent of the United States population. The panorama of diseases with some hereditary etiology affects at least half the population, a figure which outstrips even the widespread abuse of drugs and alcohol in this country. Disagreements about AIDS and drugs, and about the testing issues that surround them, are among the most heated that occur in the workplace. It is reasonable to assume that genetic testing will provoke comparable anger and controversy. While the ethical aspects of such testing will likely become much more complex and confusing over time, it behooves all workers and managers to become familiar with the potential legal treatment of some of these issues under the law, since the law may produce some clarity on these subjects in the relatively near future.

Right to Privacy

Already we can determine that genetic testing by employees risks invasion of privacy claims. The courts have held that a right of privacy exists in the workplace.[1] However, an employee's right of privacy is not absolute. There may well be legitimate business reasons for an employer to obtain information about an employee that intrudes on the latter's privacy. In deciding when an individual's privacy has been inappropriately invaded, the courts have typically engaged in a balancing test: Has the employer demonstrated sufficient business justification to obtain the information, and has the employer gone about obtaining it in the least intrusive way, so as to outweigh the employee's interest and expectations in privacy?

Based on the foregoing, it is apparent that an employer's testing program to determine the presence of some genetic condition has the potential to violate an employee's privacy rights. If an employer takes blood from an employee in order to carry out a test, that is an obvious physical intrusion. If the employer learns that the employee carries a gene predisposing him towards familial Alzheimer's disease, that may disclose intensely personal information about the employee and his or her family background. If the employer finds out that the employee has a gene linked to manic depression, that may lead to an erroneous conclusion that the person is now too unstable for duty, thereby portraying him or her in a false light.

In order for an employer to justify its need to undertake tests when such results may occur, the employer must therefore be able to articulate a specific problem in the work place necessitating its action. For example, the courts have often disapproved an employer's administering drug or alcohol tests unless the employer has demonstrated some compelling reason: that the safety of individuals, or other employees, or members of the public is at stake; that there are security needs which must be satisfied; that there are job performance requirements that must be met; or that important public relations considerations are involved.[2] Even then, the employer must undertake its tests in a way that will maintain the dignity of the individual and will safeguard as much as possible against any inadvertent or

[1] Virtually every state has recognized that a general right of privacy exists either by virtue of common law (i.e., judge-made law) or statute. For example, in Massachusetts, state law gives the courts the right to grant an equitable remedy and award damages when an individual has been subjected to "unreasonable, substantial, or serious interference with his privacy." Mass. Gen. Laws Chapter 214, § 1B. Whether as a matter of common or statutory law, the right of privacy has been interpreted to encompass protection from four distinct wrongs: (1) intrusion upon an individual's physical solitude; (2) the publication of private matters about a person violating ordinary decencies; (3) putting an individual in a false light in the public eye; and (4) the appropriation of some element of the individual's personality for commercial use.

[2] A good example of a recent case in which societal concerns outweighed the individual's privacy interests is *Child Protection Group v. Cline*, No. 17296 (W. Va. Sup. Ct. November 12, 1986), which involved the disclosure under the state freedom of information act of medical information concerning the mental competency of a school bus driver who had exhibited peculiar behavior. There, the court found that the disclosure of medical information would indeed be an invasion of privacy, but that the compelling public need outweighed the confidentiality issues involved.

unnecessary disclosure of private information to third parties. Finally, the employer will have a much better chance of establishing the legitimacy of its testing program if, rather than not hiring or discharging the individual, it can show that the testing program was done with a rehabilitative purpose (where relevant), or in order to provide reasonable accommodations.

No court as yet has examined genetic testing in the context of employee privacy rights. Employers will try to defend such testing by showing that it is necessary, for instance, to avoid placing individuals who are prone to certain illnesses or disabilities like manic depression in high-stress jobs, or to reduce the costs of health and life insurance premiums by not hiring at-risk individuals. It remains to be seen whether employers will have to satisfy the kinds of criteria that the courts have articulated with respect to drug and alcohol testing in order to demonstrate that their needs outweigh a person's privacy interests.

While privacy considerations underlie the moral and legal framework which has emerged in the area of employer screening,[3] there are a number of other specific legal issues, some of them unrelated to privacy, which bear on this subject and of which employers should be aware. These issues have achieved some degree of clarity in the AIDS and drug and alcohol testing areas, and many of them will no doubt prove applicable to other emerging topics concerning employer testing, at least by analogy. In general, it is safe to say that use of data gleaned from genetic testing, as well as administration of the tests themselves, will implicate state and federal handicap discrimination laws in addition to the privacy considerations discussed above. There are also several other more peripheral legal issues which necessarily enter the testing picture. With respect to all of these, society's experience with AIDS testing can provide useful guidance as to future trends in the genetic testing area.

Guidance from AIDS Testing Experience

The subject of testing employees for disease has received considerable legal scrutiny over the past few years. Legal commentators have predicted, and the courts and state agencies have begun to confirm, that AIDS is a protected handicap under state and federal handicap discrimination legislation. Those statutes generally shield from discrimination not only persons who are presently disabled (interpreted broadly to encompass *any* deficiency in physiological or mental functioning), but also those with a record or history of disability, and those who are merely (*perceived* or *regarded as* disabled by others. Under this broad definition, almost any discrimination among employees even partly predicated on concern about disability probably falls within the coverage of such legislation. Thus, whether or not they have the disease, male homosexuals and intravenous drug users today receive protection under most handicap discrimination laws to the extent they are discriminated against due to fears about AIDS.

Similarly, it is likely that an individual with genetic impairments but no outward manifestation thereof would still be deemed a handicapped individual if discriminated against in any way on the basis of a positive test for predisposition to genetic diseases (i.e., on the basis of a preceived, if not actual, disability).[4] How-

[3] The importance attached to individual privacy in this area was recently evidenced by the federal Public Health Service's aborted plan to require mandatory HIV (AIDS) antibody testing for marriage licenses, hospital admission, and high-risk pregnant women. Heeding paramount concerns of various groups about "confidentiality, civil liberties, and special sensitivities," the Service eventually conceded that before any such mandatory screening could occur, statutory and procedural changes in federal and state laws would have to be implemented in order to guarantee confidentiality and protect against discrimination.

[4] Although the Supreme Court has explicitly left unanswered whether an asymptomatic carrier of a contagious

ever, most handicap statutes prohibit discrimination only against "otherwise qualified handicapped individuals," that is, individuals who can meet the essential requirements of their jobs, though perhaps with some accommodation for their disability.

