Chapter 11

INTEREST ARBITRATION: SOMETHING OLD, SOMETHING NEW

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There are several interest arbitration trends and one new issue that I would like to discuss. The first relates to the issue of the seemingly ever increasing costs of health insurance. Not surprisingly, this issue has been the subject of a steady stream of interest arbitration decisions. As Arbitrator Ed Benn has noted, "Insurance costs are skyrocketing which makes bargaining on this issue border on the impossible."[1] From my review of interest arbitration awards issued in the past few years, it is clear that arbitrators are increasingly receptive to employer proposals to restructure health insurance plan design to try to reduce costs and/or to require employees to pick up an increasing share of the cost of health insurance. And, because health insurance costs are rising so rapidly, many arbitrators have carved out an exception to the familiar quid pro quo doctrine.[2] As Arbitrator Edward Krinsky observed in a 2002 decision[3]:

> Deductibles and copayments are commonplace in the comparable counties. These are not unusual benefits which the County is seeking for which it should need to offer a special incentive in order to receive them. Rather, the County is making a reasonable effort to control escalating health costs, and is doing so in a manner similar to what has been agreed to by employers and unions in comparable counties. . . .

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[1] *City of Countryside and FOP Labor Council* (Arb. Edwin Benn, Nov. 5, 2003) at p. 12. As Arbitrator Benn observed in a later decision, "To meet this national problem, sharing of employees in premium costs has become quite common." *County of Effingham/Sheriff of Effingham County & AFSCME Council 31,* Case No. S-MA-03-264 (Arb. Edwin Benn, Dec. 8, 2004.) at p. 18. See also *Washington Area Metropolitan Transit Authority and Fraternal Order of Police* (Arb. M. David Vaughn, Dec. 19, 2005) ("The large increases in health care costs constitute a strong reason to seek alternative structures which will better contain future increases, particularly where those objectives can be met without significant cuts in services and benefits.").

[2] Under the quid pro quo doctrine, a party that is seeking to change the status quo is normally required to demonstrate the need for the change, as well as to offer something in return for the change.

[3] *La Crosse County (Highway Employees),* Case 186, No. 59631 (Arb. Edward Krinsky, Sept. 2002).

From my observation, more and more arbitrators are simply concluding, as Arbitrator Benn observed in a recent City of Chicago case, "where it can be demonstrated that significant cost increases exist, an employer seeking to increase health care responsibility by its employees has met its burden justifying a greater shifting of costs,"[4] without any mention of a need to offer a quid pro quo.[5] Our moderator has adopted an alternative approach in the context of health insurance, i.e., "A party proposing language in a collective bargaining agreement changing past practice must show that there is a change in the circumstances which require changed contract provisions and that its proposed language is appropriate to meet that need. Alternatively, it must show that it has offered an appropriate *quid pro quo*."[6]

In a related vein, interest arbitrators have given great deference to employer offers that are in line with what the employer has successfully negotiated with other bargaining units, frequently pointing out the need for uniformity on a benefit such as health insurance.[7] This is especially true where the case involves a union that is the "lone holdout" and where the employer is seeking uniformity with its other bargaining units. As Arbitrator Fredric Dichter observed in a 2000 decision[8]:

> This Arbitrator in past cases has recognized that when addressing benefits the need for uniformity is great. I, therefore, agree with . . . the City that no quid pro quo is required. The Lone Holdout rule does trump any requirement that otherwise would exist.

As Arbitrator Daniel Nielsen noted, "In the area of insurance benefits, a uniform internal pattern is particularly persuasive."[9]

Retiree Health Insurance

A related issue that is sure to result in significant interest arbitration proceedings in the coming years is retiree health insurance,

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[4] *City of Chicago and FOP Lodge No. 7* (Arb. Edwin Benn, Feb. 25, 2005) at p. 50.

[5] *See, e.g., City of Marinette (Firefighters)*, Decision No. 30771-A (Arb. William Petri, Dec. 21, 2004).

[6] *North Central Community Service Program Board*, Decision No. 30265-A (Arb. Stanley Michelstetter II, Nov. 1, 2002).

[7] *See, e.g., Village of Schaumburg and MAP Chapter #195* (Arb. Thomas Yaeger, Apr. 14, 2007), at p. 27 (". . . unless there is some compelling reason why this bargaining unit should not be treated like the other Village bargaining units, the Village's ability to negotiate the same provision with its other represented bargaining units should receive significant if not controlling weight in this interest arbitration").

