CHAPTER 7

ARBITRATION OF PUBLIC-SECTOR INTEREST DISPUTES: ECONOMICS, POLITICS, AND EQUITY

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Introduction

The arbitration of interest disputes, in its various incarnations and transformations, is now well settled in the landscape of the public sector. The legislatures are adding to the number of statutes that provide for a resolution of interest disputes by neutrals.[1] Public-employee unions apparently prefer this method of resolution to its alternatives, and while the public employer may not be too enthusiastic, open signs of revolt are few—although they may be increasing.[2] Interest-arbitration legislation is surviving constitutional tests arising largely from the delegation-

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[1] According to the 1974 report of the Academy's Committee on Public Employment Disputes Settlement, by the end of that year 36 states had enacted collective bargaining statutes covering all or some categories of public employees; only 10 states remained with no laws, executive orders, or attorney general's opinions authorizing public-sector bargaining. Major public-sector labor legislation was enacted in 1975 in Connecticut, Indiana, Washington, Utah, California, and Maine, all states that have previously had some public-sector bargaining experience. Twenty states, as of January 1, 1976, have legislated arbitration, and the Indiana legislation sanctioning voluntary interest arbitration brought the number of states that approved this procedure to seven. Arvid Anderson and Joan Weitzman, *Significant Developments in Public Employment Dispute Settlement During 1974*, in ARBITRATION—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), and unpublished submissions to the committee for its 1976 report.

[2] Benjamin Aaron notes a growing disenchantment among government employers with the arbitration of interest disputes. At the same time he records a diminishing interest by some groups of government employees in the right to strike and presumably a growing acceptance of alternative settlement procedures. Aaron, *Procedures for Settling Interest Disputes in the Essential and Public Sectors: A Comparative View*, in COLLECTIVE BARGAINING IN THE ESSENTIAL AND PUBLIC SERVICE SECTORS, ed. Morley Gunderson (Toronto: University of Toronto Press, 1976), at 112–41. Aaron mentions the problems with public-sector collective bargaining in California (p. 136), and these are elaborated in Marion Ross, *The Local Government Budget Crisis: Is Bargaining to Blame?* CPER, CALIFORNIA PUBLIC EMPLOYEE RELATIONS (December 1975), at 2–12.

of-power issue.[3] Amidst such evidences of harmony, I would like to introduce several discordant notes, raise some (hopefully) disturbing questions, and suggest some possible future trends.

I will stress the obvious fact that any neutral setting a wage rate is deciding fundamentally about the allocation of resources in the public sector. The importance of such decisions could be minimized in a period of rapid growth in the public sector, which has now passed at least for a time. As Ross points out, "The outlook for the economy is not what it was in the halcyon days of the mid-60s. The assumption of an abundant and ever-expanding economy with 'more' for the public sector without cost to the private sector is no longer viable, if it ever was." [4] The neutral has few tools or concepts to make the appropriate decisions as to the allocation of limited resources. The criteria that he is given are of some use in the private sector, where the possibilities of a strike are present to lend reality to market forces, but they serve a different purpose in the public sector.[5] Several changes may be necessary if the practice of arbitrating interest disputes is to survive in the changed environment.

The Tag-Along Doctrine of Comparability

Admittedly, the economics of public wage determination is a murky area. It has long been recognized that the public sector is different from the private sector. The received theory is that the market operates in the private sector and the public sector somehow tags along; wages in the public sector somehow become fixed by making comparisons with the private sector.

The comparability principle has a long history and can be traced to an 1862 law in which Congress instructed the Secretary

[3] In 1975, the constitutionality of legislated binding arbitration was tested in Michigan, New York, South Dakota, and Washington. The constitutionality of the law was upheld in New York, *City of Amsterdam* v. *Helsby*, 371 N.Y.S.2d 404, 322 N.E.2d 290, 89 LRRM 2871 (1975); in Michigan by an evenly divided supreme court, *Dearborn Fire Fighters* v. *City of Dearborn*, 394 Mich. 229, 231 N.W.2d 226, 90 LRRM 2002 (1975); and in Washington, *City of Spokane* v. *Police Guild*, 89 LRRM 2903 (1975). The constitutionality of the South Dakota statute was not upheld in *City of Sioux Falls* v. *Firefighters*, 234 N.W.2d 35, 90 LRRM 2945 (1975).

[4] Ross, *supra* note 2, at 11.

[5] The common law rule that strikes by public employees are illegal has been buttressed by statute, court decision, and attorney general's opinion, but strikes by public employees do occur, and in Pennsylvania and Hawaii strikes by public employees are legal under the stipulated circumstances. Pennsylvania Public Employees Relations Act, PA. STAT. ANN. tit. 43, §§1101.101–1101.2301 (Supp. 1973), and Hawaii Public Employment Relations Act, HAWAII REV. STAT. §§ 89–1 to 89–20 (Supp. 1972).

of the Navy to set wages of blue-collar workers to conform "with those of private establishments in the immediate vicinity." [6] In the Federal Government, we can trace this doctrine through to the Coordinated Federal Wage System, approved December 1, 1967, which provided that blue-collar workers performing the same job in the same locality should receive the same pay regardless of which federal agency employed them. In 1972, the Federal Wage System replaced the Coordinated Federal Wage System, but the same basic procedure continues to be followed. And there is today legal recognition of the comparability principle for civilian employees of the Federal Government.

The evidence now seems increasingly clear that the doctrine has not worked the way it was intended to, and that in both 1960 and 1970, federal workers were paid more than comparable private-sector workers.[7] Whatever the reasons for these untoward results, they probably cannot all be chalked up to the growth of public-employee unionism in the federal sector. Much the same phenomenon is present at the state and local government levels, where the prevailing-wage requirements have arisen for much the same reason as at the federal level.

At neither level of government does output pass through the marketplace. There are no obvious constraints operating on the public employer short of actual crises. In normal times, it has not been easy to apply these presumably objective doctrines that depend upon government surveys of comparable workers in the private sector, and the doctrine is necessarily administered in a political context. It has been said that there is a tendency for lawmakers and other elected officials to support the wage preferences of government employees.[8] In any event, Fogel and Lewin conclude that government employers frequently pay more than necessary to attract a work force at the low- and middle-skill ranges and generally pay less than necessary to attract employees

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[6] U.S. Civil Service Commission, CHALLENGE AND CHANGE—ANNUAL REPORT 1968 (Washington: U.S. Government Printing Office, 1968), at 27, quoted in Sharon P. Smith, *Pay Differentials Between Federal Government and Private Sector Workers*, 29 IND. & LAB. RELS. REV. 180 (January 1976).

[7] Smith, *id.*, at 196. Smith found that the absolute earning differential increased by 58% from 1960 to 1970, while the wage-rate differential increased by 78%. She further found that in both years a substantial portion of these percentage differentials could not be attributed to measured differences in productivity between the two types of workers or to differences in the stability of employment in the two sectors.

[8] Walter Fogel and David Lewin, *Wage Determination in the Public Sector*, 27 IND. & LAB. RELS. REV. 415 (April 1974).

of average quality at the upper managerial and professional levels. They doubt that high worker productivity offsets the higher public wages; also, they agree with Ehrenberg that market forces are not sufficiently strong to limit the size of real wage increases that state and local government employees may seek in the future.[9]

The Decline of Prosperity

Given such a history, it is not fair to charge collective bargaining in the public sector with exclusive responsibility for the distortions that may have occurred in the wage structure. At the same time, we have to recognize that collective bargaining becomes prominent just when the period of lusty growth in the governmental sector is exhausting itself. All of these factors combine to focus attention on the arbitration of public-sector interest disputes in 1976.

