

CHAPTER 3

LESSONS FROM INTEREST ARBITRATION IN THE PUBLIC SECTOR: THE EXPERIENCE OF FOUR JURISDICTIONS

ARVID ANDERSON*

The title of this session is a bit presumptuous, implying that learning about the impact of arbitration on bargaining is a one-way street from the public sector to the private sector. This is not true, of course, since there is now an increasing number of examples of highly successful private sector arbitrations of interest terms. The recent steel settlement is a most notable current example, but there are others: for instance, the baseball experiment of earlier this year. Peter Seitz has written an excellent account of his experience with high-low arbitration which appears in the April issue of the *Arbitration Journal*. Additionally, certain construction contracts for the sheet metal and electrical industries, certain public utility and transit contracts, and the fur industry agreements utilize interest arbitration.¹

Arbitration is no longer an obscenity when used to describe the determination of contract terms. But then, what words are considered obscene today? Arbitration of new contract terms, interest disputes, that is, in the public sector has become an increasingly accepted practice in response to public interest demands for a strike alternative. At least 10 state laws,² several local laws,³ the

*Member, National Academy of Arbitrators; Chairman, Office of Collective Bargaining, New York, N. Y.

¹ An agreement was also reached recently between the Amalgamated Meat Cutters Union and Iowa Beef Processors, Inc., to refer unresolved contract issues, including wages, cost of living, and contract duration, to binding arbitration. This agreement ended a six-month work stoppage at three of the company's plants.

² For example, New York City [N.Y. Civil Service Law §204-a(1) (McKinney 1973)]; Indiana [Ind. Code §§20-7.5-1 to 7.5-14 (1971)]; Wisconsin [§§111.80-97 (Supp. 1973)]; Michigan [Mich. Comp. Laws Ann. §§423.201-216 (Supp. 1973)]; South Dakota [S.D. Comp. Laws Ann. §3-18 (Supp. 1972)]; Maine [Me. Rev. Stat. Ann. tit. 26, §§961-972 (Supp. 1972)]; Washington [Wash. Rev. Code Ann. §41.56.010-.950 (1972)]; Massachusetts [Mass. Ann. Laws Ch. 149, §1781 (Supp. 1972)]; Connecticut [Conn. Gen. Stat. Ann. §§7-467 to -477 (1972)]; Rhode Island [R. I. Gen. Laws Ann. §§28-9.1-1 *et seq.* (1968)].

³ For example, New York City [N.Y.C. Admin. Code §§1173-1.0 to 1173-13.0 (1973)]; San Francisco [San Francisco Admin. Code Art. XI.A (1973)]; Baltimore [Baltimore City Code, §§110-124, Art. I (1968)].

Canadian statute for federal employees,⁴ and the United States Postal Corporation Act⁵ have conferred the right of collective bargaining on public employees, while at the same time barring the right to strike. These laws have provided for the arbitration of contract terms for certain categories of employees as a means of impasse resolution, and as a substitute for the strike weapon. Thus, the emphasis in this paper will be on the public sector.

The majority of public sector jurisdictions have banned the right to strike and do not provide for arbitration as a means of resolving contract terms, but a sufficient number of jurisdictions have adopted arbitration as a means of impasse resolution to warrant an examination of their experience. These jurisdictions include Wisconsin, Michigan, Pennsylvania, and New York City, which we will hear about today. The states of Massachusetts, Michigan, Oregon, Pennsylvania, Minnesota, Rhode Island, South Dakota, Washington, Wisconsin, and Wyoming also provide for arbitration of police and fire disputes and ban strikes. A number of other jurisdictions have authorized voluntary arbitration of interest disputes.⁶ Thus, we are not looking at an unusual development in one or two jurisdictions, but a wide spectrum of experience. While the experience is varied and the evidence is far from complete, we are able to ask and answer, in part, such questions as: Has arbitration prevented strikes? Has arbitration discouraged collective bargaining? Is bargaining possible without strike deadlines? What of the scope of arbitration awards and the quality of settlements? Also, what impact do last-offer techniques have on arbitration, mediation, and collective bargaining? And what of the role of the arbitrator in interest arbitration? Is he a mediator or a judge—or both?

While each of our panel members will present individual statistics on his experience, the early evidence demonstrates that arbitration of contract terms is here to stay in the public sector; that arbitration has not chilled collective bargaining and, in fact, has induced it in some cases; and that arbitration is growing in acceptance and importance as a means of contract settlement. In

⁴ Canadian Public Service Staff Relations Act (1967).

