CHAPTER V

FOREIGN EXPERIENCE IN PUBLIC EMPLOYEE DISPUTES

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CHAIRMAN ROBERT L. STUTZ: The problem of public employee dispute settlement is so obvious that it should require little elaboration. I think it safe to suggest that no one in this room has not been affected directly and seriously by a least one public employee job action, sick-in, or whatever else the strike was euphemistically termed, during the past few months.

The problems in the private sector are largely the concern only of the company, the union, and the employees directly involved; unless the private company happens to be a public utility providing a vital public service, the ordinary citizen couldn't care less how or whether the private sector dispute is resolved. Even the Taft-Hartley Law's 29 emergencies, which ostensibly threatened our very health and safety, had questionable impact on John Q. Citizen.

In contrast, labor-management relations in public employment are of direct interest and concern to every citizen and taxpayer, especially as those relations affect the quality of the services

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provided by the public employer. The availability of public safety services, the frequency of mail delivery, the regularity of refuse collection, the quality of public education, the efficacy of air traffic control, for example, concern us all. And when circumstances redirect that concern momentarily from quality to availability, our dedication to individual and collective rights and freedoms may become severely strained.

During the past 10 years the rising tide of collective bargaining in public employment has literally overwhelmed us and, to complete the metaphor, the tide obviously has not yet reached flood level. Public employee unions are by far the fastest growing unions in the United States. They now comprise approximately 10 percent of total union membership, or slightly under two million members in professional and related associations. There are literally thousands of sets of negotiations between public employers and public employee organizations each year. Strikes by public employees in absolute numbers are relatively few—414 in 1969—but the dramatic impact of some of those strikes has been clear to everyone, and their frequency has increased many times.

Much concern has been expressed over whether our private sector bargaining and dispute settlement experience has transferability to the public sector. To use the current idiom, whether de jure or de facto, the transfer is being made with great rapidity, to the consternation of some, the surprise of many, and the satisfaction of few.

To be sure, the language of the dispute settlement trade has been somewhat obscured, and some of our colleagues have made notable contributions to the obfuscation. It used to be that when we were called into a dispute, we knew what was expected of us. We were either to mediate or to arbitrate. Now, with the addition of some new terms and qualifying phrases, our roles are confusing not only to us, but to everyone involved.

It may be somewhat unsettling to the American ego, but the hard fact of the matter is that some of the other Western democracies have had much more meaningful experience with public employee labor relations than we have had. Deflating as the thought may be, the program committee of this meeting has en-

tertained the idea that we have something to learn from the experience of others. That is the genesis of this session.

By a fortuitous circumstance, the interest of the Academy in public dispute settlement and a University of Michigan study devoted to foreign experience in the same general area have reached a confluence. In fairness, we have pressed the University of Michigan researchers a little to bring their findings to early fruition, but they have risen to the challenge and have agreed to share with us what must be identified as tentative findings of part of a major and comprehensive research effort. The results of that effort will form the basis of an international conference on public employee relations which will be convened in May 1971, and at that time the full findings of this research will be made known.

The title of this session, "Foreign Experience in Public Employee Disputes," is an obvious overstatement that requires qualification. We will be concerned this morning with the experiences in seven countries: Sweden, Belgium, France, West Germany, Australia, Great Britain, and Canada.

The systems of public employee relations in each of these countries is older and in some respects more sophisticated than our own systems, and the purpose of this discusion will be to attempt to discover what we have to learn from the other institutionalized approaches to familiar problems. Our primary concern will be with the public employee dispute settlement process, although other procedural and substantive issues may inevitably become involved. Each of our speakers has competence in specific countries and will direct his remarks accordingly.

In order to focus attention on manageable bites of this rather awe-inspiring subject, the speakers have agreed to confine their remarks in turn to each of five general subjects: The first will be the collective bargaining system in effect in the country of interest, with differentiation of the private and public systems when appropriate. Second, the speakers will discuss the extent of use of the negotiation process, the level at which negotiations proceed, and the use of the strike weapon. The third subject area will be the use of nonbinding dispute settlement machinery, such as mediation and fact-finding. The fourth will be the use

of binding methods of dispute resolution. Finally, the speakers will be asked to suggest some general conclusions that they might draw as to lessons we have to learn from the experience of these seven other countries.

COLLECTIVE BARGAINING SYSTEMS

The first speaker is co-chairman of the University of Michigan study, Russell A. Smith, who will discuss for us the collective bargaining systems in Sweden and Belgium.

PROFESSOR RUSSELL A. SMITH: I think it is apparent from the statements just made by our chairman that the assignment given to us is much broader than we could possibly complete this morning. He said, for example, that each of us is going to discuss the collective bargaining systems in the countries we have been assigned.

Quite obviously, one could spend the entire session, if he knew enough, discussing the collective bargaining system of any one of these countries. Equally obviously, we can't do anything like that during the time allotted to us, so the remarks we are to make will be pretty generalized, lacking in detail, and perhaps to some extent even inaccurate. The fact is that we are really not as informed as we thought we would be at this juncture because some of our assigned national studies have not yet been submitted or are incomplete, even in draft form. For example, we have not yet received any of our British monographs. The exception is Canada. This is the domain of Harry Arthurs, and, as you will see, he is an able student of the public labor relations scene there.

I am supposed to discuss at this point the collective bargaining systems of Sweden and Belgium. Let me make just a few general observations. In Sweden and Belgium, one interesting fact is the extent of unionization in both the public and the private sectors. There is a higher percentage of unionization in each of these countries than in the United States.

