INDUSTRIAL RELATIONS RESEARCH ASSOCIATION

Proceedings of the
1983 Spring Meeting

March 16-18, 1983

Honolulu, Hawaii

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Edited by Barbara D. Dennis

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

Reprinted from the August, 1983, Issue of
LABOR LAW JOURNAL
Published and Copyrighted 1983 by
Commerce Clearing House, Inc., Chicago, Illinois 60646

Proceedings of the 1983 Spring Meeting
Industrial Relations Research Association

Library of Congress Catalog Card Number: 50:13564

ISBN 0-913447-23-4

INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES

PROCEEDINGS OF THE ANNUAL MEETING (May Publication)

PROCEEDINGS OF THE SPRING MEETING (Fall Publication)

Annual Research Volume (Fall Publication)—MEMBERSHIP DIRECTORY-HANDBOOK every sixth year in lieu of research volume

IRRA NEWSLETTER (Published Quarterly)

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Industrial Relations Research Association Spring Meeting

March 16-18, 1983 — Honolulu, Hawaii

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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.

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Sincerely yours,

Jack Stieber

IRRA President 1983

PREFACE

A number of important aspects of collective bargaining and dispute settlement—several focusing on the setting of the meeting, Hawaii—were program topics for the IRRA's 1983 Spring Meeting in Honolulu.

To set the scene, the two speakers at the opening session, Wayne L. Horvitz and Bernard W. Stern, described "Hawaii's Unique Industrial Relations Climate," and the luncheon speakers, President Fujio Matsuda of the University of Hawaii and Thomas K. Hitch, economist, First Hawaiian Bank, provided further information on the host state. Matsuda's subject was "International Education at the University of Hawaii, and Hitch's was "Hawaii's Economy."

Concurrent morning and afternoon sessions were devoted to such traditional labor relations topics as collective bargaining and grievance handling, arbitration and arbitrators, workers' compensation, comparable worth, productivity and technology, and impasse resolution. The meeting concluded with three Contributed Papers sessions.

But all was not business at the Honolulu meeting. Hawaii chapter members entertained their guests at an evening reception at the historic governor's mansion, where the University of Hawaii Dance Ensemble presented a program of Hawaiian chants and dances. The following evening there was a "moonlight" cruise on a windjammer. There was no moon, but the city lights and Waikiki Beach were spectacular enough.

The Hawaii chapter members were generous hosts for the meeting, with many of them also serving as session chairpersons and discussants. Joyce Najita was in charge of local arrangements, and the Association is grateful to her and to all who contributed to an outstanding program. The Association is also grateful to LABOR LAW JOURNAL for publishing the papers and discussions from this meeting in their August issue.

BARBARA D. DENNIS
Editor, IRRA

International Education at the University Of Hawaii

By FUJIO MATSUDA

President, University of Hawaii

WE ARE LIVING in an exciting age in the most dynamic region of the world—the Pacific region, tied together over vast distances by common interest and increasing interdependence. If we need a current clue to the importance of the countries rimming the Pacific, we need only to look to trade. Our commerce with the region is larger than that with Europe. Our two-way trade with Japan is the greatest between any two countries in the history of the world.

We all know about the economic miracle of Asia: the growth in Asia over the last ten years has been greater than in any other part of the world. The economic development of Asia may be thought of in three phases. Japan is in the first phase. Per capita income there is U. S. $9,000 as compared to the per capita income in the U. S. of over $10,000. Hong Kong, Singapore, Taiwan, and South Korea are in the second phase. Per capita income in these countries is less than $5,000. China, the Philippines, Indonesia, Thailand, etc., are in the third phase. Per capita income in these countries is less than $1,000.

This third group of nations represents vast land-based resources and population—one-third of the world population, with recorded civilizations that go back several thousand years. These countries are beginning to stir. They want to modernize and industrialize. The people there have the universal urge to enjoy the good life and to reap the social and economic benefits of industrialization.

Technology and capital are needed if the U. S. is to play a meaningful role in the Pacific. We will be in competition with Japan to provide the needed goods and services. We cannot hope to dominate or to exploit. We will have to work together with Asian and Pacific nations for what is mutually beneficial. Cooperation is vital in this interdependent world.

The 21st century will also see continued technological development. Both the U. S. and Japan are entering the postindustrial society—the information age. Knowledge rather than material resources will be paramount. More than just automation/robots is involved. Scientists and engineers are seriously working on computers that think. Biotechnology is just beginning.

Our ocean resources are barely tapped. We are still in the hunting-gathering stage of development in harvesting the resources of the sea. Great biological and mineral wealth is stored or growing in the oceans, and the greatest ocean on earth is all around us. The ocean is also a great reservoir of an essential commodity of the modern world—energy. In fact, modernization can be measured by or indexed by the relative use of energy. If we can learn to tap a fraction of the mechanical energy stored in this great ocean which is replenished daily by our mother-star through solar radiation, our energy problems will be solved. The ocean also is a source of the fuel needed for nuclear fusion, another "inexhaustible" form of energy.

The 21st century will clearly be the Pacific century, but the U. S. is not automatically assured of a central role in this exciting international arena. We need to actively seek it, cultivate it, and compete for it. It is an arena that is unfamiliar and uncomfortable to us.

We do not understand their many languages and, although they have been forced to learn our tongue, we do not understand their values, their historical and cultural frames of reference, their social and political philosophies, their aspirations. We speak the same words yet do not communicate. We as a nation still look toward Europe and the Judeo-Christian culture. The Atlantic is still our ocean, not the Pacific.

Although Hawaii is an American state, our people have their roots in Asia and Polynesia as well as the mainland United States and Europe. Our society reflects this heritage in its cultural diversity. We are an unusual people in that we have adopted to a significant degree aspects of cultures that are our neighbors' in addition to those of our own families.

Leading the Way

One of the primary purposes of education is to give the student an understanding of self and the society in which we live. The University of Hawaii, more than any other university in the United States, has the opportunity and obligation to lead the way in educating the new American—the Pacific American—who can be comfortable in two or more rather different cultures and will have the facility of speaking one or more Asian/Pacific languages. The liberally educated Pacific American of the future will be multicultural and multilingual. We, in Hawaii, have a responsibility to help train and thus provide the Asian and Pacific expertise to our nation.

The university's commitment to internationalism began with the founders who felt that public higher education should focus on regional and international matters. Since the 1920s, the university has been one of the principal generators of international activities in Hawaii. Included are achievements such as the establishment of the East-West Philosophers' Conference, transcultural training for the Peace Corps and the Agency for International Development, Pacific-wide research and development consortiums, and the world's only international educational satellite network. Over the years, we have developed one of the nation's outstanding Asian and Pacific study programs. And, of course, the university played a crucial role in the creation of the East-West Center and operated the Center until it was spun off as a separate institution in 1975.

International eduaction at the university takes many different forms. It includes foreign language and area studies, cross-cultural studies, exchanges, study abroad, technical assistance and training, faculty research or service abroad, and the like. At the present

time, some 40 percent of the curriculum on the Manoa campus is international in nature.

This campus offers instruction in 44 languages and thus has the most extensive foreign language curriculum in the United States. It has the largest enrollment in East Asian languages; one-fourth of all American undergraduates in Japanese language courses are at this campus. The university also has the largest U. S. enrollment anywhere in Indo-Pacific languages. Some of them are not taught anywhere else in the United States.

Our professional schools are heavily involved in international activities at home and abroad. For example, our school of medicine conducts an American-type residency program at Chubu hospital in Okinawa for about 50 medical graduates of Japanese medical schools. And our school of public health offers a graduate concentration in international health and has faculty and student exchange programs with Mahidol University in Bangkok and the University of Indonesia in Jakarta.

At the present time our college of engineering is actively planning a Pacific center for high technology research on the Manoa campus. This center will involve both American and Japanese public as well as private sectors. A possible project is the development of ocean robotics. These robots could be sent on hazardous missions in the ocean environment for deep seabed mining, for maintaining OTEC (ocean thermal energy conversion) stations, and for tending aquaculture farms. The center would attract engineers and scientists from the U. S. mainland and Japan.

While the university has a lot to be proud of, we are also aware of our problems. The Americanization process has taken its toll in Hawaii, and we are fast becoming a state where our people only have Asian-Pacific faces. Many of our young no longer speak Asian/Pacific languages, nor do they know much about their ancestral cultures. As in our sister states, the young people in Hawaii are fast becoming monolingual and monocultural.

Facing the Next Century

The university has the responsibility of preparing students to face the 21st century—a time when the world will be increasingly interdependent, a world where English is not the only medium of communication. What kind of an education should a student at the University of Hawaii receive to face the Pacific era?

To integrate international education into the curriculum, we need to consider questions such as the following. If knowledge of the world and other national or cultural perspectives are important aspects of citizenship in this increasingly interdependent world, what is the best way to integrate international education into the curriculum so that it becomes a part of the foundation of education? What needs to be done to ensure that every student graduating from the university has an understanding of the world and understands at least one other world view? What constitutes an adequate international dimension for graduating University of Hawaii students in vocational education, two-year programs, baccalaureate programs in arts and sciences, professional programs, and graduate program?

Should the university have campus-wide language entry and graduation requirements? Should an international minor be required—for example, an international theme of about four courses grouped around a culture within the general education core? Are there presently institutional barriers to international education—in teaching, research, and service?

Language requirements have eroded through the years, as they have at our sister institutions on the mainland. We are considering reinstating those requirements. Within the Manoa campus, we have been encouraging the language and humanities divisions to work with professional schools to set up appropriate language and cultural classes. Pilot courses in French, Spanish, Japanese, and Chinese for the school of travel industry management were developed, with an emphasis placed on communication in a travel industry setting. These courses were so successful that the school of travel industry management has now instituted a one-year language requirement for graduation.

For public service-oriented schools such as nursing and social work, a pilot course on Samoan language and culture, focusing on language and cultural attitudes for health and welfare, was established. The course was given high marks, and we are planning to expand the program to include other languages.

The division of language and linguistics has convened a committee to develop special language and cultural courses to meet the needs of the individual professional schools. As you know, this is not an easy task. Language professors do not know the context or terminologies of specific professional schools, and professors in professional schools do not know how to teach languages. It takes dedication and teamwork. New curriculum has to be developed and new teaching methods explored. I have every confidence that courses will be developed that meet the high standards we have set for the successful ones already in place.

We are also looking at lifelong education. For example, the college of engineering is looking at language and cultural needs of the practicing engineers who consult internationally. We are considering putting courses together to meet their needs. In addition to providing lifelong education for practicing professionals, our faculty members are also looking for opportunities to increase their own knowledge. The Samoan course I spoke of earlier was attended not only by students but by community nurses and nursing faculty members. This past year, the college of tropical agriculture requested a special minicourse on Indonesian language and culture for faculty members involved in that area of the world. We are looking into the possibility of establishing special summer courses on language and culture for our faculty.

Living abroad is an essential part of the development of the Pacific American, and we would like to encourage and assist in study-abroad programs. If we could find the resources, we would make it a requirement. We now have two scholarships for students to study in Japan and one in Korea—a miniscule start, but it is a beginning. In addition, we are developing reciprocal arrangements with universities for student and faculty exchanges.

Conclusion

As you can see, international education is not a simple task. It involves retraining faculty, building the infrastructure, providing opportunities for faculty and students to go abroad, and, perhaps the most difficult of all, changing educational requirements.

While we in higher education are concerned with integrating international education into our curriculum, we are also aware of the role played by lower education. A study done in 1979 showed that only 15 percent of American high school students study a foreign language and that the number is declining every year.

We all know that beginning foreign language study in college is really too

late. The best time for learning languages is early childhood. We should take advantage of the language and cultural resources of our ethnic communities and require language studies in the primary and secondary schools. But that is a major subject in itself, and I will not attempt it here.

Education does not operate in a vacuum. We cannot succeed by imposing requirements alone. We need to live in a society that is supportive of international education, a society that rewards language and cultural expertise. As the world becomes part of our local communities, we will need to work with different sectors of society to find ways of overcoming attitudes that are barriers to the acquisition of international expertise. We are looking at many fronts and trying to come up with solutions.

The university has a responsibility to educate the people of Hawaii and in this process also contribute to the total welfare of the state and the nation in the Pacific era which has begun. The challenges are obvious—yet exciting. We must face up to them.

Maraming salamat, arigato, and *hshe hshe* for your kind attention. You have my best wishes for an interesting and satisfying meeting here in Hawaii. Mahalo and aloha. **[The End]**

SESSION I

Hawaii's Unique Industrial Relations Climate

Hawaii: Unique in Itself

By WAYNE L. HORVITZ*

Horvitz and Schmertz

THE TITLE OF THIS SESSION sent me scurrying to the dictionary. I found a disconcerting definition of the word "unique." It is a sobering experience to find that a commonplace word that you use rather carelessly every day is, in fact, quite precise in its meaning. "Unique" is no exception. The dictionary definition is: existing as the only one or as the sole example, single, solitary in type or characteristics; having no like or equal, standing alone in quality, unequaled, unparalleled. It occurred to me that this session had been planned by the Hawaii Visitors Bureau. I dismissed the idea. But what blithe spirits, I wondered, moved the planners of this program when they selected the title for the keynote session? That is the more interesting question. I do not know the answer, of course, but I can hazard a guess or two.

Many of you in the room this morning, including those sharing the platform with me, have always, I am sure, considered their attachment to Hawaii—whether as residents, visiting professionals, or just visitors—as unique. This is as true for those who spend a lifetime here as for those who come for a visit. As a result of my own experience in Hawaii, I share that view. But that does not answer our question.

Certainly all the factors that make up the feelings that people have about Hawaii—the warmth of its residents, the physical surroundings, the pace of life—all contribute to undisguised feelings of attachment and admiration. But you know and I know that the history of these islands has not always been filled with aloha. Racial harmony often has been more talked about than real; politics has often been chauvinistic and mean-spirited; and Hawaii's industrial relations history for the better part of 25 or more years was distinctly adversarial. That historical period was marked by organizational battles and constant breakdowns in collective bargaining that led to long and bitter strikes. Internecine power struggles within unions and within managements and some of the worst examples of the divisiveness caused by the virus of McCarthyism were also hallmarks of the 1940s, 1950s, and even beyond. What a contrast! How could this be?

* The author is President-Elect of the Industrial Relations Research Association.

I think a case can be made that, in the context of the 50 states that make up this country, the state of Hawaii may be, in some important respects, unique. Only that possibility—that it is the islands of Hawaii that are unique—can support the suggestion that its industrial relations climate was or is, ipso facto, unique. For if the "climate" is in any way unique, it is the result not of the uniqueness of the industrial relations history or its present scene but of the factors that made these islands unusual from first discovery to today. What became the industrial relations climate of Hawaii, for better or worse, was established long ago.

I hesitate to assign, on a scale of one to ten, those factors that seem to me to be determinative of Hawaii's uniqueness when I am faced with the formidable array of experience on this panel. However, I shall try to focus on what I think are some of the most important, in no special order.

First, to state the obvious, Hawaii is a group of islands. This factor alone has always presented challenges for industrial relations policy, for government, state and federal, and for labor and management. Hawaii's dependence on ocean transportation and the manner in which its agricultural and tourist economy developed which heightened that dependency are two obvious examples.

The multiracial and multicultural character of Hawaii's population in general, and its work force in particular, is surely not comparable to any other state in the United States and perhaps not comparable to any other country. But that fact alone is not nearly as important as the fact that this multiracial population was in many respects artificially imposed on a small archipelago in the Pacific. A pecking order was structured on top of the traditional Hawaiian culture and racial lines were drawn by those who created and built the Hawaiian economy. This structure remained until labor organizations and minority groups used that very divisiveness to create a changed power structure.

Irreversible Changes

But even that would not have been enough. Whether you take your Hawaiian labor and social history from Michener's *Hawaii,* Fuch's *Hawaii Pono,* or Zalburg's *A Spark Is Struck* is, I suppose, a matter of taste. Yet no one seriously doubts the social as well as the physical impact of the attack on Pearl Harbor, and the irreversible changes that were triggered by World War II.

As author Lawrence Fuchs observed: "Because of Hawaii's insularity and the thoroughness of oligarchy control, social changes that swept the mainland prior to World War II rarely affected the Islands. But the bombs that burst on Pearl Harbor shattered the old ways of life in Hawaii. The potentials for change already existed in Hawaii's public school system and the guarantee by Congress of the right of every citizen to vote. Social change was encouraged by federal labor legislation favoring collective bargaining. But war gave the greatest impetus to change. The schools were crucibles of democracy; World War II was its catalyst.

"Drastic change came rapidly to many aspects of life following the war. Within a few years the nearly monolithic control of one political party gave way to vigorous two-party competition. Where there had been virtually no labor unions, a powerful, aggressive union emerged. Hawaii's economic dependence on industrial agriculture was broken. The 1950's [sic] became a period of ferment, of creative and dynamic change. Democ-

racy erupted, with its tensions and strains, but with opportunities, too."[1]

One as only to add to that the specifics: the 442nd Regiment; the 100th Battalion; the influence of the Japanese internment on the mainland; and, most of all, I believe, the GI Bill of Rights. Then after World War II came the DC-7, the 707, and the 747. More than any other single commercial factor, these machines were the instruments of change in the body, if not the soul, of Hawaii. Irreversible economic changes occurred, land use shifts skewed its economic center, and the reach of its major businesses moved beyond the shores of Hawaii. Traditional societal values were shaken by the influence of rapid transportation and communication. Finally, these post-World War II changes cemented, once and for all, the link with the U. S. mainland.

However, the period from 1945 to statehood was a rocky one for union growth, for collective bargaining, and for the development of a stable industrial relations climate. A number of factors contributed to this. Martial law lasted from December 7, 1941, until October 24, 1944. Whether this was a reaction to the hysteria of the time or not, the policy satisfied the desires of the U. S. military command and many of Hawaii's business and political leaders. Since unions had made only erratic progress before 1941, the entire war period for obvious reasons was not a period when infant labor organizations could successfully pursue their objectives. Organization attempts that were conducted prior to World War II, which have been well documented, were almost exclusively the work of single and dedicated individuals—on the waterfront, in the mills, and on the plantations. But their efforts were received with mixed and scattered support in Hawaii and on the mainland. Employer resistance was swift and effective. It is fair to say that, in that setting, guerilla warfare was inevitable. Inevitably there would be a larger war, and both of these things happened.

Central Question

But that is still not the central question that concerns us. The question we are posing here is: is any of this unique and does it, ipso facto, create a unique industrial relations climate? I suppose an ancillary question is: does that climate, if it ever existed, exist today?

A truism in this business is that companies get the kinds of unions they deserve. Put another way, the industrial relations climate is always an amalgam. It is fashioned by individuals on both sides and, more fundamentally, by the industry, its economics, and its culture—its plants and the communities in which it operates. Superimposed on this are all the larger outside forces, economic, social, and cultural, that impinge upon it.

Hawaii as an entity is no exception. The factors that contributed to both the cultural lag in industrial relations development vis-à-vis the mainland and the explosiveness of the era that began in the late forties and continued in the fifties were indeed unique to Hawaii. Nothing like it had ever occurred before.

But a similar list of factors, different but no less striking, could be listed for auto, steel, or trucking. And if one wishes to embrace the great-man theory of history, names like Hall, Rutledge, Damaso, Miyagi, Goldblatt, and Bridges on one side, and Dillingham, Budge, Cadagan, McNaughton, Blaisdell, Steel,

[1] Lawrence H. Fuchs, *Hawaii Pono: A Social History* (New York: Harcourt, Brace & World, 1961), p. 262.

Maxwell, and Wilcox, just to name a few on the other, could be matched with Lewis, Murray, Abel, Weir, Morgan, Taylor, Stevens—and you can fill in all the rest. All were products of their own time and place, all governed by the industry and its culture, all changing with the times, creative and adaptive. Were they unique? Well, they were different.

The one big factor that *was* unique, if we must find something, was implanted long before Jack Hall jumped ship in Hawaii, and that was the economic and social decision to look westward rather than eastward. Once that decision had been made, the path that the pioneers of industry and industrial relations in these islands would take, with all of its interesting and special features, had been charted. The time frame was different, but the engine that drove it all was the social, legal, and economic revolution of the thirties in the United States. That is what opened the way for union organization on a vast and different scale. That is what was waiting for the winds of war to fan the winds of change.

Of course the people who changed Hawaii created some homegrown strategies to achieve their objectives. Having experienced both, I can attest that there were and are differences in style and substance on both sides of the Hawaiian table that their mainland brothers do not either know, understand, or appreciate. I always detected a certain sense of embattled pride in *not* following the negotiating patterns or bargaining structures used on the mainland. In fact, latter-day attempts, particularly on the part of management, to develop strategies that ignored fundamental changes and influences that occurred on the mainland proved in the long run to be self-defeating. Blessed be the tie that binds, their missionary forefathers might have reminded them. United States industrial relations history and U. S. industrial relations were and are the primary influences on Hawaiian industrial relations. It is not a question of better or worse. It is a fact.

As I look back on it, I think it is safe to say that it was hard not to get caught up in the myth, even for a malihini. The obvious differences in population, climate, and way of life betwen Hawaii and the mainland, even after statehood, helped to create that Hawaiian style—the ways union organized and bargained and the way each side pursued its vision of the future for these islands. Everyone came to believe this and, if everyone believed it, it surely must be true.

One could not conclude a discussion of this kind without a bow to the host of personalities on both sides who shaped Hawaii's industrial relations history. Few would disagree with Lou Goldblatt's final pithy assessment of Jack Hall when he said at the time of Hall's death, "If there is any guy who shook the volcanoes loose of their ashes, Jack Hall did. He changed the whole history of the islands."[2] The ashes are loose again and Lou Goldblatt has also, only recently, passed on.

But there were others—many others, on both sides—who from the earliest days of this island's industrial relations history left their mark in many important, different, and often controversial ways. They were union organizers on the waterfront, in the sugar mills, the plantations, hotels, utilities, and in the public sector. They were the founders, leaders, and administrators of the Employers Council. They were attorneys and legislators, and they were drawn together, whether in combat or

[2] Sanford Zalburg, *A Spark Is Struck! Jack Hall and the ILWU in Hawaii* (Honolulu: University Press of Hawaii, 1980), p. 518.

cooperation, by their own vision of what the islands should be—economically, racially, socially, and culturally. And the whole tapestry was colored by each one's insistence that it was important to fashion a uniquely Hawaiian solution.

One final historical note to bring us up to date: although I will continue to stubbornly insist that Hooponopono has its symbiotic counterparts in industrial relations history and practice in other parts of the United States, I do feel constrained to point out two historic labor developments in Hawaiian industrial relations history that were indeed unique for their time. These were the first successful organization of agricultural workers in the country, a success that has really not been equalled to this day, and the decision by the ILWU to develop a political stance and influence in Hawaii that ignored the traditional, if not exclusive, alliance between labor and the Democratic Party on the mainland. That decision alone enabled the ILWU to become a powerful swing vote in state and local politics as well as a national influence in the houses of Congress—an influence clearly disproportionate to the size of its membership. Art Rutledge, whose own influence in these islands has been considerable, observed, in speaking of Hall, "We had many differences as to methods. He believed he could accomplish much through politics while I believed in direct action."[3]

The Future

But what of the future? If my assessment is correct, the choices and challenges in Hawaii will inevitably follow, in broad outline, the general picture that is developing throughout the country. What does that picture look like?

I believe that the conventional wisdom governing labor-management relations in the U. S. today is that the labor half of the boat is sinking. The litany is familiar. Trade unions are losing membership as jobs shrink and organization of new members fails to keep pace; labor's once vaunted political clout is gone, and it is on the defensive at the bargaining table.

There is no question that deep and serious problems confront the unions. That they are so glaringly evident should not, however, obscure the fact that many of these problems are also management's problems. If labor is facing a crisis, it also is a crisis for management.

Whether management recognizes this and how it reacts to it are crucial. It could control the nation's labor relations policy for the next 10 to 20 years.

How does this arise? Over the years, labor and sympathetic administrations and the Congresses created a number of agencies and regulations designed to monitor and regulate the employee-employer relationships and conditions at the worksite. Then candidate Reagan made these agencies' regulations a prime target in his promise to "get government off the backs of the people."

Though the relaxed role of these agencies might be reassuring to American management, the problems they were designed to handle will not therefore disappear. If OSHA inspectors and inspections are eliminated, plants will not thereby become safer. If strikes threaten vital segments of the economy, the demand that government "do something" will again rise to irresistible proportions.

The area of challenge and opportunity for labor and management in the period just ahead is, as I see it, to provide the policies, actions, and mechanisms to handle these problems before

[3] *Ibid.*, p. 518.

flood stage. If both sides welcome this turn of events, it should be because they firmly believe that decisionmaking by private institutions and arrangements is preferable and more mutually beneficial than fiats from public bodies.

But does management wish to include in its program for the future a strong relationship with the trade unions that represent their workers, or no role at all? There are straws in the wind.

At one end of the present management spectrum is a growing support for the belief that nonunion operations are preferable and, indeed, achievable. Those industries which eschew the open warfare of this approach have gone "double-breasted," wearing [sic] union and nonunion plants in the same company or industry. Other managements openly employ consultants who specialize in resisting union organization and/or provide counsel on how to get rid of unions already in place.

Nearer the center of the management spectrum is the largest group, the traditionalists. They are continuing, for now, a traditional and relatively typical policy characterized by an open and robust adversarial relationship containing elements of shared power and mutual regard and achieving considerable problem-solving within that relationship.

The third and smallest of the managerial groups espouses new approaches to industrial relations. This group argues that labor and management should reevaluate the adversarial relationship. The proponents of this view suggest that labor and management open long-range and full-range discussions on common problems that can be attacked cooperatively while not abandoning the positive aspects of adversarial bargaining on traditional issues. This approach emphasizes work structures that promote more democratic and participative roles for employees in the planning, organization, design, and establishment of the conditions of work. This leads naturally to ongoing dialogue and problem-solving that differs from historic collective bargaining and in many cases alters the traditional roles of the representatives of labor and management.

Conclusion

The present national mood seems certain to prevail for some time, heralding a reduction, if not an elimination, of federal and state activity in many fields affecting labor-management relations. But the need for collective as well as individual protection against unknown, unpredictable, and tough forces is strong. Trade unions have historically played a key role in providing mechanisms for guaranteeing those protections. As the old problems and the new surface with greater intensity, it will be dangerous, if not foolhardy, for management to deny them a role in its choice of options. Unions will then be on the receiving end of the challenge.

My own experience tells me that too much time is being wasted on the attractions of climatic power shifts while ignoring the shift in responsibility. Not less, but more responsibility will fall on private decision-makers than perhaps they dreamed possible.

This is going to put a larger burden on the private decisionmaking process. If American management decides to cast its lot with the enchantment of the collective bargaining process, this will be good news for labor and for those of us who believe in it as one of the best ways to allocate resources among management and workers in a democratic society. Hawaii should take note.

