PRIVATE SECTOR IMPLICATIONS OF THE INITIAL WISCONSIN FINAL-OFFER ARBITRATION EXPERIENCE*

JAMES L. STERN**

In 1972 the State of Wisconsin amended its public sector labor relations statute to provide for the resolution of interest disputes between units of local government and police, firefighters, and county law enforcement officers by final-offer arbitration. For the prior 10-year period, fact-finding had been the terminal step. The move to binding arbitration was one of the amendments to the statute sought by the coalition of public sector unions in its successful drive to make major revisions in the law. Before discussing possible private sector implications of this development, the nature and coverage of the final-offer arbitration system is described.

The Final-Offer Arbitration Statute

The unusual decision to give preference to final-offer arbitration instead of conventional arbitration apparently flowed from two considerations: The vice president of the International Association of Firefighters (IAFF) for the Wisconsin area favored it. He was an important political figure in the drive to secure the revised statute, and other union leaders went along with him because of his enthusiastic support of this feature which was of particular significance to firefighters. Also, the firefighters believed that they had been penalized by third-party timidity in fact-finding cases in which the neutrals upheld city management attempts to break wage parity with police. In several Wisconsin cities, fact-finders had recommended compromises under which firefighters would receive wage increases that were greater than those granted to most other city employees but which were less than those gained by the police with whom they were formerly equal. Final-offer arbitration was seen as a means of preventing arbitrators from fashioning compromises and as a procedure that was in-

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** Member, National Academy of Arbitrators; Professor of Economics, University of Wisconsin, Madison, Wis.

tended to make the parties bargain more realistically in order to avoid the all-or-nothing consequences of this type of arbitration.

The Wisconsin statute provides that either party may petition the Wisconsin Employment Relations Commission (WERC) to order arbitration. The WERC investigates the dispute to determine whether an impasse has been reached. This is not a pro forma certification to arbitration because the WERC conducts an intensive mediation effort during the investigation and orders arbitration only after it is convinced that there is a bona fide impasse. At that point, unless the parties have agreed upon an arbitrator or board of arbitration, the WERC orders the parties to submit their final offers and furnishes the parties a panel of five names from which they select the arbitrator. The cost of arbitration is borne by the parties.

If both parties desire to use conventional arbitration rather than final-offer arbitration, the statute specifically authorizes this option. In the absence of such an agreement, however, the parties are bound by what is referred to in the Wisconsin statute as Form 2 arbitration, under which "The arbitrator shall select the final offer of one of the parties and shall issue an award incorporating that offer without modification." [1] In only one of the first 24 cases in which awards have been issued did the parties jointly agree upon conventional arbitration.

The statute provides guidelines for the arbitrator in making his decision. These are the same as those specified in the Michigan arbitration statute and state that he shall give weight to the lawful authority of the employer, stipulations of the parties, ability to pay, cost of living, comparisons with other employees in the public and private sectors doing similar work, comparisons with other employees generally in comparable communities, and other such factors that are normally or traditionally taken into consideration in determining the wages, hours, and conditions of employment in the private and public sectors. Although the statute does not provide specifically that arbitrators may mediate issues, several of the more experienced arbitrators have occasionally attempted to do so.

Eligibility for use of arbitration is confined to county and city law enforceent and firefighting personnel and is further re-

[1] Wisconsin Stats. 111.77 (4) (b).

stricted to cities having a population of at least 2,500 and no more than 500,000. This last restriction exempts the city of Milwaukee from this portion of the public sector labor relations statute—a decision attributable to intra- and interunion political considerations.[2] As of 1974, 143 cities are covered by final-offer arbitration, and, of these, 101 bargain with either police or firefighters; 100 have negotiated labor agreements with police, and 51 have negotiated agreements with firefighters. Of the 72 Wisconsin counties, 41 have negotiated agreements with law enforcement officers. (Counties employ no firefighters.)

From the responses from 71 percent of the units which bargain, we learned that the average population of cities which bargain is approximately 20,000, the average number of all types of public employees is about 190, and the average size of the police and firefighter units is about 30 and 45, respectively. The 41 counties which bargain have an average population of approximately 90,000, employ about 900 public employees, and have an average of about 50 people in the law enforcement units. Bargaining is relatively new to a majority of these units, as approximately 55 percent of the 192 units negotiated their first agreements less than six years ago.

The foregoing summary provides a picture of the basic Wisconsin terrain subject to final-offer arbitration and provides an idea of the basis for the following compilation of possible implications for private sector use of final-offer arbitration. It should be emphasized that data in this study of Wisconsin (and Pennsylvania and Michigan) are confined to the uniformed protective services in the public sector. Extrapolation of the data to the private sector, therefore, is a matter of judgment, and conclusions drawn should be regarded most tentatively—taken with a barrel of salt, so to speak.