Also, a basic characteristic of the collective bargaining systems, as I understand them, of both countries is a high degree of centralization. That is to say, there are certain large confederations or associations of employers in each of these countries and

certain large confederations or associations of labor organizations in both the private and public sectors. As far as I can gather, the basic collective bargaining job is done through a nationalized or centralized type of bargaining carried on between the employer confederations on the one hand and the various confederations of unions on the other.

I might add that I also get the impression that the important confederations on the employee side in each of these countries encompass both the public and private sectors, although there are in each of the countries certain labor organizations that do not have counterparts in the private sector. One additional point should be made about the public sector and collective bargaining systems in general. While in each of these countries there is centralized bargaining as the most important characteristic, there are some things left, pursuant to the national agreements, to be settled at local levels, and this is particularly true, I believe, in Belgium. So there is a combination of centralized and localized negotiation. One of the considerably important aspects of this is that much of the basic financing in connection with public sector negotiations is taken care of at the national level. When we get around to an attempt to make some judgments about the significance of the foreign experience, I believe that this is a point that will be of considerable importance in evaluating that experience in contrast to ours.

CHAIRMAN STUTZ: The next speaker, who will describe for us the collective bargaining systems in France, West Germany, and Australia, is Professor Charles Rehmus, co-chairman of the University of Michigan study.

PROFESSOR CHARLES M. REHMUS: The distribution of countries among us is somewhat arbitrary, mine spanning the entire globe.

In Australia, the model is one in which the private and the public collective bargaining systems are largely identical. It is a system in which legal enactment plays a major role, with negotiating structure, appeal rights, and arbitration procedures established by law in each of the individual Australian states and for the Commonwealth Government as a whole. In addition, special labor relations statutes have been enacted covering

many of the major industries as well as for the public service throughout Australia. Union organization in the public sector is substantial, comprising 80 percent of all employees on what the Australians call the "nonstaff side," or, as we would put it, 80 percent of nonmanagerial public employees.

Parenthetically, one of the interesting things we have noted throughout the nations being examined is the high degree of public employee attachment to unionization. In every case among these industrialized democracies, public employee unionization percentages are significantly higher than the percentages in the private sector. This development is also occurring in the United States. Today, 54 percent of civilian federal employees are in unions, almost double the private sector rate. Even among our state, municipal, and educational employees, while accurate data are hard to come by, it appears that the rate of unionization is already about 25 percent, roughly equal to that in our private sector. The reasons for this world-wide strength of unionization among public employees is one of the subjects we plan to explore.

To return to the Australian scene: They have a few large major unions as well as many smaller ones. Again, characteristic of most nations except the United States and Canada, they do not use a system of exclusive representation. Instead, the unions are representative only of their own members.

The distinctive feature of the Australian industrial relations system in both the private and the public sectors is simply that the parties settle almost all of their major negotiating issues by means of compulsory binding arbitration. The laws provide for collective bargaining, and the parties, at least in theory, are not against collective bargaining. They simply prefer arbitration. I will leave it at that, since we will return to this later.

Shifting halfway around the globe, to France, and looking only at the public sector for the moment, two broad categories of public employees may be distinguished: those who are employed by the states, provinces, and municipalities; and the employees of the so-called nationalized industries, such as railways, gas, and electricity. All public employees in France are guaranteed the right of organization. This right is embodied in the

constitutions of both the Fourth and the Fifth Republics, based on the principle that every person may defend his rights and interests by trade union action.

As far as the civil service or governmental employees in France are concerned, the collective bargaining situation can be described as little better than chaotic. There is a civil service statute that, in theory, develops a permanent and elaborate machinery whereby employees, through their organizations, may participate in the formulation of personnel policies affecting them. Moreover, additional safeguards are given to employees on questions of promotion and disciplinary measures through their right of recourse to administrative courts.

The unions, I noted a moment ago, are given representation on many consultative bodies. Here, interestingly enough, they use the concept of the "most representative union," by analogy somewhat similar to the concept of "standard union" under our Railway Labor Act, in which certain unions are given a preferred or special status of one kind or another. The French do this as well, simply saying, "You are the most representative unions. Therefore you get representation on these consultative bodies."

Once representation is established, however, the procedure is essentially one of political trade-offs rather than collective bargaining as we know it. For example, a representative of the Government chairs each of these consultative bodies. He normally will have a veto or the decisive vote in case there are differences of opinion between the employees and the Government.

In France, as far as municipalities and other units of local government are concerned, the statutes are framed in such a way that the employing local governmental units have little to say in the employment conditions of their own personnel. All final powers are reserved to the central Government. While the statutes for municipalities again give a right of consultation to the unions, in actual fact the chief element of negotiations, wage and salary determination, takes place at the national level.

As far as negotiations for the nationalized industries in France are concerned, again there is a distinctively French system quite

unlike our own. The major decisions tend to be made by boards established for each of the nationalized industries. Membership on these boards is composed of representatives of Parliament, the industry management, the municipalities, consumer interests, and finally the employee organizations themselves. The rights of employee organizations, once again, tend to take the form of consultation—stating an opinion about the proposed decisions—rather than the right to bargain collectively. In addition, there is a national staff council for each of these nationalized industries which, although dealing with many of the issues of concern to employees (such as discipline, promotion, or apprenticeship), nevertheless has no right to set wages and salaries.

In summary, under French law wages and salaries in nationalized industries will be negotiated collectively; in actual fact, however, the tendency is for every wage and salary dispute in nationalized industries to become a dispute not between the unions and the management of the industries, but one to be resolved through a process of political negotiation between the unions and the central Government.

Moving across the border to Germany, you find again a distinctive system of public employment. In Germany the point to be remembered is that there are in effect three categories of public employment.

