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Industrial Relations Research Association Spring Meeting

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PREFACE
to the
Industrial Relations Research Association Series
Spring Meeting Proceedings

The Association's 1971 Spring Meeting was dominated by the theme of government intervention in employer-employee relations. The areas of governmental activity included long-standing issues of industrial relations concern as well as more recent matters of public policy.

First, a session was devoted to the perennial question of national emergency disputes. However, the discussion was made current by the inclusion of local disputes and by analysis of the most recent proposals for handling national emergency disputes.

Second, a session was concerned with policy issues in public employee bargaining, demonstrating the mixed pattern of governmental policy in various states.

Third, the enforcement of fair employment practices was analyzed from a number of viewpoints, including an address on this topic by the Assistant Secretary of Labor for Wage and Labor Standards.

Finally, the question of local-Federal relationships in manpower planning was discussed by the Assistant Secretary of Labor for Manpower.

We are indebted to the IRRA President George Hildebrand and session chairmen for program arrangements, to Lawrence Donnelly and other members of his committee for local arrangements in Cincinnati, and to the participants for the presentations and preparation of manuscripts for these Proceedings.

Once more our thanks go to the LABOR LAW JOURNAL for the initial publication of the papers and discussions and to Elizabeth Gulesserian for her assistance in an editorial capacity.

GERALD G. SOMERS
Editor, IRRA

SESSION I

Emergency Stoppages in the Private Sector

Emergency Disputes Involving Privately Owned Local Level Services

By BENJAMIN J. TAYLOR
The University of Oklahoma

OVER THE YEARS, a series of studies has focused on the economic impact of strikes in key industries serving national markets. The actual economic impact of the great strikes, such as those in bituminous coal and basic steel, has been studied and the general conclusion is that little or no output was lost as a result of the strikes if a period of time, such as a year, was used for the basis evaluation.[1] Nonetheless, highly publicized national strikes seem to instill a fear that the "public interest" will be violated, and this fear is often even greater when an interruption in local services provided by both the private and the public sector is threatened.

For many years, the general public has maintained an interest in the continued supply of local services such as electricity, gas, telephone, water, hospitals, and transportation. The public interest in the control of utilities disputes has been reflected in the passage of state legislation to ensure continued service in the event of work stoppages. The first state to attempt to regulate labor relations in this category was Kansas. It set up through legislation a Court of Industrial Relations in 1920, which had the power to regulate all matters concerning public utilities, but the law was declared unconstitutional by the United States Supreme Court in 1923.[2]

Strikes in the utility industry rarely occurred between 1919 and 1946. There were numerous threats of strikes, but few materialized

[1] See Donald E. Cullen, *National Emergency Strikes*, Industrial and Labor Relations Paperback No. 7, Ithaca, New York: Cornell University, October 1968 for an excellent review of several studies.

[2] *Wolff Packing Company v. Court of Industrial Relations*, 262 U. S. 522, (1923).

because all parties to the dispute were able to make some peaceful settlement of their differences, thus avoiding an "antisocial" work stoppage. By 1946, however, both labor and management had apparently lost much of the art of collective bargaining, and shortly after World War II, a series of strikes occurred. The general public became particularly alarmed as the pace of strike activity quickened in local markets as well as among firms serving national markets. States reacted to the strike record of 1946 by enacting laws to protect the public interest. By 1947, all but four states (Mississippi, Nevada, Vermont, and West Virginia) had some form of regulatory law governing labor relations (as reported in a special report of the American Bar Association). Nine states prohibited strikes, eight provided for cooling off periods, ten required secret ballots before a strike could be called, and twenty-eight provided for fact-finding boards to investigate strikes. In addition, eight states required compulsory arbitration and five provided for state seizure of utilities during work stoppages.[3]

State efforts to protect the "local interest" were short lived. In 1950 and 1951 respectively, a Michigan statute requiring a compulsory strike vote and a Wisconsin law that prohibited strikes and required compulsory arbitration of labor disputes involving public utilities were both ruled inapplicable to labor disputes affecting interstate commerce by the U. S. Supreme Court.[4] The decision on the Wisconsin law is of particular interest because it bars the states from prohibiting peaceful strikes that could interrupt essential public utility services, strikes that might be considered "local emergency" strikes. Utility firms serve local and regional populations and, although covered by national labor law, as are certain transit systems and profit-oriented hospitals, they do not fall under the national emergency provisions of Taft-Hartley.

By 1968, the broad industry classification of transportation, communication, electric, gas, and sanitary services registered a loss of over ⅘ (.84) of 1 per cent of estimated working time due to work stoppages. This compares to the approximately ¼ of 1 per cent (.28) loss of total estimated working time for the economy as a whole.[5] Organizational and economic strikes hit hospitals around the country in unprecedented numbers during the latter 1960's. Substantial concern has once again developed among the general public with respect to strikes and what should be done about them.

It is the purpose of this paper to evaluate the potential of local-level work stoppages for example, in privately owned public utilities, hospitals, and local and inter-urban transportation that would impose economic hardship on a community. Also, the critical issue of handling such work stoppages is of prime importance.

Public Utilities

The potential ability of the private utilities sector to invoke serious economic hardship on local communities is unquestioned. Table I shows that most employment is in the private

[3] Martin T. Farris, *State Anti-Strike Legislation in the Public Utility Industry*, unpublished Masters Thesis, Montana State University, 1950, p. 29.

[4] *International Union, United Automobile Workers of America v. O'Brien*, 339 U. S. 454, 18 LC ¶ 65,761 (1950); *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Wisconsin Employment Relations Board*, 340 U. S. 383, 19 LC ¶ 66,193 (1951).

[5] U. S. Department of Labor, *Handbook of Labor Statistics, 1970*, Washington, D. C.: U. S. Government Printing Office, 1970, pp. 341-352.

TABLE I

Public and Private Utility Employment (1967) (Thousands)

Utility Category	*Total*[a] *Employment*	*Public*[b]	*Private*
Communications	840	0	840
Telephone	806	0	806
Telegraph	34	0	34
Electric Companies	262	55	207
Gas Companies	153	8	145

Sources:

[a] U. S. Bureau of Census, *Statistical Abstract of the United States, 1968*, 89th ed., Washington, D. C.: U. S. Government Printing Office, 1968.

[b] U. S. Bureau of Census, *Census of Governments*, 1967, Vol. 3, No. 2, Compendium of Public Employment, Washington, D. C.: U. S. Government Printing Office, 1969.

sector and thus subject to national labor law. Communications employment falls exclusively in the private sector. Ninety-five per cent of gas and 79 per cent of electrical employment also falls in the private sector.

In total kilowatt hour sales, the private sector supplied 82.2 per cent of the total in 1967, an amount that has remained approximately the same for several years.[6] The private sector obviously dominates in all of the utility categories deemed essential to the public welfare. Despite the local interest in utilities and communications labor disputes, states and lesser subdivision authorities lack jurisdiction to deal with them. The inability of state and local governments to control work stoppages in these categories may not be as serious as the data indicates. There are various short run (fixed plant) and long run (variable plant) reasons why continued federal control over labor relations seems desirable.

The Short Run.—In the short run, a consistent federal policy for establishing bargaining relationships, and for the handling of unfair labor practices should substantially narrow the area of conflict that might otherwise hamper the labor relations scene. The National Labor Relation Board's orderly machinery avoids the haphazard practices that exist under many state and local jurisdictions regarding the establishment of bargaining representatives and, thereafter, giving the institution of collective bargaining a chance to develop.

Economic issues involving wages, hours, and other terms and conditions of employment should be the primary ones that could result in either strikes or lockouts. Even this category does not seem to impose short-run problems of uninterrupted services. A struck firm has several options which will permit it to protect the public interest.

A firm might seek to place more employees in supervisory categories and, therefore, out of the employee classifications. Such a practice might increase its ability to become "strike proof." Firms supplying communications, electricity, and gas may find that such a practice will permit them to circumvent basic service stoppages to consumers with primary interruptions limited essentially to certain re-

[6] Federal Power Commission, *Statistics of Privately Owned Electric Utilities in the U. S., 1967*, Washington, D. C.: U. S. Government Printing Office, 1968.

pairs and installation of new consumer equipment.

Even if first-line supervisors engage in work stoppages, the general state of technology in gas and electricity may permit interregional exchange of vital supplies to the extent that hardship proportions are not reached as a result of the stoppage. Indeed, one writer found that public utilities stoppages in the postwar period did not reach emergency proportions.[7] Short-run effects can be virtually eliminated in the long run if firms in the industry view stoppages as threats to their ability to provide the public with uninterrupted service.

The Long Run.—If supervisory employees are unable to maintain some desired minimal level of services, the firm, whether dealing in electricity, gas, telephone, or water, has the incentive to substitute capital for labor to the point that it can attain the desired level of service by using supervisory employees. If this method is used, the expectations of a possible strike increases the cost of labor to the firm and justifies its decision to use more capital at the expense of labor on economic grounds. If current technology is unavailable to replace labor with capital, the firm has the economic incentive to intensify its search for a more desirable capital-labor mix in its quest to find a long-run solution to its problem. The search for new techniques would become relatively more attractive to a firm if employees strike "too much"; with the result that management is highly uncertain of its ability to operate continuously without interruption due to labor relations problems. Excessive work stoppages would speed up the process of substituting capital for labor which in turn would decrease the ability of unions to mount effective strikes.

There seems to be no basic reason to interfere with free collective bargaining in communications, electricity, and gas. Costs such as may be incurred as a result of work stoppages provide important information for rational decision making. The threat of eventual replacement through substitution of capital for labor should result in diminishing strike activity over time, not more of it. Local and national intervention into labor disputes could probably curtail any inconvenience associated with work stoppages, but it would always be at the expense of free collective bargaining. The parties, if left alone, may more nearly approach an optimal welfare solution than if interfered with because they may have to recognize and pay the appropriate costs associated with their actions.

Hospitals

The public has substantial interest in an uninterrupted flow of medical services provided by hospitals. The health industry has increasingly used hospitals to supply health services to the general public. The private sector dominates the short term nonfederal category, the one primarily responsible for delivering services to the general public. Table II reveals the extent of private ownership among registered hospitals over the period 1946-1969. Nearly 72 per cent of all registered hospitals are either private for profit or non-profit, both in the private sector. Acute illnesses are predominantly cared for in private short-term hospitals.[8] The public sector deals generally with special ill-

[7] See Donald E. Cullen, cited at footnote 1, for a review of the studies by Thomas Kennedy, p. 41.

[8] Ralph E. Berry, Jr., "The Economic Structure of American Hospitals," in *Federal Programs for the Development of Human Resources, Joint Economic Committee*, Vol. 2, Washington, D. C.: U. S. Government Printing Office, 1968, p. 530.

TABLE II

Registered Hospitals
American Hospital Association
1946-1969

Year	Number of Hospitals Non-federal—Short-term U. S. Totals (number)	Private Non Profit (number)	Private For Profit (number)	% Private Non Profit of Total	% Private For Profit of Total	% Combined Private of Total
1946	4444	2584	1076	58.1	24.2	82.3
1950	5031	2871	1218	57.0	24.2	81.2
1955	5237	3097	1020	59.1	19.4	78.6
1960	5407	3291	856	60.8	15.8	76.6
1961	5460	3305	848	60.5	15.5	76.0
1962	5564	3346	860	60.1	15.4	75.5
1963	5684	3394	896	59.7	15.7	75.4
1964	5712	3402	870	59.5	15.2	74.7
1965	5736	3426	857	59.7	14.9	74.6
1966	5812	3440	852	59.1	14.6	73.8
1967	5850	3461	821	59.1	14.0	73.1
1968	5820	3430	769	58.9	13.2	72.1
1969	5853	3428	759	58.5	12.9	71.5

Source: Hospital Statistics, Vol. 44, Part 2, August 1, 1970, pp. 472-475.

nesses, such as tuberculosis, and the medically indigent.

In the present context, bed capacity is even more important than the number of hospitals accounted for by the private sector. Table III reveals the number of profit and nonprofit private facilities and their relative importance. Despite the importance of the private sector in the delivery of health services to local areas and the public interest in their continued operation, work stoppages and their potential to create local emergencies are probably more an emotional danger than an actual one for several reasons.

First, it has been estimated that the most efficient occupancy rate for hospitals is 85 per cent of total capacity.[9] Occupancy rates in the private sector have historically fallen below the optimum when the year is used as the relevant period of measure (see Table III). The data suggests that the industry has substantial excess capacity to absorb those patients who might otherwise have chosen a different hospital if it were not struck. To the extent that nonstruck hospital occupancy rates do not exceed the 85 per cent optimum, users may find their per-patient-day costs are less than they would have experienced in the absence of a work stoppage if the use of less conveniently located facilities moves toward optimal capacity. It is assumed that hospitals are not engaged in price fixing for the purpose of protecting the less efficient ones. Large metropolitan areas often pose few inconveniences on hospital patients because most may be about equal distance from several hospitals.

[9] See Norman T. J. Bailey, "Calculating the Scale of Inpatient Accommodation," in *Toward a Measure of Medical Care*, London: Oxford University Press, 1962, pp. 55-65; United States Public Health Service, *Areawide Planning for Hospitals and Related Health Facilities*, Washington, D. C.: United States Government Printing Office, 1961.

TABLE III

Bed Capacity in Registered Hospitals 1946-69

Year	U. S. Totals Non-Federal Short-Term General Hospitals (Thousands)	Total Occupancy Rates	Private for Profit (Thousands)	Private Nonprofit (Thousands)	Private for Profit Occupancy Rates	Private Nonprofit Occupancy Rates	Combined Private Beds of Total (Percent)
1946	473	72.1	39	301	64.1	76.7	71.8
1950	505	73.7	42	332	61.9	74.4	74.0
1955	568	71.5	37	389	59.5	73.0	75.0
1960	639	74.7	37	446	65.4	76.6	75.5
1961	659	74.3	38	458	65.4	76.1	75.2
1962	677	75.1	40	472	67.3	76.8	75.6
1963	698	76.0	44	486	68.0	77.7	75.9
1964	721	76.3	46	499	68.3	78.1	75.5
1965	741	76.0	47	515	68.6	77.8	75.8
1966	768	76.5	48	533	69.0	78.5	75.6
1967	788	77.6	47	550	72.7	79.7	75.7
1968	806	78.2	48	566	73.9	80.0	76.1
1969	826	78.8	48	579	74.6	80.8	75.9

Source: Hospital Statistics, Vol. 44, Part 2, August 1, 1970.

A physician normally prefers to place all of his patients in a single hospital for his own convenience, not that of the patients.

Indeed, a recent study suggests that as occupancy rates of hospitals rise, the admissions policies seem to move toward admitting the more deserving patients.[10] The requirement of some additional travel to alternative facilities during work stoppages could result in less misuse of medical facilities on the part of both patients and physicians. If there is such a thing as decreasing costs associated with hospital utilization up to 85 per cent of capacity, those who are placed in alternative facilities should reap the benefits of a more economical organization, which could compensate them for the additional travel associated with their treatment. Also, greater reliance on out-patient treatment could result if physicians consider the extra travel too costly for their purposes.

Second, postponement of non-emergency surgery could be another means of dealing with the problem of struck facilities, particularly in light of optimum capacity estimates that exceed actual capacity figures. This situation suggests ample freedom to intensify facility utilization after a strike is settled.

There are other factors that should be considered in an evaluation of the impact of work stoppages on private hospital patients. In relatively small communities, the distance that emergency patients must travel can often be the difference between life and death. Any "hands off" policy regarding control of local emergency disputes should be qualified only with

[10] John A. Rafferty, "Patterns of Hospital Use: An Analysis of Short-Run Variations," *Journal of Political Economy*, Vol. 79, No. 1, 1971, pp. 162-63.

the provision that extreme emergency cases would have access to any required facilities. Surely the public interest would be preserved by observing such a provision.

Problem of Bargaining Unit.—It is highly unlikely that all employees of any given private hospital would belong to the same union. In the private sector, with relatively small firms dominating the industry, the risk of replacement of certain striking employees is high. Professional associations such as those serving nurses, physical therapists, and others may very well not honor picket lines of striking "nonprofessional" workers. The absence of industrial type unions serving all employees of a given firm would probably result in an inability to totally close a hospital, except for emergency facilities including service to those previously admitted patients incapable of caring for themselves. Even if picket lines are honored by the various bargaining units, such an event may not be serious if alternative facilities are available with a minimum of travel. In such cases, the prospect of serious disruption of services is slight. The greater the ease of replacement in any given labor market, the less the probable impact of a work stoppage. In the absence of coordinated bargaining on the part of all units representing employees, hospital work stoppages in all sectors may fall short of being disputes that impose hardship on the public. Work stoppages may disrupt the usual flow of medical services supplied by a given firm, but in the absence of coordinated stoppages affecting more than one facility, a local emergency invoking hardship on users probably would not develop.

Transportation

Work stoppages in privately owned local and inter-urban passenger transportation appear to impose a potentially serious burden on local communities. Total employment in this category numbers 603,000 of which only 80,000 (or 13.3 per cent) are public employees.[11]

Despite the preponderance of privately controlled urban transportation the danger of a local emergency developing from a work stoppage may not be overly serious. Only the largest metropolitan areas of the United States might incur substantial costs, mainly associated with inconvenience. Inconvenience seems to be the key word in transportation despite the impact reported for the 1966 transit strike in New York City.[12] The Barrington study reported that 40 per cent of workers normally using the struck facilities lost one or more days during the thirteen-day stoppage. Low income workers were hit hard with 60 per cent losing some time and 30 per cent not working at all. Other users of the facilities delayed normal activities such as shopping, social, recreational, and educational trips. The basic problem, even in the largest metropolitan areas, is the reaction of private transit users to a more prolonged stoppage. If adjustments can be made to work stoppages that extend beyond a period such as three weeks, such alternatives are presumably available to the general users during shorter periods of time.

Substitutes, even if imperfect, are available to local transit systems. These include walking, private automobiles, car pools, bicycles, motorcycles, and taxi service. It is suggested that the

[11] U. S. Bureau of the Census, *Statistical Abstract of the United States, 1968*, 89th edition, Washington, D. C., 1968 and U. S. Bureau of Census, *Census of Governments*, 1967, Vol. 3, No. 2, Compendium of Public Employment, Washington, D. C.: U. S. Government Printing Office, 1969.

[12] Donald E. Cullen, cited at footnote 1, at pp. 41-42.

longer the duration of a work stoppage involving local transit systems, the more the local users will utilize alternative modes of transportation. The acceptance of alternatives is largely a function of expectations regarding the length of time the stoppage will persist. It may well be that users do not immediately accept substitutes to their usual transit patterns because of expectations either that government authorities will place enough pressure on the parties to obtain relatively quick settlement or that the parties will reach agreement quickly. It is suggested in this regard that once alternatives are accepted, users tend not to return to use of the struck facility. The ability of government to intervene directly will postpone the decision of many users to seek alternative modes of travel and, in turn, seriously damage the institution of free collective bargaining. Generally, with external interference, the causes of the dispute will not be settled, but merely postponed to another time.

One other aspect should be considered as a long-run solution if the public interest in the dispute is high. Frequent disruption of private transit services could lead to greater willingness on the part of the general public to invest in such services and hence to less reliance on private systems. Public ownership of local transit systems may be expected to increase if the expectation of frequent strikes changes the public view of the cost-benefit ratio as between private and public control. Even nonusers may be conditioned to support the use of tax monies to operate local transit systems if work stoppages involving private transit raise their costs of commuting. Costs may be imposed on nonusers through greater congestion of city streets and, in turn, an increase in commuting time. An individual evaluation of the various costs imposed by work stoppages can be calculated more accurately if the private sector is free to arrive at the collective bargaining solution consistent with the relative evaluations of each party's own best interest. For the above reasons, less interference with the negotiating parties should actually lead to fewer work stoppages involving the private sector. It should be cautioned, however, that recent experiences with public employee labor unrest indicate that the mere transfer of ownership from the private to public sector may not be as effective an alternative to strike control as in prior years.

Conclusions

Legal procedures are needed to deal with work stoppages involving the privately owned local level services of gas, electricity, communications, hospitals, and transportation only if it is concluded that public users should not make minimal short-run adjustments. Government interference with the free collective bargaining process distorts the actual costs that are imposed on all parties including the general public. Labor and management groups become less responsible in their bargaining relationships because of the prospect of some imposed settlement through a variety of procedures that might be used such as those either legally available or proposed by researchers for use in national emergency disputes.

The general public is unable to make reasonably accurate assessments of costs associated with work stoppages if they are prevented. If strikes and lockouts involving privately owned local level services either become or remain protected activities under national law, the general public has an option of changing the composition of ownership of the various facilities

from private to public through its willingness to invest more heavily through taxation or bonding, in those industries that seriously interfere with its convenience. An optimal division between public and private ownership depends on accurate information regarding the risk of interrupted services associated with either form of ownership. It is suggested that the most efficient method of supplying such information to the general public is to permit labor and management groups to use the strike and lockout to settle collective bargaining differences. Any other approach seems inferior if a freely competitive society is to be maintained. Restrictions on the use of the basic economic weapons available to the parties can only result in less than realistic offers and demands. Interference can be justified on only political, not economic grounds.

[The End]

National Emergency Disputes: Some Current Proposals

By BENJAMIN AARON

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THE PRESENT emergency disputes procedures of the Railway Labor Act (RLA) and of the Labor Management Relations (Taft-Hartley) Act (LMRA) have now been in effect for 37 and 24 years, respectively.

RESURGENCE OF INTEREST IN EMERGENCY DISPUTES

For at least the last 20 years there has been a continuing crescendo of criticism of these procedures, initially aimed primarily against the LMRA, but more recently directed chiefly at the RLA. The regularity of new bills to repeal, revise, or supplement statutory emergency disputes procedures matches that of the annual return of the swallows to Capistrano. Congress, however, has shown a marked disinclination to tinker with existing labor relations law, and has made major changes only once every 12 years since 1935. This pattern of behavior does not betoken a popular belief in numerology; rather, it reflects the extraordinary power equilibrium within the Congress between the advocates of change and the defenders of the status quo.

This year may be different, not because September will mark the twelfth anniversary of the last major labor law enactment, but because there are signs of increasing public impatience with the continuing labor relations crisis in the railroad industry that has plagued the nation almost without interruption for the past decade. Also a major strike in steel and a rash of smaller strikes in both the private and the public sectors, should they occur, might disrupt the balance of competing interests that has prevailed for most of the last three decades. If that should happen, the American public will probably look, as it has always done in the past, to new legislation to cure the problem; and that legislation is likely to concentrate on the most immediate and egregious mani-

festations of the trouble rather than to attempt to deal with its root causes.

So much for predictions. I now turn to another, more manageable aspect of the subject: the analysis of some current proposals to modify existing procedures for handling emergency disputes. I shall concentrate primarily on selected provisions of two pending Senate bills and two additional proposals that, so far as I know, lack legislative sponsors. The Senate bills are the Emergency Public Interest Protection Act of 1971,[1] sponsored by Senators Griffin of Michigan and Dole of Kansas, which embodies proposals prepared by the Nixon administration, and the Emergency Labor Disputes Act of 1971,[2] sponsored by Senator Javits of New York. The two additional proposals are a draft bill prepared in 1968 for the Department of Commerce by Benson Soffer[3] and the Final Recommendations by a Special Committee of the American Bar Association (ABA) on National Strikes in Transportation Industries.[4]

DEFINITION OF "EMERGENCY"

As defined in section 10 of the RLA, an emergency dispute is one which, in the judgment of the National Mediation Board (NMB), "threaten[s] substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service."

As defined in section 206 of the LMRA, an emergency dispute is "a threatened or actual strike or lockout affecting an entire industry or substantial part thereof," engaged in interstate commerce or in production of goods for commerce, which will, in the opinion of the President, "if permitted to occur or to continue, imperil the national health or safety."

It would be well to note at the outset that the reference to the NMB's role in the RLA procedure is misleading; for section 10 goes on to say that after the NMB has notified the President of its judgment that an emergency dispute exists, the President "may thereupon, in his discretion," create an emergency board. Thus, under both the RLA and the LMRA procedures, it is the President alone who decides when an emergency dispute exists.

The Javits Bill

Of the various proposals considered in this paper only the Javits and the Soffer bills would change existing statutory definitions of emergency disputes.[5] The Javits bill would repeal section 10 of the RLA, amend the LMRA procedures, and make the latter applicable to all emergency disputes. The definition of emergency dispute would be redefined to cover "a threatened or actual strike or lockout or other labor dispute in an industry affecting commerce," which

[1] S. 560, 92d Cong., 1st Sess. (1971).

[2] S. 594, 92d Cong., 1st Sess. (1971).

[3] An unofficial draft, a copy of which was kindly given to me by the author, together with annotations and explanatory material.

[4] Bureau of National Affairs, Inc. (BNA), *Daily Labor Report*, No. 23, February 3, 1970, pp. D-1 - D-11. The Committee consisted of Charles S. Desmond, Chairman, George E. Bodle, Archibald Cox, William J. Curtin, Edward J. Hickey, Jr., Bernard Meltzer, Gerard D. Reilly, Harry H. Wellington, and Jerre S. Williams.

[5] The ABA Special Committee's recommendations retain the definition of emergency dispute presently found in Sec. 10 of the RLA. They would require, however, that before invoking certain emergency procedures, discussed below, the President find "that the failure of the parties to settle the controversy may impair the national security or seriously endanger the health, safety or welfare of a large segment of the public sufficiently to warrant curtailment of the freedom to strike or lockout."

may in the opinion of the President, after consultation with the Director of the Federal Mediation and Conciliation Service (FMCS), "if permitted to occur or to continue, imperil the health or safety of the Nation or a substantial part of its population or territory."

Elsewhere in the Javits bill there is a reference to "regional emergencies," but neither that term nor the phrase "substantial part of [the Nation's] population or territory" is defined. If given a flexible interpretation by the President and the courts, this language could be applied to such disputes as transportation and hospital strikes in large cities. In my opinion this expansion of federal control is neither necessary nor desirable. Some local disputes undoubtedly can have serious effects on the health and safety of the population, but there is no persuasive evidence that local authorities are unable to deal with them. If an entire region—the whole northeast, for example—should be affected, I think the present LMRA language is broad and flexible enough to cover the situation.