The problem of dispute settlements has become acute as governmental units, particularly municipalities, are suffering from financial crises and are beginning to react to the higher levels of wages they are called upon to pay. Again, it is ridiculous to blame collective bargaining or the public-sector unions for the cities' financial crises. In the 1970s, inflation, suburbanization, and, until the beginning of 1976, recession must be given their fair share of the credit. Inflation has eroded purchasing power, thus fueling union demands, while suburbanization and recession have reduced the capacity of central cities to meet these demands. The rapid growth of suburban facilities, employment, and population not only weakens the political ability of central cities to extract requisite intergovernmental aid, but also reduces local tax bases.[10] All these factors operate in the same direction to force attention on the fact that the neutral who is setting wages is deciding not only who gets what, but also who shall not get anything and possibly who shall remain and who shall leave the city.

Whatever the model for public-sector wage determination,[11] one limitation on the wages paid may come from a crisis situa-

[9] Ronald G. Ehrenberg, *The Demand for State and Local Government Employees*, 63 AMER. ECON. REV. 378 (June 1973).

[10] Raymond D. Horton, *Arbitration, Arbitrators and the Public Interest*, 28 IND. & LAB. RELS. REV. 498 (July 1975).

[11] Robert J. Carlsson and James W. Robinson, *Toward a Public Employment Wage Theory*, 22 IND. & LAB. RELS. REV. 243–48 (January 1969); *see also* their *Criticism and Comment: Compensation Decisions in Public Organizations*, 9 IND. RELS. 111–13 (October 1969).

tion, such as the vaguely defined, but unfortunately real, concept of a "taxpayer revolt." Such a revolt may arise from a general unwillingness to pay taxes beyond a particular limit, or possibly simply from the taxpayers' feeling that their concept of fairness has been violated. After basic equity conditions have been met, after wages have caught up, the taxpayers may resent being asked to finance higher levels of compensation for public employees without receiving commensurate returns in the way of increased or improved public services.[12]

Perhaps as long as the public-sector salaries were below those of the private sector, taxpayers were willing to pay higher taxes to finance pay increases; but now any wage increase may have to be accompanied by adjustments, and these may well be employment adjustments such as layoffs or other types of separations. Public management, at last, is reacting to wage changes with some of the same tactics used in the private sector. The public-sector managers, conscious of taxpayer preferences or the adverse effects of further increases in rates with a dwindling tax base, offset the increased costs by using less labor through efficiency drives and through the introduction of new technology. If such trends continue, and if layoffs become the order of the day, then the public and private sectors may be drawing closer together and wage setting may become more realistic. Viewed in this fashion, the crisis that has occurred in New York City has a bright side as well as a discouraging one, although few of us will live long enough to see the beneficial results.

But we operate in the present, and for the present it is still true that the public sector is quite different from the private sector; there still are no obvious factors to maximize in the public sector, nor any easily discernible market tests. The private employer who is unhappy paying higher wages has several options, including giving up the business. The municipality, the state government, and the Federal Government do not have the alternative of going out of business, although the crises in New York City certainly indicate that they can come very close.

Same Criteria—Different Uses

Because of these dissimilarities, the parties to the collective bargain and the neutrals called in to decide impasses are in quite a

[12] Robert B. McKersie, *An Evaluation of Productivity Bargaining in the Public Sector,* in COLLECTIVE BARGAINING AND PRODUCTIVITY, eds. Gerald G. Somers et al. (Madison, Wis.: Industrial Relations Research Association, 1975), Ch. 3, at 46.

different position in the public sector than in the private sector. In the private sector, negotiators around the bargaining table recognize that the criteria they use are convenient rationales for positions they advocate. The parties have learned to talk in terms of what has happened to the cost of living, they have learned to make adroit comparisons to buttress their own particular collective bargaining positions, and they argue about the relative ability or inability of the employer to pay the sought-after wage increases. But experienced negotiators recognize that such criteria are but convenient ways to couch their arguments.

Negotiators come to the bargaining table with definable expectations that are shaped by the marketplace. They need not know a great deal about the economics of the particular industry or the elasticities of the demand curve for labor, the prospects for improvements in productivity, or even the employment effects of a wage increase. Experienced negotiators have an intuitive sense of what the market will allow, and they recognize the real and practical limits to wage changes, both up and down.

The private employer knows that he faces a labor market and that he must be able to recruit and hold workers, and the union recognizes that the survival of the company is essential. Both parties share the understanding that any wage increase can come only from a certain number of finite sources. These include the wages of other employees, increases in the prices of the product, changes in productivity, or profits. If profits are impinged upon too greatly, the employer may choose another use for his capital resources and move from the location, reduce the scope of his operations, or simply go out of business entirely.

Such basic economic facts of life are translated into reality in collective bargaining negotiations in the private sector with the strike threat as an indispensable ingredient in the background. But when arbitration of interest disputes enters the public sector, it is usually because the possibility of a strike is not supposed to be present.

The ban on strikes in the public sector and the substitution of the resolution of disputes by neutrals are justified on two grounds. One is that the public must be protected from the inconvenience and harm that might arise because of the strike by public employees; and the second is that the fate of the public employees ought not to be left to the arbitrary discretion of management once the essential buttressing of the collective bargain,

the strike, has been denied them.[13] In short, the theory is that the strike is banned because it would be bad for the public, and the employees, in light of the ban on the strike, are now entitled to alternative settlement procedures. If these procedures are to be delegated to arbitrators, the legislature must endorse such a method of setting wages and conditions and empower arbitrators to decide such disputes. Lawyers are not happy unless such delegation is accompanied by statutory guidance: hence, the development of the criteria.

Comparability Revisited

The comparability criteria emerge in the statutes phrased in countless different ways. For the most part, they are the traditional ones that have been used by the parties in private-sector negotiations for rationales, and they are the criteria with which many of the lawyers are familiar and comfortable. They are similar to comparability criteria used by Civil Service Commissions in setting wages, and they also are related to the concept of "inequalities and gross inequities" used by the War Labor Board.[14]

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[13] The traditional justification for the public-sector interest-dispute settlement procedures is that the strikes are banned in the public sector and some fair, impartial alternative to strikes must exist. Arvid Anderson, *Lessons from Interest Arbitration in the Public Sector: The Experience of Four Jurisdictions, in* ARBITRATION—1974, Proceedings of the 27th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1975), at 59–69.

[14] Under authority granted by the Act of October 2, 1942, the President issued Executive Order 9250, which provided that no wage changes could be made unless approved by the National War Labor Board, and the board was not to approve any increases in wage rates prevailing on September 15, 1942, "unless such increase is necessary to correct maladjustments or inequalities, to eliminate substandards of living, to correct gross inequities or to aid in the effective prosecution of the war." The board, on November 6, 1942, issued a policy statement defining the four bases for approval of wage increases. The board used these criteria until April 8, 1943, when the President issued Executive Order 9328, generally known as the "hold the line" order, limiting the authority of the board to authorize further wage increases, particularly under the critieria of inequality and gross inequities.

Thus, even as now, it was the "comparison" criteria that caused the most trouble. A clarifying policy directive on May 12, 1943, reinstated the four major cases for adjustments set forth in Executive Order 9250 except that the concept of inequalities and gross inequities was limited and defined. The so-called "bracket system" was established where increases were permitted only up to the minimum of the sound and tested rates established for particular occupations and particular industries and labor market areas.

