III. AN ARBITRATOR'S VIEWPOINT

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(with the assistance of Lawrence E. Katz**)

This paper will focus primarily on the six New England states with which I am most familiar. Although only one of those states, Massachusetts, now has a tax cap law, five have enacted legislation specifying the factors which are to be considered in interest arbitration proceedings. Moreover, the Commonwealth of Massachusetts has recently adopted legislation applicable to the Massachusetts Bay Transportation Authority, which represents probably the most extensive intervention in the collective bargaining/interest arbitration process which now exists in this country.

Within New England, New Hampshire is the only state without statutory public-sector interest arbitration. The remaining states provide for compulsory or voluntary, binding or nonbinding, interest arbitration for one or more categories of public employees, and in all such instances the legislation specifies the factors which are to be considered by the arbitrator or arbitration board. A summary of certain key factors are set out in Table 1.

At the risk of sounding heretical (at least to those legislators who drafted and adopted this "factor" legislation), I would suggest that none of these statutes (nor similar statutes which are found in other states) alters the substance of the interest arbitration process. Every one of the specific listed factors would legitimately be entitled to consideration under the "common law" (that is, case law) which has been developed over the years in public-sector interest arbitration. Indeed, four of the state legislatures have seen fit to recognize this body of case law by including the final, catchall factor which is typically phrased as:

> "Such other factors . . . which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service or in private employment."[1]

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[1]Mass. Stat. 1973, c.1078, §§4 & 4B.

TABLE 1

Factors Specified for Consideration in Public-Sector Interest Arbitrations—New England States

	Conn.[a]	Maine[b]	Mass.[c]	MBTA[d]	R.I.[e]	Vt.[f]
1. Interest and welfare of public	x	x	x		x	x
2. Interest and welfare of employees	x					
3. Ability to pay	x	x	x	x		x
4. Comparable wages	x	x	x	x	x	x
5. Cost of living (CPI)	x	x	x	x		x
6. Comparable working conditions	x	x	x	x	x	x
7. Continuity and stability of employment		x		x		x
8. Other traditional factors		x	x	x		x

[a]The five factors noted in the table are found in Conn. Stats., §10-153f(c)(4) which provides for compulsory interest arbitration for teachers; a slightly narrower listing of factors, which excludes any reference to changes in the cost of living (CPI) is contained in §7-473(c)(2) and §7-474(j)(2), which, respectively, provide for voluntary and mandatory interest arbitration for municipal employees.

[b]The seven factors noted in the table are found in Maine Stats. 979-D.4.c., which provides for compulsory arbitration for state employees which is final and binding on all issues except salaries, pensions, and insurance. With respect to these latter items, the findings are merely advisory.

[c]The six factors noted in the table are found in Mass. Stats. of 1973, Ch. 1078 (as amended), §§4 and 4B, which, respectively, provided or provide for compulsory interest arbitration for municipal police and firefighters and for state and Metropolitan District Commission police. However, Section 4 was repealed by the so-called Proposition 2½, Stats. of 1980, Ch. 580, §10. Section 4B was not repealed; however, pursuant to Section 8A of c.1078, it expired on June 30, 1982.

Section 4A of c.1078 established a Joint Labor-Management Committee (the so-called "Dunlop Committee") which had the authority to refer municipal police and fire disputes to binding interest arbitration, pursuant to the now repealed provisions of Section 4. On February 10, 1981, in Opinion 80/81-12, the Attorney General ruled that the Committee retained its authority to order arbitration, but the repeal of Section 4 "has eliminated the binding effect of Committee awards on municipal legislative bodies." *Id.*, at 12.

[d]The six factors noted in the table are found in Mass. General Laws, c.161A, §19F, which was added by Stats. 1978, c.405, §2, and amended by Stats. 1980, c. 581, §9. This statute provides for compulsory, binding arbitration for MBTA employees.

[e]The three factors noted in the table are found in the somewhat differing provisions of R.I. General Laws, §§28-9.1-10, 28-9.2-10, 28-9.5-10, and 36-11-10, which, respectively, govern compulsory interest arbitration for firefighters, municipal police, state police, and state employees. With respect to the latter group only (state employees), the decision as to wages is advisory and not binding.