The requirement in the Javits bill that the President consult with the Director of the FMCS before concluding that an emergency dispute exists, although perhaps desirable, ignores political realities and could not, I think, be enforced in practice. Presidents choose their own advisors; in recent years they have tended to rely for advice in these matters almost exclusively on their Secretaries of Labor, despite the independent status of the FMCS and the NMB. The proposed requirement, while seeming to enhance the status of the FMCS Director, would actually, I fear, simply complicate the relationship between the Director and the Secretary.

The Javits bill also draws what to me is an invisible distinction between "a threatened or actual strike or lockout" and an "other labor dispute in an industry affecting commerce." I would suppose that any self-help resorted to by either management or labor that was likely to imperil national or regional health or safety could almost certainly be classified as a threatened or actual strike or lockout.

The Soffer Bill

Soffer's bill takes a different approach. It deals primarily with the LMRA emergency procedures, which it would amend fundamentally by creating a permanent independent agency within the executive branch to be known as the "Emergency Labor Disputes Board." The Board would consist of three members, appointed by the President with the advice and consent of the Senate. When requested by the Secretary of Labor or the Secretary of Commerce, this Board, rather than the President, would determine and report to the Attorney General "whether a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof, if permitted to occur or continue, will interrupt the continued supply of goods or services that appears to be essential to the safety or the economic or physical health of the United States."

This proposal thus modifies the present LMRA definition of an emergency. Interruption of "the continued supply of goods or services that appears to be essential to the safety or the economic or physical health of the United States" seems at first blush to be a broader standard than "imperil[ing] the national health or safety." On closer examination, however, it seems to do no more than to confirm the Supreme Court's de-

cision in *United Steelworkers v. United States.*[6]

It has frequently been suggested that the RLA definition of an emergency permits much too loose a construction, and that many of the so-called emergencies in the railroad industry have presented no serious threat to the economy. That criticism is misdirected; the real causes of the emergencies have been the practice in the industry of treating almost every major dispute as one for "national handling," and the previous reluctance of the courts to permit the rail unions to call selective strikes. The recent decision of the Court of Appeals for the District of Columbia permitting at least a limited resort by rail unions to selective strikes,[7] if upheld by the Supreme Court, will do more to reduce the number of emergency disputes in that industry than would a change in the statutory definition of emergency.

The Soffer bill also provides for direct and decisive intervention by the President, if necessary, at a later stage of the emergency dispute. Presumably, therefore, a primary function of the Emergency Labor Disputes Board is to insulate the President from political pressures at the outset of the dispute when, if the government decides to intervene, an application for an injunction will be filed. This is not the first time such a proposal has been advanced and doubtless it will not be the last; the idea has considerable appeal. I have come, reluctantly, to conclude, however, that the arrangement is impracticable and potentially harmful to the prestige of the President. Any decision made within the executive branch will be imputed to him anyway; and if the proposed Board were to act independently of the President, it might initiate actions that were inimical to what he thought were the best interests of the country. His position in respect of the proper role to be played by the federal government in major labor disputes might thereby be undermined; yet it is doubtful that he could avoid being held responsible for the consequences. In my view, therefore, the responsibility for determining when an emergency dispute exists is, and must remain, one of the unavoidable burdens of the presidential office. I also believe that whether an emergency does or does not exist is essentially a political question, and that the decision to declare an emergency is as much a reflection of the incumbent President's temperament and style as of the actual or potential economic or physical impact of the dispute.[8] It seems to me futile to spell out objective criteria to guide the President in this regard.

One of the most interesting features of the Soffer bill is the requirement that the Emergency Labor Disputes Board shall "designate goods or services in or affecting interstate commerce that may be essential to physical health of metropolitan areas or other communities but which are not likely to be essential to the safety or the economic or physical health of the Nation." Following such designation, the States would be free to enact legislation to assure the continued supply of the specified goods or services when a labor dispute caused or threatened interruption of the supply. State legislation would have to conform, however, to five standards set forth in the bill:

[6] 361 U. S. 39, 38 LC ¶ 65,904 (1959).

[7] *Delaware & Hudson Ry. v. United Transportation Union,* 65 LC ¶ 11,629 (CA D of C 1971).

[8] I have previously stated these views in "National Emergency Disputes: Is There a 'Final Solution'?" *Wisconsin Law Review,* Vol. 1970, No. 1, p. 141.

"(1) a factual determination that continuation of supply is essential to physical health, (2) review of such determination by a State court upon petition for injunctive relief, (3) appropriate appellate review of court orders, (4) vacation of an injunction within a reasonable period of time unless arbitration provisions are invoked, and (5) if arbitration is provided for, criteria for arbitration awards that conform, to the extent practicable, to those [in another section of the bill providing for compulsory arbitration, under certain conditions, of national emergency disputes.]"

The State legislation would also have to provide that if either the Secretary of Labor or the Secretary of Commerce requested a determination by the federal Board concerning the designation of goods or services previously referred to, such request would "estop the State from action and any State injunction ordered or State proceedings undertaken" would be terminated forthwith.

The proposed federal controls over local emergency disputes, although less direct than those provided in the Javits bill and thus, to that extent, less objectionable, nevertheless seem to me to constitute an unwarranted interference in state and local affairs, for the reasons previously stated.

EMERGENCY DISPUTE PROCEDURES

Special Procedures for Strike-Prone Industries

The Griffin-Dole bill would repeal section 10 of the RLA, and provide alternative procedures under the LMRA to those presently available following the initial 80-day cooling-off period. These procedures would be applicable only to the transportation industries: railroads, airlines, maritime, longshore and trucking. The assumption is that "present procedures for dealing with disputes in the transportation industry, in general, have proved insufficient to prevent serious disruptions of transportation services."

The recommendations of the ABA Special Committee are similar, but differ in two important respects. First, they would retain section 10 of the RLA in amended form and apply its expanded provisions to the maritime industry (including both offshore and longshore). Second, they would exclude trucking from this special coverage. In its report the Committee pointed out that "[t]here has never been a work stoppage in [the trucking] . . . industry that has activated the [LMRA] national emergency provisions. . . ." Conceding that "recent changes in the trucking industry could, in the future, lead to a nationwide breakdown of collective bargaining and to serious damage to the public interest," the Committee nevertheless concluded that the trucking industry should not be covered by its recommendations "at this time."

Undoubtedly, labor disputes in the transportation industries, including trucking, have the greatest potential for creating national or regional emergencies. So far, however, trucking disputes, although causing considerable public inconvenience, have always been settled through private collective bargaining. The wage bargains may have been highly inflationary, but the same can be said of settlements in many other disputes not considered to be in the emergency category. In my view, therefore, the recommendations of the ABA Special Committee in respect of the trucking industry are preferable to the corresponding provisions of the Griffin-Dole bill.

Preventive Procedures

The Griffin-Dole and the Soffer bills, and the ABA Special Committee's recommendations all contain provisions designed to prevent emergency disputes from arising. The Griffin-Dole bill would establish a seven-member National Special Industries Commission of experienced persons, appointed by the President. The Commission would be authorized "to study and investigate industries (determined by the Secretary of Labor to be particularly vulnerable to national emergency disputes), combinations or groups thereof, and problems relating thereto." Included in this study would be ways and means by which collective bargaining might be "improved, altered, revised, or supplemented so as to avoid or minimize" emergency disputes; the "effectiveness and usefulness of . . . mediation, conciliation, arbitration, and other . . . procedures" in aiding or supplementing collective bargaining; and the "administration, operation, and possible need for revision" of the proposed act. The Commission would be required to report its findings and recommendations to the President within a period of two years following the appointment of its members.

The Emergency Labor Disputes Board provided for in the Soffer bill would be authorized "to make both long and short range studies of the impact of strikes and lockouts on the safety or the economic or physical health of the Nation." The draftsman has put the following gloss on this provision: "It is implied, and intended, that the Board would promote voluntary union-management agreements on partial operations in all sensitive areas well in advance of any potential labor dispute."

The ABA Special Committee approaches the problem somewhat differently. It would have the President appoint, after consultation with labor and management representatives, tripartite commissions in the railroad, airline, and maritime industries. Each commission would be chaired by one of the public members; but the public members would not be permitted to vote. The commissions would be charged with "developing for the industry an agreed plan for eliminating or minimizing the danger of strikes or lockouts which impair the national security or threaten serious injury to the health, safety or welfare of a large segment of the public," as well as recommending changes in the RLA or the LMRA "designed to make collective bargaining more effective in the industry concerned." Reports would be submitted to the President and the Congress within eight months from the establishment of the commissions. The public members would not be required to report, but would be available for advice in the event that the voting members of a commission deadlocked.

In making this recommendation the Committee expressed the opinion that the collective bargaining parties in these industries have the specialized knowledge and experience, as well as the prime responsibility, to develop improved machinery for dispute settlement. In the Committee's view, "the combination of such experienced knowledge and the more detached perspective of the public members would facilitate agreement on measures consistent with the public interest and responsive to the distinctive problems involved." Even if these efforts failed, the Committee added, they would "provide a sounder basis for any legislative action."

Of the three proposals, that of the ABA Special Committee seems the best. It would give the affected parties both the opportunity and the

responsibility to devise a procedure to prevent the occurrence of emergency disputes; only in the event of their failure to produce a plan acceptable to Congress would the legislative recommendations become necessary. The other two proposals place the initial responsibility for developing voluntary procedures within the affected industries on a government commission or board. If experience is any guide, these instrumentalities could expect, at best, no more than nominal cooperation from the collective bargaining parties and, at worst, open opposition. Moreover, neither the executive nor the legislative branches have accorded to the reports and legislative recommendations of government agencies the same respect they have given to proposed legislation supported by both labor and management.[9]

The "Arsenal of Weapons"

The arguments in favor of giving the executive branch a choice of procedures, or an "arsenal of weapons," with which to deal with emergency disputes are familiar and need not be repeated. We have advanced far beyond reliance upon the single, simplistic remedy of a labor injunction; but there is still substantial disagreement over what additional procedures could or should be employed. Interestingly enough, the debate has produced very few wholly new proposals during the past two decades; what we have had, instead, is largely a continuing reappraisal of familiar devices with minor variations.[10]

As previously mentioned, the Griffin-Dole bill provides for alternate procedures under the LMRA following the initial 80-day cooling-off period in emergency disputes in any of the transportation industries. The bill would give the President the choice of one, but only one, of three procedures; after making his choice, he would be required to notify Congress immediately. His decision would take effect unless rejected by resolution of either House within ten days. In that event, or if the President declined to invoke any of the three alternative procedures, he would be required to submit a report on the dispute to Congress, together with any recommendations he saw fit to make.

The Javits bill also would empower the President to act before the expiration of the 80-day LMRA injunction to issue an executive order "prescribing the procedure to be followed by the parties thereafter and any other actions which he determines to be necessary or appropriate to protect the health and safety of the Nation or that substantial part of the population or territory" threatened by the dispute. The executive order would be in effect "for the shortest period of time consistent with the emergency and a resolution of the dispute," and would be required to meet four criteria:

"(1) provide for the maintenance or resumption of operations and ser-

[9] Compare, for example, the Congressional treatment accorded the bill that became the Railway Labor Act of 1926, 44 Stat. 577, which was jointly sponsored by carriers and labor organizations in the industry, with that given the Report of Advisory Panel on Labor-Management Relations Law to the Senate Labor Committee on the Organization and Procedure of the NLRB, S. Doc. 81, 86th Cong., 2d Sess. (1960). The Advisory Panel, a tripartite group of experts chaired by Archibald Cox, issued a detailed report and recommendations on the organization and procedures of the NLRB that were completely ignored by Congress.

[10] Most of the proposals discussed herein were considered in *The Public Interest in National Labor Policy*, New York: CED 1961, pp. 95-110, a report by an Independent Study Group described by its chairman, Clark Kerr, as a "wholly disowned subsidiary" of the Committee for Economic Development.

vices essential to the national or regional health or safety, (2) encourage resolution of the dispute through collective bargaining, (3) encourage and preserve future collective bargaining with [sic] industry affected, and (4), to the extent consistent with meeting the emergency, avoid undue interference with the rights of the parties to the dispute."

Under the Javits bill, the executive order would be immediately transmitted to Congress and would become effective after 15 days, unless in the meantime either House adopted a resolution in opposition.

The Soffer bill includes provisions for dealing with emergency disputes not settled under either the modified LMRA procedures previously summarized or under those of the RLA. This bill would require the President to submit a full report on the dispute to the Congress, together with formal notice of his intention to appoint a board of arbitration to decide the terms for settlement of the dispute. This action could be prevented only if, within ten days, both Houses adopted by a majority roll-call vote a concurrent resolution of disapproval.

The ABA Special Committee's recommendations would, in the case of failure of any transportation industry previously designated to establish effective means for dealing with emergency disputes within the prescribed eight-month period, apply a new procedure to emergency disputes in such an industry, based on a modified section 10 of the RLA. The new procedure would require the emergency board to attempt to adjust the dispute through mediation and conciliation for 60 days. If unsuccessful, the board would report to the President and recommend one of four alternative procedures to handle the dispute. The President would be required to select one of the four procedures so recommended.[11]

It will be observed that of the four sets of proposals, only the Griffin-Dole bill and the ABA Special Committee's recommendations actually specify a series of alternative methods of dispute settlement, after preliminary emergency procedures have been exhausted. Although nothing in either the Javits or the Soffer bills would specifically preclude resort to other procedures, the former concentrates on the remedy of seizure, and the latter, on compulsory arbitration.

Another point worth mentioning is that the criteria in the Javits bill governing the executive order, although representing laudable objectives, are stated in language that is likely to cause more trouble than it is worth. One wonders, for example, how anyone can predict in advance whether or not the executive order will "encourage and preserve future collective bargaining" in the affected industry.

I turn now to a consideration of the specific alternative procedures set forth in the bills and proposals covered by this paper.

(1) Extension of the 80-day Injunction.—The first of the three alternative procedures provided for in the Griffin-Dole bill would be simply an extension of the 80-day injunction under the LMRA for an additional period, not to exceed 30 days, during which collective bargaining would continue, and the board of inquiry

[11] Committee members Bodle and Hickey dissented from the remainder of the recommendations, refusing to accept "the premise of an assumed failure by the industry commissions to cope with the problem and a presumed need for Congress to enact permanent post impasse legislation."

could[12] "continue to mediate the dispute with the assistance of, and in close coordination with," the FMCS Director.

Choice of this alternative, of course, might not produce a settlement. In that event, the situation would be just as it is under present LMRA procedures. Consequently, this does not impress one as a credible alternative. Indeed, it seems unlikely that it would be used very often, if at all; for the bill unaccountably, and unwisely, limits the President's choice to just one of the prescribed alternatives.

(2) **Partial Operation.**—The Griffin-Dole bill's second alternative procedure would permit the President to appoint a "special board" of three impartial members, whose function would be to determine "[w]hether and under what conditions a partial strike or lockout . . . in an entire industry or substantial part thereof could take place without imperiling the national health or safety," and whether such a partial strike or lockout would "appear to be sufficient in economic impact to encourage each of the parties to make continuing efforts to resolve the dispute."

The special board would have 30 days in which to hold hearings[13] and make its determination. If it found that a partial strike or lockout satisfying the statutory criteria could take place, it would be empowered to issue an order "specifying the extent and conditions of partial operation that must be maintained," provided, however, that the order did not "place a greater economic burden on any party than that which a total cessation of operations would impose." Such an order, if issued, would be effective for a period not to exceed 180 days, during which the parties would be forbidden to interfere by strike or lockout with the partial operations. The order, or any modification, could be reviewed by the district court that granted the 80-day injunction, but would be conclusive unless found by that court to be "arbitrary or capricious." During the period of partial operation, no change could be made in the terms and conditions of employment unless by mutual agreement of the parties. The special board could, however, suspend or modify any term or condition to the extent necessary to make it consistent with the conditions of partial operation.

The partial strike or lockout has often been suggested and has considerable appeal; but the practical difficulties of implementing this particular proposal would be enormous. Consider the requirement that the special board's order must not "place a greater economic burden on any party than that which a total cessation of operations would impose." The emphasis on economic burden betrays an ignorance of the causes and dynamics of labor disputes, and overlooks the possibility that the burden on the union might be primarily organizational, as a consequence of having some of its members working while others were on strike.

There is also the distinct possibility that the special board might conclude that a partial strike or lockout would not satisfy the statutory criteria and should therefore not be allowed. In that event the government would again be in the same position it is at present when the 80-day injunction expires.

[12] The bill uses the permissive word "may," thereby contributing to the ambiguity surrounding the status of the board of inquiry vis-à-vis the FMCS and the parties.

[13] Detailed rules governing the special board's procedures are set forth in the bill.

(3) Final Offer Selection—Compulsory Arbitration.—Under the third alternative procedure provided in the Griffin-Dole bill the President could direct each party to submit two alternative final offers to the Secretary of Labor within three days. These would be transmitted by the Secretary to the other parties. Any offers thus submitted would have to "constitute a complete collective bargaining agreement and resolve all the issues involved in the dispute." The exchange of offers would be followed by a five-day period of collective bargaining. If no settlement resulted, the parties would have two additional days in which to appoint a three-member, neutral panel to act as the "final offer selector."

The panel, which would have a maximum of 30 days from the time the President invoked the final offer selection procedure in which to complete its work, would hold informal hearings with the parties. The government would have no right to participate in such hearings. The panel would be expressly forbidden to attempt to mediate a settlement; it would also be forbidden to communicate with third parties concerning recommendations for settlement of the dispute.

Finally, the panel would be limited to a selection of "the most reasonable . . . of the final offers submitted by the parties." In so doing it could not consider, or receive evidence concerning, previous collective bargaining or offers of settlement by the parties. It would also be forbidden to compromise or alter the final offer selected. The panel would be permitted[14] to take five factors into account: (1) past collective bargaining between the parties; (2) intra-industry comparisons of wages, hours, and working conditions; (3) interindustry comparisons of those variables; (4) "security and tenure of employment with regard for the effect of technological changes on manning practices or on the utilization of particular occupations"; and (5) "the public interest and any other factors normally considered in the determination of wages, hours, and conditions of employment." The final offer thus selected would be deemed to represent the contract between the parties. The panel's determination would be conclusive unless found to be "arbitrary or capricious" by the court which granted the initial 80-day injunction.

The Soffer bill, as previously noted, provides for compulsory arbitration. The award of the board of arbitration would be binding for a period not to exceed two years, and would be based upon the "historical relationships between the terms of compensation or other conditions of work of the employees involved in the labor dispute, and the terms or conditions affecting comparable collective bargaining units." In the absence of such an historical relationship, the board would be required to base its determinations upon "collective bargaining settlements covering employees in comparable occupations in the locality involved." If the last offer of either party met the foregoing criteria "to a reasonable extent," the board would be required to adopt such offer as its award.

The ABA Committee recommended compulsory arbitration as one of the four alternatives available to the President. Before electing either this procedure or the form of seizure (to be discussed below), however, the President would be required to make the

[14] Again, the bill uses the permissive word "may."

additional finding referred to previously.[15] The arbitration board would be appointed by the President unless, within five days after the President announced his decision to resort to compulsory arbitration, the parties jointly selected the board members. In arriving at its award the board would be required to consider five factors: (1) the public interest in continuation of the transportation services affected by the dispute; (2) intra-industry comparisons of wages, hours, and working conditions; (3) interindustry comparisons of those variables; (4) "security and tenure of employment with due respect for the effect of technological changes in manning practices of the utilization of particular occupations"; and (5) "other factors normally considered" in determining wages, hours, and working conditions in the industry.

The entire thrust of the Griffin-Dole's alternative procedures provisions seems to be in the direction of final offer selection. Although this proposal has previously been put forward in other contexts,[16] it is not as familiar as the usual panaceas for dealing with national emergency disputes; hence its relative freshness gives it a certain attractiveness that conceals a number of difficult problems. The five criteria by which the selection panel is to determine the "most reasonable" offer, which also appear in the ABA Special Committee's recommendations, are more easily stated than applied. Some are exceedingly vague; for example, what is meant by "security and tenure of employment with due regard for the effect of technological changes on manning practices or on the utilization of particular occupations," or by "the public interest and any other factors normally considered in the determination of wages, hours, and conditions of employment"? By specifying such broad criteria without weighting them or providing any other directions for their application, the bill would, in effect, give the selection panel unfettered discretion. Under these circumstances, the risk of a judicial determination that the panel's selection was "arbitrary and capricious" is more than minimal.

The requirement that any offer submitted by a party "must constitute a complete collective bargaining agreement and resolve all the issues involved in the dispute" makes it likely, I think, that parties will be reluctant to "sign off" on some issues if they suspect that others will be settled through use of this procedure. Evaluation and comparison of different proposals on some issues will be extremely difficult, if not impossible; for example, work rules and health, welfare, and pension benefits. If the final offer selected by the panel is deemed to represent the contract between the parties, what happens to the process of ratification required under many union constitutions?

The limitations on the final offer selection procedure, such as the prohibition of any communication between the selection panel and third parties concerning recommendations for settlement, are likely to be more honored in the breach than in the observance. Even if they were not, few would be disposed to believe it.

Proponents of the final offer selection procedure state that it differs materially from compulsory arbitration in that, under the latter procedure, the content of the contract is determined by the exercise of discre-

[15] See footnote 5.

[16] See, for example, Carl M. Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" *Industrial Relations*, Vol. 5, February 1966, pp. 49-50.

tion vested solely in the arbitrators. This seems to me only partly true. In both procedures the outer limits are set by the parties. Given the very broad discretion that the panel can exercise in selecting the "most reasonable" offers, it seems somewhat disingenuous to assert that the Government is intruding less in this process than in the case of compulsory arbitration. Is there really, I wonder, so much difference between, on the one hand, the process of issuing a compulsory arbitration award, based on the evidence and arguments of the parties, which does not, however, adopt the specific proposals of either side, and, on the other, selecting the "most reasonable" from among "final" and "alternative final" offers submitted by the parties?

The Soffer bill lacks necessary details concerning the method of selecting the arbitration board, and it imposes limitations on the factors that the board may take into account that are, in my opinion, much too restrictive. It also includes a slight element of "final offer selection," but if one wants to go that route, the Griffin-Dole procedure, or something like it, seems preferable. Yet, in its present form, that procedure is unnecessarily complex, and the provision for "alternative final offers" introduces an element of gamesmanship that is completely inconsistent with the goal of resumption of normal collective bargaining.

(4) **Seizure.**—A form of seizure is provided for in both the Javits bill and the ABA Special Committee's recommendations. The former would permit the Federal Government to "take possession of and operate, in whole or in part, any business enterprise of an employer involved in a given dispute... for the account of the employer." The employer would have the option, however, of waiving all claims to the proceeds of the operation and to receive in lieu thereof "just, fair, and reasonable compensation for the period of such possession and operation by the United States," as determined by the President. If the amount so determined were unacceptable to the employer, it would be paid 75 percent of the amount and would be entitled to sue the Government in the Court of Claims for additional compensation.

The ABA Special Committee's recommendations provide for "executive receivership" of *all* the properties involved in the dispute as one of the four alternatives available to the President. The receivership would continue for as long and under such conditions as the President deemed to be "in the public interest." The options open to the carrier or carriers involved would be either to sue the government for just compensation or to accept the Government's operation of the business for its account after deduction of the costs of the receivership incurred by the Government. If a carrier elected to sue for just compensation, it would receive 75 percent of the Government's last offer, pending final disposition of the suit. During the period of receivership, any union security arrangement previously in effect would be suspended. The Government would be empowered to adjust wages "by some fair procedure," provided that such adjustments represented "the minimum necessary to provide equitable compensation for employees working during the period of the receivership."[17] Strikes and other concerted

[17] Committee member Reilly dissented from this recommendation on the ground that if carriers are to be placed in receivership, unions representing the employees of such carriers should also be placed in receivership for a coterminous period in order to insure equality of treatment.

activities interfering with the receivership would be unlawful.

The Committee's recommendations are more specific than the provisions of the Javits bill in respect of the effect of the Government's taking on the relations between the disputants; specifically, they seek to impose, as the Javits bill does not, at least some burden on the union and the employees, as well as on the employer. In that respect they are, perhaps, preferable; but in my view both proposals are objectionable on several grounds.

To begin with, I find it difficult to reconcile the seizure provisions of the Javits bill with its requirement that any executive order shall "encourage resolution of the dispute through collective bargaining, [and] ... encourage and preserve future bargaining" between the parties. Nor can I readily imagine how an executive receivership will satisfy the objective set forth in the Committee's recommendations of "preserving the system of free collective bargaining."

Seizure is not likely to encourage and preserve collective bargaining in any industry. To the extent that the President resorts to this method of dealing with emergency disputes, future collective bargaining is more likely to be inhibited. Even if not so intended, seizure has the outward appearance of executive dictatorship. Nevertheless, I think it fallacious to assume that collective bargaining will be strengthened because both parties would rather bargain than submit to seizure. Once the costs of seizure have been calculated, some employers will embrace it as the least unpleasant and unprofitable alternative after an impasse has been reached. Like so many other drastic measures, seizure loses its *in terrorem* effect in direct proportion to the frequency of its use.

Moreover, seizure under either of these proposals cannot possibly avoid serious interference with the rights of the affected employees. Each would compel employees to continue working under unsatisfactory conditions; in this respect they would, in effect, simply continue for an indefinite period injunctions already in effect. The rights of employees of the seized enterprise under workmen's compensation, unemployment insurance, and other social legislation would be jeopardized. In short, I agree with Archibald Cox that "sound policy would seem to dictate resort to seizure only in those rare cases where executive action may be justified without an established legislative policy."[18]

(5) No Action.—Although the President would have the option of taking no action in an emergency dispute under all the proposals considered, the ABA Special Committee's recommendations specifically list this as one of the four alternatives available to him after the emergency board has submitted its report. The inclusion of this provision was probably inspired by the experience with railroad disputes under the RLA. It may be salutary, and certainly cannot be harmful, to remind parties accustomed to creating emergencies that on some occasions they may be condemned to stew in their own juice.