The Nonnarcotic Effect

The Wisconsin record tends to refute the statement made by Willard Wirtz at the 1963 meeting of the National Academy of Arbitrators in Chicago. He said: "Experience—particularly the War Labor Board experience during the '40's—shows that a statutory requirement that labor disputes be submitted to arbitration

[2] Milwaukee police are covered by a separate provision under the statute providing for conventional arbitration of interest disputes; the firefighters are covered by fact-finding.

has a narcotic effect on private bargainers, that they turn to it as an easy—and habit forming—release from the obligation of hard, responsible bargaining." [3] The Wisconsin data, summarized in Table 1, indicate that the parties have tended to settle disputes by themselves rather than abdicate this responsibility to arbitrators. In about two thirds of the 173 negotiations for 1973 agree-

Table 1

Number of Police, Firefighter, and County Law Enforcement Officers Agreements Negotiated and Number and Percent of These Agreements Resolved by Mediation, Fact-Finding, and Arbitration

	1968-1971	1972	1973	1974[c]
Number of bargains	427	143	173	147
No. of mediations[a]	52	22	13	9
No. of fact-finding petitions	64	12[b]	—	—
No. of arbitration petitions	—	14[b]	43	40
Total number of requests for third-party assistance	116	48	56	49
No. of fact-finding awards	24	4	—	—
No. of arbitration awards	—	7	16	1
Total number of awards	24	11	16	
Mediations + petitions/bargains	27%	34%	32%	34%
Awards/mediations + petitions	21%	23%	29%	
Awards/bargains	6%	8%	9%	

Note: The number of bargains was calculated from the questionnaires and adjusted to reflect the 70 percent response rate and the number of two-year agreements. The number of mediations, fact-finding and arbitration petitions, and fact-finding and arbitration awards is taken from state records. Adjustments were made in state figures to convert them from fiscal years to calendar years, as municipal agreements run for calendar years.

[a] In order to avoid double counting, the number of mediation cases has been reduced by those that were not settled at that step and were referred to fact-finding or arbitration.

[b] When the 1972 amendments providing for arbitration were enacted, there were still some situations in which the parties had not reached agreement on their 1972 contracts. Fourteen of these, some of which had originally been filed as fact-finding cases, resulted in arbitration petitions. The cases which were refiled as arbitration cases have been subtracted from the fact-finding cases to avoid double counting.

[c] As of April 1, 1974, there had been 49 petitions for third-party assistance in negotiating 1974 agreements. Twenty-three petitions were still pending at some step of the procedure. Therefore, although only one award had been issued as of April 1, 1974, the total number that will be issued is not yet known.

[3] W. Willard Wirtz, "The Challenge to Free Collective Bargaining," in *Labor Arbitration and Industrial Change*, Proceedings of the 16th Annual Meeting, National Academy of Arbitrators, ed. Mark L. Kahn (Washington: BNA Books, 1963), at 303-304.

ments, the parties settled without any third-party assistance. In the other third, mediation took place and resolved about three quarters of those disputes that had been referred to mediators either as direct requests for mediation or as petitions for arbitration. Included in the number of disputes that were mediated are the few that were resolved by the parties themselves during the procedure leading up to the arbitration hearing, or at the hearing with the aid of the arbitrator. *In only 9 percent of the 173 negotiations was an arbitral award issued.*

As of April 1, 1974, the experience in negotiating 1974 agreements was following a similar pattern in so far as the proportion of negotiations in which the parties sought third-party assistance —still about one third of the negotiations. It is too soon to say for sure, however, whether the percent of negotiations that are resolved by arbitral awards will again be about 10 percent because there are 23 cases pending at various stages of the procedure. But so far, an award has been issued in only one case, and if the 1973 percent of petitions pursued to awards holds true again, only about 10 percent of the negotiations will be settled by arbitration awards.

A question of particular interest to policy makers is whether the proportion of third-party awards is less under a system of final-offer arbitration than under conventional arbitration, final-offer-by-issue arbitration, or fact-finding. As yet, this study has not progressed to the point at which a definitive statement about this point can be made, but some evidence is available. The percentage of negotiations settled by arbitration awards seems to be higher in Pennsylvania than in Michigan or Wisconsin, although this variance may be attributable to the absence of mediation and other differences in the statutes rather than to differences in the type of arbitration.

Differences that may be found between Michigan and Wisconsin also may be attributable to differences in mediation and other aspects of the statutes as well as to differences in the arbitration processes. Detailed figures for Michigan are not yet available, but, theoretically, we would expect a lower proportion of awards in Wisconsin because of the all-or-nothing aspect of the Wisconsin procedure as opposed to the choice of offers on an issue-by-issue basis in Michigan. Offset against this, however, is the greater use of med-arb in Michigan. Regardless of which state turns out to

have the lower proportion of awards, it is clear that in both states the parties are resolving most disputes by themselves and that no narcotic effect has appeared as yet.

When the Wisconsin experience under final-offer arbitration is compared with its previous experience under fact-finding, the results run contrary to what one might expect and to what some mediators have suggested. Mediators have noted that they may have more clout when mediation is followed by a binding procedure rather than an advisory one. The data in Table 1, however, show that both the percent of negotiations referred to fact-finding during the last four complete years of fact-finding (1968-1971) and the percent of awards issued were slightly less than under final-offer arbitration.

This result may be attributable to a variety of factors other than the change in procedures. Although law enforcement personnel had access to fact-finding under the old statute, they were not considered employees and, therefore, did not have full bargaining rights. When full bargaining rights were provided along with final-offer arbitration, collective bargaining spread to smaller cities and rural counties. Conservative managements in those areas may have been less prone to accept bargaining and may have forced unions to arbitration to a greater degree than managements in large cities. Also, the various phases of the Federal Government's wage control programs may have inhibited recourse to third-party procedures to a greater extent in one period than in another.

