Impasse Resolution in the Public Sector

Before examining the various alternatives used to resolve public sector labor disputes, it seems sensible to set forth explicitly some of the underlying value judgments that, in effect, provide the framework within which we choose among these alternatives. Then, subsequent sections of this paper will briefly summarize bargaining systems, describe the tools for dispute resolution, examine the evolution of dispute settlement techniques in various segments of the public sector, and evaluate how these tools are working.

In a political democracy there will be continuing pressure to extend this concept to the workplace and to introduce "industrial democracy." This was nicely put by an English critic of collective bargaining who wrote in 1869: "One thing is clear . . . the relation between workmen and their employers has permanently changed in its character. The democratic idea which rules in politics has no less penetrated into industry. The notion of a governing class, exacting implicit obedience from inferiors, and imposing upon them their own terms of service, is gone, never to return. Henceforward, employers and their workmen must meet as equals."¹

In the 100 years that have elapsed since that statement was written we have in effect adopted a standard of values which says that, other things being equal, bilateral decision-making between those who direct work and those who perform it is preferable to unilateral action. Phrased another way, we can say that we have enacted legislation to promote collective bargaining over individual bargaining and in the process have created a value judgment on the part of most citizens of western democracies that collective bargaining is good.

At first, however, the public sector was exempt from the direct application of this doctrine. Instead, substitutes were found. Essentially, these were civil service type systems in which standards for judging merit were established and procedures were followed in order to eliminate favoritism. It was assumed that those who directed activities in the public sector, free from the
insidious pressures of the profit motive of the private sector, would act in a fashion that would eliminate the need for collective bargaining by public employees. But this need has not been eliminated. Public sector employees have said that they want the right to be consulted, and, in many instances, the further right to bargain about the work they perform. The transfer of values from the private to the public sector is not a surprising phenomenon. Its significance tends to be overlooked, however, because it is occurring gradually, and as yet, the changes that are implied have not been fully comprehended.

Twenty-five years ago, conventional wisdom suggested that it was not appropriate for public employees at the federal, state and local levels to engage in collective bargaining. Today, conventional wisdom suggests the contrary and calls attention to the inevitability of this development. Although it may seem trite to call attention to this change in values, it should be noted that many problem areas are regarded as problem areas primarily because the methods traditionally used to resolve them are consonant with the value system of the past rather than that currently being formed.

Despite the risk of grossly oversimplifying the problem, one can characterize it as the replacement of the principle of "sovereignty" by that of "essentiality." No longer is there reliance on the idea that actions cannot be permitted because they threaten the sovereignty of the public employer. Instead, this has been superseded by dependence on the idea that actions can be prohibited in the public interest if they threaten the health and safety of the community. This new value judgment is not yet well identified and is still in the process of change.

Most threats to health and safety are being defined broadly today by judges and government officials to include any stoppage of services which inconveniences and irritates important voting blocs sufficiently to have adverse political consequences. Actions which do not endanger health or safety, but which are legally classified in that category in order to minimize irritation, may have to be endured if, in the future, the community is to be protected from stoppages that actually threaten its health or safety. A few court decisions in the past few years have reflected a less sweeping and more accurate definition of threats to health and safety, and may exemplify the position that will prevail in the future. For example, the Michigan Supreme Court denied injunctive relief in a situation in which the employer had not demonstrated that irreparable damage to the public health and safety would be caused by a teacher strike.²

In addition to this problem of changing values, however, there is another, distinctly different, set of problems which are relevant whether we are discussing the United States, a socialist or communist industrialized nation, or even one of the newly developing countries. These are the problems which
arise out of the relationship between the individuals who perform the work and the individuals who supervise them. In all societies, decisions must be made about what work is to be done, how it is to be carried out, how hard individuals will be required to work and how much they will be paid for their efforts. Regardless of the way in which the enterprise is organized, individuals doing the work develop their own norms and, by a variety of tactics, attempt to introduce those norms into systems designed by the managers.

Essentially, the second underlying point being raised here is that, even in the absence of collective bargaining, workers have historically formulated norms of output and patterns of performance which in turn have influenced the ways in which the directors of enterprises have been able to carry out their tasks. The extension of collective bargaining to the public sector means that the framework for making such decisions has been changed and that there has been an explicit recognition that such decisions are bilateral in nature.

**SUMMARY OF COLLECTIVE BARGAINING SYSTEMS**

The various public sector bargaining systems for federal, state and municipal employees of different types are modeled after the private sector system, although there are significant differences. In both the private and public sectors, the ground rules for bargaining are outlined in a statute or executive order and one or more administrative agencies are created to interpret the legislation and administer its operation.

These statutes and agencies must define the classes of employers and employees to be covered and determine the appropriate bargaining units for such covered employees. Once units are determined, the agency then must interpret the provisions of the statute in regard to such problems as the scope of bargaining. For example, is bargaining to be confined to working conditions, or to wages and working conditions, but not fringes such as pensions? There are also procedural problems to be faced, e.g., whether the parties are obligated to bargain in good faith and what penalties may be imposed if it is found that one side or the other has committed an unfair labor practice.