[f]The seven factors noted in the table are found in the Municipal Employee Relations Act, in Vt. Stats., Title 21, c.20, §1732(d), which is incorporated by reference into §1733(c), which provides for voluntary or compulsory interest arbitration.

Surely, in an interest arbitration proceeding, changes in the cost of living would be one relevant piece of evidence, regardless of whether that factor is mandated by statute. The fact that it is required by legislation in four New England states is essentially meaningless; so too is the fact that Rhode Island failed to recognize that factor explicitly, since the statutory listing does not purport to be all-inclusive; hence, the omission of this factor does not prohibit it being given appropriate consideration.

To say that "factor" legislation has not changed the substance of the interest arbitration process is not to say that it has not changed the procedure. It certainly has, particularly when the statute places an affirmative obligation on the arbitrator or board of arbitration to make detailed findings of fact which consider each of the enumerated factors. Such provisions are now common,[2] and they may become more so, because the existence of detailed findings as to statutory factors has played a major role in judicial decisions—for example, sustaining interest arbitration statutes against constitutional attacks, grounded on an improper delegation of legislative authority.[3]

"Factor" legislation, when coupled with "findings" legislation, requires more of the arbitrator or board than a lengthy and detailed decision. It also affects the course of the hearing itself. In the absence of "factor" legislation, the parties might feel free to omit evidence on a particular factor. In the absence of such evidence, the decision of the arbitrator or board would necessarily give no consideration to the omitted factor. When there is "factor" legislation, the parties seemingly must present evidence (or perhaps stipulations) on each specified factor, and if they fail to do so, the arbitrator or board may be obliged affirmatively to seek such evidence from them.

An illustration of this "procedural" point may be made with respect to the increasingly important factor of ability to pay. In the past, absent any "factor" legislation, if the employer failed

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[2]*See, e.g.,* Conn. Stat. §10–153f(c)(4); Mass. Stat. 1973, c.1078, §4 (police and firefighter, now repealed) and §4B (state and MDC police); Mass. G.L. c.161A, §19G; N.J. Stat. §34:13A–16(f)(5) and 16(g); R.I. G.L. §§28–9.1–9 to 10, 28–9.2–9 to 10, 28–9.5–9 to 10, and 36-11-9 to 10; Vt. Stat. Title 21, c.20, §1733(c).

[3]*See, e.g., City of Detroit* v. *Detroit Police Officers Association,* 294 N.W.2d 68, 105 LRRM 3083 (Mich. 1980); *New Jersey State Policemen's Benevolent Assn., Local 29* (Irvington PBA) v. *Town of Irvington,* 80 N.J. 271, 403 A.2d 473, 102 LRRM 2169 (1979); *City of Richfield* v. *Local No. 1215, IAFF,* 276 N.W.2d 42 (Minn. 1979); *Town of Arlington* v. *Board of Conciliation and Arbitration,* 370 Mass. 769, 352 N.E.2d 914, 93 LRRM 2494 (1976); *City of Warwick* v. *Warwick Regular Firemen's Association,* 256 A.2d 205, 71 LRRM 3192 (R.I. 1969).

to present evidence of inability to pay, it would have been assumed that there was such an ability. And such an assumption probably made sense in an era of open-ended tax rates in which the ability to pay (as distinguished from the willingness to pay) always existed, in the sense that the power to levy the needed funds was there.

Now, with "factor" legislation, and particularly with the emergence of tax caps and other tax-limiting legislation, a union acts at its own peril if it fails to present evidence that the employer is able to fund the contractual demands that the union has made.

All of which now brings us more directly to the central topic of the day, which is the effect of tax caps and other tax-limiting legislation on the interest arbitration process. For starters, we are left largely to reasoned conjecture, since there is little real history to go on. Although California voters enacted Proposition 13 in June 1978, the state's large surplus was distributed as local aid, which has enabled the impact of Proposition 13 to be deferred until the upcoming fiscal year, commencing July 1, 1981 (by which time the state surplus will have been exhausted).