Changes in the Process and Outcome of Bargaining

The availability of arbitration at the request of either party clearly helps weak unions, and it is assumed that this holds true for conventional arbitration and final-offer-by-issue as well as for final-offer arbitration. In formulating its bargaining position, municipal management must now take into account the possibility that the union will seek arbitration if the package seems unsatisfactory. Unions that formerly presented suggestions for improvements in wages and other conditions of employment to a finance committee of a city council or county board and then, possibly with some grumbling, accepted the offer determined unilaterally by management, now have forced management to take bargaining more seriously. They meet more often, they exchange proposals,

and they modify their positions. Both parties appear eager to settle by themselves rather than to have an outsider impose a binding decision on them. Threats of bringing in an outsider are used by the weaker party, however, in attempts to induce change in the position of the other party.

In some industrial communities in which the unions are very strong, we find management petitioning for arbitration. The threat of third-party judgments performs a valuable function in those situations in which elected officials are loath to alienate a potent labor vote. Existence of arbitration may restrain a strong union from pushing as hard as otherwise would be the case. In a few instances, it appears that the stronger party (and this applies equally to unions and managements) is unwilling to compromise on a particular issue and has preferred, as a face-saving measure, that it be resolved adversely to its interests by an arbitrator. Overall, since the parties prefer to settle by themselves in most situations, the existence of arbitration apparently helps them to do so, although the terms may be different from those that would have prevailed in the absence of arbitration.

Management and union spokesmen state that the existence of arbitration is raising wages in the low-wage communities and reducing the dispersion. There is no consensus yet, however, about the impact of arbitration on the pattern-setters, with some management and union leaders stating that the statute has minimal effect in those negotiations. Statistical evidence to resolve this difference of opinion is not yet available, and quite possibly will not be conclusive. It does seem likely, however, that it will be found that arbitration is causing the wages of the uniformed services to increase more than they would have under fact-finding.

Another question raised about arbitration is whether unions will comply with the statute. In Wisconsin, compliance is almost complete, possibly because the arbitration statute was sought by the police and firefighter organizations. They see it as their statute, and apparently they feel they have a responsibility to abide by it.

One instance of noncompliance, which is of interest, arose in a strong labor town in which the unions wished to introduce cost-of-living clauses. The spokesman for the labor groups believed that an arbitrator would be unlikely to innovate and that com-

parisons with other communities in the area would lead the arbitrator to reject the union demand for the clause. Therefore, he chose instead to initiate an intensive public political education program favoring cost-of-living clauses, supplemented by broad-scale industrial action, not only by firefighters and police but also by other city employees, teachers, and private sector union workers. Tactics included rallies, picketing of city hall, sick-ins, insistence that all negotiations be public, and inclusion of television and press representatives in union caucuses.

Sufficient pressure was generated on labor-supported public officials to force them to yield to the union demand for cost-of-living protection. It is too early to tell whether this tactic will spread. This type of action is limited, however, by the need for an issue on which popular support can be mobilized—and a cost-of-living clause in an inflationary period seems to be one of the few such issues. Further, the community must be one in which labor is strong enough to mobilize sufficient support to make the granting of this demand palatable to the majority of the electorate.

Another aspect of the impact of final-offer arbitration on the bargaining process is whether it brings the parties closer to settlement than does conventional arbitration. This involves an examination of such facts as whether the number of issues referred to arbitration in each case is fewer than under conventional arbitration. Also of interest is whether the gap between the parties on the wage issue is less under final-offer than under conventional arbitration. Detailed statistics on these points are not yet at hand, but preliminary analyses provide fuel for discussion.

Twenty-four arbitrations had been published by April 1974. In one case, the parties mutually agreed to proceed by Form 1 (conventional) arbitration and presented 11 issues to the arbitrator for resolution. In the 23 final-offer arbitration cases, seven involved only one issue (in four the issue was wages), four involved two issues, seven involved three to five issues, four involved six to eight issues, and one involved 12 issues. This breakdown exaggerates the number of issues in some cases when there are several unresolved economic issues; in one of the four-issue cases, for example, the issues were wages, meal allowances, night shift differential, and retroactivity. Examination of the awards suggests that final-

offer arbitration persuades the parties to reduce the number of issues to be arbitrated. Interviews with the parties reinforce this impression. Most of the parties are aware that by holding out for some particular item, they may jeopardize their entire position.

In several of the multiple-issue disputes, arbitrators were faced with the dilemma to which Fred Witney referred in his article about the Indianapolis final-offer arbitration experience.[4] The problem arises when an arbitrator is in agreement with one side on one major economic issue and in agreement with the other on an equally important noneconomic issue, or, alternatively, when he believes that one issue is sufficiently important that he will rule in favor of the party with the better position on this issue despite its weaker position on several other issues.

For example, one arbitrator stated that the union wage position was more equitable than that of management, but he believed that the union demand for a maintenance-of-standards clause (the Wisconsin public sector euphemism for what is called a past-practice clause in the private sector) should not be granted. Economic considerations prevailed, and he ruled in favor of the union; but he made clear that he did not appreciate being forced to put a maintenance-of-standards clause into effect and would not have done so if he had had the power to modify final offers.