CONCLUSIONS

The foregoing review of some of the proposals to amend our present laws for dealing with emergency labor disputes has necessarily been sketchy and has omitted comments

[18] Archibald Cox, "Seizure in Emergency Disputes," in *Emergency Disputes and National Policy*, Irving Bernstein, Harold L. Enarson, and R. W. Fleming, eds., IRRA Series, New York: Harper, 1955, p. 242.

on a number of details. Moreover, because the assigned topic of this paper is emergency disputes, I have not discussed what is possibly the most significant portion of the Griffin-Dole bill, namely, the elimination of the National Railroad Adjustment Board and drastic change in the functions of the National Mediation Board. Those proposed amendments alone might well do more to improve collective bargaining in the railroad industry than all the other proposals combined.

When one reflects upon the various suggestions for dealing with emergency disputes, however, one cannot help wondering whether their adoption, individually or in some combination, would be clearly worthwhile. I confess that I cannot work up much enthusiasm for the possible consequences. The only suggestion that seems to me to have unqualified merit is the ABA Special Committee's proposal to appoint tripartite commissions in the railroad, airline, and maritime industries for the purpose of developing agreed plans for eliminating or minimizing the danger of strikes or lockouts in those industries.

Realistically, the only bill with much of a chance is the Griffin-Dole bill, sponsored by the Nixon administration. This proposal has the support of Senator Javits,[19] whose belief in the efficacy of the additional remedy of seizure is not, I believe, widely shared, as well as the qualified approval of the ABA Special Committee.[20] The chief attraction of the bill is, of course, the compulsory final offer selection provision, which I have tried to show is a sophisticated, but not necessarily improved, form of compulsory arbitration. I am disturbed not only by its gimmickry but also by its delusive simplicity. Although I freely grant that this judgment may itself be unfair, I should dislike having to embody this scheme in a federal law as the price of finding out whether it will work as advertised. Perhaps it might be possible to persuade a few parties to disputes over new contract terms to try final offer selection voluntarily, before we enshrine the procedure in permanent legislation. We might learn a great deal from such experiments.

This paper represents my third attempt in the last 14 years to wrestle with the problem of improving procedures for handling emergency disputes.[21] During this period I have come to believe that there is no "final solution." Although there are many obvious shortcomings in our present statutory procedures, the number of disputes causing serious disruptions in operations and services essential to the health and safety of significant numbers of the population has been minimal. Rather than adopt any of the proposals discussed in this paper, I would rather rely on our present emergency procedures and, if necessary, on ad hoc legislation that Congress can always enact to deal with specific disputes that cannot adequately be dealt with in any other way.

[The End]

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[19] See "Statement and Bill by Senator Javits (Rep., N. Y.) for 'Emergency Labor Disputes Act of 1971,'" BNA, *Daily Labor Report,* No. 24 February 4, 1971, p. E-1.

[20] ABA Special Committee on National Strikes in the Transportation Industries, Final Report (undated), member Bodle dissenting.

[21] Aaron, cited at footnote 8; Aaron, "Emergency Dispute Settlement," in Southwestern Legal Foundation, *Labor Law Developments 1967,* New York: Matthew Bender 1967, pp. 185-208.

Emergency Stoppages in the Private Sector

A Discussion

By ROBERT E. BYRNES

The Cincinnati Gas and Electric Co.

IS LEGISLATION at the local, state or federal level a proper means to resolve collective bargaining differences so as to avert emergency work stoppages in the private sector? Mr. Taylor, after analyzing work stoppages involving utility services, hospitals, and transportation at the local level, has concluded that governmental interference is not the answer. Upon review of two bills presented in the 92nd Congress, Mr. Aaron has likewise concluded that new legislative procedures will not provide a cure-all remedy to resolve national emergency disputes. Agreeing with the analyses and conclusions of these excellent papers, I would like to comment briefly upon other means which could be utilized to diminish the frequency of these emergency work stoppages in the private sector. As the representative of a private gas and electric utility company, my comments, in many cases, are most appropriate to that particular industry.

The ineffectiveness of legislation as a method to prevent emergency work stoppages is readily apparent to all Cincinnatians. The Ohio law provides that no employee of the State, a municipal corporation, or other political subdivisions shall strike. In the event of a strike, statutory provisions preclude wage increases for a designated period of time. Contrary to that law, a large proportion of our city's employees participated in a work stoppage in 1970. Incarcerating the employees' representatives who violated legally obtained picketing injunctions intensified the already strained relationship between city officials and the bargaining representatives. The legislative enactments in this and other States which prohibit strikes of employees in the public sector are openly being defied by employees and continuously challenged in courts. There is no logical reason to believe that similar legislation for the protection of the health and welfare of customers of an essential private service would be any more effective. As has been suggested, the bargaining process can be weakened when a legislative tool is available to help mold the relationships of the bargaining parties.

Three Remedies

Without attempting to be all-inclusive, three different and apparent remedies are available to bargaining representatives which would significantly diminish the frequency of emergency work stoppages in the private sector. These remedies could result from legislative enactments but, more effectively, they could be effected by the bargaining parties. First, employer and employee bargaining representatives should be empowered to ratify the agreements which they mutually negotiate. Second, all represented employees should be given an opportunity to vote on a final management offer before a majority strike vote of the entire mem-

bership is solicited. Finally, as suggested by Mr. Aaron, the bargaining parties could agree to arbitrate a settlement according to the most reasonable offer theory.

The ever-increasing number of negotiated agreements that are substantially rejected by the voting rank and file union members is a serious challenge to the collective bargaining concept. In many instances, an emergency strike in the private sector is averted by the good faith bargaining of the negotiating parties only to subsequently become a reality because of agreement rejection by the rank and file employee. Many studies and reports have been made concerning the reasons for employee rejection of negotiated settlements. An objective evaluation of the reasons for employee rejections can be a valuable aid for improving employer-employee relationships. However, elimination of employee rejections through voluntary constitutional and bylaw amendments by unions so as to invest bargaining committees with the power and authority to ratify collective bargaining agreements, will only enhance a continuation of free, unencumbered collective bargaining.

In many instances, as a technique in bargaining, a strike vote is solicited among the rank and file union members prior to negotiations. Authority to impose a strike upon an entire union membership is thereby made possible, even though only a small percentage of the total membership participated in such a vote. Subsequently, when the contract deadline approaches, employees find themselves on strike even though they may be completely unaware of all details of a final management offer. To remedy these unfortunate situations, unions having to submit proposals to the union membership for ratification should implement machinery to insure that the complete and final management offer is submitted to the entire membership for approval. Only after this submission, and then after a majority affirmative vote of the entire union membership, should a strike be authorized. While it is felt that this machinery is less desirable than a procedure whereby a bargaining committee is invested with complete bargaining authority, it is another example of a voluntarily assumed procedure which can only help to avert imposed regulations.

Final Offer Selection

In his discussion, Mr. Aaron has made reference to the final offer selection procedure set forth in Senate Bill 560. He has concluded that such a procedure should not become permanent through legislation. While Mr. Aaron appears to skeptically encourage private parties in dispute to try this procedure, I submit that a similar procedure should be given much more consideration. When bargaining parties are confronted with the prospect that an outside source will be utilized to resolve a difference of opinion, a natural reluctance to appreciate the position of the other party is almost always evident. This reluctance is justified through experiences which demonstrate that the selected neutral party, in many cases, compromises the positions of each party. Just as mediators attempt to draw opposite parties together, a voluntarily-agreed-to procedure whereby each party to a dispute submits his last, best offer to a third party will have a significant impact towards bringing the parties to agreement. The attractiveness of the most reasonable offer theory is not the machinery which it offers to resolve a dispute but the impact it will have towards eliminating disputes. Par-

ties negotiating such a procedure may find, when the time for the last final offer arrives, that all differences have been resolved.

Effect of Work Stoppage

In many instances a work stoppage in the private sector is a futile and ineffective mechanism to achieve desired bargaining results. An investor-owned gas, electric, or communications utility is an excellent example for demonstrating this uselessness. As Mr. Taylor has pointed out, managements seek methods to substitute capital for labor when excessive strikes threaten a utility's ability to provide uninterrupted service. Investor-owned public utilities are subject to governmental controls which regulate, among other things, the rates, jurisdiction, and profits of the utilities and which obligate a utility to provide continuous and uninterrupted service. In order to protect the health and welfare of its customers, a utility will employ all possible means to insure continuous operations. A work stoppage does not have a significant economic impact on a public utility which is providing uninterrupted service and which has not experienced a resultant loss of income. While the supervisory personnel of a utility may be subjected to extended periods of work during a work stoppage and while certain service procedures may be curtailed, the loss to striking employees of a utility exceeds the loss of the employer.

It appears to be generally agreed that additional legislation procedures at the local, state or federal level will not necessarily resolve the problem of emergency disputes in the private sector. The fact that many legislative attempts to control work stoppages in the public sector have been relatively unsuccessful demonstrates the legislative effectiveness in this area. If it is recognized that many emergency work stoppages in the private sector are futile and if parties to bargaining agreements undertake to voluntarily implement procedures to insure against future work stoppage, the need for legislation will disappear. It is to the benefit of management representatives and union representatives to mutually work together in developing workable procedures for a given industry so that the public health and welfare will not be jeopardized. **[The End]**

Emergency Stoppages in the Private Sector

A Discussion

By DONALD H. WOLLETT

University of California (Davis)

PROFESSOR TAYLOR argues that the interruption of privately-owned local level services does not frequently (if at all) generate genuine public emergencies. He concludes, accordingly, that the costs of permitting labor and management to continue to use the strike and the lockout to settle bargaining differences are not excessive.

Professor Aaron concludes that the number of disputes causing serious disruptions in operations and services essential to the health and safety of significant numbers of the population has been minimal. He expresses his willingness to live with the status quo, relying on the present emergency procedures followed, if necessary, by ad hoc legislation by Congress.

I find the conclusions reached by both of the speakers persuasive.

At the risk of sounding cavalier, I must say that I regard the problem, if it is viewed as a concern for the consequences to the public of an interruption of so-called essential services, as one of relatively low priority. The consequences are usually greatly overstated, while political and judicial reaction often borders on hysteria. There have been occasional work stoppages which generated or threatened to generate serious dangers to public health or safety, but they have been few in number. It is only the protracted stoppage of a strategic service which is likely to have an intolerable impact, and such strikes seldom occur because they are too expensive to the strikers and their organization. Furthermore, no one has devised a foolproof means of avoiding the risk of such stoppages. Even imposed settlements, for example, compulsory arbitration, may not avoid nor terminate strike action.

Furthermore, imposed settlements have other costs which are generally thought to be too high. First, they negate the concept that the terms and conditions of employment should be jointly determined by the employer and the employees directly affected. It is psychologically unsound, I think, to deprive employees of the rewarding experience of participating in the decisions which affect their working environment.

Imposed Settlements

As Harry Arthurs has pointed out, one of the difficulties with methods of imposing settlement on the parties is that they involve processes that are too rational. "Labor relations is . . . concerned with the hopes and fears, ambitions and frustrations, of human beings in society. . . . [E]mployees join unions for many reasons: to gain some control over their conditions of work, to overcome the feeling that they are entirely at the mercy of an all-powerful employer, to punish their employer for real or fancied wrongs, to vindicate their declining socio-economic status in a changing society, or simply to express frustration with the tensions of modern industrial society. . . . To none of these factors is arbitration responsive. Arbitration is a remote and arid, if rational, process. But what alone will satisfy is the sense of participation in a drama, and perhaps even the cathartic experience of a strike. . . . I would strongly suggest that we must for psychological reasons continue to play the frustrating game of conflict. . . ."[1]

Secondly, imposed settlements, particularly if their form is known in advance, will predictably have a debilitating impact on the bargaining process. Will the parties make an earnest effort at give-and-take when, by so doing, they may prejudice their respective positions when they get into arbitration?

Collective bargaining works where both parties are genuinely apprehensive over what will happen if they do not reach agreement. Thus, they

[1] Arthurs, "The Arbitral Process," paper presented to the Int'l Symposium on Public Employment Relations, New York City, May, 1971.

are motivated to propose and counterpropose and to reach toward mutually acceptable compromise. If, then, we favor negotiated settlements over imposed settlements, the trick is to introduce fear into the psychology of both parties at the bargaining table —anxiety over the alternative to nonagreement.

Therefore, I am inclined to the view that, without exception, in public employment or private employment, a strike should be a credible possibility—with the nature, timing, and extent of governmental intervention, if any, an unknown. Thus, I applaud the recent decision of the Court of Appeals for the District of Columbia upholding the right of railroad unions to engage in selective strikes.[2]

Similarly, I have always found the dissenting opinion by Mr. Justice Douglas in the *Steelworkers* case appealing.[3] Under his view the essentially political decision under Taft-Hartley that an emergency exists would be converted into a judicial decision by requiring hard evidence sustaining the presidential finding and by tailoring any injunction so as to prohibit only those parts of the strike which demonstrably create a threat to health or safety.

I have spelled out a similar view in the following terms:

"Whether a particular . . . strike is unlawful . . . should be left in the hands of the courts, subject to prescribed statutory guidelines. . . . First, injunctive process should not be issued except on the basis of findings of fact made . . . on the basis of evidence elicited at a hearing. If the evidence establishes that the strike imminently threatens public health or safety, an injunction should issue. However, the order should be no broader than necessary in order to protect the community against the demonstrated threat. . . . Thus the injunction might require the maintenance of service only in respect to certain identified emergencies with the strike being generally permissible in the absence of further proofs of threats of irreparable harm to the community's health or safety. Furthermore, if the question of the [parties'] good faith at the bargaining table is put in issue . . ., the decree should contain explicit findings on that point. . . . If the proofs do not establish jeopardy to public health or safety, injunctive relief should be denied in the absence of an explicit finding of good faith on the part of the employer and bad faith on the part of the employee organization. . . . If these were the rules in respect to the permissibility of . . . strikes, I believe that the effects would be salutary. Uncertainty in the minds of both parties as to whether or not a strike would ultimately be enjoined or permitted should motivate them to be on their good behavior and bargain in good faith in an all-out effort to reach a mutually satisfactory agreement."[4]

[2] *Delaware and Hudson Ry. Co. v. United Transportation Union,* 65 LC ¶ 11,629 (1971).

[3] *United Steelworkers of America v. United States,* 361 U. S. 39, 71; 38 LC ¶ 65,904 (1961).

[4] Wollett, "The Taylor Law and the Strike Ban," *Public Employee Organization and Bargaining* (Anderson, Ed., 1968), 29, 35-36. Compare *School District v. Holland Education Association,* 380 Mich. 314, 157 N. W. 2d 206 (1968). See also the provisions of the Norris-LaGuardia Act, 29 U. S. C. § 101 et seq., which require a hearing; finding of facts, supported by an evidentiary record, of substantial and irreparable injury; inadequate remedy at law; greater injury to complainant by denial of relief than injury to defendant by granting it; and proof by complainant of every reasonable effort to settle the dispute.

Winner-Take-All Proposal

The genius of the "winner-take-all" arbitration proposal of the Griffin-Dole Bill, which Professor Aaron discusses, is that it couples the concept of imposed settlement with risks that arguably will aid rather than chill the bargaining process. The parties will be motivated to negotiate because the risks of not negotiating are unacceptable.[5]

I do have some difficulties with the proposal.

First, it assumes that the parties are sophisticated enough to evaluate their positions realistically against the standards which arbitrators are likely to use in making their choices. If this assumption is not true, the procedure is not likely to have significant motivational impact because the parties will not have enough sense to be afraid.

Secondly (and this is illustrative of Harry Arthurs' point), the parties will be discouraged from making or keeping on the table ideologically motivated proposals which they know they cannot achieve but which it is important for them to make for political reasons. This may make for rationality at the cost of employee frustration and acceptability to them of the settlement.

Finally, what is to be done with the typical situation where the parties have bargained on a package basis and a multiplicity of issues remain unresolved: wages, holidays, shift premiums, overtime, plus a number of other items such as grievance procedures, work rules, and seniority? How is the "final offer selector" to rationalize his choice between the packages in ways which will achieve acceptability? Will he not be inclined to deal solely with those issues where he feels comfortable because there are acceptable criteria, ducking other issues in respect to which he feels uncomfortable, if not incompetent? If this should occur, the scope of bargaining, as a practical matter, will become circumscribed by the ability or willingness of the "final offer selector" to deal with problems. Thus, the process may become a source of frustration to employees. Again the remarks of Harry Arthurs are pertinent.

Nevertheless, despite these doubts, I believe that the proposal deserves to be tried. However, I would prefer that the laboratory be somewhat smaller than the entire country. I understand that there is a likelihood that Connecticut may experiment with the procedure in school board-teacher disputes and that a similar proposal has a chance of enactment in the State of Oregon for disputes between nurses and hospitals. Experimentation on such limited bases will give us some empirical data for making better judgments with respect to the validity of the procedure. **[The End]**

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[5] These risks could be accentuated by superimposing the "klutz" theory of dispute settlement. According to Leo Rosten's book, "The Joys of Yiddish," a "klutz" is a congenital bungler (p. 184). If the "final offer selector" were required to be taken from a panel consisting exclusively of "klutzes", a new dimension of fear would be added, making the risks of non-agreement intolerable.

For a More Effective National Manpower System

By MALCOLM R. LOVELL, JR.

United States Department of Labor

ONE OF THE Nixon Administration's major efforts has been the battery of innovative legislative proposals put before the Congress the past two years to make the American system of government more responsive to the people. Though broad in their subject matter, their underlying motivation is consistently the same—to revitalize the American system of government and return some of the basic powers to the people.

Here, for example, are some of the more important objectives:

—To overhaul and modernize the Executive Branch;

—To establish a new philosophy and relationship between the federal, state, and local governments;

—To create jobs and sustain long-range reforms to aid cities, counties and states through a full-employment budget for fiscal '72;

—To put a floor under the income of poor families—through welfare reform;

—To provide a new approach to manpower services, including creation of at least 200,000 public jobs for welfare recipients;

—To allocate $5 billion next year in unrestricted funds to state and local governments through General Revenue Sharing;

—To provide another $11 billion for Special Revenue Sharing in six broad fields.

My particular interest in all of this is the Nation's manpower system. This network of state and local employment offices and manpower centers helps people find jobs that use their talents to the utmost, helps employers find workers who can constructively assist them in their endeavors, and, finally, helps all who need it gain the skills to qualify for satisfying and rewarding jobs.

To make this manpower system work more effectively for all Americans is one of this Administration's primary aims.

Under the President's leadership, the Labor Department is accelerating plans to hand over to mayors and governors as much manpower program responsibility as possible under existing legislation.

This decentralization of authority will go forward even as we seek new manpower legislation in this session of Congress. The planned shift of authority and monies will tie in nicely with any future approval of the President's revenue-sharing proposal.

The same can be said about the far-reaching welfare reform legislation, which already has a start through the Department's Work Incentive (WIN) program with over 100,000 welfare recipients currently participating.

We hope to have a good start on developing the procedural mechanisms and manpower program administrative capacity when revenue sharing and welfare reform become legislative realities. I cannot emphasize

enough the need for passage of these three proposals. All three will require a far greater commitment than ever before by the Nation to fully utilize its manpower resources.

Governmental Decentralization

The Administration has made a notable start in decentralizing the operation of programs by reorganizing the Government's regional offices. As a result, related federal departments now have field offices in the same ten cities. Not only that, but these regional headquarters have been greatly strengthened in their personnel, have been given more authority for program decisions and have been given more funds with which these programs can be carried out on the local scene.

Another major step towards decentralization has been the Labor Department's manpower planning grants to governors and mayors. They have received over the past several years almost $10 million for hiring qualified professional planners of the manpower programs they will be running in the future. Over 600 of these skilled planners are on the job now—evenly distributed among mayors', governors', and local employment service offices.

In another move to place greater reliance on mayors and governors, we are strengthening the Cooperative Area Manpower Planning System (CAMPS). Our aim is to encourage the mayors and governors to reshape the membership of the local and state CAMPS committees so they will be more representative of local interests. Originally these committees consisted mainly of local representatives of federally-funded programs with a strong vested interest in various federal agencies—Labor, HEW, Agriculture, and so on.

From now on, we expect the CAMPS committees to have heavier representation of businessmen, educators, labor leaders; the clientele served. And we expect these people to seek out the real needs of their communities so local manpower programs can be planned to meet them. This cannot help but be more effective than local programs created en masse in Washington.

The Administration's Family Assistance Act aims to ease the bureaucratic and financial burden of welfare on the states and to decrease the dependency of welfare recipients through fair work requirements, more enticing incentives, job training, and day-care facilities.

At the same time, the legislation has been designed to establish the principle of a guaranteed, annual, minimum-cash income (about $2,400 for a family of four initially) for all Americans, increasing benefits to those receiving the least help (primarily in the South), while introducing a vast new program of federal supplements to families of working poor who were never before eligible.

To strengthen the training and employment features of the proposed Act, the Department of Labor has presented to the Congress a blueprint which would:

—Create a program of 200,000 public service jobs designed to provide work experience and on-the-job training so that persons so employed would be movable into regular jobs.

—Impose financial penalties for refusing registration, work or training.

—Require rehabilitation for alcoholics and drug addicts on welfare.

—Require all agencies receiving Federal financial assistance to list their job openings with the local man-

power agency, and keeping such agencies open during Saturdays and some evenings to provide greater accessibility to services.

It is obvious that all the legislation and all of our best efforts will fall short unless welfare is discarded as an acceptable alternative to work. The only route to steady, substantial improvement in one's working life and style of living is through a job —a job that provides enough money to make a man self-supporting.

Manpower Legislation

This country has always had bipartisan support in manpower training legislation. We will certainly need such support as we seek a new charter for a decentralized and more effective manpower program, and we fully anticipate receiving it.

I would like to touch briefly on several misconceptions that have developed since the unsuccessful effort in the last session of Congress to produce acceptable manpower legislation.

For one thing, a major flaw in the bill sent to the President was the failure to connect public service employment firmly to manpower development goals. There was no workable mechanism in the bill to assure or encourage the movement of unemployed workers through these publicly supported jobs to suitable permanent employment in the public or private sector.

Furthermore, the public service employment portion of the compromise bill passed by the Congress should have been a permanent component of an overall comprehensive manpower program without specific dollars or labels attached to it. Instead, it was a further categorization of manpower funds and programs—just the thing our experience has told us we must avoid.

I hope that the manpower reform bill we have resubmitted to the Congress can be passed in this session. We are dealing with a far-reaching revision in one of the Nation's key programs—one that affects the very fabric of our daily lives.

The combination of revenue sharing, welfare reform, and a comprehensive manpower act should go a long way in enhancing the well-being of our communities and reducing human misery in this Nation.

I hope that all of these important measures can be passed and put into action simultaneously. **[The End]**

SESSION II

Policy Concerns in Public Employee Bargaining

Introduction

By E. EDWARD HERMAN

University of Cincinnati

IN RECENT YEARS, sessions on public employee bargaining have become a tradition at the gatherings of industrial relations experts. There are some very good reasons for this newly emerging tradition, namely strikes of public employees and the very rapidly changing legislative climate in the public sector.

To set the stage for our panelists a few comments about collective bargaining legislation in the public sector may be in order.

I would like to summarize very briefly the range of possible problem areas confronting any legislature contemplating a collective bargaining law for its public employees.

I think that one of the most difficult problems in attaining satisfactory collective bargaining legislation for the public sector is still the emotional commitment of many legislators to the maintenance of the legal status quo. This usually implies a strong resistance by the legislative authorities to provide for a law which would give public employees a genuine right to collective bargaining. It should be pointed out, however, that during the last few years, public officials became more permissive concerning the collective bargaining rights of public employees. The catalysts which induced this change in attitudes were probably the traumatic shocks induced by strikes of public employees.

After the legislator accepts the concept of a formal bargaining relationship between the public employer and his employees, he is then called upon to make many decisions on very intricate subjects. Some of the issues that he encounters are similar to those which had to be resolved in the private sector a few decades earlier; others are unique to the public sector.

The potential industrial relations act governing the status of the public employees must have a proper agency for its administration. The act has to define who is to be covered by its clauses; and it has to make provisions for the determination of appropriateness of bargaining units. It also has to stipulate the subjects over which the parties can bargain.

However, the above provisions are not the most complex for the legislator to resolve.

His big problem is the right to strike of public employees. If he decides that the employees shall be prohibited to strike but permitted to bargain collectively, he has to provide them with legal procedures for resolution of a possible impasse in bargaining. He can include in these procedures, mediation, fact finding with or without recommendations, and voluntary or compulsory arbitration. Selecting the appropriate machinery for impasse resolution is probably the most demanding task with which the legislator is confronted.

His undertaking is not any easier if he decides to give the right to strike to public employees. He would still have to define the procedures to be followed before a strike could take place. He would also have to decide who are the public employees that may engage in strike activity.

To conclude, the legislator requires a substantial amount of policy-oriented research effort from the industrial relations profession. That is an area in which our panelists made a significant contribution, as you will see from their presentations today.

[The End]

Public Employee Bargaining and the Conferral of Public Benefits

By ROBERT E. DOHERTY

Cornell University

ONE OF THE basic techniques used by society in discharging its social functions is that of public benefit conferral. What is meant by this term, simply stated, is that certain benefits are conferred upon citizens by government, usually on the ground that citizens ought to enjoy these benefits as a matter of right, but also on the ground that these benefits can be more effectively or more justly provided by government than by private enterprise. This paper will attempt to show the effect collective bargaining may be having on the manner in which these benefits are presently being conferred or are likely to be conferred in the future.

The extent and nature of public benefits are in a constant state of evolutionary flux. Early in the nation's history, for example, most municipalities conferred only two benefits on its citizens: a modicum of police protection and a public water supply. Those benefits we now regard

as natural and commonplace; such benefits as fire protection, welfare, education, public health, are more recent social inventions.