While the possible effects of Proposition 13 may have been considered in many fact-finding or interest arbitration cases, I have been able to find only one reported case on the issue, *County of Humboldt,*[4] in which a three-member fact-finding panel found that the union's economic demands were arguably justified, but recommended against them because the employer was *"not* in a position to finance the economic request. . . ."[5] The decision does not read easily because it involves a large amount of governmental accounting, which is apparently needed to make the crucial determination on ability to pay. If this detailed accounting analysis is to be the wave of the future, the Massachusetts legislature may well have been right in requiring that interest arbitrators for the MBTA "shall be experienced in state and local finance"[6]—although the American Arbitration Association, which has been given the responsibility of certifying the qualifications of the potential arbitrators,[7] may find it difficult to determine whether particular arbitrators meet the vague and general requirement of the statute.

Speaking of Massachusetts, although our Proposition 2½ is

[4]72 LA 63 (1978).
[5]72 LA at 66.
[6]Mass. G.L., c.161A, §19E.
[7]*Id.,* §19D

"brand new," having been approved by the electorate on November 4, 1980, we will not be able to blunt or defer its impact through increased state aid (as in California) because Massachusetts simply does not have a state surplus to fall back on. This means that Proposition 2½ began having a limited impact as of January 1, 1981, through a 62-percent reduction in automobile excise taxes (which are collected by cities and towns), and that it will have a far more devastating impact as of July 1, 1981, when local property taxes are reduced (in most communities) to the mandated 2½-percent ceiling, based on full and fair market value. To soften the blow, taxes are to reach the new level by reductions of a maximum of 15 percent per year, for those cities and towns, such as Boston, where taxes are so much higher than the new ceiling that a one-year adjustment would impose too great a hardship.

At this early point one might engage in informed speculation as to the effects of Proposition 2½ on the interest arbitration process. But in one sense there is little left to speculate about because the proponents of that proposition, apparently regarding interest arbitration as producing settlements that were too high, also eliminated the major form of binding interest arbitration in the public sector—involving local police and firefighters. However, these cases may still be submitted to interest arbitration in either of two ways. Governmental employers and public-sector unions (not limited to police and firefighters) may submit to voluntary interest arbitration in lieu of mandatory fact-finding.[8] Also, police and firefighter cases may still be considered by the joint labor-management ("Dunlop") committee and brought to arbitration, although the results of any such arbitration are not binding on the municipal legislative body, since the original arbitration statute has been repealed.[9]

Although it seems likely that this legislative limitation on the ability of municipalities to raise revenues would have had pro-

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[8]Mass. G.L., c.150E, §9, par. 5. Although this paragraph contains a cross reference to §4 of c.1078 of the Acts of 1973, which was repealed by Proposition 2½, it would still appear that such a voluntary arbitration would be binding on the appropriate legislative body, in light of the provisions of the sixth paragraph of §9, which explicitly provides to that effect. This is in contrast to arbitration conducted under the authority of the joint labor-management committee, since the legislation authorizing such arbitration does not provide for such a binding effect, but relies exclusively upon the cross reference to §4 of c.1078. *See* note c to Table 1.

[9]*See* note c to Table 1. Mr. Dunlop might well be persuasive enough to surmount the nonbinding quality of arbitration under §4A by getting the parties to agree to "voluntary" arbitration under §9, which, as noted *supra* note 8, would be binding.

found effects upon the interest arbitration process, the legislature apparently had so little confidence in that process, even after "loading the deck" in favor of the municipalities, that it was not willing to allow the newly dealt hand to be played out at the arbitration table.

Police and firefighters are prohibited from striking and are unable to attempt to resolve their contractual impasses with their employers on that basis. Interest arbitration provided an alternative means of resolving such impasses. By removing arbitration as an option, the proponents of Proposition 2½ seem to be saying that the method of impasse resolution that they prefer is the unilateral determination of wages and conditions of employment by the employer. That this is a major step backward is unquestionable. That it will be perceived as a step backward by the police and firefighter unions is also unquestionable, and since they are being put in a no-win position of having to accept the unilateral determinations of the employer, they may well see themselves as having nothing to lose by engaging in unlawful strikes.

