III. THE EMPLOYER VIEW

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Fact-finders, I think, occupy a rather peculiar position in public disputes settlements. They need more of an elephant hide than the ordinary arbitrator. But what exactly is a fact-finder? In Michigan it is defined as follows: Whenever, in the course of mediation, it becomes apparent to the Labor Mediation Board that the matters in disagreement between the parties might be more easily settled, the Board may make written findings with respect to matters in disagreement. The findings, though, are not binding on the parties.

Governor Romney seemed to think that the failures of the thirties in Michigan were a panacea for the sixties; he endorsed the bill, and it became law. One section of the Act has been complied with 100 percent. A member of our Board is here and has heard the criticism that the Act has been violated and does not work, but my own research discloses that Section III of the Act has been complied with 100 percent. We have had no violations of the section in the last three years.

The Michigan statutes are somewhat unique in the fact-finding area. The assumption is that mediation has already been attempted and has failed to produce a settlement, and that fact-finding is the next step in the collective bargaining process. In too many cases, it has occurred after the strike, not before.

Now, under the Michigan law fact-finding takes one of two statutory forms: (1) a single impartial fact-finder or a panel of fact-finders is designated by the State Labor Mediation Board; or, (2) each party can name someone to represent it and serve on the board, and if they do not reach agreement, they can call in a third party and start all over again with three people. However, I would say that in most cases the single fact-finder has been the mechanism used.

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Fact-Finding and Mediation

Perhaps there is some disagreement among people in the fact-finding area as to how fact-finding and mediation dovetail. Fact-finding is really not mediation, and the advisability of fact-finding in mediation is certainly questionable. Mediation has the objective of securing a voluntary agreement without regard to the determination of the facts in disagreement or the effort of a settlement. In our area, many have indicated that public employers fail to understand the function of mediation; after a mediator has exhausted the process, the public employers claim they were let down. They fail to realize that the normal function of the mediator is to secure agreement so that he can close his files. He doesn't particularly care if it is a good agreement or a bad agreement, or whom it helps.

Public employers, as well as public servants, thought the statute was designed for a higher negotiator, and the result was that they felt they had bared their souls only to find that the mediator had betrayed them to the other side and led them to the slaughter. To me this is proof only of the fine job of salesmanship done by the mediator.

Fact-finding is intended to be a somewhat formal procedure, where evidence is presented to an impartial panel or fact-finder; after considering all the evidence and testimony, the fact-finder or panel makes recommendations, supposedly based on some form of effective reasoning. Mediation is not a conciliatory process, but fact-finding is. Mediation is a little like kissing your girl friend. You hope it leads to something else. Fact-finding is like kissing your wife. You tell it like it is.

Criticisms of Fact-Finding

Of the criticisms that I personally have of the fact-finding process in Michigan, the first is that some fact-finders lack experience. The instant fact-finders, as I refer to them, ran rampant in 1967. It was not the fault of the collective bargaining process in the public sector. The problem was with the schools. The legislature had not appropriated state aid for the schools, so the public employer did not really know what his financial ability to pay was going to be. The Teachers' Union didn't know either, and nobody

wanted to effect a settlement out of ignorance. The result was the threat of a great rash of strikes, and the State Labor Mediation Board reacted by appointing so-called fact-finders who found facts on the issue basis. They said to the employer: "I am the fact-finder. Now, what is your position?" And to the union, they said: "What is your position?" Both sides told him. The fact-finder then went out of the room, came back, scribbled his recommendation, and handed them to both parties; then the report went to the Labor Board. Naturally, both parties objected to his findings.

Very few cases are ever made public. I think the idea that the fact-finding process is designed to bring public pressure to bear on both parties is somewhat amiss. It does bring public pressure to bear in large disputes, such as disagreements involving the police, fire fighters, or sanitation workers. But in the average suburban community, where the press pays very little attention to the workings of small-time government, the public seldom knows what took place. It is the persuasive ability and reputation of the man behind the fact-finding that influence the parties around the collective bargaining table.

Another problem with fact-finding, as I view it in Michigan, is the failure of the fact-finders to weigh all the relevant factors. They gloss over them and come to a quick recommendation. I think there is something significant in the term "fact-finding" that has been overlooked by people who play a role in fact-finding. As I see it, fact-finders should not accept at face value the representations made by the respective parties in a fact-finding hearing. I think fact-finders should probe to ascertain all the facts they consider to be relevant in arriving at a conclusion.

As a representative of the public employer in many cases, I must admit that the budgetary schemes put together by public employers are often subject to severe question. School districts have unique ways of padding the budget. Most public employers are anxious to wind up at the end of the year with cash, but the union says, "If you have any money, we'll get it all, regardless of whether it is fair to people in other communities." This has started a trend among public employers of hiding the money. Let me give you a typical example of a school budget. The school board knows full well that it is going to have only 400 teachers. They know that

the average teacher's salary is $9,000 a year. So when they prepare the budget, they indicate they will need 20 more teachers this year than last year, also knowing full well that they will never get them—thereby picking up $180,000 at the end of the year. If the fact-finders don't go into such matters, but accept things at face value, we are apt to get distorted financing, because public employers are apt to conceal information.