Under most statutes, an employer *may* in fact discriminate against handicapped individuals who are *unqualified* (i.e., those who cannot perform the essential functions of their job without reasonable accommodation, pose an unreasonable safety risk, or cannot be accommodated without imposing severe financial and other burdens on the employer). In the case of genetic infirmities, however, one would expect that while large numbers of people might somehow fall within the definition of a "handicapped individual" for employment purposes (again, in most cases as a result of the test-giver's perceptions of disability) the vast majority would still be "qualified" and therefore protected from discrimination.

With AIDS testing, and perhaps even more so with genetic screening, the use of test data to make employment decisions (including insurability determinations) would almost invariably constitute prima facie handicap discrimination, since there is no necessary logical relation between the two (a predisposition to one or more genetic disorders would not necessarily render a person unqualified for a given job). Indeed, several courts interpreting various handicap statutes have specifically held that *risk of future incapacitation does not constitute a sufficient basis for a refusal to hire or promote.* Thus, several state anti-discrimination agencies have deemed the AIDS antibody test impermissible in most employment contexts, since the disease is not transmissible through normal workplace activities and since all but the most obviously ill individuals will currently be capable of performing the essential functions of their jobs.

Potential Liability

Even apart from handicap discrimination issues, employers who were to engage in genetic testing could expose themselves to various other kinds of statutory or common law liability. As noted above, such testing could well trigger an invasion of privacy suit. It could also trigger a defamation action based not only on the unwarranted dissemination of test results but possibly also on the administration of the test itself, if that were known to certain third parties. Employers who give such tests could also court assault and battery suits grounded on employee's fear of being tested for a certain defect or on the actual testing, respectively.[5] Moreover, if the manner in which a company administered an involuntary genetic test were extremely arbitrary and callous, the employer could well face a separate claim for intentional infliction of emotional distress.[6]

In addition to common law liability, employers may potentially also face a number of statutory barriers in proceed-

(Footnote Continued)

disease qualifies as a handicapped individual, its recent decision in *Arline v. School Board of Nassau County,* 39 EPD ¶ 36,081, leaves little doubt that it would so designate such an individual if the question was placed squarely before it.

[5] Thus far it appears that an employee forced to submit to an AIDS test against his or her will can certainly set forth assault and/or battery claims against an employer.

In the drug context, one employee sued his employer for assault, defamation, and invasion of privacy because he was accused of being a drug user, was physcially searched, and given blood and urine tests. The assault claim was based on the physical search and the blood test. *Strachan v. Union Oil Co.,* 768 F.2d 703 (5th Cir. 1985), 103 LC ¶ 11, 590.

[6] A recent example shows the extent to which an employer may expose itself to all kinds of common law claims by ignoring the interests of its employees in a testing situation. In March of this year, an employee of the Prudential Insurance Company of America filed suit charging that he was tested for the AIDS antibody without his consent, and that when the test yielded a positive finding, the company not only refused to sell him a life insurance policy but disseminated the information publicly. The suit asks for a total of $2.2 million in compensatory and punitive damages for breach of implied contract, tortious disclosure of confidential information, negligence, fraudulent misrepresentation, intentional infliction of emotional distress, and deceptive business practices.

ing to implement a genetic testing program. Although there are presently no such statutes on the books, some can be expected in the near future, and it is likely that many will be patterned on the AIDS experience. The most obvious problem that a genetic testing law might address is reliability. In the AIDS area, the serologic test for the AIDS antibody still has certain reliability problems, and, in any event, seropositivity (which only indicates infection by the AIDS virus) does not reveal whether a person has the disease, will ever develop the disease, or is contagious. For these reasons, although a positive test result may justify a decision to dispose of a blood product on the chance that it might prove infectious, this result in and of itself cannot indicate the existence of a condition that would interfere with job performance. Hence, several states have specifically passed laws prohibiting such tests for employment purposes. Society can expect that, whatever the progress made in the accuracy of genetic screening or its correlation with various performance factors, residual problems will continue to make its use in employment settings problematic for the near future.

Legislation may also soon be forthcoming concerning the use of genetic tests for insurance purposes. In the AIDS area, insurance companies and HMOs which carry or administer employee benefit plans have sought to limit their exposure by refusing the claims of employees who are suffering from AIDS or who have tested positive for exposure to AIDS. Or, they have requested that the employer condition employment or plan eligibility on the results of a specific screening. Several states have thus far barred the use of serologic tests for the AIDS antibody as a condition of insurability, and it is likely that similar legislation may be forthcoming with respect to genetic testing. Even at the present time, employers and/or benefit plan administrators may violate the Employment Retirement Income Security Act (ERISA) if they take adverse action against an employee in order to avoid a certain economic impact on an employee benefit plan.

It seems clear that, with rare exceptions, suits based on the foregoing common law or statutory grounds would probably prove successful, since neither society at large, nor an individual employer, generally has the kind of urgent, significant need for test information in the genetic testing area that obtains in the drug and alcohol contexts. Thus, while testing for a genetic predisposition to heart attacks may be appropriate for airline pilots, or for other individuals whose jobs directly implicate public safety, it is difficult to conceive of many other situations where an employee's or applicant's statutory or common law rights could be justifiably abridged. Under these circumstances, few employers, much less third parties, have any reason to obtain or disseminate such information. While genetic testing may consequently become commonplace in health care settings, its use in or for the workplace will necessarily remain quite limited for the foreseeable future.

[The End]

The Changing Health Care System

By John T. Dunlop

Harvard University

In the late 1960s it was natural that I would apply the analog of an industrial relations system[1] to an analysis of the health care system in the United States and its projected changes.[2] The principal actors were doctors, hospitals and one of their subsets, academic health centers, and insurance intermediaries, in addition to the trinity of labor, management, and government that largely generated funding and set the rules, including wages and prices, and relationships within the system. These actors interacted in a context or environment described by a scientific base and technology (transferred through teaching hospitals), complex markets and budgets, and the distribution of power in the larger society. The output of the system consisted of countless procedures, hospital days, and services provided through the actors. The health care system of the country was bound together by a common ideological view of the role of each actor and its attitudes toward the others.[3] It is essential, now as then, to think of health care, as industrial relations, in interactive and systematic terms. Moreover, an explicit analytic concept facilitates comparative analysis among countries and communities here.

As I stated then, "the medical care arrangements of the United States for the fifty years after the Flexner report had a certain internal unity and cohesion." I now would say that cohesion remained largely in place, despite the large infusion of government funds with Medicare and Medicaid, until the structural changes of the later 1970s and 1980s began to make a visible showing. "The medical care system of the past generation was characterized by biomedical centers for teaching and research, hospital-based medicine, solo-practice, a fee-for-service compensation, and group insurance for a large segment of the population, but excluding disadvantaged groups, those out of employment or in low-paid sectors. While such a system of medical care was gradually changing in a number of respects, in the main it had an internal unity and congruence."

