CHAPTER 8

INTEREST ARBITRATION

I. STATE AND LOCAL GOVERNMENT EXPERIENCE

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The promise and performance of state and local interest arbitration are the subjects of this paper. Natural first considerations are growth and types of coverage in existence. Next, I will examine constitutional and legislative challenges to interest arbitration laws. I then turn to an evaluation of interest arbitration. Many factors conceivably could go into such an evaluation, but the concentration here will be on chill and narcotic effects, outcomes, and the strike record. Finally, I will distill the findings and offer five suggestions designed to make the interest arbitration system in state and local bargaining more effective.

Growth and Types of Coverage

Most of us cut our industrial relations teeth at a time when we could rejoice about basic agreement on three tenets:

1. Collective bargaining is a desirable instrument of public policy. Among its fundamental virtues, the strengthening of democracy in a free society is a primary attribute.
2. Grievance arbitration is an appropriate method of resolving rights disputes. We were (and, I hope, are) convinced that grievance arbitration meets the needs of the parties and society.
3. Compulsory arbitration is undesirable for resolution of interest disputes. Management, labor, and neutrals found regular opportunity to agree on this thesis. Emphasis was placed on the impropriety of an outsider dictating terms of an agreement and the predicted disastrous chilling effect of arbitration on bargaining.

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Despite the agreement on the third tenet, experimentation has taken place at the state level. Following World War I, Kansas adopted a compulsory arbitration statute that was later found unconstitutional. After World War II, eleven states enacted compulsory arbitration statutes covering essential services of some type in the state. Massachusetts brought into being the then famous "choice of procedures" act. Most of these laws were invalidated as unconstitutional following the 1951 Supreme Court decision affecting the Wisconsin law. Although some of them are still on the books, they are essentially unused. Prior to the 1974 health-care industry amendments to the Taft-Hartley Act, a few states tried compulsory arbitration in that field on a limited basis.

The new wave began in 1968 and followed a decade of public employee organization statutes led off by Wisconsin in 1959. Although the scope of bargaining was extremely limited, President Kennedy's Executive Order 10988 in 1962 legitimized public employee bargaining insofar as many states were concerned and served as an impetus for state legislation. By the end of the sixties, the problem of what to do about police and firefighter bargaining had emerged. No jurisdiction wanted to permit de jure strikes in the public safety area, and all were concerned about the possibility of de facto strikes. The answer for almost half of the states was passage of some form of compulsory arbitration statute.

A handful of states apply their compulsory arbitration law to broad groupings of public employees. One or two have limited coverage of selected groups of public employees outside the public safety sector. Of the approximately 20 state compulsory arbitration laws in use, 13 concentrate on police or firefighters, or both. Some states add related public security groups such as prison guards or court employees. Police and firefighters are generally included in those states with broad compulsory arbitration coverage. Given basic application of these laws to police and firefighters, they are the groups on which I will concentrate in this paper. In passing, I note that three states limit compulsory arbitration coverage to firefighters. This may reflect less inherent logic than the fact that the International Association of Firefighters, AFL-CIO, has more political clout in the states involved than the more fragmented police organizations.

The states with compulsory arbitration laws include Alaska, Connecticut, Hawaii, Iowa, Maine, Michigan, Minnesota, Mon-

tana, Nebraska, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, Wisconsin, and Wyoming. The list runs the gamut from states known for their industrial base to those perceived as agricultural. On an overall basis, one distinguishing characteristic is that they are generally supportive of union growth. While there are almost the same number of states with right-to-work laws as the number with compulsory arbitration laws, overlap is minimal in that only four of the states with compulsory arbitration laws also have right-to-work legislation.

What type of compulsory arbitration approach have these states chosen? The states have long been termed experimental laboratories for labor legislation. Certainly they have lived up to their categorization when it comes to interest arbitration. Although slightly more than half of the states involved have opted for conventional interest arbitration—that is, either a single arbitrator or a tripartite board (most common) may select any of the positions of the parties or any position which falls between them on any issue—the remaining states reflect variety.

