Compulsory Arbitration and Police Labor Relations

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During the past 12 years, compulsory arbitration has emerged as a frequently used mechanism to resolve collective bargaining impasses between government employers and unions of police officers and firefighters.

The vast majority of public sector negotiations produce agreements without strikes, but a large number of these agreements are created as a result of strike threats. Each year, several hundred of these threats become operational. Experiences with public employee strikes suggest several conclusions.

First, these strikes are overwhelmingly a local government phenomenon.[1] In any given year, 90 percent or so of all strikes will occur among the municipalities, counties, school districts, and special districts which

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comprise local government. Occupationally, teachers are the most strike-prone group, and wages are the most contentious issue. This strike distribution is not surprising when one considers that local governments employ more than one-half of all public employees, that these workers are more solidly organized [2] and more militant than State and Federal employees, and that local governments tend to be faced with greater financial scarcities than State and Federal governments.

Second, the relationship between strike prohibitions and strike activity is mixed. For example, 1973–75 data show Pennsylvania and Michigan as two of the most strike-prone States. In Pennsylvania, strikes are statutorily permitted; in Michigan, they are statutorily prohibited but judicially permitted because of the reluctance of the courts to enjoin them. However, Hawaii legalized strikes in 1970; since then, only one work stoppage has occurred in the State.[3] During 1973–75, Ohio also had a large number of strikes, and these stoppages occurred in the face of that State's Ferguson Act and its stringent strike penalties, which are rarely applied. During these same two years, New York experienced only a fraction of the Pennsylvania, Michigan, and Ohio levels of strikes, and New York has a larger number of bargaining units. As a possible explanation, New York's Taylor Law not only prohibits strikes but mandates that some fairly stiff penalties be applied in each strike.[4] Existing research may not have been able to discover any consistent relationship between strikes and strike prohibitions, but the somewhat simplistic analysis presented above tentatively suggests that consistently applied strike penalties may prevent many stoppages from occurring.

Third, there is little systematic data on the relationship between strikes and bargaining outcomes. Logical reasoning suggests that strike-induced settlements may be more favorable to the employees than nonstrike settlements on the grounds that employers of striking personnel are willing to pay a premium to have withheld services restored. This, in fact, may happen, but it has not happened to such an extent that is readily apparent. For instance, Gerhart correlated an index of favorable union-bargaining outcomes with a State strike-activity index and found a positive but weak association.[5] Kochan and Wheeler correlated firefighter strikes with favorable union outcomes and found no discernible relationship, but they did find favorable outcomes correlated with union pressure tactics, such as picketing and slowdowns.[6] Thus, strikes may produce otherwise unrealizable gains for employees, but the available evidence suggests that these strike gains are rather small. Further, there have been some well-publicized strikes in 1976 which have resulted in very small settlements for the employees.[7] As a result, any positive or negative general conclusion about the relationship between strikes and bargaining outcomes is very tenuous.

Fourth, the relationship between government strikes and the maintenance of the public welfare is similarly ambiguous. As a general conclusion, the danger most public employee strikes pose to the citizenry's health, safety, or welfare is more rhetorical than real, for the public appears to survive the vast majority of these strikes (including police stoppages) with a minimum of apprehension and inconvenience. However, this conclusion needs to be qualified with three important considerations: (1) There are widely varying degrees of essentiality to the public welfare across the range of government services, so a

police strike is more troublesome than a parks and recreation strike? The essentiality of the same services for example, fire protection can vary among jurisdictions along such dimensions as size, density, population composition, income level, and so on, with large central cities appearing more vulnerable than small suburbs; and the citizens' proximity to and need for the deprived services may vary greatly.

Finally, the high level of strikes that has prevailed since 1969 indicates that these are becoming more and more "normal" events which increasingly are built into the parties' expectations. This admittedly subjective assessment is supported by the increasing legalization of strikes, and by the apparent increasing willingness of management to take strikes in order to implement "less" relative to union demands for "more." [8] Just as this society has learned to cope with a relatively high level of private sector strikes, so the same process is occurring in the public sector. However, there is still a widespread unwillingness to accept police and fire strikes as "normal," and an increasing number of jurisdictions have implemented compulsory arbitration to insure that public safety work stoppages will not occur.