Another criticism I have just alluded to is the idea that public employee bargaining should be based solely on faith, but that that should not be the sole motivating factor, even though it is in the public sector. Does the public employer have the money? Should he be required to spend it?

I think fact-finders should look at previous settlements made by the employer and union in question and look at the settlements in the surrounding communities. What is the relevant wage ability in the community? What are the comparative salaries in private employment—not only comparative salaries, but how do comparative positions overall shape up?

In fact, I think the public employees' unions, like Mr. Wurf's, have done a fine job. In Michigan the cry among public employees has always been, "We want to be treated like private employees." In Lansing, Mich., the private employees say they want the same salaries as public employees in the State of Michigan. So now they have arrived.

Another area of criticism is that fact-finders substitute their discretion and judgment for that of the legislative officials or public officials; it is assumed that if we are going to have fact-finding, you will substitute your discretion. If the public employer has not read the facts and hasn't properly stated them, then *that* is why we have fact-finding. It is the obligation of the fact-finders to *define the facts.*

Another criticism of fact-finding reports is that some people feel it is necessary to salve the conscience of all parties involved in the proceeding. As a result, many of the fact-finding reports not only fail to settle this year's dispute, but serve as prologues to the disputes of next year. In other words, if the fact-finders would stick to the current issues and avoid voluntary statements such as, "Teachers are the most valuable, the most important elements

in our society today because they hold in their hands the minds of our young," they would accomplish a lot more. Such statements mean that next year the employees will want twice as much money and they will use the fact-finding reports to show why. It would benefit all concerned if fact-finders could control their urge to engage in novel-writing. Just find the facts.

One other criticism that occurs to me is the predictability in many cases of the results of fact-finding. In almost all cases in a given area, you will find that the fact-finders tend to add to the last official positions of the parties. Only in rare instances is the fact-finding report completely honest. This hurts the collective bargaining process, because in some areas the idea is to provoke a situation where, if we have to go to fact-finding, we hold down the public employer's offer and let the fact-finder add $200. We can pretty well predict a settlement on this basis. Fact-finders may have to draw on their previous experience; they shouldn't be slaves to that previous experience.

I want to comment on whether or not fact-finding should be binding on both parties. The constitutional lawyers and, indeed, all school board and city lawyers passing on bond issues—whether we should have water mains and how much money we will raise for sewers—are generally not qualified in the collective bargaining field. This makes life difficult for both the unions and the people involved in collective bargaining. These lawyers generally hold that it is unconstitutional to allow the fact-finder to make a final and binding decision. I don't know how many cases we have had in fact-finding, but there are two gentlemen, members of this Academy, that I have been involved with in fact-finding in Michigan. In both cases the public employer has agreed to be bound by the results of the fact-finding report because of their reputations and my recommendation.

I cite this only to emphasize to you that the members of this Academy, as no other group that I know of, are in a position to make a contribution to the labor-management field.

Discussion—

Discussion focused on the qualifications of fact-finders, the shortage of experienced persons available for fact-finding assignments,

and the meager information with which a fact-finder is often compelled to work.

Disputing Mr. Saxton on the fact finder's qualifications, a member of the audience suggested that people with industrial relations know-how, regardless of whether they have a labor or an employer background, could and should be used as fact-finders. In response, Mr. Saxton stressed the necessity for experience: "A man with experience can do certain things and make them effective. A man without experience cannot. Unfortunately, I don't think the State of Michigan or any other state is blessed with enough people with that kind of experience. . . ." He rejected the idea that prominent persons in a community could perform the fact-finding function.

Mr. Anderson, on the other hand, said that in his experience, men and women who were personally qualified, whether they had a labor or an industrial background and assuming they were unanimously approved by the tripartite board, could serve well.

The question of lack of information was raised in terms of the experience of an Academy member who had had a case where the only information he had from a board of education was what it wanted as salaries, and he was unable to ask for any more information. His query was: Should an arbitrator take judicial notice of the lack of information?

Mr. Wurf responded that his instinct was to say that he should not. "But there is a basic problem he does face—frequent ineptness by both parties in presenting a case so that real mediation has never entered the situation. So when the fact-finder comes in with some expertise, in view of the unstable situation by way of lack of experience, I would go along with the suggestion that the fact-finder should indicate he has not had all the facts."

Mr. Saxton was of the opinion that a fact-finder has to probe for facts, while Mr. Anderson expressed doubts about the necessity of a fact-finder's going into all of the ramifications of a case: "It seems to me the parties should have the opportunity to state their positions. I presume they would do that, so you could frame a recommendation—what their feelings are about the types of solution you should recommend."

Mr. Mark Kahn observed that fact-finding is not just a matter of finding facts but also is influenced by which facts are available and how the arbitrator applies his judgment. There seemed to be agreement that problems are beginning to diminish as employers and employees in the public sector gain experience and become more sophisticated.