In another case in which management was not offering full retroactivity, the arbitrator selected the management position because he believed that its position on contract duration should be upheld. In a third case, an arbitrator stated that management's position on economic issues was reasonable except for its refusal to grant retroactivity. Because the arbitrator thought that retroactivity was essential to the maintenance of a sound bargaining relationship, he ruled for the union. Despite these problems, however, most Wisconsin arbitrators have stated that they favor the continuance of final-offer arbitration in preference to a shift to conventional arbitration or final offer on an issue-by-issue basis.

Initial personal interviews with the parties indicate that most managements and unions also still favor final-offer arbitration over conventional arbitration, although responses to written ques-

[4] Fred Witney, "Final-Offer Arbitration: The Indianapolis Experience," 96 *Monthly Lab. Rev.* 20-25 (May 1973).

tionnaires suggest that there is a good deal of misunderstanding about the process on the part of individuals who have not been involved in it as yet. As for any damage wrought by the winner-take-all aspects of the final-offer arbitration awards (and, by the way, the box score in Wisconsin stands at 12 to 11 in favor of management), it has not caused the winners or the losers either to condemn the procedure on this ground or to suggest that it be replaced by conventional arbitration.

Without regard to the arbitrator's dilemma, however, several union winners have claimed that in subsequent negotiations they have moderated their demands in order to improve relationships that may have been exacerbated by an award upholding the union position in a multiple-issue case. In any event, this problem occurs only rarely. Of the 173 bargains for 1973 agreements concluded under the final-offer arbitration statute, only about three or four involved this multiple-noncompatible-issue dilemma. It seems, therefore, that any loss attributable to this aspect of the program may be far outweighed by the deterrent from usage of final-offer arbitration relative to conventional arbitration if, in fact, when all the evidence is in, it is shown to have such an effect.

In conclusion, several miscellaneous points might be noted. There is some ambiguity in the Wisconsin statute, and the parties are still jostling for position about such matters as when the final offer must be tendered and the latest point at which it can be amended. We have those who favor a relaxed interpretation of the statute in order to facilitate settlement by the parties or through mediation. Against this position, however, are aligned those who believe that the deterrent power of final-offer arbitration must be fully protected by a stricter interpretation which precludes amendments of offers subsequent to five days prior to the arbitration hearing.

It is difficult to predict the long-run effect of the statute on bargaining strategy. Going to arbitration one year has an effect on bargaining the next year, just as an occasional strike keeps the threat of a strike meaningful. Using the arbitration procedure to induce the opposite party to take a relatively reasonable position and still challenging it in arbitration and losing may have some advantages to union and management leaders in dealing with rank-and-file militants or political opposition. The behavioral

permutations that final-offer arbitration may occasion are probably innumerable and difficult to anticipate. As far as anyone can tell, however, it has helped rather than hurt the bargaining process in the public sector. Whether it will have a similar effect in the private sector, where we have long looked to the strike as the appropriate means of resolving interest disputes, is open to conjecture. There may well be situations in which management and labor may wish to turn to this alternative, and, in those situations, much of the public sector experience will be relevant.

Discussion—

CHAIRMAN CLARE B. MCDERMOTT: And now comes the interesting part of any such program as this. The speakers have done their work, and they are entitled to the enjoyment of dealing with the questions they may have stimulated or barbs they may have engendered.

MR. KEVIN C. EFROYMSON: I have two questions for the panel. The first question has to do with the opinion of the panel concerning a national public employee bargaining bill with one single method of impasse resolution as opposed to the kind of experimentation you're getting with the various state statutes. The second question relates to the level of settlement in the public sector under the statutes. I would like to know how the level of these settlements, at the bargaining table and in arbitration, compares to the level of settlements in the private sector in the same areas.

MR. ANDERSON: I will leave to my economist friends, and there are at least two of them up here, the answer to your second question. As to the comment on the federal law and only one means of impasse resolution, my personal view, on which I've given some testimony and about which I feel rather strongly, is that if there is to be a federal law, it ought to be what I call nonpreemptive in character. A federal law would provide certain standards for state or local procedures; these procedures would have to be substantially equivalent to those of the federal law. However, I would not want the determination of whether or not the state or local law was substantially equivalent to be made by the administrators of any federal statute. I say that based upon my experience of more than 25 years as a bureaucrat at both state and local

levels in attempting to work out cession agreements with the NLRB over the phrase "not inconsistent" with federal law. The NLRB would not cede anything, and administrators of a new federal law are unlikely to voluntarily cede anything. The only way that could possibly work, that I'm aware of, is with the scheme that now exists in New York State, which allows a New York City experiment, the New York City Collective Bargaining Law, and the Office of Collective Bargaining, under the general aegis of the Taylor law on the conditions of substantial equivalency. The Taylor law puts the burden of proof upon the administrators of the state act to move in the state courts in order to prove that the local law or procedures aren't substantially equivalent to the state law.

I've given that long answer for the reason that I think it is important to retain the right of state and local experimentation in impasse resolution, perhaps in scope of bargaining and in the use of mediation techniques. Whether or not a state or local government wants to use the strike route, or whether or not it wants to use arbitration—final offer, issue by issue, or conventional—that sort of decision ought to be left to state and local governments, at least for now. I see no need for applying in the public sector the uniformity which under federal law prevails in private industry.

And one last emphasis to show my bias: I feel rather strongly that we should be concerned with stimulating local and state responsibility for resolution of employee problems and for dealing with their own public employees, not only on wages, hours, and working conditions, but on the public policy questions involved. While, in general, I think there is good argument for enacting a federal law in support of the general right to organize and bargain collectively and so forth, I would be very reluctant to see a blanketing, preemptive statute at this point in time. Others may have totally different views; those are mine.