Theory suggests that final-offer-by-package is the type of interest arbitration best calculated to drive the parties to their own settlement, but few states have been willing to go this route. Wisconsin has been the pioneer and has also led in experimenting with a med-arb approach to interest arbitration. Hawaii and Massachusetts (fact-finder's position included) were the other states with final-offer-by-package, but compulsory arbitration in Massachusetts law was terminated for municipalities as part of tax reform in 1981. Michigan was the first state to try final-offer arbitration on an issue-by-issue basis and was joined by Connecticut, Iowa, and Maine. A number of other states have mixed final-offer types. One of the most creative approaches is in New Jersey where the parties are offered a menu of six different types of interest arbitration from which they may choose. If the parties fail to choose, the assigned method is final-offer-by-package for economic items and issue-by-issue for noneconomic matters. Iowa uses issue-by-issue final offer, but includes the fact-finder's position as one of three choices to be considered. Rhode Island, perhaps a bit wary of arbitration, limits its conventional binding arbitration to noneconomic matters. Arbitration is advisory on other issues. Experimentation has also taken place at the local level. Eugene, Oregon, has had some interesting experience with an approach which permits the parties to submit two

final-offers-by-package simultaneously, and thus gives the arbitrator four packages from which to choose. In using the different modes of final offer, the states have also varied in the purity of their approach. Some states limit final offers to one. Others, implicitly or explicitly, recognize the possibility of mediation by the arbitration board or arbitrator and permit or encourage referral of final offers to the parties for rework.

Although the Massachusetts law no longer provides for interest arbitration in municipalities, their work with a supervisory tripartite arbitration board is instructive. Under the leadership of John Dunlop and Morris Horowitz, both Academy members, a Joint Labor-Management Committee was established, with representatives from police and firefighter organizations as well as municipal government. The committee was given broad power to decide in which cases it wished to intervene and the form of intervention. The range was from individual to team mediation, to the remanding of certain or all issues for further negotiation, to selection and imposition of the form of arbitration to be used. Early success was dramatic in that the committee assumed jurisdiction over 221 cases from September 1978 to January 1980, and only seven of these cases went to arbitration. During the two years prior to the establishment of the committee, some 97 cases went to arbitration.[1] Many observers gave much credit to the leadership of the committee, but its early success makes it attractive as we search for ways to make interest arbitration more effective.

In sum, interest arbitration has exhibited dramatic growth in the 15 years between 1968 and 1983. Some 40 percent of the states now have some form of interest arbitration. The jury is still out on the "best" type of interest arbitration, but variety has been and will likely continue to be present.

Legislative and Constitutional Challenges

Constitutional challenge to interest arbitration statutes has been commonplace. Most of the states with such laws have witnessed a constitutional challenge to those laws. The leading basis for challenge has been the argument that compulsory interest arbitration is an illegal delegation of authority to an arbi-

[1]Altman, *Proposition 2 1/2—A Taxpayer's Revolution in Massachusetts*, 4 PERS/ALRA Information Bulletin 6–7 (March–April 1981).

trator or board of arbitration who was not elected and not responsible to voters. Other constitutional or constitutionally related arguments include absence or lack of clarity with regard to criteria to be considered and interference with home-rule powers of local government. Only three states, Colorado, South Dakota, and Utah, have invalidated state interest arbitration statutes. Decisions are on appeal in Connecticut and Texas (advisory arbitration) rejecting their interest arbitration laws. In some states, local charters permit compulsory arbitration on other than a statewide basis. Such a law was found illegal in California.

The other side of the coin is that compulsory interest arbitration has been upheld in 13 states.[2] Some states have gone to great lengths to implement or preserve their laws. For example, Pennsylvania passed a constitutional challenge. Michigan first enacted a compulsory interest arbitration law and then responded to comments by supreme court justices in that state by amending the law to avoid a constitutional challenge. A large majority of the laws are in place and our chair, Charles Rehmus, has observed elsewhere: "After reviewing many of these statutes and the cases considering their constitutionality, it seems probable in most jurisdictions that if a legislature wants to enact a binding arbitration statute, it can be properly drafted to meet the requirements of that state's constitution."[3]

Outside of minor housekeeping changes, whatever type of law is brought into being in most states tends to remain in place. Sometimes clearly needed changes are avoided because either public employers or public unions, or both, fear the outcome of reopening the statute to legislative change. Nevertheless, some states have been creatively experimental. Wisconsin and Massachusetts have already been mentioned. New Jersey and New York have benefited from formal research and study commissions. Minnesota, following the federal example of its northern neighbor, Canada, has permitted some public employees to opt for either the strike or compulsory arbitration.

States have not been prone to discontinue existing laws either

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[2]D. S. Chauhan, *Handling Disputes Between the Parties: Conflict Resolution in Collective Bargaining*, in Handbook on Public Personnel Administration and Labor Relations, eds. Rabin et al. (New York: Marcel Dekker, 1983).

[3]Rehmus, *Interest Arbitration*, in Portrait of a Process—Collective Negotiations in Public Employment, eds. Helsby et al. (Port Washington, Pa.: Labor Relations Press, 1979), 210–11.

by legislative action or referendum. As noted earlier, the major exception here is Massachusetts.