Compulsory Arbitration

During the past few years, arbitration seems to have captured the lion's share of the attention focused on governmental impasse resolution procedures. For instance, there are presently at least 17 States that have implemented compulsory arbitration statutes; in 1965, there was only 1.[9] Here we deal with the arbitration of contract negotiation impasses (or "interest disputes"), where arbitration is compulsory rather than voluntary and the award is binding rather than advisory. Voluntary arbitration, where two sides must agree to take their dispute to an arbitrator, is rarely used, and advisory arbitration is a euphemism for factfinding. Grievance arbitration ("rights disputes") is not included in the analysis. The term "legislated arbitration" lacks explanatory power. Every public sector arbitration statute or ordinance has been approved by the relevant legislative body or by a vote of the electorate (the ultimate legislature), so the fact that an arbitration procedure has been "legislated" says nothing about whether it is a conventional or final offer, compulsory or voluntary, advisory or binding, etc.

The desire for arbitration seems to be based on four factors: (1) Its binding award creates a final resolution of a dispute; (2) it reduces strikes almost to the vanishing point; (3) it tends to equalize the power of the parties in negotiations; and (4) it provides a face-saving tool which union and management representatives may find useful.

The most important publicly stated rationale supporting the existence of arbitration statutes is that arbitration reduces strikes. Most of these statutes apply to police and firefighters, who arguably provide government's most essential services. Thus they insure that the citizenry will continuously receive vital public safety protection. The available evidence does show that in those jurisdictions where arbitration exists, there have been almost no strikes, especially over arbitrable issues.[10] Critics respond by pointing to the 1969 Montreal police strike, the 1974 New York City fire strike, and a few early 1970's police strikes in Michigan, all of which took place while arbitration procedures were in effect in those jurisdictions. These isolated incidents do not destroy the validity of the strike-prevention rationale; instead they demonstrate that in a democratic society there is no feasible way to insure a total and complete absence of such stoppages.

Arbitration reduces strikes because its binding award eliminates almost any opportunity for one side to provoke or conduct a work stoppage for terms more favorable than those provided by the arbitrator. However, it is incorrect to view arbitration as the *quid pro quo* for the right to strike, for employee groups are not giving up any right they previously enjoyed.[11] A more accurate interpretation of arbitration statutes is that they represent political and functional *quid pro quos*. Politically, the arbitration advocates—mostly police and fire unions—have been able to convince State legislators of the desirability of such statutes, and the politicians presumably collect political IOU's in return. Functionally, such statutes represent a procedural compromise with the police and fire unions in return for giving up their ability to conduct (illegal) strikes.

The fact that such statutes have come into existence primarily because of vigorous union lobbying—frequently over the opposition of municipal management—illustrates a third point: Arbitration is perceived by the unions as a low-cost power equalizer which increases their strength at the bargaining table. Under an arbitration procedure, management cannot realistically adopt a "take it or leave it" bargaining posture, for such a tac-

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may be rendered useless by the arbitrator's binding award. Similarly, management cannot bargain to impasse and unilaterally implement its desired changes. Further, arbitration is a much lower cost route for seeking benefits than strikes, for strikes are risky and may engender a negative public and managerial response.[12] In contrast, arbitrators usually award the employees more than the employer has offered, and hence the risk of an antagonistic arbitration award is minimal.

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Although most municipal managers appear unenthusiastic and even hostile toward arbitration, the process is not devoid of benefits for them (in addition to the absence of strikes). Arbitration provides both union leaders and managerial officials with the ability to save face when coping with constituent pressures. The binding nature of the arbitrator's award enables union and management representatives to use the arbitrator as a scapegoat, if there is constituent backlash toward the outcome. This face-saving feature assumes the greatest importance in those large and financially constrained central cities where union member militancy tends to be high and municipal ability to pay rather low.[13]

In summation, what sets arbitration apart from mediation and factfinding is its binding award. In those impasses where the parties are unable or unwilling to reach a mutually satisfactory agreement without a work stoppage, this quality of finality offers a useful guarantee of the continued availability of essential public services.

