> Give me six lines written by the most honest man, I will find something there to hang him.

On this aspect too, I can only say once again that it is too early to know.

III. THE RESOLUTION OF IMPASSES

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Introduction

The treatment of impasses over new contracts in the public sector is still far from a settled issue. For one reason, the whole area lies on the frontier of collective bargaining; in many jurisdictions there is a legislative void as well as a lack of experience. For another, the approach one decides to take will be determined largely by the philosophical view one adopts toward labor relations in the public service. In consequence, some preliminary reconnaissance of this still largely uncharted territory seems in order.

As to prevailing philosophies, if one is a devoted advocate of the civil service principle, he will probably want to reject the possibility of collective bargaining, even though a measure of reconciliation is in fact possible. The situation is akin to that of a specialist in job evaluation who is asked by his management to assist in negotiating a system of wage differentials. Further, if one is deeply committed to a strict technical view of the sovereignty of the legislature, again he will probably rule out any place for independent unionism. In this instance, the position is similar to that of a company counsel urging an absolutist version of the doctrine of management rights.

On the other hand, if one sees some value to collective bargaining in the public sphere, as I suppose most of us here do, the ruling questions will take a different form. Probably the foremost one to emerge is whether the public sector is essentially a case *sui generis,* that is, whether it differs enough in substance from its private

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sector counterpart to require special treatment. And if the answer here is the affirmative, as I think it must be, its specific content will still be contingent upon the principles with which one approaches interest disputes in this peculiar field.

In the first place, some will favor a carefully specified procedural sequence with precise time limits, whereas others will prefer a flexible response, tailored pragmatically to the particular case. In the second place, some will put the primary emphasis upon avoiding stoppages at all costs, whereas others will hold that the right to strike should be granted on about the same basis as in the private sector, with only occasional exceptions to the rule when "health and safety" interests are clearly paramount. Finally, of course, if one favors a no-stoppage ban, the whole question of sanctions becomes critical to any statutory formulation of the rules of the game for collective bargaining in the public sector.

As I see the matter, if one accepts the basic proposition that there is nothing special about labor relations in the public domain, then it follows that no special procedure is required. All we need do is simply transfer the private-sector model: establish an independent agency to deal with representation questions and unfair practices. Let this agency also provide mediation upon request of either party to a dispute or at its own initiative. After due notice is given and the period for negotiation has run out, either side may resort to economic warfare, with continuing availability of mediation. If settlement cannot be had, the public employer is free to operate if he can, even using replacements, while the union can go out on strike. Carrying the analogy still further, it would be perfectly possible to provide for an emergency procedure of the restricted Taft-Hartley type, to be available for use when the top officials of government can convince the appropriate court that the health and safety of the public would be or are seriously impaired by a shutdown.

There are undeniable attractions to the full transfer of the private-sector model to the government domain. It calls for no new devices. It requires no greater coercion than is applied to both sides in the private sphere. It eludes all of the distasteful issues involved in sanctions against strikes. And it holds out the promise that

bipartite rule-making and administration can supplant the traditionally unilateral powers claimed by legislatures and by their deputies, the civil service commissions.

But to my mind there is a basic flaw in the reasoning in support of this analogy. In essence, the argument ignores the fundamental fact that most of the services supplied by government are exclusively provided and are essential to the whole community. Their consumption by the public cannot be postponed, and the services cannot be stored to be drawn upon as needed. More than this, substitutes either cannot be had through private purchase, or they are impracticable alternatives for most citizens. And here is where the public sector differs in substance from the private, for in the latter essentiality is far less the rule, while postponability and substitution are both normally possible. Thus we need make no appeal to the arcane logic of the doctrine of sovereignty to warrant the conclusion that for the most part continuity of operations in the public sector is mandatory. And even if we could draw up a list of exceptions to the principle of essentiality, it would be of little practical use. The law, the courts, and public opinion are all strongly on the side of the doctrine that no interruptions to the provision of the diverse services of government should be permitted. This, I submit, is a question of fact, whatever may be one's personal values regarding the issue. Indeed, I think that a policy of no strikes will gather momentum as the spread of public-sector bargaining continues.

