and lockout will remain available as ultimate weapons—at least in certain industries. Moreover, the psychological impact on the parties of their mutual right to strike and lockout is often the primary catalyst inducing dispute settlement.

However, as my colleagues will illustrate, the innovations in dispute resolution that are being introduced in several public sector jurisdictions offer significant lessons for public and private bargainers: (1) that new procedures are available and that arbitration has supplemented rather than supplanted free collective bargaining and, in some cases, may even have enhanced it; (2) that arbitration procedures contain a great deal of flexibility, depending on how the statute is administered, how the arbitrators are chosen, how the issues are submitted, and how the arbitrator performs his role in the dispute settlement process; and (3) that the benefits to be gained through peaceful, albeit third-party prescribed, settlements may outweigh the very risky right to engage in economic warfare—particularly today when the impact of foreign competition is a mutual concern of management and labor.

Will the record of arbitration in limiting strikes and not chilling bargaining stay good? We don't know. Collective bargaining means change. Procedures that work today may not work tomorrow. But for now, I recommend consideration by private and public sector bargainers of limited issue and other creative forms of arbitration, at least on experimental bases. Certainly, the public record, based on the jurisdictions being examined here, justifies consideration by private and public sector labor and management leaders of the possibilities of utilizing interest arbitration. It has now become respectable to think about this procedure; its selective use may prove to be beneficial to all parties, as well as in the public interest.

WHAT THE PRIVATE SECTOR CAN LEARN FROM THE PUBLIC SECTOR IN INTEREST ARBITRATIONS: THE PENNSYLVANIA EXPERIENCE

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Pennsylvania has had almost six years of experience with compulsory interest arbitration. As in most other public jurisdictions,

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access to such arbitration is limited to public safety employees—police, firefighters, prison guards, and court employees. Before describing the results of the procedure and some of their implications, it may be well to review briefly the circumstances surrounding enactment of the law and the major provisions of the law.

Major Provisions of the Law

Act 111, which applies to police and firefighters, was enacted in 1968 following an amendment to the state constitution. Prior to Act 111, collective bargaining for public safety employees was virtually nonexistent. An earlier law providing for advisory arbitration had proven ineffective in settling impasses and had led employee organizations to demand binding arbitration.

The motives of these organizations is apparent in the language of Act 111. Little or no attention is devoted to such matters as representation, unfair labor practices, scope of bargaining, or a series of impasse procedures. The bulk of the slim law refers to the arbitration process and awards. The law permits either party to move to arbitration following 30 days of negotiations. The tripartite arbitration panel is composed of a representative of the employer, one of the employee organization, and an impartial chairman. The partisan arbitrators may select the neutral directly or, if unable to do so, utilize the services of the American Arbitration Association in the selection process.

No specific criteria are listed in the act to guide the deliberations of the arbitration panel. Awards approved by at least a majority of the arbitration panel are binding on legislative bodies, however, and cannot be appealed to the courts. Finally, it should be mentioned that under the Pennsylvania law the employee organization pays for the costs of presenting its case at the arbitration hearing as well as its representative on the arbitration panel; the public employer pays all other costs, including the fee of the neutral chairman.

Significant Elements of the Process

Given the language of the law and the circumstances of its enactment, it should come as no surprise that negotiations preceding arbitration are sometimes perfunctory. The lack of bargaining at times is a result of inexperience in collective bargaining.

Parties do not understand the meaning of negotiations and do not have knowledgeable advisers to teach them the techniques and procedures of negotiating agreements. Even now, arbitrators are called into situations where the parties are entering their first agreement. Moreover, the turnover in persons elected to public office means that negotiating lessons learned in one administration must often be relearned if incumbents lose office. In the private sector, the extent and length of collective bargaining and the continuity in managements presumably would reduce this problem.