⁵ Postal Reorganization Act, Public Law 91-375, Aug. 12, 1970, 91st Congress, H.R. 17070.

⁶ For example, Hawaii [Hawaii Rev. Stat. §89-11 (1971)]; Kansas [Kansas Stat. Ann. §75-4332 (Supp. 1972)]; Nebraska [Neb. Rev. Stat. §48-820 (1968)]; New Jersey [N.J. Stat. Ann. §34:13A-7 (1965)]; New York [N.Y. Civil Service Law §209 (McKinney 1973)].

New York City, for example, where final and binding arbitration is now the law for all local employees, except teachers and transit workers who are subject to the Taylor law, there have been 239 contracts negotiated and only 15 impasse panel awards in the 27 months since the law was enacted. Of these 15 awards, the majority were confirmations, in whole or in part, of the bargaining of the parties, assisted by the impasse panel.

Thus, the record to date in New York City is demonstrating that binding arbitration has not chilled bargaining by the parties directly and that the arbitrators serving as impasse panel members have facilitated the completion of the bargaining in about 6 percent of the cases. Will the record stay that way? We don't know. A new administration and changing union tactics make such predictions uncertain, but the record is showing that the right to strike is not the *sine qua non* of the collective bargaining process.⁷ Saying so does not make it so. I am not arguing that collective bargaining in the public service cannot be made to work with the right to strike. There are some jurisdictions, for example, Pennsylvania and Hawaii, where that right exists for some public employees under certain conditions.⁸ Nor am I arguing that the enactment of arbitration statutes prohibiting the right to strike eliminates the power to strike, or prevents the occurrence of some strikes. Plainly, there is no absolute guarantee against strikes in a free society. Our experience in New York City with the five and one-half hour strike of firefighters is an example. The firefighters' strike was terminated by an agreement to arbitrate the dispute. I have referred to the strike question because it is necessary to get rid of certain clichés about the relationship of strikes and the bargaining process before one can examine intelligently the impact of arbitration on dispute settlement. If one believes that bargaining or impasse resolution on a fair basis is not possible without the right to strike, there isn't much one can learn about an alternative system of arbitration.

⁷ As David Cole has written, "Nor is it a fact that the strike has consistently been regarded as essential to the process of collective bargaining. . . . On the contrary, it takes very little research to demonstrate that historically this proposition has often been subject to question." See David L. Cole, "The Search for Industrial Peace," in "Exploring Alternatives to the Strike," a Special Section, 96 *Monthly Lab. Rev.* 35 (Sept. 1973), at 37-39.

⁸ In Pennsylvania, all employees except police, firemen, guards at prisons and mental hospitals, and court employees may strike as long as their work stoppage does not create a clear and present danger to public health, safety, or welfare.

The fact that arbitration is being discussed today on the basis of experience in four major jurisdictions demonstrates that there is a new attitude and new acceptance of arbitration in the resolution of public contract disputes. And if interest arbitration is acceptable and is working in the public sector, why should it not be tried in the search for an alternative for resolving some disputes in the private sector, particularly on a voluntary basis? Bob Fleming, in his address at our last annual meeting, urged private parties to experiment more broadly than they have in the past with interest arbitration.⁹ He pointed out that attitudes toward the process had changed, and that while arbitration of interest disputes was not a panacea, it appeared to be an idea whose time had come—an idea that should be considered as a reasonable alternative to the strike as a means of dispute settlement.

I refer to arbitration as an alternative to the strike, a substitute for the strike. I do not say that it is a strike equivalent. In some instances, arbitration will be more effective than the strike, and in other instances it is likely to produce less for the union than the power of the strike could command. In the public sector, the power of librarians or welfare workers to effect a result favorable to them by means of a strike is different from that of police or firemen employed by a major city, regardless of whether the strike is legal. Arbitration tends to balance the bargaining power between the employer and the employee organization in the public sector. Arbitration could be a balancing factor in the private sector as well, and that may be a very desirable goal in industries delivering monopoly services to the public. Moreover, the very fact of a balance in bargaining power along with other economic factors may make the cost of disagreement by the strike so high that arbitration is a reasonable alternative. Steel seems to be that example. The question then arises: Is what is good for the steel industry and the United Steelworkers good for the rest of industry and the labor movement? Each industry, each employer, and each labor leader will have to answer that question. The point is that arbitration is now a respectable option to the strike route for some or all unresolved issues.