And, of course, things are still in a state of evolution. Solid waste collection, to use an illustration from one of the most dramatic instances of public employee union-city confrontation in recent years, is only in part a public benefit. The best estimate I can find is that approximately 65 percent of all communities in the United States operate all or part of local waste collection systems. Large portions of this service, even in cities where waste collection is a public matter, still remains in private hands.[1]

Or take mass transit as an example. In 1970 only 13 percent of all urban transit systems were publicly owned, as against 9 percent in 1967 and 5 percent in 1963. More important, however, is the growth in percent of passenger revenue and in employment, from approximately 50 percent in 1960 in both categories to over 80 percent in 1970.[2]

THE MAKING OF PUBLIC POLICY DECISIONS

By what political processes are public policy decisions made? How do municipalities, for example, decide which benefit to confer, and in what magnitude and style? How ought the tax burden required to provide these benefits be assessed? Or failing sufficient resources on the revenue side, by what alchemy is the decision made as to which public benefits ought to be reduced or eliminated in order to allow for more generous provisions to others? The process is not now, nor has it probably ever been, an entirely rational one. To be sure, there is in most municipal legislatures a certain amount of rational discourse, a careful weighing of facts and evidence. Perhaps there is more of this kind of behavior than the cynical among us would be willing to admit.

But there are other forces with which policy makers must share their authority. Litchfield and Margolis[3] have identified the five "classical" extra legislative influences on public policy formulation which have, over a period of time, had a considerable impact on the decision-making process:

1. The electorate. Elected officials must hold a least a minimal regard for the electorate's wishes.

2. Popular pressure. The mass media and citizens' organizations can have considerable influence on the issue at hand if it is a dramatic one, or is fraught with controversy.

3. The power structure. Leaders in business, finance, trade unions, and others can exercise considerable influence if the issue is one that affects the existing social and economic balance in the community.

4. Party machinery. In Elihu Root's phrase, the "invisible Government" of party loyalty can, when circumstances are right, be the author of public policy.

[1] Anton J. Muhich, Albert J. Klee, and Paul W. Britton, *1968 National Survey of Community Solid Waste Practices* (Cincinnati: Consumer Protection and Environmental Health Service, 1968), p. 3.

[2] *Transit Fact Book, 1970-71* (Washington: American Transportation Association, 1971, special supplement); *Transit Fact Book, 1968* (Washington: American Transportation Association, 1969, special supplement); Lyle C. Fitch, *Urban Transportation and Public Policy* (San Francisco: Chandler Publishing Co., 1964), p. 37.

[3] Nathaniel Litchfield and Julius Margolis, "Benefit-Cost Analyses as a Tool in Urban Government," *Public Expenditures in the Urban Community*, Howard Schaller ed., (Baltimore: Johns Hopkins Press, 1963), pp. 118-146.

5. The chief executive officer. While the chief executive has only delegated and ministerial powers, he does more than merely carry out public policies. Strong mayors, for example, tend to have considerable influence on the actual formulation of policies.

There are, in addition to these classical influences, at least three other extraparliamentary influences of more recent invention which seem to be having a profound effect on public policy formulation:

(1)—*The demonstration.* Welfare mothers invade welfare headquarters demanding an increase in childrens' clothing allotment; parents boycott the public schools protesting segregation (or integration) of educational facilities. The effect of such demonstrations on the public decision-making process is impossible to calculate. But if one could analogize from the consequences that demonstrations have had for decision making on college and university campuses, one would have to conclude that the capacity for mischief is considerable.

(2)—*Benefit-cost analysis.* The quantitative expert brings to the decision makers the approximate "weight" of a number of alternatives, providing the decision maker with the information, and possibly even the ways of thinking about problems, that will allow for more rational public policy decisions. One is struck in reading about this process by the thoroughness and the imagination of so many of the benefit-cost analysis systems. One is also struck, I should add however, by how little attention is paid to these analyses by the very legislative bodies that have contracted for the services.

(3)—*Collective bargaining.* This may turn out to be the most important "extraparliamentarian" influence of all. It is one of the essential purposes of bargaining, after all, to get the boss to change his mind, to do things differently—particularly in the area of manpower policy, but in other areas as well—from the way he would have done had there been no union to contend with. Legislative bodies seem no less susceptible to union persuasion than do bosses in the private sector. Indeed, I think one could make a case that they are more so.

THE INFLUENCE OF COLLECTIVE BARGAINING ON PUBLIC BENEFIT CONFERRAL

Public policy formulation is a strange and complicated business. I do not profess personally to even a rudimentary understanding of how public decisions get made. I am of the view, however, that while extraparliamentary influences are both inevitable and necessary elements of the democratic process, they should not be allowed to obscure the fact that legislative bodies are supposed to be essentially deliberative bodies. If they are ever to distinguish between public passions and public interests, legislatures shall have to be at least partially insulated from group pressures.

How does a threatened stoppage or slowdown by the teachers' union or the sanitation union compare in its effect on the political process to parliamentary debate on the same issue? Superficial evidence indicates that in those communities where unions are powerful the former has considerably more influence than the latter. One wishes that the evidence were more persuasive and more precise. But then the effect of private sector unionism on the firm and on worker earnings is still a matter of open debate. And that has not prevented us from pontificating in that field. A paucity of data and a crude methodology, more-

over, ought not deter us from reaching some tentative conclusions, even when the possibility of slipping into the logical fallacy that is the bane of so many students of labor relations—*post hoc ergo propter hoc*—always threatens.

Why do I say that public sector bargaining contains the potential for doing mischief to the legislative process and, consequently, to orderly benefit conferral? The best reason I can think of for believing so is that I live in the State of New York. Another reason is that my favorite reading matter is the *New York Times,* which keeps me posted on the labor relations activities in the state and in the city. Still another reason is that my job calls for me to visit the City of New York on occasion, and if I might offer some almost flagrant bits of superficial and impressionistic evidence: this city, which is the most tightly and thoroughly organized city in the country, and is, therefore, less of an aberration than a harbinger of municipal labor relations to come, is dirtier, less safe, more unpleasant to get around in at present than at any other time in my recollection. Let me add to my subjective views the *Times'* impression of the city-owned (and effectively organized) transit system: "Once the ideal city transit service of the world, the New York Subway now outdoes all its counterparts on the planet in dirt, noise, crime, delay, confusion, unreliability and unrelenting war on the nervous system of its riders."[4]

Now if this impression shared by the *Times* and myself, that the quality of public benefit conferral in New York City is on the decline, is an accurate one, to what can we attribute this deterioration? Certainly not entirely to taxpayer niggardliness. To take wage payments as an example, New Yorkers increased their contributions to the municipal wage bill by 187 per cent between fiscal 1961-1962 and 1970-1971, and added another 142 per cent in pension contributions. This increase in expenditure over the decade is in part a reflection of the 47 per cent increase in the number of city employees (from 218,000 to 321,000) and a weighted average salary increase of almost 50 per cent. Since the cost of living in New York City increased by only 29 per cent during the decade, city workers improved their purchasing power by about 2 per cent a year.[5] In most instances, real income increased at a faster rate than productivity.

Municipal Unions

It would be a mistake to put all, or even most, of the blame for the city's ills at the hands of the municipal unions. Obviously, the problem of urban decline and the lessening quality of public benefits have deeper causes than the antics of greedy and insensitive public workers and union officials. Greedy, insensitive, intransigent, and sometimes not very bright public officials, some of whom have a long record of exploiting the weak position of public employees, must share the blame. And so, too, must state and federal officials. And a lot of the problem rests with circumstances that nobody seems able either to understand or control. Be that as it may, municipal unions have in my view been able to develop a disproportionate influence over the political process, and by gaining this influence they have gained the power to alter the pattern of benefit conferral.

[4] *New York Times,* April 4, 1971, p. 22.

[5] *Executive Budget for 1970-71, Message of the Mayor, City of New York,* p. 61.

Dissimilar Restraints

One reason for my thinking that municipal unions have achieved a disproportionate amount of decision-making power is that they are not usually subject to the same kinds of restraint as are private sector unions. There is nothing in public sector bargaining at all comparable to the discipline exerted by the product market. Thus there is no countervailing downward pressure on wages. A costly tax increase may indeed engender some countervailing pressure, but these pressures, as Wellington and Winter point out, "are often of no significance in the typical large city. The delayed effect of a particular settlement on the already incomprehensible municipal budget or tax structure is rarely a matter of high visibility, and it may be in the interest of political leaders, as well as the union, to see that it does not become so."[6]

It is sometimes argued that a tax revolt can serve as a deterrent to excessive wage demands. The implementation of a wage demand which would result in increased tax delinquency, in heavy out-migration, in causing firms to cancel plans to locate within the city—these are the counterparts to the discipline provided by the market. It is conceivable that we shall see the parties weighing such evidence during contract negotiations in the future. Yet I do not think that the testing out of this thesis would be wise public policy, that it would be in the public good for governments to pursue manpower policies whose limits are designed to take just short of the point of fiscal collapse.

Little Technological Displacement

My second reason for concern about the social and political impact of municipal bargaining is that the power of municipal unions is rarely restrained by the possibility of technological displacement. Municipal services are for the most part labor-intensive. Thus there is little chance of securing productivity improvements as a trade off for wage and benefit improvements. To return once more to my favorite city to illustrate my case, population in New York City increased by slightly more than 1 per cent between 1960 and 1970, yet during that same period the number of police patrolmen increased by 34 per cent, the number of firemen by 22 per cent, and the number of public school teachers by 57 per cent.[7]

Even in the single service that is susceptible to technological improvements, sanitation, there have been very few productivity savings. After an investment of $25,000,000 in new trucks and equipment, it still costs the City of New York around $50.00 per ton to pick up garbage compared to $17.50 per ton for private cartmen in the same city.[8]

The only trade off that seems possible in the public sector—higher wages for a reduced work force—is hardly worth the candle. Fewer workers usually means lower quality service. And that means that the city administration will face resistance not only from the union but from certain segments of the public as well. The easiest way out for the city is to cut those public benefits in areas where the unions are weakest and where the prime beneficiaries of such services are not mobilized politically. I

[6] Harry H. Wellington and Ralph K. Winter, Jr., "Structuring Collective Bargaining in Public Employment," *Yale Law Journal*, April 1970, p. 808.

[7] *Executive Budget for 1970-71, Message of the Mayor, City of New York*, p. 61.

[8] *New York Times*, April 6, 1971, p. 1.

shall return to this problem in a moment.

Pressurized Situation

A third concern about the way collective bargaining is apparently influencing public decision making stems from the pressure-cooker atmosphere almost always induced by municipal bargaining. By this I mean that public policy decisions are frequently made hastily, often during a period of crisis. In the schools, for example, decisions on such subtle and complicated educational issues as student-teacher ratios, professional duties, perhaps even on aspects of curricular reform are frequently made not on the basis of careful study and thoughtful discussion but because the teachers are threatening to strike. Or maybe they are out already, and it is the parent groups who are threatening the board of education with even more dire action unless it reaches a settlement—and soon.

A wage policy that took years in the making is summarily thrown out because garbage is piling up in the street, or the subways are not running, or firemen are threatening job action.

A simple example of the mischief that bargaining can have for the municipal decision-making process is the way in which the police dispute was handled in Detroit in 1968. Let me cite just one piece of what turned out to be persuasive logic from the report issued by the three-member panel in that dispute. The city had argued that, among other reasons, it could not meet the police demands because (1) it had already committed itself to a much needed capital improvement plan, for example, park improvements, land acquisitions, street lighting; and (2), in order to protect the fiscal integrity of the city, certain revenues would have to be applied to the reduction of an anticipated deficit. The panel's response to these two arguments was that (a) the capital improvements ought to be deferred; and (b) "Under the *exigent circumstances* of this case, we believe that the financing of any immediate salary increase for patrolmen should be given priority over reduction of an anticipated deficit"[9] [emphasis added].

Now the exigent circumstances alluded to above were not brought about by a sudden collapse of the Detroit police force or by a massive outbreak of crime. Rather, the exigency was caused by an epidemic of "blue flu," the policeman's way of taking job action. And it was because of the application of this collective bargaining pressure tactic not because of a concern for quality police protection, that it was ultimately decided to defer capital improvements and to go more deeply into deficit financing.

Unfair Bargaining Results

My fourth source of concern about the impact bargaining may be having on the manner in which we confer public benefits is that under bargaining the lion tends to get somewhat more than the lion's share. I have already suggested that in those instances where neither the providers nor the beneficiaries of public benefits are well organized (book dispensers, book lovers) there is a strong possibility that they will receive short shrift in a municipality where everybody else *is* organized. I do not believe that it is entirely a fortuitous circumstance that, while the budgets (and the percentage of those budgets going to employee benefits) of the

[9] 235 *Government Employee Relations Report* D-6, 1967.

fire, police, sanitation, and transit departments in the City of New York have increased dramatically in the last few years, the Parks Department is presently 700 men short of its full complement of 5,000 park attendants. Nor is the fact that a large number of parks in the City of New York are today uninhabitable[10] completely unrelated to this shortage of park attendants.

It would be difficult to argue that it is not more important for a municipality to provide police and fire protection, education and sanitation than culture and recreation, if a municipality is ever actually faced with that choice. Cities can limp along without the latter; it is doubtful if they could survive without the former. Whether they would deserve to be called cities, "the essential organ for expressing and actualizing the new human personality,"[11] as Lewis Mumford has described them, is quite another matter.

Nor does it actually come down to choosing between excellence in sanitation facilities and fire and police protection, on the one hand, and boarded-up libraries and museums, on the other. The way in which allocations are spent can have as much, perhaps more, impact on the quality of the public benefits conferred as the total allocation itself. The fact that firemen in the City of New York (firemen, first-grade) have been offered a $2,000 wage increase over a 28-month period, on top of a new salary base of $12,150,[12] plus a generous pension plan, provides absolutely no assurance that we shall have better fire protection. Indeed it could mean that if as a partial consequence of this settlement the city is forced to cut back on the number of fire fighters and/or curtail expenditures for capital equipment, we shall have not more but less protection.

CONCLUSION

Because municipal unions are not subject to the discipline of the product market and union membership is relatively immune from the threat of technological displacement, municipal managements find it difficult to muster sufficient counter pressures. Because bargaining tends to induce a crisis atmosphere public decisions are frequently made in the hopes of remedying immediate crisis situations. These short-run remedies often seem to come at the expense of a more thoughtful search for solutions to underlying and persistent problems. Certainly no other group of claimants on the public purse are in a position to exercise the same amount of influence on the protectors of that purse as are municipal unions. In an age of confrontation, those who exchange their labor for wages are at a considerable advantage over those who merely exchange their tax payments for the promise of efficient and uninterrupted public services.

What may be at stake is further dilution of representative government. We have long tolerated a number of extraparliamentarian pressures in public policy formulation. Indeed, such pressures are almost inherent in our political system. Perhaps we shall learn to take public employee bargaining, including the right to strike, in stride as well. Conceivably we shall look back at these turbulent times from the vantage of a decade or two hence and wonder what the shouting and handwringing was all about.

[10] *New York Times,* March 19, 1971, p. 41.

[11] Lewis Mumford, *The City in History* (New York: Harcourt, Brace and World, 1961), p. 573.

[12] *New York Times,* April 21, 1971, p. 51.

Yet there was a story that appeared in the *New York Times* a month or so ago, the import of which has since been gnawing at my innards. Jack Biegel, an official of the sanitationmen's union, was asked by a *Times* reporter to comment on the brouhaha surrounding the recent skyrocketing of pension costs for public employees, a good portion of that increase being attributed to the fact that most plans now provide for early retirement at rather generous benefits. "If people retire earlier it will not be because of the higher benefits," said Mr. Biegel, "but because of disenchantment with urban life."[13] Now to a great many New Yorkers whose pension benefits do not allow for such an easy escape route, who have suffered through one long sanitation strike in recent years and have been given reason to feel uncomfortable about the prospect of another, and who pay a very high price for a not very efficient service—to these people Mr. Biegel's remarks must sound both ominous and ironic.

What these ordinary citizens want, I suspect, is prompt and orderly delivery of public services. If polled, they would probably express some doubt as to whether they are receiving their due. They would also probably report that, while they want their public servants to earn a decent wage, a sanitation man's base salary in excess of $12,000, plus very generous fringe benefits,[14] just might be a trifle too much, considering the quality of the service offered, the condition of the labor market, and the benefits received by similarly situated, private sector employees.

In short, many of our citizens are beginning to wonder if perhaps our system of public benefit conferral has gotten out of whack. There is also, I believe, a growing concern that because this "disequilibrium" was not brought about by the normal political process, traditional political channels will afford less than an adequate remedy. **[The End]**

The Status of Public Employee Bargaining

By DALE G. BRICKNER

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PUBLIC EMPLOYEE collective bargaining in the State of Indiana is currently immersed in a swamp of quasi-illegality which restricts its growth and distorts the character of existing employer-employee relationships. Both public employers and public employee organizations face a contradictory conglomeration of court decisions, Attorney Generals' opinions and rulings of the State Board of Accounts. Despite the fact that public employment relations have become increasingly confused, the Indiana General Assembly has repeatedly failed to pass regulatory legislation. Indeed, the biennial expectation of such legis-

[13] *New York Times,* March 15, 1971, p. 59.

[14] The factfinding panel's recommendation in the 1971 dispute was that sanitation workers ought to receive a new base salary of $10,951, plus a $1,710 increase over a 27 month period. *New York Times,* April 21, 1971, p. 51.

lative action has itself contributed further to the uncertainty surrounding improvised systems for determining bargaining units and agents, and for defining the scope of collective bargaining relationships.

Legislative Obituary

The 1971 session of the Indiana General Assembly almost passed a public employee bargaining bill, being consistent to the extent that it also almost passed tax reform and comprehensive environmental control legislation. Since the 1969 legislature seemed generally more apathetic to the need for such legislation, the narrow margin of defeat in 1971 might be viewed as substantial progress. At least the issue was firmly established as a high-priority item, a position it is unlikely to yield in the next legislative session. For this reason, the political-legislative history of the 1971 legislation, and its basic structure and characteristics, may be as indicative as any other factors of the path Indiana will follow in the years ahead.

The Legislation.—At the beginning of the 1971 session, an array of bills and proposals sprang full armed from the attache cases of legislators and lobbyists: permissive bills and punitive bills; meet-and-confer bills and collective bargaining bills; comprehensive bills and bills excluding teachers, or policemen and firemen; and special-interest bills specifically for teachers, or policemen and firemen. It became evident very quickly, however, that both the House and Senate would expedite H. B. 1118 and S. B. 128, a set of fraternal twins. Eventually, the field narrowed to H. B. 1118 when the Senate merged and passed its own bill under the House title.

H. B. 1118 might best be characterized as a public employment adaption of Taft-Hartley. The originally enrolled document underwent two major revisions in the Committee on Labor, and emerged on the House floor as a considerably more restrictive piece of legislation than its authors first intended. The Committee amendments, in fact, seem to be significantly indicative of the character of the controversy surrounding the legislation.

At the very top of the list of fundamental modifications was the elimination of teachers from the definition of employees, and the retention of school boards in the definition of employers.[1]

Second, the Committee deleted a broadly worded definition of "labor dispute"—plagiarized from Norris-LaGuardia—and substituted a highly restrictive definition of a "strike."

Third, the employees' rights clause—Taft-Hartley's Section 7—was amended to define precisely the area of managerial prerogatives.

Fourth, although employers and employee organizations were constrained in both drafts to bargain in good faith, the original bill's extensive definition of this concept was completely stricken in the final committee report.

Fifth, the three employee organization unfair labor practices—Taft-Hartley Sections 8(b)(1)-(3)—were expanded to four with the words: "(to) cause, instigate, encourage or engage in an unlawful strike as defined in Section 2(9) and 3(a)."[2] Section 3(a), which was entirely new, defined an unlawful strike as one "which constitutes a substantial threat of serious or irreparable harm to public health, welfare or safety."[3]

[1] Teachers were reinserted in the bill by amendment on the House floor. After the Interim Study Committee bill on teacher negotiations, H. B. 1036, was defeated by one vote, the Republican caucus decided to support inclusion of teachers in H. B. 1118.

[2] Committee on Labor, *Report on House Bill No. 1118,* Indiana General Assembly, 1971, p. 33.

[3] Ibid., p. 32.

Finally, the original document's impasse procedure contained three steps: (1) mediation 30 days prior to contract expiration; (2) fact finding within a 60 day cooling-off period following contract expiration; and (3) binding arbitration in police and fire department disputes. As a substitute for the third step, the committee amendment provided that any organization prohibited from striking under Section 3(a) would submit the dispute to a three-member panel. Both parties would make a final offer and the panel would choose one without modification.

Thus the committee-amended version of H. B. 1118 appeared on the House floor with a "do-pass" recommendation.

Lobbyists.—At the end of the 1969 legislative session, it was generally accepted that public employee bargaining legislation failed partly because proponents could not agree among themselves on the requirements for an acceptable bill. The undocumented allegation was that organizations affiliated and unaffiliated with the AFL-CIO emerged from the process of legislative compromise with fundamentally conflicting views of the ability of their respective organizations to live with the bill most likely to pass.[4]

Entering the 1971 session, the political forces seemed strongly balanced in favor of passage of H. B. 1118. Both the Indiana State Teachers Association and the Indiana Federation of Teachers, AFL-CIO, opted for coverage by a comprehensive bill, with the latter organization claiming considerable credit for drafting the legislation. The other major labor lobbyists were equally united: AFSCME, Fire Fighters, Fraternal Order of Police and the State AFL-CIO. The lone exception was the Teamsters.

Among groups likely to oppose permissive legislation, the forces were neither as strong nor as unified as might be expected. The Indiana School Boards Association flatly opposed any legislation mandating teacher negotiations, arguing that experience in states with permissive legislation indicated that strikes increased and school costs rose rapidly. The Indiana Association of Public School Superintendents, however, adopted a somewhat narrower position asking for limitation of negotiable items "to direct financial expenditures affecting the salary and salary-related fringe benefits of individual employees."[5]

The Indiana Chamber of Commerce and the Indiana Manufacturers Association, both powerful and influential groups, were judged by closely partisan forces to have been less aggressive than expected in lobbying against the legislation. Although the Indiana Association of Cities and Towns apparently preferred meet-and-confer legislation, its attitude toward specific issues, such as grievance arbitration, was deemed to be "surprisingly enlightened" by one public employee organization representative.

Thus the alignment of political forces seemed particularly advantageous for the passage of legislation in 1971. In addition, the social-political

[4] Except as otherwise noted, the opinions and positions of groups discussed in the paper were obtained from the following sources: (1) Interviews with legislative representatives of the American Federation of State, County and Municipal Employees; Indiana Federation of Teachers; Indiana State Teachers Association; Indiana State AFL-CIO; Indiana School Boards Association; and Indiana Association of Public School Superintendents; (2) Releases and legislative reports of partisan groups, particularly the I. S. T. A. *Legislative Bulletin;* (3) An interview with the Minority Leader of the Senate.

[5] Indiana Association of Public School Superintendents, Resolution 71-5, "Negotiations," adopted January 15, 1971.

climate did not suggest the possibility that unduly restrictive or punitive legislation would gain favor in the legislature. Unlike 1957, when the right-to-work law rolled through on a wave of reaction to strike-connected violence, there was no public outcry against long, costly or acrimonious public employee disputes.

Legislative Defeat.—H .B. 1118 was extensively amended on the floors of both houses, and the differing versions passed out to a joint conference committee. The ultimate defeat of the bill can be traced to controversy over two key amendments. The Duvall amendment made advocating or conducting a strike vote punishable by 180 days in jail and a $1,000 fine. The Lundquist amendment limited teacher negotiations primarily to salaries and economic fringe benefits.

These amendments, along with the alterations made by the Committee on Labor, established the conditions for the dissolution of forces supporting enactment. The AFSCME was willing to accept the conference committee bill, maintaining that the Duvall amendment was unconstitutional. The teachers' union contended that it did not want the Duvall provision on the books, even if it were unconstitutional, and withdrew its support. Neither the teachers' union nor the teachers' association liked the Lundquist amendment, but were further torn by the threatened removal of a grandfather clause which would have permitted school districts currently bargaining on non-economic issues to continue to do so. Finally, the Teamsters came out strongly in opposition to the bill, abandoning a more moderately negative position.

The Indiana General Assembly, with its unerring flair for the comic opera, did not kill H. B. 1118 cleanly. Senator Joseph G. Bruggenschmidt, a conference committee member, announced that he had been offered a bribe to scuttle the legislation. For reasons apparently unassociated with this dramatic disclosure, Senator Bruggenschmidt refused to sign the conference committee report.[6] Various maneuvers to remove this roadblock failed, and the bill itself died on a 32 to 10 Senate vote opposing replacement of both Senate members of the conference committee.

Who killed the public employee bargaining law? Two of the largest public employee organizations in the State lay the blame squarely on the Teamsters. If this hypothesis were completely valid, however, H. B. 1118 probably would not have gone so far down the road to final passage. The Teamsters might reasonably be credited with dealing the *coup de grâce*, but its role in the legislative erosion of the bill's original character is less easily demonstrated.

An alternate hypothesis would place defeat at the doorstep of teachers, not because their organizations were ineffective in the legislature, but simply because they are teachers. It is difficult to escape the conclusion that a substantial part of the legislative controversy swirled about teacher-related bargaining issues, and it is equally difficult to avoid the observation that substantial numbers of Indiana's citizen legislators cannot ac-

[6] Senator Bruggenschmidt created an unbreakable impasse. He refused to accept a Republican offer to eliminate teachers from the bill, because he had been otherwise instructed by the Democratic caucus. His own conditions for keeping teachers in the bill included elimination of the grandfather clause and addition of a provision requiring a school board to seek approval of economic agreements from its County Council and County Board of Tax Review. *The Courier-Journal*, Louisville, (April 14, 1971), section B, p. 1.

cept the heretical vision of the classic schoolmarm sitting at a bargaining table or walking a picket line. If a bill had been introduced in the Indiana legislature which had no relationship to teacher bargaining, it very likely would have passed in both houses.