The binding nature of arbitration, though, has raised three important questions about the process: (1) Does the existence of arbitration reduce the parties' incentives to engage in the hard bargaining necessary to reach agreements? (2) does arbitration provide for more expensive settlements than would result from direct negotiations? and (3) is arbitration, with its delegation of governmental authority to a private party, constitutionally and politically compatible with our democratic system of representative government?

Conventional compulsory arbitration is alleged to have a "chilling effect" on the parties' incentives to reach their own agreement. The reasoning behind this is that if either one of the parties perceives, for whatever reasons, that it may get a better deal from an arbitrator than from a negotiated agreement, it will have an incentive to cling to excessive demands in the hope of tilting the arbitration award in its favor. If one side acts this way, the other side has no realistic choice but to respond in a like manner: the result is surface bargaining and a wide gap between the parties' real positions. This lack of hard bargaining will occur because of the very small costs attached to remaining in disagreement: There will be no strike by the union, no unilateral changes by the employer, and the compromise nature of the typical arbitration award will give the employees less than the union has asked for but more than the employer has offered. This compromise award is made possible by the discretion the arbitrator possesses to fashion the award he deems appropriate on the disputed issues.

This reasoning applies to the bargaining process under conventional arbitration, which is the more common kind. However, policymakers in several jurisdictions—including Wisconsin, Iowa, Massachusetts, and Eugene, Oreg.—recently have implemented final-offer arbitration.[14] a process which attempts to preserve the strike-prevention and impasse-finality features of conventional arbitration while simultaneously increasing the parties' incentives to reach their own agreement. This kind of arbitration attempts to increase the parties' costs of not reaching agreement by eliminating arbitral discretion and thus forcing the arbitrator to select one or the other party's final offer. The final-offer theory predicts that each side will develop even more reasonable negotiating positions in the hope of winning the award. These convergent movements will result because of the fear that the arbitrator will select the other side's offer. Consequently, final-offer arbitration should not have a chilling effect upon the parties' incentives to negotiate because the potentially severe costs of disagreement should push the parties together in a "strikelike" manner that conventional arbitration does not.

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There is some evidence which supports the chilling effect rationale under conventional arbitration. For instance, Bowers found that in the first few years under Pennsylvania's arbitration statute for police and fire impasses that one-third to one-half of all of these negotiations ended in arbitration awards.[15] Wheeler found that the proportion of firefighter negotiations resulting in arbitration awards (in those States where arbitration was available) was much higher than the proportion of negotiations in other States which produced factfinders' reports.[16] Tom Kochan and his associates found in New York police negotiations that the gap between un-

ion demands and employer offers on salaries was larger under conventional arbitration than under the previous factfinding procedures.[17] Kochan's study also has found that the financially hard-pressed central cities around New York State have become semipermanent clients of the arbitration system. However, this chilling effect data should not hide the fact that in conventional arbitration jurisdictions the majority of negotiations are settled through negotiated agreements. In other words, this chilling effect has not destroyed good faith collective bargaining.

Examination of conventional and final-offer experiences from several jurisdictions suggests that although final-offer arbitration does not meet all its theoretical expectations, it does seem to induce or coerce a larger proportion of negotiated settlements than conventional arbitration. However, it is important to note that different kinds of final-offer procedures have been constructed, and these procedural differences may have diverse impacts upon the bargaining process. For instance, the parties' incentives to negotiate their own agreement may be greater when the arbitrator makes one "all or nothing" selection decision (package selection) than when he makes separate selection decisions on each of the disputed issues (issue selection).[18]

Final-offer arbitration also has its faults, the most publicized being the potential for inequitable arbitration awards under a package selection requirement. The final-offer arbitrator cannot excise any offensive or unworkable proposals, and if he is faced with two unpalatable final offers, he may be forced into implementing an award which he knows is inequitable toward one side and hence will cause problems between the parties. However, this "lesser of two evils" phenomenon has rarely occurred.[19]