It should be noted, as will be discussed later in the paper, that the wage stabilization program gave little weight to the question of ability to pay, the idea being that the fact of ability to pay could not justify the increase above that permissible under stabilization principles. Since the only increases permitted under the program were those necessary to correct inequities, a refusal to approve a permissible wage increase on the ground of inability to pay would have resulted in ordering

No matter what the analytical difficulties, it is always possible to make findings that the wages of the employees under consideration are more than or less than, or equal to, the wages of other employees with whom they are found comparable.

Block has elevated comparisons to the rank of a fundamental criterion.[15] He cites Bernstein to the effect that all parties derive benefit from wage comparisons. The worker feels no discrimination if he stays abreast of other workers; for the union, they provide a yardstick for measuring bargaining skills; the employer is assured that his competition will not gain a cost advantage and that he will be able to recruit; and for arbitrators, they have the appeal of precedent and of being able to satisfy normal expectations.[16] Block goes on to point out that when one looks for comparisons, they may turn out to be multiple and the arbitrators may find it difficult to make a choice among equally good possibilities. But he notes that wage comparisons are not to be taken as "an assortment of mirrors in a closed circle endlessly reflecting one another without a primary image." [17] He finds primary referrants in each of the basic areas of the economy that provide guidelines to be used as approximations, and he concludes that "one cannot overstress comparisons as the primary criterion for resolving interest disputes over economic issues." [18]

But is not the comparison criterion a fairly empty box? Any advocate who cannot find some comparisons favorable to his side is certainly not worthy of his hire. If the favorable comparison cannot be found in terms of wage rates, then perhaps it can be found in terms of amounts of wage increases given in the past. One side may talk in terms of net earnings, the other in terms of total compensation including fringes. Even in the private sector where collective bargaining experience may reach back several decades, it is difficult to establish any "traditional" standards for comparison. With whom should a particular company be compared? What shall be the basis of the comparison? I am not say-

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workers to do their jobs at inequitable wages. *See The General Principles of Wage Stabilization*, Ch. 16, and *Ability-to-Pay*, Ch. 17, in TERMINATION REPORT, NATIONAL WAR LABOR BOARD, INDUSTRIAL DISPUTES AND WAGE STABILIZATION IN WAR TIME, JANUARY 12, 1942–DECEMBER 31, 1945, Vol. I, at 183–200.

[15] Howard S. Block, *Criteria in Public Sector Disputes*, in ARBITRATION AND THE PUBLIC INTEREST, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1971), at 183–200.

[16] Irving Bernstein, ARBITRATION OF WAGES (Berkeley: University of California, Institute of Industrial Relations, 1954), at 54.

[17] Block, *supra* note 15, at 166.

[18] *Id.*, at 167.

ing that a neutral cannot decide such issues, only that he has few valid criteria to bolster his criterion—if that is not too confusing a way to point out his range of choices.

Above all else, there remains the problem of distinguishing the differentials in rates, earnings, or total compensation that are "justified" from those that are not. In the parlance of the War Labor Board, not all differentials are inequities. Since at least the days of Adam Smith, who existed even before the War Labor Board, compensating differentials have been recognized. Wages may differ due to the hazards of the job, the conditions at work, or differences in job tenure.[19]

If the comparisons are made in terms of occupations, one soon finds that similarity of job titles does not guarantee similarity of job requirements. A lathe operator in one plant may face quite a different assortment of duties than does a lathe operator in another, and much the same is true of teachers, water inspectors, and fire-alarm dispatchers.

In collective bargaining negotiations, the parties wrangle over conflicting choices of standards, differences in jobs, and differences in methods of comparison. In the private sector, such discussion may serve a useful function since the parties' negotiations are always tempered by the sometimes obscure but always present market constraints. The employer does want to be in a position to recruit labor, and the union does recognize the economic limits on wage increases. If pushed too far, the employer can and will react. The private employer need not wait for a stockholders' revolt or a movement of the stockholders out of the shares of his company, with a consequent drop in market price. (I suppose this is the private-sector equivalent of the flight to suburbia.) Long before such revolt or reaction takes place, his income statements and balance sheets will tell him something is wrong.

Cost of Living

What is true of the comparability criteria is just as true of the cost-of-living argument. It is a reversible criterion used by unions when the cost of living is going up and stressed by management

[19] Some of the difficulties in determining comparability are discussed by Paul Phillips, *Collective Bargaining Dynamics in the Public Interest Sectors: The Market and Politics,* in Gunderson, ed., *supra* note 2. When it comes to the practical difficulties in determining comparability, Phillips points out the problems of evaluating positions in the public and private sectors where there are differences in employment stability and promotion potential and where a range of rates rather than a single rate exists (p. 50).

when the cost of living is going down. (It may be difficult to visualize that there have been such times in our history and even more incredible to state that they may one day return.) The application of the cost-of-living criterion is not clear and unambiguous. Each side chooses the base period most favorable to its case; one side may compare changes in total compensation with the index, while the other uses changes in wage rates, and so on.

Ability to Pay

Ability to pay is the third criterion, although this standard may be phrased in various ways. In the private sector, as with the other criteria, it is used by both sides depending on the economic situations. The unions urge it as a valid and meaningful criterion in times of the company's prosperity, and the employers use it when economic clouds darken. I would argue that, as with other criteria, it reflects market factors in some vague way, but it is used as convenient rationalization for the positions advocated by each side.

No serious economic analyst would argue that the past financial history of the company is a valid criterion on which to base future wage rates. Next year's wages must be paid out of next year's earnings, not from past or retained earnings. Nonetheless, the immediate past might be the only available forecast of the near future. At least this is the one criterion that comes closest to getting at the economic realities, and I shall argue that in the public sector it deserves more weight than it has received in the past.

In the private sector, the parties may weight these criteria as they wish. They may choose to couch their decisions in terms of these criteria, or they may rely on other arguments. They are engaged in the serious business of negotiating and bargaining, conscious of their relative power positions and assessing carefully the limits as they see them.

The More Realistic Determinants

In the private sector, any dispute resolution takes place under the shadow of the threat to strike on one side and the willingness and ability to take a strike on the other. Such assessments of bargaining strength are reflections of the underlying market forces

that impose limits on both parties. The reality cannot always be phrased in terms of the traditional criteria of comparisons, cost of living, or even ability to pay. The bargaining situation stems from each party's assessment of the ability of the firm to sell a product at a particular price and the evaluation of the contribution of labor toward the production of that product. It stems from an assessment by each side of the condition of the labor market. Are the current wages attracting sufficient workers of the quality necessary to do the job? Are there too few job applicants? Or are there more workers applying for the jobs than there are vacancies available, giving rise to a queuing problem? Or in times of unemployment, are there proportionately more workers applying for particular jobs than are applying for jobs in other companies? The neutral entering into such a situation in the private sector must be able to assess each party's perception of the situation. If he enters as a mediator, he must suggest solutions that come as close as possible to the solutions that would come about if the relative bargaining strength of each party were put to the test. Hence, what emerges is truly a substitute for the strike.

If neutrals are to do the job in the public sector, it is necessary that they assume the same role as neutrals do in the private sector. They must be able to suggest or order settlements of wage issues that would conform in some measure to what the situation would be had the parties been allowed the right to strike and the right to take the strike.

The criteria may have been inserted into the laws so as to solve, or perhaps evade, the delegation-of-authority issue. The theory has been that if you can give neutrals, who are not politically accountable, scientific criteria that they, as experts, can use to solve the problem, then we can truly say, as the courts have done, that it is appropriate that they be given this type of authority. I recognize that such legal fictions may be necessary if public interest arbitration is to continue, but I do not delude myself into believing that these criteria, even in the hands of experts, can produce definitive answers. And even if they did, it seems to me that they would still not get at the basic allocation-of-the-resources problem. Neutrals must come to grips with the fact that they are deciding questions that will influence the public welfare, the growth of the municipalities, and whether or not particular functions are continued.