⁹ R. W. 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), at 1-7.

A criticism of interest arbitration has been the belief that third-party settlement will result in the imposition of new contract terms by an outsider, who has no understanding or responsibility for the process. The fear is that an arbitrator will impose his misguided brand of industrial justice as an irrevocable and unworkable condition of employment upon the parties. If one searches, perhaps a horrible example or two to prove the point can be found in some jurisdictions. No procedure is perfect, but the experience to date is proving that arbitration has not resulted in a large number of third-party determinations imposed from the outside without any regard to the needs or wishes of the parties. Rather, what we have seen developing is the use of third-party assistance with the possibility of finality, or arbitration, if other means fail. What has been evolving is not "mediation to finality," to use Willard Wirtz's phrase, but what the Kagels call "med-arb to finality." What is happening is that just as in grievance-arbitration matters, jointly selected, jointly paid arbitrators have been asked to assist the parties to resolve their disputes, using mediation techniques to explore the acceptability of possible awards.

Interest arbitration in New York City has been concerned with accommodation, adjustment, and acceptability rather than formal win-lose adjudication, as is the emphasis in most contract rights disputes. Words such as accommodation, adjustment, and acceptability—are they not synonymous with compromise? And are not arbitrators criticized for compromising awards? The answer is yes, but compromise is the *essence* of collective bargaining, and compromise may be just what the arbitration of new contract terms calls for. Remember, I am talking about interest arbitration—contract-making. The game is different; the rules are different from those of grievance arbitration.

In some jurisdictions, interest arbitration is tripartite in character. This procedure, if the employer and union representatives are not zealously partisan, can aid the neutral arbitrator in correctly assessing the areas of expectation of the parties in formulating his final determination. Some arbitration decisions are also confirmations of the bargaining decisions of the parties, which they prefer, for their own political needs, to have issued as arbitration awards rather than as agreements reached by themselves. If the agreement is reached in good faith, and the arbitrator can

in good conscience support the conclusion, why shouldn't he confirm the bargaining of the parties? Scapegoats and arbitrators are expendable.

Some jurisdictions are experimenting with final-offer arbitration in police and fire disputes, and we will hear more of the Michigan and Wisconsin experiences later. Whether final-offer procedures, either issue by issue on economic items or total package awards, aid or impede collective bargaining is one of the questions under assessment. The question is whether final-offer arbitration, or forced-choice arbitration, as it perhaps should be more properly called, is a better stimulus to collective bargaining than conventional arbitration. Significantly, such questions now center on the alternative means of arbitration and not on the issue of whether arbitration can work as an acceptable means of dispute settlement. The issue then becomes which form of arbitration is most likely to be the most effective in encouraging the collective bargaining process.

As for the fear that arbitrators will impose unique, innovative provisions that may prove unworkable, it is interesting to note that there has been a reticence on the part of arbitrators to be innovative. It appears that most arbitrators prefer to follow, or perhaps it is fair to say that the parties expect the arbitrators to follow, predictable paths. Furthermore, the scope of public sector arbitration is usually governed by statute and the agreement of the parties.¹⁰ Statutory criteria, such as cost of living and comparability, coupled with the possible specific agreements of the parties on the scope of arbitration, discourage radical innovation. A recent example is a police arbitration in Dearborn, Mich., where Ted St. Antoine declined to install a dental insurance plan that he considered to be too innovative. Of course, there were many other issues in dispute in the particular case, but St. Antoine commented: "The chairman of the panel, at least, would ordinarily prefer to leave most of the pioneering in labor agree-

¹⁰ Under the New York City Collective Bargaining Law, the report and recommendations of an arbitration panel must be confined to matters within the scope of mandatory collective bargaining. The statute also sets forth the following criteria, which must be considered by the arbitrators: (a) comparison of wages, hours, and working conditions of the public employees with those of other employees performing similar work and other employees generally in public and private employment in comparable communities; (b) overall compensation paid to employees; (c) changes in the cost of living; (d) the public welfare and interest; (e) factors normally considered in the determination of wages, hours, and conditions of employment.

ments to voluntary collective bargaining, rather than impose new provisions through the compulsory process or statutory arbitration.”¹¹

In the private sector, the parties by agreement can establish their own criteria and limits to guide any issues submitted to arbitration and thus reduce the risk of an unacceptable award.