The first is the so-called established civil service whose legal relationships with the state are governed by statute. It is important to remember that the established civil service concept is not the same as that we normally think of, embodying a group of high-level government officials. There are civil servants throughout all levels of German public service and proprietary industries. Thus, both the management of a large bureau and railroad conductors may be part of the established civil service and have their employment relationship governed by statute.

Side by side with these civil service categories, down through the hierarchical structure of government, there is a second category: salaried employees whose contractual relationship with the employing authority is the same as that for salaried employees in private industry. Working for them and subordinate to them, there is the third category: manual workers who are paid on

an hourly or weekly basis—again, whose contractual relationship is the same as that of weekly or hourly paid workers in private industry.

I will not go into detail at this time about the various rights of these groups. Suffice it to say that the established civil service does not bargain collectively, in the sense that we know it. It claims no right to strike against the Government. It has only a voice, through a consultative process, in the statutes that will be enacted concerning employment conditions.

Salaried employees and manual workers throughout the German governmental structure do have the right of collective bargaining. They also have the right of establishing written labor-management agreements covering their wages and working conditions. Again, as in France, however, a distinctive feature of the German system is a high degree of centralization. Many important decisions are made at the national level, fundamentally affecting the wages and working conditions of employees who work for the states and for the individual municipalities.

CHAIRMAN STUTZ: Our third speaker, as Professor Smith has already indicated, is eminently qualified to describe for us a system with which he has been intimately involved here in Canada. In addition to the Canadian collective bargaining system, Mr. Harry W. Arthurs will describe for us the public employee system in Her Majesty's Government in Great Britain.

DEAN HARRY W. ARTHURS: Let me say briefly, in an introductory way, that the Canadian private sector system should be familiar to any American observer. The Wagner Act concepts are basic to our collective bargaining system, although to them has been added an historic component of compulsory conciliation. However, I think one can say that in the public sector the Canadian experience is distinctive in the sense that it has been "normalized." That is, it has moved toward the private sector system to a degree that perhaps is unfamiliar to most Americans.

Very rapidly over the past 25 years, the public sector has come to resemble the private sector. For example, beginning in 1944, municipal employees in all provinces were brought immediately under private sector legislation and, with few exceptions, have

pretty much remained there since that time. In the same year, employees of the Saskatchewan provincial government were moved to private sector legislation and have remained there.

At the federal level—the Government being the major employer in the public sector—employees were brought under what again is familiar private-sector-style legislative arrangements in 1967, with the right to organize and bargain collectively and, subject to one major modification which I will describe later, the right to strike.

In several of the provinces other than Saskatchewan, the regular private sector legislation basically prevails, or the federal model has been adopted with modifications. In practically all of the remaining provinces, the collective bargaining system has, as its terminal point, not the strike but some form of compulsory arbitration or binding mediation. In those few remaining areas of the public service where no definitive dispute resolution techniques exist, they are being developed.

Thus, if you will allow me an oversimplification, I can say at a minimum that Canadian public employees do have the right to bargain collectively; at a maximum, they have the right, under collective bargaining procedures, to strike; and, at a point beyond which we are rapidly passing, they generally have a right to compulsory arbitration or binding mediation or, in any event, to some definitive form of dispute resolution.

The United Kingdom has a collective bargaining system that is based not so much on legislation as on past understandings and accepted ways of doing things. To a large extent both labor and management seem to have agreed tacitly to abstain from using any form of legal recourse in the regulation of their relations. This private sector pattern has been reflected in the public sector in some respects.

In 1919, the national Government and its employees entered into an agreement to establish what is known as the Whitley Council system. This system is based on agreement rather than legislation. The form of negotiation between the Government and unions representing employees has as its terminal point arbitration which, at the present time at least, can be invoked only by the joint agreement of both sides. I will say a little more

about the Whitley Council arbitration system when we come to that, but one should not be surprised to find the virtual absence of any legislative sanction given in either the private or the public sector to arrangements worked out between unions and employers.

That, in a very brief oversimplification, will serve for the moment.

THE NEGOTIATION PROCESS AND THE STRIKE WEAPON

CHAIRMAN STUTZ: The second area of interest to which the speakers will direct their attention is the use of the negotiation process and the strike weapon within the systems they have already described.

MR. SMITH: There are a few points I want to add to what I stated at the outset concerning Belgium and Sweden. Professor Rehmus spoke about the so-called "most representative union" situation in France. This same concept prevails in Belgium. I am not sure I fully understand what it means, except that I get the impression that the Government or the private employer, as the case may be, makes a determination as to which are the most representative unions in relation to the segment of employees being represented or that have been organized by the respective unions, and then proceeds to deal with those unions.

Neither of these countries, therefore, recognizes our American principle of exclusivity of representation. This is to me a rather interesting point. Somehow we in this country come to think there is something almost sacred about this principle. But foreign experience suggests that other approaches to the representation question are viable.

What happens must be pretty interesting—how the employers, whether private or public, work out their collective bargaining arrangements with these so-called most representative unions having, in some cases, overlapping constituencies of occupational groups. The answer appears to be that the unions work this out on some kind of collaborative basis in dealing with the employers. How they get their internal problems resolved I don't know, but at least they do present a common front in dealing with the employer.

Getting back to Belgium: The collective bargaining pattern, at least in some segments of the public sector, seems to resemble that obtaining in the private sector. What it comes to is collective bargaining carried on through a system of bipartite committees functioning at the national and enterprise levels. Thus, the structure for bargaining is wholly different from ours. They sit as management and union representatives in a unitary body, and they work out their differences. Whether what goes on resembles our adversary process of collective bargaining, I frankly don't know yet.