Quite a different situation occurs when lack of bargaining is due to unwillingness to bargain by one or both of the parties. Some jurisdictions repeatedly end up in arbitration, although the parties involved are reputed to be sophisticated in labor relations. Either or both of the parties may fear political consequences of agreement. The responsibility for the terms of settlement is then shifted to the arbitration panel. A related reason for opting for arbitration is that militants on either side of the table may press for arbitration, regardless of the consequences. The arbitration process becomes a quasi-strike weapon in the sense that it is the ultimate impasse step which evidences unrelenting aggressiveness as well as belief in the justice of one's own cause.

Depending on the circumstances governing private sector interest arbitrations, the conditions noted here need not apply. Except for regulated industries, private employers are substantially less sensitive to public and stockholder political reaction than are their public sector counterparts. They would be more likely to accept responsibility for terms they felt were suitable, if they could obtain them in direct negotiations. Employee organizations in the private sector may face internal political difficulties in accepting negotiated agreements. Using interest arbitration as an "ultimate weapon" becomes a stronger possibility if there are no alternative final impasse steps. Private sector labor relations policy could be structured to encourage interest arbitration without completely and irrevocably prohibiting alternative arrangements, as is now the case with public safety employees.

The lack of statutory mediation in Pennsylvania exacerbates the problem of bargaining prior to arbitration proceedings. For those unfamiliar with bargaining procedures and nuances, there is no opportunity to be exposed to the educational function of

mediation. For those unwilling to bargain, there is no additional encouragement or outside persuasion to bargain. Anyone wanting to promote collective bargaining would welcome the assistance of competent mediators in hopes of reducing the number of impasses brought to arbitration.

The arbitration panel, and the neutral arbitrator in particular, may choose different roles in different cases because the statutory guidelines are practically nonexistent. In fact, however, the structure of the arbitration panel and the nature of the proceedings influence the conduct of all concerned. Neutral arbitrators in Pennsylvania sometimes mediate issues directly with the parties during the course of arbitration hearings. More often and more significant, however, is the mediation that occurs during the executive sessions following conclusion of the arbitration hearing. The tripartite structure of the arbitration panel and the majority requirement for binding awards forestall the neutral arbitrator from making a totally independent decision on outstanding issues. To begin with, the neutral may try to determine the issues on which the parties actually disagree. The partisan arbitrators often can decide the outcome of many issues by themselves or with some mediation by the neutral. The more experienced the partisan arbitrators and the more independent they are of their constituents' direct control, the more likely they are to compromise. The ability of the partisan arbitrators to agree on such issues underlines the parties' inability or unwillingness to negotiate these issues, or their desire to bring the entire list of demands to arbitration.

A more difficult task for the arbitration panel lies in any remaining issues where ready agreement by the partisan arbitrators is not possible. Here, too, the neutral may first try to mediate differences to narrow the range separating the parties. In the final analysis, however, the neutral arbitrator needs the support of at least one other member of the panel to render a binding award. He may make a unilateral determination and hope to persuade at least one of the partisan arbitrators of the propriety of the decision; the acceptability of the decision to the partisan arbitrator will be based more on its proximity to the partisan arbitrator's position than on its intrinsic value. Or the neutral may modify his determination to the point where he can gain the vote of one of the partisan arbitrators.

The point should be clear: Interest arbitration awards by tripartite boards in Pennsylvania are often the product of bargaining among the three members of the board. Unlike arbitration with a single impartial, interest arbitrations are likely to be influenced by pragmatic needs and negotiating skills as much as by objective standards. The lack of statutory standards in Pennsylvania may encourage intrapanel bargaining, although the presence of standards used in other states would probably not affect the arbitration process significantly. In one sense, the negotiations which the parties were unable to complete at the bargaining table have been shifted to their representatives and the neutral in arbitration.