The Current Legal Climate

In the absence of a legislative enactment, Indiana's public employment relationships will continue to be conditioned by administrative rulings and court decisions. At best, these devices provide an unsatisfactory framework for resolving basic issues of policy and procedure.

There are currently four Attorney Generals' opinions dealing with public employee collective bargaining. The oldest of such opinions, issued in 1944 and 1946, state categorically that governmental units may not negotiate a written contract with employee organizations.[7]

Two recent opinions, however, are clearly more relevant to operational decisions of governmental units. The Dillon opinion, issued in 1965, was written in response to a question posed by the Indiana University Board of Trustees concerning its ability to adopt a policy which would permit the negotiation of agreements with employee organizations.[8] These "Conditions of Cooperation" are an undisguised adaptation of E. O. 10988.[9] Attorney General Dillon's opinion not only sanctioned this device for public universities, but also went on to suggest that collective bargaining was legal in the public sector generally.

Although this opinion was initially greeted as a much needed clarification of public employment relationships, its defects were not long concealed. Professor Getman has noted its more glaring weaknesses.

". . . an Attorney General's opinion is a peculiar device entitled to little weight by courts, but it has significant practical implications because it is usually followed by government agencies and relied on by public officials. Moreover, the 1965 opinion was unclear as to how far it meant to permit the establishment of collective bargaining. Finally, it was unsatisfactory because as the opinion itself pointed out, it could not set up an organized system for determining questions of representation."[10]

Four years after the Dillon opinion, another attorney general, in an administration of different political persuasion, was asked to rule on the legality of a school corporation entering into a collective bargaining agreement with a teacher organization. The 1969 Sendak opinion held that this act is beyond the powers legally vested in boards of school trustees.[11] The opinion suggested, as strongly as the Dillon opinion did to the contrary, that such action was inappropriate for any governmental unit. The Sendak opinion further commented that the legislature could confer this power on governmental units, but having retained the right, the legislature must be presumed to intend that it remain unexercised. Finally, the opinion recommended that interested parties take

[7] *Official Opinions of the Attorney General of Indiana,* (1944) O. A. G., No. 55, p. 224, and (1946) O. A. G., No. 51, p. 184.

[8] *Official Opinions of the Attorney General of Indiana,* (1966) O. A. G., No. 22, p. 144.

[9] Indiana University, *Administrative Manual,* Operating Directive No. D-27, "Conditions for Cooperation Between Employee Organizations and the Administration of Indiana University," adopted July 7, 1966 and revised May 19, 1967.

[10] Julius G. Getman, "Legal Issues Affecting Collective Bargaining," an unpublished paper delivered at a conference at Indiana University on Labor Relations in Public Employment, (April 3, 1970), pp. 3-4.

[11] *Official Opinions of the Attorney General of Indiana,* No. 21, August 8, 1969.

their case either to the legislature or to the courts.

The third significant element in the legal structure surrounding public employment relationships is the Indiana Supreme Court's decision in *Teachers v. School City of Anderson.*[12] Although the majority opinion of the Court is complex and the subject of significant controversy among legal scholars, it is sufficient for present purposes to note that it held public employee strikes to be illegal, and the State's anti-injunction law inapplicable in such situations.

Finally, mention should be made of the ruling of the State Board of Accounts to the effect that governmental units may not pay claims for personal services rendered by arbitrators, mediators and fact finders.

Taken together these opinions, decisions and rulings have created the previously noted climate of uncertainty so inimical to the establishment of stable relationships in the public sector. Many public employers are engaging in activities clearly in contravention of stated legal guidelines, and others are using the same guidelines as a method for evading the requests of employee organizations for recognition and bargaining rights. Similarly, public employers who are contractually required to pay arbitration costs have discovered the convenient term "consultation," and those employers who want to avoid third-party settlements are hiding behind the rule of the State Board of Accounts. Thus the state of the law has created a situation in which employers who either want to bargain or have to bargain, do so. Those who neither want to bargain nor have to bargain take refuge behind a paper-thin shield of legalisms.

Problems and Prospects

One of the most evident results of the legislature's failure to pass a public employment relations bill is that each governmental unit in its first encounter with an organization's demand for recognition must draft its own operational guidelines. The four state universities have substantially similar documents setting forth types of recognition, rules for unit determination and the scope of the bargaining relationship.

In a recent school district situation, four sets of negotiations were proceeding simultaneously. In the center ring of this circus were teams attempting to frame an "Agreement of Professional Negotiations." The basic document under consideration read very much like a public employee bargaining law. In ring two was a so-called Policy Council, which the school board had designed for the purpose of "discussing" non-economic issues. On the basis of the school board's agreement to "negotiate" economic issues, teams three and four were working on salary scales and insurance programs. At last reading there seemed to be no reasonable solution to controversies over the form of the parties' continuing relationship. The school board, meanwhile, unilaterally abrogated an agreement reached in the Policy Council on the school calendar, and cut salaries accordingly.

Although the foregoing example may not be typical of teacher negotiations, it does illustrate the problems that arise where there is no legally imposed duty to bargain, no legal definition of bargainable issues, and no legal criteria for determining representation rights.

[12] *Anderson Federation of Teachers, Local 519 v. School City of Anderson,* 251 N. E. 2d 15, 1969.

In a somewhat similar vein, employee organizations which accepted the type of policy statements now existing in the state university system are finding them to be unduly restrictive and unsatisfactory. Thus a new wave of pressure is likely to be generated for rewriting pseudo-10988's. This potentially acrimonious situation could be eliminated by state legislation.

Finally, it must be noted that significant inequalities have resulted from the lack of basic legislation. School corporations, for example, with no existing bargaining relationship, may choose to avoid any involvement on the basis of the Sendak opinion. A teacher organization which insists upon bargaining must do so with the threat of an illegal strike. At the other extreme, a school corporation with a long established relationship of exclusive recognition is clearly operating in contravention of established doctrine, and may also be negotiating on issues that would commonly be excluded from those mandated by a uniform state law. Between these extremes there can be many opportunities for an employer to (unilaterally) abrogate or modify established agreements, or (unilaterally) decline to accept third party decisions.

Public employee organizations can hardly be expected to demand equal protection of the laws if employer relationships are most satisfactory in situations where the parties are acting extralegally. It is not difficult to envision the growing animosity of employee organizations which observe broadly based contractual relationships existing in various parts of the state, and are simultaneously confronted by an employer who maintains that it is illegal to enter into a similar relationship. Even if a public employment relations act had been passed by the last legislature, the enmity borne of this situation might be expected to adversely affect employer-employee relations far into the future.

[The End]

Public-Private Sector Multi-Employer Collective Bargaining
The Role of the Employer Representative[1]

By CYRUS F. SMYTHE, JR.

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COLLECTIVE BARGAINING in the private sector has been described and analyzed extensively during the past thirty years. In the public sector analysis is still rather thin in content. Considerable controversy exists as to the desired and/or real similarities and differences between the public and private sector bargaining processes.

Research concerning the bargaining processes with county, city, village and school board relationships reveals a quite different environment and role for the employer representative as compared to his counterpart in the

[1] This paper concentrates only on local governmental units: cities, villages, counties, and school boards. The analysis is not appropriate to the federal or state governments.

private sector. The employer representative's role will be examined in four basic types of collective bargaining relationships in the private and public sectors: (a)—single employer—single union; (b)—multi-employer—single union; (c)—single employer—multi-union; (d)—multi-employer—multi-union.

The purpose is to illustrate that the public sector employer representative for a single employer for the stipulated categories of public employers is similar to that played by the representative in a private sector multi-employer relationship. The role is significantly different from that of the representative of the single private sector employer. In relationships involving multi-employers and multiple unions the complexities of representation grow with greater magnitude for those involved with the public sector.

The Private Sector—Single Employer-Single Union

The employer representative in the private sector is given a continuing set of definitive guidelines prior to and during the bargaining process.[2] Management, during the bargaining process, continually evaluates the employer positions based on the union's bargaining positions and other criteria considered relevant. The employer representative knows quite clearly what positions to take and the timing of those positions. The role is one of putting forth positions and changes in positions in as strategic a manner as the representative can devise. Of prime importance is the fact that the representative knows at all times the limits which management has established.

Additionally, the representative has reasonable confidence that the employer's positions and tactics relative to changes in positions are confidential and unknown to the union leadership. The critical unknowns in the bargaining process (often, in recent years, to both the employer representatives and the union bargaining committee) are the perceptions of the union members concerning their assessment of their bargaining power and their willingness to act collectively to implement the perceived bargaining power.[3] The task of the employer representative is to lower the expectations of the union membership through the bargaining process and thereby weaken the memberships' desire to utilize collective action to gain benefits higher than those deemed "workable" by management. The employer representative is limited in strategies only by his creativity within the economic constraints. The general environment is one of definitive management decision-making in a confidential manner on the one side and the political nature of the union on the other.

The Public Sector—Single Employer-Single Union

A representative of an elected public body seldom finds a definitive framework of bargaining objectives stipulated either prior to bargaining or during bargaining.[4] Elected bodies of local governmental units are generally composed of a mixture of philos-

[2] A 1970 survey conducted by the author, of 200 private sector representatives in this category from 20 different states brought the following results: 193 stated that they did have firm guidelines at every stage of the bargaining process. 7 stated varying degrees of indefinitiveness in guidelines.

[3] Union bargaining power is defined as the relative costs to management of agreeing to or disagreeing with the union demands. In the private sector the costs of agreement and disagreement are usually measured in economic terms. In the public sector the costs are more commonly measured in political terms.

[4] A 1970 survey conducted by the author, of public employer representatives from eleven states in the category stipulated brought the following results: of 65 rep-

(Continued on the following page.)

ophies, biases and political loyalties. The bargainer's task in representing such elected groups is more like the union leader's job than the representative's job for a private single employer. Both the public employer representative and the union leader involved need to continually analyze their internal political composition based on alternative settlement packages. Also, the employer representative can seldom have confidence in the security of whatever goals or guidelines the elected body might discuss. Certain elected officials for political or philosophical reasons may continually keep a union informed as to the elected group's guidelines.[5]

The process of bargaining is one which needs to be oriented toward finding a package mixture at a cost level which will win majority approval without too many political repercussions within the elected body and the union membership. The public employer representative is thus drawn into the role of a mediator between the conflicting interests within the elected body and between those conflicting interests and the conflicting interests within the union as interpreted and mediated by the union leadership. Neither the employer representative nor the union leadership "represent" in the private sector sense. Both are by necessity forced into a mediator's role as imposed by the political processes of approval on the part of both parties.[6]

The environment for the single public employer representative is commonly indecisive decision-making in a non-confidential manner by an elected group. This group approves by majority vote any negotiated settlement on the one side and the political nature of the union on the other. The public employer representative's job is thus more complex and sensitive than that of the bargainer in the private sector representing a single employer.

The Private Sector— Multi-Employer-Single Union

Associations of private sector employers for labor relations purposes fall into two general categories: (1), organizations of employers limited to a given industry such as construction or printing; and (2), more general associations which represent various employers within a given geographic area. In either case, the employer association representative is faced with the necessity of developing a settlement which must be approved by the political structure within both the association and union groups.

Replacing the relatively definitive decision-making process of the single private employer management group is the uneven economic situation of a variety of individual employers. Normally in an association there are a few economically strong employers and a few operating on the edge of financial disaster. Also, the individual employer's relationships with the union can vary sharply. Some develop relationships which could be described as collusive; while others engage in relationships bordering on open hostility.

(Footnote 4 continued.)
resentatives all 65 were unsure prior to and during bargaining of the final goals of the elected body they represented in the event the union membership voted to engage in some type of collective action.

[5] The survey of public employer representatives in the category stipulated brought the following results: of 65 representatives, only 3 were sure of information security.

[6] A 1970 survey conducted by the author, of union representatives and public employer representatives from the category stipulated brought the following results: of 42 union representatives, 34 stated their job was more joint solution finding than membership representation. Of 65 employer representatives, 58 felt trapped by the two way majority approval necessity and spent more time attempting to find solutions rather than representing definitive goals.

Finally, there is little justification for the representative to believe that confidential bargaining goal information developed in association meetings will remain confidential.[7]

The role of the association representative is more political in nature than that of the representative of the single private employer and more analogous to that of the representative of the single public employer. While the single private employer representative contends with the political decision-making process on the union side, management gives a specific framework on the other. The representative of an association does not often receive such firm direction.[8] The association representative is thus faced with the development of a settlement package salable to both the association and union groups in a political process. While certain individual employers in the association may be able to assume dominant decision-making power within the association, care must be taken to preserve the cohesiveness of the association itself within the decision process.

As in the single public employer-single union relationship, the association representative finds the role more mediation between two political groups than representation of definite goals.[9]

The Public Sector— Multi-Employer-Single Union

Within a metropolitan area, a single union may succeed in organizing a single work group (appropriate bargaining unit) in a number of separate local governmental units. Such an occurrence accentuates two conflicting desires among both the elected officials of the local units and employees of the units in the metropolitan area.

In such environments the elected bodies of the individual governments are continually torn between the desire to keep their wages and benefit levels competitive with their neighboring communities and the desire to establish and maintain wage and benefit levels which reflect their own uniqueness. Individual communities within metropolitan areas do differ and may differ significantly in terms of ethnic group mix, average income level, assessed evaluation, growth rate and type, quality of education offered, level of services provided or demanded, willingness of residents to tax themselves for community projects and numerous other factors which cause communities to differ or want to differ from each other.

Employees approach bargaining with a desire to receive a competitive wage and benefit level, to attain more if possible, and the fear of receiving less. Thus, employees in municipalities with high resident income levels or high valuation per capita and a reputation of above average quality and quantity of community services want their wage and benefit levels to reflect their communities' "status."[10]

Employees working in communities with a lower than average ability to pay argue that their community should

[7] A 1970 survey conducted by the author among association representatives from twenty states revealed the following: of 120 association representatives, only 6 believed that bargaining goals and strategies were unknown to the union leadership.

[8] The survey also revealed: of 120 association representatives, only 14 believed they understood the final position of the association during bargaining in the event of collective action by the union.

[9] The association representatives survey also demonstrated: of 120 representatives, 108 felt more as a go-between than a representative of the association.

[10] A 1969-70 random sample survey conducted by the author among employees in the Minnesota Twin City metropolitan area employed by high ability to pay communities and school boards showed that 92 percent felt that their wages and benefits should be higher than average.

be competitive. The argument is one of equal pay for equal work.[11]

Employees in those communities which tended toward average ability to pay argue for comparability with the higher ability to pay communities.[12]

Where a single union represents the same class of employees in different communities, the union is under constant membership pressure to attain: a) higher than average wage levels for employees in the high ability to pay communities than those attained in other communities; b) wage levels equal to the average in communities with low ability to pay.

The achievement of either goal creates no solution for the union leadership. Members continually threaten to drop their membership for the purpose of joining another union which can "deliver."

Among the elected officials of the communities, the strongest interest in establishing and maintaining a multi-employer bargaining relationship is seen in those communities with average ability to pay. Their goal is to "bring down into line" the wage levels of the high ability to pay communities so as to reduce union pressure for higher wages in their own communities. The establishment of multi-employer bargaining is most often resisted by those communities on either end of the ability to pay scale.[13]

In a public sector multi-employer-single union relationship, the employers' representative and the union leadership must contend with the following separate and identifiable interests:

(A) within the union:
1. the interests of the union as an organization in bargaining rights;
2. the interests of individual union members;
3. the interests of minority groups of union members;
4. the interests of a majority group of union members;
5. the interests of the union leaders.

(B) within the employer group:
1. the interests of the employers as a group in maintaining the multi-employer relationship;
2. the interests of the individual governmental units of the group;
3. the interests of individual elected officials;
4. the interests of minority groups of governmental units;
5. the interests of a majority group of governmental units;
6. the interests of the group leadership.

All of these interests are issue related and will tend to change and

[11] A 1969-70 random sample survey conducted by the author among employees in the Minnesota Twin City metropolitan area employed by low ability to pay communities and school boards showed that 83 per cent felt that their wages and benefits should equal the average.

[12] A 1969-70 random sample survey conducted by the author among employees in the Minnesota Twin City metropolitan area employed by average ability to pay communities showed that 68 per cent wanted wages equal to the highest paid, the remaining wanted the average paid.

The propensities for multi-employer bargaining among employees is highest in communities with the lowest ability to pay and lowest in communities with the highest ability to pay. Without exception employees surveyed in these two types of communities voiced these desires.

[13] A 1969-70 survey conducted by the author of forty communities in three different metropolitan areas shows only one of thirty high ability to pay communities satisfied with or interested in multi-employer bargaining, none of twenty low ability to pay communities satisfied with or interested in multi-employer bargaining, and eighteen of twenty-three average ability to pay communities satisfied with or interested in such an approach.

groupings shift as the issues in bargaining are modified or changed in content or level.

The Private Sector— Single Employer-Multi-Union

An employer with a number of different unions within a single operating entity may be faced with a debilitating power relationship with a single union or some of the single unions.[14] A union may be able to present the company with a cost of agreement-disagreement equation such as to force the employer constantly to the edge of disaster. Even absent such conditions, the employer is continually faced with the problems of unions forced by their membership into constant one-upmanship in the bargaining process.

The role of the employer representative is to try to maintain a rational wage and benefit balance between the competing unions even though management tends to overreact to contain unions. Such an environment can lead to collusive arrangements with some unions at the expense of other unions. The employer representative normally enjoys confidence in the security of bargaining goals and strategies and firm guidelines with regard to such goals.[15]

The Public Sector— Single Employer-Multi-Union

Some public employers such as New York City and Detroit have been carved into a large number of separate bargaining units. Their number of separate bargaining relationships far exceeds any known experience in the private sector. Some of the employee groups have significant amounts of bargaining power in terms of the cost of disagreement either in political or public welfare terms. Other groups by themselves have little bargaining power unless other more potent groups refuse to cross picket lines.

The role of the employer representative in such instances is complicated beyond the already stipulated problems of the single public employer representative by the constant one-upmanship game played between the unions and the resulting more extensive indecisiveness among the elected officials.[16]

The Private Sector— Multi-Employer-Multi-Union

A wide variety of power relationships are found in this type of environment. The major factors to be considered are:

1. heterogeneity of employers;
2. extent of bargaining rights by the separate unions;
3. relative size or dominance of employers;
4. degree of cohesion and cooperation by the employers;
5. existence of coalitions for bargaining among the unions;
6. relative size or dominance of unions;
7. degree of competition between employers in the marketplace and for labor;
8. degree of competition between unions to expand their bargaining rights.

The role of the employers' representative will vary widely, dependent

[14] See, for example, the American or British newspaper industry bargaining experience.

[15] A 1970 survey conducted by the author of representatives of employers with multiple union relationships revealed that: 18 of 20 representatives had confidence of information and definitive bargaining guidelines.

[16] A 1970 survey conducted by the author of representatives of public employers in such situations revealed that only 2 of 30 received definite guidelines from the elected officials in the form of a comprehensive set of goals for the bargaining relationships.

on the particular mix of these factors. However, the potential for the most intricate and explosive or, under certain conditions, collusive bargaining patterns are found in these relationships.

The Public Sector— Multi-Employer-Multi-Union

A number of separate employers in a metropolitan area with different unions representing different work groups within each community and with different unions involved with the same class of employees between municipalities presents a complex situation.

For example, assume a number of separate municipalities in a metropolitan area, each with (for the sake of relative simplicity) only four separate bargaining units: firemen, police, public works, and administrative. Each group in each community is represented by a different union. Some of the unions involved have been able to organize a given employee group in a number of the municipalities.

The bargaining complexities of the multi-employer-single union model are now made more intractable by the introduction of union competition.

Establishing Public Sector Multi-Employer Bargaining Relationships

A. *Multi-Employer-Single Union*

Employees of metropolitan local units of government have tended to bring to the bargaining table in the years 1967-1970 an increased emphasis on money wage rates.[17] This trend is attributed to the impact of the building trades' wage increases negotiated in the private sector at approximately the same period coupled with the traditional downgrading by public employees of the value of their job security. In addition, a study among Minnesota Twin Cities metropolitan area public employees indicates a lack of knowledge of the monetary value of the fringe benefits within the employees' own governmental unit, and an almost total inability to name the range of fringe benefits in other metropolitan communities; yet a high percentage of the employees could list the wage rates paid for comparable jobs in the other communities.[18]

Efforts, therefore, to establish multi-employer bargaining relationships in the Twin City metropolitan area have had the best results when the initial efforts by the communities and the union leadership are concentrated on the establishment of a uniform wage for-agreed-on bench mark jobs, with a fairly common job description, which exist in all of the communities involved.[19]

By limiting the initial master contract bargaining to the basic wage levels for common jobs:

1) union members in high ability to pay communities and the communities can establish total cost packages for the employees higher than the average through higher cost fringe

[17] A 1969-70 survey conducted by the author, of 300 managers of local metropolitan governmental units in eleven states revealed: 284 perceived a change in bargaining emphasis by their unions beginning with bargaining for the calendar year 1967.

[18] Of 250 employees surveyed in 23 different Minnesota Twin City metropolitan area communities, none could name within a $1000.00 figure the value of their fringe benefits; none could list more than 3 of the major benefits of neighboring communities accurately; 87 per cent could accurately give the money pay rates for comparable employees in neighboring communities.

[19] This approach established a multi-employer single union bargaining relationship between the Minnesota Twin City Metropolitan Area Managers Association and the International Union of Operating Engineers, Local 49, in the contract negotiations for the year 1969. This relationship in 1971 includes more than thirty separate communities.

benefits. These benefits negotiated on a local basis are generally unknown in value except to the local community employees, and their negotiation causes little political problem to the union in the short run, as long as the basic money wages are consistent between the communities.[20]

2) union members in low ability to pay communities are more satisfied with their community and the union since their basic wage level is equal to that of the other communities. The elected governing bodies of these communities justify this wage competitiveness by pointing out the lower than average cost of fringe benefits and the lower total payroll cost per employee than higher ability to pay communities. The union is regarded more favorably by the membership in such communities.[21]

Bargaining during 1968 and 1971 between the Minnesota Twin City metropolitan area communities in a multi-employer-single union (Operating Engineers, Local 49) relationship has expanded in scope on a master agreement basis to include such items as a management prerogatives clause, grievance procedures, definition of overtime and normal work day, number of paid holidays, and injury on duty benefits. Both the community managers and the union anticipate continual growth in the scope of the agreement within the economic constraints which exist between the separate communities.

The community managers, the elected officials and the union feel that the multi-employer approach is jointly beneficial. However, their opinion is that the relationship can endure only as long as the communities, the employees, and the union continue to perceive that the benefits outweigh the disadvantages. The role of the representatives of both the employer group and the union is largely a political one of continuing to prove to their constituencies that the multi-employer approach is a more satisfactory approach than the constant previous problem of one-upmanship and/or downmanship.

The environment for the employer bargainer is, however, relatively indecisive decision-making in an often non-confidential manner by the individual elected bodies which may have differing goals—each of which must approve the negotiated master settlement on the one side and the political nature of the union on the other.

B. *Multi-Employer-Multi-Unions*

In this situation, as previously stated, different unions have been able to organize members of a given appropriate bargaining unit such as police in various communities. The unions are in competition with each other to prove their representation capabilities. They compete by necessity on the money wage paid to the bench mark jobs common to the different bargaining units—such as the monthly rate paid to a police patrolman or firefighter. Differences in this bench mark rate between communities cause the employees significant psychological problems and the union political problems in dealing with their members when this rate

[20] Local 49 leadership, with regard to the established multi-employer-Local 49 relationship cited in footnote #19, reports few general membership problems based on fringe benefit disparities. When there were basic wage differentials between communities the union leadership was under constant pressure from the employees who received lower than the average rates to obtain more. This pressure was coupled with threats by the employees to join a different union.

[21] Local 49 leadership reports significantly lower membership pressure from such low ability to pay communities after the multi-employer bargaining relationship was established.

is below what the employees feel is competitive in their judgment.

The public employer representative is caught in this competition as well as the unions.

The difficulties of establishing multi-employer bargaining to deal with a single class of employees represented by different unions in different metropolitan area communities can be established by one of two means—both of which have low probabilities based on the experience in the major metropolitan areas in the United States: 1. Convince the unions involved to form a coalition; 2. Convince the separate elected governmental bodies to name the same individuals to represent each of their communities for bargaining purposes with a given class of their employees; further to jointly agree to accept the negotiated wage rate; and further to support during bargaining the representatives' bargaining positions by refusal to enter into separate negotiations.

The role of the employers' representative in this environment is a many faceted one. In the absence of convincing the unions to form a coalition, the representative must constantly attempt to convince elected bodies to join together to deal with unions which do not want the employers to proceed on a multi-employer basis. In addition, the composition of the elected bodies is continually changing with periodic elections, further compounding the representative's difficulties in maintaining a united employer front.

Conclusions

I. **The role of the bargainer:**

A. *Single Employer-Single Union*

1. Private Sector
   a. Definitive direction by management
   b. Confidence of goals, strategies and tactics
   c. A union with a political approval process
2. Public Sector
   a. Inconsistent or indefinite direction by an elected group
   b. Problematic confidence with regard to employer goals, strategies, tactics
   c. A union with a political approval process
   d. An employer with a political approval process

B. *Multi-Employer-Single Union*

1. Private Sector
   a. Inconsistent or indefinite direction by a group of employers
   b. Problematic confidence with regard to employer goals, strategies, tactics
   c. A union with a political approval process
   d. An employer with a political approval process
2. Public Sector
   a. Inconsistent or indefinite direction by a group of individual public elected bodies
   b. Problematic confidence with regard to goals, strategies, tactics
   c. A union with a political approval process
   d. Each public body with a political approval process of the negotiated settlement
   e. Employer tendency to play one-upmanship or downmanship

C. *Single Employer-Multi-Union*

1. Private Sector
   a. Problematic consistency in goal setting with the different relationships

b. Confidence with regard to goals, strategies, tactics
c. Unions with a political approval process
d. One-upmanship among unions
e. Variations in power relationships

2. Public Sector
a. Inconsistent or indefinite direction by an elected body
b. Problematic confidence with regard to goals, strategies, tactics
c. Unions with a political approval process
d. One-upmanship among unions
e. Variations in power relationships

D. *Multi-Employer-Multi-Union*

1. Private Sector
a. Problematic consistency and definitiveness of goals
b. Problematic confidence with regard to goals, strategies, tactics
c. Unions with a political approval process
d. One-upmanship among unions
e. Variations in power relationships

2. Public Sector
a. Inconsistent or indefinite direction by a group of separately elected bodies
b. Improbable confidence with regard to goals, strategies, tactics
c. Unions with a political approval process
d. One-upmanship among unions
e. Each public body with a political approval process of the negotiated settlement
f. Employer tendency to play one-upmanship or down-manship with each other and the unions

II. Establishing and Maintaining a Multi-Employer Relationship

Multi-employer bargaining units in the private sector have an extensive history. Such units have been formed to satisfy certain needs of the parties and vary widely in terms of their impact on bargaining power, efficiency of bargaining efforts, scope of agreements, and the constructiveness of the bargaining relationship.

