employment were sealed off from each other by disparate benefits and challenges. Ideally, the public sector offered civil service, a term synonymous with job security, substantial vacations, holidays, sick-leave plans, and other generous fringe benefits. Salaries, of course, always lagged behind the private sector.

In less than 30 years, "Big Labor" has set a pace for all of private industry which has outstripped the public sector in overall fringe benefits and widened the salary gap. The one area in which the public sector still offers a substantial advantage is that of job tenure. The incidence of layoffs, although on the increase in public employment, is still negligible when compared to the conditions prevalent in private industry.

Another major contributing factor to developments in the public sector is that the proportion of white-collar and professional employees in public employment has shifted from the offspring of middle-class parents with status hangups about joining unions to the offspring of higher paid blue-collar parents who accept unions as much a part of their lives as the church, the PTA, or the local Legion post.

The one constant factor in the linkage between the public and private sectors is the long-range pull of the applicable prevailing wage in private industry. It is a primary fact of life for both sectors that they compete in the same labor market for competent personnel. The public sector tends to lag behind the private sector, even far behind, in salaries and other benefits when unemployment is more than 4 percent. But let the labor market become tight, as it has been during periods of great industrial activity, and then the public sector is compelled to make accelerated adjustments to bring their salaries and benefits much closer to the average prevailing conditions in private industry. This long-term regulative aspect of the labor market, I suggest, will never become obsolete.

Comment—

RUSSELL A. SMITH *

Mr. Block's observations concerning the subject of his paper, "Criteria in Public Sector Interest Disputes," are interesting and provocative, and I have a few reactions to some of his com-

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ments. But I note that, acting under a nonreviewable but providential excess of jurisdiction, he has actually gone somewhat beyond the labelled subject of his remarks, so I assume it is within the prerogative of a discussant to range at least as broadly.

In his introductory comments our speaker referred to the attempted distinction, currently in vogue in some jurisdictions in this country and abroad, between collective negotiations and collective bargaining—or, as sometimes expressed, between a meet-and-confer concept of collective discussions and the collective bargaining concept as we know it in the private sector. I did not understand that Howard is to be taken necessarily as approving the attempted distinction as a basis for public sector labor relations legislation, but I did understand that he considers the distinction a valid one—that is, one that is theoretically sound and, I gather, one that is perhaps even theoretically required, as a matter of analysis, in public sector labor relations in any jurisdiction or context in which strike action is prohibited by law. "Bargaining," he says, connotes that a legal "consideration" is exchanged, and, on the union side, this is the giving up, for the term of the agreement, of the legal right to strike.

Howard's legal analysis may be sound enough. But if he is implying that because of this the meet-and-confer model has to prevail in the public sector, I guess I have to register some doubt. It seems to me the evidence, up to this point, is that public sector unions will use the strike weapon either in its outright form or some variant, whatever the state of the law, in support of bargaining demands unless they are provided with an acceptable alternative. If this is so, what we have is a de facto recognition, or at least public tolerance, of strike action, within limits. This means that unions are in a position, as a practical matter, to offer public employers a de facto, if not Willistonian, consideration to support the agreement reached in bargaining. This is *their own* promise not to strike during the term of the agreement, and I suggest that while this may not be a legal consideration, it is nevertheless a valuable one in that it consists of a pledge willingly assumed by the contracting party, not imposed from without, and hence is a commitment more likely to be observed. In other words, I suggest that the public as well as the private sector employer, through genuine collective bargaining, can and does buy labor peace.

The final question I would raise about this attempted "negotiations"—"bargaining" distinction is whether, as a practical matter, it can prevail. Will American unions accept an approach that makes the union's role simply that of lobbyist, even though it is through a process called conferring or negotiating, under circumstances where binding agreements do not result and where employees are expected to abstain from the use of any form of pressure other than the force of reason or the ballot box? I doubt it, although it may be that they will accept and even approve as a plus this more limited role as to some of the subjects of potential bargaining that, in some jurisdictions, are now expressly excluded entirely from the area of discussions or bargaining.

After delineating the "negotiations"—"bargaining" distinction, Howard proceeded to say that in the public sector if differences cannot be resolved with the help of mediation, the parties "must turn to the alternatives of interest arbitration or fact-finding as a substitute for a strike contest." Of course, if the meet-and-confer analysis were accepted fully, this would not, presumably, be true, since strike action would be foresworn in any event. But, whatever the approach, and even if we were to move increasingly toward a legal acceptance of public employee strike action, at least within limits, I think, as Howard does, that there will be steadily increasing resort to the use of neutrals in a role that goes beyond that of mediation and includes arbitration. And it may even turn out, contrary to orthodox view, that neutrals will increasingly be given the dual roles of mediator-arbitrator or mediator/fact-finder. Preferably, this would come about through agreement of the parties, as in the case of Sam Kagel's current involvement with the San Francisco nurses. I don't profess to be an expert on the mysteries, techniques, and art of the mediation process, but I have a hunch that a neutral who starts in a given dispute as mediator, but who has been given authority, finally, to decide unresolved issues, is likely to be pretty productive in his initial role as mediator.