[The End]

The Factors Determining Hawaii's Industrial Relations "Climate" *

By BERNARD W. STERN

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FIVE FACTORS which, in varying degrees, have imparted a unique flavor to industrial relations in Hawaii are: the plantation heritage; Hawaii's geographical isolation; the multicultural background of Hawaii's people; the close integration of Hawaii politics and industrial relations; and a unified employer position. Some qualification of terms may facilitate our understanding of what we will be talking about.

For one, there is no single pervasive industrial relations climate in Hawaii. There are several such climates in different industries at different stages of harmony and discord. Among the more prominent identifiable climates are sugar and pineapple, hotels, construction, maritime, transportation, utilities, and public employees. There is also an industrial relations climate for over 100,000 unorganized workers, particularly in retail trade and finance, who, despite efforts by many unions, are still without union representation.

Second, in talking about uniqueness, we are talking about differences that cannot be duplicated elsewhere, and these differences vary from one industrial relations climate to another. After some 36 years of a bargaining relationship, contracts in sugar and pine [sic], for example, are uniquely Hawaiian and could probably not be duplicated anywhere on the mainland. The Hawaii longshore contract, to take another example, substantially follows the West Coast longshore contract with some modifications for local customs and practices. At the other extreme, it would be difficult to find any significant differences between construction trades contracts here and on the mainland. And between the extremes at either end there are many variations.

A little historical perspective may also be in order. In any consideration of industrial relations in Hawaii, account must be taken of the radical economic transformation that occurred in these islands over the past 40 or so years and especially since statehood was achieved in 1959. There has been a basic shift from an economy dominated by commodity production to one that is service oriented.

Sugar and pine, once the basic industries of the islands, have been superseded as sources of employment and producers of revenue by tourism (the state's largest industry), construction, diversified manufacturing, and the federal defense establishment. In the 10 to 15 year period after statehood, according to Thomas Hitch, First Hawaiin Bank economist, Hawaii was "certainly the fastest-growing state in the whole country." Construction, in the ten-year period from 1955 to 1965, is estimated to have exceeded in value the total

* Several persons, in particular John Marabella, Ah Quon McElrath, and Joyce Najita, contributed information and suggestions for this article. The author's wife, Janet, was most helpful in editing the manuscript. The author is solely responsible for the views and opinions expressed.

dollar value of all Hawaiian construction in the previous 100 years.

Further affecting the collective bargaining situation was the enactment in 1970 of the Hawaii Public Employee Collective Bargaining Law. Public employee unions had been functioning in Hawaii for at least 30 years before 1970; the new law, however, accorded an enhanced status and recognition to these unions, resulting in a vast increase in their memberships and influence. In the 12 years that the act has been in operation, two fairly long and costly statewide strikes by public employee groups (teachers and blue-collar and custodial) have occurred.

After due allowance for the qualification of terms and recognition of historical changes, there remains a recognizable distinction between the industrial relations scene in Hawaii and the mainland in a very large number, if not all, of situations. How have the factors listed above affected industrial relations in Hawaii?

The Plantation Heritage

For about 50 to 60 years before World War II, the Hawaiian economy was dominated by the plantation (sugar and pine). The "Big Five" corporations—Alexander and Baldwin, Castle & Cooke, C. Brewer, T. H. Davies, and American Factors—served as investors in and agents for the plantations. As a byproduct of those services, they also fulfilled certain broader community functions—providing interisland transoceanic shipping, merchandising facilities, insurance, banking, public utilities, and others.

Dr. Andrew Lind, the University of Hawaii sociologist, in a paper on "Hawaiian Backgrounds: The Plantation Frontier" noted that, despite some oversimplifications by journalists, "the evidence clearly points to a highly centralized and unified economy, whose influence extended deeply into the political and social realm. . . ." The plantations, as Lind pointed out, provided virtually all requirements of living for their workers, recruited from almost every corner of the earth. "The planter not only had to feed, clothe, house, and doctor his workers, he also felt obliged to establish rules for their conduct. . . ." Lind further noted that these "paternalistic controls, so essential for the effective functioning of the early plantations, have survived to a considerable degree in the centralized and bureaucratic controls of both public and private agencies in today's Hawaii."

Remnants of these paternalistic attitudes are still a significant part of today's industrial relations scene. When the International Longshoremen's and Warehousemen's Union (ILWU) was recognized as the collective bargaining agent for plantation workers in the early 1940s, concern for the "off the job" conditions and benefits of these workers became high priority items at the negotiating table. And, because of the close links through the Big Five companies to other island economic activities, many of the conditions originally established on the plantations were spread to other areas, both before and after union organization.

Typical of the kinds of benefits found in many Hawaiian contracts on and off the plantation are paid sick leave, frequently without a waiting period, for blue-collar workers and comprehensive medical care for workers and their dependents at levels beyond those achieved in most mainland areas. Other kinds of benefits are: the right of immigrant workers to be returned to their homeland, usually with a lump-sum cash-out of their accrued pension benefits; relatively liberal paid holidays and vacations; and severance pay for discharged workers (long before such bene-

fits were achieved in mainland industries).

Here, for example, are two clauses, only recently negotiated, out of an agreement between Young Brothers, an interisland barge company, and the ILWU. A "Leave of Absence" clause states: "Employees with one or more years of continuous service with the company are offered the opportunity of taking leaves of absence without pay for the purpose of visiting the land of their birth or of accompanying their parents or spouse on such a visit not to exceed three months provided that such absences are not taken during periods when the employee's services are required by the company. . . ." A "Separation Allowances" clause states: "An employee who is paid a separation allowance under the foregoing provisions shall decide upon termination, whether he desires to leave the United States for permanent residence in a foreign country other than Canada, and if he does so repatriate, he shall receive an additional allowance computed on the basis of three days for each completed year of his continuous service. An employee who is paid such a separation allowance and who desires to leave the United States for permanent residence in a foreign country other than Canada, will be provided minimum one-way passage by 'Y' class air transportation to such foreign country, provided he leaves for such foreign country at the earliest time that transportation can be reasonably arranged."

Some clauses, such as these, are being phased out as changing conditions make them unnecessary; others have become an integral part of the bargaining picture and are likely to persist so long as unions are recognized.

Hawaii's Geographical Isolation

Hawaii, as an island community, is almost entirely dependent on outside sources for its food and clothing, for materials and supplies needed in construction and other industries, and for the daily living needs of its people. While the "jet age" of transportation has made many needed products more accessible, the economy still depends to a large extent on water transportation.

The great vulnerability of this island community to a waterfront strike was dramatically demonstrated in the 1949 islandwide longshore strike. The strike, in which the sole issue was the ILWU's insistence on narrowing the wage differential with the West Coast, lasted 177 days and virtually devastated large sectors of the economy. Sanford Zalburg, in his book *A Spark Is Struck! Jack Hall and the ILWU in Hawaii*, describes the impact of this strike.

"By now [the end of the strike] 24,423 people on Oahu—17.6 percent of the work force—were jobless. Some companies had been forced to cut their employees' pay by as much as half. Food prices had climbed 6.6 percent; some small businesses had gone under. Research Associates of Hawaii estimated that the strike cost the islands $100 million. It was a nice round figure; no one really knew the price tag. The ILWU was satisfied. 'The longshore strike guaranteed our survival. . . .'"

Except for a brief two-day statewide stoppage in 1972, there has not been any other waterfront strike in Hawaii. But, even today, a rumor of a possible maritime strike, whether originating on the West Coast or in Hawaii, is enough to cause such items as rice and toilet paper to quickly disappear from grocery shelves.

Hawaii's geographic isolation has consequences for bargaining in industries other than maritime. Union control of labor supply is facilitated in two respects. First, within this remote, con-

tained area, each labor union is generally organized in one local on an islandwide basis. Second, unlike most mainland areas, there is no readily available supply of replacement labor from contiguous areas in the event of a strike. Strikebreakers from within the state have sometimes been found, but in a closely knit community and especially for labor with any degree of skill this is not easily done. And bringing in replacements from the mainland is a costly effort of questionable value.

The unusual damage caused by strikes in this kind of community imparts a special urgency to every negotiation and places a premium on the need for peaceful solutions to labor conflicts.

Multicultural Background

The vast bulk of Hawaii's people are either immigrants or the direct descendants of immigrants originally imported to work on the plantations. These include Chinese, Japanese, Filipinos, Portuguese, Koreans, Puerto Ricans, and many others. Together with the native Hawaiians and Caucasians, these groups constitute the basic stocks from which Hawaii's present population is derived.

With unionization, many of the barriers that had previously separated ethnic groups on the job and in their living quarters were eradicated. An awakened interest and participation in politics further solidified worker groups around common interests and objectives.

Out of these various racial and ethnic backgrounds there also developed a kind of amalgam or blend of traditions and attitudes that can best be described as "local," as contrasted with "haole" (literally "foreigners," usually applied to Caucasians) attiudes, mainly stemming from mainland U. S.

The significance of what might be termed "localism" may be difficult to comprehend for someone not living in Hawaii. An example from outside the collective bargaining area may illustrate this point.

Recently the city of Honolulu undertook a search for a new police chief. Mayor Eileen Anderson, after a meeting with the seven-member police commission, according to the press report, "suggested strongly that the new chief should be promoted from within the senior ranks of the department rather than brought from outside. . . . 'That's very important,' she said. 'We have a unique community here [and] our own way of treating people. Having a local orientation is very important.' "

How local attitudes have affected the industrial relations situation can best be shown in two examples. Hawaii has had its share of long and hard-fought organizational efforts and strikes—not too many recently and perhaps none approaching the extreme violence and tension that characterized many mainland encounters during the 1930s and 1940s. In Hawaii, there is an unusual lack of bitterness and resentment following such encounters. As some have said, "We bruise easily but heal quickly." Only in Hawaii could the script for the Olaa plantation stoppage of 1948 have been written.

In mid-1948, the Olaa Sugar Company proposed a pay cut of 17.2 cents because of its "distressed" condition. The union stated it might take a five-cent cut, but that was all. After nearly 70 days of strike, a settlement was reached on the basis of a five-cent wage cut. The union regarded this as a great victory and tossed a luau (a Hawaiian-style banquet) to celebrate the occasion.

Sanford Zalburg, in his biography of Jack Hall, describes the party. "Hall said there never was such a victory luau—five cows, fifteen pigs, eight thou-

sand laulaus (pork, beef, salt fish, taro tops, wrapped in ti leaves). Almost four thousand people attended, including management. As Dave [Thompson] said, it was the goddamndest luau ever thrown and if there was anybody who didn't get drunk, it was his own fault."

Similar parties with both union and management participants, perhaps on a smaller scale, have followed other strike settlements.

Another example of how local attitudes affect industrial relations may be seen in the relatively relaxed and casual way in which unionists regard union officials and negotiators who move into industrial relations positions with management. Many of the top management negotiators in Hawaii today are former union officials.

What in a mainland setting has frequently been regarded as a betrayal of the union is for the most part here regarded as part of the "local boy makes good" syndrome. As one local union official expressed it, when questioned about this, "We'd rather deal with local people who know and understand our situation than with some mainland haoles who don't know what it's all about."

In appraising these attitudes, it must be borne in mind that Hawaii, especially since statehood, has been a highly mobile society in which many of the sons and daughters of plantation workers moved into positions of leadership in government, the professions, business, finance, and education. To many, a move from a union to management is just a higher rung on the economic ladder.

What effect all of this may have on the class consciousness of Hawaiian workers will be left for other scholars to explore.

Integration of Politics And Industrial Relations

Rarely, if ever, has Samuel Gompers's dictum regarding political action by labor, "reward your friends and punish your enemies," been as consistently and effectively applied as it has been by the ILWU in Hawaii. From its earliest days, ILWU leadership recognized the need to combine political action with economic action in order to achieve its broad social ends, as well as its immediate bargaining objectives.

In 1944, the ILWU, together with several other unions (four AFL, two CIO, one unaffiliated) organized Labor's Political Action Committee, which engaged in an intensive effort to register voters for that year's elections. When the election was over, the Committee found that 15 of the 19 candidates it had endorsed for the House and six of eight candidates for the Senate had won. The very next year the legislature enacted a "Little Wagner Act" which guaranteed to agricultural field and dairy workers the same rights of organization and bargaining provided for workers covered by the National Labor Relations Act.

The ILWU played a leading role in the affairs of the Democratic Party and the state legislature for many years. It also actively supported many friendly Republican office-holders when it best served the union's interests. The union's ability to hold and deliver the vote earned the respect of politicians of both parties.

In 1962, all labor unions, for the one and only time in Hawaii's history, were united in support of a candidate for governor—John A. Burns, Democrat. For the next 12 years, while Burns held office, the ILWU's poitical power was at its peak. It was generally understood that the ILWU enjoyed a favorable relationship with the governor. The union was not above acting as a "power

broker" in using its political influence to gain advantages for its members or to support business interests when labor and business concerns overlapped.

In 1961, even before the Burns administration came into office, the ILWU successfully drove through the legislature a cut in the sugar and pineapple excise tax rate from two percent to .5 percent. The savings of several million dollars to the industries, according to Hall, was something he expected them to share with their employees.

The Burns administration also played an active role in helping to keep peace on the labor front. A strike or the threat of a strike in important negotiations frequently brought Bert Kobayashi, the state's attorney general (later supreme court justice), into the picture as a mediator, at the governor's request. Kobayashi was unusually effective in bringing about peaceful solutions to difficult situations. This was true of negotiations by the ILWU, construction unions, Teamsters, and many others.

The close connection between Hawaiian politics and the industrial relations situation has affected almost every negotiation in recent years. Many unions, ILWU and others, still enjoy strong political influence but probably not as strong as it once was.

A Unified Employer Position

Since 1943, the Hawaii Employers Council has developed and maintained a fairly unified employer position, on issues of principle, in dealing with unions. Originally organized by the Big Five companies to deal with the ILWU on the waterfront and on the plantations, the Council since its formation has represented employers in nearly every economic activity in Hawaii. Its clients include many small employers who, left to their own resources, might not be able to deal effectively with unions. Some industry groups, such as construction and hotels, maintain their own negotiating councils, but many employers in these groups still maintain their Council membership.

The Council, in pragmatic fashion, operates on two fronts. It represents employers bargaining with unions which have won recognition, and it assists employers in resisting new organizations in unorganized industries. It has achieved significant successes and some defeats in both areas.

It is on the ideological front that the Council has probably been most effective. There it has operated as a "defender of the faith" in preserving employer principles and prerogatives in such areas as management rights, discipline and discharge, grievance and arbitration clauses, and many others. Over the years it has been forced to yield in some areas—for example, union security—but has maintained a fairly inviolate position on most noneconomic and some economic issues.

The Council's imprint is found on practically every major contract in Hawaii, including public employee contracts, since when the state was first faced with the need to bargain with its public employee unions it turned to the Council for basic research and advice.

One significant measure of the Council's success in influencing employer attitudes is that, to date, except for some very few isolated cases, there are no cost-of-living escalator clauses in collective bargaining contracts in Hawaii.

What About the Future?

Hawaii's economy is undergoing some basic structural changes that will undoubtedly affect the industrial relations situation.

Two of the Big Five companies (C. Brewer, T. H. Davies) and one large

independent company (Del Monte) have been bought by multinational corporations. Dillingham has become a private company. Of the three remaining Big Five companies, one (Amfac) has already shifted its headquarters to California; the others have extensive mainland operations, although they still are headquartered in Hawaii. All of these companies still maintain bases in Hawaii. I believe that we can safely assume a gradual shifting of control over industrial relations to mainland centers.

Other changes are also in the making. Many of the conditions on which Hawaii's "different" contract provisions were based are disappearing. There is no longer a plantation-sponsored immigration program, and plantation provision of direct housing and medical care is being phased out. Technology is fast reducing Hawaii's geographic isolation. Labor's political influence, while still very strong, has been diffused by the growth of many unions with different political loyalties.

We see an inevitable fading of Hawaii's industrial relations uniqueness in most industries. The pace at which such fading will occur will depend on many factors, economic and social, that we cannot now predict. But we believe we can make one prediction—when the IRRA next meets in Hawaii, there will not be another report on Hawaii's Unique Industrial Relations Climate.

[The End]

A Discussion

By HENRY B. EPSTEIN

Hawaii State Teachers Association

HAWAII has one of the most all-inclusive public sector collective bargaining laws in the country, with many unique features. How did this come about? Part of it has been discussed already by previous speakers who mentioned the political activities of unions in Hawaii. The other part relates to the emphasis on public sector collective bargaining in the 1960s and the trend that was then taking place.

What are the unique features of Hawaii's law? For one thing, it is statewide and covers all classes of workers—teachers, university faculty, fire fighters, and police as well as regular civil service workers. For another, unit determination was written into the law by the legislature. There are 13 units, all spelled out in the statutes. Also, there are supervisory units, and many supervisors are covered by the act. And there is a limited right to strike.

A few features of the law can be described as pro-labor. There is an agency shop, by law, which covers an employee on the first day he or she goes to work where there is a bargaining unit. And a specified number of members of the union bargaining committee are permitted to bargain while the members remain on the payroll.

Offsetting these provisions are a number of pro-management provisions. For example, there is a very strong management rights section which severely limits the areas that can be negotiated. Health fund bene-

fits, retirement, and other fringes are excluded from bargaining, and the legislative bodies have the final say on negotiated agreements because cost items are subject to review and approval by the legislative bodies.

As you can see, Hawaii public sector bargaining law is a mixed bag, a sort of Hawaiian chop suey, and some interesting provisions have been negotiated under it. Refuse workers have a ukupau section in their agreement. On the mainland that would be called "task work" or an incentive plan, and what it means is that, when you finish a job, you are pau—finished for the day. The contracts here also cover hanai families for funeral leave. Hanai relates to informal adoption, Hawaiian style.

In ten years of bargaining, only two of the thirteen units have had strikes. And, there have been only two changes in representation since 1971, both in relatively small units.

Yes, there is something unique about public sector bargaining, Hawaiian style. **[The End]**

SESSION II

Collective Bargaining

The New Climate: Implications for Research On Public Sector Wage Determination And Labor Relations

By DANIEL J. B. MITCHELL

University of California, Los Angeles

MUCH OF THE EARLY LITERATURE on public sector wage determination and collective bargaining was written in an era of expanding public employment and government unionization. But, by the late 1970s the economic and political climate surrounding the public sector had changed. Initially, the change appeared to be a byproduct of the 1973-1975 recession, that is, the severe revenue shortfalls in New York City and certain other jurisdictions. However, the post-recession period was marked by a "taxpayer revolt," notably California's Proposition 13. Public employment growth slowed relative to the private sector; unionization of government workers while it continued to increase did so at a more modest pace. This change in climate suggests a renewed agenda for public sector wage research.

Pay trends in government show evidence of the new climate. Table 1 presents the ratio of government to private compensation levels over the period 1966-1981. In the late 1960s, federal pay increases outpaced private, for both civil servants and federal-enterprise workers, the latter being mainly postal employees. A similar, but less dramatic, tendency appeared at the state and local levels. However, during the early 1970s, this process halted, except for postal workers who received private-style collective bargaining rights in 1970. By the late 1970s, public wages were rising more slowly than private, causing the government-to-private pay ratios of Table 1 to decline.

In the late 1960s and early 1970s, much concern was expressed about the impact of unions on public wages. Some observers thought that government managers, unconstrained by profit incentives and fearful of public demands to avoid strikes, would easily yield to excessive wage demands. Yet Table 2 suggests that these fears were grossly overstated. During the late 1970s, pay in jurisdictions located in

states with a relatively high proportion of unionized public employees actually rose more slowly than pay for comparable workers in other states. Of course, private pay also appeared to rise more slowly in the highly organized jurisdictions. Except for school districts, a similar pattern is seen for per capita incomes. However, it is apparent that public sector unions could not shield their members from the adverse shift in the external climate during 1975-1980. This result is in marked contrast to the private sector where union pay rose faster than nonunion.

Table 1 shows that, as in the private sector, nonwage (fringe) pay has been rising in importance in government. Social Security tax increases have played a role in boosting the fringe share of the compensation dollar in private employment. However, most federal workers are not covered by Social Security, and many state and local workers are also uncovered. Hence, the increasing fringe share of the government compensation budget must be viewed as a largely "voluntary" decision of public authorities and, where bargaining occurs, public unions.

TABLE 1

COMPARISONS OF GOVERNMENT AND PRIVATE COMPENSATION, 1966-1981

	Level of Government			
	Federal Government[a]	Federal Enterprises	State and Local	Private Sector
	Ratio of Government to Private Pay[b]			
1966	1.31	1.02	.96	—
1971	1.43	1.11	1.04	—
1976	1.43	1.28	1.02	—
1981	1.36	1.26	.98	—
	Nonwage Compensation as Percent of Total Compensation			
1966	7.6%	7.2%	9.8%	9.7%
1971	10.1	10.2	10.9	11.2
1976	14.7	14.9	14.4	14.3
1981	16.5	16.4	17.3	15.4

Source: *Survey of Current Business* 62 (July 1982); U. S. Bureau of Economic Analysis, *The National Income and Product Accounts of the United States, 1929-76 Statistical Tables* (Washington: GPO, 1981), Tables 6.5B, 6.6B, 6.8B in both sources.

[a] Civilians excluding federal enterprise workers.

[b] Total compensation per full-time-equivalent employee.

TABLE 2

ANNUALIZED RATES OF PAY AND PER CAPITA INCOME INCREASES IN HEAVILY UNIONIZED (HU) AND LIGHTLY UNIONIZED (LU) JURISDICTIONS, 1975-1980

	States[a]		*Localities*[b]		*School Districts*[c]	
	HU	LU	HU	LU	HU	LU
State employees[d]	7.0%	7.7%	—	—	—	—
Local employees[d]	—	—	7.3%	7.7%	—	—
School employees[d]	—	—	—	—	7.2%	7.5%
Manufacturing employees[e]	8.6	9.3	8.7	9.3	8.9	9.5
Per capita income[f]	9.8	10.2	10.0	10.1	10.3	10.1

Note: HU = heavily unionized jurisdictions, that is, those in states where the proportions of employees covered by collective bargaining at the jurisdictional level shown was above the all-state average for that level. LU = lightly unionized industries, that is, all other jurisdictions. All figures are simple averages.

Source: *Employment and Earnings*, various issues; *Statistical Abstract of the United States*, various issues; U. S. Bureau of the Census, *Labor-Management Relations in State and Local Governments*, 1975 and 1980 editions.

[a] Fifty-state sample.
[b] Fifty states plus District of Columbia in sample.
[c] Forty-five states which have school districts in sample.
[d] October monthly earnings for full-time workers at state, local, or school district level.
[e] October hourly earnings of production workers.
[f] Based on annual per capita income.

There are many reasons why public and private fringes are difficult to compare. Available data compare employer *outlays* for fringes rather than the *value* of the fringes to the employee. However, as Table I indicates, government employer outlays for nonwage pay as a percent of total compensation were generally below private levels in the 1960s. By the mid-1970s, the public and private sectors had equalized on a relative outlay basis. And, during the inhospitable climate of the late 1970s, relative public fringe outlays clearly pulled ahead.

Readily available data do not permit a union/nonunion breakdown of public fringes. Yet unionization may well have encouraged the fringe trend. Research in the private sector indicates a union affinity for fringes; there is no reason to believe that the public sector unions do not share these preferences.

But unions may not be the only factor encouraging fringe pay in government. In the pension area, public authorities are less constrained than private employers to avoid unfunded liabilities. As long as public pension trusts avoid deficits on a pay-as-you-go basis, they pose no immediate fiscal problem. Indeed, there is a temptation during hard times to dip into public pension funds to provide compensation improvements. In fiscal year 1983, for example, California state employees received no wage increase. However, their take-home pay was raised by reducing the employee contributions for pensions without an offsetting employer appropriation or a reduction in promised benefits. Pension assets were also used to increase employer funding of health benefits, thus reducing deductions from employee paychecks.

The Taxpayer Revolt

In June 1978, public resistance to escalating California property taxes (due mainly to rising property values) led to the passage of Proposition 13. This amendment to the state constitution cut property tax rates to one percent of assessed value, rolled back assessments to 1975 levels (except when property changed hands), and put a two-percent annual lid on assessment increases for property which is not sold. Property tax revenues as a proportion of state and local general revenue in California fell from 26.5 percent in fiscal 1978 to 15.3 percent in the following year.

The direct impact of the loss of property-tax revenue was on local authorities. However, to minimize drastic service cuts, the state government provided "bailout" funds to localities. As a result, state and local government became a de facto combined fiscal unit. State employees were given no pay increase in 1978. Because it was now in a position to control local policy, the state legislature required that its zero wage increase program be applied locally as a condition for receiving bailout money.[1]

The California experience provides a useful guide to the employment/pay options chosen by public officials (and unions where they bargain) when faced with severe cuts in revenue. State and local government employment had grown at an average annual rate of more than four percent during 1973-1978. From the second quarter of 1978 to the second quarter of 1979, California public employment dropped by more than four percent. Since that time the employment figures have shown no trend.[2] Hence, state and local authorities clearly used employment reduction as a means of adapting to a constrained budget.

On the wage side, however, the adaption appeared to be more transitory. Table 3 shows the ratio of California government wages at various jurisdictional levels to average government wages paid nationally at those levels. The California wage freeze of 1978 appears clearly on the table as a fall in the ratios at most levels. But, in the three-year period 1979-1981, there is a tendency for the relative wage to recover. As Table 1 indicates, compared with private wages, public wages on average showed a lag in the late 1970s, and Proposition 13 and its spillover effects in other states may have contributed to this lag. Nevertheless, Table 3 suggests that public authorities are reluctant to let their wage levels fall "too" far below par, even if this means lower employment levels.

Implications for the Research Agenda

Research on public sector wage determination and industrial relations has mushroomed. I have reviewed this literature in two recent papers and, hence, will confine my comments here to the needs for future research in the light of the empirical evidence presented above.[3] Clearly, a discrete

[1] Some workers who had previously negotiated pay increases due them eventually received those adjustments.

[2] Not all jurisdictions were expanding their employment levels prior to Proposition 13. In Los Angeles City and County, for example, employment contractions resulting from the mid-1970s recession were still under way when Proposition 13 was enacted. Proposition 13 led to continued contractions. See Gene Swimmer, "The Impact of Proposition 13 on Public Employee Relations: The Case of Los Angeles," *Journal of Collective Negotiations* 11:1 (1982), pp. 13-22.

[3] Daniel J. B. Mitchell, "The Impact of Collective Bargaining on Compensation in the Public Sector," *Public-Sector Bargaining*, eds. Benjamin Aaron, Joseph R. Grodin, and James L. Stern (Washington: Bureau of

(Continued on the next page.)