I do not want to leave the impression that arbitration is always safe and predictable. In fact, the lack of predictability of arbitration results encourages direct settlement by the parties. The former director of the New York City Office of Labor Relations, Herbert L. Haber, stated: “The ‘threat’ of arbitration in this area is an even greater spur to management’s settlement motivation than a strike. My fear of itinerant philosophers making judgments on policy determinations will likely keep my feet to the fire even longer than my fear of a walkout.”¹²

Related to the question of predictability of arbitration awards is the question of the timing of an award. The parties’ knowledge that arbitration procedures will be invoked within a certain time period if they fail to reach agreement often stimulates bargaining in a manner similar to the strike deadline. Anyone who knows government knows how terribly slow it can be in decision-making. Undoubtedly, this delay is one of the reasons for public sector strikes. After all, government does nothing as well as it does anything. But unions also can be slow in making decisions, particularly if they want to follow or improve upon patterns set by other organizations or wait for the results of a political or union election or legislative action. In those circumstances, the employer may want to take the initiative in arbitration.

Under the New York City law, only neutrals who are mutually selected by the parties are requested to serve as impasse panelists. The term impasse panel is synonymous with fact-finding, with the important difference that the panel recommendation may become final and binding if no appeal is taken to the Board of Collective Bargaining within 10 days from the date of the recommendations. If an appeal is taken, the Board of Collec-

¹¹ Arbitration decision in the *Matter of City of Dearborn, Michigan, and Police Officers Association of Dearborn*, Theodore J. St. Antoine, Arbitration Panel Chairman, 545 GERR 3/11/74, at E.2.

¹² Herbert L. Haber, “Factfinding with Binding Recommendations,” in *supra* note 7, at 44.

tive Bargaining may affirm or modify the recommendations, subject only to the conditions of due process and the further condition that any part of a recommendation or decision that requires the enactment of a law prior to implementation cannot be implemented until such law is enacted. To date, only three impasse panel cases have been appealed, and all have been affirmed without change. It is expected that impasse panel members will be prepared to serve as active mediators in efforts to resolve some or all of the disputes. This is not so in every case, but in most. We have noticed in New York City that not all issues in dispute between parties are submitted to the impasse panel. A very large number of them may be reduced or eliminated by direct bargaining of the parties or with the use of mediation efforts prior to the impasse panel procedures. Thus, in practice, the parties submit a limited number of issues, often concerning very specialized topics, to the impasse panel. The parties may have reached tentative agreement on most contract terms, and the impasse panel determinations merely add to the final agreement.

A recent dispute in New York City illustrates the importance of administrators' refusing to submit a very large number of issues to an impasse panel without first ascertaining whether or not there can be a resolution of some of those issues short of arbitration, or at least mediation assistance in the proper framing of the issues to be considered for arbitration.

In this citywide case, the contract covered 120,000 to 130,000 employees, and the dispute concerned conditions that must by law be uniform for them, such as vacation, sick leave, holidays, and overtime. Initially, there were over 200 disputed issues. Intensive, persistent mediation efforts by the deputy chairman of the Office of Collective Bargaining, George Bennett, reduced those issues to 30 before they went to the impasse panel, and some of those 30 were really duplications—management or union positions on the same subject.

Under the New York City Collective Bargaining Law, recommendations issued by an impasse panel in a contract dispute must be confined to matters that are mandatory subjects of bargaining. Disputes concerning permissive subjects may be submitted to an impasse panel, however, but only if both parties mutually agree upon such submission. Prohibited subjects of bargaining—those

statutorily, constitutionally, or judicially barred from negotiations—are not within the purview of an impasse panel.

The tripartite Board of Collective Bargaining makes final determinations as to whether a particular subject may be submitted to arbitration. Because impasse proceedings are often complicated by disagreements between the parties as to the negotiability of certain issues, the Office of Collective Bargaining has developed an expedited process to determine which matters fall within an impasse panel's jurisdiction.

This process was used to expedite settlement in a 1972 impasse between the city and the New York State Nurses' Association. After questions arose as to the scope of arbitration, the Board of Collective Bargaining divided all issues at impasse into three categories: (1) those that were concededly within the province of the impasse panel; (2) professional matters; (3) matters on which bargainability was contested.