In Belgium there have been a series of six so-called "social programmation" agreements, beginning in 1962, negotiated at the national level between the central Government and the confederations of most representative unions, the last one having been concluded in 1970. They cover broad areas, such as general salary increases, vacations, cost-of-living adjustments, pensions, and the like. These agreements are not per se enforceable in law as collective bargaining agreements. They depend for their enforceability upon the edict of the Government, although they take the form of working instruments that look like collective bargaining agreements.

The central point, then, about the nature of these national agreements—and this applies to Sweden as well—is that they gain their enforcement through a political process that follows the negotiation of the agreements, but this is somewhat irrelevant because of the particular kind of "cabinet form" governmental structure that exists. This also applies in general, as I understand it, to the local government levels. That means, of course, that when the government or its spokesmen negotiate an agreement, national or local, it has the capacity, at least theoretically, to back up the agreement with the necessary financing. That is a very important distinction between the systems in these countries and our own.

As to the right to strike—traditionally, in Belgium, the law pretty much follows the tradition in this country, based essentially on the same kind of legal concepts of sovereignty, that one does not strike against one's self, to use the phrase that appears in the manuscript of our Belgian contributor. The term applied is *contra-*

dictio interminis—inconsistency of a strike where the obligation of the employee is to render service to the Government.

Moreover, I understand there is legislation, applicable at least to some public sector situations, pursuant to which, if a strike occurs, the Government can designate categories of "essential" employees and "requisition" them—that is, require that they continue to work. The sanctions for "illegal" strikes are penal. The labor injunction is unknown. Finally, whatever may be the state of law, the Government is reluctant to intervene when strikes occur.

Regardless of the state of the law, the fact is that strike action is very rarely taken. Unions are convinced that immoderate use of strikes may lead to their ineffectiveness.

In Sweden the process, as has been mentioned, is one of centralized bargaining, and what has happened there—and this may be somewhat like the British situation—is that there is not very much labor relations law in the ordinary sense relating to the bargaining process and interest dispute settlement. The parties have worked out means of settling disputes through centralized bargaining.

On the other hand, there is a good deal of law concerning settlement of grievances. I am sure you are all aware of the existence in Sweden of the labor court, which has jurisdiction to enforce collective bargaining agreements. For an excellent treatment of the operation of the court, see Ben Aaron's article in the *UCLA Law Review,* September 1969 issue.

MR. REHMUS: Looking for a moment at the right to strike, Australia applies concepts similar to those we find generally in the United States. Australia's public employees have no right to strike. The Australians have, however, bitten the bullet and accepted the fact that the quid pro quo for deprivation of the right to strike is the right of employees to have all unresolved negotiating disputes go to binding neutral arbitration.

Strikes, nevertheless, occur in Australia over the results of arbitration awards. As have many of our jurisdictions in the United States, Australia has found it impossible effectively to enforce its ban against public employee strikes. They have experimented with a number of sanctions, such as imprisonment and fines upon

unions and upon members. Nevertheless, strikes do continue to occur, though not nearly as frequently as they do in some of our public jurisdictions in the United States.

In contrast, in both France and Germany the right of most public employees to strike is not in question. In France, for example, the right to strike is guaranteed to public employees by the constitution. The only limitation on it is in 1963 legislation, which requires a public employee union to give five days' notice before it strikes. This five-day notice limitation was deemed by the unions to be so severe an encroachment upon their fundamental right that its enactment in and of itself led to a number of strikes. It appears also that in the last several years the unions have increasingly been ignoring the five-day limitation and have been striking without any notice whatsoever. The reason that the French find this system of complete right to strike at least to a degree tolerable is simply that the strike in France has a definite but very limited function.

To the best of my understanding, the public employee unions strike the Government as notice of intent to bargain seriously. The unions periodically put demands upon the Government. If they want to say to the Government, "This time we aren't kidding. This time we really want a 5-percent general increase" sometime within the next month or two, they go out on a 24-hour or 48-hour strike. This is effective as notice to the Government, "You had better sit down seriously at the table and talk with us." So the French live with the system wherein as many as 3½ million public and private employees go out on strike at one time. This may be for a period of only 24 hours. They live with it because of its short duration and because of the peculiar function that it has in French society.

On the right to strike in West Germany, I am indebted to our colleague and fellow Academy member, Bill McPherson, who is preparing a monograph for us on the German experience. The constitution and laws of the Federal Republic contain no specific provision regarding the legality or illegality of strikes in the public sector. There is, nevertheless, general agreement on the legal limits of the strike right. Established civil servants cannot legally strike, and this has been generally recognized both by civil servants and by the Deutsche Beamtenbund (DBB), which repre-

sents them. In addition, at least three German states specifically prohibit civil servant strikes in their constitutions or in legislation.

The situation is quite different in the case of the other two groups of public employees—the salaried and the hourly paid workers. Their employment relations are governed by private law, and thus they have a complete right to strike over bargaining impasses. They may not, however, strike over grievances; such disputes must be taken to the labor courts.

In summary, there are differences in the right of public employees in West Germany to strike. Such differences are nationwide, however, and do not differ from state to state as they may in the United States and Canada. Nor are their rights based on a judgment regarding the essentiality of the work performed. As I noted previously, the civil servants who may not strike are engaged in a wide variety of jobs of all degrees of essentiality, although all police, firemen, and prison guards are civil servants. In other situations, however, the same task is performed by civil servants and by wage or salaried workers; thus, some may strike and some may not, the difference depending strictly on the legal basis of the employment relationship.