It is widely recognized in the private sector that a mandatory grievance arbitration clause and a no-strike clause are the quid pro quo for one another. The proponents of Proposition 2½ apparently do not realize that in public-sector bargaining, interest arbitration legislation is also the quid pro quo for no-strike legislation, and unions are not likely to sit back and quietly allow such one-sided interference in the impasse resolution process.

With the elimination of police and firefighter arbitration, the only public-sector bargaining units where the effects of Proposition 2½ may be played out in binding interest arbitration are those for state and metropolitan district police and employees of the MBTA.[10] Yet, ironically, none of the employing units in these three instances is a municipality and, therefore, none is affected by Proposition 2½ as directly as an individual municipality would be. Indeed, Proposition 2½ does not limit the state's sources of revenue (consisting largely of the proceeds from the state income tax). Hence, Proposition 2½ should have little effect on interest arbitration for state police.

On the other hand, the Metropolitan District Commission (MDC) and MBTA provide services to groups of cities and

[10] *Id.* In addition, pursuant to contract but not statute, interest arbitration is provided for the Massachusetts Turnpike Authority and Teamsters Local 127.

towns, upon which assessments are levied. The reduction in local revenues mandated by Proposition 2½ would therefore tend to have a greater effect upon these bargaining units than upon those within the state. However, just to make certain that the new policies of fiscal restraint are felt in these bargaining units, additional legislation has been passed under which both the MDC and the MBTA are now subject to a 4 percent "cap" on increases in the assessments which they levy upon their component cities and towns,[11] and under which the MBTA is also subject to a 104 percent budget cap, which may be overridden only by a two-thirds vote of its advisory board.[12]

The situation with respect to interest arbitration at the MBTA is rendered more complex by additional legislation which will be discussed later. At this point it would be appropriate to consider interest arbitration within the MDC police bargaining unit, in which the effects of Proposition 2½ will be more similar to those upon cities and towns (which could have been considered more directly were it not for the repeal of interest arbitration in the municipal sector).

Obviously, the impact of the new legislation will be felt first in the area of economic proposals. Wages will bear the direct brunt of the tax-limit or expenditure-limit legislation, but there will also be a concurrent effect upon other fringe-benefit economic issues. Also, and perhaps more importantly, since wages and other direct economic benefits will become fixed costs once they are set (unless there are COLA provisions), the employers will be forced to make economies in other areas in order to comply with the legislation, which may mean a reduction in bargaining-unit work through reductions in force, reductions in overtime, and increases in productivity. Thus, interest arbitrators will likely be faced with these kinds of issues far more frequently, as well as related issues such as job security, subcontracting, manning, and civilianization of the workforce (in the uniformed services).

Ability to pay and its effects upon wages will be of paramount importance. In the *Irvington PBA* case,[13] the New Jersey Su-

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[11]Mass. G.L. c.59, §20A (added by Proposition 2½, St. 1980, c.580, §12) which applies directly to the MBTA, and which has also been made applicable to the MBTA by virtue of St. 1980, c.581, §21, beginning with calendar year 1981.

[12]Mass. St. 1979, c.151, §§8A–8B (added by St. 1980, c.581, §13). This 104-percent budget cap is similar to that imposed upon cities and towns by other sections of c.151—which, while still extant, has been effectively superseded by Proposition 2½.

[13]*Supra* note 3.

preme Court aptly pointed out the dilemma faced by a governmental employer, which is not dissimilar to that faced by an interest arbitrator:

> "In a world plagued by double-digit inflation, some group will likely suffer if municipal appropriations can increase each year by at most 5%. Non-payroll costs, such as utilities and insurance, will generally rise by more than 5%. As a result, payroll expenditures must increase by less than 5% if the municipality is to remain within permissible Cap Law limits. If the municipality desires to maintain its current level of services, it will therefore be forced to grant pay raises which are outstripped by the rate of inflation. In such a case, the real income of public employees will diminish with time.
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> "If a municipality does not wish to or, as in the present case, cannot prevent salary levels from rising above a 5% figure, it will be forced to effect further genuine economies and thus cut back the services which it had theretofore provided its residents. In such a case, the burden ensuing from the Cap Law will be borne by those residents as well as by the employees whose jobs are eliminated on account of the town's fiscal situation."[14]