[8] *City of New Berlin*, 114 LA 1704, 1711 (Arb. Fredric Dichter, May 18, 2000).

[9] *Dane County (Deputies)*, Decision No. 25576-A (Arb. Daniel Nielsen).

especially in the public glare of GASB 45, i.e., the accounting standard issued by the Governmental Accounting Standards Board that covers post-employment health benefits. In issuing its standard, the GASB noted that most post-employment benefits other than pensions ("OPEB" for short) "are financed on a pay-as-you-go basis" and, as a result, "current financial reporting generally fails to, among other things, [p]rovide information about the *actuarial accrued liabilities* for promised benefits associated with past services and whether and to what extent those benefits have been funded."[10] To correct this problem, GASB 45 requires "systemic, accrual-basis measurement and recognition of OPEB cost (expense) over the period that approximates employees' years of service" and "information about actuarial liabilities associated with OPEB and whether and to what extent progress is being made in funding the plan."[11] GASB 45 is being phased in in three steps. For large governmental entities with revenues in excess of $100 million or more, GASB 45 "is effective for [fiscal years] . . . beginning after December 15, 2006."[12] For governmental entities with revenues of $10 million or more, GASB 45 is effective for fiscal years beginning after December 15, 2007. All other governmental entities are covered for fiscal years beginning after December 15, 2008.[13]

Concerns over GASB 45 liability are beginning to attract the attention of public employers nationwide. Consider the following:

- The California Comptroller reported that the state's unfunded liability over the next 30 years for retiree health care benefits was $47.88 billion. [14]
- North Carolina's State Health Plan puts its unfunded liability for health benefits for state employees and teachers at $23.8 billion.[15]
- The City of Chicago has pegged its unfunded liability for non-pension post-retirement benefits—primarily health benefits—at $1.4 billion.[16]

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[10] *Id.* at pp. 1–2 (emphasis in original).
[11] *Id.* at p. 2.
[12] *Id.* at p. 5.
[13] A summary of GASB Statement 45 is available the GASB's Web site at http://www.gasb.org.
[14] 45 GERR 580 (May 15, 2007).
[15] 44 GERR 1323 (Dec. 19, 2006).
[16] 44 GERR 363 (Apr. 4, 2006). According to the GERR report, this "estimate takes into account a settlement of litigation involving the city and its employees that terminates Chicago's obligations to fund retiree health premiums beyond June 30, 2013." *Id.*

Given the tremendous liabilities facing many public employers, interest arbitrators will be increasingly called upon to rule on efforts by public employers to reduce or eliminate GASB 45 liability for unfunded retiree health benefits. Although interest arbitrators have been quite reluctant to award union proposals to establish or enhance retiree health benefits, to date, interest arbitrators have not yet had to decide many cases where employers were seeking to reduce or eliminate GASB 45 unfunded retiree health insurance liability. However, such cases will surely increase in the near future. I did find one interest arbitration decision where the employer's GASB 45 unfunded liability was at issue. In *Racine Water Works Utility*, Arbitrator Honeyman awarded an employer offer that capped the retiree health benefit, concluding that "the Employer has made a substantial showing of a need to change an extraordinarily expensive benefit. . . ."[17] In responding to the union's contention that the actual long-term cost impact was unknown, Arbitrator Honeyman stated:

> The degree to which GASB's 45 requirement of "long tail" financial liabilities will drive up financing costs and undermine the employer's financial viability is, admittedly, speculative. But the recent sad history of some major and formerly rock-solid companies at least partly related to their obligations to retired employees, suggests that the Employer's concerns are not mere fantasy. [18]

It is to be hoped that interest arbitrators will recognize the tremendous unfunded liability that some public employers have with respect to retiree health benefits and will be receptive to employer offers that seek to reduce and/or eliminate the public employer's unfunded liability. In particular, interest arbitrators should be willing to give favorable consideration to proposals to cap or freeze retiree health benefits and/or to establish two tiers to deal with this issue, especially where the existence of such benefits is not supported by the external comparability evidence.