TABLE 3

RATIO OF CALIFORNIA GOVERNMENT WAGE TO U. S. PUBLIC SECTOR WAGE AT EQUIVALENT LEVEL OF GOVERNMENT[a]

	Period[b]			
	1972-74	1975-77	1978	1979-81
State	1.26	1.29	1.23	1.32
Local	1.24	1.25	1.23	1.25
Counties	1.25	1.33	1.26	1.29
Los Angeles County[c]	1.37	1.50	1.36	1.40
Cities	1.25	1.24	1.21	1.27
Los Angeles City[c]	1.43	1.40	1.34	1.45
School districts	1.26	1.26	1.26	1.26
Special districts	1.18	1.14	1.13	1.19

Source: U. S. Bureau of the Census, various government employment (GE) publications.

[a] Figures derived from October monthly earnings of full-time employees.

[b] For three-year periods, figure shown is simple average of annual ratios for individual years.

[c] Noninstructional personnel.

change in the climate surrounding the governmental sector offers an opportunity to reassess previous findings.

Union/nonunion pay differentials: the public sector literature has generally paralleled private sector research in estimation of union pay impacts. Typically, in the public sector the union effect on pay has been found not to exceed that of the private sector; indeed, with some exceptions, it has often been found to be smaller.[4] Table 2 suggests that, whatever the government union/nonunion pay differentials were in the mid-1970s, some narrowing may well have taken place since. Or, at least, the differentials may have stabilized. A closer look using up-to-date data is warranted. Of special interest would be a comparison of recent private sector union wage concessions with parallel situations in government employment.[5]

Government/private pay differentials: since government is a nonprofit entity, the classical analysis of pay and employment determination, derived from profit maximization, cannot be easily applied. There has been considerable interest in whether government workers are "over-" or "underpaid" relative to their private counterparts. The answers from sophisticated studies have not been much different from what appears from the gross, unadjusted data of Table 1. Federal workers have tended to be classified as "overpaid"; state and local workers have not. Within groups, government is reported to have a union-type wage effect, even in the absence of

(Footnote 3 continued.)
National Affairs, Inc., 1979), pp. 118-49; Daniel J. B. Mitchell, "Unions and Wages in the Public Sector: A Review of Recent Evidence," *Journal of Collective Negotiations in the Public Sector*, forthcoming. References to earlier research findings may be found in these papers.

[4] An exception is William H. Bough and Joe A. Stone, "Teachers, Unions, and Wages in the 1970s: Unionism Now Pays," *Industrial and Labor Relations Review* 35 (April 1982), pp. 368-76.

[5] A number of transit districts negotiated wage freezes in 1982, for example.

collective bargaining. That is, the wages of low-paid groups, women and minorities, tend to be boosted more than those of other employees when they enter government employment.

Since Table 1 suggests a narrowing of government/private pay differentials, these conclusions need further examination. A detailed study by demographic group, skill level, and other relevant characteristics which compared the mid-1970s with the early 1980s would be useful. Apart from aggregate pay levels, it would be interesting to know how government wage structure reacted to an unfavorable economic and political climate. Were public managers inclined to reexamine traditional pay relations (such as police and fire parity) in a search for ways to stretch the budget dollar?

Fringe benefits: much of the research in public sector fringes has focused on pensions. As already noted, there are various technical problems in comparing the value of such fringes to employees. Apart from comparing promised benefits, questions arise concerning how employees view unfunded promises. In an era where the willingness of the general population to cover unfunded liabilities by future tax increases is uncertain, the matter becomes especially pressing. Have public sector workers (and their union representatives) become more skeptical of future pension promises? If so, what implications might such an attiude change have for future bargaining demands concerning the mix of cash versus deferred compensation?[6]

Resource allocation: the classical private sector model suggests that firms economize on inputs to production whose relative prices rise [sic]. Included in the model as an input is labor. In theory, relative wage changes trigger resource allocation decisions. Although in the absence of profit incentives, the theory cannot be directly applied to government, there is some evidence that qualitatively similar reactions occur in the public sector. Whatever the goals of public managers may be, the budget limitations they face have certain parallels with private profit constraints.

In an environment of tightening budget restrictions, it might be hypothesized that relative wage movements could trigger sharper reactions with regard to employment levels. And the more tangible and plausible such reactions become, the greater the chance that they will affect collectively bargained wage outcomes. In simple terms, if management can credibly establish an absolute budget constraint, the wage-employment trade-off faced by a union becomes "one for one," that is, each one-percent wage increase won at the bargaining table triggers a one-percent employment or hours reduction. Such a trade-off is substantially greater than the normal short-run elasticity of labor demand found in the private sector. Hence, future research on public sector resource allocation and on collective bargaining in an unfavorable economic climate needs to be linked.

The labor relations climate: in the private sector, economic adversity has recently produced changes in traditional labor-management relations as well as wage concessions. There have been various cooperative experiments involving worker participation in management, quality of work life, and so

[6] Government pensions are often contributory, in contrast with private employment. They ignore federal tax incentives provided by employer pension contributions. It would be interesting to know if public wage authorities have been motivated to make their fringe packages more tax efficient in an effort to make maximum use of their limited compensation dollars.

on. Strike incidence has been at extremely low levels. In the public sector, however, the cooperative spirit has been less apparent. At the federal level, the air traffic controllers' strike of 1981 was broken and the strikers dismissed. The outcome of that dispute may have increased public management toughness elsewhere.[7] In Los Angeles County, for example, voters approved in November 1982 Proposition A—a charter amendment submitted to the electorate by the County Board of Supervisors. Proposition A requires automatic firing of strikers, forbids amnesty, and imposes a wage freeze on nonstriking members of striking unions.

After Proposition 13 was enacted, California public sector strike activity appeared to drop temporarily. Fifty such strikes were recorded in 1977, 23 in 1978 (the year Proposition 13 was passed), and 83 in 1979. Strike statistics are erratic, but they suggest a lull during adversity and then a catchup, much like the wage data of Table 3. More work on the impact of economic adversity on public sector labor disputes would be enlightening. Equally important would be a study of other indicators of labor-management relations such as grievance rates, litigation, and willingness to adopt some of the cooperative arrangements now attracting interest in the private sector.

Conclusion

The shift in the economic and political climate in the public sector provides an opportunity to reevaluate the large volume of research on government wage-setting and industrial relations that has accumulated over the past two decades. Some research findings, made under more favorable economic circumstances, may have to be qualified or abandoned in view of recent evidence. As has been the case in the private sector of late, new circumstances produce new results. **[The End]**

A Discussion

By J. N. MUSTO

University of Hawaii Professional Assembly

IT IS DIFFICULT, if not impossible, to disagree with the conclusion of Dr. Mitchell that the current shift in the economic and political climate of this nation requires a reevaluation of the research done in connection with public sector labor relations. (I would avoid the use of the term "industrial relations" because one of the major problems in the public sector has been the somewhat monolithic adoption, by public officials, of the "industrial model for collective bargaining." This conceptual approach can have the effect of contaminating public sector research in the belief that one must find analogous industrial experiences.) I would hope that the new research, particularly if it attempts to measure the beneficial effects of unionism for public employees, takes into account the unique nature of public employment.

[7] Unions may also be more reluctant to strike due to the air traffic controllers' example. "FMCS Chief Says Fate of PATCO Members Has Chilled Strikes in Public Sector," *Daily Labor Report*, August 12, 1982, p. A-1.

Specifically, I would suggest that it is artificial to separate the legislative impact of public employee representatives from their roles as union representatives in collective bargaining. A review of the state laws passed to enable public sector bargaining demonstrates a tradition of more restrictive scopes for negotiations than those found in the private sector under the jurisdiction of the National Labor Relations Act. Although many of the states looked to the NLRA as a model in enacting public sector legislation, that statute and its concomitant NLRB decisions represent the broadest interpretation of public sector unionism. My own state of Hawaii is an excellent example, where we find that the provisions of Chapter 89 specifically exclude "matters of classification and reclassification, the Hawaii Public Employees Health Fund, retirement benefits, and the salary ranges and number of incremental and longevity steps now provided by law . . . ."[1] The question arises: does the public sector union have an impact, positive or negative, upon these compensation factors even though they are excluded from negotiations? I believe that the evidence will show that public sector unions are essential in maintaining and increasing such benefits.

There has long been recognition by the courts (see *Abood* et al.[2]) that public sector unions are within the parameters of their representation duties when they engage in legislative lobbying. Interestingly, this is brought up through the challenges of nonunion members to the use of their monies by exclusive representatives for such lobbying. The courts have upheld lobbying (with some exceptions) to be a permissible activity to the degree to which such efforts impact upon public employees' wages, hours, and other terms and conditions of employment. Therefore, it is essential that any research into the wage benefits of unionization measure the concomitant gains made through the legislative process.[3]

To take this contention one step further, I would hypothesize that the major wage gains brought about by teacher unionism are, in fact, related to an increase in their political activity. The National Education Association has been both praised and condemned for its "emergence" as a new political force.

At the local level, this has translated into teachers being effective forces in the election of school board members as well as state legislators. In fact, in a number of cases the existence of public sector collective bargaining is a response to the legislative lobbying of teachers. Now, I would suggest that this effort has not been undertaken simply in the self-interest of educators. I believe that what we would see, if we examined in detail states where such action has taken place, is a refocusing of public understanding toward the priority of education at the state and local levels. I agree with Terrel Bell that education is to the states what defense is to the federal government, that is, the first and primary fiscal responsibility of each respective entity.

[1] "Hawaii Public Employment Relations Act," Hawaii Revised Statutes, Chapter 89, Section 89-9(d)(7).

[2] *Abood v. Detroit Board of Education*, 431 US 209 (US SCt, 1977), 81 LC ¶55,041.

[3] At note 24 they touch on the interaction between the legislative process and teacher unionism; an exception is William H. Bough and Joe A. Stone, "Teachers, Unions, and Wages in the 1970s: Unionism Now Pays," *Industrial and Labor Relations Review* 35 (April 1982), pp. 368-76.

Research done in the area of public sector employment must recognize that the emergence of collective bargaining, unlike that in the private sector, came about as a natural extension of a participatory democracy. Negotiations are one effective tool for public officials to use in making their decisions about the priority of government but certainly not the only one.

To this point Hawaii law states: "The legislature finds that joint decision-making is the modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, and to maintain a favorable political and social environment."[4]

In addition, the presence of public employee representatives did not begin with collective bargaining. In states which specifically preclude public sector negotiations, there are large and effective associations. It would be interesting to examine the history of how these types of organizations have changed over the pre- to post-bargaining era, with a special analysis directed toward identifying the association-employer relationship.

Conclusion

Dr. Mitchell stated in a previous work, "The issue of measurement is really one of interpretation."[5] On the issue of the relationship between the political structure and teacher unionism in Hawaii, he noted, "All equations estimated omit Hawaii due to the difference in the structure of responsibility for local education in that state compared with others."[6]

Perhaps the situation is one of definitions and locales. However, I believe that more useful information will come from research directed at analyzing the complex variables of public sector employment rather than trying to develop indices of unionism for quantitative application. Certainly, Hawaii is a unique place when one examines the interrelationship between government and public sector collective bargaining. Some have even noted tht Hawaii's political environment is unlike that found anywhere else in the United States. It is a good place to test this hypothesis.

[The End]

[4] Hawaii Revised Statutes, Section 89-1.

[5] Daniel J. B. Mitchell, "The Impact of Collective Bargaining on Compensation in the Public Sector," *Public-Sector Bargaining*, eds. Benjamin Aaron, Joseph R. Grodin, and James L. Stern (Washington: Bureau of National Affairs, 1979), p. 132.

[6] Mitchell, *ibid.*, p. 135, note 15.

SESSION III

Federal Sector Bargaining

Arbitration in the Federal Sector: Selected Problem Areas

By JOSEPH F. GENTILE

Arbitrator/Attorney

THE PURPOSE OF THIS ARTICLE is to explore selected problem areas in the arbitration of labor-management disputes in the federal sector. Much has been written regarding the theoretical and legalistic implications of arbitration in this area.[1] However, the thrust of this article is practical application.

The selected problem areas for practical dissection are three: the formulation of the issue for arbitral deliberation and decision; the handling of arbitrability disputes; and the nature, scope, and characteristics of "past practice." Each problem area will be discussed from the perspective and perception of the arbitrator and the advocate.

In most arbitrations, the first order of business is a review of the relevant provisions of the grievance-arbitration clause of the negotiated agreement. The second order of business is the formulation of the issue to be addressed and determined by the arbitrator. This formulation may be found in a formally executed "submission agreement," or it may be orally stipulated by the parties. In either event, the issue is framed for arbitral consideration.

Generally, the issue is stated in a twofold format: one, the question which the parties want answered and, two, the remedy, should the answer be stated in a certain manner. "Arbitral remedies" in the federal sector is a subject much discussed and debated; however, the limits of this paper do not allow a full exploration. It is sufficient to note that the advocates have the responsibility to educate the arbitrator as to his "authority" in this area, particularly as to the regulations, rules, and laws affecting arbitral remedial authority.

Ancillary to the typical formulation of the issue is the possibility of a threshold arbitrability question. If this situation develops, the

[1] See generally John Kagel, "Grievance Arbitration in the Federal Sector: How Final and Binding?", 51 *Ore. L. Rev.* 134, 139-40 (1979); John Kagel, "Grievance Arbitration in the Federal Service: Still Hardly Final and Binding?" *Arbitration Issues for the 1980s*, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators (Washington: Bureau of National Affairs, Inc., 1982), pp. 178-97.

arbitrability question should be considered as the first order of business. More comments on arbitrability will be made later in this discussion.

Why is the framing of the issue so important? In combination with the grievance-arbitration provision of the negotiated agreement, the agreed-to issue in large measure circumscribes the authority base of the arbitrator. It is the responsibility of the arbitrator to answer the question presented for consideration. If the issue is stated in broad dimensions, the decision and, in all likelihood, the remedy will be worded in broad terms.

Advocates anguish at this thought. However, it is they who have the responsibility to tell the arbitrator in as precise a way as reasonably possible what questions must be answered and what remedy is proper and in harmony with the agreement, the laws, and the regulations.

The formulation of the issue also provides important guidance to the arbitrator in addressing the relevance of evidence. The more specific the issue, the more orderly the hearing can be with respect to the presentation of evidence.

Issue Disputes

From the above comments it would appear that the framing of the issue is a rather simple task. In many cases this is certainly true. However, in others, the statement of an agreed-to issue can create confrontation and irreconcilable differences.

When faced with a dispute on the issues, an arbitrator will endeavor to use his or her good offices to effect a reconciliation. Finding that common ground for compromise is in the best interest of the parties, for, absent such agreement, the parties will have it framed by arbitral fiat. Advocates would be well advised to avoid the latter eventuality. Parenthetical to this process, the greater the distance between each side's formulation, the greater the arbitral involvement in the case, not just answering the question but stating the question to be answered.

Should reconciliation not be achieved, the arbitrator will usually ask the parties to stipulate that the arbitrator has the authority to state the issue. In fact, many negotiated agreements now provide the contractual basis for such a contingency.

Assume for the moment that there is an impasse on the framing of the issue and the parties have stipulated that the arbitrator has the authority to formulate the issue. The arbitrator requests that the parties proceed with their respective cases. At this point the advocates are faced with a most difficult task, depending, of course, on how far apart their respective statements of the issues are. Developing the theory of the dispute, structuring the opening statement, organizing the orderly presentation of the evidence, and developing the arguments all rest on what question is to be presented for arbitral action.

The arbitrator has an equally difficult problem, for the hearing will begin with the direction clouded and, depending on the distance between the respective formulations, considerable uncertainty. This makes for a rather "wide-open" hearing. The earlier the issue can be stated by the arbitrator, the easier it will be for all concerned.

The issue provides the necessary guidance of the hearing and the authority base for the arbitrator. Thus, it must not be treated as secondary to the process but must be approached with serious concern.

Handling Arbitrability Disputes

"Arbitrability" has been variously defined in the literature of arbitration. Simply stated, it is a question regarding the contractual propriety of a matter being considered in the arbitral forum because of a fatal procedural defect or whether the subject is one that may be properly placed before the arbitrator.

In the federal sector, Title VII of the Civil Service Reform Act has two sections which directly involve the question of arbitrability. They are 5 USC 7121(a)(1) and 5 USC 7121(c).[2]

Section 7121(c) provides for specific exclusions from the grievance procedure. Unfortunately, there is often a very fine line between these delineated exceptions and the issue as presented by the aggrieved employee. From an arbitrator's perspective, this "very fine line" develops into a considerable gray area between subjects for arbitral review and those to be excluded. It is at this point that assistance from the advocates as to relevant regulations, decisions, and rules would be anticipated.

Section 7121(a)(1) mandates that the negotiated agreement provide procedures for questions of arbitrability. These provisions also leave decisions on arbitrability to the arbitrator. Nearly all federal sector agreements under which I have arbitrated have provided that the arbitrator decide arbitrability questions.

Arbitrability issues are generally of a threshold nature; thus, they are usually raised and addressed before the merits of the dispute are considered. In the federal sector, they may include procedural as well as substantive issues; therefore, the scope of arbitral review is significantly broader than that traditionally found in the private sector. Additionally, the arbitrator will be asked to consider relevant provisions of the Civil Service Reform Act, existing laws such as the Fair Labor Standards Act, regulations of appropriate authorities, including the policies contained in the *Federal Personnel Manual*, and decisions by the Federal Labor Relations Authority. In making arbitrability determinations, the arbitrator must rely on the advocates to provide the necessary guidance into these often uncharted waters.

The most common arbitrability problem faced by arbitrators in the federal sector is that of timeliness. Have the procedural time requirements of the grievance-arbitration provision been met? If the time limits have not been met, what are the consequences? Are the time requirements mandatory? Are the time constraints jurisdictional in character? The answers to these questions can create a variety of results.

The party raising the existence of a procedural defect that would preclude a hearing of a dispute on the merits has the responsibility to persuade the arbitrator that the defect is fatal to such a hearing. This is a difficult task indeed, for the advocate, faced with this burden of persuasion, must run an arbitral steeplechase. The hurdles include the presumption of arbitrability, the public policy favoring the arbitration of disputes on the merits, and the concern, if not a strong reluctance, of arbitrators to preclude an aggrieved employee his "hearing day" on some procedural "technicality."

A review of various arbitral decisions indicates that a "waiver" to the strict enforcement of time limits has been found by an arbitrator in four types of situations. These are where: there exists a history of lax enforcement of the time requirements and the party

[2] See Francis J. Loevi, Jr., and Roger P. Kaplan, *Arbitration and the Federal Sector Advocate*, 2d ed. (New York: American Arbitration Association, 1982), pp. 1-4.

asserting the strict compliance did not put the other on reasonable and timely notice that "henceforth" it would be enforced; the nature or character of the dispute was of a "continuing" nature, so that each day the matter was not resolved triggered time limits anew; the parties have engaged in a continuing dialogue on the merits without any reservation of the right to assert the time requirements; and the side against whom the untimeliness is being asserted claimed that there was, indeed, "substantial compliance with the requirements" and there was an absence of prejudice.

Arbitrator opinions vary as to when a procedural arbitrability issue must be raised. Some view it as a jurisdictional matter that can be raised for the first time at any level of the procedure, including arbitration. Others indicate that, if the procedural arbitrability issue is not raised immediately or in the early stages of the grievance procedure, then one of the "waiver" theories previously stated may be found controlling.

A word about "bifurcation": it is a word which crossed the desert from the legal community into the arbitral forum, and it simply means that a hearing is split. In the context of procedural arbitrability, the procedural arbitrability question is raised, evidence is taken, and an arbitral decision is rendered prior to the taking of any evidence on the substance of the dispute. This is usually requested by one side or the other when there are two primary concerns. One, the evidence on the merits is such that, if the arbitrator heard it, it could prejudice his or her approach to the arbitrability issue and, two, the parties, for whatever reason, want one arbitrator to hear the arbitrability question and another arbitrator to hear the merits, if that be required.

The byproduct of "bifurcation" is higher costs and further delays. Both of these consequences are out of harmony with the intent of arbitration as an adjudicative forum.

A final comment about arbitrability: one of the most difficult situations is when one of the parties discovers an arbitrability issue halfway through the hearing, after the issue was stipulated by the parties. Such a discovery and the assertion of that issue will turn a rather drab hearing into a heated exchange of words. Some arbitrators will allow the amendment of the issue, absent mutual agreement; others will apply the more legalistic approach and, absent mutual agreement to change the stipulation, require the parties to live with the initial issue as framed. Obviously, if there was no initial agreement on the issue, this addition of the arbitrability question further compounds the prior discussion of issue formulation.

"Past Practice"

The words "past practice," "customs," or "habits" conjure mixed images, responses, and conceptions in the minds of arbitrators and advocates. What are they? When can they be used? What makes a "past practice" mature into an enforceable right?

Much has been written on the subject.[3] Simply stated, a "past practice," by its own words, is a "way of accomplishing something or a course of conduct, accepted by both sides, and which has as an asset some historical heritage." This definition is somewhat simplistic, for a careful review of the rationale enunciated by arbitrators over

[3] Loevi and Kaplan, *ibid.*, pp. 7-8; Richard P. McLaughlin, "Custom and Past Practice," 18 *Arb. J.* 205-228 (1963).

the years and now adopted in the federal sector reveals that a "past practice," to be truly enforceable or binding, must meet certain tests, possess certain indicia, or have certain qualities. What are they?

Though arbitrators vary as to the terminology they use to describe a "mature" or "binding" past practice and also as to the persuasive effect of the factors, the following five tests, indicia, or qualities form the core of the solar system around which an "enforceable" past practice rotates. One, how long has the practice been in existence? The longer it has been around, the more it "must be the manifested intent of the parties." Some would characterize this factor as "longevity." Two, how often has the practice been exercised? In other words, how frequently (number of incidents) has the practice been raised, repeated, and applied? The more frequently it has been used, the more clear it must be that this was the intended approach. Three, how consistently and uniformly has the practice been implemented? The more consistent and uniform it is, the more the practice is ascertainable as the intent of the parties. Four, have the parties mutually agreed or accepted the practice, either directly or impliedly through notice, knowledge, inaction, and thus condonation or acquiescence? Five, is the practice rooted in a reasonable and rational application of the relevant provisions of the negotiated agreement?

The fourth test or quality, "mutuality," is the most important consideration, for most arbitrators will not find a "binding" past practice with tests one, two, three, and five being established, absent four.

It is apparent from the above that it takes considerable evidence to elevate a practice to an enforceable or binding right. This arbitral elevation is even more complex, for the practical effect of an arbitrator's adopting a "past practice" to resolve a dispute is to engraft the practice onto the contractual language of the agreement. Thus the practice is granted the "rights, privileges and benefits" of being a de facto contractual provision. This action by an "arbitral tree surgeon" generally requires proof at a clear and convincing level, for, in effect, a written instrument or agreement has been augmented.

When can a "past practice" be used, assuming that it meets the tests or has the indicia described above? An established "past practice" comes into its own when an arbitrator is unable to reasonably ascertain the intent of the parties from a reading of the relevant provisions of the negotiated agreement —in more direct terms, when the language of the agreement is vague, indefinite, ambiguous, obtuse, or unclear.

Given these conditions, the arbitrator will look to extrinsic evidence in his or her quest for the intendment of the language. The language alone will not allow sufficient guidelines for arbitral evaluation—thus the need to go elsewhere. There are various sources of extrinsic evidence, the principal ones being bargaining history and "past practice." Parenthetically, it is the responsibility of the advocate relying on "past practice" to prove it should be relied upon to make clear and definite that which the language fails to accomplish in its own right.

Conclusion

Three critical areas of arbitration were chosen for this brief discussion to stimulate further critical thought.[4] The

[4] Van Allyn Goodwin, "Federal Sector Arbitration Under the Civil Service Reform Act of 1978," 17 *San Diego L. Rev.* 857-893 (1980).

formulation of the issue is of critical importance as it relates directly to the arbitrator's authority to act on the disputed matter and to channel the flow of evidence during the hearing. Arbitrability questions should be raised early in the grievance procedure; they should not be of a frivolous nature and, if asserted, they should be established by persuasive evidence. "Past practice" is useful in explaining the intent of the parties,[5] but it is only one of many tools and aids available to the advocates and arbitrators in their attempts to interpret and apply unclear or ambiguous language which the parties negotiated and placed in their agreement.

[The End]

[5] C. Ray Gullett and Wayne H. Goff, "The Arbitral Decision-Making Process: A Computerized Simulation," *Personnel Journal* 59 (August 1980), pp. 663-67.

SESSION IV

Arbitration and Arbitrators

Arbitration Training: A Matter of Institutional Survival

By ARNOLD M. ZACK

Arbitrator

WE HAVE ALL HEARD the complaints. Arbitration takes too long. There are not enough good arbitrators. We have to wait months for a hearing. It costs too much—transcripts, briefs, expensive arbitrators—and when it is all over we get a 20-page opinion, 16 pages of which repeat the facts and our contentions and three or four of which contain that "wisdom" for which we hired the arbitrator. If we go with a well-known arbitrator, we wait an extra three or four months, it costs us more, and his opinion is often later because he is so busy. If we use a new arbitrator, he or she will not know our business. The hearing will be lengthy and inefficient, the opinion will be wishy-washy, and the arbitrator will probably split the difference.

The short answer to these complaints is twofold. One, it is a free marketplace and the parties can select whomever they wish. Two, unless they take action to help develop new arbitrators, there soon will be no more "name" arbitrators available. The War Labor Board alumni became the experts they are today because the parties selected them to hear their cases. The parties used them, and they developed their skills by hearing cases.

The longer, more painful, and more realistic answer to the problem is as follows. The mounting discontent with arbitration reflects the disillusionment of management and labor with the process as it has changed over the past two or three decades. These changes have resulted in the loss of speed and economy—and, yes, perhaps even justice—that arbitration represented in its early days.

In addition, the threat of court review of decisions involving external law issues, the necessity to exhaust contractual remedies through arbitration before many cases can be taken to court, and the parties' attempts to guess what judicial opinions might be during their consideration of whether to use the arbitration process have all increased the number of arbitration cases. Arbitrators' ventures into statutory waters have further lengthened hearings and opinions and increased the consequences, impact, and cost of their decisions.

Add to all of this the diminishing number of "main-line" arbitrators, the parties' anxiety about the effectiveness of the process, and the increasing external intrusions, and the result is a great deal of pressure on those who have relatively little experience as arbitrators. So that they may "fill the shoes" of their predecessors, these newer arbitrators must be provided training in the conduct of a hearing, in substantive issues, in opinion writing, and in the standards and ethics of the profession. Further, the parties, the designating agencies, and neutral and tripiartite organizations such as the IRRA must endeavor to overcome the complacency and egocentricity of some "established" arbitrators by encouraging them, too, to participate in such training.