Finally, it should be noted that legal strikes of public employees do take place, and threats of strikes are increasingly common. While the incidence of such stoppages is not high by many standards, the use of the weapon is certainly real. Interestingly enough, in terms of a contemporary problem in the United States, one of the most militant groups of German public employees is the air traffic controllers.

MR. ARTHURS: I suppose the problem of sovereignty is an important issue in this discussion of the right to strike. I wouldn't have mentioned it myself, if my colleagues hadn't made a point of mentioning it, because I really don't think there is much in it. Certainly I think it is fair to say that in Canada the issue of sovereignty is more theoretical than practical: Public employees will exercise their right—not legal right but a practical right—to strike whenever working conditions are intolerable to them, whether they are striking "against themselves," or in violation of constitutional principles, or in conformity to law.

I think this is an accurate reflection of what we are coming

to accept not simply in the field of industrial relations, but more generally in the evolution of the concept of sovereignty. If one pauses for a moment to reflect in a broader context on the degree to which the state exercises legal immunities today, it becomes apparent that the gulf between "public" and "private" is rapidly diminishing. In this country at least (and I suspect in the States) the whole problem of sovereignty of government is rapidly being solved by making governments subject to private sector rules. Approaching the matter from another direction, the large corporation is acquiring many governmental characteristics and is beginning to perform many governmental functions. One could go on and on, but I think we will begin to see many other ways in which "public" and "private" have ceased to be really useful terms.

Now, having said that, it is not surprising to find that in the sphere of industrial relations the line between sectors is being rapidly erased, particularly as it relates to the right to strike. Perhaps the important points are how the right to strike will be channeled, how it will be used, to what ends it will be used, and what means are available to ameliorate strikes. These seem to me to be the important questions—not whether sovereignty is to be perceived as a barrier to the strike.

Under our federal Public Service Staff Relations Act, Federal Government employees have the right to organize, as do the private sector employees, and they enjoy legal protection against unfair labor practices of employers. Negotiations too are conducted in a typical way. There is some provision for what we call compulsory mediation and likewise, on occasion, for fact-finding. The ultimate recourse, subject to two qualifications, is the right to engage in a lawful strike.

What I want to talk about are those two qualifications because I think they touch on the importance of acknowledging the strike as a fact and doing something useful about it.

If the union chooses the arbitration route, of course, no problems arise. If it chooses the strike route, the important problem is, "How will certain kinds of public services be maintained?" Our federal statute identifies those services which are "essential to the safety and security of Canada"—fairly narrow terminology —not "well being," not "happiness," not "national prestige," but

"the safety and security of Canada." Employees so designated, who are in bargaining units that have selected the right to strike, are forbidden to strike, although it is the ultimate weapon that their bargaining agent has selected. Thus, designated employees are forbidden to strike but still receive the fruits of negotiations conducted under the threat of strike, even though they are not themselves permitted to desert their posts.

To what extent have people opted for the right to strike and to what extent have they chosen arbitration? These statistics might be helpful: Something in the neighborhood of 200,000 employees of the Federal Government are now included in bargaining units. Some 98 units, comprising 160,000 employees (in round figures), have elected arbitration. Eighteen units, comprising 38,000 employees, have chosen the strike. Of these 38,000, roughly 25,000 are postmen, who constitute by far the largest group of employees in Government who want the strike option. So, first of all, at the moment the great preponderance of employees, roughly 80 percent of those who made the election, have opted for arbitration rather than the strike.

Now, in those units that have elected the strike option, something less than 5 percent have been designated "essential to the safety and security of Canada"—designated, let me say, up to this point (Jake Finkelman can correct me if I am wrong) by both union and Government, who agreed that their services were essential.

Let me add one further statistic. We actually have had one strike under legislation—a post office strike which lasted three weeks. I am not sure why postal services are somewhat more important in the United States than in Canada. I might speculate that the perception of the people who make the judgments about what is important is better, but that would be rude.

I will say this for the Canadian system. We managed to live fairly well without the postal service. Alternate arrangements were made for the mail to be delivered. Arrangements were made for businesses that depend on cash flow to pick up their own mail—and my suspicion is that far more people receive bills than send them. Now, of course, the people who suffered considerably were those who were directly involved in the strike. The mail-

men were not very well prepared for the strike and had no real strike fund. They suffered. On the other hand, I think they demonstrated that the Government was not too vulnerable. The union made only a moderate advance over the position that the Government had been ready to settle for. The net result was to restore everyone's sense of perspective and to prove that exercise of the right to strike would not bring the Government to its knees. It was, overall, very healthy.

Now let me briefly canvass the provincial and municipal scene. As I have already indicated, at the municipal level in several provinces the right to strike does exist. On several occasions when the right was exercised in relation to essential services—hospitals, electrical distribution systems, and a few others—government intervention occurred on an ad hoc basis, either by stopping a particular strike and submitting to arbitration or by withdrawing the right to strike, on a continuing basis, from certain kinds of employees in the public sector.

In addition to this kind of ad hoc legislation, almost from the beginning in the mid-forties, there has been legislation precluding strikes by policemen and firemen. This city, Montreal, which suffered a policemen's strike last October, tells another side of the story. Here an arbitration award came down which police and firemen believed to be inadequate; there was a police strike lasting throughout the course of a day. Unfortunately, it was marked by rioting, arson, theft, and violence.

I don't know what general conclusions can be drawn from this experience. The strike had many implications beyond the industrial relations scene. It was a reflection of much that has been happening in Quebec. For this reason, I don't know whether one can generalize from the Montreal strike and say that arbitration is not a viable system for police anywhere. On the other hand, I would suspect that many of the tensions present in Montreal are analogous to the racial tensions you have in American cities. The combined burden of the urban crisis and the industrial relations grievances of the police might simply be greater than any compulsory arbitration system could bear.

