constituencies—that is, the governor, the legislature, and so on. And this is the dilemma for the interest arbitrator, who must legislate the terms of the contract in a political environment.

III. AN EMPLOYER VIEW

ROBERT M. VERCRUYSSE*

In Colorado Springs almost 15 years ago, my senior partner, Bill Saxton, was asked to present the employer's view on fact-finding after Jerry Wurf of AFSCME presented the union view.[1] Today in Quebec, in 1983, we have 15 years' additional experience to address the question of the promise and performance of interest arbitration. Vic Gotbaum of AFSCME presents the union's view. I will present the employer's perspective on behalf of myself and our firm. And who among you would dare say that history never repeats itself? Bill Saxton is alive, busy as ever, and has asked me to convey his greetings.

Labor arbitration falls into two separate and distinct categories, (1) "rights" arbitration and (2) "interest" arbitration. "Rights" or grievance arbitration typically involves a dispute during the term of a collective bargaining agreement as to whether the agreement has been violated. For the arbitrators involved in arbitration of the question of "rights," there is usually a grievance and an arbitration procedure which spells out his or her obligation as the arbiter of the agreement. In addition, there are also specific clauses of the collective bargaining agreement that define the rights with respect to wages, vacations, benefits, and working conditions which the parties themselves have negotiated. Moreover, as all arbitrators are aware, there is the admonition that the arbitrator is the interpreter of the parties' agreement and is not empowered to add to, delete from, or modify the express terms of the collective bargaining agreement. The arbitrator acts as judge to see if the parties' conduct has violated the agreement.

"Interest" arbitration is the antithesis of "rights" arbitration. When an arbitrator serves the parties as an interest arbitrator,

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[1]Saxton, *The Employer View,* in Arbitration and the Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 127–33.

he is legislating, not judging. The parties themselves have been unable to reach agreement, and they look to that arbitrator to do what they have failed to do through bargaining—find the common ground that is ultimately embodied in the collective bargaining agreement.

Often, the interest arbitrator is called into the dispute when disaster threatens. In an attempt to avoid a strike, the parties turn to a professional arbitrator to use his or her expertise to forge the terms of the new agreement. Unlike grievance arbitration, there is no specific procedure, and certainly there are no specific terms of the parties' mutual agreement by which to judge their conduct. Instead, that interest arbitrator "legislates" what the new terms of the collective bargaining agreement are to be.

Interest arbitration has not been embraced by private industry. Except in rare cases, such as ballplayers' salaries, the parties have not voluntarily accepted the concept of an arbitrator-legislated agreement, yet private industry has voluntarily embraced the concept of rights or grievance arbitration. Why the difference? The answer, it seems to me, is that absent the structure of the grievance procedure and the negotiated contract terms, the parties simply don't trust the arbitrator! They would rather face the risk of strike than the risk of submitting the dispute to a neutral third party for resolution.

Jack Stieber once observed:

> "The contrast between the widespread acceptance of grievance arbitration and the infrequent use of contract arbitration calls for some explanation. The acceptance of grievance arbitration is due to the recognition by both unions and companies that individual grievances which affect one or a relatively small number of workers and involve disputes over the application and interpretation of existing contractual provisions are not worth the cost of striking or taking a strike. . . .
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> "The rationale for grievance arbitration as distinct from contract arbitration, so obvious to the practitioners and the experts, is less clear to the general public. To the layman, all strikes are harmful, whether they occur as a result of an unresolved grievance or a dispute over wages, hours, and working conditions. Why, if arbitration works so well in grievance disputes, is the same principle not applicable to contract disputes which present an even greater threat of strikes? The answer lies in the different view of the strike and the alternatives as seen by the parties and the public. The public, considering only its own well-being, convenience, and needs, sees all strikes as bad and consequently welcomes an alternative, such as ar-

bitration, which appears to avoid strikes and at the same time seems to be fair to both sides. The parties, considering their own self-interest, see grave risks in the arbitration of contract terms both in terms of economic costs and perhaps more important, in the threat it presents to free collective bargaining and their institutional survival."[2]

Fortunately for those of us who make our living arbitrating, the rules for public employees are quite different. The people have determined that in certain public utilities negotiations and with public employees, there are no legal strikes. That is not to say there are no strikes, just that they aren't legal.