Criteria for the resolution of public sector interest disputes obviously are important, as Howard says, whether in relation to the processes of negotiation, bargaining, mediation, fact-finding, or arbitration. Howard recognizes the unique problems

of the public sector in this regard, but has confidence, at least as to neutrals who may participate, that their expertise will result in the development of "criteria that will be ultimately acceptable to the parties in the public sector." Moreover, he believes "the public sector neutral . . . does not wander in an uncharted field even though he must at times adopt an approach diametrically opposite to that used in the private sector," although "he must be innovative" and "must plow new ground." He turns to a consideration of comparisons as the fundamental criterion, then to the matter of ability to pay and the related problem of priorities, and finally, as regards criteria, to what he terms "uniform wage policy v. inequities."

Public sector negotiations can involve difficult noneconomic problems, some of which are not easily handled in terms of readily available or easily developed criteria. Among the more complex in this category are the issues arising out of union demands that, allegedly, cannot or should not be granted because of legal limitations on the authority of the public body doing the negotiating by virtue, for example, of civil service laws, teacher tenure legislation, home rule city charters, and a wide variety of specific legislation which arguably is prescriptive concerning the right of the public body to foreclose, through bargaining, the authority of the body to retain discretion. Some very sticky legal problems exist in these areas, and the threshold question facing the neutral is whether he should duck them altogether. If he gets to the merits of a specific proposal, either bypassing or deciding the legal question, he faces the question of suitable criteria. Comparisons—that is, what has been done about such issues elsewhere—may be useful. But in many instances this will indeed be a "plow new ground" area. Union security, including agency shop, is another and related kind of issue. Absent enabling legislation, legal questions may be raised. But if resolved, a neutral may have trouble developing the basis for an answer on the merits. He may believe that private sector trends ought *not* to be controlling, and public sector practice in his state may be varied and hence of little help. Does he then eschew pioneering, wait for a bargaining pattern to develop, in effect thereby removing the issue from the case, or does he proceed, as did his predecessors in the private sector before him (including the War Labor

Board and the railroad emergency boards functioning after the enabling amendment of the Railway Labor Act) to deal with the pros and cons? In so doing, are there considerations peculiar to public sector employment which should be considered relevant?

The economic issues arising in the public sector negotiations are much like those of the private sector—that is, they are wages and fringes. As to these, my own view is that the development and application of suitable criteria for their resolution pose either no insuperable or especially unique problems, or, on the other hand, some extremely difficult and unique ones, depending almost entirely on the relevance of the question of ability to pay. If inability to pay is not pleaded, or if pleaded is deemed irrelevant, the analysis on the merits in most respects can proceed on the basis of criteria (comparisons, cost-of-living increases, inequities, and so forth) characteristic of the private sector. Some might say certain public sector issues are unique, such as the question of parity between police and firefighters, but they really aren't. Tandem relationships are common in the private sector.

But if the fiscal position of the public authority (city or school board, for example) is brought into the case and deemed relevant, the neutral's task is frequently difficult to the point of utter inability to cope with the problem, and, I might add, exhaustion, unless the finding is that the employer is utterly without the financial resources to fund *any* increase in labor costs. In that case, if the neutral regards (or is required by law to regard) ability to pay as a supervening criterion, his task is simple. He denies the union's demands. And there are some municipalities and school boards which, to use Howard Block's term, are just "dead broke," at least in terms of revenues balanced against liabilities already assumed (including those attending a retention of the existing work force). Moreover, under principles of municipal law presumably in force in many jurisdiction, deficit budgets are not supposed to exist.

But these simplistic remarks dodge a whole series of problems for the neutral ranging from the factual to the basic questions of principle. I suggest that among the very serious questions are several that are not within the realm of expertise of labor dispute arbitrators on the basis solely of their private sec-

tor experience. The initial question is in a sense factual only. It is: What is the public body's actual fiscal position in terms of its ability to absorb *any* increased operating costs? Any sound analysis of this matter often requires an exhaustive and knowledgeable inquiry into budget allocations, revenue sources, transferability of appropriations, borrowing capability, and the like. The second question is whether, if the public body's ability to absorb increased operating costs is limited (which is probably the typical situation), the neutral should attempt to determine the gross amount of increased labor costs, if any, which the public body can finance. This in itself may turn out to be a fairly complicated problem. But, assuming this gross amount can be determined, the next and crucial question is whether the neutral should assume that this fund is all that can be provided, by way of increases, for any and all groups of employees—given the repercussionary effects of an increase awarded to the group before him—or should act on the basis that this fund can be enlarged by the public body by reductions in force or rearrangements of priorities. Obviously related is the question whether the neutral should attempt to determine the impact his award will have in terms of affecting the economic demands of other groups of employees and their ultimate settlement. Bear in mind, of course, that it is assumed that these other groups of employees, and their bargaining representatives, if any, are not parties to his proceeding or represented in it.

