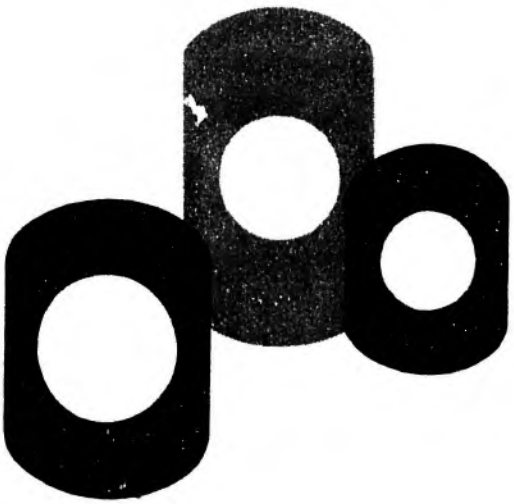
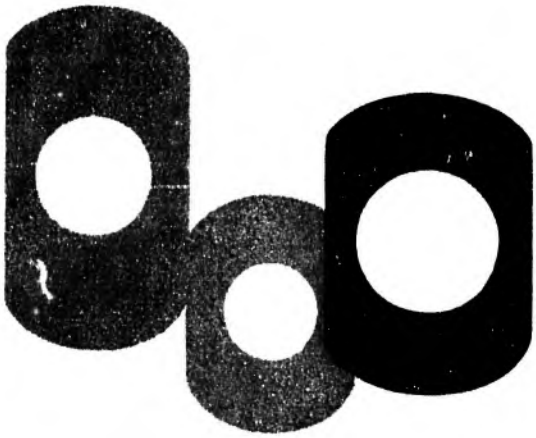


# CHALLENGES TO COLLECTIVE BARGAINING

Proceedings of Conference

edited by Benjamin C. Sigal



**LABOR-MANAGEMENT EDUCATION PROGRAM**

Industrial Relations Center
College of Business Administration
and
College of General Studies
University of Hawaii
Honolulu, Hawaii
September 1968

Proceedings of
Conference on

# CHALLENGES TO COLLECTIVE BARGAINING

August 11, 1967
Honolulu, Hawaii

edited by Benjamin C. Sigal

**LABOR-MANAGEMENT EDUCATION PROGRAM**
Industrial Relations Center
College of Business Administration
and
College of General Studies
University of Hawaii
Honolulu, Hawaii
September 1968

# SPEAKERS

| | |
|---|---|
| BENJAMIN AARON | Professor of Law and Director of the Institute of Industrial Relations, University of California, Los Angeles. Labor Arbitrator and Umpire for various industries. Former Public Member of the Wage Stabilization Board. |
| NATHAN P. FEINSINGER | Professor of Law, University of Wisconsin. Labor Arbitrator. Former Chairman of Presidential Fact-Finding Boards on Steel and Meat Packing Industries and former Chairman, National Wage Stabilization Board. |
| THEODORE KHEEL | Attorney. Labor Mediator and Arbitrator. Member of many presidential fact-finding and arbitration boards. Executive Director, Foundation Employees Health, Medical Care and Welfare, Inc.; Partner-Battle, Fowler, Stokes and Kheel; former Chairman, New York Regional Board, National War Labor Board. |
| HAROLD S. ROBERTS | Senior Professor of Economics, and Director of Industrial Relations Center, College of Business Administration, University of Hawaii. Labor Arbitrator and Consultant on personnel problems. Former Chief of Collective Bargaining, Bureau of Labor Statistics, U.S. Department of Labor. |
| JACK STIEBER | Professor of Economics and Director of the School of Labor and Industrial Relations, Michigan State University. Served as Executive Secretary to the President's Advisory Committee on Labor-Management Policy and as Research Consultant to the International Labour Organization. Consultant to public and private agencies. |

# PREFACE

The discussions contained in this publication were presented in a Conference on Challenges to Collective Bargaining held in Honolulu, Hawaii on August 11, 1967. The Conference was held under the auspices of the Labor-Management Education Program of the University of Hawaii. Both the Conference and this publication were made possible by funds allotted under Title I of the Higher Education Act of 1965.

The basic theme to which the discussions were directed was that changes are required in our attitudes, our concepts, and our laws, in order to deal effectively with new problems arising in labor-management relations in both the public and private sectors. The material in this volume makes a useful contribution to public understanding of many of the complex issues involved.

Harold S. Roberts, Director
Industrial Relations Center
July 1968

Benjamin C. Sigal, Director
Labor-Management Education Program

# TABLE OF CONTENTS


| | | |
|---|---|---|
| A NEW APPROACH TO STRIKES IN PUBLIC EMPLOYMENT | Jack Stieber | 1 |
| CAN COLLECTIVE BARGAINING DEAL EFFECTIVELY WITH PROBLEMS CREATED BY AUTOMATION? | Theodore W. Kheel | 7 |
| LABOR RELATIONS LAW: AN ASSESSMENT | Benjamin Aaron | 14 |
| COLLOQUIUM | Jack Stieber<br>Benjamin Aaron<br>Nathan P. Feinsinger<br>Harold S. Roberts, *Moderator* | 28 |

# A New Approach to Strikes in Public Employment

Jack Stieber

The U. S. Department of Labor reported 142 work stoppages in public employment last year, involving 105,000 workers who were idled for 455,000 days. This made 1966 the biggest year, by far, for strikes in Government. There were more than three times as many strikes as in 1965 and more than twice as many as in the previous peak year of 1952 during the Korean War. All but nine of the strikes in 1966 were in local government, with schools, sanitation, protection services, and hospitals and other health services, in that order, accounting for close to 90 percent of the total. There were only two stoppages in public transportation, including the celebrated New York City transit strike in January, but they caused more than half of all time lost due to government strikes in 1966. In addition to reported stoppages, which include only those involving six or more workers and lasting at least one day or shift, there were undoubtedly others of a few hours duration, not to mention mass resignations by teachers and nurses, "reporting sick," "work-ins" and other strike substitutes. This article will deal primarily with the strike problem at the local level where it is most pressing.

While still insignificant in number of strikes, workers involved, and days lost, as compared with any other industry, strikes in public employment pose a major problem in labor-management relations in the United States today. There are several reasons why so few strikes should occasion so much concern.

First, all strikes in government are in violation of the law. They are specifically prohibited by the Taft-Hartley Act, by all states which have public employment relations laws, and by numerous court decisions. The willingness of so many otherwise law-abiding citizens to violate and defy the law poses a moral issue as well as a practical problem of how to deal with such stoppages.

Second, many government services are vital to the normal functioning of the community. Strikes by policemen, fire fighters, and prison guards are intolerable and even the organizations to which these employees belong do not assert the right to strike. Strikes in hospitals, sanitation, and public utilities may present a threat to health or safety if they last more than a few days. Public transit, especially in a few large cities, is so important to the convenience and economic well-being of the people that many would classify it as an essential service. And, strikes which close schools disrupt the social, economic and emotional lives of more people than almost any other kind of work stoppage.

Third, strikes in public employment are bound to increase because government is the largest and fastest-growing industry in the United States and public employees are joining unions at a rapid rate. In October 1966 there were 11½ million government employees--2.9 million Federal, 2.2 million state and 6.4 million local. This total is expected to grow to 15 million by 1975 when one out of every five employees will be working in government. In the AFL-CIO, almost the only unions which are growing rapidly are those operating in government. The American Federation of Government Employees, which organizes Federal employees, claims 250,000 members; the State, County and Municipal Employees, 350,000; and the Teachers' Union, 132,000; increases of 300 to 500 percent for each union over the last decade. Equally important are professional associations which, under pressure from union competition, act more and more like unions. The largest and most powerful of these is the million member

National Education Association and its state and local affiliates. To most people, employee organization and strike go together and there is nothing in the record of recent years to dissuade them of this belief.

Actually, concern over the strike issue has overshadowed the great progress that has been made in public employee-management relations in the last few years. The 1960's have already earned a place in labor relations history as the decade of the public employee. Executive Order 10988 signed by President Kennedy in 1962; comprehensive state laws in Wisconsin, Michigan, New York, Connecticut, Massachusetts, Delaware and Minnesota and more limited laws in other states; and municipal ordinances in a number of the largest cities, including New York, Philadelphia and Cincinnati, have finally given government employees rights accorded to private employees thirty years ago: the right to join unions, to have their organizations recognized by employers, and to negotiate over wages, hours and conditions of employment. All the state laws have been passed or substantially liberalized since 1960 and every year finds additional states added to the roster of those with public employment relations laws. However, most states still have no statutes dealing specifically with public employees and a number of others expressly prohibit collective bargaining in government or have declared negotiated agreements to be unenforceable.

Because strikes are prohibited, the states with public employment relations laws have recognized a special responsibility to develop procedures to resolve impasses in negotiations. The principal methods used are mediation and, if that fails, fact-finding with public recommendations. Wisconsin has had the most experience with fact-finding. Between 1962 and 1966, fact-finders were appointed in 38 disputes and their recommendations served as the basis for settlement in 70 percent of the cases. Michigan, whose law was passed in 1965, has resorted to fact-finding in some 50 disputes, with salutary results. Arbitration is provided in most states only at the request of the parties, although a few prescribe compulsory arbitration for disputes involving policemen, fire fighters and public utilities.

Most negotiations in public as in private employment are resolved by the parties with or without the assistance of government mediators. The use of fact-finding--a procedure which is reserved for emergency disputes in private industry but is available in even the smallest and most inconsequential public dispute under most state laws--will result in settlement of all but a few really hard-core disputes. But what about impasses after all efforts to resolve the dispute have failed? Should public employee organizations be denied the ultimate weapon which is available to unions in private industry? What should be done about employees who strike in violation of the law? These questions have aroused great passions among some public employee unions and have led to considerable disagreement among impartial experts in the industrial relations field.

With respect to the second question, the trend is away from laws calling for automatic dismissal or other severe penalties, including re-employment only under extremely harsh conditions, for striking public employees. Experience has shown such laws to be ineffective because elected public officials will almost never invoke them. This was the case in New York under the Condon-Wadlin Act and in Michigan under the old Hutchinson Act. Most states with statutes governing labor relations in public employment do not specify automatic penalties for employees who violate the law by striking. However, the 1965 Michigan law states that a public employer may discipline a striking employee up to and including discharge, and the New York State law, passed in 1967 over bitter union opposition, provides penalties against unions rather than employees. The New York law calls for injunctions to halt public employee strikes and prescribes fines against unions that disobey such court orders, equal to one week's membership dues or $10,000, whichever is less, for each day that the strike continues.

Some of those who oppose a blanket prohibition on strikes in government argue that there cannot be genuine collective bargaining without the right to strike. Take away the strike threat and employers, public and private alike, will realize that they have the upper hand and not engage in real collective bargaining. Unions can cite case after case in which a government employer contended he could not negotiate certain issues but changed his tune quickly when a strike was threatened or actually called. Then, apparently, unsurmountable obstacles to negotiation seemed to fade away and an agreement was reached in short order.

Others consider it illogical and inequitable to deny the right to strike to government employees when it is not denied to employees in private industry doing the same work. Thus, the government, at one level or another, owns and operates printing plants, electric utilities, transit facilities, hospitals, cafeterias, liquor stores and other establishments which are indistinguishable in almost every way from similar facilities in the private sector. In some cases, direct public employment shades over into government-owned but privately-operated enterprises. In atomic installations, for example, collective bargaining modeled on the private sector has been permitted, including strikes, although the operation is wholly financed with public funds. Looking at the problem in another way, one may ask why clerks and office workers in the state capitol or in the highway authority should be prohibited from striking, while electric utility, transit or even hospital employees may strike as long as they work for private employers. Surely, the services supplied by the first group of public employees are less essential to the community than those furnished by the second group of private employees.

Those who support the prohibition against all government strikes do so primarily on three grounds: (1) fear that the principle of sovereignty will be imperilled by legalizing any strikes in government, (2) difficulty in differentiating between essential and non-essential activities, and (3) belief that the strike is an economic weapon which, in government, is not matched by countervailing power normally available in private industry.

The sovereignty doctrine holds that any strike of public employees is an attack upon the state and a challenge to government authority. It has been used for many years and is still cited in some states to deny government employees the right to bargain collectively. However meaningful state sovereignty may be to political scientists, it carries little weight with government employees when it comes to their relationship to the state as employer. Secretary of Labor Wirtz put it succinctly when he said: "This doctrine is wrong in theory; what's more, it won't work." It is interesting to note that other countries do not regard all strikes by government employees as a threat to state sovereignty. Most West European countries limit but do not prohibit all public employee strikes and, in 1966, Canada passed a law which expressly permits Federal employees to strike. The Canadian statute gives unions of government employees a choice between compulsory arbitration or strike action in the event of an impasse in negotiations. The union must indicate which course it will follow at the beginning of each negotiation and may not alter its choice throughout that negotiation.

The essential versus non-essential services approach to government employee stoppages has usually been rejected because of the difficulty of classifying activities in each category. Furthermore, this approach would have to take into account the distribution of employment at the local level, where most all government strikes have occurred. Of the 6.4 million local government employees, more than 3½ million are employed in schools--2.3 million as teachers and 1.2 million in non-instructional activities. An additional 1.6 million are employed in police and fire protection, public welfare, hospitals and health, sanitation, correctional institutions and public utilities. Only 1.3 million are engaged in activities that are clearly non-essential in the sense that interruption of service could be endured for an extended period without posing a threat to the health, safety or welfare of the populace. The employment

distribution will, of course, vary from one community to another. It is clear from these statistics that, if it is to be meaningful, any law which limits the prohibition of strikes to essential government services would have to be narrowly construed and would certainly have to exclude schools, where more than half of all local government employees are concentrated. A law which extended the right to strike only to a small minority of all public employees, most of then unorganized and without the power to carry out a successful strike, would be a hoax.

While the classification of essential and non-essential services would be difficult, I am not convinced that it represents an insurmountable obstacle to legislation which would distinguish between prohibited and permissible stoppages in government employment. This is an administrative problem no more difficult than many others handled by government agencies, and particularly by the National Labor Relations Board in its day-to-day administration of the Taft-Hartley Act.

The third argument against relaxing the prohibition on government strikes is that public employers cannot long withstand stoppages which victimize the community. It is argued that private employers may resort to a variety of weapons to combat strikes: they may lock out their employees; try to operate with other workers; suspend operations, secure in the knowledge that pent-up demand or strike insurance will mitigate economic losses; or even go out of business entirely. The knowledge that potent weapons are available to the opposing sides exerts reciprocal pressures upon the parties to modify their positions to the extent necessary to bring about a settlement. Both unions and employers know from experience that jobs can and have been lost and markets seriously depleted as a result of strikes or settlements leading to non-competitive price increases.

The government employer is in an entirely different position. He cannot lock out his employees or decide to go out of business. Extended suspension of government services is not politically feasible. While government may, in an emergency, call upon the National Guard or the Army to perform certain essential services, this solution does not lend itself, even on a temporary basis, to such public services as education and hospital care. Besides, such action involves political risks which elected officials would be reluctant to take.

The economic and market pressures which operate upon unions and private employers do not usually exist in the public sector. Competitors will not teach children, write relief checks or provide case work services to welfare clients; consumers will not find ready substitutes or learn to do without garbage collection or medical care; excessive settlements will not price most government services out of the market, although the resulting tax increase may drive elected officials out of office.

Certainly there are important differences between strikes in government and work stoppages in private industry. At the same time, strikes by public and private employees have the same economic objectives--the improvement of wages, hours and working conditions. Given the low salaries and poor conditions which often characterize employment in our schools, hospitals, social agencies and other public services, one is loathe to deprive these employees of any legitimate weapon to improve their situation, unless it is clear that irreparable injury may result to the community at large.

The United States has come a long way in dealing with public employee-management relations during the last few years. Future progress will depend, in part, upon how we handle the difficult problem of public employee strikes. What are the lessons of past experience for future policy on this issue?

1. The right to join employee organizations and to negotiate with their employers through representatives of their own choosing should be guaranteed to all public employees at all levels of government, by Federal legislation, if necessary. Government employees in backward states should not be denied these fundamental rights.

2. Governments have a responsibility to promote settlements without interruption of public services. This includes provision for mediation and fact-finding with recommendations in all disputes in which an impasse has been reached in negotiations.

3. Employee organizations and public employers in all government services should be encouraged to develop their own procedures to resolve disputes without interruption of work, including the use of voluntary arbitration. Long experience in private industry has demonstrated that the parties are usually better satisfied with their own solutions than with those imposed from the outside.

4. Regardless of preventive measures or prohibitions and penalties provided by law, strikes in government will occur. Government policy towards such stoppages should take into account the nature of the service provided and the impact upon the public. There is no more reason to treat all strikes in government alike than there is to apply the same yardstick to all stoppages in private industry. Just as a work stoppage on the railroads or waterfront is handled differently from a strike in a widget factory, so should a strike of policemen or fire fighters be regarded differently from an interruption of service in state liquor stores.

5. Public services should be classified into three categories: those which cannot be given up for even the shortest period of time, those which can be interrupted for a limited period but not indefinitely, and those services in which work stoppages can be sustained for extended periods without serious effects on the community.

   –With respect to the first category, which in my opinion would include only police and fire protection and prisons, compulsory arbitration should be used to resolve negotiation impasses but only after all other methods have failed.

   –Strikes in the second group of services, which would include hospitals, public utilities, sanitation and schools, should not be prohibited but should be made subject to injunctive relief through the courts when they begin to threaten the health, safety, or welfare of the community. The courts, in deciding whether or not to issue injunctions, should consider the total equities in the particular case and should utilize their traditional right to adapt sanctions against those violating injunctions to the particular situation, as recommended in the report of the Advisory Committee on Public Employee Relations to Michigan Governor George Romney. The term "total equities" includes not only the impact of a strike on the public but also the extent to which employee organizations and public employers have met their statutory obligations.

   –Work stoppages in government activities which do not fall into either of the above classifications should be permitted on the same basis as in private industry.

1. The right to join employee organizations and to negotiate with their employers through representatives of their own choosing should be guaranteed to all public employees at all levels of government, by Federal legislation, if necessary. Government employees in backward states should not be denied these fundamental rights.

2. Governments have a responsibility to promote settlements without interruption of public services. This includes provision for mediation and fact-finding with recommendations in all disputes in which an impasse has been reached in negotiations.

3. Employee organizations and public employers in all government services should be encouraged to develop their own procedures to resolve disputes without interruption of work, including the use of voluntary arbitration. Long experience in private industry has demonstrated that the parties are usually better satisfied with their own solutions than with those imposed from the outside.

4. Regardless of preventive measures or prohibitions and penalties provided by law, strikes in government will occur. Government policy towards such stoppages should take into account the nature of the service provided and the impact upon the public. There is no more reason to treat all strikes in government alike than there is to apply the same yardstick to all stoppages in private industry. Just as a work stoppage on the railroads or waterfront is handled differently from a strike in a widget factory, so should a strike of policemen or fire fighters be regarded differently from an interruption of service in state liquor stores.

5. Public services should be classified into three categories: those which cannot be given up for even the shortest period of time, those which can be interrupted for a limited period but not indefinitely, and those services in which work stoppages can be sustained for extended periods without serious effects on the community.

   -With respect to the first category, which in my opinion would include only police and fire protection and prisons, compulsory arbitration should be used to resolve negotiation impasses but only after all other methods have failed.

   -Strikes in the second group of services, which would include hospitals, public utilities, sanitation and schools, should not be prohibited but should be made subject to injunctive relief through the courts when they begin to threaten the health, safety, or welfare of the community. The courts, in deciding whether or not to issue injunctions, should consider the total equities in the particular case and should utilize their traditional right to adapt sanctions against those violating injunctions to the particular situation, as recommended in the report of the Advisory Committee on Public Employee Relations to Michigan Governor George Romney. The term "total equities" includes not only the impact of a strike on the public but also the extent to which employee organizations and public employers have met their statutory obligations.

   -Work stoppages in government activities which do not fall into either of the above classifications should be permitted on the same basis as in private industry.

These changes in public policy will come slowly, if at all. Experimentation with different approaches in the states is desirable and should be encouraged. Eventually, however, I believe that laws dealing with employee-management relations in government will tend towards greater uniformity because the nature of public employment differs little among states, and employee organizations, which are national in scope, will insist on equality of treatment for all government employees.

# Can Collective Bargaining Deal Effectively with Problems Created by Automation?

Theodore W. Kheel

If anyone in the audience is kind enough to say that he is disappointed that I cannot be with you today, I assure you his distress in no way compares with my own. I looked forward to this conference with great expectations and planned to come early and leave late. I was last in Hawaii 49 years ago and I still have a vivid recollection of its loveliness. I wanted to return to verify the memories I have carried with me all these years.

The beginning of the end of my revisit occurred at 4 a.m. Tuesday, July 18, while I was fast asleep in a hotel in Paris, France. It was 11 p.m., Monday, July 17, in Washington at that hour and President Johnson had just signed the bill ending the railroad strike. I was awakened by the phone ringing in my room and, believe me, had no idea that I would as a result not be able to come to Hawaii. I will leave for reminiscing in smaller groups a description of my first reaction when a man's voice at the other end of the Atlantic Ocean announced that the President was calling. I do not know if I can converse easily with a President under any circumstances. I do know I did not at 4 a.m. on July 18. Of course I said "yes" when the President asked me to serve on the Board to settle the railroad dispute.

I returned the next day, but actually I was on my way back from a conference in Rome on Automation, Full Employment and a Balanced Economy, co-sponsored by the American Foundation on Automation and Employment, Inc., its counterpart in Great Britain, the British Foundation, and the Federations of Swedish Employers and Trade Unions. The American Foundation was formed by labor and management in 1962 to encourage the use of automation by solving the employment problems it creates. The work of the Foundation and the subject matter of the conference are both relevant to the topic assigned to me today.

Full employment is an objective everyone favors, like peace and prosperity. Its attainment was designated a national objective in legislation passed nearly 20 years ago, but it is doubtful if we are any closer to it than we were when that law was passed. Yes, there have been statistical improvements. But we have been measuring our distance from this goal with an index which was, at least until recently, as comparable in precision to our needs, as Galileo's telescope is to modern day radar for measuring the earth's distance from the moon. We now know, for example, that unemployment affects different people in different ways. There are age, sex, color, area, and skill differences, to name merely the obvious. Statistics alone do not and cannot tell the full story.

Until fairly recently, the main drive against unemployment came almost entirely from the labor movement. At the least the riots of this summer have underscored the need for national concern.

Labor's apprehension was most acute in 1963 when the unemployment rate soared over six percent. It has diminished now that shortages have developed, particularly among skilled employees, in many areas of the country. But it still becomes heated when, for example, automation threatens drastically to eliminate jobs in a particular industry.

Collective bargaining can and does help cope with such situations, perhaps not as

fast as employers and others might wish but more significantly than most realize. Adjustments are constantly being made. Moreover, even if labor were disposed to stop automation, it could not succeed. American businessmen have a unique ability to compete. If they are stopped from moving in one way, they invariably devise another. Nor is the labor movement blind to the realities of change, for that is what automation means–dynamic change. Individual leaders may interpose roadblocks at particular times and if they failed to, other leaders would replace them who would. But I find a willingness to explore alternatives, to accept change if its immediate impact can be eased, and to seek to bring the rank and file along on the need for and inevitability of, change. But it doesn't do any good at all if union leadership gets so far ahead of the membership that it cannot help develop and shape worker attitudes.

This is basically the philosophy of the Foundation and it is subscribed to by many unions as well as employers. We not only accept automation as inevitable but welcome it for the benefits it can bring. But we do not shut our eyes to the vast changes it imposes on employees. By seeking to ameliorate those changes, we think automation will encounter less resistance and advance more rapidly.