Changes To Be Made

There is a role for public interest arbitration, but if neutrals are to do the job, changes have to be made. First of all, we need much better economic information from the parties than they presently provide. I suspect that once it is known what information is wanted, it will be forthcoming. Once it is present, it will be up to the neutrals to accept it and use it.

I despair each time the cost-of-living index is brought up in an impasse procedure since I know that what will follow will be extensive argument and examination as to whether the person producing it is competent to comment on it or to evaluate it. The procedure is gone through with each piece of economic data that is presented. I listen to a great deal of what I believe to be irrelevant material relating to the preparation of the document and how the person who is on the witness stand happens to have knowledge about such esoterica. I have been around arbitration hearings long enough to be brainwashed into believing that some of the questioning may be necessary. But after all procedural issues are disposed of and the witness's credentials are verified and his exhibits admitted, I wait for comment on the importance of the material presented and possibly some analysis of whether the data support the point which is intended to be made. I am filled with curiosity about the numbers, but much too often I find the examination has been concluded once the irrelevant sparring is over.

In part, such failure to probe stems from an unwillingness of many impasse panel members drawn from the legal profession to delve into economic information. I do not quite understand this. If I can learn to rule on objections sufficiently well so as to be able to preserve the illusion that I know what I am doing, then the lawyers can certainly examine economic information. If using the ability-to-pay criterion is the way to focus on the economic condition and on the labor market, then let us use such a criterion. However, it must be recognized that not only is it appropriate in times of financial crisis when the public employer raises the ability-to-pay issue, but it would be equally applicable when the economic growth quickens and tax revenues increase. Under both situations, the problem is one of resource allocation.

But ability to pay may be too narrow a criterion. It may be that we should include "the interests and welfare of the public,"

as in the Michigan statute, or a similarly phrased criterion, as in New York City's OCB law. I question whether any phrasing of a criterion can be effective, however, unless the parties and the arbitrators come to recognize that equity considerations flowing from the comparability doctrine are important, that the politics of wage setting will always be present, but that equity and politics must be accompanied by economic analysis. The difficulties are great, since I believe that realistic consideration of economic factors requires some attitudinal changes and some innovations. Being an arbitrator and hence experienced at protecting my flanks, I must immediately note that some of the legal brethren are experienced at handling economic data, and it may be that my criticisms extend to only a few. But it may not be so much a matter of knowledge as it is being prisoners of a procedure that may not be adapted to the new conditions. In any case, I would like to see at least the following:

1. A willingness to take wide—very wide—arbitral notice of the existing, well-recognized sources of information and a willingness to judge other data on their merits. The professional competence of the Bureau of Labor Statistics is well known and need not be reestablished at each hearing. When it comes to, say, survey data from lesser known establishments, their credibility has to be determined by standard error of estimates and sampling and reporting procedures, not by the credentials of the presenter.

2. A willingness to receive and evaluate information about the labor market. I note that the criteria listed in the New York law covering the arbitration of police and fire disputes include comparisons of peculiarities in regard to other trades and professions, including specifically (1) hazards of employment, (2) physical qualifications, (3) educational qualifications, (4) mental qualifications, and (5) job-training skills.[20] Such instructions carry the comparison to an extreme. They may serve to avoid inappropriate comparisons (and possibly testify to the fact that not all differences in wages can be construed as inequalities that should be wiped out), but they are in the nature of job-evaluation factors that are useful in establishing job differentials within a plant but not the general level of rates.

Maine, on the other hand, instructs arbitrators to use a whole host of criteria, including "the need of state government for qualified employees." Such a criterion could be interpreted as requir-

[20] Anderson and Weitzman, *supra* note 1, at 311.

ing the arbitrator to at least take a look at the state of the labor market. The presence of vacancies in the face of efforts by the public employer to recruit may be taken as prima facie evidence that wages are too low or that working conditions are too onerous. The existence of long waiting lists of applicants eager for the jobs lends credence to the opposite assumption: The wages and conditions are sufficient to attract the required number of people. These are reflections of real market conditions that should be given due consideration. To do so requires at least a willingness to entertain evidence of this nature and to recognize that labor-market constraints might be used to modify the usual comparisons and cost-of-living criterion.

3. A willingness to evaluate the true cost of wage and other money proposals, as well as of the so-called nonmoney items. The public employer's time horizon may be fixed by the frequency of elections, and, in such a myopic state, a willingness to give benefits with little cost now and greater costs in the future is evident. But the events of the last several years indicate that the future is now and that catching up with reality is painful.

One lesson to be learned is that future costs have to be taken into account now. The procedure may require arbitrators to brush up on present-value calculations, or at least to pack a brand new copy of Granof's *How To Cost Your Labor Contract*[21] with their well-worn Elkouri and Elkouri. Given such a perspective, eventually we may get around to estimating the true cost of nonwage items, such as work rules, seniority provisions, and so on.

4. A willingness to listen and to evaluate testimony relating to the financial condition of the employer. Such testimony is relevant not only to applying the ability-to-pay criterion but also to assessing the impact of the settlement on the welfare of the public. It is granted that these are difficult criteria to apply, but ignoring them will not make the problem disappear. The wage decisions do affect the allocation of resources, and we will be living under conditions where limits on resources will be apparent. If decisions about curtailment of services or the relative value of one function over another cannot be made, at least the problems can be exposed to public scrutiny and discussion.

5. A consideration of productivity both in negotiations and by the arbitration panel. I need not say much about this much-

[21] Washington: BNA Books, 1973.

talked-about and little-practiced factor because of the growing literature in the area.[22] Suffice it to say that the impact of wage increases on the long-run ability of the public employer to pay would be minimal if offset by increases in productivity.

The above list could be extended, but perhaps the general point has been made. The belief expressed here is that arbitrators should handle economic questions and data freely and easily. The difficulties of doing so can easily be exaggerated. Think of how little we knew about the rules for conducting grievance arbitrations 30 years ago. It took the trauma of having to decide several public-sector grievance cases to impress upon me how much we have learned and the extent of the agreement on basic concepts that has evolved in the private sector. The most skeptical among us who eschew all precedents cannot but be impressed by the shared values most parties bring today to the ordinary discipline arbitration. Such was not the case a quarter of a century ago. The development has been a gradual one, and much the same process must take place in public-sector interest arbitration with regard to consideration of economic factors.

There is a tendency to judge the success of the disputes-settlement procedures by the extent of industrial peace. It is only natural to want to evaluate procedures for the peaceful settlement of disputes by how many disputes are settled peaceably. But the consequences of the strike in terms of the settlement may be economically more significant than the strike.[23] If arbitration of disputes is to be considered a success, it must not prevent strikes at the expense of contributing to the decline of the quality of life in the public sector. It must be alive to the importance of the effects of decisions on the economic survival of governments.

If arbitrators cannot operate in such a fashion and make these decisions, either because they are too fundamentally political or because they are unwilling to assume the burden of moving into an unfamiliar economic world, then we must resort to alternatives. Removing the finality from decisions is one option now prevalent in some jurisdictions. One extreme method is to require a public referendum before the results reached by arbitra-

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[22] *See* McKersie, *supra* note 12, and Arvid Anderson, *The Impact of Public Sector Bargaining: An Essay Dedicated to Nathan P. Feinsinger,* 1973 WIS. L. REV. 989, 991–95 (1974).