Many of the same considerations promoting or discouraging multiple units in the private sector also exist within the public sector. Generally, the extent of union organization determines whether a multi-employer unit is feasible. The conditions most favorable to the establishment of such units are:

1. The employers are similar in terms of the level of government within a given geographic region.

2. The employers are similar in terms of their legal authority to implement settlements.

3. The employers are similar in terms of their financial resources.

4. The employers are similar in their attitudes toward unions.

5. The employers are committed to the logic of establishing and maintaining equal wages, hours and benefits of a major nature between the various employers within a geographic region for similar categories of employees.

6. The same union organization has bargaining rights in similar bargaining units with the separate employers.

7. The union has a desire to equalize the major conditions of employment in their separate bargaining relationships within a geographic region.

8. Employers compete in the same labor markets.

9. The individual political units have a professional full-time management—city manager, school superintendent, county manager.

To the extent that these conditions are not all met, the probabilities of a constructive multi-employer unit being established and maintained are reduced. On the other hand, the fact that the conditions are met is not a guarantee of high odds in favor of a workable multi-employer-single-union relationship.

In metropolitan areas where a number of independent municipalities exist in addition to a core city, there are constant forces promoting multi-employer cooperation in bargaining efforts with similar job groups and just as constant pressures to destroy a unified approach to such bargaining.

Municipalities are torn between their desire not to be inconsistent with neighboring communities in terms of wage rates and the basic fringes and their desire to have their wages, hours, and conditions of employment reflect the uniqueness (real or imagined) of their governmental entity.

Employee groups are affected by similar problems. They do not want to settle for less than another community, would like more than other community groups receive, yet realize that there is value in consistency between neighboring communities.

The problems are compounded when a sizeable number of communities around a core city exist and there are significant differences between the communities in terms of per capita evaluation, head of household income, and level of education.

In areas like the Minnesota Twin Cities and suburbs, the history of multi-employer bargaining is a mixture of successful and unsuccessful attempts. Yet, the pressures on both union leaders and municipality management in metropolitan areas for equal treatment for similar employee groups will probably mean more experimentation with the joint approach in future years. **[The End]**

The Decade for a Remedy for Economic Discrimination

By ARTHUR A. FLETCHER

United States Department of Labor

WHEN I CAME into office as Assistant Secretary of Labor in the spring of 1969, I found that the Office of Federal Contract Compliance was in disarray. It had no program. It had little staff. It had little budget. And it had no reputation to speak of, because, in the years of its operation under the previous administration, it had done little. One of its major failures had been its inability to come to grips with the problems of discrimination against blacks and other minorities in the construction industry. As you know, the ending of this kind of discrimination has been on the agenda of the black community

for many years. There is no doubt that the pattern of discrimination in the construction industry is the most difficult to eradicate. The construction industry is a complex combination of institutions which reflect the nature of the building industry, and the pressures of the building trades unions. Men are hired for specific jobs, then discharged by the contractors. The unions refer men to jobs, and when they are terminated at the end of the job, they come back to the union hall to be sent to another job. The unions seek to keep the number of workers small so that they can get higher wages. The unions often started as ethnically based institutions, selecting additional members from the sons or family members of existing members. Where membership was largely white, these family preferences or preferences for friends and relatives, kept it that way. The result was that in the so-called skilled trades, which commanded high wages, black and Spanish surname representation was less than 5 per cent nationwide, while in the less skilled trades, the percentage was higher, and in the laborers category, it was substantial. Black and Spanish surname workers got the lower paying, dirty jobs, while whites reserved the higher paying jobs for themselves. In this process, unions developed enormous political power so that the Labor Department often represented union interests, rather than public interests. In 1965, when it became the job of the Labor Department to implement the antidiscrimination clause in government contracts, the department moved cautiously, to put it mildly. The department did little to seriously challenge the exclusion of minorities from the building trades.

Conception and Opposition

I was sworn in as Assistant Secretary of Labor by President Nixon on May 5, 1969. Under Secretary of Labor Shultz, it became my responsibility to change this situation, to enforce the law against discrimination in the construction trades. We immediately began a search for something better than the haphazard, inept efforts which had characterized the Office of Federal Contract Compliance in the previous administration. That administration had talked about goals, targets and timetables, but had not put the talk into specific practice. We decided to try this program out. We went into Philadelphia and estimated the future growth of the trade, certain other factors, and came to conclusions that, during the course of the next four years, the six trades in Philadelphia which were the worst offenders, should have specific percentage ranges of minority employees, in each of the forthcoming years, if they were to overcome the effects of the past exclusion of minorities.

The announcement of the Philadelphia plan created a classical confrontation between the executive branch and the legislative branch of government. The unions screamed. They enlisted the Comptroller General to conclude that the plan was illegal. This created a fundamental constitutional conflict between Congress and the President. The reason for the conflict is that the Comptroller General works for Congress, and he had declared a program of the executive branch to be in violation of the Constitution. Suddenly, the Congress was claiming a power—which in America resides only in the court—to tell the President his action is unconstitutional. The President would not stand for that. In response, first the Solicitor of Labor and then the Attorney General, issued written opinions support-

ing the plan. The stage was set for a constitutional confrontation, with the President's supporters standing behind the Philadelphia plan. Then, the opponents of the plan tried another tactic. They attached a rider onto an appropriations bill, to knock out the Philadelphia plan. They moved the battle to Capitol Hill. At this point, the President intervened personally, defending the Philadelphia plan and using his political influence at Capitol Hill to save it. This set of maneuvers put the labor movement in opposition to the civil rights movement in the Congress for the first time in history. Dazed supporters of civil rights found themselves voting to uphold a Republican program against an attack by traditionally Democratic and traditionally pro-civil rights speaking, labor movement. In fact the labor movement itself was badly split, many unions which sought decent working conditions for all American workers, refused to support the position of the construction unions, in opposition to the plan.

Initial Difficulties

Thus the plan survived, and was put into effect. Like all new efforts, this one had shortcomings. The major defect was pointed out to us by George Meany, the president of the AFL-CIO. The plan covered only federal contract work of government contractors, not all their work. Therefore, the contractors could have a lily-white work force on private jobs, and put just enough blacks or Spanish surname Americans to work on the federal jobs to meet the minimum standards. The contractors could move men around, so called "motorcycle compliance," to meet the requirements. There were other difficulties. Initially there was no efficient reporting system, so we didn't know what was happening. However, these difficulties were all corrected as quickly as possible. The plan was extended to cover private work of government contractors; a reporting system was devised, and put into effect. A similar plan was instituted in the District of Columbia.

Meanwhile, the contractors and the unions began a court test of the plan. The district court upheld the plan, and the unions and contractors appealed. Finally, and this is the main burden of my report to you tonight, the Court of Appeals for the Third Circuit, sitting in Philadelphia, brushed aside all objections to the plan, and upheld it. I will talk in a moment about the reasoning of the court. But first I want to focus your attention on the crucial fact; that for the first time in our nation's history, a specific plan, requiring goals and timetables to increase minority employment, to destroy the effects of past discrimination, imposed by an administration determined to enforce equal employment opportunity, has been upheld, by the second highest court in the land. Never before has government tried so hard to bring about equality; and never before have the courts so wholeheartedly supported the effort.

Court Decision

First, the court described the history of the executive order, tracing it back to the actions of President Roosevelt in 1941. Then the court pointed out that it was dealing with an exercise of executive power, operating in an area where Congress has already acted in passing Title VII of the Civil Rights Act of 1964. But this exercise of the executive power was in relation to the problem of procurement of federally assisted construction. In that area, the President operated pursuant to the express or implied power of Congress.

". . . it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen . . ."

With that statement as its starting point, the court proceeded to demolish all objections to the plan.

The authority for the plan was placed squarely on the power of procurement of federally needed construction. I quote:

". . . in direct procurement the federal government has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects. It has the identical interest with respect to federally assisted construction projects. When the Congress authorizes an appropriation for a program of federal assistance, and authorizes the executive branch to implement the program by arranging for assistance to specific projects, in the absence of specific statutory regulations it must be deemed to have granted to the President a general authority to act for the protection of federal interests . . ."

And from this base, all the objections were eliminated. The plan did not violate the so-called no quota provision of Title VII of the Civil Rights Act of 1964, because that provision did not apply to procurement activities. The plan did not force employers to discriminate against minorities because hiring of minorities could be done without discrimination against whites. Furthermore, nothing in the Civil Rights Acts prevents the President from remedying the situation of the exclusion of minority workers from key trades in Philadelphia.

Furthermore, said the court, the plan validly overrode provisions of the collective bargaining agreements dealing with hiring halls in Philadelphia. Hiring halls were not illegal; but neither was the plan. The contractor could take his choice; limit the use of the hiring hall, or not do business with federally-assisted contracts.

And finally, the opponents of the plan argued it was unconstitutional, as imposing racial quotas prohibited by the Equal Protection Clause of the Fifth Amendment. This bit of legal argumentation attempted to turn a charter of liberty into a license for continued oppression of minorities. The Court of Appeals would have none of this argument:

"347 U. S. 497 (1954). The Philadelphia plan is valid executive action designed to remedy the perceived evil that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest. The Fifth Amendment does not prohibit such action."

And at the end, the court said that we could have imposed the plans without any hearings as to the reasons why minorities had been excluded from the trades.

". . . the federal interest is in maximum availability of construction tradesmen for the projects in which the federal government has a cost and completion interest. A finding as to the historical reason for the exclusion of available tradesmen from the labor pool is not essential for federal contractual remedial action."

Conclusion

This was a hands down clear victory for the principle of the Phila-

delphia plan. I personally hope the Supreme Court will take the case and finally put aside legal objections to the plan. In the meantime, now that the court has acted, we are going ahead. We will impose further plans in other parts of the country, where it is clear that lesser measures will not work to end the era of exclusion of minorities. We will consider adoption of a national plan to avoid the necessity for hearings in city after city, all of which tell essentially the same story of Negro and Spanish surname exclusion from the trades. We have been given permission by the court to proceed with the enforcement of the equal opportunity obligation. We have overcome all the obstacles that a set of determined unions could put in our path. We shall continue, until the equality of opportunity which is the right of all Americans, exists in practice in all America. Thank you. **[The End]**

SESSION III

Fair Employment Practices

Will Greater EEOC Powers Expand Minority Employment?

By HERBERT R. NORTHRUP

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DURING THE PAST decade more progress has been made in achieving equal employment opportunity than in any similar, previous period. Yet, equality is far from a reality. In particular, high unemployment continues to exist in the black populated areas of the cities, and change in many industries, although evident, seems to occur slowly.

Pride in progress is thus coupled with disappointment and frustration at the lack of more. It is perhaps therefore not surprising that instant solutions are so easily peddled and that the consequences of their creating more frustrations as well as more problems thereby are so lightly ignored. Nevertheless, it seems important to me to raise one small voice against the current wisdom (perhaps I should say religion, so fervently and emotionally is it held) that greater powers for the Equal Employment Opportunity Commission would automatically mean greater job equality; and to emphasize that one can hold such views while firmly supporting equal employment opportunity and continuing efforts of government to insist on such opportunity. In making these remarks, I shall rely heavily on the research now being conducted at the Wharton School under my direction,[1] and my thirty year interest in seeking to make equal employment opportunity a reality.[2]

[1] Reference is to the Racial Policies of American Industry report series and to the Studies of Negro Employment. Since 1967, we have produced twenty-four monographs and five volumes detailing the background and present status of Negroes in industry. Additional monographs and volumes are in process.

[2] This dates back to the late 1930's and early 1940's when I served as research assistant to Gunnar Myrdal in the preparation of *An American Dilemma*, and published my first book, *Organized Labor and the Negro* (New York: Harper & Brothers, 1944).

GREATER POWER FOR EEOC?

Current legislation before Congress would give the Equal Employment Opportunity Commission power to issue cease and desist orders on the model of the National Labor Relations Board. An alternate bill, opposed by the Democratic majority and its civil rights and labor allies, would instead give EEOC the right to seek court enforcement on its own. At present it has neither power, but it can and does file *amicus,* or supporting briefs, when individuals file cases, and can refer cases to the Department of Justice for action where a "pattern of discrimination" is alleged to exist.

Similar bills have been introduced in each Congress since the Civil Rights Act of 1964 was passed. Title VII, which establishes the EEOC and deals with employment, was charged with being inadequate before it went into effect. Uncritically, this charge became part of the wisdom of our times and agreement thereto the *sine qua non* of minority leadership political support. In the last Congress, only a dispute between civil rights leaders and the AFL-CIO over the role of the Office of Federal Contract Compliance, the civil rights coordinating agency for executive branch procurement, seemingly prevented its passage.

It would appear logical to assume that the only rationale for giving government bureaucracy more authority over the decisions of private citizens is that present authority has failed to achieve the results desired by Congress through existing legislation. Yet such a change is difficult to sustain, and most emphatically ignores (1) voluntary compliance; (2) cases brought by individuals; and (3) "pattern of discrimination" cases initiated by the Department of Justice generally at EEOC recommendation. Certainly, the great changes in employment patterns wrought since 1965 must be attributed in part to the average citizen's desire to comport with the law. Fortuitously the law became effective at the height of the greatest boom in our industrial history, and the combination of the two contributed to the great change; but the policy of the law certainly played a major role.

In court enforcement matters, the most significant is probably the pattern cases, but individual cases have achieved key decisional victories. For example, the "rightful place" doctrine, preventing the impact of past discrimination from continuing unabated, was won in an individually brought case,[3] supported by EEOC, as was the testing decision involving Duke Power Company.[4] The former doctrine was enhanced and expanded in a pattern of discrimination case;[5] the pattern type cases have been used with effectiveness in several building trades cases[6] and successfully to upset the discriminatory seniority system in a major trucking situation—the first break in the invidious union-management policies found in the key over-the-road trucking industry.[7] Numerous other key cases and litigations could

[3] *Quarles v. Philip Morris, Inc.,* 279 F. Supp. 505, 57 LC ¶9101 (D. C. Va. 1968).

[4] *Griggs v. Duke Power Co.,* U. S. Sup. Ct., 3 EPD ¶8137 (1971).

[5] *U. S. v. Local 189, United Papermakers, et al.,* 282 F. Supp. 39 (D. C. La., 1968) 57 LC ¶9120; affirmed U. S. Ct. Appeals, 5th Cir., July 29, 1969.

[6] Two significant cases are *Local 53 v. Vogler,* 407 F. 2d 1047 (CA-5), 59 LC ¶9195 (1969); and *Dobbins v. Local 212,* IBEW, 292 F. Supp. 413, 58 LC ¶9158 (D. C. Ohio), (1968). For numerous other EEOC and state commission cases, see *Race Relations Law Survey,* various issues.

[7] *United States v. Roadway Express, Inc.,* Civil Action No. C-68-321, (D. C. Ohio), 63 LC ¶9516 (1970); see also *Jones et al. v. Lee Way Motor Freight, Inc.,* 431 F. 2d 245 (CA-10), 63 LC ¶9504 (1970).

be cited to support the position that EEOC initiated or supported litigation has been far more potent than the supporters of bureaucratically enhanced power would lead one to believe. Indeed, I suggest that the case can be far more easily made that EEOC, as now constituted, has had significant enforcement success rather than the other way around.

The 1970 Civil Rights Commission Report

Of course, despite the successful litigation involving EEOC and despite the great progress made in the past several years, it has been charged that more progress (and presumably more litigation) would have occurred if the EEOC had greater powers. The most important document which attempts to relate civil rights enforcement insufficiency as a direct cause of continuing job inequality is the 1970 study of the United States Commission on Civil Rights entitled, *Federal Civil Rights Enforcement Effort.*[8] This bulky 1,115 page report, about which many have commented, but which few have read, delves into all aspects of civil rights interest and concludes uniformly that laws and enforcement procedures are not working well. The reasoning is charmingly simplistic: if any inequality exists, enforcement of rights is a failure.

Approximately 350 pages of the *Report* are devoted to employment. Some quite reasonable suggestions are made, for example, concerning the need for better coordination among enforcement agencies and between such agencies and procurement bodies. In addition, the *Report* acknowledges the effective litigation record of EEOC, noting that the latter "has had noteworthy success in its *amicus* activity in persuading the courts to adopt its position, particularly in the areas of formulating adequate remedies, determining issues of 'standing to sue' and in developing procedures designed to benefit the charging party."[9] The *Report,* however, is primarily concerned with demonstrating EEOC inadequacy. Thus it concludes that "while there have been some overall minority employment gains in the general private labor market, discrimination continues largely unabated six years after Congress ordered equal employment opportunity as organic law."[10]

This conclusion, of course, is not only factually incorrect; it also assumes that job inequality is *per se* the result of continued discrimination, whereas the *Report* authors surely must know such relationships are far more complicated. Of course, effective government support is an absolute necessity if we are to achieve equal employment. This has been documented innumerable times. In the Racial Policies of American Industry studies, which now cover experience in 27 industries, this has been repeatedly pointed out. Equally well documented is that such support is insufficient in itself to achieve equality. It cannot overcome inadequate training and education; its effectiveness is limited when employment is declining; it cannot immediately offset a history of discrimination; it cannot move people from one location to jobs in another; and it cannot reorder the job structure of an industry to a marked degree, although it can, and has, recast discriminatory upgrading policies and seniority systems.

Aerospace Industry

Consider, for example, the situation in the aerospace industry. In 1966, I obtained data from 21 of the largest

[8] Washington, 1970. Hereinafter referred to as the Commission's *Report.*

[9] *Ibid.,* p. 337.

[10] *Ibid.,* p. 57.

companies in this industry, which then employed 788,022 persons in 127 establishments, or about two-thirds of the industry's total.[11] These companies employed 179,436 professionals in 1966, of whom only 0.8 per cent, or 1,435, were black. On the face, this looks like a highly discriminatory pattern of employment. Moreover, in 1968, these same companies had, if conventional ratings are utilized, improved little. Their total professional employment declined a bit to 179,041, their black professional complement increased slightly to 1,598, but the Negro percentage was still only 0.9 per cent. On such a basis, a company with a considerably better than average record in these matters than the industry, McDonnell Douglas, was publicly excoriated by the Civil Rights Commission as unfit to receive a key government contract because of its low percentage of black personnel in professional and other top salaried positions.[12]

But if one looks at the total picture, a different situation emerges. In 1966, when 21 companies in the aerospace industry had a professional black ratio of only 0.8 per cent, they employed approximately 40 percent of all Negro professionals in manufacturing industry reporting to the EEOC. Data for 1968 on all manufacturing are not available, but I judge, from the 1969 all-industry data, that the proportion of Negro professionals had expanded more rapidly in industry generally than in aerospace, but still aerospace had a large share of those available.

These is still more to the total picture. Professor Robert Kiehl of the Newark College of Engineering has been keeping a careful record of the demand and supply of Negro engineering talent since the mid 1950's. In his most recent study, released in October 1970, he concludes:

(1)—Only about 2 per cent of engineering students are black, but that percentage is not increasing, and did not increase between 1962 and 1970.

(2)—Government fair employment practice legislation has greatly aided black engineers in finding jobs, but apparently has not increased the supply.

(3)—"There seems to be no question but that there are widespread education and employment opportunities for blacks in engineering. . .

(4)—"The relative lack of information on engineering coupled with employment discrimination of the past seem to be the chief reasons for the apparent lack of interest of blacks in the profession today."[13]

Studies of other professions would undoubtedly yield similar results: opportunities available, but going begging, and slow accretion at best at the supply level. Obviously, giving cease and desist powers to the EEOC would not solve this problem.

Moreover, since 1969, aerospace employment has declined dramatically. Engineers have been especially hard hit by unemployment, and further cuts are likely in view of the liberal-led onslaught on defense and space spending. Wiped out are the

[11] Herbert R. Northrup, et al., *Negro Employment in Basic Industry*, Studies of Negro Employment, Vol. I (Philadelphia: Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania, 1970), Part Three, pp. 165-166, 172-173; Part Eight, pp. 726-728.

[12] This occurred at the 1970 St. Louis hearings of the Commission which were given wide publicity. The Commission's *Report* discusses McDonnell Douglas at length, often with less than total accuracy and always without fairness.

[13] Robert Kiehl, *Opportunities for Blacks in the Profession of Engineering*. A study prepared for the Manpower Administration, U. S. Department of Labor (Newark: Foundation for the Advancement of Graduate Study in Engineering, 1970), pp. 13-14.

jobs for which many Negroes were trained by this industry, which without doubt has developed the outstanding training capacity in the land. Especially to be lamented is the disappearance of high talent positions in the Southeast where aerospace concerns led in breaking the color line, opening up housing to black professionals, and upgrading the indigenous labor force.[14] The almost unanimous support of civil rights leaders to cuts in defense and space spending has cost their race considerably in quality jobs. Advocating more power for the EEOC will not restore what is lost.

If space permitted, analyses could be made of several other industries to show that the problem of inequality could not be cured by greater EEOC enforcement powers where the need is for trained personnel,[15] or where employment is declining,[16] or turnover low,[17] or location (for nonracial reasons) has altered from cities to areas where few minorities dwell.[18] Far from being a failure, existing civil rights legislation has done wonders in the face of the structural and labor market obstacles which it has faced, and will continue to face whether a greater powers bill is enacted, until all aspects of past discrimination in education, motivation, and other socio-economic factors are eliminated through the efforts of all of us.

To return to the Civil Rights Commission *Report,* its conclusions are not only simplistic, its facts are questionable. The *Report* makes no effort to provide a systematic analysis. Rather, it leapfrogs from industry to industry, area to area, and year to year, to present a grab bag of information designed to support a pre-arrived-at conclusion. Its facts pertain to a five-year period and many probably changed before their publishing. Using as it does isolated examples, the reader must assume that they are typical. They are not necessarily so. By overwhelming the reader with quantity without qualitative analysis or orientation, the desired effect is obtained.

Moreover, many of the so-called facts are gleaned from Commission hearings. These are highly structured affairs, in which witnesses are arranged for beforehand, companies or unions are damned publicly without right of witness cross examination, and information is accepted from highly partisan sources without appropriate rebuttal. Thus the Commission made great headlines castigating McDonnell Douglas (and probably saved itself from going out of

[14] See Northrup, *op. cit.,* esp. Part Three, pp. 204-214.

[15] See Theodore V. Purcell and Daniel P. Mulvey, *The Negro in the Electrical Manufacturing Industry.* The Racial Policies of American Industry, Report No. 27 (Philadelphia: Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania, 1971); and Herbert R. Northrup, *et al., The Negro in the Air Transport Industry.* The Racial Policies of American Industry, Report No. 23 (Philadelphia: Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania, 1971).

[16] Northrup, *Negro Employment in Basic Industry, op. cit.,* Part Five (Rubber Tires); Herbert R. Northrup and Richard L. Rowan, *et al., Negro Employment in Southern Industry.* Studies of Negro Employment, Vol. IV (Philadelphia: Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania, 1970), Part Three (Tobacco).

[17] Northrup, Rowan, *Negro Employment in Southern Industry, op. cit.* Part One (Paper).

[18] Walter A. Fogel, *The Negro in the Meat Industry.* The Racial Policies of American Industry, Report No. 12 (Phialdelphia: Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania, 1970). A forthcoming study by Professor Robert Ozanne on the farm equipment and construction machinery industry will likewise show the great impact of location on minority opportunity, as do many of the Racial Policies monographs.

existence) in St. Louis last year. A principal witness was an individual who had been discharged from the company for chaining people in offices and blocking traffic. The Commission listened sympathetically to his special pleading a short time before a federal judge, noting that violating the law and endangering human lives are not protected activities under the Civil Rights Act, dismissed with prejudice his case for reemployment.[19]

The NLRB Model and the EEOC

A secondary argument adduced by those who argue for more power for EEOC is procedural. They point out quite correctly that complaint procedure under EEOC is clumsy and time consuming, requiring as it does, first, reference to a local or state body if available, then conciliation, and finally seeking redress in courts. Moreover, where cases are referred to the Department of Justice for possible pattern of discrimination charges, the latter has found it necessary to reinvestigate because of the failure of EEOC to supply sufficient evidence.[20]

The procedural problems are compounded by EEOC's inability to handle its case load expeditiously. This is usually blamed on inadequate staffing, but the Civil Rights Commission's *Report* also charged various administrative laxities, a high turnover of personnel, and inexperienced management.[21]

Proponents of more power for EEOC argue that it would be able to settle cases more quickly, that it would be able to handle cases more expeditiously and that it would litigate more successfully if it had more powers.[22] The arguments are neither consistent nor persuasive. To be sure, the procedure is time consuming. But it has not been demonstrated that giving EEOC more authority would speed up the process. Certainly the administrative defects in the agency are not caused by lack of authority. Administrative shortcomings, turnover, and inexperience can be corrected over time, but not by cease and desist orders.