Having said that, I can report that compulsory arbitration seems to work fairly well in the rest of the country, in police and fire departments and other areas where it operates.

Let me conclude by describing briefly an important area in which the right to strike is gradually being recognized: the public school system in Ontario. Through a strange historical anomaly, collective bargaining by teachers in Ontario, a large industrialized province, is conducted almost entirely beyond the boundaries of any legislation. The only statutory stipulation is that to be a teacher in Ontario one must be a member of the Ontario Teachers' Federation. The federation has an almost unwritten agreement with its employer counterpart, the Ontario School Trustees Federation, governing negotiation procedures. While the procedures do not contemplate strikes, they do provide that twice each year teachers have a right to resign their posts and thus create a quasi-strike. More and more frequently the Teachers' Federation is collecting mass resignations which it is prepared to deposit on the appropriate date with the school board in order to back negotiating demands. This nonstatutory, though lawful, "resignation" technique employed by the teachers is, in functional terms, a strike. I think that it is a rather peculiar model of how a publicly employed group can devise, without legislative sanction, a kind of private sector model where the strike is a terminal point.

MR. REHMUS: For those employees in Canada who have a legal right to strike, has anyone asserted that there is a countervailing governmental right to lock out?

MR. ARTHURS: I would imagine that the Government would have a right to lock out.

MR. REHMUS: The reason I raise the point, although I am encroaching on Russ Smith slightly, is because we have an interesting situation in Sweden. Some years ago SACO, which represents most of the Swedish teachers, struck about 20 percent of its members. The Government then locked out all the rest of the teachers in Sweden, up to and including the university professors, for about three weeks because they didn't want to face the possibility of whipsaw strikes and settlements.

By comparison, in Michigan, where we are faced with a largely complete de facto right of teachers to strike, it has been held recently that the employer does not have the right to lock out.

MR. SMITH: You refer to the bulk of the arbitration system with respect to Ontario and, I guess, some of the other provinces. Maybe this should be reserved for the last few minutes of our discussion, but do you have any impression as to what impact, adverse or otherwise, arbitration has upon collective bargaining and the collective bargaining process? In the United States one of the arguments against compulsory arbitration is that it stifles collective bargaining and therefore we shouldn't go for it.

MR. ARTHURS: Well, my impression is that it sure doesn't help. In the last four years with the statute that compels arbitration, I have noticed the increasing trend toward arbitration and away from pre-arbitration settlement. It started around 3 or 5 percent, stepped up to 8 or 10 percent, and is now somewhere around 20 percent of disputes going on to arbitration, so that, contrary to my first impression shortly after the statute was passed, the experience seems to confirm the conventional wisdom that compulsory arbitration chills bargaining.

NONBINDING DISPUTE SETTLEMENT MACHINERY

CHAIRMAN STUTZ: I think perhaps we can move along now to the third major topic to which the speakers have been asked to address their remarks, nonbinding dispute settlement machinery.

MR. SMITH: The situation in Belgium, as I understand it, is something like this: There is no formal governmental conciliation or mediation machinery available with respect to public sector disputes, as there is in the private sector. To quote my authority, problems in relation to disputes are settled through "continuous contact" between the parties. The last social programmation agreement, which covers national departments, agencies, public and private schools, provinces, and municipalities, provides for the creation of a joint committee, in our terminology, under the presidency of the Minister of Public Employment, which is supposed to supervise the application and interpretation of the agreement. There is no provision for third-party intervention in the resolution of contract interests or rights disputes. There is no counterpart to our fact-finding, advisory arbitration, or other kinds of procedures.

The situation is similar in Sweden, except that mediation is provided. But here again the basic national agreement provides

for the creation of a public service council, a bipartite group to which, on petition of either party, may be referred any dispute that in the opinion of either party is calculated to disturb important social functions.

Upon the occasion of such an appeal, the council is to determine whether the dispute does threaten to disturb a social function and, if it does so find, then to request those concerned to limit or to end the dispute. It is further provided that, pending determination of the issue by the council, any so-called "offensive" action by way of strike or lockout is to be postponed for a maximum of three weeks.

MR. REHMUS: I can be rather succinct on the subject. In Australia they have government-appointed conciliators. Their work is almost totally ineffective for the simple reason that the parties have somewhere else to go—to arbitration—and are on their way there. Those of you who have acted as mediators know this is almost an inevitable result where parties have somewhere else to go.

In France there is no governmental structure for conciliation or fact-finding. Though they have hundreds of public employee strikes, they apparently do not bother with conciliation, mediation, or fact-finding. This is apparently because of the commonsense observation, "Since the strike is going to last only a day or two anyway, why bother about settling it?"

In West Germany there are a few government conciliators. Almost every state has one conciliator, but their role doesn't seem to be important or fundamental. As far as the Federal Government is concerned, neither the constitution nor legislation has provided for conciliation or arbitration.

Where conciliation is used in the private sector in West Germany, it is ordinarily because of the inclusion within collective bargaining agreements of a private voluntary system for conciliation and fact-finding by a board composed of an equal number of representatives of both parties. The model appears similar to the system used by the IBEW and the National Electrical Contractors Association in the United States. In Germany this voluntary system is fairly common and quite effective in the private sector. We cannot find that it has been used in the public sector, however.