Most people view automation merely as affecting the blue collar workers and some of the less skilled white collar ones. It is true that they are most obviously affected. But our Foundation made a study of automation's impact on middle management. This study attracted such wide attention that we are now bringing out a second printing. The title is *Automation and the Middle Manager–What Has Happened and What the Future Holds.* I would like to quote to you some of the many conclusions:

> "The computer has already cut deeply into the need for middle managers. But, as a result of our booming economy, there is no evidence of widespread unemployment among middle managers, to date, resulting from installation of computer systems in American Industry. Those displaced have gotten other jobs. Normal attrition thus far has been enough. Nor has there been, as yet, any marked change in the job content of middle management. The job reduction has stemmed mainly from the elimination of clerical functions and the assumption of minor decision-making by the computer.
>
> "The storm signals as well as the potential for the future cannot safely be ignored or overlooked, either by top or middle management or by government planners and manpower specialists. An impressive number of participants in this study have marshalled a persuasive case: The middle manager's job stability in terms of the number and kind of jobs there will be is subject to a far more serious threat and open to greater possibilities than past experience and expected trends in the immediate future would suggest.
>
> 1. While the decisions now being made by computers are characteristically those of employees of lesser rank than middle managers, there are vast areas of middle-management decision-making within the existing capabilities of the computer which are not being realized.
>
> 2. It is not the inherent limitations of computer technology that have prevented a further intrusion by the machines into the traditional preserves of the manager, but the following human deficiencies:
>
>    a. Top management's resistance to change; its skepticism or lack of

orientation to the potentialities of computer systems; and improper use when installed

b. Middle-management hostility to change and conflicts between computer specialists and traditional managers

c. Lack of personnel trained in the programming and operations of computers

d. Failure to structure the work situations of management in ways adaptable to the machine

e. High cost of computer installations.

3. When these difficulties are overcome–and it is a matter of when, not if–it seems clear that the social implications of displacement of managers will not serve as a deterrent to computerization; and that existing industry programs for retraining and early retirement are woefully inadequate to meet the displacement patterns arising as computers approach their maximum utility. Because of the time span involved in removing the human limitations on full computer development, however, there is still the opportunity to (a) recognize the full capability of the machine and (b) plan intelligently for the necessary adjustments in manpower utilization.

"Although there is dissenting opinion as to the foregoing propositions, there is near-unanimous agreement among the company spokesmen interviewed that:

1. There will be a drastic change in the job content of the middle manager: The repetitive tasks will vanish and he will be confronted with a greater variety of information, requiring more rigorous analysis in decision-making. Although his job will be more intellectually demanding, he will find more freedom, more flexibility, and more creativity in it.

2. Middle managers of the future will not be chosen solely from the ranks of computer specialists; among those who remain, there will be a premium on the traditional virtues of leadership, ability to make critical judgments, courage and vision.

3. The corporate structure will contain fewer levels of management responsibility. There will be a greater degree of centralization in the information-gathering, but not necessarily in the decision-making process.

4. Resistance to change by middle managers and hostility between them and computer specialists, though a frequent and sometimes frustrating component of the installation of machine systems, can be minimized by careful top-management planning.

5. There is as yet no radical change in the hiring patterns of middle management; the business administration graduate is still favored over the pure technician, although business-oriented trainees now have had more exposure to scientific disciplines than in the past.

6. The companies surveyed have not introduced, in connection with computerization, programs to retain and upgrade the skills of their middle managers despite their obvious need. Employers and the individual

middle manager have a joint responsibility for remedying potential skill deficiencies through company training programs and self-improvement.

7. American colleges and universities must update and broaden their curricula to meet the future managerial needs of industry. Business schools are under heavy attack for failing to offer either (1)sufficient computer technology or (2) insight into the practical problems of operating an enterprise. But companies are hardly in a position to complain in view of their own training deficiencies.

"The fact is that most managements are not yet prepared for the computer and, in part as a result, the computer has not advanced significantly in the area of middle management. Now is the time for intelligent preparation for the human problems which have delayed the use of the computer and will undoubtedly intensify in the future, for surely the computer will move relentlessly forward as competition and new technology forces its use."

So much for the middle managers.

Let us now examine the impact of automation on collective bargaining, and how collective bargaining is attempting to deal with the problem.

Automation has already profoundly influenced collective bargaining. It has brought the most difficult of bargaining issues--the clash of productivity with job protection--into the forefront of most negotiations. It has contributed materially to the decline in the size of unions and it has placed two expanding groups seemingly beyond the present reach of organized labor: the unemployed and white-collar and technical employees. It has also weakened labor's bargaining strength in certain industries.

All of this has led some observers to conclude that collective bargaining is on the decline or already on the way out. Actually, collective bargaining is working better today than it ever has. There are fewer strikes and more negotiated settlements. Arbitration is being used effectively in settling in-plant grievances. Procedures for inter-union conflicts are being refined. Around-the-year bargaining in joint study committees, such as the Human Relations Research Committee in basic steel, is providing labor and management with new insights and keys to the solutions of their most difficult problems.

Yet the impact of automation on jobs has posed the most critical challenge collective bargaining has ever faced. Because the problems of automation and technological change cannot be solved solely by private parties in collective bargaining, the steps toward constructive answers thus far developed constitute a tribute to the viability of this remarkable institution of voluntary adjustment. I intend to underscore the need for extending rather than contracting the bargaining process as an indispensable adjunct to the mechanics of change.

Organized labor is in effec[illegible]ommitted by policy to the machine and is unwilling as a body to resist industrial progress. Indeed, some unions openly encourage automation. Besides, organized labor knows too well how violently the general public is opposed to "featherbedding" to make this the cornerstone of its policy on automation even if it were inclined to do so. Obviously, there are exceptions. This is not, however, the public view of labor's attitude toward automation. Unfavourable publicity about featherbedding and widespread reporting of a few special situations involving manpower changes have led many to believe that labor is opposed to automation. Thus when George Meany referred to automation as a "curse" at the

biennial convention of the AFL-CIO, in November 1963, his remarks were incorrectly interpreted as opposing automation. But they were more an expression of fear about what automation was going to do and were, in that way, a call for action to cure its consequences. He did not urge, nor has he ever suggested, that automation should be stopped or slowed as a means of avoiding this "catastrophe."

The basic approach of organized labor was best expressed by A. J. Hayes, Co-chairman of the American Foundation on Automation and Employment, in a speech delivered at the University of Portland:

> Properly absorbed and applied, automation can improve the life of workers both on and off the job. It can release millions of human beings from heavy, hazardous, dirty, and monotonous jobs.
>
> More importantly, automation is a means of releasing mankind from the grip of historic scarcity and building a world without want.
>
> Despite our concern, American labor has not reacted to technological change as did the Luddites who roamed the English countryside in the early 19th Century smashing the textile looms that were destroying their jobs. We know that it will not serve society to smash the machines that are today destroying jobs.

Despite the clash of productivity and job security, labor-management relations are maturing and improving. Difficult problems are being solved through collective bargaining, and labor and management are evolving adjustments to the manpower challenge.

The principal methods which private parties have employed to facilitate the adjustment of employees who have been displaced through automation or technological change were listed by Derek Bok. They are:

1. Advanced Notice of Layoff or Shutdown
2. Methods of Avoiding Layoff
   (1) Attrition
   (2) Early retirement
   (3) Retraining
   (4) Transfer
   (5) Relocation allowances
3. Methods of Easing the Burden of Unemployment
   (1) Severance pay
   (2) Supplemental unemployment benefits
   (3) Vesting of pension rights
4. Methods of Facilitating New Employment
   (1) Placement and referral services
   (2) Training for jobs outside the plant
   (3) Union-sponsored training programmes
   (4) Apprenticeship
   (5) Other forms of training
   (6) Antidiscrimination policies

There have been a variety of agreements, many very inventive, designed to reduce the impact of automation. The Kaiser Steel Company–United Steelworkers Long Range Sharing Plan relies on sharing of actual savings in production costs on a month-to-month

basis resulting from improvements in technology and work methods, and also offers several types of employment and income security. The Pacific Coast shipping industry, under an agreement with the International Longshoremen's and Warehousemen's Union, has put up a sum of money to protect employment in West Coast ports.

Basic Ingredient

Intrinsic to these solutions is the use of attrition as the primary ingredient: spare the worker but not the job. As workers leave for one reason or another, or are encouraged to leave through early retirement plans, the existing work force, or as much of it as can be saved, is protected in exchange for the right to introduce new machinery and/or work methods which eliminate jobs. This method of adjustment, of course, does nothing for the unemployed or the new entrant into the job market. Unions naturally concern themselves with the members at hand. They are the dues payers, the ones who attend meetings, who seek job protection from their leaders–with the implied threat of getting other leaders if they do not succeed. The use of attrition has furthered the trend toward reduced employment in unionized industries, and has other consequences as well, such as a constant rise in the average age of the work force. But, whatever its limitations, it is likely to continue.

The reliance on attrition is adversely affecting bargaining by decreasing the number of employees subject to it. This is unfortunate, since experience has shown that collective bargaining is the most effective and efficient method of adjustment employer-employee relations in a democratic society.

Collective bargaining can legally embrace the wages, hours and working conditions of workers represented by a union.

It cannot help those who have not been hired or those who have been let go without reinstatement rights. Obviously, a union's main concern is going to be with the workers on hand who pay dues for representation. But there are some activities which can help those outside the organization who are now in such desperate need. We have not nearly begun to explore the possibilities of labor-management assistance in job training for the unskilled and untrained, constituting so large a portion of the Negro unemployed in ghetto areas.

I like to believe, in addition, that a labor-management organization like our Foundation can also make a substantial contribution. We have recently purchased permanent headquarters in New York City which we call Automation House. We intend to establish there, among other labor-management activities, a Center for Job Training Information. We have found that there is throughout the United States a burgeoning industry of teaching machines, devices, and programs which can materially speed up the learning process for the unskilled and uneducated, especially in equipping them for work. We intend to have on hand there detailed information about these developments with motion pictures, video and audio tapes, slides and brochures to demonstrate how they can be used. Unique devices will be on display and

trained experts will explain their use. We will also conduct lectures and seminars and provide anyone from industry, labor, government or the public generally with information about the latest techniques in job training.

Labor and management will always be antagonists at the bargaining table, and there is nothing wrong with that. But they have many areas of mutual interest. These can be encouraged without diminishing the vigor of the bargaining process. Indeed, it can help. That is what we are trying to do at Automation House through the Foundation.

I regret more than I can say that I could not enjoy the opportunity of telling you of these activities in person. At least I believe I have a valid excuse for not attending. Please accept my very best wishes for a most successful conference.

Thank you.

# Labor Relations Law: An Assessment

Benjamin Aaron

Any survey of the present state of labor relations law in the United States must take account, at the outset, of at least four major characteristics which, in this particular combination, distinguish it from that of other industrialized countries. First, despite its common-law origins, in almost all significant details it has been created by statute rather than by the gradual accretion of judicial decisions. Second, it is of relatively recent origin, the oldest significant statute presently on the books being the Norris-LaGuardia Act, which was adopted in 1932. Third, those labor relations laws of the greatest importance are federal laws, and the authority of the several states over labor-management relations has been almost completely eroded by the doctrine of federal preemption. Fourth, although the single most important principle underlying what we choose to call our "national labor policy" is the commitment to "free" collective bargaining in the private sector, the United States has a more comprehensive and bewildering array of restrictive laws regulating the relations between employers and unions than does any other industrialized country.

There are several other significant features of American labor relations law which, if not as unique as those already mentioned, nevertheless have a substantial impact upon collective bargaining in this country. In typically pragmatic fashion each of the several federal statutes was enacted to deal with one or more specific problems; but, unfortunately, almost none of these has taken sufficient account, if any, of the need to accommodate the new law with the policies and procedures of those already on the books. As a result, we have built up, not an integrated and internally consistent body of federal labor relations law, but a collection of individual statutes that are mutually inconsistent in some important particulars, that overlap in others, and that manage, nevertheless, to leave some vital areas of labor-management relations totally uncovered or covered inadequately.

Partly as a consequence of these developments, Congress has assigned much of the task of administering the various labor relations laws to a number of administrative tribunals, independent agencies, and executive departments. The Supreme Court has added to the decentralization of decision-making by construing some statutes as requiring judicial deference to awards rendered by private arbitrators.

In my talk I shall illustrate with appropriate examples the impact of American labor law on collective bargaining. My thesis is that the time has come to review the entire body of this law: to enunciate or redefine policies in certain critical areas, to repeal unnecessary legislation, to reconsider questionable judicial and administrative doctrines, and at least to begin thinking about the possibility of drafting a comprehensive, internally consistent labor code

*Federalism and Labor Relations Law*

Within the past 30 years, Congress and the Supreme Court have gone a long way toward establishing federal law as the supreme and exclusive instrument for dealing with all but the most minor labor disputes. The constitutionality of that arrangement is now beyond challenge: it rests upon the Supremacy Clause of the United States Constitution and upon the indisputable power of Congress to legislate in respect to conduct "affecting commerce." The manner in which Congress has exercised that power, however, as well as the construction

placed upon its enactments by the Supreme Court, have created serious doubts in the minds of many persons about the wisdom of the resulting policy.

The passage of the Wagner Act in 1935 heralded the end of diverse local controls of labor-management relations and the beginning of a national labor policy uniformly applicable throughout the nation. Whatever doubts may originally have existed concerning the necessity or desirability of a national policy inevitably gave way before the increasing evidence of the impact of local labor disputes on enterprises and activities far removed from the scene of actual conflict. But the extent to which the states are precluded from passing supplementary legislation covering labor-management relations, or to which their courts are barred from affording remedies neither specifically permitted nor prohibited by federal law, has been a subject of continuing debate.

Thus far, however, Congress has refused to abolish an exception to the uniform national policy that it incorporated with the 1947 Taft-Hartley amendments to the NLRA. Section 8(a)(3) of the amended Act permits the voluntary execution of union-shop agreements, with certain safeguards. Section 14(b) provides, however, that states or territories may prohibit the execution or application of agreements requiring membership in a labor organization as a condition of employment. The constitutionality of this provision has been sustained against attacks by labor unions, and the rather mild endorsement by the present Administration of a proposal to repeal Section 14(b) has been insufficient thus far to secure congressional adoption of that amendment.

Apart from the emotional and irrational reactions that public debate of union security clauses invariably engenders, the basic case against Section 14(b) is that it is illogical, untidy, and unnecessary. If a uniform national policy of labor-management relations is desirable, then it makes no sense to exempt from that policy one of the most explosive of all collective-bargaining issues. Moreover, the present rule produces uneven results: a national agreement between a union and a large corporation with plants in many states provides the same basic benefits to bargaining-unit employees in all plants, but denies the union the benefit of a negotiated union-shop and checkoff provision in those states with right-to-work laws. To add to this inequality of treatment, the Railway Labor Act, amended in 1951 to authorize union-security clauses similar to those permitted under the NLRA, contains no provision corresponding to Section 14(b) and supersedes all contradictory state laws applicable to railroad and airline employees. Finally, Section 14(b) provides no real protection to individual workers against abuse of power by their bargaining representative. All it can do is make the union less effective in dealing with the employer.

Equally inconsistent with a national labor policy for rail transportation are state "full-crew" laws requiring interstate carriers to employ a minimum-size engine and train crews operating within their borders. These laws were all enacted many years ago, and have repeatedly been sustained by the Supreme Court against charges that they violated the Fourteenth Amendment and the Commerce Clause. The national interest is not well served, however, by allowing a minority of states to prevent ad hoc adjustments to technological change by Procrustean rules laid down in archaic statutes.

Other reservations of state power in the labor relations field governed by the LMRA are more easily defended. As the Court pointed out in *San Diego Building Trades Council v. Garmon* (1959), states have been permitted "to grant compensation for the consequences, as defined by the traditional law of torts, of conduct [growing out of a labor dispute] marked by violence and imminent threats to the public order." They have also been permitted to enjoin this type of conduct. This is "because the compelling state interest, in

the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction." Similarly, power to regulate has not been withdrawn from the states "where the activity regulated was a merely peripheral concern" of the LMRA, or "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction," an inference that Congress had deprived the states of power to act would not be warranted.

However, as Justice Frankfurter observed in *International Association of Machinists v. Gonzales* (1958), "the statutory implications concerning what has been taken from the States and what has been left to them are of a Delphic nature, to be translated into concreteness by the process of litigating elucidation." This process is a continuing one, and it has not always been easy to understand why the Court has permitted the states to act in some areas after having broadly prohibited exercise of state power in others. In the *Garmon* case, in which the doctrine of federal preemption achieved its most luxuriant growth, the Court declared that "when an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Yet the Court has recently ruled–in *Linn v. United Plant Guard Workers* (1966)–that a state court does not lack authority to entertain an action for defamation arising out of a labor dispute nor to award damages when the complainant can show that the defamatory statements were circulated with malice and caused him damage.

In two other kinds of disputes that are "arguably subject to Sec. 7 or Sec. 8 of the Act," and hence presumably within the primary jurisdiction of the NLRB, the Supreme Court has decided that neither state nor federal courts, nor private arbitrators, "must defer to the exclusive competence" of the Board. Section 301(a) of the LMRA provides that suits for violation of contracts between employees and unions in industries affecting commerce may be brought in an appropriate federal district court without respect to the amount in controversy or to the citizenship of the parties. Some suits based on an alleged breach of contract involve conduct that is also arguably or admittedly an unfair labor practice; for example, the breach may consist of a violation of a contractual provision not to discriminate against employees for privileged union activity. If the accusation of contract violation is also an arbitrable grievance, the aggrieved party may submit the issue to arbitration, rather than file a charge of unfair labor practice with the Board. If the complaint is not arbitrable, the aggrieved party may sidestep the Board and exercise his federal right under Section 301 to sue his opponent in court.

However, as held in *Textile Workers Union v. Lincoln Mills* (1957), disposition of the dispute by arbitration, or its adjudication by a federal or state court, results from the application of a new body of federal substantive law, fashioned by the federal courts, under the guidance of the Supreme Court, in obedience to the congressional mandate inferred from Section 301 of the LMRA. Thus, preexisting state laws that would have left to the state courts the discretion to refuse either to order arbitration of a grievance or to enforce an arbitrator's award, are no longer effective to the extent that they conflict with substantive federal law. By the same token, although state courts may assert jurisdiction over suits for breach of contract brought under Section 301, they must apply federal law.

The statutory scheme under the Railway Labor Act is substantially different. The law creates rights and imposes duties similar to those established by the NLRA, but it does not denominate any conduct by employers or unions as an "unfair labor practice," and neither the National Labor Adjustment Board (NRAB) nor the National Mediation Board (NMB) has functions or powers similar to those of the NLRB in unfair labor practice cases.

Unsettled controversies growing out of the interpretation or application of collective agreements (commonly known as "minor disputes") are referred to the NRAB, which has the powers of a compulsory arbitration board. The parties may, however, establish by mutual agreement their own private arbitration machinery (called a system board of adjustment) as a substitute for the NRAB. With few exceptions, state and federal courts are precluded from entertaining actions for declaratory judgments to construe collective agreements under the RLA.

Still a different arrangement is applicable to airline employees. In 1936 the RLA was extended to include the air transport industry. The one section of the Act not made applicable was that dealing with the NRAB. Instead, Section 204 of the amended Act requires carriers and unions representing their employees to establish boards of adjustment for the settlement of grievances.

The Supreme Court has held in *International Associations of Machinists v. Central Airlines, Inc.* (1963) that a contract executed under Section 204 is to be interpreted and enforced according to federal law; "for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law, or if a contract were struck down though in furtherance of the federal scheme."

In the present state of labor relations law, three questions concerning federal-state relations are paramount: First, is it desirable or possible to develop a broad statutory policy applicable to all the situations previously discussed, that will dispose of most of the line-drawing problems created by preemption doctrine? Second, whether Congress promulgates such a policy or, as is more likely, continues to abdicate its authority in this area in favor of the courts, should the states be accorded more or less power than they presently have to apply their own procedural and substantive laws to labor disputes occurring within their boundaries? Third, is there any justification for differing degrees of federal control over labor-management relations under the LMRA and the RLA? Is there, indeed, a continuing need for two separate statutes?

Meanwhile, it has become increasingly apparent that Congress lacks both the talent and the will to deal with the "formidable intellectual and political difficulties" of allocating power between state and federal governments, and the courts have necessarily had to fill in the gaps and reconcile conflicts in statutory policies on a case-by-case basis. The result is a patchwork quilt of decisional law, with some parts notably out of harmony with others.

*Rights of Individual Employees*

At common law the individual employee's rights amounted to little more than his largely illusory right of "freedom of contract." Modern statutes have guaranteed him protection against hostile discrimination for union activity or on grounds of race, creed, color, sex, national origin, and age. Even these protections are not uniformly provided, and may be limited or entirely absent in certain industries, occupations, establishments or localities.

The more fundamental protections against arbitrary or unfair treatment in the matter of promotions, remuneration, dismissal, and retirement are provided, however, if at all, by a collective agreement negotiated between the union, as exclusive bargaining representative of all employees in the appropriate unit, and the employer. Section 301 of the LMRA treats these agreements as contracts that may be enforced by the principal parties--

the employer and the union–against each other. But what, if any, rights established by a collective agreement become vested in each individual employee and can be asserted and enforced by him, irrespective of the union's approval or opposition? This question, with its many ramifications, has given rise to some of the most perplexing problems in contemporary labor relations law.

The question also raises a fundamental issue of policy. As we shall see, rights of individual employees have been treated quite differently under the RLA than under the LMRA. It is important to inquire whether these differences are necessary or desirable.

All that can be said with certainty about individual employee rights under either statute is that the law is still far from settled. Starting with the premise that a labor organization which derives from federal law its right of exclusive representation of all employees in the appropriate bargaining unit (NLRA) or craft or class (RLA), and thus owes a duty fairly to represent all employees in the unit, the Supreme Court has enforced that duty in appropriate cases, the majority of which have involved racial discrimination by unions covered by either the NLRA or the RLA. And despite the provisions in both statutes for the referral of disputes arising thereunder to administrative agencies (i.e., the NLRB, the NMB, and the NRAB), the Court has ruled that when these agencies have been unable or have failed to provide the necessary protection against illegal discrimination by unions, or by unions and employers acting in collusion, the affected employees may obtain redress in the form of an injunction or damages directly from the courts.

At the same time, the Court has recognized that in bargaining on behalf of large numbers of employees, many of whom have differing long-term interests and immediate objectives, a union must be allowed to make compromises which, in its judgment, are in the best interests of the majority and which, equally importantly, strengthen its own institutional position. Thus, in *Ford Motor Co. v. Huffman* (1953)the Court has unanimously held that "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

In the day-to-day administration of the collective agreement, however, and especially in the handling of individual grievances, questions concerning the propriety of union conduct and the rights of employees to the benefits of the agreement assume a baffling subtlety and complexity. Underlying these questions is the still-unresolved issue of the nature of the collective agreement itself. To say that it is, among other things, an enforceable contract does not entirely dispose of the problem. Clearly, the union and the employer have the right to enforce the terms of the agreement against each other; but what of the rights of individual employees? Is it true, as contended by Professor Summers, that "the individual employee has rights under the collective agreement, the enforcement of which are not subject to the union's exclusive control," and that "the union and the employer cannot block the enforcement of these rights by agreeing between themselves that those rights can be compromised or ignored without the individual's consent or authorization"? Is Professor Cox more persuasive in arguing that the union should be given a free hand to evaluate the individual's claim in the collective interest, and therefore must be allowed to refuse to process the grievance, so long as it acts in good faith? Or is it possible to adopt a middle course, as urged by Professor Blumrosen, and permit individual employees to compel unions to process grievances involving only the "critical job interests" of discharge, compensation, and seniority?

Adoption of one of these theories, or perhaps of another, is only the first step

in dealing with the practical problems arising under the collective agreement. To illustrate the nature of these problems, let us consider two hypothetical cases. In the first, suppose that an individual grievance arising out of an allegedly unfair dismissal is rejected by the union, after investigation, on the ground that the discharge was for just cause. Suppose further that the grievant suspects that the union has not represented him in good faith, but has colluded with the employer to secure his discharge for some reason unconnected with union membership or nonmembership. In the second, suppose that the grievant's wage or seniority claim is processed by the union but is dropped or compromised without the grievant's consent and against his wishes, or is handled in an allegedly inept or negligent fashion. What channels of relief, if any, are open to the grievant in each of these situations?