The more recent dynamic changes in the health care system have been generated by certain major changes in the environment and by changes in the interrelations of these actors and associated shifts in the ideological views previously held in common. Henri See, the French economic historian, has well likened significant social change to the waves of the sea eroding the base of a cliff. For years no change is apparent, and then one day the whole side of the cliff falls into the sea. It is vital to understand the underlying forces and not to misinterpret the spectacular changes in the health care or industrial relations landscape.[4]

It is useful to distinguish two types of developments in the environment initiating and driving the sea changes and transformations now ongoing in the health care system. The first type are ineluctable and perhaps largely beyond the control of man, such as those arising from the aging of the population and technological changes, although their impact and consequences may be shaped by policies within the system. The second type of development in the environment driving basic changes are more directly and immediately the result of private and public policy initiatives. Both types of initiators of change commingle, of course, in the health care system. These policy changes in the past several decades in the health care context include: (1) rapid expansion in the number of medical schools and doctors and the import of foreign-trained

[1] John T. Dunlop, *Industrial Relations Systems* (New York: Henry Holt and Company, 1958).

[2] John T. Dunlop, "Models of Medical Care and Medical Education: Policy Perspectives," Unpublished paper, December 16, 1969.

[3] Paul Starr, *The Social Transformation of American Medicine* (New York: Basic Books, 1982).

[4] John T. Dunlop, "Health Care in the Year 2000," *Harvard 350th*, September 6, 1986.

graduates; (2) the responses of large business and labor to the inflation in health care charges; (3) the associated expansion in capitation and managed care; (4) the introduction of disease related groups (DRGs) in Medicare; and (5) the growth of explicit profit-making institutions and particularly the resort to the capital markets for funding rather than to government and philanthropy.

Each of these major developments in the health care context in recent years has had significant impact on the various actors, their relations and interactions, on the output of the health care system, and even on the prevailing shared views among the actors. Each development deserves a major paper, but I will comment briefly on several.

In the late 1960s, there were 84 medical schools in the country; there are now 127. The total number of doctors in the U.S. rose from 276,000 in 1963 to 334,000 in 1970 and 519,000 in 1983. Forty-three percent of these 519,000 received their medical degrees after 1970. U.S. medical school graduates in the same years were 239,000, 271,000, and 398,000, while foreign school graduates rose from 31,000 in 1963 to 57,000 in 1970 and 112,000 in 1983.[5] The number of physicians per 100,000 population increased from 140 in 1950 to 221 in 1985 and is expected to be 280 by the end of the century, double the 1950 figure. The growth in women and minorities among doctors has no doubt been a desirable development of the period. But the large expansion in physicians, with somewhat different interests, less wedded to fee-for-service, is exerting fundamental changes on the health care system combined with other developments including increases in outpatient treatment, declines in hospital admission rates and lengths of stay, and the emphasis on wellness programs. Such rapid rates of change in supply and productivity would create significant changes in most systems.

Role of Business

The changes generated by business (and labor) and their changing role in the health care system are of particular interest in this industrial relations setting. The large infusion of Medicare and Medicaid funding starting in the mid-1960s, the inflationary economic developments of the 1970s with their impact on this service sector, as well as the increasing impact of aging and technological changes have combined to raise health care charges and expenditures at a very rapid rate in the past 15 years. Employer contributions for health insurance premiums rose at an average annual rate of nearly 14 percent during the 10-year period 1975-1985. The CPI medical care index rose at about the same average annual rate, 13.9 percent. The current rates of increase are still of major concern and still inducing policy reactions. It is the structural reactions that are most significant.

(1) The large business enterprises reacted by drawing the concern over health care cost inflation to the attention of top executives rather than leaving the issues with isolated benefit managers. The Business Roundtable named Walter Wriston to the chairmanship of a health cost task force. His pronouncements that there was "more health care in an automobile than steel" helped focus the attention of top management. The Labor-Management Group in 1978 issued its *Position Papers on Health Care Costs* alerting union officials and large company officers of a large variety of specific measures to take to constrain cost increases: prospective reimbursement, health maintenance organizations, preadmission testing, utilization review, second opinions, medical malpractice issues, etc., although the parties stated they had differing views on

[5] American Medical Association, *Physician Characteristics and Distribution in the U.S., 1984* (Chicago: AMA, 1985).

comprehensive national health insurance at this time.

(2) Business organizations began to gather much more detailed data on health care utilization and on the experience of their work force through their insurers, but also directly. One of the major permanent changes of the period is the extensive organization and increasing availability of health care data on costs, charges, and utilization. This quest for data leads naturally to information on the experience of different providers in a service community and comparisons and contrasts across the country in large enterprises. Joint labor-management trusts and unions as well have been following the same course.

(3) One of the major outgrowths of this business concern with health costs was the initiative to create community health care coalitions, particularly in the late 1970s and early 1980s.[6] These organizations should be of special interest to students of industrial relations. They are purely voluntary organizations created by no legislation or by no regulation. They have expanded often from a business-only start to include hospitals, doctors, insurers and the Blue Cross Blue Shield Association, and more recently labor organizations and local government. Today there are several hundred of these bodies, a few state-wide, that operate in virtually every community with a population of 100,000. Their activities are closely followed and reported by the Group of Six. It seems to me that these groups start with discourse, learning how the health care system works, diverse attitudes and expectations at first hand, and they go on to gather data and examine utilization patterns. Some coalitions then go on to undertake major projects affecting the health care delivery system of the community: utilization constraints, access to care for the uninsured, capitation and managed care, professional liability, excess hospital capacity, etc. These coalitions are permanently altering the health care systems of our communities, if for no other reason, by virtue of the widespread direct understanding of the operation of each actor and the factual basis of utilization and practice patterns.

(4) The concern with health care costs in large businesses has led beyond co-payments or deductibles directly to the growth of self-insurance of one's own employees and the undermining of community rating to spread risks of the uninsured over the whole community. As Jack W. Owen of the American Hospital Association has well said, "No one wants to pay the costs for someone else," a drastic shift in ideology from an earlier era. This attitude, coupled with the complex problems of many small enterprises which do not have health insurance, makes extremely difficult any approach to provide insurance for the growing number of people, 35 million in 1985 (17.4 percent of the civilian nonagricultural popluation under age 65), without health insurance.[7] Our cost constraining measures and attitudes have helped to bring us back to the problems in health care of the mid-1960s and the uninsured.

(5) A major range of problems that cannot longer be delayed relate to health care for retired employees and faculty, including the complex problem of provision of long-term care. Many enterprises, including universities, have lately assumed the cost of health care in some form for retirees. As people live longer and as technology enhances longevity, these costs are likely to escalate significantly.