In Michigan, labor relations in the public sector have been governed by the Public Employment Relations Act since 1963.[3] The act provides for mediation and fact-finding.

In 1969, the police and firefighters unions succeeded in getting the Michigan legislature to mandate compulsory arbitration for the treatment of collective bargaining disputes involving employees providing essential services, such as municipal police and fire protection service.[4] In 1972, the Michigan legislature amended Act 312 to provide for the arbitration of economic issues by presenting the arbitrator with a choice between the final offers of each party on an issue-by-issue basis.[5] In 1976, Act 312 was expanded to include, among those covered by compulsory arbitration, emergency medical service personnel employed by fire and police departments.[6] In 1977, Act 312 was again amended to include the emergency telephone operators employed by police or fire departments.[7]

Thus, Michigan is one example of a state which has mediation, fact-finding, and compulsory arbitration to resolve those disputes where public employees and their unions have been unable to reach voluntary agreement with the employer.

Quite frankly, I view our statutes as the grievance procedure for interest arbitrators. Both PERA and Act 312—our compul-

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[2]Stieber, *Voluntary Arbitration of Contract Terms,* in Arbitration and the Expanding Role of Neutrals, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 71, at 107–108.

[3]Mich. Comp. L. Ann. §423.201 et seq., Mich. State. Ann. §16.455(1) et seq.

[4]Mich. Pub. Acts 1969, No. 312; Mich. Comp. L. Ann. §423.231 et seq., Mich. Stat. Ann. §17.455(31) et seq.

[5]Mich. Pub. Acts 1972, No. 127.

[6]Mich. Pub. Acts 1976, No. 203.

[7]Mich. Pub. Acts 1977, No. 303.

sory arbitration statute—provide the means of getting unresolved issues in negotiations to the third-party neutral, much like the grievance procedure provides a means of getting a "right" dispute to an arbitrator.

Both fact-finding and compulsory arbitration are invoked by a petition filed by one of the parties. That petition informs the Michigan Employment Relations Commission that there is a dispute in negotiations that the parties themselves are unable to resolve and that the assistance of a neutral is required to assist the parties. The petition sets forth the issues in dispute and generally states the last position of each party at the table.

In nonbinding fact-finding, we trust a single neutral to issue a report. In compulsory arbitration, the statute allows each party to appoint a panel member. Then an impartial chairman is selected from the list of qualified arbitrators provided by the Michigan Employment Relations Commission. Our eminent panel chairman, Chuck Rehmus, was once the chairperson of the Michigan Employment Relations Commission and was charged with the duty of finding qualified neutrals to serve as interest arbitrators and fact-finders.

Both the commission rules under PERA as well as the compulsory arbitration statute require that the parties mediate their dispute prior to the initiation of the formal fact-finding or arbitration procedures. Nevertheless, both the compulsory arbitrators and the fact-finders routinely engage in mediation before the dispute is heard. This mediation which is practiced by the Michigan "neutrals" is not required or even contemplated by the statute and, in my opinion, demeans the traditional arbitration process, reinforcing the point that interest arbitrators are indeed legislators, not judges.

Reluctant though I am to criticize the distinguished brethren gathered in this assembly, as an advocate who represents employers in interest disputes, I feel obliged to point out that very few arbitrators who pressure the parties to come to agreement by accepting the "reasonable" proposal of one of the negotiating teams are subsequently viewed as neutrals on that issue when the formal hearing begins. My own impressions of arbitrators as mediators is that they do a poor job mediating because they generally lack training and expertise in contract negotiations. Often, in their enthusiasm to reach agreement, they exacerbate the mistrust that the parties already have of fact-finding and compulsory arbitration.

My partner, Bill Saxton, once told me, "Never trust a mediator. Their only function is to get the parties to agree. They don't protect your client. You do!" Perhaps some of those thoughts have reached into my thinking about interest arbitrators' mediating. At any rate, Chuck Rehmus, in his paper to this assembly in 1974 entitled "Is a 'Final Offer' Ever Final?"[8] expressed a contrary view. Perhaps during our subsequent discussions this may be fertile ground for future exploration.