Arbitral Treatment of "Catch Up" Arguments

Not infrequently in interest arbitration a union asserts that it has fallen in relation to the internal and/or external comparables even though this change in position occurred through prior

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[17] *Racine Water Works Utility*, WERC Decision No. 31232-A (Arb. Christopher Honeyman, Dec. 16, 2005), at p. 13.
[18] *Id.* at p. 11.

voluntary agreement(s) of the parties. It now appears that most interest arbitrators apply a common maxim in rights arbitration, i.e., you cannot get through interest arbitration what you were not able to get through prior voluntary collective bargaining. Apropos to this point is the following ruling of Arbitrator William Petri:

> . . . the Union's reference to alleged deterioration in firefighter wage rates dating back to 1992 is not relevant in these proceedings, because the interest arbitration process is not a vehicle for revisiting the propriety of such previously negotiated wages, hours and terms and conditions of employment. [19]

Another variation is where a union negotiates a deal with an employer and subsequently believes that another union representing other employees of the same employer got a better deal and, as a result, seeks a so-called "equity adjustment." Arbitrator M. David Vaughn faced just such a situation in a Postal Service case involving the Mail Handlers Union.[20] In rejecting the union's catch-up argument, Arbitrator Vaughn stated:

> Interest arbitrators must be reluctant to undo an earlier negotiated agreement on the basis that one Party in hindsight thinks the other got the better of the deal. Put another way, a deal is a deal. [21]

Med-Arb

Med-Arb is certainly not a new idea or trend, but it is something on which I would like to comment. Whether having the interest arbitrator serve as a mediator is both issue- and arbitrator-specific. By that I mean that certain issues are more amenable to mediation than others and some arbitrators are more qualified and suited to mediate than others. Where there are experienced attorneys or advocates on both sides, they usually know which cases are well suited for mediation, and in such instances it has been my experience that an arbitrator is frequently selected based at least in part on his or her skills as a mediator and with the mutual agreement that the arbitrator will try to mediate the dispute, with

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[19] *City of Marinette (Firefighters),* Decision No. 30771-A (Arb. William Petri, Dec. 21, 2004). *See also Village of Greendale*, Decision No. 30432-A, (Arb. Edward Krinsky, Jan. 23, 2003) at p. 8. ("…to the extent that there has been wage deterioration, it is something which the parties realized, or should have realized was occurring when they mutually arrived at their settlements. The Association's arguments are not persuasive that arbitration should now be used to begin to correct the results of years of voluntary bargaining.").

[20] *United States Postal Service and National Postal Mail Handlers Union* (Arb. M David Vaughn, Apr. 24, 1996).

[21] *Id.* at p. 14.

the understanding that the arbitrator will conduct a hearing only if mediation does not resolve the dispute. Although I think med-arb has great merit where both parties and the arbitrator agree to mediation, I would oppose legislating med-arb or having an arbitrator impose mediation over the objection of either party. In my experience, mediation works best where both parties willingly and mutually consent to its use.

I would also note that arbitral mediation frequently works where mediation through the Federal Mediation and Conciliation Service (FMCS) or one of the state mediation agencies has been unsuccessful. And the reason should be obvious. As good as most FMCS and state agency mediators are, they have no authority to resolve the dispute with finality. On the other hand, an arbitrator chosen by the parties to hear an interest dispute has the authority to issue a final and binding decision and, as a result, has a greater ability to influence the parties' positions on the disputed issues.

The Employee Free Choice Act of 2007

H.R. 800, the so-called "Employee Free Choice Act of 2007" (EFCA), which passed in the U.S. House of Representatives by a vote of 228 to 183, and which is now pending in the U.S. Senate, would constitute, in the words of the AFL-CIO, ". . . the most important labor law reform legislation in 70 years."[22] In addition to requiring the National Labor Relations Board (NLRB) to certify unions based on a card check majority, the EFCA would mandate interest arbitration for first contracts if negotiations and mediation do not produce a ratified contract. The Act as passed by the House thus provides that if no agreement on a first contract is reached after 90 days of bargaining and if the FMCS "is not able to bring the parties to agreement by conciliation" within 30 days of the date mediation is requested,[23] the FMCS "shall refer the dispute to an arbitration board established in accordance with such regulations as may be prescribed by the Service."[24] The Act further provides that "[t]he arbitration panel shall render a decision settling the dispute and such decision shall be binding upon the

[22]http://blog.aflcio.org/2007/03/01/house-passes-employee-free-choice-act.