[23] Albert Rees, *The Sources of Union Power,* in LABOR ECONOMICS AND LABOR RELATIONS, eds. Lloyd G. Reynolds, Stanley H. Masters, and Collette Moser (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1974), at 300.

tion panels can be put into effect. Or the decisions can be subject to budget approval under control of the elected representatives of the people.[24]

A Final Note

If collective bargaining, like democracy, is the worst system except for its alternatives, is public-sector interest arbitration the worst way to settle disputes, save for its alternatives? I cannot be sure. Increasingly, experienced observers of the public-sector scene, such as Howlett,[25] Aaron,[26] Anderson,[27] and Burton,[28] advocate allowing some public-sector employees to strike. I am not opposed, but I would look upon such proposals with more favor were I more confident of the ability of the municipalities and other governments to take the strike. If strikes were allowed, except in the most essential sectors, the collectively bargained settlements would provide good bench marks or guidelines such as we now have in the private sector. Public-sector interest arbitration could then be reserved for the essential services in which strikes would be forbidden. Certainly it would be much easier to apply each of the criteria, including the economic ones, if such fully collectively bargained settlement results were available.

I remain in the position of the preacher who, when asked if he believed in baptism, replied that he not only believes in it but he has actually seen it. I have enough familiarity with public-sector interest arbitration to believe that it can do the job. The industrial peace can be kept, without "giving the city away" or allowing local martinets to rule arbitrarily, if neutrals come to grips with the economic factors. Surely an institution that has survived so many transformations, through war, inflation, reces-

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[24] Ross cites several examples of laws where the electorate participates in the final decision. *See* Ross, *supra* note 2, at 5–6.

[25] Robert Howlett refers to his "mild endorsement" of a Michigan proposal to allow teachers to strike, in "New Contract Arbitration in the Public Sector," mimeo.

[26] Aaron discusses sympathetically a proposed California law that would grant to state employees the limited right to strike. Aaron, *supra* note 2, at 136.

[27] Anderson advances his personal view that some employees may be granted the right to strike if government retains the right to enjoin strikes that threaten public health, safety, and welfare. Anderson, *supra* note 22, at 1008.

[28] Burton and Krider, after an extensive analysis, conclude that strikes in the public sector, save for strikes where the public may be endangered, should be legalized. A summary of their view may be found in John F. Burton, Jr., and Charles Krider, *The Role and Consequences of Strikes by Public Employees,* in Reynolds et al., eds, *supra* note 23, at 397–405.

sion, and cataclysmic changes in the organization of public-sector employees, can now adapt to a new and changed environment. The changes only bring to the public sector many of the same constraints that have always operated in the private sector. Arbitrators can do the job if they are willing to tackle it.

Comment—

Muriel M. Morse*

The Economics of Arbitration

Professor Monroe Berkowitz has done an excellent job in identifying concerns with the economics of public-sector interest arbitration. I support his suggestions for arbitrators who will be called upon to decide public-sector interest disputes. We in public management would hope that an arbitrator would bring to the dispute the insight into the differences between government and industry that Professor Berkowitz has shown. In discussing the economics of interest arbitration, I should like to expand upon those differences and the relative impact on arbitration of impasses.

Though there are basic differences in the negotiation process, the institution of government, like industry, allows for bargaining between management and employee organizations. But any similarities between private and public labor relations end with a breakdown in the negotiation process.

Negotiations are bounded by the framework of this institution, whereas arbitration apparently would discount such boundaries arrived at through the political process. Here we see the importance of understanding the distinction between government and industry. To apply criteria of industrial dispute resolution to government would be to lose sight of the additional criteria inherent in the institution of government. Just as Professor Berkowitz suggests that arbitrators with legal backgrounds become familiar with economic factors, we might likewise suggest that those with economic backgrounds develop some expertise beyond just an understanding of the judicial process to include the legal framework

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of the public institution, which provides the authority for its existence and processes.

There is little, if any, doubt as to the importance of economic criteria in arbitration. However, in addition to the difficulties of evaluating economic data, there is the difficulty in weighting the arguments on ability to pay, wage comparisons, and cost of living against the backdrop of the political process and the ultimate preferences of the community. Should some means be developed for considering the political process in government interest disputes, we might not have to be in a position of drastic reaction to financial crises.

An example of the economic impact on a local government jurisdiction is the case in Detroit, reportedly in financial difficulties, where police officers have been able to win regular salary increases through interest arbitration at the expense of the struggling city treasury. For many years a Detroit police officer's compensation was lower than that of a Michigan state police officer. But beginning in 1970, with compulsory arbitration, the Detroit salaries have increased to a level that is today higher than that for the state police. Spokesmen for the city attribute their increase solely to arbitration. Though we do not know how much of Detroit's overall financial problems can be blamed on interest arbitration, we can assume that something was amiss in the evaluation of the city's ability to pay and in making wage comparisons. Likewise, in Oakland we saw an interest arbitration award resulting in an estimated 30-percent increase in fire personnel costs, which caused the Oakland city council to look for "alternative courses of action" when considering the impact of the award.

Also in terms of economic impact, the strike can be less costly than arbitration to the agency and taxpayers. In fact, as Mack H. Hamada of the Hawaii Public Employment Relations Board writes, "[A] strike does not hit a public employer in his wallet—in fact during the teachers' strike here the employer saved lots of money. . . . Rather, it points to the fact that the public sector is not the same as the private one . . . ." The point here is that bargaining in government is based more on political strength than on economic strength, as in industry.

Some view arbitration of interest disputes as a panacea for avoiding strikes in the public sector, especially strikes curtailing essential services such as police, fire, sanitation, and health care. But can we be even reasonably sure that a strike will not occur

after submitting an interest dispute to arbitration? We might want to ask this of the citizens of Montreal where, in 1969, a fire and police strike followed a binding arbitration award in an interest dispute.

Clearly, the philosophy of collective bargaining is to have respective powers of each side at the table lead to an equitable employment relationship without external influence. As Benjamin Aaron has written, arbitration may have a "chilling effect on the bargaining process . . . [knowing] that, absent settlement, arbitration stands at the end of the line and . . . [there is] the fear of prejudicing their positions in the arbitration proceedings." Professor Aaron points out that there has not been substantial evidence to support this contention. But neither is there evidence to disclaim the adverse impact of arbitration on the bargaining process.

Thus, arbitration as an impasse-resolution procedure may itself be a cause of impasse. How then do we develop procedures for resolving interest disputes that would be designed to minimize the chance for impasse and would, at the same time, consider the institutional limitation of government?

The Politics of Arbitration

If one believes in the public policy-setting process which allows for identification of responsibility and for community pressure or restraints on public resources (and I do), one should not be quick to implant industrial-sector labor relations, with inherent emphasis on economics, into the government sector where the emphasis is on public policy through politics.

Literature well supports the contention that basic distinctions exist between government and industry labor relations. Professors Harry H. Wellington and Ralph K. Winter, Jr., of the Yale Law School have addressed themselves to these distinctions in describing the impact of bargaining on the allocation process. Their point was that unions in the public sector enjoy considerably greater power than do their counterparts in industry because of the strong political influence with the public entity with which they are bargaining. Though arbitration removes most, if not all, of the political influence, public interest-dispute arbitrators will nevertheless need to be cognizant of the bargaining situation prior to the impasse that they are called upon to resolve.

Professors Wellington and Winter add, "In a system where impasse procedures involving third parties are established in order to reduce work stoppages . . . third party intervention must be partly responsive to union demands . . . . [T]he neutral party, to be effective, will have to work out accommodations that inevitably advance some of the union's claims some of the time. And the neutral, with his eyes fixed on achieving a settlement, can hardly be concerned with balancing all the items on the community agenda or reflecting the interests of all relevant groups." With this overriding political impact in mind, we must still lend at least some credence to the principle that the elected governing body is the instrument through which public policy is established and, therefore, resources are allocated.