MR. REHMUS: I won't comment on the first part of the question because I fully agree with Andy. On the second part, as far as the arbitration experience in Michigan is concerned, our statute covers only police, firefighters, and deputy sheriffs. It is almost impossible to find private sector employees whose working conditions and job responsibilities are at all similar to these groups of public safety employees. Although the Michigan statute permits arbitrators to compare wages between public and private

sector employees with similar skills and responsibilities, in fact no valid private sector comparisons exist for these groups.

The Michigan statute lists some nine criteria that may be used by arbitrators in setting wages and benefits. Among these nine criteria, it is clear that arbitrators rely most heavily upon three—changes in the cost of living, the ability of the governmental unit to pay, and the wage rates paid to public employees in the same occupations in other Michigan communities which the arbitrator feels are comparable.

The history of arbitrated wage settlements in Michigan is quite clear. Where the parties have gone to arbitration, the first award is apt to be rather high. Such an award has often been characterized as a "catch-up," in that the arbitrator finds that the wages of employees in City X should be brought up to those in certain other cities. In subsequent years, if these same parties went to arbitration, the awards tended to be much closer to, although not identical with, changes in the cost of living. Several years ago I did a very rough and hasty study attempting to compare negotiated with arbitrated settlements. My general conclusion at that time was that arbitration awards were running about 1 percent higher than the level of negotiated wage settlements. We do not have data and analysis at the present time which would tell us whether this is still true today.

MR. STERN: One other thing that's going on, which makes it difficult to answer your question specifically, is that in a medium-sized community where the public sector pattern used to be set by AFSCME for all public employees and they would compare with the private sector, now they hang back because they don't have binding arbitration and, in effect, they shove the police forward. As we all know, police wages, compared to wages of public employees, have been moving up rather fast in the past few years. So, with binding arbitration, we'll get a police award coming first, which will reflect catch-up and these other factors. Negotiations will then move to AFSCME, and the settlement there may then be regarded as a standard for private sector settlements. Thus, there is an interrelationship going on that will make it very difficult to tell whether the public sector is keeping up with the private sector, or vice versa.

MR. HERMAN LAZARUS: Will the economic consequences of an arbitral determination in the public sector make interest arbitration

more appropriate in the public sector than in the private sector? What I have in mind is the source of finances. It strikes me that it would be easier to pass off the cost of a financial settlement in terms of increased taxes, whereas you might have a more difficult problem when your results affect the solvency of a private company.

MR. ANDERSON: I think the answer is yes. Generally, the whole concept of public sector bargaining is based on the concept of comparability, like pay for like work, and not on the proposition that public employees must lead the parade. Therefore, the yes answer necessarily follows. But our illustrations here today have not emphasized only economic questions. We've tried to suggest also that whatever may be the limitation of arbitration in dealing with certain issues, there may be other subjects, not necessarily economic in nature, that might be more appropriate to handle by arbitration. But the use of arbitration to settle economic disputes is not inappropriate, and there could be some accepted standards or criteria to be applied if the parties felt they wanted to use arbitration.

MR. REHMUS: Because interest arbitration is obviously a technique to resolve impasses, there is a tendency to overlook the initial function of interest arbitration. This function is to create some kind of rough equality of bargaining power in relationships where the right to strike is denied. The evidence is clear that in Michigan, at least, our compulsory arbitration statute has had this effect. The vast majority of the larger cities and counties have established viable collective bargaining relationships in which the parties ordinarily negotiate their own settlements despite the fact that there is no right to strike.

MR. EUGENE COTTON: My question or comment is not directed to the situation where in private bargaining relationships, the parties bargain first against an ultimate strike threat and then, having narrowed the issues, decide jointly that the issues are such that they are willing to submit them to interest arbitration. Rather, it is directed to what seems to have been the main thrust of the public sector discussion—the kind of situation where you are "bargaining" against an ultimate submission to interest arbitration. I think the panelists perhaps have fallen into an academic semantic kind of trap when they pat themselves on the back and comment on the degree to which the parties have con-

tinued to "engage in collective bargaining," when the alternative is to go to arbitration. After all, in a personal injury lawsuit, there are huge volumes of settlements made in the courtroom corridors or made before you go into court because you're fearful of what the judge will do. I don't regard that as collective bargaining.

The standard concept of collective bargaining started with the notion that the individual employees joined together to commit themselves to a kind of collective action and to utilize that as their bargaining device to achieve certain results. The collective bargaining process traditionally becomes a measure of the strength of commitment of each of the parties, or the strength of feeling of each of the parties about the importance of various issues and their willingness to submit those issues, because of their strengths or feeling on them, to the economic test. But if all you're doing is "bargaining" against the question of predilections or prejudice of an individual arbitrator and you're trying to decide if he will hold for you or against you, you're not engaged in what I consider bargaining. As a matter of fact, in that concept, you might as well regard the selection of a bargaining representative as a vote on which attorney should represent you. You no longer need an organization as such, and, as a matter of fact, I suppose we might fall back eventually on the concept of a class action as a means of resolving these issues that will go into interest arbitration. So I just raise a question as to whether you don't have to probe a little more deeply into what is the concept of collective bargaining. Do you really preserve collective bargaining if you wind up with a fairly widespread system of merely bargaining against an ultimate determination by an arbitrator?