In the *Irvington* case, which involved last-best-offer arbitration, the arbitrator recommended the union's proposal which called for a wage increase in excess of 5 percent (seemingly in the vicinity of 7–8 percent). The town presented an inability-to-pay argument, maintaining that the maximum budgetary increment permitted under the 5 percent Cap Law was $536,000, and that all but $11,000 of this allowable increment was already accounted for (or "eaten up") by other unavoidable cost increases, such as previously negotiated pay increases for other employees, utilities, and insurance. The employer's argument was not dissimilar to that presented in the *County of Humboldt* case which was mentioned earlier.[15]

If similar arguments are presented in Massachusetts, as I assume they will be, their effect will be even more drastic because, at best, we are talking about a 4-percent cap on MDC and MBTA assessments, a 4-percent budget cap on the MBTA (rather than the 5-percent cap in *Irvington*), and budget reductions of as much as 15 percent per year in many of our municipalities.

I would characterize the "inability-to-pay" arguments presented by these employers as the "last-in-line" argument; that is, after money has been allotted to all the other creditors of the governmental unit involved—including whatever increases that

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[14] 403 A.2d at 486.
[15] *Supra* note 4.

have been allowed—whatever is left may be applied to the employees in the bargaining unit, and if that is not enough to fund an increase in wages, which would otherwise be justifiable when judged by all the traditional criteria, that is just too bad. The shortfall lands at the employees' doorstep.

Although this kind of "last-in-line" argument appears to have been accepted in the *Humboldt County* case, I believe that the New Jersey Supreme Court acted quite wisely and quite realistically in firmly rejecting such an approach in the *Irvington* case. There is no logical reason why an oil company should be granted a 25-percent increase, or an insurance company a 10-percent increase, simply because they sent their bills first.

Or, even if you accept the payment of these other bills as a given, that does not mean that the wages of employees should be determined by the amount of funding that remains. The employer may opt to reduce other services, and the attendant expenditures. Or, if the employer still concludes that the overall payroll for the particular group of employees must be limited or reduced, that may be accomplished by giving an appropriate wage increase and reducing the number of employees.

What the New Jersey Supreme Court was saying (and with which I am in full agreement) is that funding limitations must be shared fairly, to the extent that is possible, by the providers of public services who are paid by the employer (whether they be employees or other suppliers—although I recognize that the employer may not be in a position to bargain fully with some suppliers, such as oil companies) and by the recipients of those services, that is, the general public, who must expect a reduction or limitation in the services that they receive.

Also, within the group of employee providers, unless those employees "voluntarily" agree to provide the same level of services by accepting decreases or smaller increases in their wages, it seems unfair to force them to do so, because they are then being singled out as the only group which is paying the price of the tax-limit legislation; they are, in effect, subsidizing the municipality by providing full services previously provided at less than a fair rate of pay. (No doubt the employers would receive an interesting response if they should try to get their oil suppliers to reduce their prices or limit their increases.)

Of course, if the employees decline to subsidize municipal services in such a manner, layoffs will be one alternative method of achieving the needed cost reductions. While this is "fair" in

the sense that the public is receiving less service (and therefore sharing the burden), it may be unfair, and unduly burdensome, to the particular employees who are laid off.

Because of the disproportionate burdens which layoffs impose on the laid-off employees, some unions may accept an employer's suggestion that wages be suppressed—if that will avoid layoffs. Such an approach was recently accepted by police in Belmont, Massachusetts, while being rejected by their firefighter brethren. Yet it is my feeling that, absent a willingness on the part of the employees to subsidize government in this manner, the arbitrator must grant an otherwise reasonable wage increase, notwithstanding the impact on employees who may be laid off, because the public is not entitled to get more services from its employees for less money. If the public has less money to spend on public employees, the logical consequence (excluding the possible effects of increased efficiency) is a reduction in services.

Having suggested that the "ability-to-pay" criterion does not require public employees to bear a disproportionate share of governmental belt-tightening, I am pleased to conclude this presentation with a fuller examination of statutory interest arbitration at the MBTA.