To this question administrative agencies and courts have provided a bewildering array of answers, many of them based on mutual y exclusive theories. Moreover, the law which has developed under the Railway Labor Act is again in some respects entirely different from that which has evolved under the Labor-Management Relations Act.

Let us first consider the situation under the RLA.

Exclusive of claims of unlawful discharge or discipline, the majority of "minor disputes" submitted to the NRAB involve "time claims"–demands for money under the complicated wage payment rules that prevail in the industry. It has long been the practice of the parties to compromise these claims without the prior knowledge or consent of the employees involved. In *Elgin, Joliet & E. Ry. v. Burley* (1945) the Supreme Court held that the bargaining agent must be authorized to act on behalf of an employee "in some legally sufficient way" before it can compromise his claim without his knowledge or permission.

A very high percentage of railroad workers are union members, and most, if not all, railroad unions have authorization provisions in their constitutions and bylaws; thus, in practice, time claims by individual employees are regularly compromised without their prior knowledge or express approval. Accordingly, an employee's chances of upsetting a settlement of a time claim on the ground that his union represented him incompetently or unfairly are virtually nonexistent.

In the discharge case which the union refuses to handle the grievant has a theoretical but wholly illusory right to carry his grievance to the NRAB for final disposition. In practice, however, the grievance is invariably rejected on procedural grounds by the NRAB, because the union and employer representatives on the Board simply reiterate the positions of the employer who discharged the grievant and of the labor organization that refused to handle the grievance. Consequently, the grievant has only one practical course to follow: he may abandon the attempt to secure reinstatement with or without back pay and, instead, sue the employer for damages for wrongful discharge.

In the case of wrongful discharge, the Supreme Court has recognized an exception to rule that the NRAB has exclusive jurisdiction over "minor disputes." In *Moore v. Illinois Central R. R.* (1941) it explained the reason as follows:

> A common-law or statutory action for wrongful discharge differs from any remedy which the [Adjustment] Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court handling such a case must consider some provisions of a collective-bargaining

agreement, its interpretation would of course have no binding effect on future interpretation by the Board.

Even under this reasoning, however, the grievant's chances of securing a court determination of the merits of his case are not certain. The cause of action for wrongful discharge is created by state law, not by the Railway Labor Act. If the state law requires an employee to exhaust his remedies under the contract grievance procedure and the RLA before bringing suit for wrongful discharge, he must comply; and this process might take years. State laws on this question are far from uniform: some do not require exhaustion; others do not; and in at least one an employee may not maintain a cause of action for damages for wrongful discharge under any circumstances.

A final and often insurmountable obstacle in the grievant's path to relief is the doctrine of election of remedies, which holds, in effect, that he may proceed either under the RLA for reinstatement or under state law for damages, but may not do both. Thus, if a state law governing the damage action requires the prior exhaustion of contract-statutory remedies under the RLA, the grievant will automatically be precluded by the election-of-remedies doctrine from bringing the action for damages after he has exhausted the contract-statutory procedures for securing reinstatement.

The law governing these types of cases under the Labor-Management Relations Act has developed differently. Section 9(a) of the NLRA, as amended by the LMRA, provides that a union designated or selected as collective bargaining representative by a majority of employees in the appropriate bargaining unit shall be "the exclusive representative of all employees . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." This plenary authority is limited in the following manner:

> *Provided,* that any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective-bargaining contract or agreement then in effect: *Provided further,* that the bargaining representative has been given opportunity to be present at such adjustment.

The NLRB did not, until quite recently, assert jurisdiction over the employee's complaint unless it involved activity protected by Section 7, in which case the employee could file an unfair labor practice charge against the union, the employer, or both. The relief available to the employee would then be limited to reinstatement with back pay in accordance with the Board's rules. Assuming the Board to be without jurisdiction, the employee could sue the employer for damages for wrongful discharge; sue the union for breach of its duty of fair representation; or sue for an injunction either to compel the employer to arbitrate his grievance or to compel the union itself to appeal the grievance to arbitration.

Here, again, court decisions lack uniformity and are based on conflicting theories. Although individual plaintiffs have been successful in a minority of cases, judgment has generally been in favor of the defendant employer or union. In some instances the employee has relied upon the proviso to Section 9(a) of the NLRA. According to the majority view, however, as expressed by the Second Circuit in *Black-Clawson Co. v. International Association of Machinists* (1962), this proviso does not confer "an indefeasible right upon the individual employee to compel compliance with the grievance procedure up to and

including . . . arbitration"; rather, it merely sets up "a buffer between the employee and his union 'permitting' the employee to take his grievances to the employer, and 'authorizing' the employer to hear and adjust them without running afoul of the 'exclusive bargaining representative' language of the operative portion of section 9(a)."

If the employee relies upon the grievance and arbitration procedure of the collective agreement, rather than on the Section 9(a) proviso, he is likely to be rebuffed in his efforts to compel arbitration on the theory that these procedures usually state that only the union may demand arbitration. Suppose, then, that the employee sues the employer under state law for damages for wrongful discharge. Under the prevailing state laws, employees have also usually been unsuccessful either in suing the employer for wrongful discharge or in bringing an action against the union for breach of its fiduciary duty of fair representation.

These state court decisions have been substantially affected, however, if not rendered completely irrelevant, by recent developments. The first and most important is the rapid growth of case law under Section 301 of the LMRA, which provided the basis for a new body of substantive federal law governing the enforcement of collective agreements. In *Humphrey v. Moore* (1964) the Supreme Court held that an employee may sue his union under Section 301 for violation of his contractual rights. The case was a class action by employees for injunctive relief against implementation of the decision of a union-employer grievance committee, made pursuant to contractual procedure, which deprived the employees of their seniority rights and threatened to result in their discharges. In ruling against the plaintiffs on the merits, however, the Court majority reaffirmed the principle first enunciated in the *Huffman* case and added: "Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes."

In *Smith v. Evening News Association* (1962) the Supreme Court decided that a suit for breach of contract may be brought under Section 301, even though the act complained of is arguably or admittedly an unfair labor practice; but so far as the individual employee is concerned, the barriers to such a suit are as formidable as ever, and perhaps more unyielding than before. In *Republic Steel Corp. v. Maddox* (1965) the Court held that an employee who brought suit for severance pay allegedly due him under a collective agreement, without first exhausting the contract grievance and arbitration procedures, was barred from maintaining the court action. The Court's opinion stated the prevailing rule to be that "unless the contract provides otherwise . . . the employee must afford the union the opportunity to act on his behalf."

Although the Court strongly hinted that the same principle should apply to discharge cases arising under the RLA, it has so far declined to overrule contrary precedents.

A second development that may affect the rights of employees covered by the NLRA, who are discharged or discriminated against for reasons unconnected with union activity, is the doctrine adopted by a majority of the NLRB in *Miranda Fuel Co.* (1962) and explained by them as follows:

> Section 7 [of the NLRA] . . . gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting employment. This right of employees is a statutory limitation on statutory bargaining representatives, and we conclude that . . . labor organizations, when acting in a statutory representative capacity, [are prohibited] from taking action against any

employee upon considerations or classifications which are irrelevant, invidious, or unfair.

The case in which this doctrine was first enunciated did not involve racial discrimination, but there is some reason to suppose that the Board majority had that problem uppermost in its mind. Historically, the Board has avoided or temporized with problems of racial discrimination by unions and employers, and Congress has repeatedly refused to proscribe that form of discrimination in labor legislation. Increasing pressure has been put on the Board in recent years to change its policies in this regard, and it has responded affirmatively in a variety of ways. Not long after announcing its decision in the *Miranda* case, the Board in *Hughes Tool Co.* (1964) applied the same doctrine for the first time to a situation involving racial discrimination.

If the *Miranda* doctrine were to become established, it would obviously have a profound effect upon rights of individual employees, as well as on the liabilities of employers and unions, under the NLRA. An employee claiming that his bargaining representative had, for any reason, not represented him fairly in the administration of the collective agreement could file an unfair labor practice charge against the union with the NLRB. Not only would the number of cases coming within the Board's jurisdiction be greatly increased, but the prevailing concept of the union's control of the grievance procedure would almost certainly be revised.

At first it seemed doubtful that the *Miranda* doctrine would prevail. Enforcement of the Board's order in that case was denied by the influential Court of Appeals for the Second Circuit. In *United Rubber Workers, Local 12 v. NLRB* (1966) the Fifth Circuit held, however, contrary to the Second Circuit's ruling in *Miranda*, that a union's failure to represent bargaining-unit employees fairly, by refusing to process grievances based on well-founded charges of racial discrimination, restrained the grievants in the exercise of their Section 7 rights in violation of Section 8(b)(1)(A) of the NLRA. The court also concluded that if an employee's complaint of unfair treatment at the hands of the union is made independently of a charge of contract violation, the issue thus raised falls within the exclusive jurisdiction of the NLRB.

This latter proposition was expressly rejected, however, by the Supreme Court in *Vaca v. Sipes* (1967), which dealt with the question of an employee's remedy after his attempt to exhaust the grievance procedure had been frustrated by the union's decision not to carry the grievance to arbitration. Without approving or disapproving *Miranda*, the Court held that the NLRB does not have exclusive jurisdiction over questions of fair representation; that both state and federal courts have jurisdiction over such cases; but that federal law must be applied. Under that law, the employee must exhaust the contractual grievance procedure, if any, before bringing suit against his employer for breach of contract? and in order to recover damages he must first prove that the union has violated its duty of fair representation.

Individual reactions to all the developments reviewed in this section are apt to depend upon the kinds of assumptions one makes about cases. In some instances the union appears to have exercised its control over the grievance procedure in an almost unbelievably arbitrary way; in others, the employee's claim of unfair treatment seems to have been too flimsy to warrant serious attention. But in most of the cases the relative merits of the competing equities are more evenly balanced, and we are left with a direct and often irreconcilable conflict between the union's institutional objectives and the rights and interests of its individual members or constituents. Despite the desirability of developing a general principle

applicable to all situations of this type, none of those yet suggested is entirely satisfactory.

*Employer Responses to Economic Strikes*

The typical "economic strike"–so called because it is not provoked by an employer's unfair labor practice–occurs when the parties have bargained to an impasse over the terms of a collective agreement. Traditionally, the battle has not begun until the union has called the employees out on strike; thus, unions have held the initiative, and therefore the advantage in at least the initial phases of economic conflict. They have controlled the timing and, less frequently, the duration of work stoppages; employers, on the other hand, have been limited for the most part to defensive responses. These have usually consisted in simply remaining closed and seeking to outlast the union in a test of economic strength, or in continuing to operate with temporary or permanent replacements. Prior to and in anticipation of a strike, employers have sometimes stockpiled production inventory.

None of these defensive weapons has proved generally satisfactory to employers. Remaining closed for the duration of the strike may impose greater costs on the employer than he can sustain. Hiring replacements may exacerbate the dispute and make settlement more difficult; moreover, replacements may be hard to find and expensive to train. The value of stockpiling depends on a variety of factors, including the nature of the product, the constancy of production and of demand, and the duration of the strike.

In recent years some employers have sought to seize the initiative from unions by locking out employees before the union could call them out on strike. Others have resorted to mutual aid pacts to enhance their financial staying power. Each of these tactics merits some attention.

With few exceptions, the Board has usually held lockouts by individual employers to be unfair labor practices. Recent developments, however, have brought significant changes in the applicable law.

The most common form of lockout today is the multi-employer lockout, which occurs when nonstruck members of the bargaining group lock out their employees in response to a "whipsaw" strike against a single member. In *NLRB v. Truck Drivers Local 449* (1957) the Supreme Court held that in these circumstances the lockout is not an unfair labor practice under the NLRA. The Court reasoned that inasmuch as multiemployer bargaining is lawful under the NLRA, multiemployer lockouts must be permitted to preserve the stability of the unit. Recognizing that "conflict may arise . . . between the right to strike and the interest of small employers in preserving multiemployer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms," the Court declared that "the ultimate problem is the balancing of the conflicting legitimate interests."

In *NLRB v. Brown* (1965) the Court reaffirmed the validity of multiemployer lockouts; but in so doing it appears to have broadened considerably the range of circumstances under which these lockouts were previously thought to be permitted by the *Buffalo Linen* decision. In the *Brown* case the multiemployer bargaining unit consisted of retail food stores. After an impasse had been reached between the employers' group and the union over the terms of a new agreement, the union struck one store and all of the others locked out their employees, on the ground that a strike against one was a strike against all. The unusual feature of the case was that the nonstruck stores continued to operate, through the use of managerial personnel, their relatives, and a few temporary employees. After a new

agreement had been executed and all employees had returned to work, the union charged the employer group with having violated Section 8(a)(1) and (3) of the NLRA.

The NLRB held that the employers had violated the NLRA, not because they had acted either out of hostility toward the union or in reprisal for the whipsaw strike, but because their conduct "carried its own indicia of unlawful intent, thereby establishing, without more, that the conduct constituted an unfair labor practice." A majority of the Supreme Court disagreed, observing that "where, as here, the tendency to discourage union membership is comparatively slight, and the employer's conduct is reasonably adapted to achieve legitimate business ends or to deal with business exigencies, we enter into an area where the improper motivation of the employer must be established by independent evidence. . . ." The Court majority concluded that such evidence was lacking in this case.

The majority approached the problem as a "judgment as to the proper balance to be struck between conflicting interests." Starting from the premise that a single struck employer may lawfully continue operations with temporary or permanent replacements, it reasoned that nonstruck employers will not lock out unless they too may continue to operate; otherwise, they will lose business and patronage to the struck employer. But if the integrity of the multiemployer unit is to be preserved, the nonstruck employers *must* lock out their employees when any member is struck; therefore, continued operation with temporary replacements becomes a necessity.

It is apparent that the Court will now find justification for a lockout that is not in defense of the integrity of a multiemployer unit. *American Ship Building Co. v. NLRB* (1965), decided the same day as the *Brown* case, involved a single employer, who shut down his shipyard following a bargaining impasse over a new contract, claiming this action was necessitated by lack of work due to customers' fears of a work stoppage. The union, which had given assurance that there would be no strike and had offered to extend the existing contract, charged the company with unfair labor practices designed to force the union to abandon its contract demands. The NLRB found, by a divided vote, that the employer had no reasonable fear of a strike, and that his use of the lockout as an "offensive" economic weapon violated the statute. The Supreme Court unanimously reversed, although three justices concurred with the decision for different reasons than those relied upon in the court's opinion. The latter accepted the Board's factual conclusion, but held that "the employer's use of a lockout solely in support of a legitimate bargaining position is [not] . . . inconsistent with the [employees'] right to bargain collectively or with the right to strike," and that a violation of Section 8(a)(3) cannot be predicated on an "intention merely to bring about a settlement of a labor dispute on favorable terms."

The *Brown* and *American Ship Building* cases raise several interesting questions. First, how realistic a balance can be struck between the conflicting legitimate interests involved in lockout cases? If the union must show that the employer lacked both a "legitimate bargaining position" and "an intention merely to bring about a settlement . . . on favorable terms" before the balance is struck in its favor, the act of balancing will be pure formality and the lockout will almost invariably be permitted. If, however, as is suggested in the *Brown* case, the employer's resort to a lockout must be "reasonably adapted to achieve legitimate business ends," there is more leeway for balancing. Finally, if the tendency of the lockout to discourage union membership is also thrown into the balance, and in other cases is regarded more seriously than it was by the Court in the *Brown* case, the balancing of conflicting legitimate interests is likely to be an exercise of considerable delicacy.

Second, who is to do the balancing: the Board or the courts? In the *American Ship Building* case the Court found that the NLRB had "in essence, denied the use of the bargaining lockout to the employer because of its conviction that use of this device would give the employer 'too much power.'" The Court held in this case and in *Brown*, as it has

held before, that the Board lacks "a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power." These precedents, plus the Board's proclivity for developing "per se rules," which have not generally been well received by the courts, suggest that the latter will continue to exercise an independent judgment on these matters.

Finally, to what extent, if any, is the decision in the *Brown* case applicable to concerted activities by employers who are not members of a multiemployer bargaining unit? The problem is illustrated by the case of *Detroit Newspaper Publishers Association v. NLRB* (1965). Two Detroit newspapers, the Free Press and the News, began separate bargaining sessions with the same union. The News obtained a promise from the Free Press that it would not yield on three specific issues; in return, the News agreed to lock out its employees if the Free Press were struck. The Free Press was struck, and the News suspended publication, even though it was still bargaining with the union.

The Board held, prior to the Supreme Court's decisions in the *Brown* and *American Ship Building* cases, that the News had committed an unfair labor practice because the two newspapers did not constitute a multiemployer unit. The Sixth Circuit, acting on the case after the two Supreme Court decisions had been announced, found no proof of unlawful motivation in the form of antiunion animus or avoidance of collective bargaining, and vacated the Board's order. The Supreme Court vacated the judgments of both the Board and the court of appeals, and instructed the latter to remand the case to the Board for further consideration in light of the *American Ship Building* case. What this action by the Court portends nobody knows; but the Court may have felt that the multiemployer lockout doctrine was inapposite in this context.

Historically, the lockout was a classic device to punish employees for concerted activities and to crush unions. In the contemporary context, however, it clearly has its legitimate uses. Of course, any lockout is likely to have a dampening effect on the ardor of some employees in the exercise of their right to engage in concerted activities; but surely this is only one element, and not a very substantial one, to be weighed in the balance of conflicting legitimate interests. Neither the *Brown* nor the *American Ship Building* decisions have dealt crippling blows to unions; rather, they seem to have restored to some employers a limited freedom of action too long denied them.

The *Detroit Newspaper Publishers* case, however, seems clearly distinguishable, even if one ignores the absence of a multiemployer bargaining unit. The secrecy of the pact between the two employers raises a serious issue; for it is highly desirable, if not an essential, aspect of good-faith bargaining, that each party advise the other of what it may do in the event of strike or lockout. Also, the attempt by one employer to affect the wage structure in another bargaining unit raises the possibility of antitrust violations, for reasons to be discussed in the following section. Finally, it appears from the record in this case that no bargaining impasse had been reached in the negotiations between the union and the News when the latter initiated the lockout. Permitting either party to resort to economic force prior to impasse is inimical to the public interest in the peaceful settlement of labor disputes through collective bargaining.

Employer mutual-aid pacts, although serving the same objectives as multiemployer lockouts, not only constitute a completely different tactical device, but also, because they have so far been confined to the railroad and airlines industries, offer an illuminating comparison between the public policies served by the Railway Labor Act and by the LMRA.

In general, the mutual-aid pacts provide for economic assistance to the struck carrier by nonstruck carriers. Under the airlines agreement, the nonstruck members are obligated to turn over to the struck carrier increased revenues, less increased costs, derived from carrying the struck carrier's traffic. Under the railroad agreement, each member contributes to an insurance fund. When a member is struck, it is paid amounts sufficient to cover its fixed costs and daily expenses. Each nonstruck member must contribute its proportionate share of the cost of indemnifying the struck carrier.

Neither agreement automatically provides for financial assistance when a member is struck; instead, each prescribes the conditions under which the right to subsidy may be invoked. Under the railroad agreement, the right arises when the strike is contrary to the RLA; or is to enforce demands contrary to recommendations of an Emergency Board convened pursuant to Section 10 of the RLA; or is in resistance to the application of Emergency Board recommendations. The airlines agreement provides for financial assistance to a carrier under the second condition specified in the railroad agreement or when a strike is called before the pre-strike procedures of the RLA have been exhausted, or is otherwise "unlawful." Both types of agreement have been upheld by administrative agencies and the courts.

Despite the judicial and administrative approval accorded mutual-aid pacts, the decisions were in each instance narrowly circumscribed and cannot be taken as a broad license for concerted economic action by employers in the railroad and airlines industries. The aid agreements are rather ingenious devices to provide protection for carriers without widening the area of open economic conflict and interrupting operations throughout the industry. This objective is hardly consistent, however, with the tendency in the railroad industry in recent years to convert every local dispute into a national issue requiring the invocation of emergency board procedures.

The RLA obviously places greater importance on the avoidance of any work stoppages than does the LMRA. The emergency disputes procedures of the latter statute have a more restricted coverage, and it does not require the compulsory arbitration of grievances. Given the differing emphases of the two statutes on preventing interruptions of work, the protective devices approved for employers under each–aid pacts under the RLA, multiemployer lockouts under the LMRA–have a logical validity. However, the premise that any threatened halt in rail transportation is inevitably as dangerous to the economy as a "national emergency" under the LMRA deserves far more critical examination than it has yet received. There is an urgent need for a detailed review of bargaining procedures in the railroad industry; in the opinion of some observers those procedures breed emergencies instead of forestalling them.

*Summary and Recommendations*

The United States has a variety of labor relations laws, each enacted to deal with specific problems, and none designed for accommodation with all of the others. Consequently, the growth of these laws has been excessive and unorganized, frequently creating new problems as it purported to solve others. The most serious inconsistencies exist between the LMRA and the RLA. These inconsistencies are not merely reflections of unique problems and practices in the railroad and air transport industries? rather, they reflect substantially different policies for which there is no longer a reasonable justification.

The various segments of the American economy are now so mutually interdependent that, so far as labor-management relations are concerned, it is no longer possible

dependent that, so far as labor-management relations are concerned, it is no longer possible to speak of "social experiments within the insulated chambers afforded by the several states." There are no "insulated chambers." The extent to which the demands of a truly national labor policy can be reconciled with historical states rights in a federal republic is a question of great complexity that requires for its solution a statecraft of the highest order. Congress has shown neither the willingness nor the ability to face the problem squarely, much less to deal with it effectively.

The continuing prospect of rising levels of wages and prices and the growth of industry-wide or multiemployer collective agreements having at least an indirect effect on product markets reveal the inadequacy of present antitrust laws to provide even a conceptual framework for analysis of these problems. In this area the decisions of the Supreme Court have obfuscated and confused rather than clarified. Congress has neglected its own obvious responsibility to establish a new policy adapted to contemporary needs.

It would be unrealistic to assume that Congress will act on any of these problems unless it is virtually compelled by circumstances to do so, or that it could without guidance and a conviction that it was reflecting consensus of organized labor and management, accomplish substantial legislative reforms. In sort, Congress needs help.

Offers of "help" abound; but, quite naturally, most come from partisans seeking special benefits. The basic job to be done--a detailed review of the principal labor laws in action--should be undertaken by a neutral commission, preferably with, but if necessary without, specific authorization from Congress. The commission should issue findings and recommendations, which should then be reviewed and criticized by labor, management, and consumer groups. The recommendations should concentrate on possibilities of repealing unnecessary laws or specific statutory provisions, eliminating conflicts and inconsistencies in present laws, and developing new policies if they are required.

Whether from such an effort would emerge a consensus that would encourage Congress to act is unlikely but not impossible. Scholars and practitioners alike would learn much from the undertaking, regardless of its legislative consequences. Finally, if the reach of this proposal appears to exceed by a considerable margin the probable grasp of accomplishment, we have at least, as Thomas Reed Powell once remarked, the poet's authority in favor of the differential.

# COLLOQUIUM

Jack Stieber

Benjamin Aaron

Nathan P. Feinsinger

Harold S. Roberts, *Moderator*

DR. ROBERTS: Our procedure this afternoon will be to get the reactions of the individual panel members to the presentations of the other panel members. I'm going to ask each of them to speak briefly and answer any of the questions raised, with the exception of the paper by Ted Kheel. After we have a go around on the panel, we'll take a look at some of the questions that have come in from the floor. So to start we'll have Ben Aaron.