The solution to the problems of increasing caseloads, the use of arbitration as a prerequisite to litigation, and the delays and costs associated with waiting for the main-line arbitrators appears to be that we need more arbitrators. Yet, a study of those arbitrator training programs that have been undertaken in the past does not provide any convincing evidence that regular attendance at academic classes, practice in decision writing, or AAA/FMCS panel listing is any guarantee of an arbitrator's success. Some graduates of these courses have "made it," but by no means all, or even a majority of them, have. The ones who succeeded might have done so without the training programs. The others, although they are presumably well screened and encouraged, probably have the "ability" but lack the "accept-ability." Their names go out on lists and the parties have many opportunities to choose them, but they are seldom selected.

There is no magic formula for the selection and training of arbitrators who would be automatically acceptable to the parties, and there is no evidence to suggest that any future formal courses would be any more successful than those in the past. The sole exception to such an indictment of training is the individual apprenticeship to an established arbitrator where the mentor assumes some responsibility for the success of the apprentice and personalizes efforts to foster his or her acceptability.

The fact is, however, that in terms of straight supply and demand there already are enough individuals who have committed themselves to becoming arbitrators and who have met the criteria for listing on the various rosters. Adding any more would only dilute the opportunities for selection of those already on the panels. And if, indeed, those classified as oldtimers were suddenly to retire (an unlikely event), the presently underutilized panel members would almost immediately become busy arbitrators. That is, after all, how the present oldtimers got their start after World War II when there was a sudden need for arbitrators to decide disputes under the new grievance arbitration provisions then being widely adopted in collective bargaining agreements.

But the real problem is whether the clients will be satisfied with the quality of their output. Despite the wails of the critics that the current arbitration system is inadequate, too costly, and too time-consuming, the solution lies not in more arbitrators but in upgrading the skills of those already listed on panels.

The present problems are compounded by the issue of group iden-

tity. Private sector clients are simply suspicious of neutrals whose experience has been in the public sector. Many of these arbitrators are, indeed, competent and have successfully breached the gap between the public and private sectors, from oblivion to early entrance into the ranks of the "masters." But there are enough who have not to lend some credence to the skepticism of private sector practitioners.

Role of the Neutral

Why the differentiation? I suggest that it stems from the orientation and basic understanding of the neutral's role in each of the two sectors.

In the private sector, the traditional profile of the arbitrator is that of a War Labor Board alumnus, with perhaps some experience as an advocate and an understanding of how contract language is agreed upon. They have decades of experience in interpreting collective bargaining agreements, in applying the unnegotiated standards of just cause and arbitral rules of evidence, and in developing equitable remedies. They have repeatedly, over the years, faced minute variations of a preestablished theme in a multitude of industries. They have tailored each decision to the case before them; they have decided each case without concern or fear that an adverse decision might affect their future caseload.

As the years have taken their toll on this group, the survivors have seen the available work still funneled to themselves, with the same level of trust and security and in spite of longer delays for hearing dates and decisions. Although the "masters" may be the prime complainers about the cloudy future of arbitrators, they are also the prime contributors to present problems by not encouraging the use and/or education of other newer arbitrators on the panels, particularly those with public sector experience.

The evolution and nurturing of the neutral in the public sector has been different. When collective bargaining first came to the sector in the mid-sixties, most private sector arbitrators were sufficiently busy with their established clientele that they declined the new work. It was additionally unappealing to them because of its evening and weekend work sessions, the parties' lack of sophistication, and the requirement that they serve as mediators and fact-finders—a role which made many of them uncomfortable. The initial demand in the public sector was for neutrals to assist in working out agreements on new contract terms and wage rates, including negotiation of grievance and arbitration clauses, the actual implementation thereof to come later.

Thus, there was a call for new people to be mediators and fact-finders. The FMCS and the state agencies did have private sector mediators on their staffs, but these people had little time available for the public sector work that appeared suddenly in time spans narrowly geared to community budget formulations or school openings or to statutorily mandated schedules. The call was often answered by those teaching in economics, labor relations, public administration, or law who had little or no experience as neutrals.

Since the geographical spread of the new public sector bargaining and the new statutes bore little relation to the geographical distribution of private enterprises or the residences of private sector arbitrators, the new neutrals often gained their experience in a vacuum, with little exposure to or interaction with private sector neu-

trals, especially arbitrators. Many of these isolated neutrals have gained national renown and now have full calendars of mediating and factfinding assignments. As a group they have provided stability between unions and managements in the public sector and, by resolving both interest and rights disputes, they have been a prime force in preventing the disruption of public services.

Yet, there continues to be a reluctance on the part of private sector clients to embrace these new public sector neutrals who function basically in an advisory capacity. As mediators and fact-finders, their responsibility is to bring the parties together or, at best, to try to sell a resolution that will be acceptable to the adversaries. Even in their role as grievance arbitrators, many serve in jurisdictions where public sector arbitrators' decisions are advisory. With the prime goal of overcoming hostility on both sides in order to effectuate a mutually tolerable outcome, it is only natural that they came to be viewed as compromisers, as individuals less concerned with their judgments of right and wrong than with what would resolve the parties' dispute. Even with the advent of binding interest arbitration, the neutrals had to be sensitive to what would be palatable to the parties and would enable them to conform politically with the outcome.

This overriding motivation for acceptability also tends to impact on the neutral's written product, where there is a greater effort to persuade, cajole, and console the loser, to help that side with any political problems brought on by the loss, and to induce them to acquiesce in the final result.

This obsession with acceptability causes concern among private sector advocates who enter arbitration expecting a clear-cut victory, or at least a clear-cut decision to resolve their dispute. They are steeped in the tradition or arbitrators who are used to deciding narrow issues presented to them and issuing decisive awards with a clear winner or loser in every case. They are accustomed to arbitrators who recognize that their own long-term survival and acceptability is dependent on the exercise of their best judgment in each case—a judgment that will probably not differ appreciably from the parties' real expectations as to how the case will come out.

It is this level of sophistication on the part of the neutral which, if lacking in the public sector neutral, may give rise to a suspicion of difference-splitting. Indeed, it may be that innate tendency to stroke the losing party that is the greatest obstacle to public sector neutrals' gaining acceptability in the private sector. Each sector has its own modus operandi and modus vivendi. Moving between the two may impose burdens too heavy for some neutrals to bear. It may be that impediment that keeps the private sector arbitrators too busy, while the public sector neutrals remain available.

From the foregoing analysis it should be evident that the present problems in arbitration are not due to inadequate numbers of arbitrators. The numbers are there, but the frequency of usage needs adjustment. The average age of private sector arbitrators is about 65, and that of the War Labor Board alumni is even higher. Their numbers are diminishing. There will always be enough warm bodies to sit as arbitrators but, if they are not competent, they will exacerbate the parties' disenchantment with the new breed and with the arbitration process itself.

The market for good arbitrators is fertile. The immediate need is to prepare public sector neutrals to augment the ranks of private sector arbitrators, and those currently arbitrating in both sectors need to have their skills upgraded so that they will be better prepared to handle the increasing external legal pressures and the new problems that will come with economic change.

Training in What?

Arbitrators function as individuals subject to no peer review, licensing, or authentication of credentials. They certainly are subject to the vagaries of the marketplace and run the risk that their style of conducting a hearing, writing an opinion, ruling on evidence, or ultimately deciding a case may place them in disfavor. Yet, for different reasons, they are loath to subject themselves to training. The busiest arbitrators, with the heaviest schedules, assert that they have met and passed the test of the marketplace; they are busy and have no time in their schedules for training. Those who are less busy tend to neglect training, too, possibly because they fear that taking such courses would be viewed as an admission that they are not yet "journeymen": after all, if the oldtimers do not take training, and you want everyone to think you are as good and as busy as they are, why should you take training [sic]?

The obvious truth is that, after decades of isolated practice, with little opportunity for infusion of new ideas or the cross-fertilization that comes from hearing how other arbitrators handle similar problems, there is a clear benefit to be gained from training, for both the experienced and the less experienced neutrals. For example, during last Christmas vacation the National Academy of Arbitrators ran a writers' workshop led by Steven Stark, who teaches judicial writing at Harvard Law School. As he pointed out to those attending this first training session in writing skills ever offered to arbitrators, "It's important to know the rules of good writing so that you can consciously opt not to use them if you wish." Even the oldtimers, the established arbitrators who took that course, found themselves learning many new techniques of good writing.

Training in the area of external law and the standards that might be used to minimize the risks of appeal would be valuable for new and old arbitrators alike. All arbitrators deal with questions about the conduct of the hearing, evidence, seniority, discipline and discharge, remedies, standards of professional ethics, and the like, but their opportunities to hear how other arbitrators handle such issues and how they could improve their own handling of them can come only from such exchanges as training sessions would afford. As with legal writing, there are no firm and final answers as to how hearings should be run and cases decided. The process is too idiosyncratic for such conformity; that is indeed its strength.

But much is to be gained from collegial exchange. For those lacking access to group seminars and training sessions, reading lists and audiovisual tapes are valuable learning tools.

How to Implement Training

The paucity of training programs and the reluctance of arbitrators to take advantage of the limited number that are available dictate that more training be offered and that attendance be based on more than personal whim. The free marketplace of

arbitration may have become too free. Other disciplines such as medicine and law require attendance at a certain number of specified courses per year. Arbitration does not.

Although I am opposed to those who believe that arbitrators should be licensed or certified, feeling that it is up to the parties to choose whomever they want to arbitrate their disputes, I do agree that arbitrators should be provided with some encouragement to take part in training programs—most effectively with the participation of the designating agencies. It can be done through a system of carrots and sticks: carrots by listing on the AAA and FMCS panel cards the courses the arbitrator has taken and sticks by sending out the cards of only those arbitrators who have completed a prescribed curriculum, or kept up to date via continuing education.

The essential prerequisite for such a program is the agreement of the designating agencies, the neutral organizations such as SPIDR and NAA, and particularly the tripartite organizations such as the IRRA to coordinate their efforts. The Arbitrators' Code of Professional Responsibility emerged from such an effort. The planners could also establish the curriculum, the faculty, and attendance requirements. Programs could be held locally, regionally, or nationally. They could be offered as an at-home, continuing education, self-training program. They could include texts, lectures, films, and audiovisual instruction. Participation in such a coordinated effort would provide an opportunity for the IRRA, in particular, to return to more pragmatic work projects and to live up to its educational commitment to the participants in the dispute-settlement process.

To be sure, there is no promise or assurance that such a continuing education program will solve everyone's problems with arbitration as it presently exists. Labor and management should look to their own practices regarding their excessive reliance on transcripts and briefs, their insistence on waiting for the busiest and most expensive arbitrators. They should look also to expedited arbitration procedures and toward greater efforts at settlement prior to arbitration.

But, to the extent that the present shortcomings in the process arise from inadequate arbitrator preparation, training, or exposure to alternative ways of handling procedural and substantive issues that come before them, then continuing education may help to expand the vision of those already busy and upgrade the competence of those seeking to be busy. It is not expected that training will be a panacea, but at a minimum it will reassure the parties using the process that arbitrators are interested in self-improvement and that the parties themselves still have a viable role in contributing to the improvement and strengthening of the arbitration process—and the arbitrators. It would also serve as reassurance to the arbitrators that the parties recognize that arbitrators are not omniscient, that they do need and profit from training, and that the parties endorse and encourage their efforts to upgrade their skills and knowledge.

If the parties and the designating agencies truly want to have better arbitrators and a more responsive process, this is their chance.

[The End]

SESSION V

Comparable Worth

Comparable Worth: Recent Developments In Selected States

By ALICE H. COOK

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ALTHOUGH THE HISTORIC DEMAND of the early labor unions and social reformers in most industrialized countries was for "equal pay for equal work," the International Labour Organisation had moved well beyond this concept when it adopted its Convention 100 in 1952 on equal remuneration. In that Convention, it made clear that "the principle of equal pay 'means equal remuneration for men and women workers for work of equal value.'" THE ILO further recommended, as the key to measuring work of equal value, "the objective appraisal of jobs on the basis of the work to be performed."[1]

The European Common Market, somewhat tardily and not without strain, interpreted its charter Article 119 calling for equal pay for equal work to conform to the ILO Convention 100.[2] Since the mid-1970s it has required its member states to adopt legislation embodying the concept of equal pay for work of equal value. A series of cases brought before its High Court, by women mainly from Great Britain and Belgium, has established that equal remuneration applies not simply to wages and salaries but to pensions, job-related expenses and perquisites, and all other forms of remuneration. The member states are gradually bringing their laws into conformity with the European Economic Community requirement, some of them under warning that, if they fail to do so, they will be hailed before the High Court.

The United States, which has been a member neither of the Common Market nor, for much of its history, of the ILO, and in any case is not a signatory to its Conventions, nevertheless led many other nations in passing an Equal Pay Act in 1963 and providing for equal employment opportunity in Title VII of the Civil Rights Act in 1964.

[1] Alice H. Cook, "Equal Pay—Where Is It?", *Industrial Relations* (May 1975), p. 163.

[2] Janice R. Bellace, "A Foreign Perspective," *Comparable Worth: Issues and Alternatives*, ed. E. Robert Livernash (Washington: Equal Employment Advisory Council, 1980), pp. 141-45.

To be sure, the EPA called only for equal pay for equal work, and these goals of paying women equally with men when they were employed on the same or closely similar work for the same employer had largely been achieved by the end of the seventies.

With this achievement, it became clear, however, that only about 20 percent of working women were employed in jobs where men and women appeared indiscriminately, while the vast majority of them worked at occupations where women predominated to 70 percent or more.[3] The result was that women were crowded into relatively few occupations, all of them comparatively low paid when measured by the requirements and remuneration of comparable male jobs.

The sponsors of equal employment opportunity legislation in the United States assumed that the opening up of all jobs to qualified applicants regardless of sex or ethnicity would result in a balancing out of the gender and ethnic disproportions in specific jobs. That this has not happened in the short run since the legislation was adopted, and particularly since it was amended in 1972, is a major factor in raising and rallying the support of many unions and women's groups to the concept of comparable worth.

The following is for those who, like myself, want to start with a definition of terms. "Comparable worth" is a concept calling for measuring the relative values to the employer of disparate jobs, specifically of those done primarily by men and those done primarily by women, through the application of job evaluation and other systems that so far as possible eliminate sex bias by attaching objective weights consistently across job families to factors inherent in the determination of gradations of skill, effort, responsibility, and working conditions.

Until recently, serious debate among lawyers and legislators focused on the meaning of the Bennett amendment to Title VII and whether, as many contended, it limited the scope of Title VII's requirements for equal compensation to those of the EPA, or whether Title VII did not permit of broader treatment, including the concept of comparable worth. The Equal Employment Opportunity Commission, which took over administration of the EPA in 1979 from the Wage and Hour Administration in the Department of Labor, was already supporting the view that Title VII called for interpretations that could well include the comparable worth approach. *Gunther*[4] confirmed that view when the Supreme Court decision on it came down in 1981. To be sure, *Gunther* fell short of dealing directly with the comparable worth issue. But the Justices were clear in stating that Title VII contained a broader concept of equality in compensation than the EPA. When it remanded the case to the lower court for rehearing on these grounds, a settlement in favor of the women shortly followed.

[3] For the origins, history, and effects of job segregation, see Martha Blaxall and Barbara Reagan, eds., *Women and the Workplace: The Implications of Occupational Segregation* (Chicago: University of Chicago Press, 1976); Ruth G. Blumrosen, "Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964," *University of Michigan Journal of Law Reform* 12 (Spring 1979), pp. 397-502.

[4] *County of Washington v. Gunther*, 101 SCt 2242 (US SCt, 1981), 26 EPD ¶ 31,877.

Several unions, but notably the International Union of Electrical Workers, had earlier gone to the courts for relief in their grievances against private employers who, as far back as World War II or even earlier, had as a general policy paid "women's rates" lower than those paid men for the same work. Because these old rates had never been matched to men's as years passed and increases were negotiated, the IUE claimed that these women continued to suffer a discriminatory differential in pay. Shortly after *Gunther,* the Supreme Court denied certiorari in these cases and the circuit court decision in IUE's favor obtained. Both companies involved in these cases thereupon negotiated monetary settlements of several millions of dollars with the union.

Just as President Reagan was elected in November 1979 and the new Administration came into power in January 1980, the EEOC raised the issue of "comparable worth" to a high place on its agenda. Commission Chair Eleanor Holmes Norton, in addressing the National Pay Equity Conference in late October 1979, analyzed the issue and discussed a strategy that she believed would bring it positively before the federal courts. In conclusion she said, "Comparable worth will be the major issue for women in the 1980s,"[5] a forecast she repeated on several occasions during the next few months before her retirement from office. This article follows the portion of that predicted development in several states.

Part of legislative history on social reform in the United States deals with the relative contribution of the states and the federal government. To be sure, since the days of the New Deal the federal government has clearly established its preeminence in this field, after having left it almost entirely to the states during the first 150 years of its history. Yet it is important to note that, in respect to both wage and hour legislation as well as civil rights statutes covering employment, the federal government has fallen in line only after a substantial number of states have moved on these issues.[6]

When a Bureau of National Affairs special report on comparable worth appeared in October 1981, it contained a section on state and local action on the issue. My attention was caught by the number of states that had laws framed in terms of comparable worth, some of them dating from early post-World War II days.[7] Were some states running well ahead of the federal government? Ironically, might the Reagan Administration's revitalization of the doctrine of states' rights encourage states to act in precisely the area in which the Administration itself was blowing a retreat?

The Industrial Relations Center at the University of Hawaii just at this point was commissioned by a legislative resolution to undertake a study of comparable worth preliminary to more clearly defined action on the part

[5] Bureau of National Affairs, *Daily Labor Report,* No. 211, 1979, p. A-2.

[6] See, for example, Ronnie Steinberg, *Wages and Hours: Labor Reform in 20th Century America* (New Brunswick, N. J.: Rutgers University Press, 1982), pp. 125-27; and Duane Lockard, *Toward Equal Opportunity: A Study of State and Local Antidiscrimination Laws* (New York: Macmillan Co., 1968).

[7] Bureau of National Affairs, "Special Report: Comparable Worth," *Daily Labor Report,* October 1981. At the time of the report, the states were Alaska, Arkansas, Georgia, Idaho, Kentucky, Maine, Maryland, Massachusetts, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, and West Virginia. Originally Pennsylvania was also on this list (p. 27). Both California and Minnesota adopted laws following the publication of the report, but their laws applied only to state employees.

of the state. The Center supplied the funds to enable me to look at a number of Eastern states that I could readily reach from my home base in Ithaca, New York, during the summer of 1982.

In arranging to visit these states,[8] I wanted to ascertain which organizations and interest groups were pushing action on the issue, what they sought to accomplish, what steps they planned to take to achieve their ends, how they financed their undertakings, and what they might already have achieved. As I collected answers to these questions, I found that the approaches to the issue fell into four categories: legislation, collective bargaining, studies both in-house and by outside experts, and litigation.

I shall summarize here the findings. A full report and an executive summary are obtainable from the Industrial Relations Center at the University of Hawaii.[9]

Legislation

The maximum parameters of a study of state legislation on equal pay could encompass the 39 states and Puerto Rico which by 1982 had statutes of this sort, most of them reading much like the federal EPA of 1963. Of these, 21 had passed equal pay laws before the federal law, while two adopted legislation in the same year. Sixteen more adopted laws after 1963. Of particular interest, however, are the 16 states that have laws going beyond equal pay for equal work and calling for equal pay for comparable work or work of comparable character. Of these, six statutes were adopted before the federal EPA and 11 thereafter. One state, Pennsylvania, replaced a comparable worth law (1955) with the federal EPA language in 1968.

The interesting question of where the language on comparable worth came from even in the pre-EPA period I have not satisfactorily answered. I believe that the Women's Bureau, which never ceased from its founding to the present to advocate equal pay, however variously defined, has produced over the long years "an impressive body of statistical data, documenting wide differentials in the wages paid to men and women in all occupations." At one time, Mary Anderson, the first head of the Bureau, chaired a national equal pay organization. In 1952, 11 years before the EPA became a reality, the Bureau consolidated "the activities of some 20 large national organizations into a united campaign for passage of a federal law."[10]

My (as yet unsubstantiated) hypothesis is that the Women's Bureau in the period between the wars put out a model draft of state equal pay legislation which a number of states adopted without much debate and on the Bureau's good authority. In any case, these laws are on the books of a good many states that are other-

[8] The states I visited were Connecticut, Maine, Maryland, Michigan, Massachusetts, New Jersey, New York, and Pennsylvania. In addition, I obtained up-dated information by correspondence or by consulting the reports of others. Among those most helpful was the draft of an as-yet unpublished chapter by Virginia Dean, Carroll Boone, and Patti Roberts on "existing legislation which relates to comparable worth," prepared for a forthcoming book on this subject by Helen Remick. These states included Alaska, California, Idaho, Illinois, Minnesota, Nebraska, Kentucky, Washington, and Wisconsin.

[9] Alice H. Cook, *"Comparable Worth: The Problem and State Approaches to Wage Equity."* (Hawaii: Industrial Relations Center, University of Hawaii, February 1983). An "Executive Summary and Recommendations" is also available.

[10] Morag MacLeod Simchak, "Equal Pay in the United States," *International Labour Review* 193 (June 1971), p. 549.

wise not well known for their progressive labor legislation.

Whatever the purpose and origin of these statutes may have been, it has not been possible to find that a single state has any legislative history on the adoption of its statute, nor have any but Pennsylvania in the records I have consulted tested these laws in their courts.[11] The lawyers with whom I have raised the question of state enforcement of comparable worth legislation, whether in the public or the private sector, have felt that little was to be gained by invoking state statutes. Indeed, they feel the groundwork for interpretations of comparable worth have so well been laid in the federal jurisdiction in *Westinghouse*[12] and *Gunther* that they prefer to use Title VII in their litigation.

Thus, general legislation directing public and private employers to pay women equally with men for work of comparable value so far provides little or no base of experience in implementation either by governmental administration of such laws or by judicial interpretation.

Another Kind of Legislation

States are now turning to another kind of legislation. These are bills directing state departments of personnel, or other appropriate bodies, to examine or reexamine their job and wage classification systems for evidence of sex bias and to undertake further studies which will provide the base for reconstruction of these systems, such that they will be bias-free and evaluated solely by job content and job requirements. To quote from a bill before the New Jersey legislature, the object is to achieve "pay rates proportional to the value attributed to the job whether or not the work is similar."[13]

Connecticut, beginning in 1979, adopted a series of three such bills, as its inquiries developed from a mandated study of sex segregation through a job evaluation of benchmark jobs to a detailed evaluation of all job titles within the state's classified service. Representative Barbara Gay has introduced a bill calling for such studies in the state of Massachusetts and Senator Wynona Lipman has introduced such a bill in the state of New Jersey. In September 1981 California adopted amendments to its government code that assigned to the state department of personnel the task of reviewing and analyzing existing studies and requiring it to make this information available annually to a policy committee of the legislature and to the bargaining parties.[14]

Idaho has a general statute covering the private as well as the public sector and in 1975 adopted further legislation requiring the civil service commission "to determine the relative worth of each job classification. . . ." This law was implemented in 1977 by a job evaluation exercise based on the point worth of jobs which, according to the state compensation specalist, has resulted in "a high degree of internal consistency

[11] The Pennsylvania courts all chose to interpret the comparable worth provisions of the 1955 law to conform to the federal EPA and may well have influenced the state to change the wording of its law in this regard. A test is now going forward in Alaska on the pay of public health nurses compared with the pay of physicians' assistants (predominantly male). The case will not be heard before August 1983. (Source: telephone call to one of the nurse plaintiffs.)

[12] *IUE v. Westinghouse Electric Corp.* (CA-3, 1980), 23 EPD ¶ 31,106A.

[13] Senate, No. 1883, State of New Jersey, introduced October 25, 1982, p. 2 ls. 42-47: "An Act concerning the analysis of job and salary classification in the State government and making an appropriation."

[14] Senate Bill 459, approved by the Governor, September 24, 1981. Filed with Secretary of State, September 25, 1981, in effect January 1, 1982. See Office of the Governor, News Release 421, September 24, 1981.

in compensation practice."[15] She goes on to report that women's salaries as a consequence of implementing the job evaluation study increased by an average of 16.2 percent, while men's went up 6.8 percent. Secretarial salaries increased by 20 to 30 percent.

In 1982, Illinois adopted a bill calling for "a comparable worth study of all state job classifications," beginning with a pilot project in which male- and female-dominated occupations will be examined in a sampling process. This study is under way using 24 benchmark classes.[16] Similarly, in the summer of 1982, Kentucky's legislature directed "a comprehensive study by the Legislative Research Commission into the comparable worth issue among the jobs of state employees."[17] In its 1982 session, Minnesota also adopted amendments to certain statutes that authorized studies and established a procedure for implementing comparability adjustments within the next biennium.[18]

Thus, the legislation that is presently effective is not framed as a general mandate calling for the introduction of comparable worth but is rather a mandate to conduct studies leading to implementation of such a policy in state employment. Helen Remick, who has written widely on this subject out of her experience in the state of Washington, believes that legislation of this sort may not be necessary. "Personnel boards are all directed to use 'the best standards of personnel administration and can therefore readily implement a job evaluation system,' " she writes in a personal letter.

Nevertheless, some of this legislation mandates not only studies but implementation of them in Minnesota, California, and Connecticut. In light of the experience in the state of Washington, which accepted the necessary implications of a study of management salaries but balked when it came to doing the same thing for women employees in the lower ranks,[19] implementation legislation may be a necessary part of a complete package. Th price of not fulfilling expectations raised by studies can be, as we shall see, litigation.

Collective Bargaining And Employee Participation

At least two states have initiated or are about to initiate studies without getting permission and appropriations from the legislature. In New York and Maine, the majority unions in the respective states have bargained with the state employer for a jointly administered comparable worth study to be designed and monitored by a labor-management committee. In each case the state has agreed in bargaining to provide a substantial sum—in Maine, $100,000 and in New York, $500,000—to pay the costs of employing an expert consultant and of committee administrative expenses.

Most studies have proceeded or are proceeding under the monitorship of such a committee which, if not strictly of labor-management construction, nevertheless has strong employee repre-

[15] Idaho Stats. 67-5309B. (Source: letter from Maxine Matlock, November 4, 1982.)

[16] Commission on the Statutes of Women, "Report to the Governor and the General Assembly" (February 1982), p. 50.

[17] Letter and enclosures from Linda Russell, Committee Administrator, Labor and Industry Committee, Legislative Research Commission, November 17, 1982.

[18] Council on the Economic Status of Women, "Update—Pay Equity for State Employees," undated (1982?), processed.