The debate between the advocates of conventional and final-offer arbitration essentially boils down to a debate over which phenomenon should be accorded greater weight: Avoiding the possibilities of inequitable arbitration awards, or increasing the parties' incentives to reach their own agreement. The writer places more emphasis on negotiating incentives, but other observers may have contrary preferences.[20] Since there is no formula by which the labor relations community can decide which of these goals is more important, the relative merits of conventional and final-offer arbitration will be debated for some time to come.

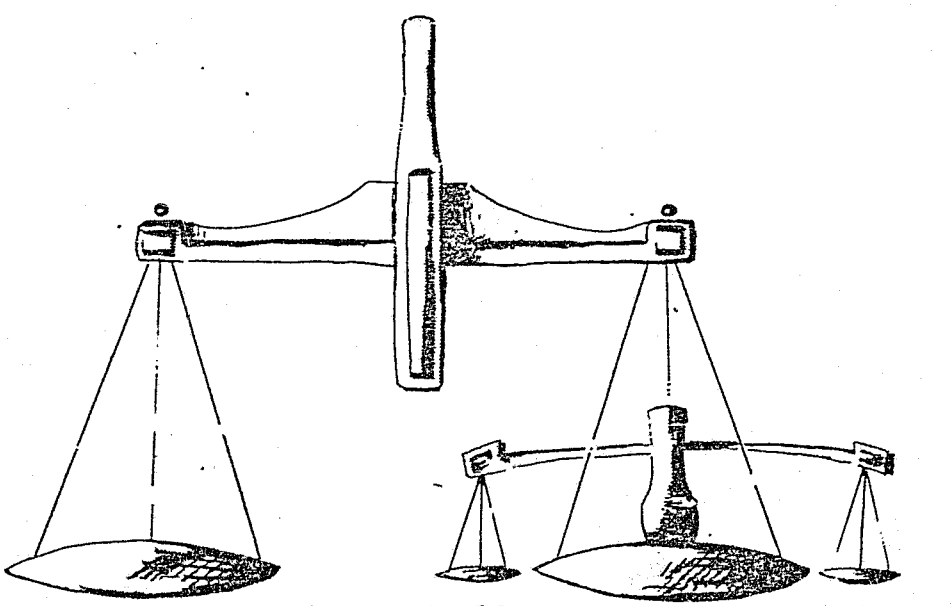
A second line of criticism directed at compulsory arbitration—conventional and final-offer— is that it may result in excessively generous awards, especially on economic issues. Although there is no precise definition of "excessive," presumably it refers to a comparison between the cost of arbitration awards and negotiated agreements. The available evidence suggests that arbitration is associated with favorable union outcomes, but the magnitude of this effect is not large. For instance, Kochan and Wheeler report a significant positive correlation between the presence of arbitration and the favorableness to the union of firefighters' contracts—on both dollar and nondollar items.[21] On the salary issue, Kasper found that final-offer arbitration in Michigan and Wisconsin raised police and fire salaries above what they would have been, but the amount was about 5 percent or less.[22] It is not surprising that favorable union outcomes are associated with arbitration, given that arbitration is designed to increase the union's bargaining power vis-a-vis management. However, the magnitude of this favorable union impact appears less than "excessive."

The third category of criticism is aimed at arbitration's alleged constitutional and political incompatibility with our democratic system of representative government. In this system, the citizens elect government officials who are responsible for the allocation of scarce public resources—both dollar and nondollar. If a majority of the citizenry is dissatisfied with these allocation decisions, the relevant officials may be voted out of office. In addition, the government's financial resources are coerced from the citizenry in the form of taxes, and government officials should be accountable for the use of these funds. Arbitration critics point out that under the typical arbitration procedure, the arbitrator often is appointed by an outside agency, enters an impasse on an ad hoc basis, issues an award, and leaves the scene. He is not elected to his position, and he is not accountable to those groups—employees, employer, and citizens—who must live with and bear the impact of his award. Further, the arbitration process it-

self rarely, if ever, provides an opportunity for the direct involvement of citizen-interest groups. Consequently, arbitration is said to be an unwarranted delegation of governmental authority to a private party and is inconsistent with our system of government.