DR. AARON: I'll just make a couple of comments about Jack Stieber's analysis this morning with which mainly I agree. The difference between us is really a matter of detail and of emphasis. I liked very much his notion that it would be a good idea if we could divide the kinds of stoppages by public employees into categories of extreme, moderate, and relatively no severity, and govern our policies accordingly. I do not agree with him that it is just about as simple as the kinds of decisions that the National Labor Relations Board makes, nor do I think that most state legislatures will be willing to delegate their authority to an administrative body within the state. I think there is a kind of inconsistency between the notion that we should have a federal law uniformly applicable throughout the states with respect to the right of public employees to organize and bargain collectively and with the notion that we should allow experimentation within the states. That is to say, Jack is for limited experimentation within the certain guidelines. I'm inclined to think that we ought to have a federal law, but I'm wondering how much experimentation will be feasible. I like the idea of experimentation, but I'm not sure that it would work out quite as helpfully as Jack seems to think. But generally speaking, I myself feel with Jack and with Nate that it does no good to simply pass a law saying that there will be no strike. I'm more inclined to emphasize those procedures that make strikes unnecessary. And there are two states, Michigan and Wisconsin, and a few others, where we've seen some major emphasis on fact-finding and mediation for the first time in a long time. I don't myself feel that we've had anywhere near the ingenuity and hard work done on these aspects of dispute settlement procedures than we've had with respect to others that are so well suited to the public sphere.

DR. STIEBER: With regard to Aaron's talk, there was one thing that I liked very much and I think it is very important. As he put it, there is an utter lack of protection for unorganized employees in the United States. This came home to me in doing some work in Western European countries. While we have a great many labor laws, perhaps more than any other country, we do not have laws with respect to certain basic conditions of employment that other countries, who do not have as much labor relations law as we do, do provide through their own legislation. For example, we do have the laws in the United States regarding hours of work and hours of overtime, and this insures reasonable likelihood that even in unorganized plants where there are no contracts, these employees also will have a certain maximum hours and after that they will receive overtime. Most European countries go beyond this with regard to these fundamental necessities that are guaranteed to employees. For example, most countries guarantee certain number of weeks of vacation to all employees regardless of contract, so that in addition to hours law they provide that all employees are entitled to, let us say, a week or two weeks' vacation.

Now unions and employers are at liberty to negotiate for more liberal provisions,

but at least we know in those countries that in an unorganized sector (and there are unorganized sectors in all of the countries that I am talking about), those employees will also have vacations. In the United States we really do very well with regard to fringe benefits where there are contracts, especially where unions are reasonably strong. But I dare say that there are plenty of people who work year in and year out without any vacation because they either are not organized or they are not in a position to bargain for a decent vacation period.

Another illustration of where the individual unorganized employee is at a disadvantage in the United States is with regard to dismissal notice. In the United States you can dismiss such an employee without any notice. Most employers who follow good personnel practices will try to give some notice. However, there is no requirement for this except where there are labor-management agreements which spell out a grievance procedure, and a discharge procedure, and a right to arbitration, and so forth. It seems to me that this is really a basic right that every individual ought to have, so that even if he is working in an unorganized plant, if he is no longer needed, or even if he is going to be discharged for cause, there ought to be some period of time during which he would receive notice, whether it be two weeks, or one week, or even a month. Generally, this is spelled out by law in most European countries. Let alone an opportunity to appeal a discharge through some kind of a procedure which would take the place of a grievance procedure with final and binding arbitration. I think this is what Ben meant when he was talking about the lack of protection for unorganized employees, and this is an area which we ought to explore. We take it for granted that where there are unions, they are going to negotiate rights and privileges for their members, tending to forget that there is a very large number of people who not only are not members of unions, but who do not work under union contracts even if they are members, and are not covered by any agreement.

As to Ted Kheel's paper, there is a matter that was not mentioned which is related to the subject of technological change and automation. Again it is a difference between American practice and West European practice. There is legislation in a number of European countries providing that before employers make collective dismissals for economic reasons--which means relatively large numbers of employees, in the range of 5 percent or more of the work force of a given employer--they must give notice to the employment service before they start laying off employees. This is especially true where the layoffs are due to technological change, and according to some of the people from Sweden particularly, this has worked out quite well. Most employers have not found that giving two months notice of their intention to make large scale layoffs creates any hardship for them.

I have found that employers in the United States generally feel that it would be almost impossible in certain lines of businesses to be able to tell even as little as a month in advance whether they will have to make a layoff of a substantial number of people because of technological change or for economic reasons. It may be interesting to discuss whether it would be feasible in the United States to have some kind of requirement that employers give a certain period of notice before making what I have referred to here as collective dismissals.

Finally, with regard to some of the things that Mr. Aaron mentioned on the public employee strikes question. There is of course an inconsistency, as he says, in asking on the one hand for more federal regulation, and on the other hand, asking for state experimentation. But I resolve it by saying that just as we have certain constitutional rights which are laid down by the U. S. Constitution which apply to everybody, there is still room for experimentation in other areas once you are within the overall constitutional guarantees. Similarly, I would say that the right of organization and the right to negotiation would be made a right that is guaranteed to all public employees. But then we would go further and recognize that there are different ways of dealing with some difficult problems, one of them being public employee

strikes, that nobody knows the answer, and that, therefore, this would be an appropriate area for state experimentation. They must still keep in mind, however, that they cannot experiment to the degree of denying the basic rights of organization and collective negotiations.

DR. ROBERTS: Would you care to distinguish between collective negotiations and collective bargaining? The courts seem to have some difficulty on this.

DR. STIEBER: I think it's an artificial distinction. Perhaps some of my colleagues will disagree on this, but as far as I can see, it is an artificial distinction which has been made between public employment negotiation and private employment bargaining. These distinctions are said to arise because there are problems, for example, as to who is the employer when you are dealing with an agency of a municipality which in itself does not have complete freedom to bargain because it must rely on somebody else for its budget--the board of estimate or city council? Also other problems exist, civil service regulations and so forth, that distinguish public employment from private employment. Consequently, some people have insisted that we should not use the term "collective bargaining" in talking about negotiations in the public sector because there are these differences, and they have, therefore, coined the phrase "collective negotiations" which would distinguish it from "collective bargaining." Perhaps there are more solid reasons for the use of the two terms, but I don't know them.

DR. ROBERTS: In this connection I would like to pose a question to Nate Feinsinger, because it involves Wisconsin and he is a great protector of the State of Wisconsin. At the meeting yesterday of State Labor Relations officials, two lawyers talked about the rights that should be available to public employees. They argued that they should have the same rights in collective bargaining as private employees do--the equal right to strike, and to inconvenience the public by withdrawing their services. One of the speakers said that the Wisconsin statute is a good one and requires collective bargaining. And then he said that the Wisconsin statute does not cover wages, hours, and working conditions. Could you explain this?

DR. FEINSINGER: No, I don't think so. In Wisconsin we have a single board known as the Wisconsin Public Relations Board. It mediates, it arbitrates, it decides unfair labor practice complaints. In my opinion, you cannot have mediation and arbitration vested in the same agency, because if the union knows that it has another step to go, it would turn down the best deal that it could get through mediation and go to arbitration. What the mediator got them while they are at that stage they have in their pockets, and they believe they can't get less when they go to arbitration. There is no other Board that I know that has more than a single function. In New York you have a mediation board, and also a State Labor Relations Board.

DR. STIEBER: In Michigan, the State Labor Mediation Board does have both the functions of mediation and fact-finding and unfair labor practices, and so forth. However, the statute with regard to public employment specifically states that these two functions should be handled by different departments or divisions of the State Mediation Board. The legislature neglected to give it enough money to actually provide for two separate divisions, so what actually happened is they have taken some of the employees who were formerly involved in processing representation elections and unfair labor practices and have assigned them to mediation functions. But there is this dual function within one board which has been criticized, and I would not be surprised if at some point the feeling became strong enough to result in putting them in separate agencies.

DR. FEINSINGER: Let me tell you a story related to this. Our Wisconsin

Supreme Court had said that policemen had no right to bargain; they had no right to strike; they had a right to fact-finding. In the fact-finding process, they had a right to appoint an outside organization, but they cannot join it as their bargaining representative. It seems to me this shows the height of ignorance and unreality itself. You can't join a union; you can't bargain, but you can have a union represent you in fact-finding! How do you account for that? A new judge, that's all.

DR. ROBERTS: I have a question from the floor. Does not the strong potential block voting power which rests in government workers' unions give them a dominant position in any negotiation with their employers, who are usually elected officials? Therefore, wouldn't giving them the ad led power--the strike--tip the scale too much in favor of the government workers?

DR. STIEBER: This might especially be true at the local level where you have a strong union city, and the elected officials may be in position where they are not free to act in the way that they would want to because they believe that these actions will have some impact in the ballot box perhaps in a very short period of time. Now this is just a fact of life. I don't see that you can stop union officials from trying to get their members and even non-members to vote a certain way. This is a right that all citizens and all organizations have. One might say these unions don t need the right to strike. They are so strong that perhaps through the legislative process and their power in the elections they can influence the economic benefits that they get. I think in a way this is true. There are some unions who weren't terribly happy about the changes which introduced collective bargaining into the public sector. For example, I suppose over the years the post office employees have influenced their own pay and benefits through lobbying activities and have done so very effectively. I don't know whether they are likely to do any better through collective bargaining. However, on the other hand, there are many cities in which unions are not all that powerful, and even in those cities where unions are important we all know that union leaders have not always or even frequently controlled the votes of their members when they go into a secret booth to vote. So that I think that the question of whether or not the unions are powerful enough actually to get what they want is debatable and will vary from one community to another. But apart from that, there are those organizations which do not have the power of numbers but are entitled to collective bargaining negotiation to influence the conditions of their employment. And these certainly must depend on some introduction of organization and collective bargaining in the public sector.

DR. FEINSINGER: We are in a transitional period. Here is the Chairman of the County Board of "X" town, who has been running the show; he has never had any discussion with a union, and suddenly he is told by the Legislature he has to bargain collectively. And he says, What's that? He says I don't have to bargain with anybody because I am the sovereign: the sovereign state, the sovereign city, the sovereign county. I cannot share my responsibility with a union. I think the unions will make a mistake if they insist on getting the whole cake right away. You've got to bide your time union, there is a new generation of county chairmen.

One of the newer devices to bridge the gap is known as advisory arbitration. This is a contradiction in terms. It is just like compulsory arbitration but with a different name. It is like saying the Iliad was not written by Homer but by another man with the same name.

DR. ROBERTS: In this connection, I asked the question before about this collective negotiation. The same thing applies to "advisory arbitration" and "mediation to finality." Is it because we're trying to run away from terms which have become objectionable and come up with something which would be acceptable to people as long as they don't recognize the objectionable thing?

DR. FEINSINGER: No, I think the argument against public bargaining is generally nothing better than the old shop-worn argument about the closed shop and the union shop and the agency shop. Those terms are devised for industrial negotiations, not for public negotiations. The "fair-share agreement," I think, is a term that I invented to distinguish the union security problem in public employment from the problem in private employment. It's as simple as that. Besides, it's got a better chance to pass in the Legislature.

DR. ROBERTS: Executive Order 10988 provides for "advisory arbitration." This is a contradiction in terms but perhaps it was the only way to get a form of arbitration into the Executive Order and make it acceptable to government agencies—even though it was not final and binding arbitration. The agencies said that they would not accept a decision by somebody who is not in authority; that the department head has to make the final decision. Although these terms may be classed as gimmicks for those of us who are accustomed to using simple, straight talk, yet, some feel that if you come up with something which gets you over the language obstacle and you can accept it, or get the legislature to pass it, or get the President to sign it, or get the Congress to go along, that it makes good sense. Maybe what we need is a new language in the public sector.

DR. STIEBER: Actually, Harry, the term advisory arbitration is different from final and binding arbitration, and the best evidence of that is that the unions in the Federal sector are not happy with advisory arbitration and they have cited illustrations where the advice of the arbitrator has not been taken. Therefore, one of the changes that they are asking for in Executive Order 10988 is to substitute final and binding arbitration for advisory arbitration so that here it is really not just a matter of semantics. It is actually a difference in the outcome and the way in which the arbitration award is treated.

DR. AARON: I think you missed a point on that, Jack. I think it is a euphemism, not for arbitration, but for fact-finding recommendations and the term advisory arbitration is designed to create the illusion that there is something final and binding when obviously there is not. So it is not a distinction between final and binding arbitration and something else. What it is is the old recommendation procedure clothed in language which was intended to give people the feeling that they were really going to get a final and binding decision. But obviously there was no way that the Executive Order could accomplish that, at that particular time.

DR. ROBERTS: How can you support that old canard that civil servants both state and federal are paid lower wage rates than employees in the private sector? Here in Hawaii private employers are continually losing employees to the federal and to the state agencies.

DR. STIEBER: I suppose I will have to say that this is my first visit to Hawaii, and I am not acquainted with the pay scales either of the private sector or the public sector. I would say that if private employers are losing employees to government organizations then this is evidence that perhaps their rates are not competitive. Generally speaking in most states and the federal government this is not the case. In the federal government, I think that certain employees may start at a higher level, but in terms of the progression that prevails, they do not as a rule pay more, and usually pay less than comparable workers receive in the private sector. I am sure that there are illustrations, not only here in Hawaii but also in some states, where the federal government, because of the importance of the installation and the necessity of attracting workers, especially in blue collar jobs, ordinance and naval installations and so on, where they have flexibility to a point where they are pricing labor away from the private employers. I am sure this is true on some instances.

DR. ROBERTS: I think perhaps you might add too that the shifts in employment

from private to public vary in different types of occupations–that you might get a loss in some and a gain in others. I think there are some factors other than wage rates, which determine whether the employee will move from the private to the public sector.

Here's a question which deals with police strikes. Do any of you want to comment on the experience of police strikes? Have they resulted in increased crime waves?

DR. STIEBER: The most interesting recent development that I know of in this area–it was not responsive to this question–but I think it does illustrate the attitude of unions toward strikes by policemen and perhaps firemen. The State, County, and Municipal Employees recently withdrew the charter that they had issued to a police local because the police local did call a strike that lasted something like two hours. And immediately after that happened, the President of the State, County, and Municipal Employees appointed a board to investigate, and apparently the board's finding was that in fact there had been an actual withholding of labor for a short period of time and since it is the policy of State, County, and Municipal Employees that they do not sanction strikes in these three areas, namely, police, firemen and prison, they withdrew their charter from that organization. But there really are very few illustrations of actual police strikes where we could get enough evidence to answer that question.

DR. ROBERTS: I'd like to note that in a recent visit I made to Canada, one of the things that interested me a great deal were the collective bargaining agreements between public employee organizations and government agencies. The agreements covering police and fire departments had specific provisions which required collective bargaining. If collective bargaining fails, a mediator is assigned by the National Agency or the regional agency. If mediation fails there is a proviso for a tripartite board to meet to make recommendations to the parties. The recommendations, however, were final and binding so that in effect you have compulsory arbitration for firemen and police. Other public employees in the country are free to take economic action, including the use of the strike.

There is a question as to how extensive public employee organizations are in Hawaii. I'd better get somebody from the audience active in the public employee area to answer that. Briefly on the state and local levels, we have four major organizations: the Hawaiian Government Employees' Association, the United Public Workers, the Hawaii Education Association, and the American Federation of Teachers, a total of almost 25,000. The largest of these is the Hawaiian Government Employees' Association. On the federal level I guess the major ones are primarily in the military installations–Pearl Harbor Naval Shipyard being the largest. They have a contract with the Hawaii Metal Trades Council. Any comment from the floor?

COMMENT: The shipyards are saying that approximately one-third of the employees belong to some employee organization. In this State there are some 6,000 federal employees who belong to one organization or another.

DR. ROBERTS: Here is a question addressed to Ben Aaron. Aside from your suggestions for overhauling of the federal labor laws, do you suggest any specific changes in the existing labor laws?

DR. AARON: Well, my particular suggestion for a death warrant is Railway Labor Act, which I think was a great piece of legislation when it was enacted and provided most valuable experience for us, but which I think now is obsolete, and I would strongly favor its repeal and the subsuming of those employees under the National Labor Relations Act with

appropriate modifications to deal with particular problems. So far as I know, I am alone in that recommendation and I don't expect it to come to pass. But I have spent a number of years of my life studying the Act and being tangled up in one way or another in its administration, and my conviction remains the same in that regard even though I don't have many supporters.

I think there are a number of provisions in other laws that might very well be repealed. There are a lot of very foolish provisions in the Taft-Hartley Act relating to national emergency disputes, but they're minor except in the context of a thorough reform. I don't think it is worthwhile mounting a crusade to repeal the ridiculous vote on the employer's last offer, or the procedure for getting a report from an emergency board to a person who has already made up his mind what he wants to do, and which is told to get a report in in a certain time so the Attorney General can get an injunction, although the purpose of the report is to advise him as to whether or not there is a national emergency. That's all very ridiculous but it's not terribly harmful. But if we were going to revise our national emergency disputes procedures, then it seems to be quite clear we ought to get rid of those really quite undignified and ridiculous provisions.

To suggest other aspects of labor reform would require, I am afraid, much more technical discussion on the problems than would be appropriate here. I would mention that I think another very grave aspect of the whole Railway Labor Act situation, and one which isn't known so much, is the whole question of elections. I think their election procedure is vastly inferior to that of the National Labor Relations Board. For one thing it does not permit any choice on the ballot for a no union vote which I think is absolutely essential in any kind of democratic procedure, and I think the whole procedure before the National Railroad Adjustment Board is an outstanding scandal and I strongly favor the elimination of all that.

When we get into the more detailed aspects of the National Labor Relations Act, as we do particularly in boycotts and that sort of thing, I think we are just tearing the seam as well. I think we have too much legislation. That is my basic point, we could do with much less of such legislation.

DR. ROBERTS: Here is a question addressed to Nate Feinsinger. Are you saying in effect that compulsory arbitration in public employment is inevitable?

DR. FEINSINGER: No, on the contrary, I don't think compulsory arbitration is ever inevitable, but I would say in this respect I disagree with Michigan. There's always time for a State Legislature or Congress to adopt the compulsory arbitration system. Therefore, we can try voluntary arbitration.

DR. ROBERTS: Question to Dr. Stieber. In Hawaii we are concerned largely with relations between unions and the federal government, not the State. What has been the attitude of the armed services toward the federal directives on collective bargaining?

DR. STIEBER: I'm really not well enough informed on the Department of Defense and the various armed services and their experience under Executive Order 10988. However, I do read regularly a government employee labor relations letter put out by BNA, and my general impression is that the Navy Department particularly, which seems to be one having considerable organization of their employees, has generally lived reasonably well under the Order. I think that they have had some advisory arbitration. I think that they have accepted the procedure. I have the impression that there is not any strong difference in the acceptance by the armed services with respect to their civilian employees as compared with let us say some other agency. Of course, there are some agencies that are outstanding in the degree of

acceptance. The Labor Department, where one I think might reasonably expect that there would be a strong acceptance of the Executive Order, has gone further than most in the degree to which they have established relations and consultation and negotiations with their employees. The Interior Department has had relations for many years. The TVA, of course, long before Executive Order 10988 had contractual relations with their employees, and was the prime example of a government employer which was negotiating and in every way treating their employees more or less like private employers. I don't have any particular information with regard to any defense services having any significant difficulty under that Order.

Let me mention two other things. When Nate Feinsinger referred to his difference with the Michigan procedure with regard to compulsory arbitration, I know he's clear on it but I want to be sure the rest of you are. He was not referring to the current Michigan law which does not provide for compulsory arbitration for any disputes in public employment. He was referring to the report of a commission established by the Governor which was asked to examine the law and to make recommendations for its improvement, and it was this commission which, among other things, recommended that for a period of three years–every three years–there be some experimentation with compulsory arbitration only for police and fire fighters. They did not go beyond this. The legislature has not acted on any of those recommendations, and therefore, in Michigan our law is no different than it is in Wisconsin.

Just one last point. I don't know why, in trying to answer the question with regard to police, I did not draw on the illustration closest to home. Actually, we have perhaps the best illustration of a non-strike among the policemen in Detroit but one which had a very significant impact, only a month or two ago. The policemen are still very unhappy about a recommendation for their wage increase for next year. They have not called a strike. However, for a period of perhaps two weeks they were calling in sick in large numbers, so that on some days there were as many as 600 policemen reporting sick. It's just a problem of money with regard to the police. They tried to combat this one day by insisting that all policemen who had called in sick report in and have doctors examine them. Well, they were a little unlucky, because one of the men who reported in keeled over when he got there because he obviously was sick. In a police force of several thousand you always will have a percentage of people who are sick. This has not been resolved. It is a case in which a very substantial number of policemen have stopped short of a strike, but they have exercised other alternatives. Among the other things that they did on one or two days was to stop writing traffic tickets. This had quite an impact on the municipal budget. These and other things only illustrate that you don't need to have the right to strike to be able to exert power.

QUESTION: What are the basic differences between collective bargaining in the private sector and collective bargaining in the public sector?

DR. AARON: In the first place, when you're dealing in a private sector, within certain limits the union has the right to withhold its services, to go on strike. The employer has certain limited responses he can make to that–he can just try to wait out the union or he can try to operate during the strike and there are various federal and state agencies which would assist the parties to reach an agreement. The employer makes his own decision. He doesn't have to go somewhere else to decide what kind of an arrangement he can take in settlement of the strike.

If you're dealing with the federal or state government, in the first place you've got limitations on the right to strike, legal limitations at any rate. And secondly–and I think this goes to the heart of the problem of public bargaining–very frequently the agency with which the union and public employees have bargained doesn't have the final say. The union maybe asking for more money from the school board whose budget has already been determined,

and even if the board wanted to grant the union's demands it may find it impossible to do so. That's one of the reasons why in the Taylor Report in New York the commission recommended very strongly that bargaining precede the final determination of what monies would be available for the year, so that when the parties got to bargain the people representing the government would be able to go to their principals and say, "Look, we think this is a fair arrangement and you've got to provide the money." Limitations on bargaining of the government are very, very much more stringent, particularly when the federal agency budget has already been determined by Congress or will be determined by Congress. I don't know if that gets to the heart of the question.

DR. STIEBER: I think in this respect there is much more room and scope for negotiation at the local level than there is at the state or the federal level. For example, you cannot as a classified civil service employee bargain over wages, because wages for civil service employees are set by Congress. I have read some very learned articles which make a very good case for the view that really as long as you cannot negotiate over wages and salaries you really cannot call it collective bargaining.

This is exactly the situation in which I was involved in just before coming out here. I was appointed fact-finder in a school district where they happened to reach an impasse. I went and held a hearing and found that the basic issue was over the salary schedule. The school board had already gone to the voters and gotten authorization for two and a half million tax increase. The main beef of the teachers was that really they had no business asking for only two and one-half million, because the teachers had told the Board that they would need at least five million in order to give the teachers what they wanted. The superintendent of schools said the Board felt that based on the fact that this city had just voted an income tax and the State of Michigan was just about to vote an income tax, they felt that anything above two and one-half million would be voted down, and he cited some very apt illustrations about neighboring communities where they had gone in for a higher millage and had been voted down.

Here was a situation where the teachers were asking for a certain amount of money which the school board was in effect saying we don't say that you're not worth it and that you're not entitled to it, but the fact of the matter is that our budget for next year has been set, and there they were. Now, private situations like that would never occur, because there is nothing in the last analysis to prevent the employer, if he is faced with a situation where the union is demanding more, from making a decision. He might make a decision (1) to raise the price of his product, (2) to close down certain unprofitable operations, or (3) to take a strike or other possibilities. But this is only one illustration of the great difference between bargaining in the public and private sectors.

DR. ROBERTS: Was there a question back there, Art?

QUESTION: What would you do about a strike in a hospital?

DR. AARON: I think one of the big problems in hospital situations is that first of all you've faced with the undeniable fact that while they are beginning very slowly to catch up, most hospital employees all around the country are very, very badly underpaid and over worked, and their general working conditions are pretty bad. The reason I think in part is that in the typical private, non-profit hospital the Board of Trustees usually are wealthy people who are very concerned about providing hospital care and are very cost-conscious. They say we're giving all our time and energy without compensation and we think everybody ought to do the same, you know. They expect their employees to work and make their livelihood under clearly substandard conditions and when the employees want to bargain, they are told how can you do

anything to interfere with providing health services for sick people.