Chill and Narcotic Effects

The chill effect presumes that the parties will be loath to make concessions since the arbitrator/arbitration board will build a position on top of concessions already made. The existence of compulsory arbitration is expected to atrophy bargaining. The narcotic effect assumes that the actual use of compulsory arbitration results in an addiction to arbitration.

Although the concepts are discrete, researchers often concentrate on the percentage of negotiations going to impasse and arbitration, thus lumping the two effects together. An excellent early summary of the data covered the experience in six states.[4] Two states with conventional arbitration—New Jersey and Pennsylvania—had approximately 30 percent of their negotiations terminate in arbitration. Four states with some form of final-offer arbitration—Iowa, Massachusetts, Michigan, and Wisconsin—had between 6 and 16 percent of their negotiations end in arbitration.

The data support the expectation that conventional arbitration is more likely to be used than final-offer arbitration. Our surprise is that the two states with the fewest arbitrations as a percentage of negotiations, Massachusetts and Iowa, used different forms of final-offer arbitration. Iowa is an issue-by-issue state, and Massachusetts, at the time of the study, used package final-offer arbitration. This was prior to the introduction of the supervisory board in Massachusetts. A priori, one would expect final-offer-by-package to place more pressure on the parties to settle short of arbitration.

One New York State study showed that, on an overall basis, the existence of a compulsory arbitration statute resulted in approximately 16 percent more negotiations reaching impasse than would have occurred otherwise.[5] Note that the reference is to impasse short of arbitration.

Observers of the narcotic effect certify that it is there and may

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[4]Lipsky and Barocci, *Final-Offer Arbitration and Public-Safety Employees: The Case of Massachusetts,* in Proceedings of the 30th Annual Meeting (1977), Industrial Relations Research Association, ed. Barbara D. Dennis (Madison, Wis.: IRRA, 1978), 72–76.

[5]Kochan and Baderschneider, *Dependence Effect on Impasse Procedures: Police and Firefighters in New York State,* 31 Ind. & Lab. Rels. Rev. 447 (July 1978).

increase slightly over time. It is limited, however, to a distinct minority of cases. The narcotic effect, as well as the chill effect, as will be seen below, may actually be decreasing.

Post-1980 research data are hard to come by. This author informally surveyed some ten attorneys in Pennsylvania and New Jersey whose practice includes extensive interest arbitration work. They reported that they were aware of a sharp drop in the number of cases going to the arbitration stage—perhaps 50 percent. They were in general agreement on the forces at work. These included:

1. *Long-term agreements.* The parties are increasingly willing to negotiate two- or three-year agreements. This removes the possibility of arbitration usage to every second or third year.

2. *Hard times.* Municipal finance problems are endemic, and the possibility of layoffs looms large. The parties in a number of jurisdictions were willing to exchange some form of job security for small or no salary increases.

3. *Emergence of leader/follower relationships.* Just as in the private sector, small units found themselves a bargain to which they could relate. I am familiar with one suburban Philadelphia county where there is tacit agreement that a particular bargain negotiated or arbitrated will be the model for others in the vicinity.

Even without the recent experience alluded to above, it appears that the fear of chill and narcotic effects was an overstated one. Some jurisdictions with complex problems, it is true, find it hard to avoid arbitration. The evidence suggests that most parties can either avoid arbitration or go in and out of it without addiction.

Outcomes and Finality

Outcome studies have concentrated most frequently on two monetary aspects of the determination. One, does the existence of an arbitration statute increase the probability of monetary gain? And two, does the use of arbitration rather than negotiations affect the monetary outcome? Studies addressing these issues face complex methodological problems. Despite a variety of assumptions and approaches to the problems, the study re-

sults are relatively uniform in concluding that neither the existence of an arbitration statute nor the use of arbitration itself significantly alters the monetary outcome. One study found a one-time effect for final-offer arbitration in Wisconsin of 5 percent, but it was noted that the result was transitional and might not be reliable.[6]

Finality is an important aspect of arbitration. Although many interest arbitration awards have been challenged, available evidence suggests that they have held up well. One problem affecting finality has been the allegation that the arbitrator/board exceeded available authority, particularly in the area of management prerogatives. Various prearbitration review mechanisms found in public employee relations boards have reduced this problem.

One worthwhile approach to the problem of party dissatisfaction with an award is in existence in New York City. There, a tripartite board may receive appeals and either affirm or modify determinations. Curiously, there have been relatively few appeals. The Board of Collective Bargaining has also been very sparing in its modifications. The existence of a quick-review mechanism has much to recommend it. Some suspect that the New York City experience reflects the ability of Arvid Anderson and his colleagues and suggests that a review approach should have some monetary cost in order to eliminate frivolous appeals.