(6) There is much evidence that business and labor have become much more aggressive purchasers of health care, more informed, more concerned with quality, and more persistent in seeking and negotiating better deals for price, quality, and access. The growth of PPOs, HMOs, buyer

[6] John T. Dunlop, "Health Care Coalitions," Unpublished paper, December 30, 1986.

[7] Employee Benefit Research Institute, Research and Information Source on Health Welfare and Retirement Issues (Washington: March 4, 1987).

guides, preadmission approval for elective surgery, and second opinions are indications. It would not be an exaggeration to say that among the actors in the health care system in an earlier day, hospitals and doctors largely dominated the system, but more recently business and labor are coming to have a real seat at this table and playing a major role.

To return to the original theme, the health care system—its operation and structural change—is of great interest to students of industrial relations, and the analysis of industrial relations systems may have some useful transference to the issues of health care. These remarks are in part intended to encourage more industrial relations specialists to become better acquainted intellectually with the health care system. The field is far too large and important to leave in the social sciences to economists alone.

Business and labor, often together, are playing a decisive role in reshaping the health care system. The health care arrangements of the country are in the midst of very rapid institutional change, not an area given to useful microeconomic or equilibrium analysis. Private business and governments, profits and nonprofit entities are increasingly intertwined. Voluntary organizations such as community coalitions have emerged to play a key role for change in some communities. Negotiations among major organizations in the health care system will prove less alien to industrial relations experience than to microtheorists. The specialized nature of markets in health care, just as with labor markets, pose insoluble problems to microeconomists or even to most students of industrial organization. A health care system is something more than an amalgam of related markets. The reality does not fit the models. As Alain C. Enthoven wrote recently, "An economist is someone who tries to prove that what works in practice also works in theory, except in health care."[8]

[The End]

A Perspective on the Health Care System

By George Thibault

Massachusetts General Hospital

I have just completed a very stimulating sabbatical year at the Kennedy School of Government at Harvard and the Institute of Medicine in Washington. I tore myself away from my day-to-day clinical and teaching activities at the Massachusetts General Hospital in order to gain a slightly different perspective on the medical scene—a different perspective by virtue of establishing some distance, exposing myself to new information and, perhaps more importantly, spending a lot of time with both physicians and nonphysicians who are thoughtful observers of the medical world and of society at large. In this article, I would like to share some of these perspectives to see if they will help you, as they have me, to better understand where we are and how we got here and to think about how we in medicine might respond most constructively as we look to the future.

[8] "Managed Competition in Health Care and the Unfinished Agenda," *Health Care Financing Review,* 1986 Annual Supplement, p. 114.

For more than a decade now we have been told that medicine is in a state of crisis. In fact, the juxtaposition of the words "medicine" and "crisis" have almost become a cliché. For a long time, the response of the medical community to this alleged crisis alternated between bewilderment and anger: "How could there be a crisis when so much good is being accomplished and when we are only doing what the public asked of us?," we asked. But we have gradually come to realize over the past decade that the crisis is real and that it has its origins in two fundamental truths:

(1) The cost of medical care had become so great and the size of the medical enterprise so enormous that the rest of society was forced to pay attention to it and to begin to challenge the autonomy of the medical community. As the percentage of GNP devoted to medical care rose from 5 percent in the early 1960s to nearly 11 percent today, and the total health care bill for the nation goes over $400 billion, people who pay these bills, directly or indirectly, and who may have other ideas about how to use those resources, begin to pay attention. Furthermore, when the cost of medical benefits for workers contributes more to the cost of a new automobile in Detroit than does the steel of which the car is made and when a medical facility (the Cleveland Clinic) becomes the largest single employer in a major metropolitan area, it's not surprising that how we conduct our business will be of increasing interest to others.

(2) A second major factor that has contributed to this crisis is the loss of public confidence in the medical profession. Though public opinion polls show that the majority of Americans continue to feel very positively about their own doctor, they are increasingly critical of the profession as a whole. This loss of confidence has many origins. Rising technology, specialization, and bureaucracy have distanced doctors from their patients. Ironically, the very technology and the science that we have celebrated and that has so contributed to our advances and rise in power have also raised expectations to a level that we cannot hope to fulfill. We have not, for instance, cured cancer, prevented heart disease, or solved the problems of old age and chronic disability, so there is public disillusionment. We have, at the same time, done exceedingly well for ourselves and, for some in our profession, *exceedingly* well. This has not gone unnoticed and is the cause of jealousy. One of my great revelations this year has been how widespread and deep is the dissatisfaction with us among very thoughtful and intelligent people. At best, we are seen as having been oblivious to the problems that have been obvious to others and unwilling to listen and to take their advice. At worst, we are seen as self-interested and overly protective of our prerogatives and incomes even when this is not in the public good.

Growth of U.S. Medicine

To try to better understand how we got to this point and how we might respond, it is useful for a moment to gain a historical perspective on the problem. For a complete and scholarly treatment of this subject, I recommend Paul Starr's *The Social Transformation of American Medicine.*[1] It is important to realize that the position of medicine in this country at this point in history is very recently obtained and is probably unique among all societies in the world. Understanding the evolution to this position may not only help us to understand the problem, but also enable us to be more secure in trying to adapt to these changing times.

Throughout the 18th and most of the 19th centuries, medicine in the U.S. was a small cottage industry; individual practitioners operated out of home or office with limited resources at their disposal and

[1] (New York: Basic Books, 1982).

very limited remuneration. The profession was fragmented and in competition with lay and domestic practitioners, and therapies that were probably usually as effective as what physicians had to offer. Though there certainly were individual prominent and notable members of the profession during this period, such as Benjamin Rush and three other MDs who signed the Declaration of Independence and such as the Warrens in Boston, the profession was by and large not held in high esteem.

From the end of the 19th century until World War II, there was a 50-year period in which professional authority and status gradually rose. There were many factors responsible for this rise, and I will cite five major ones:

(1) The progressive political and social movement in the U.S. led to a greater confidence in rational behavior, science, and institutions in general.

(2) The Flexner report in 1910 led to the closing of over 60 substandard, largely proprietary medical schools and set the stage for the rise of scientifically based medicine and the beginning of the modern academic medical center. This helped to instill public confidence in medicine and also greatly reduced the number of medical graduates, with positive economic and status implications for the profession.

(3) Modern hospitals became centers for specialized care and curing for all people rather than charitable institutions only for the poor and dying. It is well to recall as we celebrate the 175th anniversary of this great institution that it spent the first half of its history largely in the latter role. The professionalization of nursing and the advent of aseptic, painless surgery were important contributors to this change in the role of the hospital, as was the increasing urbanization of society. The modern hospital enabled the medical profession to work more efficiently and with greater resources, and thus greatly augmented both the authority and the economic standing of the physician.