If the above argument were compelling, we would expect to find the courts striking down arbitration statutes as unconstitutional. However, the legal record to date tends to support arbitration, as the highest State courts in Michigan, New York, Pennsylvania, Rhode Island, and Wyoming have upheld the constitutionality of arbitration laws in those States. The South Dakota Supreme Court, however, struck down that State's law as unconstitutional.[23] In the main, it seems fair to conclude that arbitration statutes do not unlawfully delegate governmental functions to a private party and hence are constitutionally permissible.

The other part of the governmental incompatibility criticism focuses on the political wisdom of using arbitration as a mechanism for allocating governmental resources. For instance, Ray Horton suggests that arbitrators are not necessarily neutral, in possession of the requisite expertise, or concerned with the interests of the public.[24] In short, he seems to be saying that just as war is too important to be left to the generals, governmental labor relations decisions are too important to be left to arbitrators. He then offers some specific recommen-



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factors for reducing the importance of arbitration and for obtaining higher quality awards, including implementation of the right to strike and licensing examinations for arbitrators. The points Horton makes merit serious consideration, given the importance of the resource allocation nature of the arbitration process and because these points tend not to be raised by practitioners.

As long as public labor relations policy prohibits strikes, impasse resolution procedures will be implemented and used. As a result, governmental unions and managements will rely on third parties to help them reach an agreement (via mediation or fact-finding) or to impose a settlement (via arbitration). One concern is that unions and managements will depend too much on third parties to the detriment of the effective functioning of the collective bargaining process, and we have seen that in selected jurisdictions the availability of various procedures—especially conventional arbitration—has reduced substantially the parties' efforts to negotiate their own agreements. Further, this third-party dependency seems to be greater in those States with lengthier public sector bargaining histories, which tentatively suggests that over time unions and managements learn how to incorporate the manipulation of these procedures into their negotiation strategies.[22]

However, there is no formula to determine how much third-party intervention is "too much." For example, some observers will conclude that a 25-percent arbitration award rate is evidence of too much dependency, while others will emphasize that three-fourths of the negotiations ended in negotiated agreements. In addition, if policymakers place greatest weight on protecting the public from strikes, then the extent of third-party intervention is of secondary importance. In other words, the conclusions people reach about the appropriate shape of impasse procedures will depend primarily upon their normative preferences, and the "objective" impasse resolution data can be used to support a wide variety of different conclusions.

FOOTNOTES

[2] Unless otherwise noted, the data in this section comes from the U.S. Department of Labor, Bureau of Labor Statistics, *Work Stoppages in Government, 1973*, Report 437 (1975); *Work Stoppages in Government, 1974*, Report 453 (1976); Bureau of National Affairs, *Government Employee Relations Report Reference File*, Vol. 71, pp. 1012–1027.

[3] U.S. Department of Commerce, Bureau of the Census, *Public Employment: Management-Labor Relations in State and Local Government*, 1972, Census of Governments, Vol. 3, No. 3 (1974).

[4] *New York Times*, July 4, 1976, p. 35.

[5] The Taylor Law requires that the employer of striking workers shall collect from each striker 1 day's pay as a penalty for each day on strike, in addition to the pay withheld for not working that day (i.e., a total of 2 days' pay for each day on strike). In addition, the State's Public Employment Relations Board usually suspends the union's dues checkoff privileges for several months.

[6] Paul F. Gerhart, "Determinants of Bargaining Outcomes in Local Government Labor Negotiations," *Industrial and Labor Relations Review*, Vol. 29, No. 3, pp. 347–349, April 1976.

[7] Thomas A. Kochan and Hoyt N. Wheeler, "Municipal Collective Bargaining: A Model and Analysis of Bargaining Outcomes," *Industrial and Labor Relations Review*, Vol. 29, No. 1, pp. 55–56, October 1975.