The Board of Collective Bargaining then ordered the impasse panel to issue recommendations on those issues in the first category, that is, those concededly negotiable. Issues in the second category of "professional matters" were made subjects of direct discussion by the parties, "assisted by a mutually acceptable mediator and under the aegis of the OCB." The "fact-findability" of disputed matters in the third category—for example, application outside the bargaining unit of differentials for work in higher classifications and promotional guarantees—were eventually decided by the Board of Collective Bargaining in time for them to be included in the panel's recommendations. Unresolved professional issues were reserved for future board action.

This separation of issues made the dispute settlement process more manageable and has been used in subsequent impasses. By limiting the issues within the scope of arbitration and by dealing with the three main categories of subjects concurrently rather than consecutively, the board assists the parties in reaching agreements more expeditiously.

The concept of limiting the issues that can become subject to an interest arbitration award has much validity in the private sector, too. Limited issue arbitration is one way in which private sector employers and unions can "ease" into using third parties to issue final and binding awards. Some bargaining matters, for ex-

ample those to which both parties are very committed but which each side knows are not worth the cost of a strike or lockout, may be especially appropriate for arbitration.

It has been our experience that where the third-party neutrals have been mutually chosen and where they have served as med-arbitrators, they also can be successful in reducing or eliminating or clarifying a large number of issues before the remainder must be resolved by an arbitration decision. We also have experienced a situation where tentative drafts and disposition of issues have been proposed by the impasse panelist to the parties with the opportunity for them to comment before final disposition. Such procedures seldom change the substance of a decision, but may affect the condition or language in which the decision or contract terms are resolved.

The neutrals most likely to understand the relationship between arbitration and the collective bargaining process are those who have extensive mediation experience or have served as umpires for companies and industries where they have acquired a good understanding of the nature of the industry and employment conditions. This awareness of the collective bargaining process will enable the arbitrator to assist the parties in bargaining to an agreement without the necessity of a formal decision. Normally, interest arbitration will involve greater time commitments than some busy arbitrators can or are willing to give. Generally, contract-making takes longer than resolving contract rights disputes. Some grievance arbitrators may be reluctant to aid in the settlement of cases; but, again, interest disputes are a different ball game, and a settlement by the parties themselves is normally to be vastly preferred to an award.

Anyone working in this field must be cognizant of the political factors in interest arbitration. An analysis of the political factors is beyond the scope of this paper, but their presence will be felt and arbitrators must be prepared to recognize and cope with them.¹³

It is unrealistic to expect a wholesale rush to interest arbitration in the private sector. As long as private sector collective bargaining remains essentially an economic power struggle, the strike

¹³ For a good discussion of the political arena in which public sector bargaining takes place, see Robert D. Helsby, "A Political System for a Political World in Public Sector Labor Relations," 24 *Lab. L. J.* 504 (1973).

and lockout will remain available as ultimate weapons—at least in certain industries. Moreover, the psychological impact on the parties of their mutual right to strike and lockout is often the primary catalyst inducing dispute settlement.

However, as my colleagues will illustrate, the innovations in dispute resolution that are being introduced in several public sector jurisdictions offer significant lessons for public and private bargainers: (1) that new procedures are available and that arbitration has supplemented rather than supplanted free collective bargaining and, in some cases, may even have enhanced it; (2) that arbitration procedures contain a great deal of flexibility, depending on how the statute is administered, how the arbitrators are chosen, how the issues are submitted, and how the arbitrator performs his role in the dispute settlement process; and (3) that the benefits to be gained through peaceful, albeit third-party prescribed, settlements may outweigh the very risky right to engage in economic warfare—particularly today when the impact of foreign competition is a mutual concern of management and labor.

Will the record of arbitration in limiting strikes and not chilling bargaining stay good? We don't know. Collective bargaining means change. Procedures that work today may not work tomorrow. But for now, I recommend consideration by private and public sector bargainers of limited issue and other creative forms of arbitration, at least on experimental bases. Certainly, the public record, based on the jurisdictions being examined here, justifies consideration by private and public sector labor and management leaders of the possibilities of utilizing interest arbitration. It has now become respectable to think about this procedure; its selective use may prove to be beneficial to all parties, as well as in the public interest.

WHAT THE PRIVATE SECTOR CAN LEARN FROM THE PUBLIC SECTOR IN INTEREST ARBITRATIONS: THE PENNSYLVANIA EXPERIENCE

J. JOSEPH LOEWENBERG*

Pennsylvania has had almost six years of experience with compulsory interest arbitration. As in most other public jurisdictions,

* Associate Professor of Business Administration, Temple University, Philadelphia, Pa.