(4) The medical profession became organized. Doctors began to cooperate with each other and the American Medical Association (AMA) rose as a political force. In retrospect, many have commented with some justification on the monopolistic and antiprogressive nature of this aspect of the change. It is important to note, however, that this change, seen in historical perspective rather than from the perspective of current medical wealth and power, involved some legitimate issues of standard setting and the defense of a profession that was not yet secure and had not yet made it.[2]

(5) Societal regulations, such as strict licensing laws, regulation of drugs, and public health measures, enhanced the power of physicians and the profession. It is perhaps ironic that regulation was partly instrumental in the rise of physician authority and autonomy since it is regulation that is not perceived as one of the greatest threats.

In spite of this increase in professional authority, identity, and status in the first part of this century, the lot of physicians prior to World War II was still far different from what it is today. The number of effective therapies was limited and the economic enterprise, in terms of both institutional resources and physician income, was small. One need only read Lewis Thomas's account of his father's life as a general practitioner in the 1920s and his own life as an intern in 1937 to realize how far medicine still was from its modern counterpart.

Medicine, as we know it today in the U.S., has exploded on the scene in just the past 40 years. Again, there are many fac-

[2] I would not attempt to make such a justification for the continued opposition of the AMA to change in many areas in the past four decades.

tors responsible, but I will cite but five that I think are the most important:

(1) The National Institutes of Health (NIH) and the federal government invested in research. This year we celebrate the 100th anniversary of the founding of NIH, which began as a modest Lab of Hygiene on Staten Island. It is important to realize, however, that as late as 1945 the NIH's entire research budget was $180,000. With strong Congressional and public support, the budget had grown to $400 million by 1960.

(2) Partly, but not exclusively, as a result of the rise of the NIH, the rapid advance in science and technology and the creation of the modern academic medical centers as the sites for producing and using these advances changed medicine from a small cottage industry into the "medical-industrial complex."

(3) The Hill-Burton Act of 1948 was responsible for doubling the number of hospital beds in this country over a 30-year period; beds were added particularly in rural and underserved areas. This represented a federal investment of over $3 billion, with matching state and local funds of over $9 billion. This gave more patients than ever access to high technology and modern medicine, and it also gave more doctors access to hospitals as their base of operation.

(4) Medicare and Medicaid, the hallmark social legislation of the 1960s, were enacted in 1965 to improve access to medical care for the elderly and the poor. By 1984, more than $100 billion per year was being spent under the auspices of these two programs. Not only did these programs work in increasing utilization of health care (there are many data that amply document that the poor and the elderly saw doctors more often and received more care), but in spite of the strong opposition of organized medicine to their passage, they were an economic boon to medical institutions and individual doctors.

Solutions As Problems

(5) A variety of initiatives in the 1960s to increase physician manpower were so successful that the number of medical school graduates more than doubled in a decade and now number 17,000 a year. This, like Medicare and Medicaid, was largely spurred by a desire to improve access to care.

In many ways, as a society, we can look at these four decades of medical history with pride. Enormous societal resources were mobilized and produced results. Now we have to contend with these results. As Lane Kirkland is fond of saying, "Today's problems are yesterday's solutions." The rapid expansion of the medical enterprise in the 1950s gave way to the concerns about access in the 1960s and led, in turn, to the preoccupation with costs in the 1970s and 1980s. Each of the five factors cited above—the rise of the NIH, the rise of the modern academic medical center, Hill-Burton, Medicare-Medicaid, and increased physician manpower—was a *solution,* and now each can be cited as a contributor to our present preoccupation with cost.

In an attempt to solve the problem of costs, two strong forces are at work, frequently in conflict with each other and both threatening the physician authority and autonomy to which we have become accustomed. These forces are *regulation* and *the marketplace.* Regulation, as I have pointed out, was an important factor in the rise of physician authority in the first part of the century, and the huge investment by the federal government since World War II in medical education, medical research, and medical care (all indirect forms of regulation) led to the rise of the modern medical enterprise. Now, regulation in the form of Physician Standard Review Organizations (PSROs), Determination of Needs (DONs), and Disease Related Groups (DRGs) is seen not as an aid, but as a weapon trying to tame the beast it helped to create. But regulation is getting a bad name these days not

so much because the professional does not like it, but because it is thought that the track record of regulation is not very good and the regulators themselves seem to no longer believe in it. I think that this is partly current vogue and partly a misreading of history. For example, the runaway costs of Medicare and Medicaid are cited as a failure of regulation when, in fact, the political compromise that led to their passage denied them any regulatory role and made them simply funding mechanisms. But certainly there is some basis for questioning the effectiveness of many of the regulatory attempts of the past decade. PSROs and DONs never really accomplished their goals, and DRGs are unproven as a cost-saving measure and are highly questionable in their impact on quality of care.

The disillusionment with regulation has given added impetus to the other force aimed at cost containment: the marketplace. The rise of Health Maintenance Organizations (HMOs), Preferred Provider Organizations (PPOs), cafeteria-style insurance options, open competition for market shares, and for-profit medicine are all expressions of this unleashing of market forces in the hope of controlling medical costs. As confusing and unsettling as all this is, it must be acknowledged that these forces are having some impact, though in each case there are still important caveats. HMOs are providing care at lower costs (primarily by reducing hospitalization rates), but this is largely in healthy populations and still accounts for only 10-15 percent of all medical care. It is not clear what the results will be if applied more broadly, particularly to older and more chronically ill populations, and questions of quality of care are only beginning to be addressed.

Major employers, such as General Motors and Chrysler, have reduced their health care costs by using a variety of insurance options and incentives, but it is not yet clear what the impact of these changes are on quality of care or employee satisfaction, or how applicable these tactics are in less controlled circumstances or with less highly selected populations. Institutional competition has appeared to force some "trimming of the fat" and a healthy increase in consumerism, but it is not yet clear whether this actually controls cost or could, in the long run, induce costs by encouraging unnecessary services and creating barriers to beneficial institutional cooperation. For-profit medical facilities have shown they can raise new capital, provide acceptable care, and achieve some economies of scale, but it has not yet been demonstrated that they save money for society. There are also ethical issues that may not be insoluable, but which still require much more exploration while society assesses the benefit/risk ratio of this means of providing health care.

My own review of the past decade tells me that neither regulation nor market forces will be sufficient. Regulation will always be an imperfect tool—cumbersome and imperfectly responsive to a myriad of individual situations. The market will always be imperfect in medicine because the rules of a truly free market are not operative: information is never perfect, choice is rarely totally free, and buyer and seller are often not equal in authority. It is also not at all clear that the market will take care of the poor or provide for needed education and research. If we are to deal successfully with the problems that face us, we will need the proper balance of regulation and free market in synergy with two other forces—consumerism and professionalism.