[23]H.R. 800 provides that both the period for negotiation and the period for mediation may be extended for such further period as the parties may mutually agree upon. H.R. 800, Section 3, Employee Free Choice Act of 2007 (Engrossed as Agreed to or Passed by House).

[24]*Id.*

parties for a period of 2 years, unless amended during such period by written consent of the parties."[25] Although the AFL-CIO enthusiastically supports enactment of this legislation, I cannot help but note that the Act is at odds with the AFL-CIO's longstanding and oft-stated opposition to compulsory arbitration of collective bargaining impasses.

Presumably the criteria to be used by the arbitration board will be set forth in the rules and regulations established by the FMCS. It is probably safe to predict that such criteria will track the criteria found in most state public sector interest arbitration laws and include, among others, such factors as external comparability, internal comparability, the cost of living, and the employer's ability to pay. However, the use of such criteria will be much more difficult to implement in the private sector. Because of time limitations, let me just suggest one major problem that will surely arise.

One of the most frequently invoked criteria in public sector interest arbitration is external comparability.[26] In the public sector, once the external comparables have been identified, obtaining copies of collective bargaining agreements and wage and fringe benefit data for the external comparables is greatly facilitated by the fact that such information is, by definition, public information that can be readily obtained, either voluntarily or through use of a state's freedom of information act. In the private sector, obtaining such information will be infinitely more difficult. In the first place, there are no laws requiring private employers to provide such information. Efforts by an employer to obtain such information will be encumbered by limitations imposed by antitrust laws. According to the U.S. Department of Justice Antitrust Division and the Federal Trade Commission (FTC), the following guidelines should be adhered to in order to avoid antitrust exposure[27]:

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[25] *Id.*

[26] As Arbitrator Kossoff recently noted, "It is commonly accepted that, as a general rule, the most important criterion in interest arbitration for determining which of the competing offers on wages to choose for a public employment unit of firefighters is a comparison with the wages of other employees performing similar services in public employment in comparable communities." *City of Rock Island and IAFF Local 26*, ILRB Case No. S-MA-06-142 (Arb. Sinclair Kossoff, Feb. 27, 2007) at p. 15. Arbitrator Kossoff noted that there is possibly an exception where there is evidence of a long-standing parity relationship between police and fire bargaining units in the same jurisdiction. *Id.* at n.6.

[27] *See* U.S. Department of Justice and Federal Trade Commission Statements of Enforcement Policy and Analytical Principles Related to Health Care and Antitrust, Statement 6 on Provider Participation in Exchange of Price and Cost Information (Aug. 1996). FTC officials have said that these principles, although initially directed to the health care industry, are broadly applicable to other industries.

- A third party such as a consultant should be used to collect and disseminate sensitive wage and fringe benefit data.
- The Antitrust Division and FTC recommend that to qualify for an "antitrust safety zone," wage surveys should ask only about wages paid at least three months prior to the date on which survey participants complete the survey.
- The information must be sufficiently aggregated so that recipients will not be able to identify the wages and benefits paid by any particular company. The Antitrust Division and FTC thus recommend that survey should include at least five employers and that no individual employer's data should represent more than 25 percent on a weighted basis of the statistic being reported.

Anyone familiar with application of the external comparability standard in private sector interest arbitration can easily see the problems that lie ahead if the EFCA is enacted into law. First and foremost, outside of situations where the external employer's employees are covered by a collective bargaining agreement, it will be impossible to get employer-specific wage and fringe benefit data. And the data that is collected will be old data rather than current data. How the parties and arbitrators will deal with these limitations remains to be seen.

It is reasonably clear to this observer that the sponsors of this proposed legislation have not thought through all the significant problems that would be presented if compulsory interest arbitration is mandated for first contracts, something that I would rather firmly oppose. This is surely something that the drafters of the original Wagner Act never contemplated. As the Supreme Court noted in its *H.K. Porter* decision in summarizing the legislative history of the National Labor Relations Act[28]:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. . . . But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.

[28] *H.K. Porter v. NLRB*, 397 U.S. 99, 103–04 (1970).

Let me briefly conclude by suggesting that labor, management, and neutrals should pay close attention to this proposed Employee Free Choice Act and especially its compulsory arbitration component for first contracts. If this Act is enacted as currently worded, it not only would result in the repudiation of voluntary collective bargaining, but also would lead to innumerable problems, only one of which I have had time to discuss today.