Arbitration of interest disputes, then, represents the impasse-resolution procedure most contrary to the political nature of the public-sector setting. Third-party settlements bypass the political process and therefore eliminate the potential for appropriate public action. Strikes at least allow for public action in settling the dispute. The pressure applied is through the political framework. What consideration can an arbitrator give to the public sentiment against redistributing resources to salary increases even though the cost of living is rising?

Finally, with regard to the politics of arbitration, it is quite probable that arbitrators will become legislators in the public sector. In any imposed settlement involving the allocation of resources, certain ordinances would be required to implement the settlement. Many of the required ordinances may change rules and regulations previously established for the agency through the political process.

Last year, in the State of California, we saw several legislative proposals that would have allowed provisions of a labor agreement to preempt local charters, rules, and regulations. As most of you know, California is still attempting to come up with a comprehensive enactment for public-sector labor relations (with the exception of public school systems), and it is still possible that such a preemption clause will be included. The effect for arbitrating interest disputes would be elimination of any arbitration limitations that had been established by the community. If such a law were enacted in California, we might see local agencies in a continual state of confusion with regard to employment matters. Rules and regulations might be changed from year to year and arbitrator to arbitrator.

To paraphrase the Rhode Island Supreme Court, in its 1969 decision in *Warwick* v. *Warwick Regular Fireman's Association,* the legislature delegated to the arbitrators a portion of the sovereign and legislative power of government, particularly in setting salaries. There is no superior to an arbitrator—no control or supervision—and therefore each arbitrator is a public officer. From this delegation to arbitrators there evolves little assurance of consistent ground rules for the administration of the public agency.

As you might guess, we in public management find it difficult to accept this sort of control outside the normal public-policy process, especially when we find relatively few arbitrators with expertise in, or understanding of, governmental processes. Professor Felix Nigro has written that "it can be argued that there is justification for giving the public the opportunity to vote on arbitral awards . . . ." But the question remains: How do we provide for political processes in arbitration without creating a paradox? That is, how do we give finality to arbitration while at the same time requiring public approval?

The Equity of Arbitration

Dr. Harry Kershen, of the Ardsley public school district in New York, has raised some interesting points with regard to the impartiality of arbitration. Though his framework and data are from the education system, the points raised are equally valid for all areas of the public sector.

Dr. Kershen noted that "most veteran arbitrators, those most in demand and most frequently used, are products of the depression years and were witness to the abuses inflicted upon the working class, . . . [T]he unions have perpetuated the image of the underdog, preferring to claim that equality still eludes this class of workers regardless of existing facts. The unions contend that the right to strike does not exist, that exploitation of workers by management continues." With no right to strike, "The answer lies in arbitration. It is against this backdrop that arbitrators enter the arena. Does a traditional concept of harassed teacher dominate the thinking of the arbitrator? . . . Is the arbitrator applying the private sector industrial experience to public school teachers?" Dr. Kershen adds, "[W]hat many have found is not a failure of the arbitration process per se, but a lack of understanding of public education by most arbitrators, and a possible built-in bias . . . . The continued application of the industrial sector

method of contract interpretation to public education will demolish whatever confidence remains with respect to arbitration."

Professors Wellington and Winter wrote, "Honest men acting disinterestedly often see things differently. The behaviorists are surely right in thinking that results are influenced by the perspectives of decision makers."

The fact that there is general agreement that new arbitrators have to be trained, which is alluded to in the Academy's Code of Professional Responsibility, would appear to support Dr. Kershen's hypothesis that the majority of today's arbitrators got their training in the private sector some years ago. The Code of Professional Responsibility also says, "An arbitrator must decline appointment, withdraw or request technical assistance when he or she decides that a case is beyond his or her competence." Yet, how many arbitrators will decline an interest-dispute case in the public sector even though not well versed in public administration?

Part of the arbitration process we now have must include the self-serving interest of arbitrators. The truth of the matter is that when persons make their living or increase their personal income by acting as neutrals in any capacity, we will always have the element of self-interest. Evidence of this truth for arbitrators is the extremely small number of decisions on threshold issues finding that the case is not arbitrable.

Another consideration on the equity of arbitration includes the impact of governing legislation. For example, the California Civil Code provides that failure by an arbitrator to accept material evidence is grounds for the court to vacate the award. No arbitrator likes to have his award vacated or even to be subjected to the legal difficulties that Arbitrator McNaughton was faced with recently when part of a suit naming him codefendant included a claim that he did not admit certain evidence. Consequently, evidence may be accepted whether it is relevant or not. Thus, it is possible that an arbitrator's award might be influenced by irrelevant or immaterial evidence.

Closing Comment

Much of what we have been concerned with today has been something unique to the public sector—the impact of interest-dispute arbitration on an entity with its roots in a political process.

We have seen arbitration practiced to some extent in the public arena, but I believe we do not have all of the answers yet. What is needed is more experimentation with the several forms of arbitration (advisory, binding, compulsory, voluntary, med-arb, final-offer selector) or with other impasse-resolution procedures before we can finally conclude which is the one best method for any one jurisdiction.

Included in further discussion must also be consideration of the impact of the legal right to strike on government institutions. I cannot say to you which method of settling impasses will prevail, but I should support Professor Berkowitz's comment that much of the direction we take in the future will be determined by the manner in which arbitrators perform in the next few years.

In closing, I should also like to suggest experimentation with yet another approach to resolving public-sector labor disputes. The idea is not a new one; it was proposed almost 10 years ago by Samuel I. Rosenman. Judge Rosenman suggested that a full-time labor court be established with jurisdiction over disputes that affect the public interest. It might be feasible to consider making arbitrators elective or appointive to permanent positions with specific jurisdictions. Election or appointment based upon experience might achieve what Professor Berkowitz referred to in the Michigan statute—"the interest and welfare of the public" as a criterion in arbitration of public-sector interest disputes. In addition, such a procedure as proposed by Judge Rosenman would take the guessing out of arbitrator-selection procedures, allow for a more formal judicial process, provide for more uniform criteria in decision-making, minimize the influence of the self-serving factor, and eliminate many of the other concerns with economics, politics, and equity of arbitration.

Comment—

A. L. ZWERDLING*

Years ago, back in 1938, William M. Leiserson published a book called *Right and Wrong in Labor Relations.* The theme of the volume was that there is no such thing as "right and wrong"

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in labor relations. Certainly when we deal with this subject, "Economics, Politics, and Equity," we are grappling with something concerning which there are no objective standards of measurement.

When I was a young man, I learned about "equity" in labor relations at the knee of the late Walter P. Reuther while serving as his administrative assistant. It was Walter's constant theme to speak in terms of achieving equity for the workers. "Equity" meant "more," to paraphrase one-time AFL President William Green, and it didn't mean what General Motors and other corporations in the industry understood it to mean.

Reference has been made by the speaker to "ability to pay" as an important factor in settling disputes and in interest arbitration in the public sector. I first learned about ability to pay way back in the 1940s when UAW struck General Motors Corporation during negotiations for a new contract. It was our theme then that General Motors had the ability to pay higher wages without raising prices and still make enormous profits. GM insisted at that time that it would not discuss ability to pay, branding our insistence on inquiring into this subject as "socialism."