[19] Helen Remick, "Beyond Equal Pay for Equal Work: Comparable Worth in the State of Washington," *Equal Empolyment Policy for Women*, ed. Ronnie Steinberg Ratner (Philadelphia: Temple University Press, 1980), pp. 405-18.

sentation.[20] Indeed, a number of the top job evaluation firms insist upon this participation in their studies. In part they seek the input of persons directly familiar with the actual content and staffing of jobs to be evaluated; in part they count on labor and management participation to pay off in acceptability of the study and its recommendations. Some of these committees, as for example the one projected in New Jersey, shall contain representatives of women's advocacy groups and academic experts in addition to labor and management participants. States which, like Maryland and Nebraska, did not have the oversight of a committee including representatives of the women's and employees' organizations immediately fell victim to critical studies by these groups that strongly recommended free, comprehensive reviews under advisory bodies including such representation.

The main function of collective bargaining comes into play at the point of implementation. Job evaluators generally agree that their function is not to assign wages to evaluation-ranked jobs but to leave this to the employer to undertake unilaterally or to bargain out with the unions concerned. In the states that accept public employee bargaining, however, a number impose limitations on scope of bargaining that directly affect the unions' ability to deal with comparable worth as a full bargaining partner. A number of laws forbid bargaining on job classification and require that appeals affecting reclassification be carried by individuals through a state board of appeals. Unions are thus prohibited from challenging classifications or from handling grievances under the classification system through contractual grievance procedures.

Even under such circumstances, however, unions may bargain increases—or, conceivably, give-backs—in such a way as to favor the low-paid categories over the higher paid. Bargaining an across-the-board increase would be one such device. They may also bargain, as the unions in Connecticut have done, the establishment of equity funds to be set up in bargaining units where women predominate for the purpose of building funds out of which equity adjustments may be made, even over a number of years.

Studies

Since the introduction of classification systems, states have, of course, been making studies, often with the help of outside experts preeminent in this field. Some states have reviewed, audited, and modified these systems at intervals since they were introduced; many have not. A typical classification system has become heavy with single incumbency job titles and with irregularities arising from "adjustments," always upward, to accommodate the system to some department head's need for services unobtainable at the state's prescribed salary. Recently, as a result of studies undertaken by both in-house and outside interest groups, attention has focused on the problem of job segregation, differential wages paid to heavily gender-dominated groups, and the sex-stereotyped built-in biases in job evaluation systems.

Some legislatures, some unions, and some personnel directors have been moved to initiate new appraisals of their systems. This is because a status-of-women commission, an affirmative action office, a union research department, or a legislative research group has produced evidence of job segregation by sex, sex bias within job evaluation sys-

[20] Three representatives from the private sector are on the Connecticut committee, in consideration of the probability that major changes in state law may have a ripple effect upon the private sector.

tems, sex-differentiated compensation, and similar problems.

Most of these preliminary studies that have triggered further action have been limited to establishing more or less severe job clustering by sex, accompanied by wage differentials that can most probably be accounted for by discrimination between the sexes in favor of males. In Connecticut, the Status of Women Commission, an advisory body to the legislature, carried out a study of this kind on state clerical workers. In Michigan, the Office of Women and Work in the Department of Labor, using CETA funds and employing the Arthur Young firm, not only established sex segregation and discrimination but tested whether job evaluation plans can be constructed for use across job families.

In New Jersey, the Commission on Sex Discrimination in the Statutes, with the assistance of the Affirmative Action office, did the job segregation study. In Pennsylvania, the leading union of state employees financed such a study using a group from the College of Business Administration at Temple University. And, in New York, the Center for Women in Government, a part of the State University at Albany, carried out a variety of preliminary studies.

Where job segregation exists in a critical mass and is accompanied by demonstrated but inexplicable wage differentials, the groups concerned with the initial study move on to the next step, which has been one of initiating a job evaluation exercise either of benchmark jobs or of some other sample of job titles. Such a study, to be effective, must include the state civil service and personnel offices and their experts in evaluation, classification, and wage assignment. In most cases, the necessary descriptive data are exclusively in their hands, or in their computers. Furthermore, if implementation is to follow, it must move through these offices. Hence the tendency at this stage, if not earlier, is to get to the legislatures for permission or mandate and for adequate appropriations to finance the study.

The need to carry out this phase of the study in cooperation with the parties at interest has already been discussed.[21]

Litigation

The union chiefly committed to the use of litigation in the attainment of comparable worth is the major labor organization in public labor relations, the American Federation of State, County, and Municipal Employees. Determining its strategy and carrying its cases is Winn Newman, formerly chief attorney for the IUE. He has written widely and often on both aspects of litigation.[22] Since his move to AFSCME, he has initiated legal action in the states of Washington, California, and Wisconsin and taken over a case dating from an earlier period for a clerical bargaining unit in Connec-

In a state such as Washington where, after nine years, a governor-initiated job evaluation study still is not implemented and where the affected men

[21] See section on "Collective Bargaining and Employee Participation," in text.

[22] See Winn Newman and Carole Wilson, "Statement of International Union of Electrical, Radio, and Machine Workers, AFL-CIO-CLC, before the United States Commisssion on Civil Rights, *Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, submitted March 11, 1981"; Winn Newman, "Comparable Worth—'A Job Inequity by Any Other Name . . . ,'" paper delivered to the University of Wisconsin Law School, Center for Equal Employment and Affirmative Action, November 30, 1979, processed; Winn Newman and Jeanne M. Vonhof, " 'Separate but Equal'—Job Segregation and Pay Equity in the Wake of *Gunther*," *University of Illinois Law Review*, No. 2 (1981), pp. 269-331.

and women have probably long since run out of patience with the legislative and administrative processes available to them, it is not to be wondered at that an aggressive union[23] sees a move to litigation as its best strategy. In Connecticut, quite different motives animated union action originally. A clerical unit affiliated with an independent union faced a decertification election. AFSCME wanted the union and eventually won it. During the preelection period, it took the cases of a number of clerical workers to court, charging inequitable pay. Whether litigation designed to promote an organization strategy fits the implementation strategy now being carried out in Connecticut is, in my mind at least, questionable.

That litigation can and will be used where legislative and administrative programs halt or fail is clear. Whether it should be used to hurry them along is another question and will be determined not by the judgment of an outsider but by the grasp which the union has of its own needs and power in any given situation.

Implementation

How high will the costs of comparable worth run? Can they be dealt with in a period when nearly every state is in a budget crunch?

Written into the study programs of a number of states is the requirement that the task force and its consultant present the legislature or the governor with an estimate of the cost of putting the recommended program into operation. The projected study in New York is an example.

In California, a state committed to achieving sex equity in compensation, a legislative analyst was able to say only that "an indeterminate additional annual cost [will accrue] to the General Fund." The analyst pointed out that ultimate determination must rest with the governor as employer and the appropriate employee organization through the collective bargaining process, pursuant to the Employee Relations Act. The coalition of support groups for the bill, Women in Politics, through its employment task force noted that implementation funds might be restricted by what the legislature appropriates for salary increases. The implication is that these additional costs might be spread over a number of legislative sessions until equity is achieved.[24]

While Idaho did not report a total figure, its state compensation specialist noted that "the amounts of adjustment necessary in female-dominated occupations ran between 10 and 30 percent."[25] These adjustment costs appear to have been absorbed in a single appropriation.

The Minnesota bill included a procedure for making comparability adjustments, beginning in the next biennium. Based on a listing of male- and female-dominated classes that are paid less than other classes with the same number of Hay points, the Legislative Commission on Employee Relations is to recommend an amount appropriate for comparability adjustment to the legislature. This amount may assume full implementation in one biennium or over a longer period of time.

When funds are appropriated, money is assigned for this specific purpose to the various bargaining units based on the number of underpaid classes they represent. Actual distribution of salary increases within each unit is negotiated

[23] Bureau of National Affairs, *Daily Labor Report*, No. 142, July 23, 1982, p. A-6.

[24] See "Analysis of Assembly Bill No. 129 (Lockyer) as amended in Senate August 24, 1981, 1981-82 Session, August 27, 1981" and Women in Politics news release (undated) addressed to all senate members, "Subject SB 459 (Carpenter) A Matter of Pay Equity."

[25] Letter from Maxine Matlock, November 4, 1982.

through the usual collective bargaining process.[26] Estimates of the total cost of implementing pay equity vary between $17.9 million per year, the minimum needed to bring the salary of each female class up to the *lowest* salary for a male job with the same or fewer Hay points, to a maximum of $39.8 million per year based on bringing each female class up to the *highest* salary for a male job with the same or fewer Hay points. The legislature appropriated a salary supplement of $178 million for FY 1982-83. The minimum amount for pay equity would represent approximately 20 percent of the appropriation, while the maximum would require 45 percent.[27]

The state of Washington is a classic example of the great gap to be bridged between study recommendations and implementation. The study there was done in 1974. At its completion, the governor who had ordered it, upon receiving the report of the committee and its consultant Norman Willis, immediately wrote seven million dollars into the budget to be used in beginning to make adjustments to bring the underpaid groups into comparability with the better paid categories at the same point levels. He was, however, at the end of his term, and his successor had no sympathy for the undertaking. She rejected the study's findings out of hand, despite the fact that a similar study of management salaries had been put into effect only a year earlier and her own salary had moved upward as a result.[28]

Washington, however, provides in its civil service law (Par. 5) for a supplemental salary schedule that lists "those cases where the Board determines that prevailing rates do not provide similar salaries for positions that require or impose similar responsibilities, judgment, knowledge, skills, and working conditions." The list of such underpaid persons derives from a biennial survey provided by the State Personnel Board. A new survey is currently under way.

However, the legislature has made no move during all these years to implement the findings of these supplemental surveys (prepared in 1978 and 1980) until in the last legislative session when a bill was introduced in the senate calling for implementation of these findings over a ten-year period. After receiving favorable support in both the house and senate, the bill died in the rush at the end of the session. The experience suggests, however, that the possibility of implementation continues over a period of years and in line with ongoing recommendations of an ongoing state personnel agency.[29]

It is precisely this long-term approach that the state of Connecticut has taken through its collective bargaining with at least three unions representing female-dominated job categories—clericals, nonprofessional hospital workers, and social workers. There, as we have earlier indicated, the state is engaged in the final stages of job evaluation aimed at examining every job title in the state and bringing it in line with a job point evaluation system designed by the Willis firm. When this evaluation is completed by a newly established job evaluation section of the state personnel office in 1984 or 1985, salary adjustments will begin.

In the meantime the state is paying a percentage of the payroll, varying from one to 1.9 percent, into various escrow accounts. As these "equity

[26] Council on the Economic Status of Women, cited at note 18.

[27] *Ibid.* The calculations appear to be based on studies carried out in the Legislative Audit Commission Survey of October 1978.

[28] Remick, cited at note 19, p. 408.

[29] Letter from Helen Remick, September 8, 1982.

funds" accumulate, they will be the source of payments to the underpaid categories. It is assumed that these funds will be continued, and perhaps even increased, in each bargaining term over the next eight to ten years.

Thus, Connecticut, which is in many ways further downstream in its implementation of comparable worth than most other states, is relying on a three-pronged approach to the achievement of full equity in compensation: collective bargaining, the establishment of equity funds, and the acceptance of a gradual, though not infinitively drawn out, achievement of compensation equity.

[The End]

The Comparable Worth Issue: Current Status and New Directions

By KAREN S. KOZIARA, DAVID A. PIERSON, and RUSSELL E. JOHANNESSON*

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WHETHER MEN and women receive equal wages for jobs of comparable worth may be the equal employment opportunity issue of the 1980s. The comparable worth concept raises many questions, the answers to which are often controversial. One of these controversial questions is the appropriate legal status of comparable worth, with the debate generally revolving around whether employers should be required to go beyond paying equal wages for equal work to paying equal wages for different, but comparable, jobs.

Another important question is how to compare dissimilar jobs to determine if they are being rewarded comparably. This is an apples and oranges question: how can jobs different in many ways be meaningfully compared? Finally, the implications of payment systems based on comparable worth suggest other questions. Some observers feel that wages based on comparable worth would be such a departure from current practice that the impact could have dire results for our society.[1] Others argue that wages based on comparable worth are an important and necessary part of equal employment opportunity.[2]

Thus, there is much interest in the potential impact of comparable worth upon employment, employers, and unions. We address these questions in this article. First we discuss the background and current status of the comparable worth issue, followed by an analysis of the impact of recent judicial, legislative, and labor relations events on the evolution of the issue. We conclude with a discussion of the implications of comparable worth for the broader society.

* The authors would like to acknowledge the research assistance provided by Mary P. Shallcross.

[1] See, for example, Evan J. Spelfogel, "Equal Pay for Work of Comparable Value: A New Concept," LABOR LAW JOURNAL, Vol. 32, No. 1 (January 1981), pp. 30-39.

[2] See, for example, Winn Newman and Carole W. Wilson, "The Union Role in Affirmative Action," LABOR LAW JOURNAL, Vol. 32, No. 6 (June 1931), pp. 323-42.

The continuing income gap between male and female workers is behind the current interest in the comparable worth concept—a gap that has been both persistent and consistent. Over the past four decades the average wage for full-time working women was about 59 percent of the average wage for full-time working men.[3] Much empirical research indicates that the major reason for this income gap is the concentration of women workers in low-paying occupations, with much of the difference between wages earned by men and women reflecting differences in occupational distribution.[4]

One interpretation of this information concluded that differences in occupational distribution result from labor market discrimination against women. Because of this discrimination, women have been crowded into some occupations, and wages paid for these jobs reflect labor market crowding. An alternative explanation for crowding is the preference of many women for traditionally female jobs.

These explanations are complementary rather than contradictory. Both offer explanations for the concentration of women into a limited number of occupations and the depressed wages in these occupations. Both implicitly reflect the impact of sex role stereotypes on labor market decisions. The discrimination explanation describes how sex-role stereotypes limit women's alternatives and thus influence how women are treated. The preference explanation assumes that the existence of traditional sex-role stereotypes influences women's expectations and, thus, their behavior. A combination of both theories is probably the most useful explanation for the continuing income gap between men and women.

Proponents of comparable worth as a wage-determination criterion propose addressing the male/female income gap directly rather than indirectly through its hypothetical causes. Their underlying assumption is that jobs of comparable value to an employer should be compensated equally, thus eliminating wage differentials associated with sex-segregated jobs and resulting in wage structures that reflect the worth of jobs to organizations.

Judicial Interpretations

Equal pay for comparable jobs is a different issue than equal pay for equal work. The 1963 Equal Pay Act expressly forbids employers from paying men and women different wages for jobs requiring the same skill, effort, responsibility, and working conditions. As a result, it is legitimate under the Equal Pay Act for employers to pay unequal salaries to employees doing different work.

In contrast, Title VII of the 1964 Civil Rights Act is broader in scope and prohibits discrimination against covered classes in any of the terms and conditions of employment, not just pay. The legal issue is whether or not Title VII is broad enough to cover questions of the legality of paying unequal wages for dissimilar jobs having comparable worth to an employer.

[3] U. S. Department of Labor, Women's Bureau, *The Earnings Gap Between Women and Men* (Washington: U. S. Government Printing Office, 1979).

[4] See, for example, Henry Sanborn, "Pay Differences Between Men and Women," *Industrial and Labor Relations Review* 17 (July 1962), pp. 534-50; Victor R. Fuchs, "Differences in Hourly Earnings Between Men and Women," *Monthly Labor Review* 94 (May 1971), pp. 9-15; Victor R. Fuchs, "Women's Earnings: Recent Trends and Long Run Prospects," *Monthly Labor Review* 97 (May 1974), pp. 23-26; and F. Hutner, "The Female-Male Earnings Gap," *Manual on Pay Equity*, ed. J. Grune (Washington: Conference on Alternative State and Local Policies, 1980).

A factor complicating the legal status of comparable worth is the Bennett amendment, which states that any wage differential authorized by the Equal Pay Act is not a Title VII violation. The amendment reads: "It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provision of section 206(d) of Title 29."

The Section of Title 29 (the Equal Pay Act) referred to reads as follows. "No employer having employees subject to any provision of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal or on jobs [sic] the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."

The quoted Section of the Act specifically makes it illegal to pay men and women different wages for jobs requiring equal skill, effort, responsibility, and similar working conditions. Because the comparable worth issue involves comparisons of different jobs, the Bennett Amendment raises the question of whether or not comparable worth suits may be brought under Title VII.

Until recently, the courts have given this issue somewhat mixed treatment. A number of them have ruled that the standards outlined in the Equal Pay Act require that the jobs be similar, rather than comparable, if they are to be the basis for wage discrimination suits.[5] A smaller number, however, have ruled that under some circumstances comparable jobs may be the basis for a wage-discrimination suit.

Among the most important of these rulings thus far is the Supreme Court's recent decision in *County of Washington v. Gunther*.[6] The case arose because the County of Washington, Oregon, paid substantially lower wages to female guards than to male guards in the same county jail. The female guards brought suit alleging intentional discrimination by the county because it set wages for both women and men at less than its own evaluation of what the external labor market for the jobs would be. However, the wages for female guards were set proportionately lower than those of male guards. The district court found that the jobs done by male and female guards were not substantially equal, and the case was dismissed because it did not satisfy the equal work standard of the Equal Pay Act.

In contrast, the Supreme Court ruled that the Bennett Amendment makes the Equal Pay Act's affirmative defenses applicable to Title VII suits but does not limit discriminatory wage suits to the equal pay for equal work

[5] See, for example, *Christensen v. State of Iowa*, 563 F2d 353 (CA-8, 1977), 15 EPD ¶7835; *Lemons v. City and County of Denver*, 620 F2d 228 (CA-10, 1980), 22 EPD ¶30,852, cert denied 449 US 888 (US SCt, 1980), 24 EPD ¶31,256.

[6] (DC Ore, 1976), 13 EPD ¶11,322, 602 F2d 882 (CA-9, 1979), 20 EPD ¶30,204, 623 F2d 1303 (CA-9, 1980), 23 EPD ¶30,900, 101 SCt 2242 (US SCt, 1981), 26 EPD ¶31,877.

standard of the Equal Pay Act. Women may bring suits even if no men hold equal but higher paying jobs as long as the questioned wage is not exempted by the Equal Pay Act's list of four permissible causes of wage differentials: seniority, merit, quality of production, or any other factor except sex. The reasoning behind this decision is that the language of the Bennett Amendment and its legislative history indicate an intention to ensure that Title VII did not nullify the more detailed Equal Pay Act. Thus, the Bennett Amendment incorporates the affirmative defenses of the Equal Pay Act into Title VII, but not its prohibitions requiring equal pay for equal work.

The Court pointed out that its ruling was consistent with current Equal Employment Opportunity Commission standards as well as with the remedial purposes of both Title VII and the Equal Pay Act. Pointing out that a more restrictive reading of the Bennett Amendment would prevent women from bringing suit unless their employers paid men more for doing exactly the same work, the Court explained, "We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate."

The decision is a narrow one. It suggests that comparable worth cases are not precluded by the Bennett Amendment. However, it does not indicate under what circumstances comparable worth claims will be found to be legitimate. Thus, the long-run status of comparable worth remains unclear.[7]

Although the Court ruled that suits involving discriminatory compensation claims are not limited to the equal pay for equal work standard, it did not use the comparable worth standard in deciding the case. It pointed out that the respondents had brought suit to prove that their wages were depressed by intentional wage discrimination. The Court explained, "The narrow question in this case is whether such a claim is precluded by the last sentence of . . . the 'Bennett Amendment.'"

Comparable Worth As a Bargaining Issue

Although the future legal status of comparable worth is unclear, there is no doubt that it is a legitimate subject for collective bargaining. A number of unions and organizations of working women have actively advocated equal pay for jobs of comparable worth,[8] and many of the litigation efforts have had union sponsorship or support. These groups have also been active in seeking comparable worth wage adjustments as part of Title VII compliance programs and as out-of-court settlements of discrimination suits. Organizations involved include the Coalition of Labor Union Women, the Graphic Arts International Unions, the United Food and Commercial Workers Union, the American Federation of State, County, and Municipal Employees, the International Union of Electrical Workers, the Communications Workers of America, Working Women, and Women Employed. Additionally, the 1979 AFL-CIO convention adopted a motion supporting equal wages for jobs of comparable worth.[9]

[7] For a discussion of the legal background, see Ruth G. Blumrosen, "Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964," *University of Michigan Journal of Law Reform* 12 (Spring 1979), pp. 397-502.

[8] For a detailed description of these activities, see *Manual on Pay Equity*, cited at note 4, chs. 6 and 7.

[9] *Ibid.*, ch. 7.

Comparable worth has also emerged in contract negotiations. In 1981, AFSCME Local 101 struck over the comparable worth issue during its negotiations with the city of San Jose. The strike lasted a little more than a week, and comparable worth adjustments were written into the collective bargaining agreement. Local 101 represents about 2000 employees in clerical, administrative, parks and recreation, library, and airport refueling positions.

The basis for the adjustment was a study done by Hay Associates which showed that predominantly male jobs were paid more [sic] than traditionally female jobs requiring comparable skills and responsibility. The contract provides for adjustments over a two-year period, the adjustments being based on the difference between the average wage paid for that job and the average wages for comparable jobs. The maximum wage adjustment over the two-year period is 15 percent, seven and one-half percent each year. Some 62 of 210 job classes will be affected, with adjustments scheduled for both predominantly female classifications and mixed sex/job classes. The large number of job classes affected, and the inclusion of mixed sex jobs in the adjustment process, reflect the union's concern with having a broad spectrum of members eligible for adjustments. Because it limits adjustments to 15 percent, the contract does not eliminate wage differentials among jobs of comparable value. Therefore, it is likely that comparable worth will again be a bargaining issue between the union and the city in 1983.[10]

Comparable worth supporters are also looking to state legislation as a mechanism to achieve wage adjustments. Wage structure reviews or comparable worth studies of public employees' wages have been conducted in Washington, Michigan, Minnesota, Nebraska, Idaho, New Jersey, Wisconsin, Georgia, and Iowa. Some of these studies came about as a result of collective bargaining, while others resulted from a legislative mandate. Although they show that predominantly female jobs are undervalued in comparison to predominantly male jobs, any recommended increases have generally not been implemented. In Idaho, however, wages in 1100 job classifications were adjusted, at a total cost of seven million dollars.[11] Cost obviously is one factor slowing the implementation of wage adjustments.

Future Implications

As public awareness of the comparable worth issue grows, it is likely to spark the interest of women who find themselves concentrated in primarily female occupations. Once sparked, this interest will not fade quickly. Some of it will be expressed through litigation. Regardless of any final disposition of the issue by the courts, however, comparable worth is likely to remain a wage-setting issue both at the bargaining table and for nonunion employers.

Although the issue will be a persistent one for unions and employers alike, it probably will surface more rapidly as an internal issue for the former than for the latter because of a union's representative function. The unions most affected are likely to have two characteristics. First, like AFSCME, they will probably represent workers with diverse jobs in large organizations. They also will

[10] Interview with David Heinrichsen, Local 101, American Federation of State, County, and Municipal Employees, AFL-CIO, July 22, 1981.

[11] *Manual on Pay Equity*, ch. 6.

have enough women members to make them a viable internal political force but also a high enough proportion of male members to enable meaningful wage comparisons to be made between male and female jobs.

Because comparable worth wage adjustments will change long-standing wage differentials, they have the potential for creating internal political problems for unions. These problems will be particularly acute if male workers see comparable worth adjustments as coming at their expense. On the other hand, comparable worth is potentially an extremely powerful organizing issue for unions.

Comparable worth also has the potential for affecting many employers. If it emerges as a collective bargaining trend, some nonunion employers may want to review their compensation programs, particularly if they see comparable wages increasing employee interest in unionization. If a clear judicial trend toward recognizing comparable worth as a legitimate issue develops, this, too, will be an additional impetus for employers to take proactive measures. Employers most likely to respond to these trends by reviewing their compensation programs are those employing large numbers of unorganized white-collar women.

Several important and related questions remain. What employment effects will result from comparable worth adjustments? Will employers adapt by hiring fewer people in the affected occupations? Will the higher wages in predominantly female jobs increase both male and female competition for these jobs? The answers to these questions obviously will vary by industry and according to the manner in which specific comparable worth adjustments are structured.

Finally, it is interesting to speculate about the impact of the emergence of the comparable worth issue on women concentrated in low-wage, predominantly female jobs. Generally, the comparable worth studies show wages for female jobs to be about 20 percent less than wages for comparable male jobs. The dollar amount of the gap is significant for most people, which suggests that comparable worth and its measurement will be a continuing wage-setting issue.

[The End]

SESSION VI

Productivity and Technology

Labor-Management Relations and Technological Change: Some International Comparisons Between Australia and Britain*

By GREG BAMBER and RUSSELL LANSBURY

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WE USE the term "technological change" to mean any change in the methods or context of work that is connected with the use of new machinery. At present, the growing use of microelectronics is an important basis of fundamental changes. Manual workers are being confronted with increasingly automated factories, while white-collar workers are facing an even more profound "microelectronic revolution" in their offices. The introduction of new technology has probably exaggerated the reductions in employment in manufacturing sectors in the developed economies, while there has been a relative growth in the services. This has usually been the case in both the private and public sectors (though the size of the latter largely depends on political decisions about public spending).

Discussion about the microelectronic revolution is relatively new, but there are many echoes from earlier American discussions in the 1950s about automation. To a greater extent than in the U. S., however, the economic and social impact of the new technology has recently been the subject of much debate in most other industrialized countries, including Australia and Britain. It has emerged as a central issue in these two countries as their economies have slumped and unemployment has risen.

The labor movements of both countries are concerned about the methods used to introduce new technology and the degree to which it may be used to deskill and displace existing jobs. While most unions concede that some new jobs may emerge as a result

* This article draws on G. J. Bamber and P. Willman, "Technological Changes and Industrial Relations in Britain," and R. D. Lansbury and E. Davies, "Technological Change and Industrial Relations in Australia," both of which are included in "Technological Change and Industrial Relations: An International Symposium," a special issue of the *Bulletin of Comparative Labour Relations* 12 (Summer 1983). The present authors thank their coauthors and the *Bulletin's* editor, Roger Blanpain.

of technological change, they fear that these jobs will require skills that few of the displaced workers have or are able to acquire easily. An alternative view, generally expressed by the employers, is that technological change is a spur to economic growth and higher productivity, without which pay and standards of living will decline. They argue that new technology must be introduced to create or maintain jobs and that it can often improve existing ones. Failure to keep abreast of innovations will mean that they will become less competitive and other firms will take over their markets.

Both Australia and Britain have adversarial traditions of industrial relations, with some similarities to the American traditions. But we can also contrast them with the U. S.; one is a newer and the other an older industrial society. Each has a much higher proportion of unionized workers. This is partly a reflection of the greater extent of white-collar unionism in these two countries, neither of which has been experiencing a decline in overall union density, unlike the American labor movement.