The rise of consumerism should be seen as medicine's ally rather than a threat in this struggle. Not only is an informed, health-conscious populace more likely to be healthy (which, after all, is our goal as physicians whether we can take direct credit for it or not), but it is also likely in the long run to be the strongest force against indiscriminant cost-cutting and

policy changes that could threaten the quality of health care.

I am struck by how infrequently professionalism is cited as an important force today. Perhaps, like government and altruism, professionalism is out of vogue. I think it is important, however, to remind ourselves what it means to be part of a profession. Sociologists identify three features that distinguish a profession from a trade or business: (1) It is self-regulating through systematic, required training and collegial discipline. (2) It has a base in technical, specialized knowledge. (3) It has a service rather than a profit orientation enshrined in its code of ethics.

At a time when market forces are in ascendancy, the efficiency of the corporation is much admired, and when our heroes are measured, in part, by how much money they make, it may be unfashionable or downright corny to harken back to such a definition of professionalism. I believe, however, that it is an important source of both our influence and our satisfaction as physicians. At the beginning of this presentation, I identified the crisis in medicine as having two fundamental sources: high cost and lost credibility. We need to deal with both. In a recent article in the *New England Journal* of Medicine,[3] the economist Eli Ginsberg observed that "during destabilization, there is a risk that important values may be lost." I think we are at risk of that happening to the medical profession. While the public wants us to be efficient and not wasteful, I don't think they want to "deprofessionalize" medicine by making it like any other trade or business.

The problems that face medicine are enormous and are not going to go away. As Dr. Robert Buchanan, General Director of Massachusetts General Hospital, said in a recent address before the American Association of Medical Colleges, "Nostalgia will not reverse the current direction of the change." The problems we face include continued concern about cost and the implications of changed financing patterns and insurance schemes, how to deal with the excess of physicians and hospital beds (both products of our "solutions" of the past), how to deal with an aging population which will place additional, or at least different, demands on an already stressed system, and how to both control and make room for the anticipated new technologies and scientific breakthroughs.

Problems As Opportunities

But problems also mean opportunities. The medical profession is very strong, with much to be proud of. It is not the prewar medical profession in terms of the effectiveness of its medicine or the resources available to it. In spite of the negativeness of such writers as Ivan Illich and others, there is ample evidence that the societal investment in medicine has made a difference. I cite but a few examples: Cardiovascular mortality has been declining 2-3 percent per year for the past two decades. In the 1970s, there was the largest percent increase in life expectancy for adults in this country for any decade this century. Old diseases, like MI, kidney stones, and osteoarthritis have new therapies that reduce mortality and morbidity. New diseases like Legionnaires and AIDS have been understood, if not irradicated, with unprecedented speed, and investment in fundamental research has yielded new insights into cellular and subcellular function which enable us to anticipate more breakthroughs in disease diagnosis and therapy.

I do not believe that our society is going to be unwilling to continue to make the major investment in medicine that it has to date; the comparison with the United Kingdom where only half as much of the GNP is spent on medical care is really a

[3] Eli Ginsberg, "The Destabilization of Health Care," *New England Journal of Medicine* 315 (September 16, 1986), pp. 757-61.

straw man. What we cannot do, though, is anticipate that the rate of growth will ever again be what it was for the past four decades. Even in the year of the trillion dollar federal budget, however, I think at least the same proportional investment in medicine will continue, but society will increasingly make us accountable for using these resources wisely and fairly. At any conceivable level of support, difficult choices will have to be made if equity, innovation, and quality are to be preserved. This is both our challenge and our opportunity. Just as expansion was the medical issue of the 1950s, access the issue of the 1960s, and cost containment the issue of the 1970s and 1980s, I believe that quality and equity will be the issue of the 1990s.

In a recent essay in the *Milbank Quarterly* entitled "Has Cost Containment Gone Too Far?", Victor Fuchs, the medical economist at Stanford who has written extensively about medical rationing (which he maintains correctly has always been with us, just not explicitly) and who has sometimes been critical of physicians, wrote "Selectivity will become increasingly important as the reductions in the amount of care (relative to potential benefits) grow larger. The more selective the reductions, the greater can be the decrease in cost for any given change in health or social welfare. . . . Physicians have more understanding of the potential effects on health of alternative protocols. Moreover, the improvement and expansion of research and education programs designed to increase that understanding will be essential in the long run in order to contain costs in the best possible way."[4]

Historians and sociologists in the year 2000 and beyond are likely to judge our profession on the basis of whether or not we accepted responsibility for a leadership role in defining medical quality in order to help make these difficult choices. "Quality" is on everyone's lips these days, but this talk still needs to be given substance. A number of initiatives now under way (new regulations of the Board of Registration in Medicine in Massachusetts and new proposed directives for the Joint Commission on the Accreditation of Hospitals (JCAH) are but two of them) will force us to actively engage in this process. This is a challenge to the profession as a whole, to both its organizations and its individuals, but it is particularly a challenge to our academic medical centers. Our elite institutions, beneficiaries of the medical boom of the past four decades, are the primary education and training sites for future physicians, are the major recipients of the NIH research budget, and have become the meccas of modern technologically intensive medical care. They also provide nearly 50 percent of the uncompensated care in this country (though they represent only approximately 10 percent of the hospital beds). From this position of societal strength, these institutions are uniquely poised to be leaders in the quality and equity issues. Both society and the medical profession will be the beneficiaries and the academic health centers will be better able to give an affirmative answer to the rhetorical question posed in a recent article in *Issues in Science and Technology*, "Academic Health Centers: Can They Survive?"

While not wishing to be overly optimistic and while not oblivious to the bumps and bruises that have already come our way and undoubtedly will continue, I do believe that the future can be very positive if we in medicine understand our history and understand the problem and if we are willing to use our enormous professional strengths and resources in new ways.

[The End]

[4] Victor Fuchs, "Has Cost Containment Gone Too Far?," *Milbank Quarterly* 64, No. 3 (1986), pp. 479-88.

Community-Based Health Care Systems

By Linda Hill-Chinn

Community Programs for Affordable Health Care

Community Programs for Affordable Health Care (CPAHC) is a national program funded in 1981 by the Robert Wood Johnson Foundation (RWJF) and co-sponsored by the American Hosptial Association and Blue Cross and Blue Shield Association. When the program was first designed in 1980, health care cost increases were beginning to be noticed by business and labor leaders, but little or no responses had been generated.