If these judgments are correct, then the government sector is indeed a special case. Accordingly, the critical task becomes that of designing a set of procedures that will accomplish three major objectives. The first one is to develop as fully as possible a role for collective bargaining as a method for achieving accommodation and mutual consent. The second is to protect the integrity of the bargaining process by insuring the independence of public management so that the process will not become transformed into a type of machine politics, hence political bargaining. Political bargaining is not collective bargaining. Whatever may be its own rationale, it carries real dangers to collective bargaining in the public service, and it cannot be defended by arguments in behalf

of collective bargaining as such.[62] If we seek the latter, we must insure the independence of public managements, and we must make it possible for such managements to sign binding agreements. Third, the basic procedure must recognize the need to preserve continuity of operations, but, more than this, it should restrain reliance upon coercion as much as possible, so that bargained settlements can become the rule rather than the exception.

The first objective can be served best by provision for an independent public agency to deal with questions of representation and unfair labor practices. In addition, the enabling statute should provide the parties with incentive to devise their own procedures for resolving impasses, failing which one will be mandated by law.

Treatment of Impasses

The second objective is self-evident, and needs no elaboration. The third refers to the treatment of impasses, about which the rest of my paper will be concerned.

Because the budget-making activities of public bodies are controlled by the calendar, the timing of negotiations becomes critical. They must begin early enough to permit the incorporation of settlements in the budget, and the negotiating period must allow for the possibility of intervention if voluntary agreement cannot be reached. Clearly, too, the whole process must provide sufficient opportunity for legislative consideration, open hearings, and clearance with civil service officials.

Because timing is so important, the procedure should make mediation available whenever serious conflict develops, at the option of either side or of the top public official within the jurisdiction. Obviously, too, this official must be kept continuously informed regarding the progress of negotiations. Furthermore, in my judgment it may well be desirable to provide for preventive mediation at the initiative of the independent agency charged with dealing with representation issues and unfair practices.

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[62] If the union can arrange a "fix" with City Hall, over the heads of agency management, then the management interest will have been betrayed and the locus of bargaining from there on will become shifted to a different arena. There is no real counterpart to this possibility in the private sector, because the profit motive supplies the necessary unity of interest between top management and its bargaining representatives.

Compulsory Arbitration

But suppose mediation fails. Then what? Here two alternative remedies are possible—compulsory arbitration and fact-finding without compulsory arbitration at its terminus. Recourse to either assumes, of course, that the parties have not built in their own procedure for resolving impasses, a procedure that in turn must be compatible with the fundamental policy laid down by statute.

To my mind, there are two basic weaknesses in the method of compulsory arbitration for dealing with disputes in the public service. One is that the certainty that it can be invoked constitutes an open invitation to extremist strategies. Ask for all you can, because you stand a chance of getting part of it. The insidious consequence is that this will vitiate the very process of collective bargaining. The pressures will then be shifted to what in fact is a juridical mechanism. What begins as collective bargaining ends in something quite different.[63] In the second place, compulsory arbitration amounts to a delegation of the responsibilities of public management and of the lawmakers to outsiders. In my view, this is incompatible with the basic principles of representative government. In fact, it can become a most convenient way to duck hard issues by passing them on to a board that is only temporarily in office and that is not responsible to the electorate. The result is likely to be labor policies that are unsound, because they will be more responsive to power relations than to the equitable accommodation of all interests—those of taxpayers, the citizens who use the service, management, and the whole body of public employees viewed collectively.

The Fact-Finding Approach

The second technique for dealing with impasses is that of fact-finding, following, of course, negotiations and mediation. In my view, and for the reasons just stated, this method should be an open-ended one. That is, if it issues in ultimate failure, compulsory arbitration should not be available at its terminus. I shall submit

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[63] This danger might be reduced if the arbitration proceeding were made very costly to the parties, and its availability were made uncertain by provision of a choice-of-weapons approach.

my reasons for leaving the process open-ended for subsequent consideration.

As I see the matter, fact-finding begins when mediation fails. I favor an all-public tripartite board for this purpose, to increase the likelihood of unanimity. Recourse to such a board should be at the initiative of either party or of the top public official, after the mediation period has run out. Precise time limits are required for hearing the dispute and rendering a report. It also seems to me desirable to provide that the recommendations of the board first should be submitted privately to the parties, coupled with a final mediatory effort by the board itself. If this step proves unsuccessful, the recommendations then should be made public, in hopes of building up public opinion in their behalf. If acceptance still cannot be gained, there may be some merit in having the chief executive assemble a carefully selected private committee to attempt quietly to persuade the intractable side to settle on the basis of these recommendations.