President Harry Truman appointed a presidential board to hear our contentions. When we appeared in the Department of Labor building in Washington for this public hearing, GM was represented by Wall Street attorney Walter Gordon Merritt, who urged this position on behalf of the corporation. Being young and naive at the time, I thought that I had him when I was able to point out a number of arbitration cases in which he had represented New York landlords during the depression days and urged that the arbitrator look at the books of the landlords to demonstrate their *in*ability to pay at that time. This logic was unpersuasive. GM simply walked out of the hearing and refused to participate further when the presidential board agreed with us that the question of ability to pay was appropriate to the discussion. This was an early lesson for me in "right and wrong in labor disputes."

Today when we talk about arbitration in the public sector, we find public employers tending to welcome strikes and resisting third-party determination in the peaceful mode of interest arbitration, while the nation's largest public employee union, the American Federation of State, County, and Municipal Employees,

urges binding arbitration as an alternative to strikes. No doubt this has something to do with the fact that *in*ability to pay rather than ability to pay is the typical situation for the public employer.

Six months ago I was here in San Francisco attending the AFL-CIO convention. At that convention Jerry Wurf, president of AFSCME, proposed an amendment to a resolution concerning the right to strike in public employment. He urged that the resolution be amended to advocate: "Equitable and reasonable mechanisms such as binding arbitration for public safety personnel as alternatives to strikes."

AFL-CIO delegates representing unions basically in the private sector argued against this amendment, and President George Meany concluded the debate by saying he opposed "compulsory arbitration on anybody, anywhere, at any time." Needless to say, the amendment was roundly defeated.

To me the appalling thing is that there has been no outcry in support of AFSCME's position by arbitrators or by the institutions which espouse the concept of arbitration, namely, the American Arbitration Association and this National Academy of Arbitrators.

My fellow discussant, director of personnel of the City of Los Angeles, points out that decisions concerning public-employee pay are being made by the voters themselves, as is currently the situation here in San Francisco where we find ourselves going up hill and down dale without benefit of cable car because of the public-employee strike now in progress. The current San Francisco strike is being conducted by public employees who are building trades and crafts people, and who face substantial cuts in pay because the citizens of San Francisco adopted Proposition B last fall, resulting in a different and much less favorable method of determining their rates.

This solution is, of course, a repudiation of collective bargaining in the public sector. There is no role for collective bargaining in a situation in which the decision is made unilaterally by the elected or appointed public official as public employer or by the constituent body that is represented by the public employer. Putting it another way, decision-making on this basis is a matter simply of politics, in which public employees fare better or worse depending on their political clout at a particular election.

If, however, we stick with the proposition that collective bargaining has a role in the public sector, which generally has been well established as of the 1970s, then surely those involved in this field must welcome and support interest arbitration as a rational method of arriving at solutions.

In the municipal transportation field, the union involved has advocated use of voluntary arbitration ever since it began in 1892. The policy got started long before there was widespread municipal ownership of public transportation and has continued under municipal ownership. Studies find that there have been practically no strikes in this field and that hundreds of settlements have occurred under wage arbitration.

Voluntary interest arbitration has been in effect for Canadian federal employees since 1965. There the unions have the option of going on strike after a period of negotiation if they are not in essential fields, or of choosing binding arbitration. A recent study of the Canadian Federal Service Plan showed that the no-strike route was chosen by 91 out of 100 federal bargaining units. Negotiations to a settlement by agreement occurred in most cases, 60 percent of the negotiations having been completed without assistance from third parties. Only 13 percent of the signed agreements have been the result of arbitration awards. These are hopeful signs, and sooner or later the inevitable progress toward this type of solution will become more widespread in the public sector here in the United States.

I close by commenting, once again, that those who should be in the forefront of advocacy of the tools by which they live, namely, the arbitrators and the institutions to which they belong, have failed thus far to take leadership in support of interest arbitration, at least in the field of essential public employment. I urge that you do so.

Discussion—

CHAIRMAN ARVID ANDERSON: The audience now has the opportunity to address questions to members of the panel.

THOMAS J. MCDERMOTT: In the arbitration of interest disputes, I think we have to make a distinction. On the one hand, you can take the formal approach wherein you seek to treat it in the same manner you would a grievance dispute where you need economic data. With that approach, I think that one of the reasons why ability to pay has not been a factor is the lack of real data coming from the public employers.

How do you measure ability to pay in the public sector? You have the condition of housing in the community, you can compare incomes among communities, you can use the factor of comparable wages, you have the tax assessments, and you can even compare tax assessment procedures. All of these can be used in the arbitration of an interest dispute, and they do give some indication of the ability of the community to pay. But communities are not gathering this information and are not presenting it, and that is the real reason why my lawyer-arbitrator friends have not been using it.

The result is that much of the interest arbitration—in my experience and the experience of my colleagues—has really been more like mediation-arbitration that was referred to by the last speaker. With that approach, what you do is to identify the range of expectations so that you will come up with a settlement that both sides can live with and where neither side is shocked at the result. When arbitrators fail to look for this range of expectations, you have the really rough settlements that cause great trouble.

The second comment I'd like to make is on the right to strike. One of the problems in the public sector has been that the employees have sought to bring the private-sector system of bargaining into the public sector. That is understandable because it is the only system they know. Therefore, even though most state laws have no-strike provisions, when public employees reach a serious impasse and the issue is important, they are going to strike, regardless of what the law says.

In many communities, the problem has been that the public employer relies too heavily on the fact that the law says there can be no strike. He says, "You can't strike," and therefore he does not negotiate. Then you have a strike taking place. The public employer who is conscious of the fact that he may have a strike is more likely to bring real bargaining to the table than the public employer who chooses to ignore the fact that a strike may occur.

HARRY H. RAINS: If you are arbitrating in an interest case in a state that specifies compulsory arbitration for a particular classification, such as firemen or police, and that legislation sets forth criteria, and the advocates for the parties are either delinquent or incapable of producing data within the framework of the criteria, how far does your duty go toward exploring and developing data to support your decision—bearing in mind that we have a court decision on that on Long Island in New York.

MR. BERKOWITZ: I do not know about that court decision, but I think there is a limited number of things that anybody can do. As an arbitrator, you are a prisoner of the parties. You can ask, you can suggest, you can cajole; but if the information is not forthcoming, there is not much you can do. It is similar to the position in which arbitrators find themselves in rights disputes. They leave the hearing not knowing exactly what is going on and then go home and write a decision. That may be too cynical a view, but I think that you are perfectly right in reminding us that these data are not always forthcoming.

I think what Abe was saying, in part, is that the object in life is to achieve a peaceful settlement, and what Muriel was saying, in part, is that there's more to it than that—that maybe we have to begin to look at the consequences of the settlement rather than just whether or not it ends up peaceably. That's the heart of the controversy, and that's what leads us to this almost Alice-in-Wonderland world we are living in, where we have a union counsel advocating arbitration and a public employer advocating the right to strike.

When you're living in an era when there is something to give and the economy is expanding, and when the public employees are behind a little bit anyway, the public is willing to support a settlement. If the negotiators are good at this sort of thing, they work something out.

Such a process occurs in the private sector, but there are obvious limits to increased gains in the private sector. There are not any such easily discernible limits in the public sector—until you reach crisis situations. Then it becomes a slightly different ball game, but arbitrators, up to now, have not recognized the difference.

I can remember a past governor of the State of New Jersey asking plaintively: "What can I, as governor, do to give more money to Newark without it ending up in the salaries of police and firemen?" I think that is a legitimate question when there are other competing needs in the community that have to be met. Public-sector interest arbitration can pay attention to the allocation problem, but I think it has to be done with slightly different tools and slightly different rules.