The changes in arbitration at the MBTA results from two pieces of legislation enacted in 1978 (c.405) and in 1980 (c.581). The 1978 legislation delineated the qualifications of the interest arbitrator (Massachusetts resident experienced in state and local finance[16]) and substantive factors which must be considered in rendering an award (as summarized in Table 1). In addition, the "scope of arbitration" was defined as being limited to ". . . wages, hours, and conditions of employment and shall not include any provisions for any cost of living adjustments which are based on changes in the Consumer Price Index *after* the expiration of the contract period covered by the Award."[17] This arbitrator, then sitting as the contractually designated umpire, sustained a grievance of the Carmen's Union (ATU Local Division 589) challenging the above limitations as in conflict with the collective bargaining agreement and Section 13(c) of the Urban Mass Transit Act, which the authority had agreed to abide by as a condition of receiving federal aid, and which precluded a dimi-

[16]G.L. c.161A, §19E, added by St. 1978, c.405, §2.
[17]G.L. c.161A, §19G, added by St. 1978, c.405, §2.

nution in employee benefits over the term of the agreement.[18] Since my ruling, the question has been tangled up in various court proceedings, bouncing from the federal system to the state system and back again without yet having been finally resolved.

Then, in the midst of the year-end MBTA fiscal crisis, during which the trains and buses actually stopped running for one day during the height of the December 1980 holiday shopping season, the legislature enacted further legislation (c.581) which provided emergency funding and which also imposed further limitations on the authority of management. These limitations on management's authority have a direct impact on the interest arbitration process since the interest arbitrator is permitted to consider only those factors "which are not precluded from bargaining" under the remainder of the legislation.[19]

The remainder of that legislation spells out the MBTA's authority to engage in collective bargaining, with numerous subjects being placed off limits, of which the most noteworthy, from the standpoint of an interest arbitrator, would be: (1) COLA clauses (this expands the limitation previously placed on the interest arbitrator by the 1978 legislation); (2) the use of overtime earnings as part of any pension benefit calculation; (3) the hiring of part-time employees; (4) the assignment and apportioning of overtime; (5) the subcontracting of services or goods; (6) levels of staffing and training; (7) hiring and promotion; (8) work assignments and productivity standards.[20]

As one who is reasonably familiar with the history of bargaining at the MBTA, I can understand "where the legislature was coming from" when it enacted c.581. The public perception is that past bargaining management "gave away the store" and that unions (primarily the Carmen's Union) are running the MBTA, being overpaid in the process, and resisting any changes that would improve the efficiency of the operation. While I disagree with this analysis, one may understand how people holding such views could legislate this unprecedented interference in the bargaining process.

Although the enumerated substantive limitations on the parties and the interest arbitrator are serious and unlikely to survive

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[18]*MBTA and Local Division 589, Amalgamated Transportation Union,* arbitration award dated August 13, 1979.

[19]G.L. c.161A, §19F.8, as amended by St. 1980, c.581, §9.

[20]G.L. c.161A, §19, as amended by St. 1980, c.581, §8.

court challenges to them if a recent United States district court decision prevails, there still remains some discretion on important basic issues. For example, the legislature did not rule out wage increases or afix the lowest priority to them. Although a COLA is prohibited, and while inability to pay must be considered in light of the 4-percent budget as well as the fiscal plight of the component cities and towns under Proposition 2½, there is still room for reasonable increases although, as noted in the prior analysis, this may mean layoffs and attendant reductions in service on a public transit system at a time when fare increases may have to be imposed. All of this will necessitate an acrobatic interest arbitrator to perform the required balancing act.

On March 17, 1981, the United States District Court, District of Massachusetts, Walter Jay Skinner, United States District Judge, issued a decision in preliminary injunction matters between *Local Division 589, Amalgamated Transit Union, AFL-CIO and another* v. *The Commonwealth of Massachusetts, and others,*[21] which treated with the recently enacted statutes c.405 (1978) and c.581 (1980).