When the fact-finder or arbitration panel determines that mediation is no longer useful in assisting the parties to reach their agreement, off comes the mediator hat, on goes the impartial arbitrator hat. The hearing is convened and the parties parade all of the relevant evidence before the single fact-finder, or the tripartite panel in compulsory arbitration.

In interest arbitration, evidence is a sensitive issue. Aside from the fact that the assurance of impartiality has been undermined when the arbitrator acts as mediator, the parties have traditionally looked to arbitration as an inexpensive means of resolving disputes. Interest arbitration is not inexpensive. The parties, in contemplation of the "Brandeis Brief" they will eventually file, attempt to overwhelm the arbitrator with the evidence. *"Relevance"* is a dirty word, and in part justifiably so, because the presentation of the evidence serves as a catharsis for the parties.

Erwin Ellman, an able union advocate in Michigan who has also served as an arbitrator, in his 1978 paper to this Academy observed:

> "The statute provides that 'any oral or documentary evidence and other data deemed relevant' by the panel 'may be received.' The proceedings shall be informal and technical rules of evidence shall not apply. In view of the breadth of the standards prescribed to guide decision, a panel would be foolhardy indeed to exclude proffered evidence on the ground of relevancy. Consequently, most arbitration panels suffer in mute silence the procession of witnesses who offer their views on the psychological impact of a food allowance on firefighting morale, the competency of a local bar association to select a grievance arbitrator, and the diminution of a police officer's status if he has to check the gas and oil levels in his scout

[8]Rehmus, *Is a 'Final Offer' Ever Final?* in Arbitration—1974, Proceedings of the 27th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1974), 77–81.

car. This grandiose spirit . . . elongates surprisingly the time said to be required to confer with his colleagues, meditate over the evidence, and prepare an opinion justifying a choice of one offer or another."[9]

No doubt impartial arbitrators are faced with a real dilemma when objections to irrelevant evidence are made. In "rights" arbitrations, the issue and the terms of the collective bargaining agreement provide the arbitrator with a framework to judge relevancy. Even then, there are some arbitrators who will let it in for "what it is worth." There are few similar guides for the interest arbitrator. In private interest arbitration, there is the voluntary submission agreement. In public cases in Michigan, we have the Section 9 limitations placed on arbitrators in our compulsory arbitration law. These limitations serve functions similar to those of the contract terms in rights arbitration. These are the terms against which the arbitration panel has been directed by the Michigan legislature to judge what new contract terms the parties will be bound by when the arbitrator renders his or her decision.

It should be emphasized that when the Michigan legislature determined that compulsory, binding arbitration would be used to resolve police and fire disputes, it felt compelled to give those impartial arbitrators the Section 9 instruction. No similar instructions exist for the nonbinding fact-finders. Section 9 directs the tripartite panel to consider the following factors:

"(a) The lawful authority of the employer.
"(b) Stipulations of the parties.
"(c) The interests and welfare of the public and the financial ability of the unit of government to meet these costs.
"(d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally: (i) In public employment in comparable communities, (ii) In private employment in comparable communities.
"(e) The average consumer prices for goods and services, commonly known as the cost of living.

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[9]Ellman, *Legislated Arbitration in Michigan—A Lateral Glance,* in Truth, Lie Detectors, and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1979), 291, at 295.

"(f) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and suitability of employment, and all other benefits received.
"(g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceeding."[10]

Even with the structure provided by statute, impartial interest arbitration panels let in virtually all the evidence the parties wish to present. Hearings in complex cases can, and do, go on for weeks.

After the hearing is closed, the parties wait weeks and sometimes months for the transcripts of these voluminous proceedings. Then the eloquent "Brandeis Briefs" are submitted for the fact-finder's or tripartite panel's consideration. Long-winded decisions are written, which first restate the position of each party, and then, if the decision is to have value for future negotiation, the arbitrator, in succinct, staccato sentences, explains his reasons for reaching his just result.