MR. ARTHURS: First of all, speaking of England, I can rapidly span the subject. I have already mentioned the Whitley Council arbitration system. Having said that, I must immediately report to you that somebody, describing the operation of the Whitley arbitration tribunal, said, "The system represents a search for compromise, not for adjudication." It rather baffles me to what extent it represents conciliation rather than adjudication, so I intend to put England to one side. Certainly there is no step that is formally designated as a fact-finding, conciliatory, mediatory endeavor.

In Canada the typical private sector statute, up to this point, has a two-step conciliation procedure: (1) mediation by a government-paid conciliation officer; (2) fact-finding by a tripartite board, the board being appointed ad hoc with a representative of each of the two parties and a third member designated by them as chairman.

In a very broad sense this scheme has been imported into the public sector (subject to some discretion on the part of the chairman of the Public Staff Relations Board) and is available under our federal Public Service Staff Relations Act. In addition, some experimentation has been undertaken, particularly in relation to the postal strike, with the appointment of a nonstatutory mediator. There has been a "preconciliation" mediator, a "postconciliation" mediator, and a number of other strange animals who were somehow glued together to perform functions.

I think mediators will emerge wherever the situation seems to require it, whatever the legislation provides or does not provide, and I offer in evidence the Ontario teacher situation which I described a few moments ago.

Last January negotiations broke down in the metropolitan Toronto school system and the parties hired themselves a mediator. I think there will be an impulse toward mediation whatever the final procedure is, at a minimum to clarify the issues going to arbitration, and at a maximum to avoid having strikes. I think there will be a continued use of mediation whether there is a statute or the parties simply want it.

Fact-finding has found disfavor in Canada as a general private sector device. If it remains strong anywhere, it will probably be in the public sector because, first of all, there is an expenditure of

public funds and the public will want to know something about how the Government is conducting its business and, second, because the public employer is vulnerable, in a way that no private sector employer is, to the kinds of political pressure that can be generated by a fact-finding report.

BINDING METHODS OF DISPUTE RESOLUTION

CHAIRMAN STUTZ: We can move now quickly to the fourth general subject area, the use of binding dispute settlement machinery, most commonly in the form of compulsory arbitration.

MR. SMITH: My report is very brief. Arbitration of labor disputes is almost unknown in Belgium. The unions reject both compulsory and voluntary arbitration. In Sweden they have accepted the principle of arbitration of grievances, through the labor court system, but labor courts have no jurisdiction over contract-term disputes, and there is no provision for compulsory arbitration.

MR. REHMUS: Australia, among the countries about which I am speaking today, is the sole country with wide experience in compulsory arbitration. The Australian experience is not such as to encourage those who doubt the conventional wisdom—those who say that the existence of the compulsory arbitration system will not corrode collective bargaining.

In Australia collective bargaining plays a relatively limited role in the settlement of interest disputes. The Australian system goes back to the late nineteenth century. Following their so-called great wave of strikes in the 1890s, the states and the Commonwealth Government generally opted for a compulsory arbitration system for the settlement of disputes. This has been accepted in general throughout Australian society. The parties, the Government, the public, and the unions themselves, generally favor the system for a number of reasons.

First, they say that the system substitutes reason for power and public decision-making for secret compacts. They say it brings a greater factual input into the making of wage decisions and greater equality to employees with weak labor market power. The unions seem to like it because it eliminates their responsibility for wage agreements. They can simply say to their members, "We

didn't do it. The commonwealth arbitrator made the decision and it is not our fault."

It has the interesting effect of elevating to union leadership, at least in some cases, not the man who is an outstanding political leader, not the man who is an outstanding negotiator, but the man who is most skilled in presenting arbitration cases before the Commonwealth, state, and public service arbitrators. This tendency is apparently increasing.

It is true, there are criticisms of the process throughout the Australian Commonwealth. The criticisms are those you might anticipate: First, the system is overloaded. There is a great jam-up of cases, so that frequently as much as two years elapse between the beginning of what we might call a general wage dispute and the ultimate decision. This delay in the arbitral process in itself has led to a few strikes.

The other criticisms are that the existence of the procedure leads to exaggeration of differences, speaking-for-the-record rather than negotiations, and controversy rather than compromise. Moreover, the arbitration process is becoming increasingly formalized and legalistic, as you might expect. The parties have had over 50 years of experience in presenting cases before the public arbitrators, most of whom are legally trained.

As a consequence of these complaints, there are a few situations in the past decade where the parties have turned back to collective bargaining in order to avoid the toils and delays attendant upon a compulsory arbitration system. This doesn't appear to be the wave of the future. Based on the information we have received, these cases in which people have once again opted for collective bargaining are few and infrequent. More common is the practice of bargaining out many contractual issues and reserving only the most difficult issues for the arbitrators.

The arbitrators themselves are attempting to do what they can to encourage this practice in order to reduce the delays and the heavy load of cases coming before them. In recent years they have required, before the parties come to them for decision, evidence of what they call genuine conciliation. As best I can tell, they mean by this some evidence that the parties tried to negotiate their agreements themselves and some evidence that the govern-

ment conciliator who was involved did actually try to give the situation something more than a lick and a promise. But if there is a prima facie case of some kind of face-to-face meeting and participation of a conciliator at some stage of the proceedings, most of their public disputes move inevitably and inescapably toward decisions through the arbitral process.

In the private sector one of the interesting features of the arbitration system is that the arbitrator's award sets only a floor for wages. In some cases the parties then actually sit down and negotiate what they call "over-award agreements." Under these, some or all employees get wage or salary increments over and above the arbitrator's award.

MR. ARTHURS: Compulsory arbitration in the Canadian federal system stems from the British model, but is based on legislation rather than a mere voluntary agreement. In Canada the Arbitration Tribunal is appointed for a fixed term of office, on a part-time basis, and sits when needed; it is tripartite. The chairman is not only an experienced labor mediator but also enjoys great repute as a jurist. In Britain the Whitley arbitration tribunal is bipartite rather than tripartite, but both tribunals share certain characteristics.