MR. LOEWENBERG: I think you're quite right that the threat under which the parties bargain in interest arbitration is the unknown of what might happen if the matter went to arbitration. Though the process may change the bargaining nature and relationship, I am not sure one could go so far as to say that this is no longer collective bargaining. The point has been made before that in other aspects of collective bargaining the parties or the public, as a matter of policy, have chosen to deny economic force as a way of resolving disputes. Before 1935 union recognition involved the use of economic force on both sides. The whole reason for this Academy, it seems to me, is to encourage and sanction a

substitute for using force under certain conditions. Interest arbitration, you may say, is unraveling the string to the point where nothing more is left, but I think that will be a matter of semantics. What we have suggested here today is that under some circumstances, whether because the parties have desired it or because the public has mandated it, there is a way of substituting for force and yet preserving the framework for collective bargaining. To be sure, some of the bargains were struck running down the hall, but I think the statistics at least suggest that many of the bargains were struck by the parties themselves without any direct third-party intervention. To the extent that the threat of not knowing what was going to happen in arbitration has succeeded in forcing the parties to get together, this process has been a substitute for the strike, and a successful one.

MR. STERN: I would just like to reassure you further on that point. We interviewed union and management leaders who had been bargaining for more than six years under a statute that did not provide for binding arbitration. We asked them how the institution of binding arbitration had affected the process of bargaining, and without exception the union representatives like it. They said it improved the quality of bargaining. I suspect they meant that it improved the outcome of bargaining more than it improved the process. But at the same time, none of them has said that the substitution of binding arbitration for fact-finding with advisory recommendations has, as far as they are concerned, changed the bargaining process.

MR. JESSE SIMONS: It seems to me that it's worth noting (and I may overstate it) that there are significant differences between the character and quality of public sector decision-makers—their power, attitudes, and values as expressed in the bargaining process—and the character and quality of private sector decision-makers on collective bargaining matters. To put it briefly, the public sector decision-makers on collective bargaining matters in most instances, although there are exceptions, wrap themselves in the bloody flag of managerial prerogative intransigency and stubbornness which smacks of the situation that existed some 35 or 45 years ago in the private sector. It isn't just a matter of the absence of sophistication, knowledge, and techniques in bargaining; it's more an attitude on the part of the executives. It gets complicated because the ultimate executive—governor, mayor, or county

executive—is a political creature who has been elected to office, and part of his constituency are the employees who also vote in the elections and have the power to influence future nominations. And so you have this kind of peculiar intransigence which smacks of the twenties or thirties on the one hand, and you have a kind of lip service and beginning of professionalism—lip service to collective bargaining and to the acquiring of knowledge and techniques.

The gentlemen at the table could probably speak more to this point than I can, although I have had a substantial body of exposure to this anomalous and contradictory, but nonetheless significant, factor which gives justification for the kinds of devices and procedures that are being used. Perhaps they can elucidate it with concrete examples. But I do think it is important to bear this difference in mind, especially for those who are from the private sector and who, with rare exception, do not really know or have a feel for this peculiar animal—the public sector decision-maker.

MR. STERN: We are all hesitating here; we are currently interviewing these men. Should we confess that we agree in part with you that they are left over from the last century? We have run into some of those types of individuals. On the other hand, I don't think it's fair to characterize the bargainers in cities of 50,000 and larger in that category. Many of them have had a good deal of private sector experience, and many of them in Wisconsin have learned a good bit about the public sector in the past 10 or 15 years. I've been impressed by the similarity in bargaining tactics. For example, in off-the-record meetings with top union leaders, experienced public sector management bargainers indicate that "although our stated position on the record is so much, you can get a little more if you really want to settle and want to avoid having to use the arbitration process." This is a private sector procedure which is familiar to us. It occurs at the last stage before a grievance goes to arbitration. In the private sector and in the public sector, the notion that you can get more by bargaining than you can by a third-party settlement is deliberately cultivated by management. And I would say to the extent that management does this, they are not guilty of what you describe; although our silence here suggests that there are quite a few managements who may be aptly characterized by your statement.

MR. REHMUS: Public sector bargaining relationships are still in their early and formative stages. As a result, you find a much wider variety of relationships than those we typically encounter in the private sector. In the private sector, we generally think of a collective bargaining relationship as one between two roughly equally experienced, powerful, and knowledgeable bargaining partners who have the capacity in impasses to bring real pressure on each other. In many of our large cities in Michigan, this description accurately characterizes our present public sector relationships. In other bargaining relationships in Michigan, however, you find great disparities of power as well as experiences that are reminiscent of private sector bargaining a good many generations ago. In some small cities that are far removed from the Detroit metropolitan area, for example, you find today the ultimate in a paternalistic relationship. We have found city representatives who totally dominate employee representatives and, in effect, tell their employees what is good for them. In other cities, you find supposed collective bargaining relationships in which agreements actually result from a close interlocking network of personal relationships between labor and management representation based upon blood, marriage, money, and even sex. These personal relationships are used to circumvent the bargaining table. The parties arrange an informal deal which is then transmitted back to their representatives at the negotiating table for "agreement."