Australia has inherited more characteristics and institutions from Britain. The union movement in Australia grew out of the British model and has maintained strong links with its British counterpart. Until World War II, the Australian economy was closely integrated with Britain, and many of the largest firms in Australia were originally British. Many firms have recruited managerial and technical staff from Britain. Thus, there have been strong British influences on both employers and unions in Australia. However, Australia is increasingly connected economically with Japan where the processes of pay determination and dispute settlement differ from those in Britain.

Although there has been a great deal of new labor law in Britain since 1964, the practitioners there still rely mainly on voluntary procedures (to an even greater extent than in the U. S.). Australia has a system of compulsory arbitration.

Different Institutional Frameworks

In Australia, the arbitration tribunals have long shaped the attitudes and behavior of the parties. The Conciliation and Arbitration Act of 1904, which established the federal tribunal, provided recognition for registered unions and empowered them to make claims for all their members in an industry. Such unions can ask the Australian Conciliation and Arbitration Commission to make an award (on pay or on other terms of employment) which can be legally enforced. On the other hand, ACAC will rule only on industrial matters that do not interfere with such management "prerogatives" as the introduction of new technology or changes in work practices. Although the concept of prerogatives has been weakened over time, it is still a significant barrier to unions which seek to influence management decisions on technological change.

The arbitration system has encouraged centralized decisionmaking by both employers and unions and has discouraged the development of strong union locals or a powerful shop steward movement. Hence, policymaking on new technology has been largely by union executives and officials rather than by rank-and-file members and stewards.

However, direct negotiations do occur between the parties, both within and outside the framework of compulsory arbitration. Agreements di-

rectly negotiated between the unions and employers may coexist with or take the place of arbitrated awards. They may either deal comprehensively with the terms and conditions in particular workplaces or supplement existing awards. There has been a substantial increase in the number of directly registered agreements; this represents a trend towards "a peculiar hybrid of quasi-collective bargaining" or a form of "arbitrated bargaining."[1]

In Britain, collective bargaining is the dominant means of job regulation, but the form and substance of bargaining varies between industries. In some industries, such as garment manufacturing, multiemployer bargaining is most important, while in others, such as vehicle-building, bargaining is mainly within single companies—at the company and/or plant level. The range of bargaining issues also varies and is generally wider in industries that have strong traditions of shop-steward activity, such as engineering (metal manufacturing). More than 75 percent of all employers are covered by some form of collective agreement. In a recent survey of manufacturing industry, 53 percent had a union shop agreement and only 10 percent reported no bargaining.[2]

After World War II, there was a trend in Britain towards a greater degree of decentralized bargaining; this was against a background of relatively low unemployment, but it also reflected attempts by both stewards and managers to take more initiatives at the local level. It was a need to introduce changes into oil refining, for example, that started a fashion of "productivity bargaining."[3] Particularly in relation to technological change, most managers were convinced that it was preferable to negotiate directly with the local stewards concerned rather than with the full-time union officials. Nevertheless, most collective bargaining for nonmanual employees is usually more centralized than for manual employees.

Governmental Initiatives

In 1979, the Australian government established a Committee of Inquiry into Technological Change in Australia to assist it with policy-making "in order to maximise [the] economic, social, and other benefits and to minimise any possible adverse consequences [sic]." Its recommendations have been controversial. The Fraser government argued that CITCA supported its view that technological change was a major source of economic growth and that industry should keep abreast of new developments but make full use of Australian expertise in developing new products or processes.[4] The government was less enthusiastic, however, about some of CITCA's detailed proposals for reforming Australia's industrial relations system to provide incentives for unions and employees to cooperate with employers in the introduction of technological change. The proposals included making it easier for unions to amalgamate, legislating to improve the working environment

[1] J. R. Niland, *Collective Bargaining and Compulsory Arbitration in Australia* (Sydney: University of New South Wales Press, 1978); D. Yerbury and J. E. Isaac, "Recent Trends in Collective Bargaining in Australia," *International Labour Review* 103, No. 5 (1971).

[2] W. Brown, ed., *The Changing Contours of British Industrial Relations: A Survey of Manufacturing Industry* (Oxford: Blackwell, 1981).

[3] A. Flanders, *The Fawley Productivity Agreements* (London: Faber, 1964).

[4] *Report of CITCA: Techological Change in Australia* (Canberra, 1980); P. R. Lynch, "Ministerial Statement on CITCA: Government Response" (Canberra: Hansard, Sept. 18, 1980).

(including occupational health and safety proposals), and compensating people who were laid off.

In general, the Fraser government tended to endorse CITCA's more nebulous generalizations and to ignore many of its specific recommendations, especially where these involved intervention or structural change.

The debate about the microelectronic resolution gathered momentum in several European countries in 1978. The French Nora-Minc report was very influential, and there were many other studies published, notably in West Germany and the Scandinavian countries. (However, their debate focused more on the implications for privacy and industrial democracy than did those in Britain.) To illustrate some of the landmarks of 1978 in Britain, the BBC screened an influential TV documentary, "Now the Chips Are Down," the Trades Union Congress (TUC) and the main political parties held debates at their annual conferences, and the government's "think tank" produced a report on the employment implications.[5]

Although Britain has a more centralized form of government than does Australia, the British government's approach has been more fragmented. One of its departments is responsible for promoting new technology in industry, while another shares responsibility for education and encouraging basic research with numerous local authorities and several research councils. The Department of Employment produced a report in 1979 which repeated the familiar rhetoric that failure to exploit new technology will have more deleterious consequences for employment than any consequences of accepting or applying it. The report advocated a participative approach to technological change and argued that, if firms use new technology to diversify their activities, there is no reason why compulsory dismissals should follow: "those British companies with formal (or informal) 'no redundancy' agreements are on the whole those which experience fewer industrial relations problems over the introduction of new technology."[6]

The British Manpower Services Commission (MSC) is responsible for trying to cushion the impact of technological change on the labor market. It has taken "special measures" to help alleviate unemployment, and, together with the Department of Industry, it has helped to establish information technology centres for training young people. Critics of the government argue that these are simply palliative measures which are unlikely to have much impact on either technological change or the trend of rising unemployment and that, on the one hand, it is expanding the number of training courses, but on the other hand it has cut the tripartite industrial training arrangements.

There are other governmental agencies which can provide advice to employers and unions about certain aspects of innovation in industry. Each of these bodies, however, has other functions. The National Economic Development Office (NEDO) has strongly urged successive British governments to adopt more positive adjustment policies to assist with any dislocation or hardship that

[5] S. Nora and A. Minc, *L'Informatisation de la Societé* (Paris: La Documentation Francaise, 1978), also published in English by MIT Press; G. J. Bamber, "Microchips and Industrial Relations," *Industrial Relations Journal* 11 (November/December 1980).

[6] J. Sleigh et al., *The Manpower Implications of Microelectronic Technology* (London: Her Majesty's Stationery Office, 1979).

may result from technological change.[7] There is still no one body in Britain which is charged with confronting the issues associated with technological change; however, in 1981 the Prime Minister did appoint Britain's first Minister of Information Technology.

The Unions

The establishment of the arbitration system in Australia encouraged the rapid growth of unions. Slightly more than half of the Australian labor force was unionized in 1921; this is still the level in the 1980s, though union density is higher among manual than nonmanual emloyees. The Australian Council of Trade Unions is the main peak council and covers more than 90 percent of union members. It has little formal control over its affiliates but can exercise considerable influence over their activities.

At the 1975 ACTU Congress, delegates argued that technological change *should* benefit the Australian work force by increasing productivity and thereby leading to improved pay and conditions. Since some claimed that it was being used to deskill many jobs, the ACTU resolved that "New Technology should be introduced in a way which will mould the machines to the needs of men and not men to the needs of the machines." Therefore, it wanted employers to involve unions in the process of planning innovations and called on the government to conduct research into the likely impact of future technological changes. It sought legislation to determine that no changes would be introduced until possible adverse effects had been minimized. It also wanted protection for workers who were laid off and demanded six months' notice before any layoffs and a minimum of four weeks' pay in respect of each year of employment, to compensate people who were displaced.[8]

In principle, the ACTU welcomes new technologies, but conditional [sic] on measures to offset the ill-effects that may accompany many such innovations. Some individual unions have developed extensive policies of their own on technological change, particularly the unions in the metals, printing, banking, insurance, and retail industries.

In contrast to Australia, the British labor movement did not achieve the 50-percent level of unionization until the 1970s. In the early 1980s slightly more than half of the labor force are union members and the vast majority belong to unions affiliated with the TUC. Current union density among manual workers is approximately 66 percent, while white-collar membership rose markedly during the 1970s to 45 percent.[9] Workers in Britain have been concerned about technological change since before the "Luddites" were smashing machines in the early 19th century. Since 1978, many union research departments have produced reports about new technology, and the TUC has made ten recommendations for union officials who are faced with technological change. These are summarized in the figure.

[7] In view of Britain's adversary traditions in industrial relations, NEDO is an interesting 20-year-old example of cooperation between the parties, as it aims to achieve a tripartite consensus on economic policies between the government, employers, and unions.

[8] Australian Council of Trade Unions, *ACTU Policy Decisions, 1951-78* (Melbourne: ACTU, 1978).

[9] G. S. Bain and R. J. Price, *Profiles of Union Growth: A Comparative Statistical Portrait of Eight Countries* (Oxford: Blackwell, 1980).

THE TUC'S POLICY ON NEW TECHNOLOGY

1. Seek agreements in advance of change, following consultation with the employers (e.g., in "new technology agreements").

2. Ensure that collective bargaining embraces all unions.

3. Use experts to evaluate the information, which employers should provide regularly; obtain paid time-off for training union representatives.

4. Argue that new technology should be used to increase the level of output and to provide new products or services rather than to cut manning. Seek guaranteed job security wherever possible; otherwise negotiate good compensation.

5. Set up mutually agreed training schemes with firms.

6. Aim for shorter working hours, sabbaticals, early retirement, and eliminate regular overtime.

7. Obtain rewards for any new skills but distribute the benefits widely; avoid dividing the work force into a highly skilled, well-paid minority and a deskilled but low-paid majority.

8. Be wary of employers' exerting more control over workers' lives; be involved in the design of new machines and agree on procedures about any data on work performance.

9. Monitor hazards which may arise (e.g., from visual display units); check that manning levels are sufficient for satisfactory maintenance for machines and regular breaks for operatives.

10. Set up joint union/management teams to study the effects of new technology during trial periods; deal with any disputes swiftly.

Source: Trades Union Congress, *Employment and Technology* (London: TUC, 1979).

Although many union negotiators have adopted the TUC's recommendations, they have rarely succeeded in implementing them at the workplace level. However, as the recession has deepened, in the early 1980s the TUC has concentrated more attention on macroeconomic policy. It is advocating a Keynesian reflationary program, with more expenditures on health, education, training, regional aid, and construction projects but with selective import controls.

One common problem for unions in both countries is that those who make the decisions about the design of new technology are often inaccessible to the people who will have to work with it. Such decisions are often strongly influenced by external suppliers and consultants and are often taken at distant company head offices, whereas unions in Australia and Britain have been more used to dealing with local managers and employers' associations.

Employers and Their Associations

The early growth of unions in both countries encouraged the development of employers' associations and led them to place greater emphasis on industrial relations than in many other countries. In both Australia and Britain there are more employers' associations than unions, and their organization tends to be less cohesive.

It was not until 1977 that the Australian employers formed a single peak council: the Confederation of Australian Industry. Its authority is limited, and some of the larger industry associations, such as the Metal Trades Industrial Association (MITA) and State Employers' Federations exercise more influence than the CAI over their member organizations than the CAI does.

Nevertheless, the CAI has sought to speak for all employers on policy-related issues such as the introduction of new technology. It has asked the government to set up machinery to facilitate the transfer of new technologies, to increase the funding available for innovations, and to review the regulations which hamper the introduction of new technologies. It has also argued that education and training programs should be designed to harmonize with "industrial needs." At least one of these proposals has been implemented: the government set up a Technology Transfer Council, which aims to promote the transfer of technology "from all known sources to all levels of industry with a view to improving and increasing productivity."

In general, employers have argued that the harnessing of new technologies represents the key to future economic growth in Australia. They also point out that machines can be substituted for human labor in the performance of many repetitive and unhealthy tasks. However, employers have steadfastly argued that the current relatively high levels of unemployment are not due to technological change but rather to the general depression in the economy and, notwithstanding this, to high levels of pay. And, they say, sudden and unexpected changes in government policy have also served to increase unemployment.[10]

Employers have, nevertheless, recognized the need for policies to cater to those adversely affected by technological changes. They have recommended guidelines on consultation with employees about layoffs, opportunities for retraining, and assistance schemes for anyone displaced. The employers prefer such "guidelines" to legal remedies which, they argue, may delay or deter the introduction of new technologies.

British employers have combined in associations for at least 200 years, partly to counter the power of unions. These associations have often taken the initiative in establishing new collective bargaining arrangements, notably before World War I. One central peak council was formed in 1965—the Confederation of British Industry (CBI).

In comparison with the various initiatives and the volume of material published by British unions, the employers have kept a low profile on issues associated with technological change and have published relatively little. Undoubtedly, employers' associations do discuss these issues, but they may experience more difficulty in agreeing to common policies and they are usually more secretive than unions; thus, much less is known about their policies. Nevertheless, this is not a significant gap, as the role of these associations in the "formal system" of British industrial relations has declined. Moreover, the CBI has been more forthcoming than most of the individual associations.

At its 1979 National Conference, the CBI joined the public debate by criticizing the TUC for seeking benefits in advance of the new technology but broadly welcomed TUC's initiatives as a "generally positive and constructive approach to the need for technological progress." CBI delegates unanimously resolved that "prosperity in the 1980s will depend upon investment in, and acceptance of, new technology which will promote competitiveness." They went on to urge "that fuller employment will not stem from artificial protection of jobs but from development of the economy."[11]

[10] Confederation of Australian Industry, *CAI News* 4, No. 6 (1981).

[11] Confederation of British Industry, "The Challenge and Implications of Technology," CBI National Conference Background Paper III (London, 1979); *Conference Report: Birmingham 1979* (London: CBI).

As in Australia, the British employers tend to have a more optimistic public view than most unions about unemployment. For instance, one delegate argued that the silicon chip would create two new jobs for every one lost (but he wondered whether such opportunities would be in Japan, West Germany, or Britain). Those who take a more optimistic view of the employment implications do not rely exclusively on the new jobs that may be associated with microelectronics but also argue that it can be used to create new wealth, which should generate other jobs.

Partly as a reaction to the TUC's recommendations, early in 1980 the CBI issued a series of recommendations, but they are more tentative than TUC's and they do not necessarily represent official CBI policy. However, perhaps it is significant that they are presented under the heading "Seeking the Common Ground." Although the CBI statement does not specifically respond to the TUC's policy and there are obvious differences of emphasis, the CBI and TUC leaders seem to hold similar views about many of the major issues. Both parties appear to believe that, if Britain does not invest and innovate more, its industry will continue to decline. Therefore, they tried to agree on a joint statement about new technology agreements. Interestingly, Kahn-Freund advocated that the TUC and CBI should go even further and enter into "basic agreements" on pay and conditions, as do the central organizations in some other countries.[12]

Although the national union and employers' leaders did agree on a draft joint statement, it was opposed by a significant minority of employers. In the chemical industry, for instance, the employers preferred to retain their existing arrangements for dealing with change which, they said, had worked adequately in the past. They wanted to avoid a new national agreement which some feared might detract from their goals. Moreover, with current changes in the law and increasing unemployment, some employers may have felt that they were in the ascendency over the unions and did not want to be constrained by any formal statements. In any case, in the field of technological change in particular, some employers would not concede any of their prerogatives to the CBI, which they see as a remote central organization that is sometimes "too close" to the government and the unions.

Of course, this typifies the problems faced by central confederations of both employers and unions in the U. S. and Australia as well as in Britain. In reality, the CBI has no power over how its member firms behave at the workplace level, just as the TUC has little power over rank-and-file unionists. Even if a central understanding had proved possible, it is unlikely that it could have controlled behavior or generated commitment at local levels. Such national level policies might be of little interest to the people who are actually innovating, or having to negotiate about some of the associated issues, on the shop floor.

Pay Differentials

A wide range of issues have arisen from technological change and become subjects for negotiation between employers and unions. Many factors influence the degree of importance attached to these issues and the means by which differences are settled between the parties. These include their relative

[12] O. Kahn-Freund, *Labour Relations: Heritage and Adjustment* (Oxford: Oxford University Press, 1979).

bargaining strengths and organizational structure, the degree of technological change experienced and/or now seen as inevitable, the role of government and other agencies (including arbitration tribunals) in the industrial relations system, and the prevailing social and economic climate. While the emphasis given to different issues has varied in Britain and Australia, we will compare three areas of common concern: pay differentials, job security, and employee participation in decisionmaking.

Australia has traditionally followed a centralized approach to pay determination. In making awards that specify minimum levels of pay and conditions, ACAC has generally applied the principle of "comparative wage justice," that is, employees doing the same work for different employers or in different industries should receive the same wages, irrespective of their employer's ability to pay. This has led to a rigid structure of wage relativities in which even minor changes in one award lead to corresponding changes in other awards. There is also an annual national review of the economy (the national wage case) in which all award wages are simultaneously altered, to ensure the highest award rates based upon economic capacity to pay.

CITCA concluded that this system distorted wage relativities for skilled workers, which led to the paradox of high unemployment but severe shortages of some skills. The current pay structure reduced the rewards and status of certain occupations, including some of those associated with new technology. Thus, there were too few new entrants and individuals had little incentive to upgrade their skills.

Accordingly, CITCA recommended a reappraisal of wage relativities to provide for differentials that more properly reflect skills and responsibilities. It also recommended that the multiplicity of different job classifications and pay levels should be grouped into broad bands, as rates of pay could then be more flexible in response to changes in technology and other circumstances. There has been some movement in this direction, but neither the unions nor the employers have welcomed the concept.

Pay determination in Britain has been much less centralized, especially since World War II. Although in many industries there is a "formal system" of industrywide collective bargaining, in practice this may only establish basic pay rates. Actual earnings are often more strongly influenced by plant- and/or company-level bargaining which supplements or even replaces industry-level agreements. This is particularly the case in relation to productivity bargaining and technological change, which would be difficult to determine at the industry level. Therefore, even within one local labor market there may be wide differences between firms in the level of earnings for a given skill.

In Britain, the different approaches to negotiations on the rewards for new skills can be characterized as either a "bridgehead" or a "broad front" approach. Under the former, the parties may agree that a new set of skills is sufficiently different to justify a new higher-paid specialist grade, such as "electronics technician." But under the latter they try to maintain one broad pay structure without allowing new separate grades. For example, Heinz has adopted a bridgehead approach by creating new grades of electronic electrician and electronic instrument mechanic, besides the established grades of electrician and instrument mechanic. By contrast, Metal Box has adopted a broad front approach.

The parties do not decide in a vacuum which approach to pursue. Most negotiations take place against the background

of previous agreements; collective bargaining implies a continuous relationship. Furthermore, the main unions in different bargaining units may have differing interests. Where a craft union dominates, it is more likely to aim for a bridgehead for its members; leaders of some craft unions believe that they will benefit from many of the current changes. Where a more general (noncraft) union is dominant, it is more likely to pursue a broad front approach and, thereby, try to spread the benefits more widely through its more extensive membership. However, in the early 1980s most unions are experiencing great difficulty winning any real financial gains.

Job Security

The Australian government has played a very limited role in protecting employees who are laid off, whether through technological change or any other reason. This has been partly due to the federal government's lack of jurisdiction in the private sector and the general unwillingness of state governments to use their powers in this area. Two state Labor governments have made laws on "employment protection," but these apply only to employees under state awards and have yet to be tested in practice.

The industrial tribunals have shown little inclination to take initiatives, as they do not want to encroach on managerial prerogatives. Where tribunals have been asked to settle industrial disputes about layoffs, they have preferred to make awards only for specific cases rather than to make any general prescriptions.[13] They have tended to award compensation only to those people laid off who would have had a reasonable expectation of job security and where the layoff is clearly within the control of the employer. Few awards establish protection against future layoffs; entitlements to retraining are rarely inserted in awards, and they usually leave management's decision-making rights intact.

CITCA recommended that the federal government should support the introduction of a layoff compensation scheme which would include a period of advance notice, compensation for lost seniority and other accumulated credits, and assistance in finding alternative employment. It recommended that the government sponsor a test case before ACAC to establish the above provisions within a federal award. It also called for a temporary income maintenance scheme for people laid off. The Fraser government formally endorsed some of these recommendations (adequate advance notice, provision of information, and consultation) but it balked at the proposed compensation scheme.

Unlike both the U. S. and Australia, Britain does have a legal framework for regulating dismissals. In 1965 the Labor government introduced compulsory layoff compensation. It appeared to have rather ambiguous motives for making this law. One was to discourage workers and unions from opposing collective dismissals, which it saw as necessary in some cases when new technology was introduced. The government was aiming to remove an element of worker resistance as an obstacle to technological change.[14]

The amount of "redundancy pay" is related to an individual's current pay, age, and length of service. Although many employers and union leaders were initially suspicious of this scheme, it is now widely accepted as a fact of

[13] S. Deery, "Trade Unions, Technological Change, and Redundancy Protection in Australia," *Journal of Industrial Relations* 24 (June 1982).

[14] Cf. R. H. Fryer, "Redundancy, Values, and Public Policy," *Industrial Relations Journal* 4 (Summer 1973).

industrial life in Britain. Many firms and unions have negotiated agreements to supplement the statutory minimum levels of compensation and periods of notice. Such agreements may also encourage "natural wastage" by early retirement and voluntary resignations and establish criteria for selecting people to be laid off.

Some critics see such agreements as a way of selling jobs; workers may be "bribed" to relinquish their jobs, which makes it harder for their children to find work, especially in communities that are dominated by one declining company. There have been various forms of protest about mass dismissals, including strikes, occupations, and proposals to establish workers' cooperatives.

The Department of Employment's 1979 report advocated that unions should seek agreements on more flexible manning in exchange for greater job security, which is probably the basic motive for organized labor. In spite of TUC's fourth recommendation (see the figure), especially in a recession employers may want to cut manning rather than to diversify or to increase output. The immediate union reaction is to oppose such cuts. With high unemployment, unions are decreasingly inclined to condone job losses. But it is very difficult for them to prevent layoffs, especially against the background of the compensation scheme. Eventually, and after a "cooling out" process, workers invariably lose their jobs, though the "pill" may be sweetened by apparently high compensation. It is even more difficult for them to prevent job losses through natural wastage, which they are tending to oppose as exacerbating unemployment, especially among young people. This is one reason why unions are campaigning for reductions in lifetime hours of work—to share the available jobs.

As well as the financial cost of paying part of the compensation, layoffs may also have a high nonquantifiable cost to employers if they shatter the relations of trust between the parties.[15] Such "costs" may take much longer to recoup than the cost of continuous employment during a temporary recession or while changes are introduced. Hence, enlightened managers regard layoffs as a last resort. Instead, they try to plan their manpower to avoid layoffs if possible and, in both Australia and Britain, there are still some employers who are "hoarding" skilled labor in the hope of an economic upturn.

Employee Participation

Although the issue of technological change has arisen separately from the debate about industrial democracy and employee participation, the two issues are often closely related, particularly as there has been increasing emphasis in some countries on the question of who controls the introduction of new technology. With their adversarial traditions, however, there has generally been less emphasis on this question and less interest in schemes for employee participation in English-speaking countries than in Scandinavia, West Germany, Yugoslavia, and France, for example. Nonetheless, many Australian and British unions have increasingly wanted to participate in decisionmaking and gain access to information about corporate planning and projected innovations.

In 1977 the ACTU adopted a comprehensive policy on industrial democracy which supported both representative and participative democracy at all levels of the enterprise or undertaking.[16] The

[15] Cf. A. Fox, *Man Mismanagement* (London: Hutchinson, 1974).

[16] R. D. Lansbury and G. J. Prideaux, *Improving the Quality of Work Life* (Melbourne: Longman Cheshire, 1978).

Fraser government's "employee participation" policy had many points in common with the ACTU's approach. Furthermore, the Australian Public Service Board recommends that managers consult the relevant unions before deciding to make changes and provide information on the proposed staffing, any layoffs, and the work environment. More recently, the state of Victoria made similar recommendations for both the private and public sectors of industry. Despite the number of such policies adopted by unions, employers' associations, and governments, Australian employers have been reluctant to involve employees or unions in decisionmaking. A survey of some 800 federal awards and agreements in 1978 revealed that only 14 awards provided for advance notice about layoffs and/or consultation with employees or their representatives.

In the 1970s, some British unions were finding that collective bargaining was often not an effective way of influencing employers' major decisions on innovations or plant closures. This is one reason why the TUC changed its previously ambivalent view about industrial democracy to one of conditional support.[17] However, the 1977 Bullock Report's recommendations on worker directors were not implemented, for at least three reasons. First, individual unions held widely diverging views about industrial democracy; second, there was strong opposition from much of the employers' lobby; and, third, while the Labor government was dithering about legislation, the voters elected a Conservative government in 1979 that was opposed to legislation on industrial democracy. Nonetheless, in 1982, as a byproduct of another new labor law, the Conservative government established a new requirement that larger firms would have to make an annual statement about "employee involvement."

Some managers in Britain think that another way of winning the initiative, the employers' prerogative to manage, is by sharing control; in certain cases this would be in order to regain control.[18] This is one reason why certain companies have promoted employee participation schemes. The few that do exist often owe more to employers' initiatives than to union or worker demands.

As a member of the European Economic Community, it is possible that Britain may soon be faced with EEC proposals to foster worker directors and to encourage companies to disclose more information to unions before making decisions about technological change and other matters. Both the current government and most of the employers' lobbies (including American multinational companies) are strongly resisting these EEC proposals. However, the British government and some employers' organizations are arguing that firms should foster more employee involvement, if only to preempt more far-reaching future legislation, either from the EEC or from an alternative British government. Such arguments often also add that contemporary employees expect to be consulted about decisions that affect them and, moreover, that good employee participation schemes may boost productivity and channel workers' energies into their work rather than a union.

British unions have traditionally sought to intervene in management decisionmaking through an extension of collective bargaining. When confronted with technological change, many have tried to negotiate a new technology

[17] Lord Bullock, *Report of the Committee of Inquiry on Industrial Democracy* (London: Her Majesty's Stationery Office, 1977).