Moreover, consider the NLRB upon which the liberal coalition would model EEOC. Professor Philip Ross, an ardent proponent of enhancing administrative power, found some years ago that nearly two and one-half years elapsed between the filing of an unfair labor practice charge and the issuance of a judicial decree.[23] The current chairman of the NLRB regards the extensive period required to conclude a case under NLRB procedure as his major administrative problem.[24] He and other NLRB members continue to be concerned about long drawn out procedures which in

[19] *Percy H. Green v. McDonnell Douglas Corporation*, Case No. 68 C 187 (2), U. S. D. C. E. D. Mo., 3 EPD ¶ 8014 (1970). Said the court, "To order the rehiring of plaintiff, who has been guilty of such serious acts of misconduct, cannot reasonably be said proper action to effectuate the policies of Title VII. To hold that plaintiff is entitled to be rehired is to put a premium on misconduct of this type and to encourage like conduct of others. The purpose of the Act is to secure effective redress of employees' rights, to secure for them the right to exercise their lawful civil rights without discrimination because of their exercise, not to license them to commit unlawful or tortuous acts or to protect them from the consequences of unlawful conduct against their employers."

[20] U. S. Commission on Civil Rights, *Report*, p. 341.

[21] *Ibid.*, pp. 327-341.

[22] *Ibid.*, pp. 342-344.

[23] Philip Ross, *The Government as a Source of Union Power* (Providence: Brown University Press, 1965), p. 171.

[24] See the remarks of Edward B. Miller, Chairman, NLRB, *Daily Labor Report*, October 16, 1970, pp. D-1 to D-4.

fact seem to be about equal to those of the EEOC in terms of time.[25]

It is possible that if EEOC had enforcement powers more litigants would agree to its proposed conciliation terms. Many do not now, however, because the basis proposed for settlement by EEOC conciliations is unreasonable. Cease and desist orders might increase litigation in such instances, but would not necessarily effectuate the purposes of the Civil Rights Act. Moreover, to be successful in litigation, either under cease and desist orders, or with direct EEOC court filings, EEOC investigators would have to improve their investigatory techniques and fact gathering, and learn more about industry structure, intraplant mobility, bargaining relationships, and a host of other factors involved in evaluating personnel policies. Otherwise, their cases will be lost or justice will miscarry.

The fact of the matter is that no demonstration has been made that increased powers will improve EEOC procedure or results. Certainly, it will do nothing about the agency's alleged shortage of funds. The claims that it will improve its capacity to dispose of cases rapidly is belied by the NLRB experience. And the assertion that more powers will in itself dispose of cases more satisfactorily or more rapidly is at best a pious hope unsupported by evidence.

From the beginning, the proponents of enhanced bureaucratic power have been unhappy with the EEOC enforcement procedure. Thus when the agency was just beginning operation the current Dean of the Columbia University Law School referred to EEOC as "a poor enfeebled thing . . . [having] the power to conciliate but not to compel."[26] This alleged lack of authority would certainly come as a great surprise to such companies as Philip Morris, Crown Zellerbach, Duke Power, such unions as the United Papermakers, the International Brotherhood of Electrical Workers, the Asbestos Workers, and many other companies and unions. It should also be equally startling to the thousands of black persons now enjoying good jobs because of EEOC's existence. A look at the record instead of one's preconceptions tells a different story.

Actually, the real EEOC enforcement problem is not too little, but too late. There is no reason why its procedures cannot be improved within the current model. The current chairman, Mr. William H. Brown III, has already addressed himself to this problem and is making good progress. President Nixon has proposed an increased budget for next fiscal year. Better training of personnel, improved administrative procedures, better development, and better coordination with other agencies can and will substantially shorten case disposition time and reduce case loads.

The Scope of EEOC Authority

Another reason why I believe that it would be unwise to extend the powers of EEOC is that such extension would give the agency great authority over the selection of corporate management, executives, and even directors. Again, of course, this does not imply either that there are enough black or minority persons in such positions of authority, nor that persons of minority heritage are not capable of performing these functions. Nevertheless, one may question whether agencies which are primarily interested in improving the economic status of minorities should be in a position

[25] See the remarks of John Fanning, NLRB member, "Some Reflections on Remedies under the NLRA," *Daily Labor Report*, January 19, 1971, p. D-3.

[26] Michael Sovern, *Legal Restraints on Racial Discrimination in Employment* (New York: Twentieth Century Fund, 1966), p. 205.

to exercise great authority over each and every promotion and appointment to executive positions in industry. Such review is too likely to be narrowly based. I doubt whether it is in the public interest—including that of minorities—to pressure industry to staff its top ranks with persons who are primarily representative of groups instead of primarily capable of performing functional duties. At the same time, it can clearly be demonstrated that current civil rights pressures are increasing the upward mobility of minorities in a reasonably orderly fashion. One, again, can sympathize with impatience at slow progress, but neither reverse discrimination, quota application, nor favoritism of those not qualified will aid in keeping American industry competitive or in improving its capacities to provide jobs for blacks or whites.

OFCC Powers

In addition to EEOC enforcement, the government maintains a potent weapon within its procurement function to enforce equal opportunity. Despite again the comments of the Civil Rights Commission *Report,* this has been a significant factor in inducing change since the Eisenhower Administration. The threat of contract debarment has moved many a company to alter policies and to give opportunities to minorities beyond mere nondiscrimination. Critics who point out that debarment has never occurred[27] fail to envision both the magnitude or the success of the threat in achieving the objectives not only of equal opportunity, but of affirmative action as well.[28]

THE NEED FOR NEW FORMS

Instead of considering the problem of EEOC powers within the narrow confines of civil rights problems, it should be discussed within the broad picture of administrative reform. Rather than give this agency further powers, should we not seek to end the conflicting and overlapping, costly and inefficient, current, bureaucratic, regulatory scramble in the labor and employment fields and substitute more workable forms for accomplishing our social objectives? The multitude of agencies concerned with employment now place employer and employee in a jungle maze of a choice of jurisdiction, with potentially contradictory rulings on the same subject, innumerable opportunities for multiple filings on one issue, and litigation that never seems to end. Complex occupational health and safety legislation has recently been added to the legislative supermarket that now includes laws pertaining to civil rights, union relations, minimum wages, and other aspects of the employment relationship. Each of these laws has its own administrative forms and agencies; each is administered without sufficient interest to the total regulatory picture; and each tends to build up a vested interest in the maintenance of the regulatory status quo. Often when new legislation has been enacted, inadequate consideration has been given to the impact on existing laws and the administrative function has not been carefully correlated with established forms and actions.

Actually, the primary *raison d'etre* for the administrative form to exist has not proved valid. It was supposed

[27] Debarment would put most companies out of business for it would prevent them from doing business with other federal contractors as well as with the government. It is thus in effect too great a penalty to utilize in any situation where improvement is possible, and inevitable improvement has been achieved.

[28] The Nixon Administration's role in these situations has been maligned, not told. At a future opportunity I intend to deal factually with the Nixon record in equal employment opportunity.

to provide quicker justice than did the courts which the record demonstrates has not occurred. It was to be staffed with personnel highly expert in their fields. The record in many cases here indicates that political appointments are more common. Also, in some cases, the degree of zealousness, particularly at the staff level, raises some very profound questions of justice, due process, and just plain fairness.[29] In other situations, the rights of third parties have been blatantly ignored so as not to offend key groups which the agencies serve.[30] And, of course, Ralph Nader has had a lot to say about failures of agencies to perform the function for which they were created.

I suggest that the time has come to consider a total reorganization of these agencies, combining them into a single one, functioning more on judicial than administrative lines. What I can envision is a kind of labor court. I do not use the term in the vernacular for a compulsory arbitration agency. Rather, I am thinking of a special court of law which would handle labor and employment matters at the primary jurisdiction level. Within its jurisdiction would be all regulatory functions now vested in such agencies as the Department of Labor, the National Labor Relations Board, the Equal Employment Opportunity Commission, the Department of Justice, etc. It would have its own prosecuting attorneys and judges, set up in regions, and appeal would flow naturally to the various courts of appeals.

My thinking has not reached the stage where I am ready to present a detailed program of reorganization of existing agencies. Such a beginning, however, has been made along these lines by Professor Charles J. Morris of the Southern Methodist University Law School, in a recent issue of the *Journal of Air Law and Commerce*.[31] Just as my experience in industry has provided me with insights and concerns regarding the impact and efficacy of current administrative forms, so has Professor Morris's prior service as a union counsel caused him to evaluate realistically the current administrative scene. Moreover, Professor Morris has gained additional insights as editor-in-chief of the comprehensive study of NLRB policy and practice recently issued by the American Bar Association Section of Labor Relations.[32] Regardless of whether his or my suggestions are acceptable, it certainly seems that whatever is done, it would be ill-advised to rush ahead adding to an outworn and inadequate model on the basis of such profoundly misleading information as that generated by the Civil Rights Commission.

FINAL COMMENT

At the first meeting of the Industrial Relations Research Association,

[29] Among the areas which would merit investigation on this point are the Office of the General Counsel of the NLRB, the administration of the Davis-Bacon Act by the Department of Labor, and the format and conduct of hearings, issuances of reports, and control of staff of the U. S. Commission on Civil Rights.

[30] A good example here is the record of the National Mediation Board and the National Railroad Adjustment Board in aiding and abetting the virulent discrimination against Negroes in the industry. See Northrup, *Organized Labor and the Negro*, cited at footnote 2, Chapter III; and Howard W. Risher, Jr., *The Negro in the Railroad Industry*. The Racial Policies of American Industry, Report No. 16 (Philadelphia: Industrial Research Unit, Wharton School of Finance and Commerce, University of Pennsylvania, 1971).

[31] Charles J. Morris, "Procedural Reform in Labor Law—A Preliminary Paper," *Journal of Air Law and Commerce*, Vol. XXXV (1969), pp. 537-574.

[32] Charles J. Morris (Editor-in-chief) *The Developing Labor Law* (Washington, D. C.: The Bureau of National Affairs, Inc., 1971).

held in Cleveland in 1948, I read a paper detailing how the Railway Labor Act was working in practice, and pointing out that, far from being a "model law" as conventional wisdom then ordained, it was an extraordinary legal and administrative failure which had destroyed the collective bargaining process without substituting an effective method of dispute settlement. Although no one could challenge my facts, I was virtually booed off the stage as if I was blaspheming the current religion. Time has been kind to me on this issue. But would not the country have been better served if industrial relations students had grappled realistically a quarter of a century ago with the issues presented by the breakdown of that then cherished legislation?

Today my views here are undoubtedly equally repugnant to the reigning liberal-academic establishment. Yet I believe that they are also grounded on a firm factual basis, and it is possible—although by no means certain —that they may prove as correct in terms of equal employment opportunity as were the earlier ones in terms of free collective bargaining.

Let me emphasize that the goal which we all seek is the one that I have always sought—equal opportunity for all. But as Professor Charles C. Killingsworth has noted, despite the heritage of slavery and years of discrimination "and despite the continuing necessity for efforts to eliminate racial discrimination, there appears to be a reasonable basis for doubting that this factor is the principal *present* source of economic disadvantage for the Negro. If it is not, then continuing insistence that it is may well divert attention and effort from other more important sources and remedial measures."[33] **[The End]**

Minority Training and Hiring in the Construction Industry

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THE NEW REGULATIONS of the United States Department of Labor Bureau of Apprenticeship and Training (BAT),[1] requiring goals and timetables relative to equal employment opportunity for minority workers for continued approval of apprenticeship and training programs, to become effective October 1971, represent another step in the campaign to increase minority employment in the construction industry. Almost constant turmoil has accompanied these attempts of the Office of Federal Contract Compliance (OFCC) to implement Executive Order 11246 by requiring that affirmative action programs be adopted by all contractors performing under federal or federally assisted construction contracts.[2] Ever since the first so-called plan for mi-

[33] Charles C. Killingsworth, *Jobs and Income for Negroes* (Washington: National Manpower Policy Task Force and University of Michigan, 1968), pp. 31-32.

[1] 36 *Federal Register* 68 (April 8, 1971).

[2] 33 *Federal Register* 104 (May 28, 1968).

nority hiring in the construction trades was imposed in Philadelphia in mid-1969,[3] craft unions affiliated with the AFL-CIO Building and Construction Trades Department have continued to voice their opposition to these quota goals for minority hiring.

It is the purpose of this paper to set forth the issues raised by these conflicting claims, to analyze their effect on existing institutions in the construction industry, and to suggest solutions which are likely to accommodate the interests of all concerned, both in the area of civil rights and collective bargaining.

Goals and Timetables

The first issue would be an exercise in semantics, provided it did not jeopardize the ability of union contractors to obtain federal jobs. It involves the definition of "affirmative action" under Executive Order 11246, which is administered and enforced by OFCC, and under Title VII of the Civil Rights Act of 1964, which is administered by the Equal Employment Opportunity Commission and enforced by the Justice Department. Section 706(g) of the Civil Rights Act provides that any employer or union that has "intentionally engaged in" discrimination may be required to take certain "affirmative action" as may be necessary to remedy such discrimination. Similar language is contained in Executive Order 11246, but neither defines "affirmative action." OFCC has interpreted such action to mean preferential hiring and upgrading, quota goals and timetables. Section 60-2 of OFCC regulations reads in part:

> . . . "Underutilization" is defined as having fewer minorities in a particular job category than would reasonably be expected by their availability. . . . Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables."

While USDL authorities deny that minority quotas are involved, recent action by OFCC officials in disapproving plans in St. Louis and Chicago on the grounds that they fail to specify exact goals and timetables makes it clear that compliance with Executive Order 11246 and hence participation in federally financed construction requires specific dates and numbers of minority workers to be hired. Whatever USDL calls it, OFCC agents, the public in general, and practitioners in the field in particular understand it to be a quota system.[4]

In enforcing the Civil Rights Act, on the other hand, the Justice Department deliberately avoids the use of quotas, in compliance with Section 703(j), which states in part:

"Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential

[3] The Philadelphia Plan, which is undergoing a court test, *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 311 F. Supp. 1002 62 LC ¶9421 (D. C. Pa., 1970); aff. (CA-3, 1971), 3 EPD ¶8180, sets forth percentage minority hiring goals for certain skilled craft unions increasing yearly until 1973. Almost every major northern urban center has been pressured to negotiate some kind of affirmative action plan in the construction industry, but comparison is difficult because of the diversification caused by local option. No two plans are alike; hence a court test of one cannot be considered definitive for another. This paper concentrates on three such plans operating in the midwest; one in Chicago, the other two in the St. Louis area.

[4] Cf. *St. Louis Post-Dispatch,* May 6, 1971 (editorial): "We think they (construction unions) would prefer to design their own program, one written especially for the conditions that obtain in St. Louis by complying with the Labor Department's insistence on numerical quotas."

treatment to any individual . . . because of the race . . . of such individual . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, state, section, or other area."

This lack of agreement on what constitutes affirmative action to end discrimination on the part of two federal enforcement agencies creates confusion among minority and labor groups and catches employers up in a maze of conflicting regulations.[5] The result: refusal to accede to such demands becomes a matter of right and principle rather than a racial consideration.[5a]

Manpower Goals and Hiring Halls

The second issue involved in this conflict is equally removed from strictly racial problems. Much of the turmoil and recalcitrance, particularly on the part of unions, stems from intrusion of issues related to labor shortages and labor surpluses in various occupations, as well as the unions' agreements with employers to refer workers as requested.

Among pronouncements and speeches of government officials are many examples of this attempt to link minority hiring and economic growth projections of labor shortages in the construction industry. The following quotation from a Department of Transportation (DOT) official in announcing minority training quotas for federal highway construction illustrates the point:[6]

"According to the Bureau of Labor Statistics, U. S. Department of Labor, there will be 62,000 annual openings for craftsmen between now and 1975 in the basic trades—bricklayers, carpenters, cement finishers, iron workers and operating engineers. For operating engineers, our most used craft, there are approximately 16,200 annual openings. According to the Bureau of Apprenticeship and Training, U. S. Department of Labor, there are only 10,200 apprentices completing their training each year in the basic trades.

"*Assuming* that these figures are reasonably accurate, and *assuming* that as many men enter the trades through routes other than the apprenticeship program, we stand to be 290,000 craftsmen short of 1975 projected needs in the basic crafts alone. *Based on these assumptions,* the industry will be short 154,000 carpenters and 95,000 operating engineers in 1975." (Italics supplied.)

Allegations of shortages in skills are then transferred to attacks on the apprenticeship system and hiring hall procedures. Soon the waters are so muddied with so many issues that the original one of minority training and hiring in the construction industry

[5] To the federal agencies must be added the various state and local administrative agencies empowered to enforce equal employment opportunities for minority groups.

[5a] The Senate Judiciary Committee's Subcommittee on Separation of Powers has also raised the question of the propriety of Executive action in this area in view of Congressional intent. Its report on the Philadelphia Plan (Washington, D. C., 1971) which states: "Quite clearly the framers of the legislation contemplated Presidential action in conformity with the terms of the statute but not inconsistent with it. . . ." (page 8), and concludes: "The Philadelphia Plan —makes a mockery of the separation of powers concept." (page 14)

[6] Speech of H. A. Lindberg, Chief, Construction and Maintenance Division, Federal Highway Administration, Department of Transportation, before the American Association of State Highway Officials in Houston, Texas, November 10, 1970.

is lost. The emotionalism that results makes it impossible to discuss any one of the questions on its merits. Once minority hiring goals are linked with manpower projections growing out of economic growth projections, the crystal ball replaces reason. The OFCC's authority to impose quotas and timetables is clear-cut enough to warrant unions' voluntarily giving up hard-won gains at the bargaining table in order to implement minority hiring programs which, in the long run, give more economic power to employers. Since channels exist under the Civil Rights Act and under the NLRA for destroying discriminatory hiring halls and referral systems, eliminating the union's control over the labor market has little justification on racial grounds, especially when such exclusive nondiscriminatory hiring arrangements are lawful under the National Labor Relations Act (NLRA). It is precisely this attempt to abolish by Executive fiat what Congress has deemed lawful conduct that injects a new and highly explosive dimension into the minority hiring problem.

A recent study of the Department of Labor's Office of Labor-Management Policy Development, *Exclusive Union Work Referral Systems in the Building Trades* (Washington, D. C., 1970), suggests the mingling of the two issues in tones that seek to repudiate all opposition. "There is clearly a relationship between admission to the labor pool, the work referral system, and the problems of opening up the building and construction industry to minority employment." The relationship is clear; what is not clear is whether that relationship ought to be the foundation of the minority hiring program which seeks cooperation of existing institutions in the industry. To suggest that an employer and a union should blithely agree to abrogate important terms of their existing agreed-upon collective bargaining contracts, shows a lack of awareness that an uncontrolled increase in the labor supply will enhance the employers' economic power to the ultimate disadvantage of all workers in the industry. It will also give rise to a total disregard of the consequences to the unions' organizational viability. In any event, to expect unions to preside at their own funeral is either witless or ruthless. The real issue, however, is whether minority workers should be expected to bear the full burden of such an economic conflict. It is the thrust of this paper that such conflict need not accompany the achievement of minority hiring goals.

The preservation of the joint channels for self-determination which have existed in the construction industry since the beginning of World War II is an equally worthwhile goal, neither of which needs to be sacrificed for the other. Among these institutions are the joint apprenticeship committees, the industry-sponsored training and apprenticeship programs, the apprenticeship standards approved by the Bureau of Apprenticeship and Training, the union hiring halls, the journeyman status and its qualifications, and the whole collective bargaining structure for co-determination of jurisdiction, grievances, wages and working conditions. Any program for minority hiring that ignores long established traditions or actively opposes their continued viability must clearly be justified by at least two criteria—namely, that the existing machinery is incapable of necessary reform, and that the ends sought cannot be achieved in any other practical way.

The Construction Industry

Before these criteria are analyzed, it might be well to summarize a few

basic facts about the construction industry so that its complexity and variety can be appreciated in the context of minority goals and timetables.

First of all, there is no such thing as *the* construction industry. There are many construction industries, ranging from public to private, residential to commercial, general to specialty. Even the accepted casual and seasonal pattern of employment spans a broad spectrum of experience.[7] Tables 1 and 2 illustrate some of this variety.

TABLE 1. VALUE OF CONSTRUCTION BY TYPE, 1968.

Type of Construction	*Expenditures ($Billion)*	*Percentage Distribution*
Total	$84.7	100.0
Private	$57.0	67.3
Housing	$28.8	34.0
Commercial	8.3	9.8
Utilities	6.0	7.1
Industrial	5.5	6.5
All others	8.4	9.9
Public	27.7	32.7
Highways	9.3	11.0
Education	6.1	7.2
Public building	4.2	5.0
Water and sewer	2.0	2.4
All others	6.1	7.2

Source: Bureau of Census, as reported in Departments of Labor and Commerce, *Seasonal Unemployment in the Construction Industry* (Washington, D. C., 1969), p. 26, Table 3.

TABLE 2. EMPLOYMENT IN CONTRACT CONSTRUCTION BY TYPE, CHICAGO AREA, 1966.

Type of Construction	*Employment (000's)* Jan.	June	*% Increase* Jan.-June
Total	94.7	114.2	20.5
Building, General	23.5	27.1	15.7
Other	9.1	14.5	59.3
Highway	3.0	7.1	136.7
Heavy	6.1	7.4	21.3
Special: Total	62.1	72.6	16.9
Plumbing, etc.	16.1	17.6	9.3
Electrical	10.1	10.9	7.9
Other	35.9	44.2	23.1

Source: Illinois Bureau of Employment Security, *Employment, Hours and Earnings, 1964-1966*, p. 11.

[7] Many studies along this line have appeared ranging from the definitive volume of William Haber and Harold M. Levinson, *Labor Relations and Productivity in the Building Trades* (Ann Arbor, Mich., University of Michigan, 1956), to more recent reports such as that of the Departments of Labor and Commerce, *Seasonal Unemployment in the Construction Industry* (Washington, D. C., 1969); *IRRA Spring Proceedings*, 1970, LABOR LAW JOURNAL, Vol. 21, No. 8, pp. 498-505; and *Industrial and Labor Relations Review* (July 1970), pp. 528-540.

For example, while the January to June increase in employment for highway construction is 136 per cent, for the electrical trades the percentage change is only 8 per cent. Further, a plan designed for highway construction which accounts for only 11 per cent of the industry and has the highest seasonal fluctuation might aggravate the very problems of minority unemployment it was designed to alleviate.[7a]

Most large urban centers have a multitude of employer associations and union organizations in the construction trades. For example in St. Louis, the Associated General Contractors represents commercial construction, while the Homebuilders Association represents residential contractors. But there are also the Concrete Contractors Association, Mason Contractors Association, Site Improvement Association, Mechanical Contractors Association, Electrical Contractors Association, and Plumbing Industry Council. In Chicago there are 36 different associations of employers in the building industry, only 10 of which are represented by the association of associations, the Building Construction Employers Association of Chicago.

On the union side there are some 22 crafts listed in building construction, but depending upon which of the above contractors is involved, the importance of any one craft may change radically. For example, the Illinois Road Builders Association deals mainly with operating engineers, teamsters, laborers and cement masons. In commercial construction, iron workers, carpenters, bricklayers and electricians are the main crafts, whereas in residential construction, carpenters play the major role.

There is also wide variation in the geographical jurisdiction both among contractors' associations and among unions. The Illinois Road Builders Association covers highway and heavy construction in 14 counties in northern and eastern Illinois, whereas the Associated General Contractors has similar jurisdiction for central and southern Illinois, but none in the Chicago area. The jurisdiction of a local union as to type of work is a well-known source of disputes in the construction industry; however, geographical jurisdiction also presents problems. In the Chicago and Cook County Building and Construction Trades Council there are 28 local unions, many with differing geographical jurisdiction. In the St. Louis area, a similar situation exists. Some unions cover the SMSA; others include a wider territory. In fact, one local union of operating engineers in St. Louis extends its jurisdiction as far as Texas and New Jersey on pipeline construction testing.

Since most apprentice systems have a residence requirement and most local craft unions give members who reside within its chartered jurisdiction preference in hiring, this variety in geographical jurisdiction affects the incidence of minority hiring when quotas and timetables are imposed.[8] A program that would be an easy goal for one local union and one contractor could become a nightmare of confu-

[7a] Undersecretary of Labor Fletcher indicated his awareness of this problem when he suggested during his appearance in Cincinnati that one result of the affirmative action plans might be "sharing unemployment."

[8] Discussant Eddie Campbell pointed out that his group was faced with such a problem in establishing goals for Cincinnati since a smaller percentage of minority workers in the SMSA would result in more employment for them than would a larger percentage confined to the city limits. Similar problems were voiced by the minority representative in discussing the Chicago Plan, particularly as it related to work opportunities immediately outside Cook County.

sion and hence a continual source of dispute for another. But when such problems are raised in the course of negotiating agreements on minority hiring, OFCC and minority representatives are inclined to view them as evidence of foot-dragging on the part of labor and management organizations.

Minority Hiring Plans

In the light of this background, the affirmative action programs in the construction industry thus far proposed in two major metropolitan areas are to be judged as to results accomplished in juxtaposition to the turmoil engendered by reason of interference with existing institutions.

The three plans involved are the Ogilvie Plan (for highway construction in Madison and St. Clair counties in Illinois),[9] the St. Louis Plan (for city financed construction primarily, but sought to be applied under OFCC regulations), and the Chicago Plan (covering federally financed construction in Cook County under the general jurisdiction of the Chicago and Cook County Building Trades Council and the Building Construction Employers Association of Chicago).

While the plans differ in detail of operation and implementation, their records of performance indicate that a head-on collision with established collective bargaining institutions in the industry is likely to occur if:

(1) the plans are aimed at training and upgrading minority workers for journeyman status in the construction industry outside of and apart from the established apprenticeship training program.

(2) the plans provide for job recruitment, selection and placement outside of and apart from the established hiring hall maintained under the existing collective bargaining agreement.

(3) the plans are administered by an administrative committee empowered to settle all disputes outside of and apart from the existing grievance machinery established through collective bargaining.

Apprenticeship Training

The apprenticeship system in the skilled trades in the United States has a long and varied history that to some extent parallels the development of the labor movement. While the USDL Manpower Administration (BAT) coordinates federal activities designed to stimulate apprenticeship and training programs, the system itself is as diverse and localized as the construction industry. Each local union and each local industry group is responsible for development of its own program and the implementation is directed by a Joint Apprenticeship Committee (JAC) on which management and labor are equally represented. Thus, in St. Louis there are some 19 JAC's in the construction industry with industry representation concentrated in the local chapter of the Associated General Contractors (AGC).