The arbitration process of interest disputes in Pennsylvania may offer comfort to private sector parties considering interest arbitration, while it may perturb the private sector arbitrator accustomed to grievance arbitration. The tripartite panel and majority-voting proviso provide considerable assurance that the parties' true views will be represented and their interests pursued. It is possible that the neutral arbitrator could side completely with one party's position, but that is the exceptional case. Much more frequently executive sessions of the panel reveal discussions that tend to narrow differences and result in compromising among issues and among positions on an issue. While no one claims that the process results in a settlement identical to that which the parties would have reached by themselves, it tends to ensure a workable agreement, and one that the parties' representatives have had an active role in formulating.

The neutral arbitrator may feel quite uncomfortable in this process, not being exactly sure of his role. In fact, he may find his role changing in the course of the arbitration. During the hearings, he will act as he usually does in grievance arbitration hearings. If the parties presenting the case are inexperienced to the point of not knowing how to prepare their cases adequately, he may need to ferret out the information needed for decision-making.

In the executive sessions, the neutral may find himself in a novel position. Unless he agrees with the position presented by one party, he is likely to fail if he acts as a conventional arbitrator. He may not be in full control of the executive sessions, especially if the two partisan arbitrators come to an agreement on issues at variance with his own views of settlement. He may need to

adopt the mediator's role, utilizing persuasion, suggestion, and pressure. Finally, he may find himself bargaining with one or both of the partisan arbitrators in order to obtain a valid award. At this point the neutral arbitrator may be torn between holding out for an award that he believes most appropriate in the circumstances (and which, therefore, presumably best represents public policy) or settling for an award with which at least one of the partisan arbitrators will concur. All of this will occur with fewer constraints and guidance from criteria and precedents than in grievance arbitration. Scarce wonder that some arbitrators have listed higher rates for interest arbitration than for grievance work.

Principal Results

The effectiveness of policy instruments are properly judged by their results. The results of interest arbitration in Pennsylvania are statistically imperfect because of the lack of any central agency for data collection, but in any case such results would be open to interpretation.

Certainly a much higher proportion of negotiations end in arbitration in Pennsylvania than in most other states that authorize bargaining and provide alternative impasse procedures. An estimate of the initial experience of Act 111 was that approximately 35 percent of police and firefighter negotiations were presented to arbitration and resulted in an award by the panel.[1] In the following years, the incidence of arbitration increased. The last two rounds of bargaining have seen a definite decline in usage to the point where perhaps one third of all negotiations terminate in an arbitration award.

These figures must be taken with a grain of salt not only because of doubt about their accuracy but because they represent a changing number of parties operating under varying conditions. New parties engage in their first bargaining experience each year. Some parties conclude long-term agreements and, therefore, are absent from the annual negotiating scene. Over time, a large number of parties have utilized arbitration once or more. Such utilization could have been predicted, given the inexperience of

[1] J. Joseph Loewenberg, "Compulsory Arbitration for Police and Fire Fighters in Pennsylvania in 1968," 23 *Ind. & Lab. Rels. Rev.* 367-379 (1970).

the parties, the easy access to arbitration, and the lack of intermediate bargaining steps.

What is perhaps more surprising is that in any given year since the inception of Act 111, the majority of parties in Pennsylvania have successfully negotiated their own agreements. To be sure, it has not always been the same parties who conclude their own agreements, but the ability to be in arbitration one year and to negotiate an agreement the following year denies the contention that arbitration is addictive and forthwith destroys the incentive to bargain. Approximately one third of the parties who bargain under Act 111 have never received an arbitration award, and most of these parties have been bargaining since the law became effective. Even an arbitration award may sometimes mask a negotiated agreement that one or both parties believe they cannot subscribe to directly and publicly. What all of this amounts to is that arbitration in Pennsylvania has not stifled collective bargaining, although proponents of bargaining would want to devise ways to increase the rate of negotiated settlements.