[8] John F. Lawrence and Harry Bernstein, "Public Employee Militancy in Transition," *Buffalo Evening News*, July 17, 1976, Sec. C, p. 4.

[9] *Ibid.* Perhaps the classic example of this tough negotiating posture is the San Francisco Board of Supervisors' efforts to cut the pay of city craft workers and their willingness to take a 38-day strike over the issue in spring 1976. The supervisors appeared to have overwhelming public support.

[10] These States include Alaska, Connecticut, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska (via the Court of Industrial Relations), New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Washington, Wisconsin, and Wyoming. Wyoming's arbitration statute was passed in 1965. Most of these statutes apply only to police and/or firefighters.

[11] Hoyt N. Wheeler, "An Analysis of Fire Fighter Strikes," *Labor Law Journal*, Vol. 26, No. 1, pp. 17–20, January 1975; Charles M. Rehmus, "Legislated Interest Arbitration," *Proceedings of the Twenty-Seventh Annual Winter Meeting, December 1974*, Industrial Relations Research Association, Madison, Wis., 1975, pp. 307–312.

[12] This *quid pro quo* reasoning does apply, for instance, to private sector grievance arbitration, for most unions have surrendered their legal right to strike over contract interpretation disputes in return for the employer's promise to arbitrate such disputes.

[13] For instance, in August 1975, the San Francisco police went on strike for higher wages. The public responded by voting to cut their starting pay.

[14] For a more elaborate discussion of arbitration's face-saving characteristic, see Mollie H. Bowers, "Legislated Arbitration: Legality, Enforceability, and Face-Saving," *Public Personnel Management*, Vol. 3, No. 4, pp. 270–278, July–August 1974.

[15] Other names for this process include either/or last offer, last best offer, one or the other, and forced choice arbitration.

[16] Mollie H. Bowers, "A Study of Legislated Interest Arbitration and Collective Bargaining in Public Safety Services in Michigan and Pennsylvania," Ph. D. dissertation, Cornell University, Ithaca, N.Y., 1974, p. 220; Mollie H. Bowers, "A Practical Appraisal of Legislated Arbitration in the Public Sector," unpublished manuscript, 1974, p. 64.

[17] Hoyt N. Wheeler, "Compulsory Arbitration: A Narcotic Effect?" *Industrial Relations*, Vol. 14, No. 1, pp. 117–120, February 1975.

[18] Thomas A. Kochan, et al., *An Evaluation of Impasse Procedures for Police and Firefighters in New York State*, New York State School of Industrial and Labor Relations, Cornell University, Ithaca, N.Y., January 1977, chap. 4.

[19] This discussion only hints at the potential for procedural complexity across final-offer systems. For some information, see Peter Feuille, *Final Offer Arbitration: Concepts, Developments, Techniques*, Public Employee Relations Library, No. 50, International Personnel Management Association, Chicago, Ill., 1975, chaps. 4 & 5; James L. Stern, et al., *Final Offer Arbitration*, D.C. Heath, Lexington, Mass.

[20] Stern, et al., *op. cit.*, pp. 185–186.

[21] For instance, see Charles Feigenbaum, "Final Offer Arbitration: Better Theory Than Practice," *Industrial Relations*, Vol. 14, No. 3, pp. 311–317, October 1975.

[22] Kochan and Wheeler, *op. cit.*, pp. 54 & 60.

[23] Stern, et al., *op. cit.*, chap. 6.

[24] For a discussion of several of these decisions, see Bowers, *Public Personnel Management*, *loc. cit.*

[25] Raymond D. Horton, "Arbitration, Arbitrators, and the Public Interest," *Industrial and Labor Relations Review*, Vol. 28, No. 4, pp. 497–507, July 1975.

[26] For one examination of this phenomenon, see Peter Feuille, "Final Offer Arbitration and Negotiating Incentives," *Arbitration Journal*, Vol. 32, No. 3, pp. 203–220, September 1977.

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