I think we have to bring hospital administrations into the 20th century in terms of their duty to provide for their employees as well as for their patients. The problem is sky rocketing hospital costs. We all know the kind of hospital care and medical care that we want. Everybody wants to go first-class, but none of us can afford it really, and everytime we get increases in benefits for patients or increases in pay and improved working conditions for people who work in the hospitals, we get increased costs to the patients, and we just have to reach some kind of an agreement in our society about how far we are going to go with providing good medical care. We certainly should not ask the hospital workers to subsidize the rest of us. For a long time we've been exploiting the nurses and the nurses finally just got sick of it. Now the nurses are about as militant a group of employees as you will find anywhere. And it's just a matter of time before all the other people who work in the hospitals are going to react the same way. We can't deal with that problem by telling them that they don't have the right to strike.

DR. FEINSINGER: Mr. Chairman, with your permission. I'd like to spend a minute or two to discuss the problem on a broader spectrum.

I started with the assumption that the world of force is gone and to determine disputes of any kind by means of military force, diplomatic, political, and even the judicial–that leaves the question as to how the disputes are to be decided other than by force. The newly emerging nations are saying to us, "Give us back our burdens, Mr. White Man; we will carry it ourselves."

Now mediation in a broader sense includes any kind of voluntary action. With that thought in mind we have established in the past three years at the University of Wisconsin Law School what we call a Center for Teaching and Research in Dispute Settlements with heavy emphasis obviously on civil rights disputes. But it's not limited to civil rights disputes. They cover the war area. They have labor-management disputes; I think some of you are born with just labor-management. I know I am. And the question is, how do you make the mediator? Does he have to be born this? Do you teach a man to become a mediator? That's one thing. The second thing is to take a successful mediator in the labor-management field. Like the rest of us who has made a name for himself, can he transfer those skills from the labor-management field to other fields such as civil rights disputes and international disputes? Then we have a whole host of other terms. Let me give you an example of what we're trying to do.

There is a law suit by the Frank Lloyd Wright Foundation against the City of Madison over a little item of $350,000. The case has gone up to the State Supreme Court, back down. They appointed an Arbitration Board. They have two members of the Senate office, one is their arbitrator, and the other is going to present the case. What a nuisance I admit. Same thing on the other side and with a great deal of difficulty getting a man who would be willing to serve in this group. First one they got died and I agreed to serve and, of course, we have a problem explaining to other people that this isn't a fatal assignment. They finally got him and by this time each side had spent $150,000 with fees of one kind or another and they haven't even got the show off the ground and on the road. What do you get off the ground?

At any rate, the Mayor asked me if I would mediate with a little more preparation than that. Well, the point of it is the city had offered to pay $25,000. But the real difference of opinion is $50,000 as the Foundation had offered to settle for $75,000, not $350,000.

I said, "This is very interesting. I am going to call the newspapers for a press conference. Since each of you has already spent $150,000, the real difference between you is only $50,000. That is not fair because we did intend to get the case all cleared up."

Later a friend of mine who is a very prominent lawyer in Los Angeles told me, "You better stay out of Los Angeles. Your name is mud with the lawyers," and I said, "What's the matter now?" "Oh," he said, "they heard about that settlement you forced on the Frank L. Wright Foundation and they don't like it."

If you use the word mediation to a civil rights man, he'll kill you, not literally. You won't like him because he says mediation means compromise. We are talking here of God-given and Constitutional protected rights and there is no room for compromise. I can understand that, but you see the assumption of mediation is always compromise is not a fair assumption. A lot of times one side or another is out on the limb. It doesn't have a case at all. It's very, very embarrassing to come along with somebody else and save face for him. And now in any case if anybody wants to know something about the mediation settlement, you write me at the Law School. It's just--life is a seamless web--you can't slice it into a labor-management dispute, civil rights dispute, international dispute. It's all one ball of wax. For purposes of this kind and for instruction, you have to divide the world up into slices, this whole industrial relations. I say you should consider labor-management relations as the total concept of the society in which we are living including this whole business of civil rights in the nation.

QUESTION: Is the traditional type of bargaining becoming obsolete? Is there a trend toward bargaining on the real issues from the beginning, instead of waiting for the end of negotiations?

DR. AARON: I think that this is one of the areas where it is very hard to generalize, because we don't have any uniform structure of bargaining throughout industry or in the public sector. There is certainly a marked trend away from so-called crisis bargaining in the sense that nothing can be done until just shortly before the agreement is due to expire. In some of the big industries informal bargaining goes on more or less continuously and parties are constantly working at it the year around. There is a good deal of informal exploration and by the time the parties meet for formal negotiations they pretty well have an idea of what has to be settled. But I think you have to allow for a certain amount of just formal ritual. People expect it. The membership of the union and the stockholders of the corporation would be, I think, a little disconcerted if the parties simply announced that they have reached an understanding.

And of course, as the bargaining continues on a more and more sophisticated level, the problems become much more difficult, so that there really is genuine disagreement. I was interested in a statement reported in the press about the use of computers in collective bargaining, indicating that some day the computer could take over a good part of the bargaining. The implication being that people are really just not sure about the facts, and that's what takes time and causes the trouble, and the computer could run through various proposals and come out with the facts and the parties would be bound by that.

Actually, I think more and more what the parties are arguing about is something far more fundamental; that is, the whole question of what proportionate share of the total income of the corporation should go in the way of profits to the enterprise, to greater benefits to the employees, lower prices to the consumer and so forth. And there is also in negotiations, like this year's auto negotiation, fundamental questions of what should be the nature of the employment relationship. Should all wage earners be switched to salaries for example? Now these are points that, even with careful background preparation, are going to require very hard bargaining and undoubtedly will have to go to some kind of a crisis point before a resolution can be reached.

Well, I think the millenium is far from here, but I do think that there is a great deal

of important ground work and careful preparation for bargaining that has never existed before in some of the major industries, but it will not in my judgment fully supplant the last mile or so of tough bargaining, the long hours, sometimes, of bargaining to mutual exhaustion and so forth.

QUESTION: Was the joint resolution of Congress on the railway disputes mediation, fact-finding, or compulsory arbitration?

DR. AARON: What it is is an attempt to reach some settlement, but with the added sword of Damocles over the heads of the parties indicating that if they cannot reach an agreement then the recommendationsmade by the Commission or Board will become in effect a compulsory arbitration award. I'd like to say just one cool word about that. I was a member of the first compulsory arbitration board that was established in 1963 by Congress to settle the last railroad dispute with the operating brotherhoods. You recall that there were a number of issues that were referred for mediation, but two of them having to do with whether firemen should continue to be employed on diesel engines in freight service, and what should be the size of the train crew. Those two were to be settled by final and binding arbitration.

For some 20 years or more, I've been telling my students that compulsory arbitration is not a good means of settling labor disputes. But every once in a while I doubt the validity of that advice. Having served on this arbitration board I'm happy to report that I think I was telling them the truth all those 20 years. This board met pursuant to a statute that was a model of ambiguity, that had all kinds of restrictions built into it so that the public members, although there were three of them as opposed to two representing the union and two representing management, didn't really have the whip hand at all.

We spent nine weeks in hearings, hearing things that were totally irrelevant to the dispute, that merely rehashed what the parties had done in the preceding 18 months and with the Commission appointed by President Eisenhower, and then we had to make a decision. We were told that that decision would last for two years. Our decision was greeting with ill-concealed joy by the carriers, and with outrage by the brotherhoods who, however, had refused to give us any help in trying to get an equitable solution.

Then we sat back and watched what would happen. Well we knew, first of all, that the decision would be appealed to the courts, which it was. It went all the way up to the Supreme Court of the United States and it turned out that the law was constitutional, which was obvious, and that the decision met the terms of the statute, which I think was equally obvious, but they had just begun to fight. Under the Railway Labor Act any arbitration board can be reconvened at the request of either of the parties to interpret the award. So for the next two years, our arbitration board was reconvened sixteen times, each time for about three days at a time, always on weekends, in almost as many cities. We handed down over 300 separate interpretations of the award. And a great many of those in turn were taken to the courts. Many of the decisions critical to the whole operation of the award are still pending in the courts. At the end of the two years it was not certain as indeed isn't certain yet what the status of the award is.

In short we've settled nothing; absolutely nothing. But in the meantime some 18,000 firemen were put off the railroads. They got for the most part very substantial benefits but a great deal of human misery resulted, and Congress has been investigating it ever since. It's just a terrible way to handle anything, and it seems to me that if ever we needed proof that compulsory arbitration simply will not do what it is supposed to do, which is, to take something and settle it finally, this case is a perfect example of it. Now whether present law will do something better remains to be seen, but at least there the Board has the option of mediating, which

we didn't have, and trying to reach a settlement, and the parties have a little more leeway in which to operate. I hope very strongly and I hope Ted Kheel's absence today help them do some good in this dispute. Maybe they can work out a settlement which will prevent the necessity for compulsory arbitration, but if those compulsory arbitration men were back in the same old muddle we had before, I don't think we will solve any problems at all.

DR. ROBERTS: Well, the word this morning wasn't very good from Senator Morse in the Senate. The law itself provides for a 30-day mediation which ends on the 16th and then there's 30 days of fact-finding. But the series of criteria which they don't have for the third time which I think deal with the guidelines. If that doesn't work, then they make their recommendations and then they have 30 days in which to file and these will last for two years for the effectiveness from January 1, 1967 to 1969.

Our time limit is up and I want to see if any of the members have any comments before we close our discussion.

Prepared for
American Assembly on
Collective Bargaining
Oct. 27-30, 1966

# ORGANIZATION AND COLLECTIVE BARGAINING IN THE PUBLIC SECTOR

by

Jack Stieber*

Each decade since the 1930s has had at least one major law dealing with labor relations: the Wagner Act of 1935, the Taft-Hartley Act of 1947, and the Landrum-Griffin Act of 1959. All have excluded government employers and employees from their purview. The 1960s, barely half over, have already earned the right to go down in labor relations history as the decade of the public employee. At the Federal, state and local levels of government, public employees are organizing, engaging in negotiations, and giving voice to grievances against their employers; in short, they are beginning to act like all other employees. Equally important, legislatures are passing laws according public employees most of the rights won by workers in private industry thirty years ago.

This paper discusses the growth of public employee organization and collective bargaining, analyses different approaches to some basic issues, and points up implications of this significant development for the future.

*I should like to acknowledge the assistance of Michael Masternak, research assistant in the School of Labor and Industrial Relations, Michigan State University, in the preparation of this paper.

## Organization of Government Employees

Government is the largest and fastest-growing industry in the United States. In 1965 one out of every six nonagricultural wage and salary employees was on the public payroll which totaled 10 million, 3 million more than in 1955. By 1975 government employment is expected to increase to about 15 million and comprise one out of every five employees in the country.

Almost all of the increase in government employment since 1955 has occurred at the state and local level. At 2.4 million, Federal civilian employment in 1965 had risen by only 200,000, or 13 percent, over 1955; during the same period the nation's population increased by 17 percent and state and local government employees increased from 4.7 million to 7.7 million, about 65 percent. By 1975, the Bureau of Labor Statistics projects an increase in Federal civilian manpower requirements of less than 10 percent, while state and local government needs will rise by 60 percent, a far greater increase than anticipated for any other industry.[1] Population is expected to rise by about 16 percent during the next decade.

The major reason for this phenomenal growth in government employment is the increased demand for services that are supplied by government, the most important by far being education. One out of every two state and local employees is employed in education. Other government growth industries include the supplying of health and hospital services, highway construction and maintenance, natural resource conservation, national defense and related activities.

Given the tremendous growth in government employment, trade union membership among government employees might also be expected to have increased. This has indeed happened. The BLS reports that union member-

ship in government rose from 915,000 in 1956 to 1,453,000 in 1964, an increase of almost 60 percent.[2] More than 40 percent of the increase occurred between 1962 and 1964, and 70 percent after 1960. During the same eight-year period, 1956 - 1964, trade union membership in the private sector of the economy decreased by more than 700,000 or 4 percent.

As a result of these contrasting trends, government employees comprised 8.1 percent of total trade union membership in 1964 as compared with 5.1 percent in 1956. Furthermore, while the proportion of union members in the entire labor force declined from 25 percent to 22 percent and the ratio to nonagricultural workers dropped from 33 percent to 29 percent, the percentage among government employees rose from 12 percent in 1956 to 16 percent in 1964. This membership was rather unevenly distributed as between the Federal level and state and local governments. In 1964, 900,000 or 38 percent of all Federal employees belonged to unions, while only 550, 000 or 7.5 percent of all state and local government employees were union members.

The rise of public employee unions has been spectacular. In September 1965, the AFL-CIO reported that three of the fastest growing unions during the preceding decade were exclusively in the public employee field: the American Federation of State, County and Municipal Employees (AFSCME) which had 99,000 members in 1955 and 237,000 in 1965; the American Federation of Government Employees (AFGE) which increased its membership from 47,000 to 132,000; and the American Federation of Teachers which rose from 40,000 to 97,000 members.[3] In early 1966 the AFSCME claimed 288,000 members, the AFGE 180,000 members and the Teachers Union 115,000 members.[4]

Organization of government employees is not a recent development. Craftsmen in naval instellations have been organized since the early part

of the nineteenth century. Unions currently affiliated with the AFL-CIO Metal Trades Department have a long history of organization in Federal employment. The most important of these, the International Association of Machinists, established its District 44 in 1904 to work solely in Federal employment and in 1966 reported 44,000 public employee members.

The earliest union composed entirely of Federal postal employees, the National Association of Letter Carriers, was organized in the late 19th century and was one of the first affiliates of the AFL. Today more than a half million postal workers belong to some dozen unions, most of which have existed for many years, frequently in the face of pronounced hostility.

Unions have been far less active in the classified service, which makes up about half of all Federal employment and accounts for almost all Federal white-collar employees. Less than ten percent of these employees are union members. Most of them belong to the AFGE, chartered by the AFL in 1933 and affiliated with the AFL-CIO, and to a large number of independent unions. Thus the history of union organization in the Federal Government parallels that of private industry. The President's Task Force on Employee-Management Relations in the Federal Service noted that "the more similar a government activity is to that of a private activity in which workers are normally organized, the more often it will be found that the government workers are also organized and the relations with management officials approach the pattern of such relations in private industry."[5]

At the state and local level the oldest and strongest national union is the International Association of Fire Fighters affiliated with the AFL-CIO. This union, which had its origins in the local firemen's benefit societies

and social clubs of the late 1800s, claimed 115,000 members in 1964, 90 percent of all eligible employees. More recent arrivals on the scene are the State, County and Municipal Workers and the Teachers Union, mentioned earlier. Other national unions active at the local level include the Teamsters, Building Service Employees, Transport Workers and various building trades.

Important as the gains in union membership have been at all levels of public employment, the predominant form of organization among public employees is still the independent association. By far the largest and most important organization is the National Education Association with about one million national members and a total membership in excess of 1.5 million including state associations. Some 90 percent of the nation's teachers are estimated to be enrolled in the national organization or its state and local affiliates. In many states, associations of civil service employees represent the prevalent form of membership. In California, more than half of all state and local employees belong to some 260 independent associations. In New York, the Governor's Committee on Public Employee Relations reported that there were 650 association-type local employee organizations-- more than twice the number of union locals in the state. In Michigan, the Michigan State Employees Association claims 15,000 members and is the principal rival of the AFSCME in organizing state civil service employees. This picture is duplicated in many other states.

At the Federal level, Executive Order 10988 issued in January 1962 has resulted in a proliferation of organizations representing employees in various agencies. In addition to the 29 affiliates of the AFL-CIO Government Employees Council and IAM District 44 which left the Council in 1966, one finds such organizations as the following competing in representation

elections: the National Association of Government Employees (Independent), Organization of Professional Employees of the U. S. Department of Agriculture, Patent Office Society, National Association of Internal Revenue Employees, Federal Tobacco Inspectors Mutual Association, Air Traffic Controllers Association, Federal Plant Quarantine Inspectors Mutual Association, National Association of Federal Veterinarians, and many others.

The increased organization of Federal employees can be largely ascribed to E.O. 10988. But what accounts for the upsurge of organization at the state and local level?

To some extent unions and associations in the states and municipalities also benefited from E.O. 10988. President Kennedy's espousal of collective bargaining for Federal employees encouraged some states to follow suit and provided an impetus to employee organizations at the state and local level. Several states passed laws providing for recognition of and negotiations with employee organizations. A number of other jurisdictions provided for union recognition through resolutions, ordinances, civil service rules, charter amendments, executive orders, and departmental codes.

These official actions were important. But there were other factors. Labor unions devoted more energy and resources to the task of organizing government employees. They became more militant, they organized demonstrations, picketed, talked tough to public officials and on occasion called strikes to back up their demands, even though they knew such action was prohibited. A few dramatic breakthrough agreements, such as the 1961 contract covering 44,000 New York City teachers, helped union organization in other cities and states. Associations of teachers nurses, and civil

service employees reacted to the union challenge by acting more like unions themselves, while at the same time insisting on their basic professional orientation.

The U. S. Supreme Court's reapportionment decisions in 1962 and 1964 helped the tide along. Reconstituted legislatures, more representative of urban centers, were more friendly to labor and sympathetic to collective bargaining for public employees. Michigan provides a dramatic example of the effect of reapportionment. The first legislature in 20 years controlled by Democrats, drawn heavily from the populated urban areas of the state, passed the Public Employee Relations Act of 1965, amending the punitive Hutchison Act which had provided for automatic discharge of any government employee engaging in a strike but made no provision for recognition of public employee organizations and collective bargaining. The amended Act continued to prohibit strikes but also included provisions governing certification of employee representatives, unfair labor practices, mediation of disputes and fact-finding. In Delaware, a reapportioned legislature also passed a new labor relations law for public employees. Since the impact of reapportionment on state legislatures has only begun, we may find other states changing their laws on organization and bargaining for public employees as the composition of their membership changes.

The relatively unfavorable earnings and fringe benefits of government employees in many states as compared with private industry provide a fertile field for cultivation by unions. Tighter labor markets and rising prices have already boosted negotiated settlements in private industry, possibly widening the gap between employees in industry and government. In addition, personnel management in the public service has not kept pace with the

Professionalization and advances made in private industry since the 1930s, under the impetus of the Wagner and Taft-Hartley Acts and the pressures exerted by unions. These factors, taken together, have improved the environment for the growth of unions and other employee organizations in public employment.

Experience Under Executive Order 10988

As of June 1965 there were some 2,473,000 Federal government employees distributed as follows among three basic categories: 1,260,000 classified employees, 621,000 wage board employees and 592,000 postal employees.[6] Salaries of the classified and postal employees are established by Congressional action. Wage board employees consist largely of blue-collar workers whose wage scales are determined by periodic surveys of prevailing wage rates for similar occupations in the labor market area in which they are employed.

Several months after his inauguration President Kennedy kept his campaign pledge to promote collective bargaining in the Federal service. In June 1961 he appointed a Task Force, chaired by Secretary of Labor Goldberg and made up of high administration officials, to review and advise him on employee-management relations in the Federal Service. Prior to this time the only existing legislation governing relations between Federal employees and agencies was the Lloyd-LaFollette Act of 1912 which provided protection for the right of postal employees to join unions and petition Congress. It was, in effect, Congress's response to the "gag order" first imposed by President Theodore Roosevelt in 1902 and made more restrictive by President Taft in 1909. The order prohibited any Federal employee or official from responding to any request for information from

any committee or member of Congress "except through and as authorised by the head of his department."[7]

The Task Force report noted that although 33 percent of all Federal employees belonged to national employee organizations, membership varied greatly among agencies, from the Post Office in which 84 percent of employees belonged to unions to the Department of State where "a careful search uncovered a total of 11 members."[8] There existed within the Executive Branch no policy on employee-management relations. The result was wide variation among agencies in their dealings with employee organizations. Of 57 departments and agencies studied by the Task Force, 22 had no stated labor relations policies; 11 had the "barest minimum of policy" giving employees the right to join or not to join employee organizations; 21 engaged in discussion with employee organizations on limited local problems. Only the Tennessee Valley Authority and the Interior Department had extensive relations with unions and other employee organizations including mediation and arbitration, and written agreements on pay scales, classifications, hours of work, grievances and fringe benefits.

The Task Force report, submitted in November 1961, served as the basis for Executive Order 10988 which was signed by President Kennedy on January 17, 1962. The Order gave all Federal employees the right to join or not to join organizations of their own choosing, and granted exclusive recognition and the right to enter into agreement with an agency to any organization which represents a majority of the employees in an appropriate unit. In order to attain exclusive recognition, an organization must receive a majority of all votes cast in an election participated in by at least 60 percent of the employees eligible to vote and present

at the installation on election day. The latter requirement goes beyond the Taft-Hartley Act, which requires a simple majority of those voting.

A new feature was introduced by the provision of two lower levels of recognition: formal recognition for organizations with at least 10 percent of the employees in a unit where no other organization has been granted exclusive recognition; and informal recognition for any organization with less than 10 percent membership. Formal recognition carries with it the right to be consulted in the formulation and implementation of personnel policies and practices and on matters affecting working condition. Informal recognition gives an organization the right to be heard on matters of interest to its members.

The Order provided that a dispute over the scope of an appropriate unit be resolved by the Secretary of Labor, who could resort to advisory arbitration. As of April 1966, 43 advisory arbitration decisions had been rendered and all had been accepted by the agency and organization involved.[9]

A Code of Fair Labor Practices, promulgated by the President in May 1963, is roughly equivalent to the unfair labor practices contained in the Taft-Hartley Act, with two important additions: strikes and picketing are prohibited and employee organizations may not discriminate against any employee with regard to terms and conditions of membership because of race, colow, creed or national origin.

During its first four years of operation the program showed the following results:[10]

1. About one-third (835,000) of all civilian employees were represented in 800 exclusive bargaining units.

However, deducting postal employees, this figure decreases to 16 percent or 320,000 employees. For a more meaningful picture we must look at each of the three main types of employment: about 87 percent of all postal employees were in exclusive units and worked under collective bargaining agreements; one-third of all wage-board employees were in exclusive units but only about one-fourth (170,000 out of 621,000) worked under agreements; only 7 percent of all classified employees were in exclusive units and only 4 percent (52,000 out of 1,260,000) were covered by agreements.[10a] Of the three groups, only wage-board employees have shown a significant increase in exclusive unit coverage since 1963 -- from 16 percent to 33 percent of the total.

2. Nine out of ten employees in exclusive units worked in the Post Office Department.

3. AFL-CIO unions represented 87 percent of all employees in exclusive units and 80 percent of employees outside of the post office. Ninety percent of the employees in the AFL-CIO are represented by a postal union, the AFGE, or a Metal Trades Council. In units belonging to independent associations, 90 percent of the employees are represented by an independent postal union, the National Association of Internal Revenue Employees (NAIRE) or the National Association of Government Employees (NAGE).

4. More than half of the 429 agreements negotiated have been in the Defense Department and about 85 percent are with AFL-CIO unions. Outside of the Post Office and the Defense Departments, only a little more than one-half of the employees in exclusive units work under negotiated agreements, most of them with AFL-CIO unions.

5. In 1965, 262 additional exclusive units covering almost 118,000 employees were recognized, and 217 additional agreements covering 158,000 employees were negotiated.

Bargainable issues were severely circumscribed by Section 7 of Executive Order 10988 which enumerated "certain matters" reserved for management decision. These include the right to direct employees, to hire, promote, transfer; to assign employees and to suspend, demote, discharge or discipline employees; to relieve employees from duties because of lack of work or for other legitimate reasons; and to determine the methods, means and personnel by which operations are to be conducted. Section 6(b) of the Order further notes that the obligation to negotiate "shall not be construed to extend to such areas of discretion and policy as the mission of an agency, its budget, its organization and the assignment of its personnel, or the technology of performing its work." These restrictions are in addition to such important conditions of employment as salaries of classified employees, pensions, insurance and other fringe benefits, which are established by Congress.