No wonder interest arbitrations are expensive. The parties must pay the tripartite arbitration panel for all those days of hearing and deliberation; the lawyers, advocates, and witnesses must be paid for their time spent preparing both the relevant and the irrelevant evidence presented, as well as the cost of the Brandeis Briefs; the court reporter is paid for preparing voluminous transcripts; and of course the hotel suite, gourmet meals, and other incidentals all add cost. That, plus the generally untabulated staff time lost, all present the parties with an enormous bill. Bearing all these costs in mind, it is little wonder that the parties usually successfully negotiate the next ten collective bargaining agreements by themselves.

What is the experience like for the arbitrator? Erwin Ellman has explained:

"Grievance arbitrators, who traditionally enjoy the womb-like security of the four corners of a collective bargaining agreement, will find themselves cruelly wrenched by our legislature into a wider and more uncertain universe if they accept appointment under Act 312. They are directed from the start to make legal judgments. The first standard for decision in Section 9 of the act is that the arbitration panel consider the 'lawful authority of the employer.' Does the gov-

[10]Mich. Comp. L. Ann. §423.239, Mich. Stat. Ann. §17.55(39).

> ernmental unit have authority to deviate from provisions of the city charter or the special statute governing appointment of the sheriff's deputies or local civil-service legislation? Can it accept and implement an award of the panel which overrides such provisions? The impartial chairman without aptitude in dealing with such questions of constitutional and public law can hardly meet contemplated standards of competence."[11]

Because of these legal standards contained in Section 9 of Act 312, most interest arbitrators deemed qualified by the parties are lawyers. The fee paid by the state of Michigan is limited to $200 a day. Little wonder that the unions and the public employers who want qualified arbitrators have reached into their own pockets and come up with the difference between the $200 statutory fee and the normal $202 arbitration fee most qualified arbitrators charge. After all, even arbitrators are entitled to a fair wage for a full day's work.

Despite the apparent loss of impartiality when arbitrators mediate, preservation of irrelevant evidence, submission to unending days of hearing and the enormous cost involved, does the system work? Does interest arbitration carry out its promise? I would answer in the affirmative—for the most part.

It seems to me that the only promise of interest arbitration is that it will produce new collective bargaining agreements and for the most part prevent strikes. I can report to this assembly that, in Michigan, agreements have been produced and most public strikes have been eliminated. This is particularly true in the area of police and fire interest arbitration held under the compulsory and binding provision of Act 312.

This is not to say, however, that all the parties to interest arbitration and fact-finding have been satisfied with the result. Mayor Young of Detroit has been known to complain both to the electorate and to the judiciary that Act 312 arbitrators simply don't understand their duties under Section 9. So far, at least, the awards have withstood both judicial and public attacks.

One might say that compulsory and binding arbitration has proved to be a successful treatment for the "blue flu." Nonbinding fact-finding has not been as successful a remedy for the teachers, sanitation workers, and other public employees. Both

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[11]Ellman, *supra* note 9 at 297.

dissatisfied public employers and unions have rejected the packages for settlement recommended by fact-finders.

No less a personage than Mark Kahn, your president-elect, has had a fact-finder's award rejected. Let me tell you about it. In a school teachers' case where I represented the employer, without waiting for the union, the school board—too quickly—accepted Fact-Finder Kahn's award. Unfortunately, the union became suspicious and rejected the award already accepted by the school board. Presumably, the teachers thought that if Fact-Finder Kahn had written an award the school board would accept, it wasn't good enough for them. The moral of that story is: never let an employer accept the fact-finder's report first. Incidentally, you will be pleased to know that Mark's award served as the framework for the settlement negotiated after the state circuit court enjoined the strike which was already prohibited by statute.

At this point one might logically ask if compulsory arbitration produces settlements for police and fire disputes without strikes, why hasn't that Michigan law been expanded to prevent other public employment strikes, and even private employee strikes? The answer is that, while the public will not accept police and fire strikes, it will accept strikes of other employees, both public and private, rather than compel employers to accept the legislated agreement of a third-party neutral who has no real stake in the survival of the business.