There is much to be said for the fact-finding approach. It is a logical extension of the process of collective bargaining because it continuously keeps open the possibility of voluntary settlement. I know of no other method that would serve this end as well. Moreover, it leaves the ultimate responsibility of the lawmakers intact, and, even more, it can produce a set of guidelines to a fair resolution of the dispute at their hands. In turn, this latter feature reduces the disabilities of attempting to legislate in a context of crisis, by men mostly lacking in the necessary expertise.

Sanctions Against Strikes

So far, we have said nothing about the most difficult question of all: how to deal with the possibility of a strike, either at the end of this lengthy road or even earlier. If we take it for granted—and I fully recognize that some will not—that continuity of provision of the services of government is the inevitable point of departure for any impasse procedure for the public sector, then there is no dodging the possibility that sanctions against strikes—and a more remote contingency, lockouts—must be provided. Usually this distasteful question starts off from a rather empty debate over whether to include a formal ban against stoppages within the

statute itself. The real problem is how to prevent strikes, and how to end them if they do occur. On the side of prevention, it seems to me that provision alike of the right to collective bargaining and of an impasse procedure that does the most to encourage voluntary settlement constitutes a strong positive incentive for desired conduct. The harder question is how to penalize undesired conduct effectively without fatally wounding the bargaining relationship itself.

The most extreme and the most unproductive form of sanction against strikes of which I am aware is the Condon-Wadlin Law in the State of New York. Its whole thrust is against the individual public worker who goes on strike. Only indirectly does it deal with organizations as such, in effect by terminating the bargaining relationship for a minimum of three years. The law requires that the individual employee be deemed a voluntary quit, who, if re-employed, must forego any increase in pay for three years and must serve without tenure as a probationer for five years. No distinction is made between the innocent and the guilty. Over the years since 1947, a sordid history of this law has unfolded. It has rarely been invoked in centers of union strength, but has been rather consistently applied where unions are weak, although public officials of course have a uniform mandate to bring the statue to bear wherever it is applicable. Worse still, powerful violating organizations have enjoyed retroactive legislative forgiveness for their transgressions; in what constitutes a fine disregard both for equality before the laws and respect for the law itself. And worst of all, the statute is self-defeating on its own terms. It calls for the dismissal of the entire work force involved in the strike, and it forecloses any chance for subsequent negotiated settlement.

A commonly proposed alternative to this approach is to provide for the automatic decertification of the striking union, either permanently or for a considerable period of time. In contrast to Condon-Wadlin, the intent is to strike directly at the organization itself rather than against the individual employees who belong to it. The theory is that the threatened loss of representation rights will constitute a credible deterrent sufficient to produce the course of conduct desired by public policy. Perhaps it would, if there

were no possibility for subterfuge after the fact, that is, execution of a "deal" by which the bargaining relationship could be restored.

However, the real weakness of the device is of a different order. It is that it requires a dissolution of bargaining relations as an essential part of the technique. In turn, this forecloses any possibility of further negotiations and of ultimate agreement. This disability conflicts with one of the underlying objectives cited earlier: to promote voluntary settlements as far as possible in the government domain. More than this, decertification offers no remedy for mass quits or "working to the rules."

The main alternative to decertification is open-ended fact-finding backed by the injunction power of the courts. I concede at the outset that in matters of labor relations the injunction long ago acquired a deservedly unsavory reputation. So much so that the basic merit of the instrument as a means for protecting vital and fragile equities has tended to be overlooked. But at that time the context was a very different one in which the injunction was used as a weapon to impede collective bargaining and to destroy unions. Today we are dealing with a different set of circumstances and with a specialized application of the technique of collective bargaining. Here the problem is to protect the interest of the public in continuity of operations and yet at the same time to introduce effective collective bargaining into the government sector. This is essentially a task of accommodating rather than reconciling these two conflicting principles. In my judgment, the injunction has a limited but essential role to play in achieving the desired compromise.

To be effective, the applicable law of contempt proceedings must allow the courts, upon an adequate showing in their judgment, to levy cumulative fines upon the striking organization and its officers, with reasonable discretion as to amount but without the power to remit such fines upon subsequent negotiation of a settlement. I rule out the possibility of remission simply to protect the credibility of contempt proceedings as a deterrent to undesired conduct.