I would cite one last example which I found particularly amusing. In one Michigan city we discovered, to our surprise, that the dominant party was not the city's negotiator or the head of the police union, but the chief negotiator for the firefighters' union. This individual spoke for the police as well as for his own organization, and he appeared somewhat more knowledgeable and skillful than anyone on the city's side of the table. After looking over the firefighters' collective bargaining agreement, I said, "Sir, I notice that your agreement has some of the highest wages and best fringe benefits that are to be found in Michigan. I note, however, that your contract is extremely thin in the area of work rules." With endearing frankness, he replied, "Yes, that's quite true. The reason is very simple: In about five years I expect to be fire chief, and when that day comes, I don't want all that crap in the labor agreement."

MR. ANDERSON: Jesse, unless my silence be interpreted as an endorsement of the concept of Neanderthals, the bargainers that I'm familiar with in New York City, in state government, and in other jurisdictions in New York, such as the Transit Authority and school situation, are highly sophisticated, well trained, thoroughly experienced in the collective bargaining process. The majority of the assistant labor relations directors for the city of New York come directly from the private sector, either as union representatives or management representatives. They are able, professional people who know what the business of bargaining is all about.

Now, if you're saying that getting government to make decisions is difficult, yes, you're right, but that's one of the great things about the whole advent of the collective bargaining process. Whether you have the strike or arbitration weapon, it induces government to make decisions. Government isn't allowed to get away with one of the things it does best, which is nothing. I think collective bargaining with either the right to strike or arbitration is a real stimulus to decision-making. The threat of the arbitration decision or the use of that procedure is one of the ways to get decisions. I'm not saying that arbitration is the only device that encourages decisions. I said earlier, and I'll repeat—and I've lived with it, so I understand it—the existence of arbitration as an alternative to the strike and the fact of the prohibition of a strike does not mean that there is no realistic threat of a strike, whether that's in the school system, transit system, or fire department. The strike threat is a factor that has to be accounted for in the bargaining process, and it has accounted for government's making decisions.

I've referred to only the New York scene, but I think on the whole there are fast developing in this country very able employer bargainers. Now, whether that would meet private sector notions on what collective bargaining ought to be, I don't know; but I think it comes close to meeting the test of what you have so aptly described as a definition of the bargaining process—a system of matching employers' needs with employees' desires. I think, on the whole, that bargaining is working well to raise the quality of public service, and I don't think, based on my experience, that public sector bargainers for management are inept.

MR. HOWARD BLOCK: Should there be any difference in the rights to engage in collective bargaining between public and pri-

vate employees, apart from essential services, however, that might ultimately be defined in practice?

MR. ANDERSON: In my view, yes, but there may be others who have quite a different insight into this. You see, in the public sector you're dealing essentially with a political decision-making process rather than the economic process of decision-making in the private sector. Those are generalizations. There are economic and political considerations in both. But if you're dealing with an essentially political decision-making process in matching employer and employee needs and desires, and with the concept of comparability, which is after all where the whole thrust and surge for the catch-up of public employee bargaining came from, then arbitration, a process based upon reason, persuasion, and logic, makes sense as an appropriate means of dispute settlement. Also related to dispute settlement by arbitration are political questions involving the scope of bargaining, such as school desegregation and the level of relief benefits, which I think should not be settled on the basis of industrial warfare. Therefore, I believe that there are some sound reasons in the public sector for different processes of dispute resolution than in the private sector.

MR. LOEWENBERG: I think, in a way, one has to look at what's been happening in the public sector within a time framework. We still speak of a period of experimentation for the public sector. If one looks at what has been happening in the past 10 years and the changes that have occurred in our thinking about public sector bargaining, it seems to me that public sector bargaining has been moving ever closer, but not always steadily, to the private sector model. Just the fact that now several states authorize the right to strike for public employees suggests that some of those forces which may make the two sectors more similar are indeed coming into being. I suppose it will be a while before we ever get to the guts of the question, which is: Can we have one single policy for both groups of employees? We are not ready to do that yet. It may be worthwhile for us to experiment a bit longer in the public sector to see, indeed, if there are differences that need be preserved and which warrant different techniques. Historically seen, however, the trend very definitely is bringing the two groups much closer together than ever before.

MR. REHMUS: If the question relates to the issue of whether public employees ought to have the right to bargain, I think this

no longer has any relevance. Based upon our contemporary experience in Michigan, it is not an issue I'm prepared to argue. The really relevant question about public sector bargaining seems to be the issue of the scope of bargaining. I find some of these problems peculiarly difficult. Our law contains the traditional rubric that employees have the right to bargain over "wages, hours, and other terms and conditions of employment." But whether subjects such as the manning of police cars, the scheduling of the school calendar, or the size of a university library acquisitions budget are mandatory subjects of bargaining and, if so, can be brought before an arbitrator is often very hard to answer. At present, I am not persuaded that anyone has the final answer. We meet such issues on an ad hoc basis as we confront them, but whether for good or ill I am not always sure.

MR. H. D. WOODS: A number of recent questions have to do with whether or not you can have the same kind of machinery in the public and private sectors, and I think one important element has been overlooked—the bargaining power of the parties involved. Our experience in Canada has shown that in a very large number of cases the unions do not want the right to strike and they do want the right to arbitration. One of the speakers here indicated that everybody on the union side or the employer side wants the right to strike or lockout. Our experience is that those who have clout want the right to strike, and those who don't have clout prefer arbitration because they will do better with it.