[18] J. Purcell and R. H. Smith, *The Control of Work* (London: Macmillan, 1979).

agreement, in accordance with TUC's policy. Most employers have not been willing to sign such an agreement; most of those that have been signed relate to white-collar workers.[19]

Unions representing manual workers have not been as active in trying to negotiate such special agreements, in part, perhaps, because some groups of manual workers have long enjoyed status quo arrangements, a form of employee participation. These arrangements establish that, "where workers object to a proposed change in an established practice, the practice is to continue to operate until the dispute has been dealt with through [the procedural agreement]."[20]

Such arrangements were formally included in the engineering (metal) industrywide agreement in 1979. In other industries, many work groups enjoy less formal understandings. Given that status quo arrangements enhance their power, stewards are reluctant to give them up. Where status quo is formally agreed or an informal custom, for stewards a proposed change implies an opportunity for bargaining. Status quo is especially important for unions confronted with changing work practices. Where there are no such arrangements, unions may see a new technology agreement as an opportunity to formalize a status quo clause.

In the early 1980s, however, many managers in Britain are being more assertive than hitherto. Bolstered by a resolute Conservative government and high unemployment, they are persuading unions to abandon status quo arrangements and other "restrictive practices." This new managerial approach may involve appealing over the heads of stewards directly to the rank and file. In some cases such approaches have been successful in persuading people that they must change their work practices (which may mean accepting new technology) simply because the stark alternative is even higher unemployment.

Conclusion

We believe that the technical aspects of innovations are often no more important for labor-management relations than why, when, and how the changes are made and the nature of the relationship between the parties.

Governments, unions, and employers in both Australia and Britain have formulated policies on increasing productivity and introducing technological change while they tried to minimize the social and economic consequences. Yet, in reality, these policies appear to have had little impact on the way in which innovations have been made. In both countries, employers have often taken the approach of making changes and then waiting to see what the reaction is. Only a minority have [sic] sought fully to involve unions and employees in making such decisions.

In Australia, many unions have looked to the arbitration tribunals to protect their interests. Yet the tribunals have been unwilling to interfere in the rights of management to organize their business in whatever way they see fit, including the introduction of new technology.

Most British unions have traditionally tried to exert control over workplace issues by collective bargaining. However, while unions in Britain have generally recognized the need to extend the scope of collective bargaining in order to influence the introduction of new technology, few have succeeded in achieving this end. Neither the adversarial traditions of labor-manage-

[19] R. Williams and R. Moseley, "The Trade Union Response to Information Technology," University of Aston in Birmingham, 1982, mimeo.

[20] H. A. Clegg, *The Changing System of Industrial Relations in Great Britain* (Oxford: Blackwell, 1979).

ment relations nor the structure of collective bargaining in Britain are conducive to these types of negotiations; furthermore, few British unions enjoy exclusive jurisdiction. Particularly in the manufacturing industry the labor movement has often been most effective in local negotiations between managers and stewards (who would frequently belong to a multiunion committee).

Yet, with the growth of multiplant companies, the scope for real joint decisionmaking between stewards and plant managers has diminished. Especially in relation to matters such as large-scale investments and plant closures, decisions tend to be made at the company head-office level, which may be inaccessible. British unions, then, are often not able to influence such corporate decisions, though they may be inaccessible. British unions, sequent veto on implementation—a tactic that is rarely effective except perhaps in the short term.

In Australia, multiplant companies are even more likely to have their head offices overseas, collective bargaining is less well developed, and there are fewer employment protection laws than in Britain. Consequently, despite their being more centralized, Australian unions are no more able to deal with technological changes in multiplant companies than are the British.

In both countries, the reorganization of the union movement on an industry basis would entail the demise of craft and occupational unions. Such a reorganization might create larger and more powerful unions that would be better able to influence corporate strategies, but such a change of union structure is improbable in either country. In spite of all their research reports and policy recommendations, and contrary to the "mythology" that the unions in Australia and Britain are the strongest in the world, neither country's labor movement is exerting much control over technological change except in some isolated cases where they have a temporary advantage of tactical bargaining power. Hence, the way in which new technology is introduced in the future and its effect on industrial relations will depend very much on the attitudes of employers, which will be largely shaped by economic circumstances and by public policies.

Notwithstanding fundamental differences in their larger frameworks, the previous conservative goverments of both countries have played a relatively minor role in regulating the introduction of new technology. This reflected the prevailing ideology in Australia and Britain (and in the U. S.), which spurned government intervention and preferred regulation by market forces.

However, in both Australia and Britain it is quite possible that government policies could be more strongly influenced by the labor movements in the foreseeable future.[21] This might lead to legislation in an attempt to ameliorate the impact of technological change on employment and to promote more joint decisionmaking between employers and unions. Whilst many employers fear socialism, it is likely that the recently elected Labor government in Australia and any future Labor government in Britain would proceed cautiously, through "fine tuning" of their economies and systems of industrial relations rather than through "a social revolution." In view of the generally positive attitude towards increasing productivity and technological change held by the main political parties, a moratorium on new technology is unlikely in either Australia or Britain. **[The End]**

[21] At the time of writing (March 1983), a general election had just taken place in Australia and one will be called in Britain within the next 12 months.

Collective Bargaining, Work Organization, And Worker Participation: The Return To Plant-Level Bargaining

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SIGNIFICANT CHANGES appear to be under way in the relationships among workers, unions, and employers in a number of important sectors of the American economy. Established practices and patterns of behavior are being questioned at various levels of industrial relations, ranging from the highest levels of strategic decisionmaking within firms and unions, to the level at which collective bargaining occurs, and down to the workplace itself. The most visible symbol of the changes occurring in collective bargaining in 1982-1983 has been labeled "concession bargaining."[1]

At the same time, however, an equally important, but less visible, set of changes are under way at the workplace. One source of these workplace changes is arising out of a return to more intensive *negotiations* at the plant level over work rules and work organization arrangements that influence productivity and labor costs. A second source of workplace change is arising out of some of the *worker participation* processes that various unions and employers are experimenting with under labels such as quality of work life, quality circles, employee involvement, labor-management participation teams, etc. While these experiments stand somewhat apart from concession bargaining (many of them predate the wave of concession bargaining that has occurred in the past two years), they interact with plant level bargaining over work rules since participation efforts that endure over time are likely to either directly or indirectly alter the organization of work and the relationships among jobs at the workplace.

Given the limited scope of this paper and the data available at this time, we can only illustrate what we believe to be developments occurring on a larger scale. Thus, our purposes here are only to suggest a framework for interpreting these workplace developments and to offer a set of hypotheses that should be subjected to further empirical testing.

By the term *work organization* we mean the rules governing the design and structure of jobs, the allocation of human resources among jobs, and the access of workers to scarce job

* Support for this research was provided from a grant from the Alfred P. Sloan Foundation. We wish to thank Robert B. McKersie for his helpful comments on an earlier draft. The views and comments expressed in the article are solely those of the authors and do not represent the official views of the Sloan Foundation.

[1] See, for example, Peter Cappelli, "Concession Bargaining and the National Economy, *Proceedings of the 35th Annual Meeting, Industrial Relations Research Association, 1982* (Madison, Wis.: IRRA, 1983) [sic]. This paper was one of several on the topic of concession bargaining presented as part of a session devoted to current developments in collective bargaining.

opportunities.[2] Operationally, this term encompasses the entire spectrum of personnel policies and collective bargaining provisions governing job classifications, promotions, transfers, layoffs, compensation systems and structures, subcontracting, and other issues normally discussed under the title of *work rules*. Indeed, one of the hallmarks of the U. S. collective bargaining system is the detailed and comprehensive nature of the plant-level agreements that govern the various aspects of work organization.

One of the most important set of substantive provisions in the typical plant agreement specifies the job classifications and job titles that are arrayed in a hierarchical job and corresponding wage structure. Embedded in this structure is the principle that individuals are to be compensated on the basis of "equal pay for equal work." Thus, the typical reward system found in collective bargaining agreements is based on *job* content and requirements rather than on an *individual's* knowledge, skill, ability, or performance.

The rules of access to and movement among the jobs in this structure are also specified in the agreement in the form of seniority, promotion, transfer, and bargaining unit jurisdiction provisions. Strict lines of demarcation are specified between the jobs included in the unit and the jobs of supervisors or other workers outside the unit. Within these rules, however, management has the right to assign workers and allocate work. "Management acts and workers grieve" has been adopted as the basic principle for implementing the agreement and resolving differences in interpretation on a day-to-day basis.

The local union and the employer's plant-level industrial relations or personnel staff become the protectors of the rights and rules included in the agreement. *Uniformity* in contract interpretation and application of the agreement is an objective of both the local union and the industrial relations staff. While formal contract provisions are often supplemented over time by informal and often unwritten practices,[3] these unwritten practices can take on the impact of a formal provision because of the ability of the union to use past practice as an argument in grievance arbitration proceedings. The detailed contract, work rules, enforcement procedures, and strong presence of the local union at the plant level all represent the American response to the desire of workers to protect their "job property rights," on the one hand, and employers' interests in achieving an efficient division and utilization of labor and protection of managerial prerogatives and control over the workplace,[4] on the other.

Pressures

Because there is neither a single "most efficient" nor a "most equitable" set of rules and work organization arrangements, the parties develop their guiding principles and practices in particular historical contexts. Over time, principles once established become accepted standards for structuring work organization

[2] Work rules or work organization, in turn, can be seen as one part of the larger set of rules that govern employment relationships. See John T. Dunlop, *Industrial Relations Systems* (New York: Holt, 1958).

[3] See James J. Kuhn, *Bargaining and Grievance Settlement* (New York: Columbia University Press, 1961).

[4] The concept of job property rights arose out of Selig Perlman's *A Theory of the Labor Movement* (New York: Macmillan, 1928). For an early discussion of the concerns that produced the form of job control and detailed contract bargaining that has evolved in the U. S., see Neil W. Chamberlain, *The Union Challenge to Management Control* (New York: Harper, 1948).

arrangements and defining rights, and they tend to change slowly.

Making major, or systemwide, changes in the underlying principles is a costly and difficult task since the rights of those with the most experience or seniority are likely to be threatened by any change in rules. Thus, hard bargaining over work rules tends not to be a continuous process of adaptation but instead a periodic process that occurs under relatively predictable conditions.[5] To make major changes in existing work organization arrangements normally requires the buildup of considerable cost pressures and a change in relative bargaining power in favor of the party interested in making a change. The pressures for a change may come from new technological developments, changed labor or product markets, or, as we shall see, new "principles" for organizing work that are developed in other sectors or in a more recent time period that serve as a source of competition to the existing system.[6]

On the up side of a business cycle, employers are under the greatest pressure to maximize the volume of production and, therefore, are likely to allow informal relaxation of production standards and, more generally, to loosen specific work practices that are not required to achieve high levels of production. This proposition is likely to hold for the early stages of the life cycle of a product, plant, or industry as well.

As demand for the product declines in a business cycle or tapers off during the mature stages of a product life cycle, competitive pressures on a firm lead employers to tighten work practices as the importance of meeting production schedules and achieving high volumes of output decline relative to the importance of controlling costs.[7] During these periods, excess capacity in the industry is likely to develop, placing high-cost producers at a severe competitive disadvantage in the marketplace. All of this suggests that the intensity of management efforts to change work rules will vary inversely with the business cycle and directly with the age in the life cycle of the product or industry.

The tendency for work rule provisions to be addressed more aggressively by employers during periods of slack demand or intensified competition has been well documented in the collective bargaining literature. Slichter described the intensified competition between union and nonunion plants that occurred during various recessions and the depression of the 1930s.[8] The productivity bargaining literature of the 1960s and early 1970s[9] represents another installment in the discussion of how work rules are subject to periodic buyouts of existing practices.

Similarly, the recession of 1958-1959 produced another round of managerial efforts to take a "hard line" on work rules and to regain some of the prerogatives that were incrementally lost during the expensionary [sic] period

[5] See E. Robert Livernash, "The General Problem of Work Rules," *Proceedings of the 14th Annual Meeting, Industrial Relations Research Association, 1961* (Madison, Wis.: IRRA, 1962), pp. 1-10 [sic].

[6] For a discussion of the hypothesis that technological changes and increasing specialization of markets are the driving forces for work rule and work organization changes, see Charles Sabel, *The Division of Labor: Its Progress Through Politics* (London: Cambridge University Press, 1983).

[7] Livernash, cited at note 5, p. 9.

[8] Sumner Slichter, *Union Policies and Industrial Management* (Washington: Brookings Institution, 1941), pp. 345-69.

[9] For a good summary of the productivity bargaining developments during this period, see George P. Shultz and Robert B. McKersie, "Stimulating Productivity: Choices, Problems, and Shares," *British Journal of Industrial Relations* 5 (March 1967), pp. 3-18.

of the post-World War II era.[10] Finally, the 1972 recession prompted at least one observer to document the cases of "reverse collective bargaining" that occurred during that downturn.[11] All of these can be seen as earlier examples of some of the developments in plant level collective bargaining that are occurring in the current recession.

Major collective bargaining agreements reached in 1982 provide a number of examples of work rule revisions which accompanied concessionary wage settlements. As part of the new Master Freight Agreement, for example, over-the-road truck drivers with less than full loads will make local pickup stops and perform duties previously assigned to "local drivers." Airline industry bargaining in 1982 also led to important work rule changes in at least 39 different bargaining units of the 18 major unionized carriers. At United, for example, pilots agreed to reduce crew size from three to two in exchange for new job security protections. Indeed, pilots negotiated changes in pay for nonflying time or some similar scheduling provision with at least 15 of the 18 major carriers.[12]

More generally, the central characteristic of managerial efforts in 1982 negotiations appears to have been a push for increased flexibility in human resource management. This was frequently manifested in proposals for such things as broader job classifications, more managerial discretion in the allocation of overtime, more liberal subcontracting rights, restrictions on voluntary transfers or other movements across jobs, etc. In short, while in earlier periods management efforts tended to concentrate more on manning levels, current attention focuses more directly on flexibility in the use of human resources.

Thus, as in earlier periods of slack labor markets and/or excess capacity in mature product markets, management has intensified its efforts to negotiate changes in work practices that lower labor costs and/or increase productivity. The number of such efforts has increased in response to structural shifts in demand, intensified international competition, and the depths of the current recession.[13]

While the intensity and scope of such efforts may be greater in this recession than in any downturn since the depression of the 1930s and the nature of the changes being sought may be somewhat different, standing alone, these developments would probably not signal anything fundamentally new in U. S. industrial relations. It is only when these developments in negotiations are examined in tandem with some of the current experiments in worker participation that we begin to see arising out of management's current efforts to modify work rules the potential for the emergence of a very different plant level industrial relations system.

Work Organization Reform

Just as Slichter earlier found that the emergence of newer nonunion firms put pressure on work rules and practices in older union firms in the 1930s depression, we now find that newer and more flexible forms of work organization in nonunion firms are likewise exerting significant pressures on the work organization system found

[10] See the Symposium on "The Employer Challenge and the Union Response" in the October 1961 issue of *Industrial Relations*. See also George Strauss, "The Shifting Balance of Power in the Plant," *Industrial Relations* 2 (October 1962), pp. 65-96.

[11] Peter Henle, "Reverse Collective Bargaining: A Look at Some Union Concession Situations," *Industrial and Labor Relations Review* 26 (April 1973), pp. 956-68.

[12] These data were derived from our case study files on this industry.

[13] See Cappelli, cited at note 1.

under most collective bargaining agreements. These newer nonunion systems stress broader banded and fewer job classifications, fewer wage grades, and greater flexibility in job assignments and movement of people across jobs. They also stress use of work-team arrangements rather than individual job descriptions, more extensive communications and informal complaint-handling systems, and, in some of the more advanced cases, wage payment systems that are tied to an individual's knowledge rather than to the specific job being performed. The emergence of these systems, along with intensified pressure to reduce costs from the factors discussed earlier, has posed a threat to union plants competing for the same work. In response, some firms and unions have begun using their worker participation processes to experiment with more flexible forms of work organization.

The current interest in worker participation processes can be traced to the QWL experiments of the late 1960s and early 1970s. Most of these early efforts, however, avoided explicit use of productivity improvement as a goal and explicitly stated that the formal contract provisions and grievance procedures would not be altered by the QWL process. The current round of experimentation, however, appears to be different in both of these respects. Productivity and quality improvement are now more openly discussed objectives. While most participation experiments still provide safeguards against the erosion of contract provisions, in those participation efforts that go beyond the simple quality circle types of programs and address the organization of work, it becomes impossible to avoid modifying contract provisions.

In one case we are studying, for example, a QWL task force of workers and supervisors conducted a year-long study of the production and work organization system of a high-cost unit whose work the management threatened to subcontract to lower cost nonunion vendors. The task force responded by recommending, among other things, that the group: adopt a semi-autonomous work organization system; incorporate routine maintenance functions into the scope of the group's responsibilities; allow use of part-time employees as a buffer against short-run variations in demand and scheduling bottlenecks; and limit movements across jobs within the unit and in and out of the unit. Obviously, these recommendations strike directly at the heart of the contract provisions governing seniority, classifications, compensation, and personnel movements.

The starkest alternative to the traditional work organization systems can be seen in new plants, or what are commonly referred to as "greenfield" sites. While the vast majority of these plants in the U. S. are unorganized, there are at least a small number of relatively new unionized plants that are designed around these newer concepts. One plant, for example, that has been in operation since 1978 has a six-page collective bargaining agreement and is organized around socio-technical design concepts. Compensation is based on a pay-for-knowledge procedure, with six levels of proficiency across the entire plant. Grievances or complaints are heard by a peer review board and, while arbitration is available, it has yet to be used in the five-year history of the plant.

In other plants, work areas engaged in direct competition for new work have adopted new forms of work organization, as part of the overlap between work rule changes and worker participation programs. Meanwhile, other work areas in these plants operate in the traditional style.

Our purpose in describing these new systems is neither to extol their virtues nor to critique their flaws. While some of these systems have survived and been accepted by unions, employers, and workers, others have failed, and still others have slowly reverted to more traditional work structures over time.[14] Our central point here is only to demonstrate that QWL and other worker participation experiments that advance to the point of discussing work organization tend to introduce many of the newer flexible organization forms more commonly found in newer nonunion plants.

These newer forms of organizations have profound implications for the industrial relations system and pose severe challenges for the local union since they encourage communication and problem-solving outside of the formal grievance procedure, introduce much greater diversity and variation in practices and experiences within a given bargaining unit, and significantly modify the traditional seniority-based job allocation and compensation system. The challenge for the local union under this type of system lies in finding ways to support greater worker involvement and opportunities for worker growth and open communications while still maintain the solidarity and strength needed to protect its base of rank-and-file support. Failing to do so risks either discouraging a process that may be popular or eroding the power needed to engage management effectively on larger distributive and strategic issues.

Conclusion

American management and union officials are currently making more intensive efforts to introduce changes in work rules and organization than at any time in the post-World War II time period. The intensification of interest is strongest in those industries and plants that are hardest hit by cyclical pressures, most subject to nonunion competition, and in the mature stages of their product or industry life cycle. These pressures for change are taking two interrelated forms: management-initiated proposals for changes in work rules that lower costs and increase flexibility and productivity and worker participation experiments that focus directly on costs, productivity, and quality.

Where these worker participation processes reach advanced stages, they tend to begin to effect significant modifications of the traditional work organizations that have grown up under the U. S. collective bargaining system. This, in turn, introduces new roles for both the local union and local management. If these changes survive over time and diffuse to more settings, the character of the U. S. collective bargaining and industrial relations system at the plant level will be fundamentally altered.

It should be cautioned that the few experiments that go this far are still relatively new and their chances for survival are uncertain. Thus, whether they signal a long-term and lasting shift in plant-level industrial relations cannot yet be determined. Clearly, however, we are currently in an important period of experimentation and testing. When these plant-level developments are combined with the changes under way in collective bargaining and at the higher levels of

[14] For a discussion of the tendency for innovative work organizations to revert over time to more traditional bureaucratic forms, see Richard E. Walton, "The Topeka Work System: Optimistic Vision, Pessimistic Hypotheses, and Reality," *The Innovative Organization*, eds. Robert Zager and Michael Rosow (New York: Pergamon Press, 1982), pp. 260-90.

strategic decisionmaking within corporations and unions, it becomes clear that we are currently moving through an important period in the history of American industrial relations.

[The End]

A Discussion

By ELIAS RAMOS

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I HAVE BEEN ASKED to comment on the Bamber and Lansbury article, which, admittedly, is a welcome opportunity for anybody on the Islands, having seen, as we have, the deleterious effect of technological change on our plantation economy. Over the years the size of regular employment in the sugar and pineapple industry declined and, as a consequence, the size of the bargaining units in the industry and the prominence of the International Longshoremen's and Warehousemen's Union (ILWU) have been undermined. While the productivity and wages of the remaining workers on the plantations have increased, their morale has diminished and may have reached its lowest point in years.

Neither the experiences of the U. S. in general nor of Hawaii in particular are within the scope of the present international comparison; however, I mentioned this by way of calling attention to a weakness of the article —namely, that data to show the adverse impact of technology are nowhere presented. The authors evidently assume that the apprehension of the Australian and British labor movements that the new technology might "deskill and displace existing jobs" is sufficient for anybody to appreciate the attempts of trade unions in these countries to voice their concerns and to pursue a viable dialogue with employers and the government on how to minimize the adverse effect of technological change. In my opinion, the paper would have been far more interesting if some hard data had been included.

As residents of the newer country with a relative shortage of human resources vis-à-vis natural resources, one might expect that Australian unionists, in general, would be far more disposed to accept technological change than either their British or American counterparts. However, although the ACTU is said to welcome new technologies, there is no evidence that it does so openly. (In this regard, I am reminded of my visit to the auto assembly plant in Melbourne two years ago. I noticed that the pace of work was slightly slower than on a comparable auto assembly line in Japan and not much faster than what I had seen in Britain some years back. Likewise, at Monash University I could not help but notice that the telephone sets were of World War II vintage and not any better than those I have seen in less developed countries like the Philippines.) The point I am making is that if a newer country such as Australia lags behind in technology the later developing countries such as Japan and Singapore, why would trade unions there seek to moderate technological change?

The authors contend, though, that in Australia the trade unions are some-

what ahead in developing "extensive policies of their own on technological change, particularly the unions in the metals, printing, banking, insurance, and retail industries." Again, data would have been useful. Likewise, the British TUC, operating in an older industrial environment, has a 10-point policy on new technology which, admittedly, is far more advanced than the AFL-CIO's recent resolutions—for example, No. 165, which addresses the impending impact of technology in many offices [AFL-CIO Proceedings and Executive Council Report, 1981, p. 249].

The significance of the Bamber-Lansbury article lies in its attempt to outline a range of issues which have become subjects of negotiations in a context of increasing technological change. Among these are pay differentials, job security, and employee participation—issues which American labor itself has dealt with in the process of collective bargaining with or without technological change but much more so recently with automation and computerization. An important contribution of the article is its identification of the locus of decision-making and the suggestion that technological change is beyond the scope of collective bargaining. In other words, if trade unions are going to deal with technological change, the structure of collective bargaining may have to be revised accordingly.

Second, in both Australia and Britain the labor movement has pushed for the development of a strategy to minimize the adverse impact of technological change by attempting to influence the upper levels of decision-making in these countries. What all of this means is that, increasingly, the trade unions are becoming even more political in an already highly politicized industrial relations atmosphere as is Britain's and Australia's [sic]. While collective bargaining has been deeply entrenched in Britain if not in Australia, it seems that the process is being undermined due to the failure of trade unions to hold the line on technological change through the collective bargaining mechanism. In other words, are we not witnessing Marx and, perhaps, the Webbs winning over Perlman, as the trade unions formulate their strategies for dealing with the problem of technological change?

Finally, I must say a word about the value of including this paper in the conference agenda. It certainly adds an international flavor to the conference—something I was told the conference leaders sought to avoid in view of the forthcoming Kyoto IIRA sessions where a number of us are participating. Given that high technology and robotics are real issues in industrial relations today, other papers dealing with the experiences of countries such as Singapore and Japan could have added some "seasoning" to the international content of this session. **[The End]**

A Discussion

By THOMAS Q. GILSON

University of Hawaii

DRS. KOCHAN and Katz take a cautiously optimistic view of prospects for improvement in productivity and labor-management relations as a result of a return to plant-level bargaining. They state that important changes are occurring. These are partly the result of concession bargaining. They also arise from the less visible, but equally important, processes of worker participation which go under such names as quality of work life, quality circles, and others.

Because quality circles have made some progress in Hawaii, I felt that it would be interesting to do a little research into how successful they have been and why and where they have failed. (This has reminded me of a study that I did some years ago on the installation of the Scanlon Plan—another type of worker participation which involved a productivity bonus.[1] That study turned out to deal with a failure, and I will come back to that later.) In Hawaii, quality circles have been operating for only three years, but there is already a chapter of the International Association for Quality Circles which includes representatives of federal and state agencies as well as private organizations.

In order to explore the experience in Hawaii, I have talked with representatives of C. Brewer companies, which have been among those most prominent in using quality circles, and with the International Longshore Workers [sic] Union, which represents the workers at those companies. Needless to say, however, the conclusions expressed are my own.

First, both union and management agree that the first requirement is a sincere belief by management that employees have something to contribute and a willingness to listen and take action on suggestions. A second requirement is the availability of a skillful facilitator who is effective at conducting the brain-storming sessions so that ideas are generated without being squelched by premature evaluation. Third, past misunderstandings, animosity, and personality clashes must have been worked through, or at least defused.

Among the requirements from the union's point of view is the avoidance of discussion of wages or grievances, both of which are covered by the collective bargaining agreement. Also, the workers must be free to pull out of the quality circles, either individually or as a group. The parent union initially took a neutral position, neither encouraging nor discouraging plant groups from participation. However, after some successful experiences, the position was one of support as long as the improvements did not cause layoffs or loss of jobs and did not result in speeding up the work.

In cases where the quality circles have been successful, the union re-

[1] Thomas Q. Gilson and Myron J. Lefcowitz, "A Plant-Wide Productivity Bonus in a Small Factory: A Study of an Unsuccessful Case," *Industrial and Labor Relations Review* 10 (January 1957), pp. 284-96.

ports its members felt good because someone listened to them. Members felt important because management recognized that they had something to contribute.

The company reported that, as a result of quality circles, C. Brewer companies saved $65,000 the first year and $130,000 the second year, with the third year already under way. Since several of the companies are in sugar, which has had a very depressed market and declining employment, cost reductions are extremely important to both the companies and the union. A new contract was just signed with no wage increase the first year and a five-percent increase the second year, with additional charges for health insurance—a typical example of "concession bargaining."

Several questions arise concerning the continued growth and success of quality circles and other forms of employee participation. First, will quality circles turn out to be a "flash in the pan," which have become popular in the economic recession but may lose their appeal as business conditions improve and unions are able to take a harder line? Second, will the changes in attitude and behavior on the part of both parties prove to be so difficult that their expansion will slow down after the adoptions by parties who are ready for the changes? Third, will nonunion organizations prove more suitable sites for the growth and development of quality circles?