Strikes

One of the main reasons for the existence of compulsory interest arbitration in the public sector is that it was meant to provide finality without resort to the strike. Public-sector strikes, whether legal or illegal, became a fact of life in the 1970s, and public and party concern over these strikes helped in the passage of interest arbitration statutes. Most observers agree that the presence of interest arbitration has been effective in the prevention of strikes in the fields, notably public security, covered by these laws. An illustrative research-based comment is: "There is sufficient empirical evidence, however, to conclude that the existence of an *arbitration procedure* reduced the probabil-

[6]Stern, *Final Offer Arbitration—Initial Experience in Wisconsin*, 97 Monthly Lab. Rev. 39–43 (September 1974).

ity of strikes occurring among police and firefighters when compared to negotiations governed by a factfinding procedure or no impasse procedure at all."[7]

Although the record is good, there is room for concern. Some public officials have suggested that the award price is too high, at least insofar as their city was concerned. Mayor Coleman Young of Detroit noted: ". . . the awards we have had under Act 312 are intolerable and have caused more damage to the public service in Detroit than the strikes the law was designed to prevent."[8]

On the labor side, we face the possibility of strikes against an arbitration award. Probably the single most dramatic event of this type was a police strike in Montreal. Will there be more anti-award strikes in the future?

The answer is a qualified yes. We are all aware that police and firefighters have enjoyed catch-up. Their salaries were woefully low 20 years ago. There was general agreement that low salaries, coupled with more complex jobs, warranted attention. In many jurisdictions, police and firefighters now have comparatively good salaries, excellent fringes, and a greater degree of job control than in the past. My sense is that arbitrators are conscious of the change, and arbitration awards are becoming more conservative in the public-security services. Inevitably, there will be dissatisfaction with awards and some strikes.

One approach to this problem involves the use of supervisory and/or review boards to protect the parties and the public from arbitrary or capricious determinations. More on this topic in the next section of the paper.

Recommendations for Change

Type of Arbitration

All approaches to interest arbitration have advantages and disadvantages. Although some experimentation has taken place, the states involved tend to be wedded to the type of arbitration with which they began. My experience suggests that, while the parties may have some knowledge of alternative forms of inter-

[7]Kochan, Collective Bargaining and Industrial Relations (Homewood, Ill.: Irwin, 1980), 471.
[8]LMRS Newsletter, No. 11 (1980), 1.

est arbitration, they are unfamiliar with experience under these varieties.

I subscribe to the notion that the parties should be given an opportunity to pick the type of interest arbitration which they believe will best meet their needs. The statute which best exemplifies this philosophy is the New Jersey police and firefighter law. There, the parties are offered five choices from which to select an arbitration form. A sixth type, economic issues by final-offer package and other subjects on an issue-by-issue final-offer basis, is also available and is assigned if the parties fail to agree on their form of interest arbitration.

Legislative listing of options at least provides the parties with an awareness that alternatives are available. The parties' selection of a type of interest arbitration could be facilitated by requiring the cognizant labor board to provide them with information about experience under the alternative forms. The state could maintain its support of a particular type of interest arbitration by designating, as in New Jersey, the mandated form in the event the parties fail to concur on a selection.

Tripartite Voting in Conventional Arbitration

A tripartite board, with each member having one vote, is the conventional form of interest arbitration. The tripartite board has proven to be an extremely useful device. Not the least of its virtues is that it provides the neutral with a greater understanding than can be gleaned at the hearing of the possible impact of suggested changes. Although the tripartite board works well, there are inevitably some issues where the parties take extreme positions in the executive session. These can often be mediated by the neutral arbitrator. However, if the parties hang tough on an issue, the neutral is faced with the prospect of agreeing with one or the other of the positions, neither of which the neutral finds acceptable. One approach, of course, is for the neutral to reject both positions, thus leaving the issue in limbo.

I suggest that it is desirable to provide the neutral with the reserve voting power to make a determination unilaterally when no majority can be mustered on an issue. Obviously, this power should be used sparingly, but it can be very effective in producing the type of rational movement that may not be present under conventional arbitration with the pure majority-vote requirement.

Scope of Arbitration

The scope of arbitration has proved troublesome, particularly insofar as management prerogatives are concerned. Major issues have revolved around staffing and work assignment. Some jurisdictions have responded by ruling permissive bargaining topics out of bounds for bargaining and/or arbitration. There is often a fine line between a matter that is outside arbitration and the covered financial impact of the management approach to the problem.