It has often been said that the quid pro quo for the no-strike clause is binding arbitration. The same is effectively true of interest arbitration. The quid pro quo is that the union gives up its right to engage in economic warfare in return for the agreement to submit the unresolved issues to the interest arbitrator. Why don't parties voluntarily make this exchange and thereby forgo strikes? One text I used in teaching an arbitration course at the University of Michigan Law School answered almost the identical question as follows:

> "And why do managements, in general, share with unions an adverse reaction to the use of arbitration to settle contract term disputes?
>
> "A common explanation is that there is less 'risk' in submitting grievances to arbitration than in submitting contract terms to arbitration. The functions of the arbitrator in a grievance case is thought to be quasi-judicial and confined within the framework of what the parties have already negotiated into the collective bargaining agree-

ment. Hence there are standards to guide him. On the other hand, it is thought that in the arbitration of 'interest' disputes there is a lack of meaningful standards for arbitral determination, and hence a fear of giving carte blanche to a third party who has no continuing responsibilities with respect to the operation of the enterprise or the interests of the employees. There is also the thought that better labor-management relations will result from a negotiated agreement, however difficult the negotiations may be, than from a settlement imposed by a third party."[12]

Likewise, in his 1973 Presidential Address to this Academy, Robben Fleming noted: "Arbitration of interest disputes is not a panacea, and if the parties turn to it, I am not so sure that it can, or should, last for too long a period. We know from the experience of the past 20 years that government, qua government, is not a very good source of decision-making in these kinds of affairs."[13]

Conclusion

Quite frankly, I agree with the prevailing opinion that the arbitration of interest disputes is not a panacea. Rather, it is a limited tool where the parties relinquish their sovereignty to an interest arbitrator in exchange for circumventing a strike. In police and fire disputes where it is thought the employees' services are indispensable to the public, interest arbitration has been accepted. Perhaps with a star baseball player whose services are deemed indispensable, interest arbitration is also useful. Only time will tell if the high wages ordered by arbitrators will force the team owners to retrieve their sovereignty by accepting strikes.

While a strike is never good for the employer, the union, or the employees, it has been said that strikes provide a cathartic incident that improves the relationship between the parties. Interest arbitration serves the same function because, like a strike, it forces the parties to accept an agreement they otherwise wouldn't buy. As the cost of strikes go up, it seems to me that favorable experience with interest arbitration in the public sector will produce a greater willingness to use that tool to reach

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[12]Rothchild, Merrifield, and Edwards, Collective Bargaining and Labor Arbitration, 2d ed. (Indianapolis: Bobbs-Merrill, 1979), 285–86.

[13]Fleming, *Interest Arbitration Revisited,* in Arbitration of Interest Disputes, Proceedings of the 26th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1974), 1, at 6.

agreement. Like any tool, however, it has only a limited use. The limitation on its utility will be the confidence that the parties have in the interest arbitrators. Only you can increase that confidence by writing sound opinions which will convince the parties that it is safe to give up their sovereignty to you.

IV. A UNION VIEW

VIC GOTBAUM*

I am pleased to have this chance to discuss some of my thoughts on interest arbitration with you. My remarks will be confined to a consideration of collective bargaining and bargaining impasses arising in the public sector—for two reasons. The first is that my experience is in organizing and directing a public-sector labor union, District Council 37 in New York City. The second reason is that it is only in the public sector that labor and management are required by law to resolve their bargaining impasses by having a third party write the contract for them.

We all know that in the majority of those states that even allow public employees to organize, strikes by public employees are illegal. We know that the strike threat or the strike is the major weapon labor uses to achieve its ends. Certainly, if the right to strike is prohibited, a substitute for the strike is needed or unions will strike anyway because that is the major power they can show to have a chance that their demands will be taken seriously. We know that binding interest arbitration is the substitute for the strike that legislative bodies have mandated for the parties.

My basic position is that public-sector employees should not be treated any differently than private-sector employees. Public employees should have the right to strike. I think fear of the strike paralyzes us and prevents the development of mature collective bargaining relationships in the public sector. I do not think it is likely, however, that this line between the public and private sectors will be erased. So let's talk about interest arbitration, the substitute for the strike.

My focus will be on who uses interest arbitration, some of the problems I see with its use, and some comments on how its ef-

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