I suggest that concession bargaining has made it easier for both unions and management to agree to cooperate, but I question whether this lessening of hostility will be permanent as those unions which have made concessions try to rejoin those who are still getting increases. Second, I question whether managers will be willing and able to surrender what they see as their prerogatives to make decisions.

On the union side, suspicion and hostility will be hard to overcome. As I found in the Scanlon Plan study,[2] the main causes of the failure were a lack of mutual trust and the expectations by both labor and management that the other should change its attitudes and behavior but an unwillingness of each to change its own. In the Hawaii experience, examples were given where failure to meet one or more of the requirements resulted in quality circles being less than an unqualified success. In Japan, where quality circles were introduced by Americans, they spread like wildfire. However, the norms in Japanese industrial culture involve worker participation in decisions at the workplace and much more cooperative relations between labor and management. It is hard to visualize such a spread among American managers and unions.

Finally, the nonunion sector which contains many of the growth industries in the so-called Sun Belt has been growing while many of the old-time unionized industries are declining. However, many of these growth industries are technologically nearer to the state of the art and thus have fewer opportunities for productivity improvements. It is also doubtful that their managers are more ready to share their prerogatives than those in older and unionized industries. If anything, they may be less so.

Social scientists have provided support for greater worker participation for at least three decades. Yet progress has been painfully slow. I am not sure that it will be any faster or more consistent in the decade to come. **[The End]**

[2] Gilson and Lefcowitz, *ibid.*, pp. 295, 296.

SESSION VII

Impasse and Conflict Resolution

The Pitfalls in Judging Arbitrator Impartiality By Win-Loss Tallies Under Final Offer Arbitration

By ORLEY ASHENFELTER and DAVID BLOOM

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THIS ARTICLE contains some early results of a longer term empirical study of a New Jersey arbitration statute that covers police officers and firefighters. The purpose of this larger study is twofold. First, we hope to shed some light on how differences in the structure of arbitration mechanisms affect the size and frequency of negotiated settlements as well as arbitration outcomes. This is possible in New Jersey because the same panel of arbitrators administers both final offer and conventional arbitration systems simultaneously. Second, it is our view that arbitration systems share much in common with other judicial and quasi-judicial dispute settlement mechanisms. It is our hope to shed some light on the more general issues surrounding the design and evaluation of these systems through the much needed empirical study of the operation of one such system. In this article we report some important results for the interpretation and evaluation of arbitrator impartiality under the New Jersey statute. We suspect that these results are equally relevant for the interpretation of other arbitration experiences.

Unsettled disputes between New Jersey police unions and municipalities have been subject to binding arbitration since 1978. The arbitration law is designed to give the parties considerable leeway in designing their own arbitration mechanisms. When the parties can agree on nothing else, however, their dispute is resolved by final offer arbitration on the package of economic issues. As is well-known[1], under final offer arbitration each party is required to submit

[1] Carl Stevens, in a justifiably famous paper, was the first to propose *and* analyze this scheme. His remarkably perceptive paper raises virtually every important issue necessary to an analysis of it, and even settles some. See Carl M. Stevens, "Is Compulsory Arbitration Compatible with Bargaining?", *Industrial Relations* (February 1966), pp. 38-52.

to an arbitrator a single final offer. The arbitrator is required to select one or the other of these offers *without compromise*. As Table 1 indicates, in 1978 about 35 percent of bargaining cases in New Jersey were settled by recourse to FOA, although this percentage has dropped each year since.

The only alternative arbitration mechanism of which the parties have made much use in New Jersey is conventional arbitration. Here the arbitrator fashions an award based on an analysis of the relevant facts and the arbitrator's external judgment of what would comprise a fair award. As Table 2 indicates, in 1978 about 14 percent of bargaining cases in New Jersey were settled by recourse to CA, although this percentage has subsequently stabilized at about six to seven percent.

TABLE 1
THE RESULTS OF FINAL OFFER ARBITRATION OF NEW JERSEY POLICE DISPUTES

	1980	1979	1978
Proportion of Employer Victories	.266	.348	.317
Mean of Employer Compensation Offers	5.70%	6.51%	5.01%
Mean of Union Compensation Offers	8.54%	8.29%	7.14%
Mean of Final Offer Compensation Awards	8.10%	7.57%	6.63%
Standard Deviation of Final Offer Awards	1.41%	1.48%	1.19%
Proportion of Bargaining Cases Going to Final Offer Arbitration	.23	.28	.35

TABLE 2
THE RESULTS OF CONVENTIONAL ARBITRATION OF NEW JERSEY POLICE DISPUTES

	1980	1979	1978
Mean of Conventional Compensation Awards	8.26%	8.59%	6.55%
Predicted Mean of Conventional Awards Using Data on Final Offer Arbitration Cases Only and Assuming "Fair" Arbitrators	8.27%	8.51%	7.41%
Standard Deviation of Conventional Awards	2.10%	2.27%	2.21%
Predicted Standard Deviation of Conventional Awards Using Data on Final Offer Arbitration Cases Only and Assuming "Fair" Arbitrators	1.48%	2.54%	2.70%
Proportion of Bargaining Cases Going to Conventional Arbitration	.07	.06	.14

It is natural for both employers and unions to inquire as to how they typically fare under a final offer statute. The tabulation of "box scores" or "win-loss" records is inevitable. Even when these tabulations are not publicly available it is our impression that they are the subject of considerable informed discussion and folklore.[2]

[2] The concern over the use of box scores to judge the impartiality of arbitration was expressed early on by George Seltzer, "Impartiality in Arbitration: Its Conditions and Bench Marks," *Journal of Collective Negotiations* 6 (1977), pp. 29-36.

In the first row of Table 1 we provide the box score for the New Jersey experience. In 1978 arbitrators selected the union offer on total compensation in 68 percent of FOA cases. In 1979 and 1980 arbitrators selected the union offer on total compensation in 65 and 73 percent of FOA cases, respectively. In sum, under the New Jersey statute union offers have been selected most of the time in FOA cases. There is no sign that this is a transitory phenomenon.[3] This raises the central question we address in this article. Why have arbitrators most often selected the union offers in the New Jersey final offer arbitration cases?

Underlying Model of Behavior

Presumably, most of us expected to see approximately 50 percent of the union offers selected under FOA. This is why the considerably higher percentages listed in Table 1 seem surprising. To understand why this might not be a reasonable presumption, it is necessary to spell out what underlying model of arbitrator behavior *and* union and employer behavior we presumed would produce this 50-50 result.

First, it seems reasonable to suppose that a fair arbitrator would be one who considered the objective considerations in a particular case and then settled on what, in the arbitrator's own mind, seemed a preferred settlement. Little is known about precisely how arbitrators determine their preferred awards other than the consensus that they represent a sort of "going rate."[4] Indeed, it is essential to the process that arbitrators' preferred awards are not entirely predictable; otherwise no uncertainty exists to give an incentive to the parties to negotiate their own settlement. Given that the arbitrator has determined a preferred award, however, it seems clear that a fair arbitrator must select whichever offer is closest to it.

We may suppose that the union and employer also understand this process. Using their best estimates of the arbitrator's preference they will then shape their own offers. They will understand that a higher offer by either party will increase the probability that the employer's offer will be selected. Similarly, a lower offer by either party may be assumed to increase the probability that the union's offer will be selected. As a result, most of us would expect that the union and employer offers would tend to fall equally distant from, but on opposite sides of, the parties' best estimate of the arbitrator's preferred award. If this happens, then, on average, we should naturally expect the union's offer to be selected in one-half of the cases.

[3] Although we do not have the data to establish it, it is our casual impression that this phenomenon has been common in other states where municipal workers are covered by a final offer arbitration statute. The most comparable evidence to that reported in this paper is for final offer arbitration cases involving police and firefighters in the state of Michigan reported by Ernst Benjamin, "Final-offer [sic] Arbitration Awards in Michigan, 1973-1977," Working Paper of the Institute of Labor and Industrial Relations, Wayne State University and the University of Michigan, 1978. Benjamin reports that union salary offers were accepted by arbitrators in 60 percent of the cases heard between July 1, 1973, and June 30, 1977. The difference from a 50-5 split is statistically significant at the five-percent test level. As another example, Paul Somers, "An Evaluation of Final-Offer Arbitration in Massachusetts," *Journal of Collective Negotiations* 6 (1977), p. 199, reports that union offers were selected in 60 percent or more of FOA cases in a given period in Massachusetts. On the other hand, it is not our impression that this is a universal phenomenon, an important exception being the FOA cases in professional baseball.

[4] This is an important conclusion of a study of New Jersey arbitrators by Joan Weitzman and John M. Stochaj, "Attitudes of Arbitrators Toward Final-Offer Arbitration in New Jersey," *The Arbitration Journal* 35 (March 1980), pp. 25-34.

It follows from this discussion that there are two different types of reasons why the union offer may not be selected in one-half of the cases. First, the arbitrators may not follow the decision process set out above. In particular, arbitrators may systematically give less weight to a generous employer offer than to a conservative union offer. If this is the case, then the integrity of the arbitration system is being seriously undermined. One may even wonder at how long it is likely to last.

Second, it may be that, for one reason or another, the parties do not typically position themselves equally distant from, but on opposite sides of, the arbitrator's expected preferred award [sic]. This could happen for one of two reasons. On the one hand, unions may have a more conservative view of what arbitrators will allow than do employers. On the other hand, unions may be more fearful of taking the risk of losing the arbitrator's decision than are employers. In either case we may expect that the union offers will be conservative relative to the award that arbitrators will typically prefer. Hence, the union offers will be disproportionately selected by the arbitrators.

It is important to inquire as to whether it is possible to distinguish empirically between these two alternative explanations for the disproportionate selection of union offers. If FOA is operating alone, it should be obvious that there is no simple way to untangle which of these explanations is correct. After all, to determine whether the union offers are conservative relative to the employer offers we must be able to uncover the central tendency of the arbitrators' preferred awards for comparison. Since these preferred awards are unobservable when an FOA awards operates by itself, however, there would be no simple way to do this.

New Jersey

In New Jersey, however, the same pool of arbitrators is used in both FOA and CA cases simultaneously. If we may assume that arbitrators simply assign their preferred awards in the CA cases, then the numerical central tendency of these awards can serve as a benchmark for determining whether the union offers are conservative relative to the employer offers. A comparison of Tables 1 and 2 reveals that this is indeed the case.

In 1980, for example, the mean employer offer was an annual wage increase of 5.7 percent, while the mean union offer was an annual wage increase of 8.5 percent. According to Table 2, however, the mean CA award was 8.3 percent. Hence, if we may take the CA awards as broadly indicative of arbitrators' preferred awards, it is clear that the union and employer offers were not centered at equal distances from, and on opposite sides of, the arbitrators' preferred awards. Instead, the union offers were very conservative relative to the arbitrators' preferred awards. A comparison of the mean of the union and employer offers with the mean of the CA awards in 1978 and 1979 exhibits precisely the same phenomenon.

It is possible to test statistically whether it is reasonable to suppose that the FOA arbitration decisions in New Jersey were generated by a set of fair arbitrators who were systematically applying the CA standards. To do this we assume that arbitrators select whichever offer comes closest to their preferred award. Examining the FOA data alone, it is then possible to estimate what central tendency (mean) and measure of variability (standard deviation) of arbitrator preferences is most likely to have generated

the actual FOA decisions we observe.[5] This part of our analysis could be constructured even if FOA were the only arbitration mechanism operating.

We then compare these estimates from the FOA data against the actual central tendency and measure of variability for arbitrator preferences revealed by the CA data. This part of our analysis is only possible under a statute like New Jersey's. Lines 2, 3, 4 and 5 contain the results with which to make the comparisons.

In 1980, for example, the actual mean of CA awards was 8.26 percent, while the mean predicted as generating the FOA awards if arbitrators were applying the CA standards was a remarkably close 8.27 percent. The comparisons for 1979 and 1978 are nearly as close, as can be seen from the table. For 1980 the actual standard deviation of CA awards was 2.1 percent, while the standard deviation predicted as generating the FOA awards was a very similar 1.5 percent. The comparisons for 1979 and 1978 are even closer.

In sum, the comparison of the pattern of the FOA and CA awards explains why the union offers were most often selected by arbitrators. The union offers were very conservative relative to the pool of arbitrators' preferred awards. There is no evidence that arbitrators treat generous employer offers any differently than they treat conservative union offers. Instead, the union offers are most often selected because the frequency of conservative union offers is considerably greater than the frequency of generous employer offers.

This finding does not imply that the New Jersey arbitrators, taken as a group, may not be more (or less) generous than some outside observer of the arbitration process in New Jersey would approve. For example, our analysis implies that the central tendency of arbitrators' preferred awards in 1980 was around 8.3 percent regardless of whether an arbitrator was working in the FOA or CA framework. Does this imply that the arbitrators were too generous in their general outlook?

The framework we have used provides no answer to this question, and no doubt different answers would be given from different perspectives. Our basic point, however, is that this issue cannot be settled by an appeal to win-loss tallies under final offer arbitration either. Only an analysis of actual awards and an appeal to some external criterion of fairness can answer the question of whether the arbitrators have behaved in a more (or less) generous fashion than is desirable.

The Paradox

The conservative union behavior revealed in Tables 1 and 2 results in a paradox. Unions actually received *lower* average wage increases under the FOA provisions than under the CA provisions of the New Jersey statute. For example, in 1980 the mean of the actual FOA awards was 8.1 percent, but the mean of the CA awards was higher at 8.3 percent. The union offers

[5] Greater variability of arbitrator preferences will lead to a flatter slope of the relationship between the probability that an employer's offer is selected and the (average of) the union and employer final offers. Thus, the slope of this relationship in the FOA cases is a measure of the (inverse of) the variability of arbitrator preferences. The method of estimation we use is called maximum likelihood, because it assigns values to the mean and standard deviation of arbitrator preferences that are most likely to have generated the observed FOA data under our assumption about arbitrator behavior. The details of the method we use and some additional empirical material are contained in Orley Ashenfelter and David Bloom, "Models of Arbitrator Behavior: Theory and Evidence," (Princeton University, Princeton New Jersey Industrial Relations Section Working Paper No. 146, revised version, May 1983).

are accepted in a vast majority of the FOA cases, but average union wage increases are lower under FOA than under CA. Although conservative union offers increase the likelihood of acceptance, this is not enough to offset the lower wage increase that is won. Appearances are indeed deceiving!

The result is that the union bargainers have taken a small loss in their mean wage increases under FOA relative to what would have prevailed under CA. It is also clear from a comparison of Tables 1 and 2, however, that the union bargainers have gained something in return under FOA.

In 1980, for example, the standard deviation of CA awards was 2.1 percent, but the standard deviation of FOA *actual* awards was only 1.4 percent, and the same discrepancy exists in 1979 and 1978. Thus, what the union bargainers gave up by way of a decrease in the mean award under FOA they made up by a reduction in its variability. The union bargainers have bought "insurance" with their conservative offers, albeit at a cost in their wage settlements. This suggests, but does not prove, that union bargainers may be more risk averse than employer bargainers.[6]

Conclusion

The ability to compare the outcomes under final offer arbitration and conventional arbitration from the same panel of arbitrators makes the New Jersey statute unique. The result of the comparison provides strong evidence that the union offers are most often selected by arbitrators in final offer arbitration because the union offers are very conservative relative to the central tendency of arbitrators' preferred awards.

There is no evidence that arbitrators treat generous employer offers any differently than they treat conservative union offers. Instead, the union offers are most often selected because the frequency of conservative union offers is considerably greater than the frequency of generous employer offers. This should reassure both unions and employers that the integrity of the arbitration system is intact.

There are two important conclusions we think should be drawn from these findings. First, it takes a careful analysis before box scores or win-loss records are of any value in determining the integrity or fairness of an arbitration system. Second, it follows from this consideration that an especial burden rests on the shoulders of arbitrators to resist the easy criticisms of arbitral decisions that may follow from a simplistic analysis of win-loss records. It would be tragic if the long-run integrity of the arbitration system were undermined by the shortsighted criticisms of just those arbitrator decisions that were vital to its long run viability.

[The End]

[6] This possibility was suggested before data such as these were available by Henry Farber and Harry Katz, "Interest Arbitration, Outcomes, and the Incentive to Bargain: The Role of Risk Preferences," *Industrial and Labor Relations Review* 33 (October 1979), pp. 55-63; Henry Farber, "An Analysis of Final-Offer Arbitration," *Journal of Conflict Resolution* 5 (December 1980), pp. 683-705.

equal employment opportunity

Age Bias

The Supreme Court denied review of the First Circuit's decision in *Dewey v. University of New Hampshire* (29 EPD ¶ 33,166), which affirmed as proper the dismissal of a professor at age 65. The Court also denied review of the Fifth Circuit's decision in *Stendebach v. CPC International* (30 EPD ¶ 33,153), which held that evidence of age bias was too scant to justify a jury trial.

A retired federal employee was not reinstated, as required by a settlement order resolving his age bias suit, but he was entitled to accrued pay and to continued payment of salary until his 70th birthday. The employer's failure to find an appropriate position for the retired worker made no difference to the obligation to pay him his salary, a federal trial court in Texas held (*Paterson v. Weinberger*, 31 EPD ¶ 33,588). The agreement did not require the claimant to perform any duties. He had offered to resume his former job but had been rejected. Attorneys' fees were awarded to the retiree.

The Supreme Court has declined to review a determination that a federal employee who filed claims of age bias could not also bring retaliation claims under the Constitution (*Purtill v. Harris*, CA-3, 26 EPD ¶ 32,061).

Attorneys' Fees

The Supreme Court vacated the Ninth Circuit's decision in *Manhart v. Los Angeles* (26 EPD ¶ 32,063), which affirmed an award of attorneys' fees to claimants who prevailed on a significant issue but who were denied retroactive relief. The Supreme Court also vacated the Ninth Circuit's decision in *Thornberry v. Delta Airlines* (29 EPD ¶ 33,747), which affirmed an award of fees and costs to claimants who obtained relief by a settlement. The Court remanded both cases for further consideration in light of the Court's decision in *Hensley v. Eckerhart* (32 EPD ¶ 33,618).

In *Hensley*, the Court held that a district court had not properly considered the relationship between the extent of success and the amount of an attorney's fee award. Where the plaintiff failed to prevail on a claim unrelated to the successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. The Court also denied reveiw of the Seventh Circuit's decision in *Chrapliwy v. Uniroyal* (28 EPD ¶ 32,459), which held that attorneys representing Title VII claimants were entitled to fees for efforts to debar the employer from federal contracts.

Layoff Protection

The U. S. Supreme Court upheld an arbitrator's award of damages to senior white workers adversely affected by layoffs under a company's affirmative action agreement with EEOC (*W. R. Grace and Co. v. Local Union 759,* 31 EPD ¶ 33,616). The company had conciliated discrimination charges filed with the EEOC by extending layoff protection to minority workers at the expense of seniority protection afforded to white workers under a collective bargaining agreement.

Without union participation in the conciliation agreement or a judicial determination, collective bargaining rights could not be overridden, the Court affirmed. The arbitration award did not contravene public policy against discrimination because it did not lead to the firing of minority workers but only to liability on the part of the employer. The employer had placed itself in a position of negotiating conflicting rights of separate groups.

The Court has granted review of the Sixth Circuit's decision in *Stotts v. Memphis Fire Dept.* (28 EPD ¶ 32,679), in which layoff protection was extended to black fire personnel.

Pregnancy Benefits

A limitation on the pregnancy benefits provided to the spouses of male employees amounts to unlawful sex discrimination, the Supreme Court ruled *Newport News Shipbuilding and Dry Dock Co. v. EEOC* (27 EPD ¶ 32,890, 28 EPD ¶ 32,673, 29 EPD ¶ 32,890, 32 EPD ¶ 33,673). The Court affirmed the decision of the Fourth Circuit.

Following the enactment of the Pregnancy Discrimination Act in 1978, the employer amended its health insurance plan to provide hospitalization benefits to female employees for pregnancy-related conditions. The plan did not provide the same coverage for the wives of male employees, however. Because a male employee received less complete coverage for his wife than did female employees for pregnancy, the Fourth Circuit overturned a trial court decision (25 EPD ¶ 31,679) determining the plan to be lawful. In upholding that decision, the Supreme Court noted that Congress had not only overturned its decision in *General Electric v. Gilbert* (13 EPD ¶ 11,408) but also rejected its reasoning in that case that a difference in the treatment of pregnancy was not gender-based discrimination because only women can become pregnant.

The Tenth Circuit upheld a decision that an employee was fired because she was pregnant. Charges of absenteeism, misconduct, poor attitude, and lack of cooperation were merely pretexts for the firing (*Beck v. Quicktrip Corp.,* 32 EPD ¶ 33,643). Rejection of a pregnant female applicant because she would have to leave work during her training period was not disparate treatment on the basis of sex, the Eighth Circuit ruled (*Marafino v. St. Louis County Circuit Court,* 32 EPD ¶ 33,640).

job safety and health

Asbestos

Organization Resources Counselors, Inc., has suggested to OSHA a proposed revision of the asbestos standard calling for a 0.5 fibers per cubic centimeter of air exposure limit over an eight-hour period. They suggest a ceiling of 10 fibers/cc. The current limit is 2 fibers/cc. While emphasizing that engineering controls were needed, ORC noted that respirators would also be necessary in some instances and expressed concern over the lack of adequate testing and certification procedures. ORC called for the elimination of any use of crocidolite asbestos, claiming that much of the mesothelioma from asbestos is attributable to it. OSHA has announced that a final general industry standard for asbestos will be promulgated in the fall of 1983.

Congressman George Miller has introduced a bill (H. R. 3175) to compensate victims of asbestos. Individual state insurance systems would be replaced with a single insurance pool funded by industry. Recovery through the courts is providing only 15 to 25 cents on the dollar to the victim, Miller said. The Occupational Disease Compensation Act is to be initially limited to victims of asbestos and provide the exclusive remedy against employer, union, and insurers. Subsequent expansion of the Act could include workers exposed to occupational disease at a risk at least 30 percent higher than that of unexposed workers.

Benzene

The American Petroleum Institute does not object to reconsideration of the current 10 ppm standard for benzene but does oppose the issuance of an emergency temporary standard. The Institute was responding to a petition by the American Public Health Assoociation and others for an emergency temporary standard limiting exposure to 1 ppm. An abbreviated proceeding to determine "significant risk" is neither appropriate nor permissible under the Occupational Safety and Health Act, the Institute claimed. The Supreme Court has affirmed the Fifth Circuit's decision vacating OSHA's 1978 benzene standard. A full scale proceeding is necessary to consider major industry objections to the standard which were not addressed by the courts, the Institute maintained.

Although OSHA has yet to decide if an ETS is warranted, the agency will expedite rulemaking, Assistant Secretary Thorne Auchter said in a letter to Dr. Sidney Wolfe of the Health Research Group. The tentative schedule calls for a proposed regulation to be published in December of 1983, public hearings in February of 1984, and a final rule in June 1984.

labor-management relations

Breach of Contract, Fair Representation

The six-month limitations period of Section 10(b) of the NLRA governs actions against an employer and a union alleging the employer's breach of contract and the union's breach of fair representation, the Supreme Court ruled seven to two (*Del Costello v. Teamsters,* 97 LC ¶ 10,156; *Steelworkers v. Flowers,* Dkt. No. 81-2408). Section 10(b) is designed to accommodate a balance between the competing interests of the competing parties, the Court held.

The Fourth Circuit had ruled that the Supreme Court's decision in *United Parcel Service, Inc. v. Mitchell* (91 LC ¶ 12,683) required the application of Maryland's 30-day statute of limitations. The Second Circuit in *Flowers* rejected the application of Section 10(b) and applied New York's 90-day arbitration statute against the employer and the state's three-year malpractice statute of limitations against the union.

The Supreme Court conceded that state statutes closely analogous to the federal cause of action are applicable when there is no federal statute of limitations. But the Court concluded that *Mitchell* suffered from "flaws of both legal substance and practical application." Thus, "when adoption of state statutes would be at odds with the purpose or operation of federal law, timeliness rules have been drawn from federal law—either express limitations periods from related federal statutes or such alternatives as laches."

Jurisdictional Determinations

Retaliatory motive and a lack of reasonable basis are both essential prerequisites to the NLRB's issuance of a cease-and-desist order against a state suit allegedly brought in retaliation against employees for exercising rights protected by the NLRA. A unanimous Supreme Court, with Justice Brennan filing a concurring opinion, declared "the NLRB may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law" (*Bill Johnson's Restaurants, Inc. v. NLRB,* 97 LC ¶ 10,130). The case was remanded to the Board to determine whether there was a genuine issue concerning the employer's evidence.

The Sixth Circuit read an exception into the requirement that the National Railroad Adjustment Board has exclusive jurisdiction in resolving minor disputes. Employee rights against an employer are not coextensive with the rights of the union, the court said. Accordingly, the employee could pursue his wrongful discharge claim against his employer in a federal court. The trial court must initially determine whether the employee's failure to resort to the NRAB occurred through no fault of his own. Essentially, the employee bears the burden of

showing that his union breached its duty of fair representation by not processing his discharge claim in accordance with the time requirements of the bargaining agreement (*Kaschak v. Consolidated Rail Corp.*, 97 LC ¶ 10,175).

Preponderance of Evidence

The NLRB's *Wright Line* doctrine (1980 CCH NLRB ¶ 17,256, enf'd CA-1 92, LC ¶ 12,987) continues to provide that "the Board must prove an unlawful labor practice by a preponderance of the evidence" and is consistent with Sections 8(a)(1) and (10)(c) of the NLRA, the Supreme Court ruled (*NLRB v. Transportation Management Corp.*, 97 LC ¶ 10,164). In this case, an employee had been fired for rules infractions after he had initiated union activity. A supervisor had threatened to get the employee for bringing in a union.

The company claimed that the employee would have been fired regardless of his union activity because of his practice of leaving his keys in the bus and taking unauthorized coffee breaks. The Board ruled that the employer had failed to carry its burden of proof regarding this contention. But the First Circuit ruled that the burden of proof was on the Board's General Counsel to prove that the discharge would not have taken place in the absence of the employee's union activity.

The Supreme Court determined that the "employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing."

Attorney But Not Entire Firm Disqualified

It was undisputed that an attorney previously employed by the NLRB violated regulations by participating in a case pending before the Board during his employment with the Board. The attorney was disqualified, but the administrative law judge erred in disqualifying his entire law firm as well, a panel of the Board ruled two to one (*Beverly Enterprises dba Hillview Convalescent Center*, 1983 CCH NLRB ¶ 15,711).

There was no showing that any advantage had accrued to the party represented by the disqualified Firm or attorney or that he had been aware of the present case before leaving the Board. Member Jenkins would have upheld the disqualification of the entire firm, holding that not only any impropriety but the appearance of any impropriety should be avoided.

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