I lean toward allowing permissive topics in the arbitration forum. Their inclusion may expand the issues to be considered in arbitration, but their absence may trigger unnecessary job actions. I do not believe that arbitrators are going to be overly generous in blazing new ground in interest arbitration, but the safety valve should be present.

One aspect of the scope of arbitration which raises concern is pensions. Throughout the country, municipal and state pensions face difficulties in the years ahead. Many plans are not properly funded. In arbitration, the pension topic frequently requires expensive and detailed homework in order to propose changes in an existing system. The subject frequently does not lend itself to a short presentation at an arbitration hearing, and the arbitration board often does not have the time to make the thorough review of the matter that it deserves. Police and firefighters are entitled to excellent pension coverage, but I am persuaded that this can best be done on a statewide basis. Appropriate pensions and funding, at least at this time, are probably better handled at the state legislative level.

Supervisory/Review Boards

Experience in Massachusetts and New York City support the desirability of a tripartite supervisory/review board. The board should have the power to intervene following mediation, offer its own mediation, determine the appropriateness of fact-finding, and assist the parties in selecting the form of arbitration to be used. In fact, it should be able to postpone arbitration if it believes the parties need more bargaining time. It should also serve as a review board if parties wish to appeal decisions that they believe are arbitrary or capricious or exceed the arbitrator's authority. Existing appeal mechanisms would remain in place,

but it would be safe to assume that decisions of such a review board would generally be upheld.

An approach of this type has been recommended elsewhere by Robert Helsby, one of the most astute observers of the public-sector bargaining scene.[9] I differ with Bob Helsby solely in that I would recommend that the public positions on the board be held by arbitrators. Bob prefers to use respected community leaders in this capacity. While I agree that such individuals would carry community respect, their unfamiliarity with labor relations leads me (and others) to suspect that they might make "good" but unworkable decisions.

There should probably be some financial cost associated with an appeal. It can remain modest so as not to foreclose access while discouraging overuse of the process. Appeal hearings could be public, and the decisions should be swift. In all but the exceptional case, I expect the second decision on a matter to reinforce the original decision and thus, I believe, give a recalcitrant party pause in carrying the issue further. It is important to avoid institutionalizing the appeal step as a routine matter.

Final Offer Minus One

For those states which prefer to use final-offer-by-package or package final offer on economic items, I propose that the arbitrator/arbitration board be empowered to remove one item from the package. This modest approach should not result in parties' losing incentive to prepare reasonable final-offer positions, but recognizes the reality that, for political or other reasons, either or both parties may find it necessary to include something inappropriate. Indeed, final-offer arbitrators have been known to comment that the rejected package of one side would have been acceptable except for one proposal.

The parties are adept at adjusting to changes in arbitration systems. One possibility is that they might include an unworkable proposal in the expectation that this would be the one thrown out. However, the addition of a bad proposal to protect an existing bad proposal exposes a party to more risk than I believe it would be willing to assume.

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[9]Helsby, *Strike vs. Interest Arbitration: Possible Alternatives*, 4 PERS/ALRA Inf. Bull. 5 (May–June 1981).

Conclusions

The use of interest arbitration has grown dramatically in a 15-year period. Almost half of the states now require such a system, and it is permissible in a number of other states. Interest arbitration has generally been upheld when it has been challenged on constitutional grounds. Aspects of its performance which have been considered include chill and narcotic effects, outcomes, and strikes. As an academic, I am comfortable in grading the compulsory interest arbitration scene with a solid "B." It's fair to say that interest arbitration has assuaged most of the fears we all had at the start, but it still has room for improvement.

We are now past the introductory phase of the use of compulsory interest arbitration on a wide-scale basis. There will be talk, and some action, designed to eliminate or curb the process significantly. However, I expect the next phase will emphasize gradual extension of the use of interest arbitration and improvement of existing systems. To that end, the closing section of this paper was devoted to five suggestions for such improvement.

II. TRANSIT AND OTHER ATTEMPTS TO ARBITRATE CONTRACT TERMS

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Today's session is about "Interest Arbitration: Its Promise and Performance." The promise was simple. A neutral third party, acting singly or as chairperson of a three-member board, would render a decision about the contract terms for a new or renewed collective bargaining agreement, which would resolve a labor dispute and thereby avert or end a strike or use of some other economic weapon, particularly in an industry or service where the strike is intolerable, inconvenient, and/or inadvisable.

Reading the literature, however, leads to the conclusion that this session could just as easily be entitled "The Threat and the Performance" because almost as much has been written about the disadvantages.

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