The court held:

> "a. The MBTA and the Transit Union are obliged forthwith to institute interest arbitration by three arbitrators chosen in accordance with the Articles of Agreement dated January 1, 1973, but otherwise subject to the qualifications and considerations contained in c. 405 of the Acts of 1978.
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> "b. Chapter 581 of the Acts of 1980 is invalid to restrict the scope of collective bargaining contained in the unions' existing collective bargaining agreement, because said chapter constitutes an impairment of contract in violation of Article 1, Section 10, of the Constitution of the United States."

The court reasoned that the power of the state to alter existing contractual arrangements is subject to constitutional limitation even when the contracting party is a public body. A state may impair an obligation of a public body only with respect to some aspect of the contract which was not central to the reasonable expectations of the contracting parties, and then only if the impairment is reasonable and necessary in the furtherance of a valid state policy.

The court ruled that c.405 of the Acts of 1978 was effective to amend and add to the agreement of the parties, except to the central mutual consideration of the agreement and the core of the parties' reasonable expectations, which it found to be tripar-

[21] 511 F.Supp. 312 (D.Mass. 1981).

tite interest arbitration with the neutral arbitrator being "experienced in transportation."

So much of c.405 as imposed arbitration by a single arbitrator was found to be invalid, but the c.405 requirements that the neutral arbitrator be a legal resident of the Commonwealth of Massachusetts and experienced in state and local finance were not in conflict with nor an impairment of the contract and were reasonable and valid provisions.

Where the contractual agreement to proceed to interest arbitration did not specify the standards to be applied by arbitrators, the court found no conflict or impairment of contract in the c.405 provision requiring arbitrators to rely primarily on eight factors in determining the award.

It was the court's finding that the c.405 prohibition of an award with a rollover COLA provision (with adjustment continuing for the period between the expiration of the old contract and the effective date of the new contract) was a limitation on the prior powers of the arbitrators, but it ruled that this was within the power of a state to control the affairs of a public corporation.

The court noted that c.405 granted two powers to arbitrators which they did not have before. The first was that the award of the arbitrator may be enforced against the appropriate legislative or appropriating body. The second was that they can now inquire into the financial capacity of the authority. The court stated: "The arbitrators are not limited to the specific considerations of tax burdens under this provision, but under the generality of the paragraph can presumably inquire as to other opportunities for savings or for the raising of fares."

It was the court's finding that the same legal criteria applied to the constitutional question about the effect of c.581 of the Acts of 1980 on the contract provisions. It further found that the obligation to continue to bargain collectively was a central consideration of the agreement in force when c.581 of the Acts of 1980 was passed, and to the extent that c.581 withdraws questions of substance from collective bargaining, it is in violation of Article 1, Section 10 of the Constitution of the United States.

The court ordered the parties to proceed to tripartite interest arbitration before a neutral arbitrator experienced in transportation and state and local finance who was also a resident of the Commonwealth, the arbitrators to rely on the eight factors cited in c.405.

The parties filed a joint affidavit with the court affirming that

they had begun the process of arbitration as set forth in the court's order of March 17, 1981, but reserving their rights to appeal that order or any other order or to pursue relief pending appeal or pursue any other rights in this or other litigation.

It is difficult to predict what will happen with MBTA interest arbitration in the future, but at the moment management can seek in arbitration the rights it thought it had obtained in c.581. If this is done, the arbitrators will have much greater flexibility than would have been the case had they been confronting a wage question with most other major collective bargaining concerns having been ceded to management via statute.

Conclusion

It is hoped that the MBTA legislative history is an exception, but we certainly can expect to see legislative inroads on public-sector bargaining and interest arbitration for the foreseeable future. There is a pervasive atmosphere of fiscal restraint which is required by the times, and this must be respected by the parties and by interest arbitrators. At the same time we cannot permit our legitimate concern with fiscal restraint to obscure or obliterate our obligation to assure elemental and reasoned fairness in our interest arbitration awards.

Where interest arbitrators have been guided by the traditional "common-law" criteria in the past, it comes as no burden or hardship to respect and apply the recently enacted statutory criteria, and to do so in conformity to the spirit of equitable treatment of employees expressed or implied in most statutory limitations.