WILLIAM POST: I wonder if Professor Berkowitz would care to amplify one of the criteria he was talking about with reference to standards for public settlements—the area of comparable wages freely arrived at in collective bargaining. If the parties had the

right to strike, then you would have some idea of what a settlement would be under free collective bargaining. In some of the fact-finding I've done, I have always been interested in what I consider to be area settlements, which give one an indication of the kinds of settlements that were freely arrived at. You were linking the right to strike with a better appraisal of what would be a free and open settlement.

MR. BERKOWITZ: All I am saying is that if we had the strike operating in the public sector, as has been advocated by some of the people in the room, you would have fully collectively bargained settlements that would be comparable to those arrived at in the private sector. Then you would have a realistic bench mark. I know there are defects in that idea, since you would probably not be able to allow the right to strike in the most essential services, where employees have the most bargaining power.

But we're moving into what I think is a different kind of economic era. It may very well be that a fully collectively bargained settlement would come out the way San Francisco is coming out —with no increase, or maybe even with some decrease. Such a settlement would become a bench mark which could be used to make comparisons. Any kind of collectively bargained settlement would provide a better comparison than we now have in the public sector.

ALAN ALLARD: I want to address myself to the political aspects of today's discussion. I was struck by the remark about the municipality that saved some money by taking a strike. We had this happen in the city I come from in Canada four years ago; one of the comptrollers boasted of having saved $1 million or $2 million during a strike of municipal employees. To me, this was very irresponsible, in the broadest sense of that word.

I would like to suggest that we all know that we cannot translate the private-sector bargaining system into the public sector, but it seems to me a much more political process than I think has been described today. I would like to give this example of what an arbitrator can do: We had a police dispute in Toronto, and the arbitrator decided that police cars should have two policemen in them during the night-time hours. This caused grumbling and great consternation among the City Fathers who had to find the money.

The point I'm getting at is this: As a citizen, I am not sure that I want to place responsibility in the hands of the arbitrators. I think arbitration is the answer, but I don't want arbitrators to

have to play the political role in government. Politicians are notorious for making promises, and if the politicians promise that services are to be provided, then they have to take the responsibility or face the consequences. I think that it is unfair to shift that responsibility to arbitrators.

Ms. MORSE: It seems to me that if you are going into the public sector, you really have to understand that the political process is not only a very important one, but the accountability of your elected respresentatives will be decreased and the result will be that authority and responsibility will be moved to third-party persons.

Mr. ZWERDLING: We're getting back to the beginning, and the beginning was that there shouldn't be any unions in the public sector and the City Fathers should determine what is in the best interests of the citizenry. Since we do have collective bargaining, we're faced with the dilemma of what the final step of bargaining is going to be. Is it going to be the use of the economic weapon, or is it going to be a third-party situation?

I thought that the reason there was some trepidation expressed in the public sector was because there was some notion that it was essential that police and fire fighters perform their services. In the City of Detroit, with rampant unemployment and economic distress, which means increased crime in the inner city and people fleeing to the suburbs, the solution was to cut the wages of police in order to get rid of them. That's one way of looking at the problem. I did not understand it then, and I do not now.

PAUL PRASOW: I want to ask Ms. Morse to clarify her position with regard to the use of third-party intervention in an economic interest dispute in the public sector. For example, the California Rodda Act provides for 15 days of mediation and then fact-finding for 30 days, during which time the mediator may also serve as chairman of the fact-finding panel if the parties consent. The panel has 30 days in which to issue a report and recommendations, which are not binding. Then the mediator, who may have served as chairman of the fact-finding panel, may also resume mediation, based upon the fact-finders' recommendations. Does Ms. Morse object to that procedure and, if the parties are still unable to resolve their dispute after all those stages, does she feel that a strike or some kind of economic action may then be appropriate?

Ms. MORSE: I don't object to that kind of intervention technique, but I still have some concerns about the opportunity for

community input into the process. It seems to me that one of the values of third-party resolution is the privacy of it.

MR. PRASOW: I don't understand what you mean by community input. I assume that when you have a law or ordinance that requires a certain procedure, that represents the community input. If the ordinance or state law says that you use mediation and fact-finding, isn't that, in a sense, a reflection of the legislature's perception of what the community input should be?

MS. MORSE: It certainly is a reflection of the process that they believe should be followed; there's no doubt about that. I still think that the public feels it has suffered from a lack of understanding on the part of third parties of the impact on the community of many of the results of their intervention.

DALLAS YOUNG: I direct these observations to Professor Berkowitz. You appear to have suggested that there is almost a single pattern in the public sector, and I submit to you that this is very unrealistic.

Bargaining in public transit has a great tradition in which we have had some excellent preparations on the part of management and of persons representing the union. This is one kind of experience with which one can deal. Then there are the activities of the police, where they have gone to the voters to get ordinances enacted to give them certain benefits. That's a very different pattern. And there are the models of AFSCME, which has approached its problems from other directions. We have a multiplicity of patterns, and if you attempt to pull them all together and say, "This is the public-sector approach," you do a disservice to it.

In the transit field, the parties have prepared adequate data that they have made available to arbitrators—lawyers and nonlawyers. In other areas, the relative newness of the process to the parties has meant that both the management and the labor people have sometimes come before the arbitrators inadequately prepared. If you were suggesting, as I think you were, that it is the responsibility of the arbitrator to build the case for parties who were inadequately prepared, it seems to me that you open a whole can of worms.

MR. BERKOWITZ: I'm sorry if I left you with that impression. All I was saying was that an arbitrator ought to be willing and prepared to receive information. I agree that there is a multiplicity of patterns in the public sector. When parties are at different

stages of sophistication and have different interests, they use different approaches.

BRYAN WILLIAMS: My question involves the meaning of ability to pay and what I consider to be something of an arbitrator's dilemma. Take, for example, two adjoining school districts, where one of the boards, largely because of an industrial slowdown in the area and insufficient funds, or perhaps because it did not have the foresight to raise the mill rate, does not have the ability to pay. It puts forth a good case, supported by economic data, before the arbitrator.

The teachers, on the other hand, put forth their case, which is that the historical relationship between the two districts has been on a parity and that to create disparity would cause a great deal of trouble.

It seems to me that the problem is, first of all, what is meant by ability to pay. Do you take the judgment of the politicians when you decide what that is, or do you say, "I must have data to show that the entire area simply cannot pay"? What kind of credence would you give the teachers' argument if the case before you is a solid one on economic grounds?

MR. BERKOWITZ: That question puts in sharp relief what we are trying to say here about balancing economics and equity. Both criteria have to be taken into account, and it may well be that neutrals who are called upon to exercise judgment may have to say, "No, you can't have what's necessary to keep up with the cost of living and to maintain real wages on a constant basis," or "No, you can't maintain historical differentials because, in our judgment, this district is not able to pay and still supply other services that are necessary."

I think that is the kind of judgment we are going to have to come to, rather than the alternative, which is to say that comparability, the cost of living, or some God-given right has precedence and these other services come in through the back door. If the neutrals are going to have to make these judgments, then the parties have to be prepared to enlighten them.

MR. ZWERDLING: I have two things to say: One, I think you should separate the "awesome responsibility" concept from the question of the democratic system. What makes you think that anyone elected to public office is any more competent to do the job of determining the economic criteria for selected wage rates than an arbitrator who is a trained professional and who has

some objectivity and a third-party approach? Competence is not the issue.

But the issue of whether you should have the authority is something else. When we're saddled with a debt structure that exceeds the city's salary bill and was created by an interest rate that elected officials had nothing to do with determining, and when the cost of buying piping for the plumbing system or buses for the transit system is determined by either a monopoly or an oligopoly, we are asked to call these things economic factors beyond the control of the electorate and to take them for granted. But when it comes to paying a fellow a wage, that's a different story.