The strong "management rights" clause which is included in every

agreement goes beyond what is usually found in agreements in private industry. The kind of subjects included in agreements negotiated between Federal agencies and employee organizations is illustrated by a 1964 BLS report which listed 44 types of provisions found in such contracts including: hours of work and overtime, holiday pay, rest periods, working and/or cleanup provisions, special clothing, work by supervisors, subcontracting, safety, leave ppolicies, jury duty, craft jurisdiction, wage surveys, promotions and demotions, reductions in force, job descriptions and ratings, apprenticeship and training, check-off of dues, mediation and advisory arbitration of grievances.[11]

Despite the acknowledged success of the Executive Order in promoting union membership and collective bargaining, employee organizations would like to see some changes made in the Order and more particularly in its administration by individual agencies. Their complaints focus on the following issues:[12]

1. Bilateral collective bargaining versus unilateral regulations: Except for the agency-wide agreements in the Post Office and the Railroad Retirement Board, all agreements are negotiated at the local level and must be approved by the agency head. But personnel managers at the agency level have been too restrictive in delegating authority to local managers to permit meaningful negotiations. Too often they issue rules and regulations on matters that should be subject to negotiation.

2. The grievance procedure: There are too many exclusions from the grievance procedure in most agreements, and agencies

have rarely been willing to agree to advisory arbitration in adverse action proceedings. These include position and classification cases, disciplinary cases, and disputes as to the interpretation and application of the agreement if not based on an individual grievance. There have been instances in which management has refused to comply with an advisory arbitration award. This has lead to demands that arbitration be made final and binding.

3. The scope of collective bargaining: Despite necessary limitations on matters subject to negotiations, there is far more room for bargaining than most agencies permit. Wage and salary determination is a good example. While Civil Service determines the content and coverage for grades, an agency can permit union participation in developing policies for determining grades and steps for its employees. But only a few agencies follow this practice. Furthermore, for wage board employees, and under the comparability principle of the Federal Salary Reform Act of 1962, there should be bilateral procedures for selecting comparable firms, key jobs and geographical areas to be surveyed for determining rates of pay.

4. Collective bargaining impasses: Only 10 percent of all agreements provide for outside mediation and 25 percent for fact-finding and referral to higher authority in the agency when an impasse occurs in collective bargaining. Without the strike weapon, these procedures take on added

importance to a union which is already bargaining from a very weak position.

5. Unfair practice charges: Hearing officers, selected from employees of the agency involved, merely rubberstamp the action of supervisors and management officials. A few agencies have offered to use outside arbitrators as hearing officers and the Labor Department has encouraged this practice. Some unions favor turning over administration of the Order to an impartial agency or board similar to the NLRB. Others would like to see the Department of Labor given more responsibility and the Civil Service Commission less in administering the Executive Order.

Agencies too have had complaints, particularly over the amount of time consumed in collective bargaining and handling of grievances. Their major problem however has involved the training of thousands of management officials to carry out their responsibilities under the order. Unions have also faced this problem with respect to training of representatives and stewards. Both have embarked on extensive training programs, making use of universities which have labor and management education programs.

## Experience in the States[13]

Legislation governing organization and collective bargaining in public employment ranges from several states with comprehensive laws, to some with laws for particular groups of employees, such as police and firemen, transit workers and teachers. Most states, however, have no labor relations statues dealing specifically with public employees. There have also been

numerous court decisions and opinions by state attorneys general relating to labor-management relations in the public service.

Our definition of a "comprehensive" law is one which applies to a substantial proportion of all public employees and not only contains provisions regarding the right to organize and bargain collectively, but also establishes machinery for determining bargaining representatives, dealing with unfair labor practice charges where they are included in the law, and mediating disputes. The laws in at least six states -- Connecticut, Delaware, Massachusetts, Michigan, Minnesota and Wisconsin -- met these criteria as of June 1966, all but Wisconsin's having been passed or substantially revised within the last two years. Oregon's law gives all public employees the right to organize and bargain collectively, but only classified state employees have a procedure established by the Civil Service Commission for certification of representatives. In addition, California, Connecticut, Oregon, Rhode Island and Washington have separate statutes regulating teacher-school board relations which are administered by state education agencies.[14]

Even the comprehensive state laws do not apply to all public employees and employers: The Connecticut law covers only municipal employees but specifically excludes certified teachers who are dealt with in another law; Delaware includes state and county employees, but a municipality is covered only upon affirmative legislative action by its common council or other governing body and teachers are specifically excluded from coverage; the Massachusetts law does not apply to policemen; state civil service employees are excluded from coverage in Michigan by the 1963 Constitution; the Minnesota law does not apply to teachers; the Wisconsin statute does not apply to employees of the state government who are covered by a separate

law which becomes effective January 1, 1967.

The right of public employees to organize is recognized in almost all states. Ironically, right-to-work laws have been the vehicle for protecting this right in a few states. In Arkansas, a statute prohibiting police officers from belonging to a union was invalidated under the state's right-to-work law which gives employees the right to join or refuse to join unions; and, in Texas, the courts have overturned city ordinances banning union membership by public employees as violations of the right-to-work amendment to the state constitution. In North Carolina, public employees are prohibited from belonging to any labor organization which is affiliated with any national or international union.[15]

The right of employees and the duty of public employers to bargain collectively is less widely recognized. In addition to the states mentioned above, a number of others, including Alaska, California, Idaho, Louisiana, Maine, Maryland, New Hampshire, Oregon and Wyoming, have authorized collective bargaining for public employees generally or for specific groups such as transit workers or fire fighters. Some states, however, have expressly prohibited collective bargaining by public employees or declared any agreements reached to be unenforceable. Included in this group are: Alabama, Colorado, Indiana, Iowa, Kansas, Kentucky, North Carolina, Texas and Virginia. A few states, including New York, permit employees to organize and bargain collectively but do not impose a correlative duty upon employers to bargain.

On one issue, all states, the courts, and opinions of attorneys-general are in agreement: public employees are prohibited from stroking. It is interesting to note that five of the six states with comprehensive

laws, although expressly prohibiting strikes by public employees do not spell out penalties for striking employees. Only Minnesota specifies such penalties, including termination of employment, and if reappointed, employees may not be paid more than before the strike, must wait at least one year for any increase in compensation, serve a two-year probation period and lose tenure rights. These penalties are similar to those contained in the Conlin-Wadlin law of New York State and in other states which detail penalties for strikers.

Laws recognizing the right to organize and bargain collectively are of limited value unless machinery is set up to implement and administer them. The Michigan Act, which is fairly typical, gives the Labor Mediation Board authority to determine the unit appropriate for collective bargaining, and to hold elections and certify and decertify exclusive bargaining representatives. The Act lists "unlawful" employer practices which parallel the unfair labor practices in Section 8(a) of the National Labor Relations Act: interfering, restraining or coercing employees in the exercise of their rights; dominating or interfering with any labor organization; discriminating against employees in order to encourage or discourage membership in a labor organization; discriminating against employees for giving testimony or instituting proceedings under the Act; refusing to bargain collectively. The Michigan law differs from Laws in Wisconsin, Massachusetts and Connecticut in that it does not specify "unlawful" acts on the part of labor organizations. The Chairman of the Labor Mediation Board has stated that the legislature considered a listing of unfair practices for employees unnecessary on the theory that a public employer may discipline or discharge a striking public employee.[16]

The Michigan statute requires that the Board's mediation and labor relations functions be administered separately. The Board also has authority to conduct fact-finding when there is an impasse in collective bargaining. Either the employer or the employee representative may petition to have a Hearing Officer, usually a member of the Board's staff, assigned by the Board, who will hear testimony and submit his report and recommendations to the Board and the parties. The Board then reviews the entire record, including any comments from the parties, and issues its report which may "affirm, modify or reverse" the Hearing Officer's report. This final report is made public but is not binding on the parties. Other states with fact-finding procedures, including Connecticut, Massachusetts, Minnesota and Wisconsin, usually appoint outsiders rather than staff members and publish the fact-finders' report without modification. A few states permit the fact-finder(s) to try to mediate the dispute before issuing a report.

In Michigan and in most other states, arbitration is provided only upon request of the parties. A few states, however, provide for compulsory arbitration of disputes affecting specific groups of employees: Rhode Island for firemen and policemen; Wyoming for fire fighters; Nebraska for disputes involving "government service in a proprietary capacity or service of a public utility"; Maine requires all agreements involving fire fighters to contain a no-strike provision and an alternative method of settling disputes by arbitration.

Of the six states with comprehensive laws, only Delaware does not provide for fact-finding. Wisconsin has had the most experience with fact-finding in public employee disputes, although a number of other states

have utilized this procedure for emergency disputes in private industry. During the first four years of experience under Wisconsin's law, 108 petitions for fact-finding were filed. Fact-finders were appointed in 38 of these cases; 49 were resolved by mediation prior to appointment of a fact-finder; 10 were withdrawn or consolidated with other cases; and 11 cases were pending as of June 30, 1966.[17] Professor James Stern has analyzed the first three years of experience with fact-finding in Wisconsin and concluded that "the law has made a substantial contribution to the improvement of collective bargaining among public employees ..."[18] Over 70 percent of the fact-finding awards have served as the basis for settlement of disputes. Stern specifically noted that the Wisconsin Act has served to avoid the strife experienced in some other states in disputes involving teachers.

No discussion of state laws regulating labor relations in the public sector would be complete without reference to the 1966 experience in New York State which illustrates some of the political obstacles to legislating in this area.

New York City had the first thorough-going code of labor relations for municipal employees anywhere in the country.[19] The program grew out of an Executive Order of 1958, issued by Mayor Wagner, providing for exclusive recognition on the basis of majority rule, procedures for unit determination and certification, and machinery for resolving bargaining impasses. But at the state level there was no statute governing labor relations in public employment, except for the punitive and ineffective Conlin-Wadlin law. The New York City transit strike of January 1966 put added pressure behind efforts to replace this law with a more realistic

and comprehensive statute.

Governor Rockefeller appointed a Committee on Public Employee Relations consisting of five public members and chaired by Professor George Taylor "to make legislative proposals for protecting the public against the disruption of vital public services by illegal strokes, while at the same time protecting the rights of public employees."[20] In New York City, a tripartite panel, originally set up under Mayor Wagner to review the experience under the 1958 Order and to develop "improved collective bargaining procedures", was continued by Mayor Lindsay.[21] Both groups submitted their reports on March 31, 1966.

The Governor's Committee make the following major recommendations:

1. The Conlin-Wadlin Law should be repealed and replaced by a statute which would grant public employees the right to organization and representation; empower the State, local governments and other political subdivisions to recognize, negotiate with, and enter into written agreements with employee organization; and create a Public Employment Relations Board (PERB) to assist in resolving disputes with respect to the representative status of employee organizations in State departments and in local governments.

2. To resolve disputes which reach an impasse in the course of collective negotiations, all written agreements should include procedures, developed by the parties, to invoke in the event of such an impasse in advance of budget submission. Should the impasse persist, the PERB is empowered to mediate the dispute, and if no settlement is reached, to appoint a fact-finding board of public members with power to make public recommendations.

If the fact-finders' recommendations are rejected by either party, the appropriate State or local legislative body should hold a "form of 'show cause hearing'" at which the parties would review their positions prior to final legislative action.

3. Strikes or threats of strikes by public employees should be subject to court injunction. Any organization violating the injunction could be fined in an amount left to the discretion of the court. Individual employees participating in strikes would be subject to reprimand, fine, demotion, suspension, or dismissal, depending on the extent of their misconduct.

The report of the tripartite New York City panel was directed at the specific problems of the largest and most complex city in the nation, in which unions had achieved a much higher degree of economic and political power than elsewhere in the state and where public officials had had considerable experience in collective bargaining. This report was not proposed as an alternative to the report of the Governor's Committee. Nevertheless, coming at the same time as the State report and diverging from that report's recommendations in some important respects, it was inevitable that the differences between the two would be highlighted and become important in the political maneuvering in the State legislature.

The New York City report was in the form of a memorandum signed by the Deputy Mayor and Corporation Counsel for the City and by nine leaders of employee organizations, and endorsed by the four public members. It provided:

1. A declaration of policy that the City will engage in collective bargaining and enter into written agreements with employee organizations holding certification to represent employees in designated

bargaining units.

2. A detailed exposition of the subjects coming within the scope of collective bargaining and those excluded, a management rights clause, and procedures to be followed in negotiations and implementation of agreements under various circumstances.

3. Establishment of an Office of Collective Bargaining (OCB) to be administered by a tripartite board, including a full-time impartial Chairman. The OCB was empowered to make certain that each party complies with its obligations; to oversee adherence to collective bargaining procedures; to administer procedures for resolving deadlocks; to determine bargaining units, and certify and decertify bargaining agents; and to recommend changes and improvements.

4. The Chairman of the OCB was given authority to appoint mediators and, if authorized by a majority of the Board, a disputes panel with power to mediate, hold hearings, subpoena witnesses and records, and formulate recommendations to be released to the parties and the public.

5. Unilateral changes by the City in wages, hours, or working conditions, and strikes, slowdowns, work stoppages or mass absenteeism by employees, were prohibited during negotiations and for 30 days after a Disputes Panel filed its report.

6. All agreements would contain no-strike clauses for the term of the contract and provisions for grievance procedures terminating with final and binding arbitration, to the extent permitted by law.

The four public members of the panel, in a statement accompanying the memorandum, said: "Our professional judgment and national experience, generally, with fact-finding procedures convince us that these agreed-upon procedures will result in the peaceful settlement of disputes and make strikes unnecessary." But, they added, "strikes continue to be barred by existing state laws. We are aware that changes in these laws are under consideration. The problem of strikes of public employees is a matter for legislative policy. We have sought by agreement to develop procedures designed to make strikes unnecessary and have left to other forums the problem of dealing with other contingencies." Subsequently, the public members indicated that they were evenly divided on the question of prohibiting strikes in public employment.[21]

The major differences between the recommendations of the Governor's and the Mayor's Committees were: the use of an appointed all-public board as opposed to the tripartite Office of Collective Bargaining to administer the collective bargaining procedures; the final resort in the State report, to the legislature or other appropriate governmental body if either party rejects a fact-finding report; and the prohibition of strikes and prescription of penalties on unions and employee violators in the State report. The inability of the Republican-controlled Senate and the Democratic-controlled Assembly to agree on the handling of strikes led to the failure of any law to be enacted in the 1966 session of the Legislature. New York City is expected to put the tripartite panel's recommendations into effect by Executive Order or by a local ordinance. This action had not yet been taken as of the end of July 1966.

## Comparison of Public and Private Employment

The foregoing analysis of state legislation in the public employment field indicates that the developing trend follows existing laws governing labor-management relations in private industry, except for the prohibition of strikes and the provision of alternative settlement procedures. Most unions favor this approach because they see little difference between employment in the private and public sectors. They focus upon the individual employee, his economic needs, his job and his fundamental rights as a citizen in a democratic society. Since public employees do not differ from those in private industry in terms of their economic requirements and desire to have a voice in determining their conditions of employment; since almost every job in public employment has its counterpart in private industry; and since management behaves the same was vis-a vis employees, union leaders see no reason why we should have different laws, procedures and institutions governing labor-management relations in the public and private sectors of the economy. They sum it up by calling for "first class citizenship" for public employees. The more militant unions, such as the State, County and Municipal Employees and the Teachers assert the right to strike and not infrequently practice it.

Some students of industrial relations have questioned the desirability of transferring, with little or no modification, the legal framework, concepts and institutions which have become well established in private industry to the public sector.[22] They prefer an approach which would take account of the important differences between public and private employment, both with regard to the unique characteristics of the state as employer and the indigenous development of organizations representing public employees.

The proponents of this view believe that public employees are entitled to the same basic rights as private industry employees: the right to organize, to be represented by organizations of their choice, and to engage in collective bargaining (or collective negotiations as some prefer to call it) with agreements reduced to writing. But, they point out, there are certain constraints operating in the public sector which make the complete transfer of private industry laws, practices and institutions either illegal, inappropriate or undesirable in the public sector. Among these they include the following:

1. Many of the terms and conditions of employment are mandated by legislative bodies or prescribed by civil service regulations. This acts as an important limitation on the scope of negotiations.

2. There is diffusion of decision-making authority to a much greater extent than in private industry. Private employer representatives have broad discretion to negotiate and commit the organization on almost all matters. The negotiators and top management constitute a closely knit "team." This is not true in the public sector. An agency head may have authority to negotiate on some issues but not on others which are state- or city-wide. Even the chief executive does not have the final say on the distribution of funds and can only submit recommendations to the legislative body, which has responsibility for the overall budget and levying of taxes to balance income and expenditures. And if the negotiated items include matters mandated by state law or civil service

provisions, there is still an additional layer of decision-makers to go through. This has important implications for determining the appropriate unit and the appropriate scope of negotiations within a given unit of government.

3. The legal framework, procedures and institutions in private industry were developed as a response to certain characteristics, economic and social factors and historical events. To mention only a few: the strong antagonism and use of force by a large segment of private industry to prevent employees from organizing; the helplessness of the individual employee in the face of market forces and the complete and unilateral authority of the employer to hire and fire, set wages, hours and other conditions of employment; the existence of a labor movement dominated by one federation (except for the period 1935-1955) with a strong tradition of exclusive jurisdiction.

To the extent that these factors exist in the public sector and some of them are present though not to the same degree as was true in private industry before the Wagner act - transference of private industry laws and procedures may be appropriate. But we should be wary of transplating the complete system of private industrial relations into the unnatural and unreceptive environment of public employer-employee relations.

4. Cognizance must be taken of the two types of employee organizations existing in the public sector: the "association-type" and "union-type" of organizations. The former includes

not only professional associations of teachers and school administrators, nurses and other employees, but also such unions as the fire fighters and the postal employees. Associations tend to prefer broader groupings of employees rather than the narrower bargaining units favored by unions, whose limits have been set with a view to winning elections. They normally include supervisors, while unions are limited to employees below the supervisory level. The association-type organizations have been less interested (at least until recently) in formal recognition, exclusive representation and written agreements than have unions, and have rejected the strike in favor of political pressure and lobbying for favorable laws and local ordinances.

It is too early to say which of these types is the "wave of the future" in the public sector. It is more likely that they will continue to co-exist and compete with one another. Indeed, one cannot rule out the possibility of merger, amalgamation or some form of loose affiliation among the two types of organization in some fields. But the issue should not be foreclosed by legislation or adoption of arrangements which pre-ordain the outcome by favoring one or the other type of organization. A period of competition and experimentation might have salutary results if carried on within certain ground rules, and if not permitted to hold back legislation and the development of constructive employer-employee relations in public employment.

5. Finally, the strike is unlawful in public employment and should be excluded from any system of industrial relations in the public service. (This will be discussed in the next section)

In addition to these constraints, there are doubts whether certain long-standing arrangements in private industry are suitable for dealing with the wide range of complex problems and issues facing employers and unions today. For example, Professor John Dunlop questions whether the concept of exclusive representation is as well suited to dealing with pensions and health and welfare benefits, which might better be negotiated on an industry basis, as it is for handling grievances and work rules which are best determined at the plant or enterprise level. Perhaps it would be better to have different units to deal with different issues. This is only one of a number of practices in private industry which might be re-examined. It happens to have particular relevance for public employment because of the many levels of decision-making found in government. Those engaged in labor relations in government have found that the "appropriate unit" problem is one of the most difficult to resolve.

The argument between the approaches outlined above has two facets. On the one hand, there is the question whether the differences between private and public employment are so great as to warrant significant modifications in the laws, procedures and institutions which have become engrained in American labor-management relations over the past thirty years. This question lends itself to research, discussion and negotiation, as well as to experimentation at the state and local level. Another question is the extent to which practices which have worked imperfectly

in the private sector can be improved upon in public employment, and whether such improvements might serve as the basis for changes in the industrial relations system in private industry.

The idea that the states should serve as laboratories for social experimentation is one of the alleged advantages of the federal system of government. In the labor-management relations field the process has been the other way around, with the states patterning their laws on the Federal government. This has been true even in public employment where Executive Order 10988 helped to stimulate action at the state level. We doubt that Congress will follow the lead of the states in labor legislation. But this should not deter the states from rejecting those practices which have been found wanting in our Federal law and fashioning improvements to meet the peculiar problems of public employer-employee relations at the state and local level.

## The Strike Issue

In private industry the strike is the ultimate weapon of employees in collective bargaining. In some cases - disputes affecting the national health and safety under the Taft-Hartley Act and those subject to the Railway Labor Act - strikes may be delayed for several months. But eventually, the union is free to use economic power, subject only to action by Congress.

Not so in the public sector. The strike is prohibited by Federal law, by a number of state statutes and court decisions. Presidents, Governors, Mayors and public officials -- liberal and conservative alike -- have generally supported the view that strikes by government employees cannot be tolerated. Calvin Coolidge, Governor of Massachusetts during

the Boston police strike of 1919, said, "there is no right to strike against the public safety by anybody, anywhere, at any time." Franklin D. Roosevelt, while recognizing the right of government employees to organize, wrote, in a letter to the President of the National Federation of Federal Employees in 1937, ". . . A strike of public employees manifests nothing less than an attempt . . . to prevent or obstruct the operations of government until their demands are satisfied. Such actions looking toward the paralysis of government by those who have sworn to support it is (sic) unthinkable and intolerable."[23] Similar statements have been made by other public officials.

But, strikes of government employees have occurred. David Ziskind decumented such strikes in his book One Thousand Strikes of Government Employees published in 1940. BLS statistics indicate that there were at least 883 strikes of public employees during the period 1942-1965.[24] Strikes in government occurred most frequently during the period 1942-1953. There followed a relatively quiescent period until 1964 when there were 41 public employee strikes followed by 42 in 1965 and at least 30 during the first six months of 1966.[25] However, even the increased strike activity of the last few years among public employees does not exceed that of the post-World War II and Korean War years. Strikes in government have been concentrated at the local level, occurring only occasionally at the state level, and very rarely in the Federal government. These stoppages are typically of short duration, rarely lasting more than a few days. However, the average duration of public employee strikes increased in 1965 and, so far in 1966, there have been several fairly long strikes.

There has been a long-term decline in the use of the strike in the

United States and in other industrialized countries.[26] In recent years, unions in the United States have found the strike increasingly costly and decreasingly effective as a method of resolving disputes. In public employment, on the other hand, unions and even associations, which in principle reject the strike weapon, have found that it often brings quick and rewarding results. Furthermore, they have learned that the risks are not great, despite the severe penalties which may be legally imposed on strikers. This, coupled with the belief that some public employers are unwilling to engage in genuine collective bargaining except under the threat or actuality of a strike, and the absence of alternative methods of resolving disputes, has undoubtedly contributed to the growing incidence of government strikes in recent years and will continue to do so as long as the situation remains unchanged.

Too often the strike in public employment has been treated as an unmitigated evil to be exorcised rather than the symptom of a malady which needs treatment. At the other extreme, some unions have utilized the strike as if it were the first rather than the last resort in collective bargaining. Mediation and fact-finding are being used increasingly in public employment and the record based on limited experience is promising. But there still remains the thorny question of what to do when these procedures have been exhausted and the impasse has not been resolved. Should the strike be permitted? And if not, why not?

The "sovereignty doctrine" which holds that a strike of public employees, whatever their occupation or the nature of their activity, is an attack upon the state and a challenge to government authority will no longer suffice. Secretary of Labor Wirtz put it succinctly when he said: "This doctrine is wrong in theory; what's more, it won't work."[27]

He was referring to the broad use of the sovereignty doctrine to deny rights of collective bargaining to government employees. But, the New York Governor's Committee also rejected the "rights of sovereignty" as a justification for barring strikes of public employees, stating that "this is scarcely an apt term to apply to a system of representative democratic government . . . which is responsive to the electorate."[28] Other countries, including Canada which is presently (July 1966) considering a bill giving Federal civil servants the right to strike, apparently do not regard strikes by government employees as a threat to the sovereignty of the state.[29]

Few would dispute, and the courts have upheld, the right of governments to prohibit strikes of public employees. Presumably a legislative body can also permit strikes, either for all public employees or for certain groups of employees. The question is whether a blanket prohibition on public employee strikes is necessary, wise or desirable in the context of present day industrial relations.