A prime concern of public employers has been the cost of arbitration awards. It is, of course, impossible to determine what the outcome of bargaining would have been in the absence of arbitration as an impasse procedure. A colleague and I have studied police salaries in three states with different policies on bargaining: no statutory authorization for bargaining, bargaining but no provision for interest arbitration, and interest arbitration as a terminal step to negotiating impasses.[2] It is apparent that the salaries of police in states that affirm bargaining as a public policy have "caught up" with those of their counterparts in states without such policies. There is no evidence, however, that arbitration awards or agreements reached under the threat of arbitration have exceeded rates established by collective bargaining with different impasse procedures or by employers in jurisdictions without statutory protection of bargaining. Perhaps more sophisticated analysis that would include supplementary allowances and benefits would help to put this argument into better perspective. It is logical to contend, though, that the criteria, however vague, employed by the tripartite arbitration panel and the proc-

[2] J. Joseph Loewenberg and Karen S. Koziara, "Wage Effects of Alternative Bargaining Policies in the Public Sector" (forthcoming).

ess used to arrive at the arbitration award are likely to approximate those the parties themselves would have considered.

Of lesser concern generally have been noneconomic issues that may be considered a challenge to management rights, such as scheduling and manning. In part, the problem has been minimized because the number of such issues has been few, and public safety employees have generally not insisted on including these items in the agreement. On the other hand, some employers have asked arbitration panels to remove superior officers from the bargaining unit. In part, the problem has been avoided by arbitration panels, which tend to be conservative and not grant rights in these areas. Some awards merely deny the requests, while others will refer the matter back to the parties for further study and discussion.

Probably the primary reason for enacting interest arbitration legislation is to avoid strikes by public employees. There have been no strikes by police or firefighters in Pennsylvania since the law was enacted; nor, to my knowledge, has there been anything that could be considered a work stoppage or slowdown connected with the negotiating and arbitration procedure. The reason for this record is that to date all parties have been willing to accept the procedure. The few legal suits brought to test the law quickly laid to rest legal grounds for opposing the arbitration process; individual awards have been challenged successfully only upon demonstration that the arbitration panel exceeded the public employer's authority in rendering its decision. The parties are not always happy with the results of awards. Employers continue to feel the procedure favors employees, while some employees are growing disturbed with the diminishing size of economic awards. But no one has seriously challenged the desirability of the process or come forth with a more acceptable alternative.

Experience has shown that interest arbitration is like a strike in some ways and not in others. It provides a terminal point to negotiations. In some cases it seems to apply additional pressure on the parties which is not available in its absence. About one fifth of the requests for panels of neutral arbitrators received by the American Arbitration Association each year are withdrawn or the dispute is settled prior to the issuance of an arbitration award. For the most part, interest arbitration does not involve penalties such as those associated with the strike. Except for small

political jurisdictions where the public safety employee force is also small, the economic costs of arbitration and the potential publicity that may surround it do not seem to deter parties from utilizing the procedure. The real potential penalty the parties must consider is the arbitration award.

All of these results will not necessarily be replicated if interest arbitration were introduced into the private sector, but they should at least give pause to unquestioning acceptance of the common wisdom regarding interest arbitration. There is no reason to believe that collective bargaining will inevitably deteriorate or that settlements will be exceedingly costly if arbitration were a private sector impasse procedure. Different bargaining patterns and traditions may require adapting details of the procedure, but the basic concept will have application in the private sector if the parties will it. The key remains the parties' willingness to accept the process as a viable alternative to strike action in negotiations.

Critics of interest arbitration may find much in the Pennsylvania experience with which to quarrel. Arbitrators are often among the most suspicious of interest arbitration. But no one can gainsay the facts that to date interest arbitration in Pennsylvania has accomplished the primary purposes of the 1968 law: It has provided an alternative to strikes, and it has enabled public safety employees to obtain wages and working conditions that they consider satisfactory.

To the skeptics who remain unconvinced, I can only paraphrase a popular advertisement of the day: "Try it, you *might* like it!"

IS A "FINAL OFFER" EVER FINAL?

CHARLES M. REHMUS*

The Three Princes of Serendip, so the fable tells us, had the happy faculty of making discoveries of valuable things they were not in quest of. Based upon our investigation thus far of public

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