Three basic premises led to the formation of the CPAHC. The first was that health care costs would continue to escalate at an alarming rate unless community leadership emerged to meet the challenge of restructuring the way health care services were provided and paid for. The second was that community leadership (specifically, local business, labor, hospital, and insurer leaders) working together could be a "third force" in effecting health system change locally, the other two being regulation and competition. This "third force," the community force, has potential to both manage and enhance competition and regulation at the community level. The third premise was that unbridled competition, the solution being proposed by many at the time, could do irreparable harm to local health systems by allowing each party at interest (again, business, labor, hospitals, and insurers) to aggressively pursue their own self-interests.

Indeed, we have observed some consequences of such competition. For example, businesses concerned about high health insurance premium costs raised deductibles and co-payments, thereby improving their bottom lines by shifting costs to employees but not effecting any true health system cost savings. Hospitals, concerned about filling beds and maintaining an income stream, began aggressive advertising campaigns and pursued other strategies to entice patients from other hospitals. Again, this strategy may have improved the bottom line of one hospital, but only at the expense of another. Insurers and large self-insured businesses negotiated discounts with providers, thereby reducing their costs but increasing the cost of care for others who pay extra to make up for the discount and/or decreasing access for the uninsured as hospitals have less flexibility to shift costs. The CPAHC founders were not so idealistic as to believe that self-interest had no place. Rather, they were seeking those who understood "enlightened self-interest"; community leaders who wanted real cost savings, not the quick fix that is likely to have adverse effects on another party.

A National Advisory Committee, chaired by John Dunlop and composed of national leaders in health delivery and financing, was formed and charged with recommending to the RWJF the communities that should be awarded up to $1.6 million each to plan and implement major feasible projects. The projects were to control the cost of health care *without* adversely affecting the quality of care or access to care by the poor and elderly.

The lure of $1.6 million and the status of a RWJF grant led communities to submit 323 letters of interest. Most, however, had little understanding of how difficult the task would be. And few were able to

pull together people who had naturally conflicting interests and get them to agree on the problem, much less to agree on what to do about it, without the discussion disintegrating into a finger-pointing match.

Eventually, 11 communities were able to develop projects and were awarded two-year implementation grants that were renewable for an additional two years. Two of the 11 elected not to request a renewal grant after the initial two-year period as a rapidly changing envirnoment and unresolved conflicts caused one group to dissolve and another to retrench. Although only nine communities remain, some exciting, potentially significant, and replicable projects have been implemented and many, many lessons have been learned. First, I'd like to describe two successful programs.

Council on Health Costs, Inc.

The program in Charlotte, North Carolina, was initiated by the medical society whose leadership saw the need for effective utilization review criteria to control excessive use of inpatient beds and assure quality of care, most assuredly a case of "enlightened self-interest." They recognized the need to put together a broad-based coalition of business, hospitals, insurers, and labor to avoid the appearance of the "fox guarding the chicken coop" and to assure success. The coalition was incorporated as the Council on Health Costs, Inc. The Council decided to involve as many local physicians as possible in the process of developing utilization review criteria. Eighty percent of the local physicians participated in panels of specialty physicians. They reviewed diagnoses in their specialties and developed clinical criteria reflecting high quality, cost-effective care for each diagnosis.

Six of the ten largest companies and several smaller companies in Charlotte have added the program, called Pre-Admission Review or PAR, to their health benefit packages, after undertaking a thorough employee education program. In all but two companies the program is voluntary, that is, there are *no* penalties for noncompliance. Yet it has had a significant effect on hospital use rates, lowering the hospital days per 1,000 in the general under-65 population from approximately 750 days per 1,000 (1984) to 589 days per 1,000 (1985) and in the participating companies to 345 days per 1,000 (1985) for medical surgical diagnoses. As you can see, use rates were significantly lowered for the general population, probably due to the process used to develop the standards. It is likely that the additional savings accrued to participating companies are a direct result of the review process and the thorough employee education process undertaken by each company in cooperation with the Council. These results, incidentally, contradict conventional wisdom and the argument that a utilization review (UR) program will work only if the employee is penalized for not complying with the UR recommendation.

A second project designed to address the problem of care for the elderly through physician-directed care management was funded in the first two years. The concepts of the two initial projects, utilization review and case management, are being used in additional products. A retiree health plan, incorporating utilization management, case management, and expanded outpatient benefits, is under development. A multiple employer trust that includes utilization management and case management will be offered to small employers in Mecklenberg County to ensure availability of a cost-effective, affordable benefit plan to that group. Finally, a program to reduce unnecessary use of inpatient alcohol and drug abuse and mental health services is available. Clinical criteria for review of admissions and care management protocols are being developed by mental health and substance abuse experts. The Council is administering an employee assistance pro-

gram using the criteria, and health benefit plans of participating employers are being modified to ensure consistency with the protocols.

WASAHC

The strategy for the Worcester, Massachusetts, CPAHC program, Worcester Area Systems for Affordable Health Care (WASAHC), was developed by the major businesses in Worcester through the Central Massachusetts Business Group on Health, a business-only coalition. The business group concluded that the lack of provider incentives to practice effective medicine, or market failure, was the key controllable reason for high costs.

To make health care more affordable, the business group adopted a strategy of encouraging competition among managed-care health plans, organizations responsible for both insuring and delivering managed health care to a defined group of enrollees for a fixed monthly premium. Health Maintenance Organizations (HMOs) and Preferred Provider Organizations (PPOs) are two types of health plans. These business leaders felt that if incentives were in place to reward high quality, good service, and efficiency then competition among organizations with these incentives could improve the performance of the area health system.

In developing strategy, the business leaders believed that the wrong incentives could result in some undesired effects of competition. Two ways that competition could go wrong were identified. First, if only low cost is rewarded by purchasers then quality and service could suffer. To keep this from happening, quality, service, and cost all are monitored and the results reported to the community. Second, the competition might benefit only part of the population. Specifically, there was concern that those people at high risk of major health expenses, e.g., the elderly, poor, or chronically ill, might be left out. To avoid this problem, the business leaders' strategy clearly encourages all health plans to serve the entire community.

The business leaders felt that the right incentives could be created by focusing attention on consumers choosing a plan when they are healthy. Choosing which plan to join contrasts with the employee risk-sharing approach, which includes large out-of-pocket expenses at the time of service use, through high deductibles and coinsurance.

After adopting its competition strategy, the business group concluded that broad community support was necessary to put it into practice. They then founded a community coalition, the Worcester Area Systems for Affordable Health Care (WASAHC), by inviting representatives of hospitals, insurers, phsyicians, labor, consumers, and small businesses to join. This broad-based coalition was charged with implementing the strategy.