Most supporters of the view that public employee strikes should continue to be prohibited do so on one or both of the following grounds: the essentiality of many government services to the health, safety and welfare of the community and the belief that the strike is an economic weapon which is inappropriate in public employment.

The "essential services" argument is indisputable with respect to policemen, firemen and prison guards. Although isolated strikes among such employees have occurred, few would defend them and the organizations with which they are affiliated do not assert the right to strike. But one quickly runs into differences of opinion in trying to decide what

other services are "essential" to a community.

School teachers? Professor Myron Lieberman points out that "schools are closed for summer, Christmas, Easter and Thanksgiving vacations, for football games, basketball tournaments, harvesting, teachers' conventions, inclement weather, presidential visits, and for a host of other reasons without anyone getting excited over the harm done to the children."[30] Why not for strikes to protest teacher grievances or to achieve legitimate demands in collective bargaining? But how many parents would agree with Mr. Lieberman?

Transit employees? Few people would question Norman Thomas's dedication to the cause of the working man. But after the New York transit strike of January 1966 Mr. Thomas said: " . . . there are services whose continuous operation is so important to society that strikes should not be thinkable. . . . Transit in a city like New York should be so recognized." But would the transit workers agree?[31]

Similar differences of opinion would be found to exist with regard to garbage collection, water works, public utilities, hospitals and other government services. This led the New York Governor's Committee to conclude that "a differentiation between essential and non-essential governmental services would be a subject of such intense and never-ending controversy as to be administratively impossible."[32]

Perhaps the Committee was right. Still, one of the most frequent and effective arguments against a blanket prohibition on public employee strikes is that people doing the same work in private industry are free to strike. Besides, there are innumerable government services which can by no stretch of the imagination be considered so essential that they cannot be interrupted even for short periods: state-owned liquor stores, city botanical gardens, recreation centers, government cafeterias, automobile

license bureaus; the list is almost endless. The best way to put this argument to rest would be for a few states to prohibit strikes in certain specified "essential" services but not in others. Given the increasing trend towad state regulation of public employer-employee relations, we may yet have an opportunity to see how such a law would work. Of course, public employees engaged in non-essential services also have less bargaining and political power than those in essential pursuits. Given a choice between being treated like private employees in all respects, including the right to strike, and being barred from striking but with access to mediation and fact-finding procedures, most of them would probably prefer the latter alternative.

The second, and in our view the more fundamental, argument against lifting the prohibition on the strike in public employment holds that the work stoppage does not serve the same purpose in public employment that it does in private industry. It is argued that in private industry employers have countervailing rights to the strike: they may lock out their employees, try to break the strike by operating with other employees, suspend operations for months without regard to the effect on those not directly involved in the dispute; they may even choose to go out of business entirely. The threat or actual use of these economic weapons is supposed to perform a useful function by exerting reciprocal pressures upon the parties to modify their positions to the extent necessary to bring about an agreement. Throughout the dispute both parties are subject to market pressures where the consumer's power of choice is exercised (except for certain monopoly industries e.g. telephones). Jobs can and have been lost and markets seriously depleted by long strikes or settlements leading to non-competitive price increases.[33]

These considerations are not normally present in government. The countervailing right of the lockout or the possibility of going out of business do not exist. Extended suspension of operations depriving the community of needed or even desired non-essential services is not politically feasible, even when possible from an economic viewpoint. While a government can try to break a strike and may even call upon the National Guard or the Army to perform essential services during an emergency, this is hardly a permanent solution; nor does it lend itself, even on a temporary basis, to such government services as education and hospital care. Besides, such action would be political suicide in most cities.

The economic and market pressures which operate in private industry do not usually exist in the public sector. Competitors will not teach a community's children or provide checks and case work services to welfare clients; consumers will not find ready substitutes or learn to do without garbage collection or health services; too high a settlement will not price most government services out of the market, though it may affect the number of passengers on public transport in some cities.

This does not mean that there are no constraints upon the public official when he engages in negotiations with a union; nor even that he is not as influenced as his private counterpart by the cost of settlement. The difference is that the threat is political rather than economic: the public official may not be concerned over market competition and substitute products; instead, he worries over "continuance in office, political survival and future political aspirations."[34]

In this context some groups stand to gain much more than others by resorting to the strike weapon. A recent instructive example is the New York City transit strike and the resulting settlement and exemption from

prosecution under state law for transit employees, as compared with the experience of the welfare department employees in the same city. The basic question is whether the strike, which in the United States has been viewed primarily as an economic weapon, is equally appropriate when used as a political weapon.

Finally, there is a feeling on the part of some students in the industrial relations field that the strike should not be sanctioned in public employment at a time when its use is being questioned in private industry. Public opinion has become less tolerant of work stoppages, and demands for Presidential and Congressional action to force settlements of strikes which significantly affect the economy or result in great inconvenience to large numbers of people are heard with increasing frequency. The public is particularly intolerant of strikes which deprive them of government services. To sanction the strike in public employment at this time, these people argue, would take attention away from the constructive alternatives of mediation and fact-finding and focus it on the strategy and techniques of conducting or countering work stoppages.

One of the most persuasive arguments in support of permitting the strike in government is that it is the only way to get some public officials to take collective bargaining seriously. Union representatives cite case after case in which a government employer contended he could not bargain over certain issues but changed his attitude quickly when a strike was threatened or actually started. Then, insurmountable obstacles to negotiation seemed to fade away and an agreement was reached in short order. There is no question but that some public officials have used the strike prohibition to evade their responsibility to negotiate in good faith,

even in states with laws providing for collective bargaining in government employment. Union representatives have also sometimes resorted to a strike vote, strike threat, or actual stoppage before exhausting the grievance procedure or making use of mediation. Both sides are often inexperienced in collective bargaining and ignorant of the law or the most elementary knowledge of industrial relations.

Management and labor must take their responsibilities more seriously if collective bargaining in the public sector is to make progress. Government and universities too have a responsibility to make collective bargaining work. They can make an important contribution by helping the parties improve their knowledge and skill in the industrial relations field. An example is provided by the Michigan Board of Education which contracted with the School of Labor and Industrial Relations of Michigan State University to conduct courses, workshops, institutes and conferences for teachers and other school employees, school administrators and school board members. In the long run, the answer lies in building effective organizations for collective bargaining in government and unions, developing expertise, improving the amount and quality of data and information for use in negotiations, and in broadening the areas of communications. This has happened in private industry during the last 30 years. It will have to happen in the public sector before there can be real collective bargaining.

## A Look to the Future

During the next decade we can look for the extension of legislation governing public employer-employee relations to more states. While existing laws will serve to show the way, there should be more variation

then is found in state laws applicable to the private sector because of the absence of a definitive Federal statute similar to the National Labor-Management Relations Act. History will probably repeat itself in the lag of the Southern states, both with regard to legislation and the ability of unions to organize public employees. In August 1965, the AFSCME reported only 6 signed agreements in the South out of a total of 302.[35] However, the existence of professional associations with substantial membership in Southern states may speed up the development of employer-employee relations in certain areas of public employment. An extensive survey of school districts by the University of Chicago found that the National Education Association had local affiliates in close to 90 percent of the districts in Southern states, and that 121, or 13 percent, were carrying on negotiations with school superintendents or boards.[36]

Employee organizations can be expected to press for agreements which will more closely resemble those found in private industry. Among their objectives will be: broadening the scope of negotiable issues, union security in the form of the union shop, and final and binding arbitration of grievances.

As employee organizations become stronger they will become less willing to accept unilateral determination of matters which presently are considered sovereign prerogatives of the state. They will whittle away at these in much the same way as unions in private industry have narrowed the range of management prerogatives. A particularly sensitive issue is the virtual exclusion of employee organizations from having any say in wage determination for classified civil service employees in the Federal Government and in the states. In 1966, Federal employee wage and salary adjustments were held within the administration's 3.2 percent guidepost.

President Johnson, in signing the Federal Salary and Fringe Benefits Act, urged labor and management to follow the example set "in our own house."[37]

In hearings on the bill, some Congressmen reminded the administration that it had "perfect control" over wages of Federal employees but not over the rest of the economy. Senator Hartke of Indiana chided the administration for violating the comparability principle established in the 1962 Federal Salary Act, providing that salaries of Federal employees were to be related to pay for the same levels of work in private industry. He charged that because of the guidepost limitation "all bargaining power and rights to negotiation have already been taken away. Now it becomes an intriguing question as to just how long these various union and Government representatives will submit to this kind of treatment."[38] Union representatives testified against the bill but were unsuccessful in getting the administration of Congress to raise the ante.

It is reasonable to assume that legislatures and government officials probably have adhered more closely to the guideposts than have private employers whose wage rates are set in collective bargaining. If the labor market remains relatively tight and inflationary pressures continue to mount, public employee organizations may be expected to press more vigorously for inclusion of pay scales as a negotiable item.

Union security in the form of the union shop is generally held to be inconflict with the civil service concept and contrary to the principle of equality of opportunity for appointment and promotion in government service. However, it has been argued, that "if collective bargaining through an exclusive representative is recognized as advancing the public interest . . . then reasonable practices that will promote a fruitful and responsible bargaining relationship should also be acceptable."[39]

In actual practice there are many union shop provisions and lesser forms of union security in agreements involving governmental units, In 1965, the AFSCME reported that it had at least 51 union shop agreements, and an additional 56 with a modified union shop or maintenance of membership.[40] Other unions have also negotiated union shop provisions. The checkoff of union dues is much more common in both the Federal service and at the state and local level. Union shop provisions and lesser forms of union security, including the agency shop, will probably become more widespread. However, they will face a major obstacle in areas where there is strong competition between unions and employee associations.

The sovereignty doctrine holds that Government must possess the right of final determination in all relations with its employees. Final and binding arbitration would appear to be ruled out by this principle. There is a long line of court decisions holding that general arbitration clauses in public employment represent an unlawful delegation of authority. However, in 1951 the Connecticut Supreme Court ruled that "arbitration may be a permissible method as to specific, arbitrable disputes."[41]

Despite the questionable legal status of general arbitration in the public service, the AFSCME has reported at least 133 agreements negotiated in 23 states providing for final and binding arbitration.[42] In 1966, the New York City Mayor's tripartite panel recommended final and binding arbitration of grievances "to the extent permitted by law,"

It would appear that the sovereignty doctrine is far from impregnable in the area of grievance arbitration. Unions at the Federal level want to replace advisory arbitration with final and binding decisions which would not be subject to veto by the agency involved. Some public officials may actually welcome the use of neutrals to free them from the touchy job of deciding disputes between lower level supervisors and employees. We expect that in time the same pragmatic approach which resulted in grievance

arbitration becoming widespread in private industry (95 percent of all agreements) will spread to public employment.

Arbitration to resolve impasses over terms of new agreements is another matter. In addition to the sovereignty obstacle, arbitration of contract terms is neither accepted in private industry nor does it have the support of unions and employers generally. Supporters of compulsory arbitration, whether in public or private employment, have yet to devise a system which will not at the same time lead to a breakdown of collective bargaining.

## Conclusion

The advent of employee organizations and collective bargaining to the public sector is the most significant development in the industrial relations field of the last 30 years. In addition to the more obvious implications for employees, public officials and the art of government, it may have important effects on the labor movement and on labor-management relations in the private sector.

Trade union membership in the United States has not been keeping pace with the growth in the labor force. This has been due largely to the relative decline in employment in industries where unions have been strongest, and the failure of trade unions to appeal to the growing technical and white collar segment of the labor force. Equally important, is the tendency of young people to view the labor movement as just another pressure group out for itself, like big business, the farm lobby and other self-serving organizations.

The opening up of public employment to trade unions may change all this. As the fastest growing industry, government could provide a source of enough new recruits to reverse the decline in trade union membership.

Government employees who join unions could change the image of the labor movement to make it more acceptable to white collar employees and technicians in private industry. Finally, if the teachers of the United States join unions in large numbers, youngsters may reevaluate the role of labor in society.

If public employees show a preference for association-type organizations rather than unions, the effects may be different but nonetheless significant. Employee associations have already taken on some of the characteristics of unions; the reverse has also been true as unions try to compete for the allegiance of professional employees. This drawing together of the two types will continue. In time, some unions and associations may merge or agree not to raid one another; some associations may even affiliate with the AFL-CIO. In any event, whether employees are represented by unions or associations, the total strength of organized employees will be louder and more influential in the labor markets as well as in the legislatures of the country. The effect on students will still be great, whether their teachers are members of unions or associations which act a lot like unions.

In the collective bargaining arena, we are witnessing something that students of labor-management relations have for a long time held (and many continue to hold) could not exist, namely "no-strike bargaining." If the recent trend in state legislation continues, mediation, fact-finding and other methods of settling disputes will be used more extensively than ever before. To the extent that these approaches are successful, they may have some application to disputes in private industry. If they fail, it will provide additional ammunition to those who contend that collective bargaining without the right to strike is meaningless. Whatever the result, the experience should be instructive.

## NOTES

1. Technology and the American Economy, Report of the National Commission on Technology, Automation and Economic Progress, Vol. 1, Feb. 1966, p. 29.

2. Coheny, H. P., "Trends and Changes in Union Membership," Monthly Labor Review. May 1966, pp. 510-513.

3. Daily Labor Report No. 239, Dec. 13, 1965, published by The Bureau of National Affairs, Wash., D. C.

4. Government Employee Relations Report No. 137, April 25, 1966, published by The Bureau of National Affairs, Wash., D. C.; interview with officials of American Federation of Government Employees, Feb. 24, 1966; New York Times, Jan. 12, 1966, p. 45.

5. A Policy for Employee-Management Cooperation in the Federal Service, Nov. 30, 1961, p. 3.

6. "Exclusive Recognition and Collective Bargaining Coverage Under Executive Order 10988, " AFL-CIO Education Department, Dec. 15, 1965.

7. Spero, S. D., Government As Employer, Remsen Press, New York 1948, p. 136.

8. Task Force Report, op. cit., p. 3.

9. Address by Louis S. Wallerstein, Chief, Division of Federal Employee-Management Relations, U. S. Department of Labor, to 19th Annual Conference on Labor, New York University, April 19, 1966.

10. Ibid and AFL-CIO Education Department, Loc. cit.

10(a) These figures should be distinguished from membership figures. They express the extent of collective bargaining coverage -- including members and non-members -- in exclusive units and covered by negotiated agreements.

11. Collective Bargaining Agreements in the Federal Service, BLS Bulletin No. 1451, Aug. 1965.

12. Pragan, O., "Is Private Sector Industrial Relations the Objective in the Federal Service?" IRRA Spring Meeting, May 1966.

13. Provisions of state laws based on State Labor Laws, Labor Relations Reporter, Bureau of National Affairs, Wash., D. C.

14. Anderson, A., "State Regulation of Employment Relations in Education," Adress to National Institute on Collective Negotiations in Public Education, University of Pennsylvania, June 23, 1966.

15. Anderson, A., "Legal Aspects of Collective Bargaining in Public Employment," in Developments in Public Employee Relations: Legislative, Judicial, Administrative edited by K. O. Warner, Public Personnel Association, 1965.

16. "Problems of a State Public Employment Relations Law in Practice," Address by R. G. Howlett to Conference on Public Employment and Collective Bargaining, University of Chicago, March 12, 1966.

17. Fact-finding Under Wisconsin Law - 3rd Edition, 1966 to be published Oct. 1966, Extension Bookstore, Madison, Wis.

18. Stern, J. L., "The Wisconsin Public Employee Fact-finding Procedure," Industrial and Labor Relations Review, scheduled for Oct. 1966 issue.

19. Klaus, Ida, "The Emerging Relationship," Address before Conference on Public Employment and Collective Bargaining, University of Chicago, Feb. 5, 1965.

20. Governor's Committee on Public Employee Relations, Final Report, State of New York, Mar. 31, 1966.

21. "Report of Tripartite Panel to Improve Municipal Collective Bargaining Procedures," New York City, Mar. 31, 1966.

22. Dunlop, J. T., "Industrial Relations Systems at Work," paper delivered at University of Wisconsin (typewritten, undated); also Report of New York Governor's Committee, op. cit.

23. Government as Employer, op. cit., p. 280 and p. 2.

24. Nolan, L. R. and Hall, J. T., "Strikes of Government Employees, 1942-61," Monthly Labor Review, Jan. 1963; BLS Bulletins 1302, 1339, 1381, 1420; and 1460; letter from U.S. Department of Labor, dated July 27, 1966.

25. Associated Press dispatch, The State Journal, Lansing, Mich. July 22, 1966.

26. Ross, A. M. and Hartman, P. T., Changing Patterns of Industrial Conflict, John Wiley & Sons, New York 1960; also Ross, "The Prospects for Industrial Conflict," Industrial Relations, Oct. 1961, pp. 57-74.

27. Address to Convention of American Federation of State, County and Municipal Employees, April 27, 1966.

28. New York Governor's Committee Report, op. cit., p. 12.(mimeo version)

29. Stutz, R. L., "Collective Bargaining by City Employees," Labor Law Journal, Nov. 1964; Herman, E. E., "Collective Bargaining by Civil Servants in Canada, " paper delivered at IRRA Spring Meeting, May 1966.

30. "Teacher Strikes: Acceptable Strategy," Phi Delta Kappan, Jan. 1965.

31. Post War World Council, Newsletter, Jan. 1966.

32. New York Governor's Committee Report, op. cit., p. 19.(mimeo version)

33. Ibid. pp. 10-14.

34. Simons, J., Comments delivered at IRRA Spring Meeting, May 1966.

35. Education and Research Guide, AFSCME, Aug. 1965.

36. Perry, C. A. and Wildman, W, A,, "A Survey of Collective Activity among Public School Teachers," Education Administration Quarterly, April 1966.

37. Daily Labor Report No. 139, July 19, 1966, Bureau of National Affairs, Wash., D. C.

38. Government Employee Relations Report No. 132, Mar. 12, 1966 and No. 142, May 30, 1966, Bureau of National Affairs, Wash., D. C.

39. Klaus, Ida, "Collective Bargaining in Public Employment and Collective Bargaining, University of Chicago, May 12, 1966.

40. Education and Research Guide, op. cit.

41. Shenton, D. G., "Compulsory Arbitration in the Public Service," Labor Law Journal, March 1966, p. 141.

42. Education and Research Guide, op. cit.

Jackson work copy

Introduced: 3/20/70
Referred: Judiciary, Labor and Management and Finance

IN THE HOUSE

BY THE JUDICIARY COMMITTEE
BY REQUEST

HOUSE BILL NO. 796

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to a public employment labor relations Act."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 23.40 is amended by adding new sections to read:

ARTICLE 2. PUBLIC EMPLOYMENT LABOR RELATIONS ACT.

Sec. 23.40.070. DECLARATION OF POLICY. The public policy of the state regarding labor relations and collective bargaining in public employment is as follows:

(1) There are three major interests involved, namely: that of the public, the public employee and the public employer. These interests are to a considerable extent interrelated and therefore, it is the policy of this state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Orderly and constructive employment relations for public employees and the efficient administration of government in the state serve to promote these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employee-management relations in public employment, and the availability of suitable machinery for fair and peaceful adjustment of whatever controversies may arise. It is recognized that whatever may be the rights of disputants with respect to each other in a controversy regarding public employment relations, neither party has the right to engage in acts or practices which jeopardize the public safety and interest and interfere with the effective conduct of public business.

Put in hands of an independent agency? No

(3) Where permitted by secs. 70 - 280 of this chapter, negotiations of terms and conditions of public employment should result from voluntary agreement between the public employer and its agents, as an employer, and its employees. For that purpose a public employee has the right, if he desires, to associate with others in organizing and in bargaining collectively through representation of his own choosing, without intimidation or coercion from any source.

(4) It is the policy of this state, in order to preserve and promote the interests of the public, the public employee and the public employer, to encourage the practices and procedure of collective bargaining in public employment subject to the public employee and related laws, regulations and policies governing public employment, by establishing standards of fair conduct in public employment relations.

Sec. 23.40.080. RIGHTS OF PUBLIC EMPLOYEES. Public employees shall have, and be protected in the exercise of, the right of self-organization and the right to form, join or assist any labor or employee organization, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Sec. 23.40.090. COLLECTIVE BARGAINING UNIT. (a) The department may determine, in order to insure a clear and identifiable community of interest among employees affected, an appropriate bargaining unit and whether the employees employed in a single or several departments, divisions, institutions, crafts, professions, or occupational groupings, constitute an appropriate collective bargaining unit. No collective bargaining unit may include both professional and nonprofessional employees unless a majority of the professional employees and a majority of the nonprofessional employees vote for inclusion in the unit. No unit may include employees whose positions are in one of the classes in sec. 260 of this chapter with employees

whose positions are in another one of the classes under the same section. The department may determine a collective bargaining unit with or without providing the employees involved an opportunity to determine for themselves whether they desire to establish themselves as an appropriate collective bargaining unit.

(b) When the department permits employees to determine for themselves whether they will constitute a separate bargaining unit, the determination shall be by secret ballot, and the department shall provide, by regulation, for voting procedure to be employed in making the determination.

(c) In determining, modifying or combining collective bargaining units, the department shall consider the duties, skills and working conditions of the public employees, the history of collective bargaining by the public employees and their bargaining representatives, the extent of organization among the employees, and the desire of the public employees.

Sec. 23.40.100. REPRESENTATIVES AND ELECTIONS. (a) Representatives chosen for the purposes of collective bargaining by a majority of the public employees voting in a collective bargaining unit shall be the exclusive representative of all the employees in the unit for the purposes of collective bargaining. An individual employee, or a minority group of employees in a collective bargaining unit, may present grievances to the public employer in person, or through representatives of their own choosing, and the public employer shall confer with the employee regarding the grievances, provided that the majority representative has been afforded the opportunity to be present in the conference and that any adjustment resulting from the conference is not inconsistent with the conditions of employment established by the majority representative and the public employer.

(b) When a question arises concerning the representation of public employees in a collective bargaining unit, the department shall determine the representative of the unit by taking a secret ballot of the employees and certifying in writing the results of the election to the interested parties and to the public employer. There shall be included on a ballot for the election of representatives the names of all persons, having an interest in representing public employees, submitted by a public employee or group of public employees participating in the election, except that the department may exclude from the ballot one who, at the time of the election, stands deprived of his rights under secs. 70 - 280 of this chapter by reason of a prior adjudication of his having engaged in a prohibited practice. The ballot shall be prepared to permit a vote against representation by anyone named on the ballot. The department's certification of the results of an election shall be conclusive.

(c) When an election has been conducted under (b) of this section, in which the name of more than one proposed representative appears on the ballot and results in no conclusion, the department may if requested by any party to the proceeding within 30 days from the date of the certification of the results of the election, conduct a runoff election. In the runoff election, the department may drop from the ballot the name of the representative that received the least number of votes at the original election, or the department shall drop from the ballot the privilege of voting against any representative when the least number of votes cast at the first election was against representation by any named representative.

(d) Questions concerning the determination of collective bargaining units or representation of public employees may be raised by petition of any public employee or the public employer, or the



require 30%?

see p 3 of HB368

representative of either of them. When it appears by the petition that an emergency exists requiring prompt action, the department shall act on the petition immediately and hold the election requested within a time that will meet the requirements of the emergency presented. The fact that one election has been held within the preceding year may not prevent the holding of another election among the same group of public employees, if it appears to the department that sufficient reason exists.