I can illustrate that in a number of ways: First, under our federal act, they do have the right to strike, but under the law, the union is required, before it gives notice of collective bargaining, to advise the Public Service Staff Relations Board (which is chaired by one of our members, Jake Finkelman) whether or not, in the event of an impasse, it is going the strike route or going the arbitration route. The vast majority of unions have chosen the arbitration route. The postal workers and a few others have chosen the strike route, and they have used it excessively in my opinion.

I happen to be chairman of a joint committee of labor and management that is looking into the whole problem of labor relations in one of the western provinces at the present time. And

there is an interesting situation there. We have had people appear before us and make a strong plea against the right of the Government Employees Association to strike. At the present time they have the right to arbitration, and they wanted to retain it; but they argued that they should not get the right to strike. Guess who made that presentation! It was the Manitoba Government Employees Association, and they were determined they were not going to have the right to strike. Thereafter and in the same hearing, a representative of the government—the official who does the negotiations for the government—said, "They bloody well must have the right to strike," and he insisted that they do have the right to strike and not the right to arbitration. The reason is that the bargaining is done globally for all the civil service departments—one big agreement—and that includes such a range of people that the Government Employees Association knows it could never get them to vote for a strike. They would tear themselves apart. The government negotiator knows the same thing; and he knows that as a bargainer on behalf of the government and the public treasury, he's in a better position without arbitration because an arbitrator will do his cause a lot more damage than the employees association with the right to strike. I think we should keep bargaining power in mind. We're dealing with a different kind of situation than you have in the private sector.

I think Arvid always overstates his case about how wonderful the whole thing is, but I agree with him wholeheartedly that one of the effects has been really to force reluctant, senior civil service people representing government to bargain in good faith, because otherwise there is no way of forcing them. But if arbitration is there ultimately and they can't avoid it, then they may well bargain.

Frances Bairstow's husband is a television producer for the National Film Board of Canada, and they come under the Public Service Staff Relations Act. When they were making up their minds as to whether they should go the arbitration or the strike route, some of the "purists" wanted to have the right to strike. Dave Bairstow argued against it. He didn't argue; he did it by ridicule. He said, "Of course we must have the right to strike. We will bring the Canadian public to its knees by denying them our documentaries."

MR. BENJAMIN AARON: I would like to know, on the economic aspects of bargaining, whether there are any hard data on the number of instances in which the public employer has pleaded inability to pay and in what context that kind of claim is apt to arise. How does it fit into the appropriation schedule, and so forth?

MR. STERN: In Wisconsin, inability to pay has not been pleaded seriously by many cities or counties. It's not that they aren't poor, but their experience in pleading it before arbitrators has been generally unsuccessful, so they have not relied heavily on it.

MR. REHMUS: In Michigan, ability to pay—or more precisely, inability to pay—has often been raised in an almost frivolous context. Inability to pay is contended before an arbitrator or fact-finder on the basis that the appropriate legislative body has already adopted a budget for the current fiscal year. It is argued that this self-imposed budgetary limitation operates as an inflexible limit, wholly preventing us from awarding wages any higher than can be afforded within the limits of this budget. As Jim Stern said, and I fully agree with him, arbitrators simply have not accepted this argument.

There are times, however, when inability to pay is raised in a legitimate and crucial form; for example, when a school district can prove that it is in a deficit situation on either a cash or accrual basis. I fear that some of our experiences with frivolous inability-to-pay arguments have conditioned us to pass over this argument too lightly in situations where it is legitimate. Arbitrators in Michigan generally appear to believe that employees are entitled to wage and salary increases that will keep them abreast with increases in the cost of living and will bring them up eventually to comparable jobs in comparable communities. A legitimate inability-to-pay argument creates a tendency for the arbitrator to spread the period of time over which a community is given to become comparable with other communities. Rarely, however, has an arbitrator suggested that inability to pay legitimizes substandard wages or reductions in real earnings over the long run.

MR. LOEWENBERG: Ideally, if the parties in Pennsylvania are following the timetables provided in the act, which often they do not do, the whole negotiation process, including the award, is

completed before the budget has been finalized. Then, of course, it is a matter of inserting the proper amounts in the budget and raising the necessary revenues from whatever source. The argument of inability to pay is raised very often, and I do not think its effect has any more emphasis in Pennsylvania than in the other states. The instances of an arbitrator's reducing an award because of inability to pay are not prevalent. Where we do get low economic awards, and we do have some awards on a statewide basis that are low, it seems to me not so much a matter of inability to pay as of regional differences in wages and similar factors.

MR. ANDERSON: I have one brief comment on one phase of this, mentioned earlier. Whether or not there is a strike route or the arbitration route, collective bargaining agreements are not self-implementing. Therefore, the money to honor that agreement, if one is reached or the arbitration award issued, has to be found. It may be that there are specific fiscal constraints, as Chuck has mentioned, and realistic questions about appropriations and so forth; but one of the salutary things about collective bargaining settlements in the public sector is how they induce policy-making bodies to make decisions regarding appropriations, layoffs, or discontinuance of certain services. The transit settlement in New York, for which I have no responsibility but which has had great public visibility, was very much related to what the fare increase, if any, was to be. So, ability to pay is involved in the situation. Where is the funding to come from? The fact is that the bargaining process heightens the issue of how public services are going to be funded, which services are more important, what priorities should be established. Therefore, I think bargaining serves a salutary public purpose in helping to stimulate public policy decisions.