The underlying theory of this approach is that the most effective way to prevent or to terminate stoppages undertaken by an organization is to strike at its most sensitive nerve, its finances. When

the courts possess the necessary authority in law, the threat of mounting financial loss can serve as a sufficient remedy, without recourse to punitive acts against individual members. On the positive side, the case for the injunction is that it does not foreclose resumption of bargaining and eventual settlement. By contrast, both compulsory arbitration and automatic decertification do sacrifice that very important possibility.

Parenthetically, I should add that the injunction also offers an advantage to those who would transfer in full to the government domain the arrangements now prevailing in the private sector. The reason is that, on this view of the whole matter, enjoinder would then be imposed only in those very few cases where in the judgment of the court health and safety considerations were found to be controlling. Apart from these instances, strikes would freely be allowed. However, I also believe that in fact the courts would quickly recognize the essentiality of most services provided by government, and that in the outcome the injunction would become quite broadly available as an instrument for public protection, very much in the manner described earlier.

To return now to the main argument. Like all purportedly foolproof devices for the intended control of some branch of human affairs, the injunction, too, has its weaknesses. Candor requires that we recognize them. The first is that its proper use in this context depends upon the competence and the independence of the judiciary. The second is that the injunction is unlikely to work effectively against wildcat strikes, job-action tactics, and mass quits. And the third is that if negotiations finally fail after exhaustion of the entire procedure, use of the injunction to back up an open-ended form of fact-finding means that the members of the union are expected to continue or to resume work without a contract, or to allow replacements to take over their jobs. In these extreme and probably rare situations, I see no easy solution. But at the same time, I do believe that the overall procedure I have discussed offers the best possibility for combining the twin objectives of promoting voluntary settlements through genuine collective bargaining while also insuring the continued provision of the services of government. This may be a second-best solution to an admittedly difficult problem. But I suspect that anything better is reserved not for this world but for the next.

Summary

In sketching this procedural approach, I have deliberately excluded consideration of a number of important related issues that really lie beyond my assignment. Some of them concern broad questions of strategy—whether to encourage all-inclusive or fragmented bargaining units, or how to insulate managerial independence from the corrosive processes of political influence. Another area of great interest is, of course, what forces will shape relative bargaining power in environments where the automatic discipline of profit-seeking is usually absent, where the services are supplied normally without price, and where the union is denied legal recourse to the strike. And finally there are several technical problems as well—who is to select and appoint the fact-finders, who is to negotiate for management, what relations are to prevail between that negotiator and the chief executives chosen by the electorate, how is an equitable overall wage structure to be attained and preserved, and how is the procedure to be tailored to fit such diverse contexts as a state or a city, a school district or a transit authority, a welfare administration or a sanitation department?

Unionization is now occurring at a rapid rate throughout the government sector. Its central purpose is the quite traditional one of attempting to gain a voice in shaping the employment relation, usually by pursuit of the conventional strategy of limited objectives. Unionism here also is manifesting the familiar diversity of tactics so characteristic of the long history of the American labor movement. Some organizations seek craft units, some of them aim at all-inclusive units, and some are willing to take what they can get. Moreover, they diverge in their approaches to the power problem. Some prefer political bargaining through the legislative route, while others aim at collective bargaining instead. Those that follow the bargaining route again diverge: some eschew the strike weapon while at times others rely upon it.

Viewing this complex domain in the large, it is clear that the spread of unionism among public workers is running well ahead of the rate at which needed institutional mechanisms and arrangements are being created to deal with the problems already at hand. Plainly, there are no doctrinaire solutions to these vital questions.

There is need for considerable experimentation, but the flexibility inherent in this approach should not be allowed to degenerate into the barren principle of waiting for something to turn up. In essence, what is required is a large amount of serious thinking on the part of experts about how accommodation is to be had between the conflicting principles of freedom and order in this special domain of American life. This particular dichotomy of values is likely to become particularly acute. As I view the matter, government is an inherently different and peculiarly sensitive kind of employer, with its own legal traditions, its own special institutional foundations, its own thrust toward unilateral rule-making, and its own inner logic as regards the incentives to guide employee relations policy. Only in part does the analogy with the private sector stand up.

If I am correct in this judgment, then the successful introduction of collective bargaining into the domain of government will depend upon our ability to devise new arrangements, appropriate to the exacting task of balancing the competing equities at stake: those of the employees, of public managements, of the taxpayers, and of the citizen-consumers of government services. To achieve this balance will call for considerable ingenuity, if only because the discipline of the market is so largely lacking in this peculiar field.