Now I submit that inquiries of these kinds pose problems which are so serious and difficult as to make the criterion ability to pay or, more realistically, alleged inability to pay, one which, if deemed to be relevant or required by law to be taken into consideration, is likely to be taken less seriously than others, such as comparison data. One of Howard Block's observations is that he "is inclined to agree with those who insist that when a neutral rules out inability to pay as a valid defense, he should also assume some responsibility for finding the funds to implement his award," although he also adds, apparently as a proviso, "if the parties have authorized him to do so." I interpret this remark as implying that Howard not only regards ability to pay as a proper criterion for consideration, where advanced by a party, but further as stating that the neutral does, indeed, have the full responsibility, somehow, of dealing with the series

of problems which, I have suggested, then must be addressed. But I doubt very much that he can or should attempt any assignment of that magnitude except perhaps in a situation where all parties concerned, including other unions, have deliberately vested in him what would be tantamount to the full authority of the public body with respect to its budget, allocations, and priorities.

What, then, is the likely result where ability to pay is accepted by the neutral, or by law forced upon him, as a factor to be taken into account? Only a searching analysis of arbitral decisions would provide anything like an accurate answer. I have knowledge of some, however, including several in which I have participated. My impression is that a number of arbitrators, absent any statutory compulsion to take fiscal matters into account, tend to regard them as substantially irrelevant. But my impression, further, is that where, as under the Michigan police and firefighter compulsory arbitration law, this is one of the several factors specified for consideration as applicable, there has been a more or less valiant effort to analyze the public body's fiscal position, and, upon finding a very tight situation, to make an award on economic issues which would be somewhat less, or stated as being somewhat less, than otherwise would have been considered justified, but yet not to let the fiscal factor predominate.

A good example of this is Harry Platt's recent award, achieved unanimously—and miraculously—in the Detroit firefighters' case. Earlier, but with respect to the same fiscal year, an award had been handed down by Bill Haber (with a rather stinging dissent by the city's nominee) granting police (patrolmen) a base (*i.e.,* top) rate of $12,000, effective July 1, 1970, as against a prior rate of $10,800 and a city offer of 6 percent. For 63 years a parity relationship on base salaries had obtained between police and firefighters. In the firefighter case the city sought to break parity, primarily, I judge, because of its assertedly desperate financial straits. Harry held for maintenance of the parity principle, but, in light of the city's financial plea, made the $12,000 salary effective as of January 1, 1971, rather than July 1, 1970, and made effective as of July 1, 1970, the city's substantially lower offer of 6 percent. Other examples in Michigan awards may be cited in which the city's fiscal position was given some, although not predominant, effect.

This review suggests that parties and legislators face substantial uncertainties concerning how arbitrators will deal with the ability-to-pay factor, if argued or imposed for consideration. For policymakers considering compulsory arbitration legislation, and whether to specify criteria, it seems to me to be clear that they cannot reasonably expect the ability-to-pay factor to be regarded as controlling if listed among several factors, some inconsistent with it in particular fact situations, unless they specify that it shall be. Then, if they do, they ought to realize the extreme difficulties of applying the criterion. The upshot, of course, is that they might decide to omit it as a criterion, or, as has been done in some jurisdictions, to make awards on economic issues advisory only. But the difficulties in doing this are obvious and considerable.

Comment—

ARNOLD M. ZACK *

Howard's paper has dealt effectively with the several criteria that are usually invoked by the parties in their effort to win the neutral to their point of view, and the critical view he raises of each of these criteria brings into focus the dangers of the neutral's embracing any one to the exclusion of the others. They are not separable, and no one should be embraced without recognition of the consequence to the other.

What fascinates me in this criterion or "crutch shopping" exercise we find ourselves enmeshed in as neutrals, is the prospect of the collision course on which it tends to lead us. The comparability criterion, and I would include internal comparability herein, which Howard refers to in his discussion of uniform wage policy v. inequities, has always been particularly appealing on an equity basis, satisfying our egos that our proposed solutions to disputes help to erase the unfair treatment of one group of workers compared to another.

When neutrals initially began to be involved in public sector disputes, a scant three or four or five years ago for most of us, the conventional regarding of the public sector employees was that they lagged behind their private sector counterparts by virtue of long deprivation of effective bargaining

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