Sec. 23.40.110. PROHIBITED PRACTICES. (a) It is a prohibited practice for a public employer individually or in concert with others to:

(1) interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in sec. 80 of this chapter,

(2) initiate, create, dominate or interfere with the formation or administration of a labor or employee organization or contribute financial support to it, but the public employer is not prohibited from reimbursing public employees at their prevailing wage rate for the time spent conferring with its officers or agents; it is not a prohibited practice for an officer or supervisor of the public employer to remain or become a member of the same labor or employee organization of which its employees are members, when they perform the same work or are engaged in the same profession; however, a supervisor may not participate as an active member or officer of the organization,

(3) encourage or discourage membership in a labor or employee organization, employee agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment;

(4) refuse to bargain collectively on those matters provided for in sec. 250 of this chapter with the representative of a majority of its employees in an appropriate collective bargaining unit;

however, when the public employer files with the ~~board~~ department a petition requesting a determination as to majority representation, it may not be considered to have refused to bargain until an election has been held and the result has been certified to it by the department. A refusal to bargain shall include, but not be limited to, the refusal to execute a collective bargaining agreement previously agreed upon;

(5) violate the provisions of a written agreement concerning terms and conditions of employment affecting public employees, including an agreement to arbitrate, or to accept the terms of an arbitration award, when previously the parties agreed to accept an arbitration award as final and binding upon them;

(6) deduct labor or employee organization dues or assessments from a public employee's earnings, unless the public employer has been presented with an individual order for the deduction, signed by the public employee, and terminable at the end of any year of its life by the public employee giving at least 30 days' written notice of the termination to the public employer and to the representative organization.

(b) It is an unfair labor practice for a public employee individually or in concert with others to:

(1) coerce or intimidate a public employee in the exercise of his legal rights, including those guaranteed in sec. 80 of this chapter;

(2) coerce, intimidate or induce an officer or agent of the public employer to interfere with any of its employees in the exercise of their legal rights, including those guaranteed in sec. 80 of this chapter, or to engage in a practice with regard to its employees which would be a prohibited practice if undertaken by him on his own initiative;

(3) refuse to bargain collectively on those matters provided for in sec. 250 of this chapter with the authorized officer or agent of

the public employer, provided it is the recognized or certified exclusive collective bargaining representative of employees in an appropriate collective bargaining unit; a refusal to bargain includes, but is not limited to, the refusal to execute a collective bargaining agreement previously agreed upon;

(4) violate the provisions of a written agreement concerning terms and conditions of employment affecting public employees, including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties agreed to accept an arbitration award as final and binding upon them;

(5) coerce or intimidate a supervisory employee, officer or agent of the public employer, working at the same trade or profession as its employees, to induce him to become a member of or act in concert with the labor organization of which they are members.

OK amend.

(c) It is a prohibited practice for a labor or employee organization or any other person to do or cause to be done in the interest of public employers or public employees, or in connection with a controversy over employment relations, any act prohibited by (a) and (b) of this section.

Sec. 23.40.120. INVESTIGATION AND CONCILIATION OF COMPLAINTS. If a verified written complaint is filed by or for a person claiming to be aggrieved by a prohibited practice, or a written accusation that a person subject to secs. 70 - 280 of this chapter has engaged in a prohibited practice is filed with the department, the department shall investigate the complaint or accusation. If it determines after the preliminary investigation that probable cause exists in support of the complaint or accusation, it shall try to eliminate the prohibited practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during this endeavor may be used as evidence in a subsequent proceeding.

Sec. 23.40.130. ~~FORM AND SERVICE OF~~ COMPLAINT AND ACCUSATION. If the department fails to eliminate the prohibited practice by conciliation and to obtain voluntary compliance with secs. 70 - 280 of this chapter, or if, before it attempts conciliation, it considers that the circumstances warrant, it shall serve a copy of the complaint or accusation upon the respondent. The form of the complaint or accusation and the subsequent procedures shall be conducted in accordance with the Administrative Procedure Act (AS 44.62), ~~and the department shall have the powers granted therein.~~

Sec. 23.40.140. ORDERS AND DECISIONS. If the department finds that a person named in the written complaint or accusation has engaged in a prohibited practice, the department shall issue and serve on the person an order or decision requiring him to cease and desist from the prohibited practice and to take affirmative action which will carry out the policies of secs. 70 - 280 of this chapter. If the department finds that no person named in the complaint or accusation has engaged or is engaging in a prohibited practice, the department shall state its findings of fact and issue an order dismissing the complaint or accusation.

Sec. 23.40.150. ENFORCEMENT BY INJUNCTION. The department may apply to the superior court of the judicial district ~~or division~~ in which the prohibited practice occurred for an order enjoining the prohibited acts specified in the order or decision of the department. Upon a showing by the department that the person has engaged or is about to engage in the practices, an injunction, restraining order, or other order which may be appropriate shall be granted by the court without bond.

Sec. 23.40.160. POWER TO INVESTIGATE AND COMPEL TESTIMONY. (a) For the purpose of the investigations, proceedings, or hearings which

the department considers necessary for the enforcement of secs. 70 - 280 of this chapter, the department may issue subpoenas requiring the attendance and testimony of witnesses and the production of relevant evidence.

(b) The department may administer oaths, examine witnesses, and receive evidence.

(c) The attendance of witnesses and the production of evidence may be required from any place in the state at any designated place of hearing.

(d) If a person refuses to obey a subpoena issued under secs. 70 - 280 of this chapter, any superior court for the district in which the contumacious person resides or is found may, upon application by the department, issue an order requiring him to comply with the subpoena.

Sec. 23.40.170. REGULATIONS. The department may ~~from time to time~~ issue, amend, or ~~rescind~~ regulations under the Administrative Procedure Act (AS 44.62) to carry out the provisions of secs. 70 - 280 of this chapter.

Sec. 23.40.180. PENALTY FOR VIOLATION OF ORDER OR DECISION. A person who violates a provision of an order or decision of the department is guilty of a misdemeanor and is punishable by a fine of not more than $500.

Sec. 23.40.190. PENALTY FOR OBSTRUCTING ENFORCEMENT. A person who forcibly obstructs, intimidates or interferes with an authorized representative of the department while the representative performs duties under secs. 70 - 280 of this chapter or because the representative performs those duties, is punishable by a fine of not more than $500, or by imprisonment for not more than one year, or by both.

Sec. 23.40.200. ARBITRATION. (a) Parties to a labor dispute

arising from the interpretation or application of a collective bargaining agreement affecting terms and conditions of public employment may agree in writing to have the department name arbitrators in all or any part of the dispute. The department shall appoint as arbitrators only competent, impartial and disinterested persons. Proceedings in arbitration shall be conducted in accordance with the Uniform Arbitration Act (AS 09.43.010 - 09.43.180) where applicable.

(b) The parties to a collective bargaining agreement may provide in the agreement a contract for arbitration to be conducted solely according to the Uniform Arbitration Act (09.43.010 - 09.43.180) if the Act is incorporated into the agreement or contract by reference.

Sec. 23.40.210. MEDIATION. The department may appoint a competent, impartial, disinterested person to act as mediator in any labor dispute either on its own initiative or on the request of one of the parties to the dispute; or the parties may select a mediator by agreement or mutual consent. It is the function of the mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the board have any power of compulsion in mediation proceedings.

Sec. 23.40.220. FACT FINDING. (a) If, after a reasonable period of negotiation over the terms of a collective bargaining agreement, a deadlock exists between a public employer and a labor or employee organization, either party or the parties jointly may request the department in writing to initate fact finding in order to make recommendations to resolve the existing deadlock.

(b) Upon receipt of a request to initiate fact finding, the department shall make an investigation, either informally or by a formal hearing, to determine whether the parties are, after a reasonable period of negotiations, deadlocked with respect to a dispute.

After its investigation the department shall certify the results of the investigation. If the certification requires that fact finding be initiated, the department shall appoint from a list established by the department a qualified disinterested person or three-member panel, when jointly requested by the parties, to function as a fact finder.

(c) The fact finder shall establish times and place of hearings and shall conduct the hearings under rules established by the department. Upon request, the department shall issue subpoenas for hearings conducted by the fact finder. The fact finder may administer oaths. Upon completion of the hearing, the fact finder shall make written findings of fact and recommendations for solution of the dispute and submit them to the parties and to the department. In making its findings and recommendations, the fact finder shall take into consideration among other pertinent factors the logical and traditional concept of public personnel and merit system administration concepts and principles vital to the public interest in efficient and economical governmental administration. Cost of fact finding proceedings shall be divded equally between the parties.

(d) Nothing in this section may be construed as prohibiting a fact finder from mediating the dispute, in which he is involved, at any time prior to the issuance of his recommendations.

(e) Within 30 days of the receipt of the fact finder's recommendations or within a time period agreed upon by the parties, both parties shall advise each other, in writing, as to their acceptance or rejection, in whole or in part, of the fact finder's recommendations and, at the same time, send a copy of the notification to the department. Failure to comply with the requirements of this section by the employer or employee representative is a violation of sec. 110(a)(4) and (b)(3) of this chapter.

Sec. 23.40.230. AGREEMENTS. Upon the completion of negotiations between a labor or employee organization representing a majority of employees in a collective bargaining unit and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an agreement. The agreement may include a term for which it will remain in effect, not to exceed three years. Either party to the agreement has a right of action to enforce the agreement by petition to the department.

Sec. 23.40.240. MANAGEMENT RIGHTS. (a) Nothing in secs. 70 - 280 of this chapter shall interfere with the right of the public employer, in accordance with applicable law and regulations to

(1) carry out the statutory mandate and goals assigned to the department or agency utilizing personnel, methods and means in the most appropriate and efficient manner possible;

(2) manage the employees of the department or agency; to hire, promote, transfer, assign or retain employees in positions within the department or agency and in that regard to establish reasonable work rules,

(3) suspend, demote, discharge or take other appropriate disciplinary action against an employee for cause, or to lay off employees in the event of lack of work or funds or under conditions where continuation of work would be inefficient and nonproductive.

Sec. 23.40.250. SUBJECTS OF COLLECTIVE BARGAINING. (a) Matters subject to collective bargaining are the following conditions of employment:

(1) grievance procedures;

(2) application of seniority rights as affecting the matters contained herein,

(3) work schedules relating to assigned hours and days of

does not include wages

the week and shift assignments;

(4) scheduling of vacations and other time off;

(5) use of sick leave;

(6) application and interpretation of established work rules,

(7) health and safety practices;

(8) intradepartmental transfers; and

(9) other matters consistent with this section and the statutes, rules and regulations of the public employer.

(b) Nothing in this section shall require the employer to bargain in regard to ~~statutory and regulation provided~~ prerogatives of promotion, layoff, position classification, compensation and fringe benefits, examinations, discipline, merit salary determination policy and other actions provided for by law, and regulations ~~governing civil service~~.

Sec. 23.40.260. STRIKES. (a) For purposes of this section, public employees are employed to perform services in one of the three following classes:

(1) those services which may not be given up for even the shortest period of time;

(2) those services which may be interrupted for a limited period but not for an indefinite period of time; and

(3) those services in which work stoppages may be sustained for extended periods without serious effects on the public.

(b) Class (1) includes police and fire protection employees and jail, prison and other correctional institution employees. Strikes by employees in this class are prohibited. Upon a showing by a public employer of the department that employees in this class are engaging or about to engage in a strike, an injunction, restraining order, or other order which may be appropriate shall be granted by the superior court

of the judicial district ~~or division~~ in which the strike is occurring or is about to occur. If an impasse or deadlock is reached in collective bargaining between the public employer and employees in this class, and mediation and fact-finding have been utilized without resolving the deadlock, the parties shall submit to arbitration to be carried out under the provisions of the Uniform Arbitration Act (09.43.010 - 09.43.-180).

(c) Class (2) includes hospital, public utility, sanitation and public school and other educational institution employees. Employees in this class may engage in a strike, subject to the voting requirement of (d) of this section, for a limited time. The limit is determined by the interests of the health, safety or welfare of the public. The public employer or the department may apply to the superior court of the judicial district ~~or division~~ in which the strike is occurring for an order enjoining the strike. A strike may not be enjoined unless it can be shown that it has begun to threaten the health, safety or welfare of the public. A court, in deciding whether or not to enjoin the strike, shall consider the total equities in the particular case. Total equities includes not only the impact of a strike on the public but also the extent to which employee organizations and public employers have met their statutory obligations.

(d) Class (3) includes all other public employees who are not included in classes (1) or (2). Employees in this class may engage in a strike if a majority of the employees in a collective bargaining unit vote by secret ballot to do so.

Sec. 23.40.270. DEFINITIONS. In secs. 70 - 280 of this chapter, unless the context otherwise requires,

(1) "collective bargaining" means the negotiating by the public employer, by its officers and agents, and a majority of its

employees, by their representatives in an appropriate collective bargaining unit, concerning terms and conditions of employment of all employees in the unit in a mutual effort to reach an agreement with reference to the subject under negotiation;

(2) "department" means the Department of Labor;

(3) "election" means a proceeding conducted by the department in which the employees in a collective bargaining unit cast a secret ballot for collective bargaining representatives, or for any other purpose specified in secs. 70 - 280 of this chapter;

(4) "professional employee" means

(A) an employee engaged in work:

(i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;

(ii) involving the consistent exercise of discretion and judgment in its performance,

(iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time,

(iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes; or

(B) an employee who:

(i) has completed the courses of specialized intellectual instruction and study described in (4)(A)(iv) of this

section; and

(ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in (4)(A) of this section;

(5) "public employee" means an employee of a public employer, except a person elected by popular vote, appointed to office by the governor; or a member of a board or commission, or a person who is employed by the public employer for less than 20 hours a week;

(6) "public employer" means:

(A) the State of Alaska;

(B) an organized borough,

(C) a city of any class, whether home rule or otherwise;

(7) "supervisor" means any individual having authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or to adjust their grievances, or effectively to recommend such action, if in connection with the exercise of the foregoing the exercise of the authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Sec. 23.40.280. SHORT TITLE. Secs. 70 - 280 of this chapter may be cited as the Public Employment Labor Relations Act.

* Sec. 2. AS 23.40.010 is repealed.

* Sec. 3. AS 23.40.040 is repealed.

Original sponsor: Judiciary Committee by request

Offered: 4/23/70
Referred: Labor and Management, Judiciary and Finance

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 796

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to a Public Employment Labor Relations Act."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 23.40 is amended by adding new sections to read:

ARTICLE 2. PUBLIC EMPLOYMENT LABOR RELATIONS ACT.

Sec. 23.40.070. DECLARATION OF POLICY. The public policy of the state regarding labor relations and collective bargaining in public employment is as follows:

(1) There are three major interests involved: that of the public, the public employee and the public employer. These interests are to a considerable extent interrelated, and therefore it is the policy of this state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Orderly and constructive employment relations for public employees and the efficient administration of government in the state serve to promote these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employee-management relations in public employment, and the availability of suitable machinery for fair and peaceful adjustment of whatever controversies may arise. It is recognized that whatever may be the rights of disputants with respect to each other in a controversy regarding public employment relations, neither party has the right to engage in acts or practices which jeopardize the public safety and interest and interfere with the effective conduct of public business.

# A M E N D M E N T

Offered in the HOUSE By The Judiciary Committee

To: CS(L & M) HOUSE BILL NO. 796

_____ SENATE BILL NO. ____

AMENDMENT: Page 3 Lines 6-10

Delete all material and insert in its place: "(b) When the department determines an appropriate bargaining unit, the determination is subject to approval by secret ballot of the employees concerned, and the department shall provide, by regulation, for voting procedure to be employed."

Page 15 Lines - Between 24 & 25

Insert: "(8) 'statute' and 'statutory' include local government charters and ordinances."

Page 15 Line 28

Add: "*Sec. 3. Nothing in this Act affects collective bargaining agreements in effect on the effective date of this Act."

ALASKA has enjoyed relative peace in the labor relations of the public sector, however there is a general feeling that this will not last for the following reasons:

1. The STATE and local Governments have, in most cases, responded to the need for capital improvements with such a high percentage of the tax dollar that the wage and working conditions of the public employee has suffered and have not kept pace with the private sector.

2. The public employee, in an effort to better his wages and working conditions, has made demands to be recognized as a unit for collective bargaining. Because the Alaska law is permissive regarding collective bargaining for public employees, the demands has been rejected in many areas. Such refusal leaves the employee group no alternative but to take strike action to attain their goals as they are denied the give and take of collective bargaining.

H.B. 796 is a well thought out, progressive piece of legislation in that it provides the working man his right to organize and bargain with his employer, yet at the same time protects the public safety and interest.

STATE OF ALASKA

KEITH H. MILLER, GOVERNOR

DEPARTMENT OF LABOR

OFFICE OF THE COMMISSIONER

BOX 1149 — JUNEAU 99801

April 8, 1970

The Honorable Tom Fink
House of Representatives
Alaska State Legislature
State Capitol
Juneau

Dear Tom:

I apologize for the delay in replying to your request to submit my comments on HB 796. My opinion on this bill is as follows:

On April 1, 1970, I testified before the House Judiciary Committee regarding the above bill. I stated that the bill was technically excellent, but that I did have some recommendations for improvement.

The committee clarified for me the terminology in line 9, page 4, of the bill. I had misread that section and thought that violation of one of the unfair labor practices, as included in this bill, precluded an individual from voting in an election. The committee pointed out to me that it merely precluded the placing of the name of an individual on the ballot.

Although this was the committee's opinion, it is not compatible with page 6 of the bill, (6) (b) which states that it is unfair labor practice for a public employee, individually or in concert to engage in unfair labor practices. The terminology does not include labor organizations. Thus, page 4 only precludes an individual from having his name placed on a ballot, but an individual is not a labor organization.

Next I discussed the language on page 4 and on page 5; lines 27 through 30, and 1 through 7 respectively. I stated that a time lag should be imposed between elections. I based this on my experience with the National Labor Relations Board, where there is a time lag of one year between elections. This election

bar precludes too frequent elections which, of course, are costly and time-consuming. The committee discussed a shorter time period and I agreed that a one-year bar is an arbitrary selection. I further stated that a sufficient showing of interest must be present before petitions should be entertained for a election. The NLRB uses a criteria of 30 percent of the employees in the alleged unit as a sufficient basis for the holding of elections.

If there is no criteria for showing of interest before an election is held, one employee in a unit could petition for such an election. Again, the procedure is costly and time-consuming.

I stated a personal opinion on page 5, lines 17 through 22, that I did not believe an officer or supervisor of a public employee should be permitted to remain a member of a labor organization, even though they are precluded from participating as an active member. I based my opinion on the concept that there is countervailing interest between management and labor organizations on occasion, and that this could result in a conflict of interest. Since that time it has been pointed out to me that such a bar may be appropriate in certain types of units, but in construction-oriented units rank and file members become supervisors. To preclude them from membership would also preclude them from union benefits, such as Health & Welfare or pension rights. I have no strong feelings on this particular issue and believe that preclusion from membership of supervisors could result in serious damage to the individual.

On page six, (6) (b), I thought that a labor organization should be included as one which may commit an unfair labor practice. Under the existing wording of that section, only a public employee, individually or in concert with others, may commit an unfair labor practice. A labor organization is not a public employee, but its agents may commit unfair labor practices under this act. Under the existing language, there would be no sanction.

On page eight, section 23.40.140, entitled "Orders and Decisions", there is provided an administrative procedure whereby unfair labor practice can be determined by the Department of Labor. I discussed, in general, the remedies available, such as reinstatement of, and back-pay for, discharged employees, etc. This subject is probably adequately covered in AS 23.40.150

which provides for enforcement by injunction of the Department's orders. As long as an order is reasonable and is supported by evidence, the Department can apply to the Superior Court for enforcement of said order.

I further discussed page 12, section 23.40.250, entitled "Subjects of Collective Bargaining". I pointed out that the "Subjects of Collective Bargaining" does not include wages which, I think, is a deficiency in the law.

In earlier testimony, Dwayne Carlson, lobbyist for AFL-CIO stated that he thought compulsory arbitration should be provided for Class II employees, as set forth on page 14 (c). He stated that after an injunction is obtained, the matter should be solved by compulsory arbitration. I spoke generally that I did not believe that compulsory arbitration is a good approach to labor relations. I believe that the parties have to hammer at their own agreement, and that through compulsory arbitration there is a tendency for both parties to take extreme positions and hope that the arbitrator will split the difference. I said the alternative to this was not particularly satisfactory either and that I would recommend a continuous bargaining process. In short, if an injunction is granted, it would not be retained indefinitely. The union would be allowed to strike again, and the pressure on the employer would continue. There is no truly adequate solution to this problem.

I told the committee that I had just reviewed a committee report by the Advisory Commission on Inter-government Relations, covering labor management policies for state and local government. This commission includes private citizens, members of the United States Senate, members of the U.S. House of Representatives, officers of the executive branch of the federal government, governors, mayors, members of state legislative bodies, and elected county officials. The commission had come up with some 16 recommendations, most of which were included in this piece of legislation. The commission did state that it was opposed to the striking of public employees. The commission recommended mediation and fact-finding as alternatives to the strike, and although it mentioned compulsory arbitration, it did not positively suggest this as a solution.

I went on to tell the committee that I believe there is no truly complete solution in the public sector, and that there is no magic formula that can be applied. I pointed out that although no state permits strikes by public employees, some 250 work stoppages occurred in 1968. I stated that it is the legislature's responsibility to consider all aspects of this legislation, and that one of the aspects of the legislation is timing. I stated that I did not believe that the legislature could legislate

April 8, 1970

The Honorable Tom Fink

maturity on the public employer or on the public employee group. The main problem in the public employee sector is that in the private sector there has been 35 years, or more, of collective bargaining experience, but that this is absent in the public sector. I stated that I thought that both parties had to gain a great deal of maturity and that legislation such as HB 796, may bring that maturity about.

After I concluded my testimony, Mr. Lewis Dischner, lobbyist for the Teamster's Union, stated that he disagreed with 90 percent of what I had said, and that he was in favor of the bill where I was opposed to it. He went on to say that he did not favor a "little" labor relations act, and the rest of his testimony was somewhat incomprehensible to me. After Mr. Dischner concluded his testimony, I made some additional comments.

One of my comments was that the committee should consider administration of this act by an independent agency, rather than by the executive branch of the government. I stated that since the Department of Labor is an executive agency, conflicts could result. I further pointed out that the Department of Labor could be organized and would determine the appropriate units as well as determine unfair labor practices, if any. This, to me, would not be very desirable.

I further stated that I disagree with Mr. Dischner in that HB 796 is based on the Labor Management Relations Act. I further stated that the most satisfactory thing about the National Labor Relations Board is its election procedures. I stated that these procedures are excellent and that they do afford employees the opportunity to express their free will as to selection or non-selection of their bargaining representatives.

Other people testifying at the committee hearing were Ferrell Campbell of the Operating Engineers Union, and Tom Brown, a lobbyist representing himself.

If you have any questions on the above, don't hesitate to give me a call.

Sincerely,

Bill

WILLIAM K. JERMAIN
Deputy Commissioner

WKJ:eb

An Act relating to public employment labor relations Act.

FINANCE

# Committee Report

## HOUSE OF REPRESENTATIVES

_____
Date

Mr. Speaker:

The Committee on _____ has had _____ under consideration. A majority of the members of the Committee

☐ recommends it do pass

☐ recommends it do not pass

☐ recommends it do pass with attached amendment(s)

☐ recommends it be replaced with CS for _____ and that CS for _____ do pass

☐ (and) recommends it be referred to the _____ committee

☐ reports it back without recommendation

☐ (other) _____

MEMBERS SIGNING THE MAJORITY REPORT:

_____ _____ _____

_____ _____ _____

_____ _____ _____

_____ _____ _____

MEMBERS NOT CONCURRING IN THE MAJORITY REPORT:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____ recommends:

_____
CHAIRMAN

File Copy

# AMENDMENT

IN THE HOUSE BY THE JUDICIARY COMMITTEE

TO: ~~Kxxxxx Rick~~
CSHB 796 (Lab. & Mgt.)

Page 3, Lines 6 -- 10:

Delete all material and insert in its place: "(b) When the department determines an appropriate bargaining unit, the determination is subject to approval (by secret ballot) of the employees concerned, and the department shall provide, by regulation, for voting procedure to be employed."

Page 15, Line 28:

Add: "*Sec. 3. Nothing in this Act affects collective bargaining agreements in effect on the effective date of this Act."

Page 15, Between lines 24 & 25:

Insert: "(8) 'statute' and 'statutory' include local government charters and ordinances".