The 1960's brought a semblance of order to the industry's chaotic training structure from two sides: First, the industry itself was encouraged to allocate funds for this purpose under Section 505, Labor-Management Reporting and Disclosure Act (1959), which permits trust funds for the purpose of establishing apprenticeship and training programs. Both in St. Louis and adjacent counties in Missouri and Illinois construction contractors agreed to finance training programs through a cents-per-hour contribution designated

[9] Madison and St. Clair counties in Illinois are part of the St. Louis Standard Metropolitan Statistical Area (SMSA). Governor Ogilvie of Illinois sponsored the plan.

in the various collective bargaining agreements. In St. Louis, this function is carried out through the Construction Advancement Fund and in Illinois, through the Industry Advancement Fund. Both have been responsible for erection of training facilities for the following crafts in particular: carpenters, cement masons, iron workers and operating engineers. In each instance the program has been approved by the BAT for federal contract construction.

The second thrust for improvement of apprenticeship and training has come from the federal government itself through the revamping and modernization of its own employment services. Separation of the recruiting and referral function from unemployment compensation distribution has resulted in increased cooperation between the various state offices of the Bureau of Employment Security (BES) and JAC. In addition, 24 states have established Apprenticeship Information Centers (AIC) since 1963, whose directors are authorized to deal directly with JAC-sponsored apprenticeship coordinators under various trust fund arrangements. Both St. Louis and Chicago have such information centers whose purpose is to provide available information on apprenticeship opportunities in the community and to give necessary support and assistance to eligible persons seeking entrance to apprenticeship in general and in the construction trades in particular. Needless to say, they are emphasizing the importance of equal employment opportunities for minority applicants. The accompanying table indicates the extent of this effort in the most recent period for which data are available.

TABLE 3. ACTIVITIES OF APPRENTICESHIP INFORMATION CENTERS, 1968-1970.

Year Ending June 30	Number Appearing		Number Referred		Number Accepted	
	Total	Minority Percentage	Total	Minority Percentage	Total	Minority Percentage
1968	33,574	29.3	22,020	21.1	6,180	16.8
1969	43,801	30.4	31,048	24.0	8,092	19.5
1970	49,003	34.5	36,798	31.1	7,829	21.8

Source: U. S. Department of Labor, Manpower Administration, *Release*, "Minorities Show Continuing Gains at Apprenticeship Information Centers," September 16, 1970.

An additional government prod has come in the form of funding for the purposes of recruitment and training of minority workers in the construction industry. It is in connection with this latter effort that major problems have arisen, due not only to duplication of effort as between various government agencies, labor organizations, industry groups and minority coalitions, but also due to failure of several training programs to work within the established institutions of the trade. For example, in Chicago the so-called Chicago Plan had hard sledding until the minority coalition finally agreed to participate in the programs already underway, pursuant to agreement between the building trades and the employers' association. At present that part of the program aimed at injecting full-blown journeymen into the system without prior apprenticeship training is the one real failure. Similarly in St. Louis, the attempt to recruit so-called advanced trainees under the St. Louis plan has met with opposition, while minority representation in the apprenticeship system is continually improving.

The classic failure in this connection, however, is the Ogilvie Plan in Madison and St. Clair counties of Illinois under the auspices of the Department of Transportation (DOT) highway administration. Pursuant to FHWA training provisions,[10] all highway contractors are required to have a training program prior to commencing work in order to receive the 80 cent subsidy for each hour of training as well as to receive the construction contract itself. The number of trainees designated for each state[11] is related to dollar-volume of highway construction and apprentices may not be included in this number regardless of their minority status.

TABLE 4. TOTAL NUMBER OF APPRENTICES BY TRADE AND PERCENT OF MINORITY PARTICIPATION IN CONSTRUCTION, CHICAGO AREA, 1968-71.

Trade	Aug. '68	Jan. '69	Jan. '70	Jan. '71	Aug. '68—Jan. '71 Percentage Change—all apprentices
	Number of Apprentices				
Bricklayers	107	131	218	246	29.9
Carpenters	514	592	710	894	73.9
Cement masons	107	127	123	129	20.6
Electricians	701	720	857	954	36.1
Ironworkers	285	314	400	420	47.3
Lathers	15	5	18	18	(1)
Painters	245	277	319	286	16.7
Plasterers	11	19	24	22	(2)
Plumbers-pipefitters	849	1035	1245	1193	40.5
Roofers	183	177	227	214	-27.5
Sheetmetal workers	295	320	456	507	71.9
	Percent of Minority Participation by Trade				Percentage Chg. Minority Group
Bricklayers	24.3	25.2	26.1	31.7	30.4
Carpenters	7.8	8.8	9.6	17.4	123.0
Cement masons	15.9	18.9	17.1	17.1	7.5
Electricians	5.7	6.0	6.1	10.6	86.0
Ironworkers	8.8	2.2	14.3	15.2	72.7
Lathers	(1)	(1)	(1)	(1)	(1)
Painters	20.4	24.2	31.6	27.6	35.3
Plasterers	(2)	(2)	(2)	(2)	(2)
Plumbers-pipefitters	4.5	4.2	4.0	6.5	44.4
Roofers	14.2	13.5	20.7	12.0	-15.5
Sheetmetal workers	3.7	8.4	7.7	12.8	246.0

Notes: (1) Number of apprentice lathers too small to be significant.
(2) Number of apprentice plasterers too small to be significant.
Source: U. S. Department of Labor, Bureau of Apprenticeship and Training, *Apprenticeship Account Report,* various issues.

[10] U. S. Department of Transportation, Federal Highway Administration, *Interim Order 7-2(2),* September 2, 1970.

[11] For example, 526 trainees are required in Illinois; 204 in Missouri; with an annual total of 9,982.

In attempting to implement this program in Madison and St. Clair counties in Illinois, several highway projects were closed down as a result of violence which erupted when DOT black trainees demanded that they replace workers already hired through established hiring-hall agreements. It is the preferential hiring aspect of the Ogilvie Plan that has caused skilled construction unions in Madison and St. Clair counties of Illinois to rebel, particularly since at least three local unions in the area (cement masons, iron workers, and operating engineers) are currently operating under a court decree sought by the Justice Department under the provisions of the Civil Rights Act prohibiting them from discrimination in the administration of their respective hiring halls and apprenticeship programs. Quarterly compliance reports are submitted to the Justice Department listing all referrals, and failure to abide by the terms of the court decree may result in immediate citation for contempt and appropriate punishment of both the union and its officers.

Under the operating engineers' court decree, special referral offices have been opened in East St. Louis, Illinois (which 1970 population reports list as 70 per cent black). One compliance report to the Justice Department from April to June, 1970 (a random example period) indicates that 386 referrals were made from among 50 black registrants (or about 9.9 per registrant), while 2,977 referrals were made from among 1,813 white registrants (or about 1.6 per registrant). Thus black registrants received about six times as many referrals as white registrants. Of the 37 members accepted by the union during this period, 10 were black and 27 white. All who applied were permitted to register.

Hiring Procedures

The Ogilvie Plan further calls for preferential hiring of a list of "advance trainees" (names of whom were submitted to contractors by the Metro-East Labor Council, a self-appointed minority organization demanding recognition for their members only) and further states:

"Should journeymen be referred by unions in lieu of requested Advance Trainees, the contractor shall refuse to put such journeymen to work."

The plan requires that the ratio of trainees to operating engineers alternate according to the following schedule: JJT-JJJT-JJT-JJJT and so on (J = Journeyman; T = Trainee). Since only 32 trainees were originally listed and the local union has approximately 2,500 members, this ratio implies 62 times more job referrals for the advance trainees than is given to union members. Only 5 trainees were listed to compete for jobs with 900 iron worker members under a consistent JJJT ratio. This means 50 times more job referrals for trainees than for union journeymen.

Even if such a program did not violate the existing hiring-hall agreement between the unions and the employers' associations, the reverse discrimination implied in such quotas would cause turmoil on the job site.

Hiring procedures in casual employment such as construction, seafaring, longshoring and trucking,[12] have historically been subject to criticism no matter who controls them. Tendencies toward exploitation in work assignments need no elaboration here. The abundance of legislative safeguards in this connection indicate the hazards inherent in the economics of the casual labor market. The anti-kickback (Copeland) act of 1934 and the anti-racke-

[12] Problems in construction are complicated by seasonal and skill factors that are not present to the same degree in the other occupations.

teering (Hobbs) act of 1941 attest to the problems in this labor market. Anti-union discrimination is controlled by the National Labor Relations Act of 1935, whereas discrimination by unions against non-members is prohibited by the Taft-Hartley (Labor Management Relations) Act of 1947. Racial discrimination is now outlawed by the Civil Rights Act of 1964. All of these regulations apply to employers and to unions but none has yet been applied to civil rights organizations. To institute what amounts to a civil rights hiring hall not only threatens to discriminate against non-minority workers but permits discrimination among minority groups themselves.

That such rivalry exists is no secret since both the Urban League and the NAACP have recruitment programs in St. Louis, as do the JOBS and the St. Louis plans. In the St. Louis and Chicago areas, however, all of this effort is eventually channeled through the existing union hiring hall in cooperation with the local building and construction trades council, whereas the Ogilvie Plan attempts to operate outside of and in opposition to existing hiring arrangements. Thus, the DOT plan, through the economic pressure of contract compliance, gives control of hiring to minority groups through the preferential aspects of its trainee designation.

Grievance Procedures

Bypassing the established hiring procedures leads to problems of contract administration once minority workers are hired. Since they have not come through traditional union channels, the minority organization rather than the labor organization represents their interests. In the event that a grievance arises, the minority worker who has already been set apart in the hiring process is encouraged to bypass existing contractual channels for dispute settlement and to carry his troubles to the civil rights organization responsible for his training and hiring. Union employers are at a serious disadvantage in such cases. Failure to accede to the demands of minority groups results in loss of government contracts whereas acquiescence disrupts established collective bargaining procedures and brings trouble with the recognized labor organization seeking to enforce its agreement.

Thus, the non-union firm is in a much better position to adapt to ever changing demands and to negotiate with whatever group claims to represent employees. The union employer, on the other hand, is committed to a collective bargaining agreement for its term. Obviously, without such a union contract he would be free to accede to minority demands. The union is accused of being a racist organization because it insists on its right to exclusive representation guaranteed by the National Labor Relations Act.

Acceptance of trainees who have not been qualified under the established apprenticeship program standards further complicates the process of industrial jurisprudence. When rules and standards relating to qualifications, absenteeism, work loads and upgrading have been relaxed to give minority workers preference, a cruel but inexorable vicious circle of industrial discipline begins to surround the minority worker. As such standards perpetuate his preferred status, he is never in a secure position for future upgrading. This is especially true of the "quickie" training programs in the skilled crafts. When a man is given a choice between a training period of five weeks (as under the Ogilvie Plan) or the normal apprenticeship period of two or three years, there is no doubt that he will choose the former. But his future employment as a craftsman is put in

jeopardy and he will find easy answers in racial discrimination when he is refused upgrading or finds his employment opportunities severely limited. The union's ability to protect such a worker is also handicapped, since a worker with limited skills is at a disadvantage in utilizing the union's placement facilities. Once an employer indicates that a worker is not acceptable, his chances of steady employment are reduced in an already casual labor market.

CONCLUSIONS

The consensus among representatives of all responsible groups involved in minority training and hiring in the construction industry, based on extensive interviews throughout the industry in the Chicago and St. Louis metropolitan areas, is that existing institutions should be utilized for this purpose. Extensive changes have occurred since the passage of the Civil Rights Act and active funding of recruitment and training has been undertaken via Department of Labor Manpower Administration auspices, so that equal employment opportunities now exist in most apprenticeable trades, particularly those which employ large numbers of workers, namely carpenters, iron workers, operating engineers, and electricians.

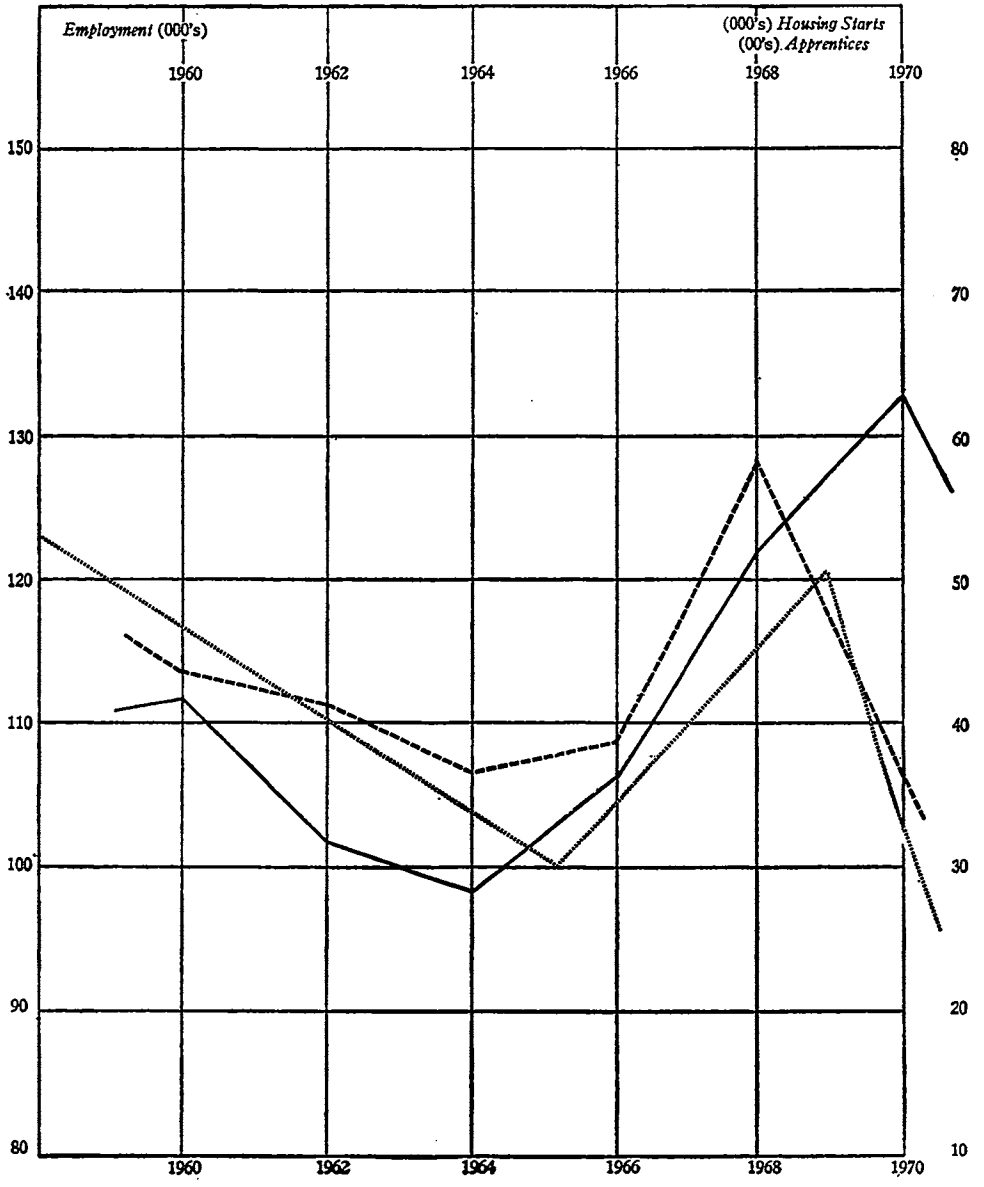
There are two main factors, both related to the economics of the construction labor market, which hamper job opportunities at the moment. Employment in the construction industry is relatively low. When journeymen are unemployed, apprentices are kept at a minimum to reduce competition for available jobs. To insist that minority trainees be hired under such circumstances creates tensions totally unrelated to racial considerations. And to stimulate recruitment and training is likewise a source of disillusionment to the minority worker when he sees doors remaining closed which qualifications promised to open. Benign neglect of manpower programs until employment improves is the best possible affirmative action under such conditions.

TABLE 5. EMPLOYMENT BY INDUSTRY GROUP, 1969-1970.

	No. of employees '000's				% Change	
Industry group	Jan. '69	June '69	Jan. '70	June '70	Jan. '69-'70	June '69-'70
Total	68,196	70,894	69,630	71,378	2.1	0.6
Mining	611	637	616	634	0.08	0.05
Construction	3,024	3,584	2,961	3,506	–2.1	–2.2
Manufacturing	19,803	20,319	19,810	19,622	0.03	–3.4
Transportation & Public Utilities	4,288	4,484	4,467	4,547	4.1	1.4
Wholesale & Retail Trade	14,189	14,686	14,660	15,009	3.3	2.2
Finance, Insurance Retail Trade	14,189	14,686	14,600	15,009	3.3	2.2
Services	10,693	11,262	11,154	11,700	4.3	3.9
Government	12,140	12,350	12,377	12,659	1.9	2.5

Source: U. S. Department of Labor, *The Employment Situation,* Table B-1, various issues.

FIGURE 1. EMPLOYMENT HOUSING STARTS, AND APPRENTICES IN CONSTRUCTION IN THE CHICAGO AREA, 1960-70.



Legend: Employment——— Housing Starts----- Apprentices.....

Sources: Employment, Illinois Bureau of Employment Security, *Chicago SMSA, Employment, Hours, and Earnings,* various issues.

Housing Starts: Bell Federal Savings and Loan Association, *Survey of New Building, Chicago Metropolitan Area,* various issues.

Apprentices: Washburne Trade School, *Enrollment of Apprentices, 1920-71.*

The second problem is related to a declining demand schedule for certain skilled trades such as lathing and painting. The technical schools which administer training for apprenticeship programs show a reduced enrollment for both of these trades, and representatives refer to them as a "dying art." To insist that minority quotas apply to such trades also flies in the face of the economic facts of life, both from the standpoint of the market for existing journeymen and the employment opportunities for trainees in the future.

Meanwhile, steps should be taken to relate equal employment opportunities to specific factual evidence of discrimination. As in the case of unfair labor practices under the National Labor Relations Act, wherein a discriminatee is made whole for violation of his rights, so too in the civil rights area, any claim of discrimination should be related to specific conduct towards specific individuals. Examples of this would include preference for qualified, older, minority workers who have been refused admission to apprenticeship programs in the past, and for laborers already in the construction industry who desire upgrading. But to require preference for persons who are complete strangers to the industry as opposed to qualified journeymen is so obvious an injustice that the turmoil which has occurred could have been predicted. DOT training programs fall in this latter category and should be discontinued at the earliest opportunity to prevent the establishment of a training hierarchy. This hierarchy will begin to have a vested interest in perpetuating a system that threatens to disrupt the industry and to cause the kind of polarization that can have serious consequences for minority training and hiring for future generations.

Injection of civil rights organizations into grievance settlement also encourages a dual hierarchy and interferes with the exclusive recognition accorded the majority union under the National Labor Relations Act. For all practical purposes it is the same as permitting a rival union to bargain for members only during the life of an existing collective bargaining agreement. It not only destroys the very stability that the agreement was designed to achieve, but it injects into the settlement a third party with no responsibility for effectuating the settlement or abiding by it. Dispute settlement becomes virtually impossible when representatives as well as demands are subject to continuous change.

Finally, goals and timetables militate against the continued viability of the existing Manpower Administration programs, which depend on cooperation of all participants in the industry for their success. Failure to attain accelerating published goals constantly underlines the negative aspects of the program and puts defensive mechanisms ahead of positive action. Statistics are a necessary part of the evaluation of any program, but in the area of human relations, data-gathering can hinder genuine progress if such data are published with a view to constant goading and nitpicking about numbers and percentages.

Once a union and an employer sign an agreement to eliminate racial discrimination and to promote equal employment opportunities, they should not be subjected to continuous harassment to improve their efforts until a reasonable period has passed for compliance and evaluation. In the labor-management relationship, the existence of the contract-bar rule and the use of two- and three-year terms for collective bargaining agreements estab-

lish that periodic stability is essential to industrial tranquility and productivity. Reasonable stability is appropriately to be established in civil rights advancement in the construction industry. **[The End]**

APPENDIX 1

A Profile of the Indentured Apprentice
Chicago Area

1.	Median age	23.5 years
2.	Married	53%
3.	Own home	25%
4.	Are parents	53% of those married
5.	Own car	61%
6.	Veterans	37%
7.	Veterans with 2 or more years of service	66%
8.	High school graduates: 80%	
	G. E. D.: 7%	87%
9.	Year or more college	28%
10.	Graduated college preparatory high school	43%

Of the factors most influential in selection of trade:

a.	Wage scale	44%
b.	Friends	30%
c.	Experience in trade	30%
d.	Working conditions	25%
e.	Relatives	23%
f.	Parents	15%
g.	Family in trade	9%

(based on order of frequency checked by day students)

Source: Washburne Trade School, Chicago, Illinois.

Fair Employment Practices

A Discussion

By WILLIAM K. ENGEMAN

Taft, Stettinius and Hollister

OUR CHAIRMAN has asked me to comment on today's papers and problems from the point of view of a practitioner. As counsel for employers, I and my colleagues have gained a certain familiarity over the past few years with the muzzle ends of the Civil Rights arsenal. In overview, to borrow a currently popular, colloquial expression from the construction industry, it is a "hard hat" area. And it is not just the client who is taking the flak.

My profession and the legal process generally found themselves "battered" in a recent report by a state civil rights commission to its legislature as follows:

"The quasi-judicial nature of administrative bodies, such as this commission, has become increasingly questionable in terms of effectiveness. Initial enactment of such laws and the creation of such agencies almost always provides a 'new bottle with a measure of the old wine'—business as usual, but modified by the illusion of good intent. The mephitis of discrimination becomes somewhat sanitized. Highly paid and professionally trained resistant counsel assures that infection is not quickly or totally removed."

Pressure for non-legal implementation of minority group demands increases just as it becomes increasingly obvious that Professor Northrup is right. Illegal racial discrimination is not to blame for much of the present minority employment situation. As a result there is substantial intolerance of the legal rights of employers, labor unions, etc. not to be adjudged guilty of discrimination without a fair trial. There may be confusion and unfairness now but if the appeals for instant "justice" are listened to, the problem will worsen. In my view, the present system of protecting equal opportunity is already overly coercive against guilty and innocent alike and is in need of serious reform.

As Professor Northrup points out, there are so many governmental agencies, dedicated to high purpose, zealously expanding and perfecting their legal and extra-legal weapons, that no practitioner can even claim to have met them all. But it is a rare practitioner who has not had the unpleasant experience of running from city human relations agency to state commission to federal commission or office or Board back to the union, the urban league, the county NAACP and the city NAACP, all trying to investigate one employment decision. There are not only many procedures, but redundance and zealousness beyond all reason. No one shares information, only charges and counter-charges. I have found many occasions to agree with the sentiments expressed by Professor Northrup that "in some cases, the degree of zealousness, particularly at the staff level, raises some very profound questions of justice, due process and just plain fairness."

I am not up here to tell war stories. But because of zealousness and redundancy, the cost of the present fair employment effort to employers is shameful. It seems to me more than most small employers can bear. They can be investigated and conciliated into conceding right is wrong, because they cannot afford prolonged investigations, hearings, findings, exceptions, briefs, meetings, conciliation confer-

ences and all of the other governmental paraphernalia which we have placed on their backs. They simply cannot stand talking to the NLRB, the OCRC, the EEOC, the OFCC, the CHRC and the NAACP because their foreman rightly fired some SOB.

Frankly, gentlemen, I have wondered many times if these procedures are not counter productive. Sometimes when an employer has been on the civil rights merry-go-round over some extraordinarily clear discharge, I sense some second thoughts. I wonder about some of the marginal prospects who were finding jobs in the late 1960's. Are employers hiring them now for insurance or conscience, when they may turn out to be undisciplinable drones? I wonder.

Reform Needed

Gentlemen, to an outsider it appears that the stage is set for reform. One group in Congress is damning the EEOC as impotent without enforcement powers. A substitute amendment has tried to give it the power which was withheld in 1964 to go into federal court itself. The Administration is pleading for cabinet and agency consolidation. To me, this looks like the perfect time for Professor Northrup's proposal. Professor Northrup's suggestion of consolidating the existing federal agencies into one agency makes too much sense to overlook. My only criticism of the suggestion is that it is perhaps too limited in scope. First of all, why not also include the FTC, the FCC, the ICC and a few others? It would take a long time for any pressure group to round up all of the players with a scorecard like that to work with. Secondly, the enactment should clearly pre-empt the state and local agencies in the area of civil rights as they are in most federally regulated areas, such as labor relations generally.

The principal argument against Professor Northrup's proposal (other than agency unemployment) will probably be based upon the supposed expertise of these agencies at the investigative and hearing levels. But any sensible person must realize that we charge our police and law enforcement agencies with far wider-ranging investigations of far more crucial questions for organized society. The FBI investigates a wide range of subject matter, from Mann Act violations to espionage cases, with a high degree of professionalism. Most city law enforcement agencies also have highly trained investigative personnel conducting a wide variety of investigations. At the hearing level, our Federal District judges deal daily with a broader spectrum of criminal, civil and miscellaneous matters than a labor court or administrative court would ever confront. I strongly feel that they make up in unbiased, dispassionate review of facts for whatever they lack from not having dealt with the same issue a hundred times before.

In other words, I think the suggestion is workable. From the standpoint of discriminatees it could provide a sure and effective remedy without chance of misstep and mistake. From the standpoint of taxpayers, who pay for the existing redundant efforts, it should leave money available for other things. From the standpoint of employers who suffer through the redundant proceedings, it could provide relief and an opportunity to reaffirm their dedication to the principles of equal employment under laws fair to them, as well as to everyone else. In short, it offers a chance for Congress to give us a coherent administrative procedure for dealing with all of these closely related problems to the end that national policies can effectively be implemented. Thank you. **[The End]**

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