WASAHC's projects address both the consumer and provider sides of the competition equation. On the provider side, promoting competition involves assisting providers in the development and expansion of health plans. On the consumer side, promoting choice means motivating and informing consumers. Specific projects focus on each of the following population groups: employers/employees, Medicare recipients, Medicaid recipients, and the uninsured.

WASAHC promotes informed consumer choice on two levels: business and government purchasers, who decide which plans will be offered to employees, and individual consumers, such as Medicare and Medicaid beneficiaries. Buyers' Information Campaigns have focused on both groups, stimulating purchasing decisions based not only on price but also on quality, access, and service.

To date, several competitive health plans have been developed and are being offered to both large and small employers, the Medicare and Medicaid populations, and, on a demonstration basis, to a por-

tion of the uninsured population. Currently, WASAHC is working to increase small employer and Medicaid beneficiary participation, to develop a program for the chronically mentally ill, which integrates physical and mental health services into one managed health plan, and to increase the availability of competitive health plan coverage to the uninsured population. The strategy is working well. Premium increases have been reduced from a high in 1982 of +19.4 percent to +1.3 percent in 1985. Inpatient days per 1,000, while still high, have been reduced from 1,491 in 1982 to 1,149 in 1986.

Other Local Projects

Significant projects have also been implemented in other cities around the country. Briefly, in Boston, a Neighborhood Health Center HMO providing efficient, high quality managed care has been established. This new HMO will be marketed to the employed population as well as Medicare, Medicaid, and, initially on a limited basis, to the uninsured. It will provide a cost-effective option for small employers who do not now offer insurance because of high premium costs. Also in Boston, hospital medical staffs and specialty societies are studying small area variations data. These data show differences in medical practice styles by diagnosis. For example, the demographically adjusted data may show variations of 100 percent or more in various surgical procedures such as tonsillectomy, hysterectomy, etc. The premise of this project is that a review and discussion of such data by physicians lead to changes in practice styles that reduce the variations and achieve a higher quality of medical care.

The Southeastern Michigan (Detroit) CPAHC program is unique due to the size of the city and the existence of two powerful groups that can control health care in Detroit: the auto makers and the United Auto Workers. Most of the funded communities (other than New York, which is a special case) are smaller in size and power is more dispersed. These two factors led the Detroit program to take a different approach to generating projects. The governing body solicits, reviews, and financially supports proposals made by consortia of providers and insurers. The program in no way interferes with the bargaining process but does provide a laboratory for experimenting with potentially cost-effective projects that might eventually become part of the auto industry benefit package. An example of a project that was funded and has been incorporated into the current contract is the podiatric PPO. Foot problems and apparent excessive use of podiatry services have been a problem in the Detroit area. The project, submitted to the Southeastern Michigan Committee for Affordable Health Care by a podiatric hospital, was financially supported by the committee and eventually became part of the Blue Cross, Blue Shield PPO offered by the auto makers. The Podiatric PPO involves over 40 percent of the state's podiatrists and serves more than 117,000 people.

The small businesses in the rural areas surrounding Topeka, Kansas, tend to provide first-dollar health coverage and have little or no desire to reduce employee health benefits despite rapidly increasing costs. Also, like most smaller businesses, the personnel manager or the owner handles all personnel matters including health benefits. They have little time to devote to studying health delivery and financing. Therefore, the Topeka CPAHC chose to work through the medical and hospital community to promote more efficient delivery of services at the appropriate service level.

The Topeka program is developing urban/rural physician and hospital referral networks. Rural primary-care physicians and urban specialistts have developed referral agreements and treatment protocols to guide their interactions in order to improve the continuity, quality, and affordability of care. The rural

primary-care physician serves as a gatekeeper, referring his patient to specialists as necessary and providing follow-up care. Major urban and rural hospitals also are developing a network. A utilization review system has been purchased by the program for use by at least one urban and four rural hospitals. Physicians will prepare protocols that indicate the level of care needed by a patient, thereby facilitating transfers among the various levels of care from home care to nursing home to rural primary/secondary hospital to urban secondary/tertiary care hospitals. The Topeka program is likely to become a model for efficient delivery of rural health care.

In Tulsa, Oklahoma, community leaders are implementing a system designed to assure the availability of managed care to all Tulsans. The larger businesses have agreed to subsidize a community-rated PPO and HMO plan called the Tulsa Health Option. The plan is offered to all businesses of two employees or more at the same cost. The subsidy from larger businesses makes the plan more affordable to smaller employers. Within five months of the initial announcement of the plan, 82 small businesses (510 enrollees) and five large businesses (7,000 enrollees) have signed on to the Tulsa Health Option. Plans are now under way to include the Medicaid population in the plan, and future plans include using corporate philanthropic funds to pay a portion of the plan premium for the uninsured poor who are not eligible for Medicaid.

We have learned a great deal over the past six years as we and the leadership groups in many communities around the country have struggled to plan and implement community programs for affordable health care. First, we now recognize that the process of building trust and confidence among parties who have diverse interests takes a very long time. In fact, a successful project can be implemented *only* if at least one major leader from each group (business, labor, hospitals, insurers, and probably medicine) is committed to the community's interest, as well as his own—the enlightened self-interest I mentioned earlier.

Second, groups that decide to undertake this kind of venture must start small. Success on small, low-conflict projects builds trust and confidence among the participating parties and also builds the group's credibility in the larger community. Once trust and credibility are built, more difficult issues can be addressed.

Third, the support of the community's power structure is essential. The community's power elite does not necessarily have to participate in the governance of the program, but some direct line to that structure can assure success.

Fourth, top notch staff is essential. The staff leader must have a technical understanding of the health system *and,* even more critical, political and organizing skills. Without top quality staff, the community leadership loses interest in the program and conflicts destroy the process.

[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 1987 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 $4.00 to cover postage.

Regular Membership	$ 36.00
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)	14.00
Student Membership (Full-time)	14.00
Institutional or Library Subscription	36.00

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,

Michael Moskow

IRRA President 1987

Also in the
Industrial Relations Research Association Series

COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE

Edited by Gerald G. Somers (1980)
(hard cover) 588 pages $20.00

U.S. INDUSTRIAL RELATIONS 1950-1980: A CRITICAL ASSESSMENT

Edited by Jack Stieber, Robert B. McKersie, and D. Quinn Mills (1981)
361 pages $15.00

INDUSTRIAL RELATIONS RESEARCH IN THE 1970s: 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

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 0-913447-35-8

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION
PROCEEDINGS OF THE 1987 SPRING MEETING, BOSTON, MASSACHUSETTS
7226 SOCIAL SCIENCE BUILDING, UNIVERSITY OF WISCONSIN
MADISON, WI 53706 USA

Address Correction Requested