First of all, both arbitration tribunals are assisted by pay research bureaus which generate statistics on an expert and impartial basis for the use of both sides. Second, both tribunals, interestingly enough, are committed to the proposition that awards should appear which announce the results but not the reasoning behind the decision. There should not be any attempt to develop jurisprudence to a point where it might assist people to prepare subsequent cases. Third, I think it is fair to say that both also have standards which, however, vague, are at least present in the mind of the tribunals in making their decisions. In Canada these are provided by statute; in Britain, by consent of the parties that adopted guidelines developed by a royal commission. Finally, I think neither system has licked a problem that must ultimately plague both compulsory arbitration and collective bargaining. Obviously, the Government, as a major employer, will make a demonstrable effort to hold the line on wages, as part of its general campaign against inflation. This will undoubtedly create press-

ures both on the Government's negotiating posture and on the arbitration tribunal.

One other point in both countries is the residual power of Parliament to appropriate funds in order to honor a settlement or an arbitration award. I think I can predict in this country that for Parliament to fail to implement an arbitration award would be almost unthinkable. It would amount to a vote of no-confidence and would bring down the Government. I imagine this would also be true in England. I could believe anything in the States.

CONCLUSIONS

CHAIRMAN STUTZ: Do any of our panel members have any comments in conclusion?

MR. SMITH: I will go over a list of tentative conclusions without benefit of any prior consultation with my colleague, Professor Arthurs. This is an attempt to draw together what we have discovered so far.

First, there appears to be an increasing trend toward recognition, either de jure or de facto, of what we in the United States call basic "rights of unionization," including collective bargaining, by public employees, and the fact of the matter appears to be that in many countries of Europe and other parts of the world there is a more extensive experience with public sector unionism than in the United States.

Second, the kind of recognition afforded tends to be related to or affected by or even parallel to private sector practices, except that in some countries (West Germany, for example), high-level civil servants are accorded less "recognition" than lower level employees. Recognition of a right to strike, de jure or de facto, is quite common except in the case of personnel essential to the public peace and security, such as police, and, of course, in Australia, where disputes are supposed to be resolved by arbitration.

Third, the development of unionism in the public sector in general tends to reflect the traditions and objectives of the private sector, and there appears to be a good deal of overlap of representation in the private and public sectors.

Fourth, foreign law and practice in connection with public employee unionism in some instances involves some rather significant departures from the concepts we have accepted in the United States, one being that the principle of exclusive recognition does not appear to be generally accepted outside the United States and Canada, at least in those countries we have surveyed.

Fifth, a point which we have not mentioned, compulsory unionism does not seem to be a cherished concept or established as a matter of practice in most of these countries. As a matter of fact, in one country, Belgium, the unions would rather not have compulsory unionism because they want the opportunity to go after employees and convince them of the merits of unionization.

Finally, the centralization of collective bargaining through confederations of employers and unions is much more prevalent elsewhere than in the United States, and in some countries, notably Sweden, it has resulted in or been accompanied by a high degree of union-management concern for the public interest. The centralized character of collective bargaining seems to be a phenomenon that we cannot really employ in the United States in public sector unionism, except perhaps when we are considering matters that arise at the state level. For example, in the public school systems it may be that there is a lesson to be learned in terms, at least, of the financing of the public school costs.

MR. REHMUS: I would like to comment that, judging by the experience in foreign countries, public employee bargaining appears to work better in a parliamentary system of government than it does in an executive system. By this I simply mean that where those who negotiate for the government are part of the legislative branch, the essential dovetailing of decisions is easier. Agreement between those who make the bargaining decision and those who must provide funds is more readily accomplished there than it is in a system where the public negotiator is separated by law from the legislative body that must provide the funds.

We have a number of quasi-parliamentary systems in the United States. For example, school boards in many states are fundamentally parliamentary systems of government. In such a situation we find it easier to make decisions over settlement terms than in systems where, after negotiations, one must go to

someone else to get the funds. The logic of separation of powers does not work so well in a collective bargaining context.

Second, Russ Smith emphasized the centralization of bargaining that we find in many of these countries. What we would call multi-employer bargaining units of various governmental units is extremely common. I suspect that this results from the logic of the situation in which splintered governmental units find themselves individually whipsawed if they don't bargain together. This may occur increasingly in the United States. For example, I think it is significant that the Michigan legislature now has before it a proposal from the governor for a wholly new system of financing public education, based primarily on the income tax rather than the property tax. Another major feature of his proposal is that we no longer bargain teacher salaries in 500 individual school districts, but in only 15 intermediate school districts covering the major geographical areas of the state. Both of these proposals for centralization result at least in part from the pressure that collective bargaining places on individual isolated districts. I believe that centralization of decision-making of this or a similar kind is an almost inevitable concomitant of public employee negotiations.

Finally, many of you may be saying to yourselves, "What relevance does the experience of many smaller countries, such as Belgium or Sweden, have for the United States?" Viewing the United States as a whole, I would think not very much. But the appropriate analogy is, I think, not to the United States but to the individual states. The extensive experience of our close neighbors in Canada may well be a major influence on both our federal and our state systems. Equally important, the lessons of experience in many other countries may be quite relevant to Maryland, Michigan, New York, or any of the individual states.

We have much to learn about living with public employee unionism and resolving negotiating impasses in the public service. We can profit from the experiences—both good and bad—of the other industrial democracies that have preceded us in the field.