If the parties are able to reach agreement and have negotiated a labor contract, the contract usually contains a provision for airing and resolving problems of contract interpretation. This mechanism, typically identified as a grievance and arbitration procedure, requires the use of a neutral third party if the parties are not able to reach agreement. An administrative agency generally plays a role in establishing rosters of neutrals and procedures by which the parties can select a neutral when needed.
In addition, in both the private and public sectors, there is a statutory framework and set of administrative rules for the resolution of disputes arising over the terms of a new agreement. The problems of which set of rules and what framework is appropriate for use in various portions of the public sector are the ones on which this paper is focussed and to which attention is directed in subsequent sections.

TOOLS FOR USE IN DISPUTE RESOLUTION

Before examining the present state of public sector dispute resolution, the various tools are listed and briefly explained and the situation in the private sector is summarized. Some of these tools are well known and need little explanation; others are mentioned in the literature but have not been applied in practice or, possibly, have had only limited use.

Mediation

The most uncontroversial tool is mediation. To some degree its un-critical acceptance stems from the fact that it is private and noncoercive, and therefore can be safely ignored if so desired. Mediation is usually undertaken by full-time government staff who specialize in this activity. Mediation itself consists of attempting to prevent one of the parties from breaking off negotiations, persuading the parties to make or to listen to new proposals, and suggesting compromises and alternative solutions to the problems which have caused the parties to reach an impasse.

Traditionally, mediation proceedings are confidential. Each side is encouraged to give the mediator the full explanation of its position with the understanding that he will not relay to the other side any information other than that which the party wants relayed. It is also assumed that the mediator will face the general public and assuage it with statements such as: “The parties have engaged in a lengthy and profitable session but as yet have not reached agreement,” but will not disclose the exact nature of the dispute. It would be considered a faux pas in most situations if the mediator were in any way to suggest that one side was being unreasonable. Like all generalizations, however, this one has exceptions, e.g., when a mediator sees no alternative and may endanger his long-run relationship with one party in order to bring pressure on it to change its position.

It should be noted that mediation is regarded as a minimal form of outside interference and is usually tried first or in combination with other more coercive tools. Mediation is used in the private sector as well as in federal, state and local government labor negotiations. It is also used in disputes outside of the labor field, such as in race relations, and in some
instances involves *ad hoc* mediators or staff members of nonprofit, non-governmental agencies.

**Factfinding**

Another widely used tool is called factfinding, although the term itself is regarded by many people as a misnomer for the actual process involved. Factfinding is usually carried out by an eminent neutral who has been appointed by a government agency on an *ad hoc* basis to help resolve a particular dispute. The factfinder has some other regular occupation such as lawyer, university professor or grievance arbitrator. In contrast to mediation, it is supposedly a public process designed to bring pressure to bear on the parties.

The usual procedure followed after the factfinder is appointed is for him to hold a public hearing at which the parties enumerate the items on which they cannot agree and present evidence in support of their positions. After the presentation of evidence, they make oral arguments or, in some instances, forego the oral argument and submit written post-hearing briefs. The factfinder studies the evidence, considers the arguments, and then issues a report discussing the issues and recommending solutions to each one. Usually, these are advisory recommendations unless the parties have agreed to be bound by them.

In many situations, factfinders engage in mediation, particularly when there are many items in dispute and it appears impractical to make recommendations to resolve all of them. The actual factfinding hearing may be formal and resemble a courtroom procedure or may be informal, depending on the wishes of the parties, the particular statute authorizing the use of factfinding, and the style that each individual factfinder prefers. The factfinding recommendations are a blend of the judicial and the practical. The factfinder is influenced by considerations of equity and criteria in the statute (if any are specified) but, since his recommendations are advisory rather than mandatory, must also take into account the acceptability of his recommendations by the stronger party. Theoretically, the issuance of the factfinding recommendations furnishes the parties and the public at large with a standard by which to judge the dispute and to bring pressure to bear to resolve it on that basis.4

Factfinding is used primarily in the public sector for the resolution of disputes involving municipal employees. Normally, it is not used in the private sector where the parties are free to strike. The right to strike is protected in the private sector and is the method relied upon for resolving private sector disputes about the terms of a new agreement. In the public sector, however, where for the most part strikes are outlawed, access to factfinding has been introduced as a substitute mechanism for dispute resolution.
One variant of factfinding that should be noted in passing is the use of factfinding without recommendations in the resolution of national emergency disputes. In those situations a board of inquiry ascertains the facts relevant to the dispute and submits these to the President of the United States, who in turn submits them to Congress with recommendations of his own for resolution of the dispute. In actual practice, boards tend to make recommendations and engage in mediation but, technically, the law limits the authority of the board to finding facts.\(^5\)

Arbitration

A third tool for resolving disputes is arbitration. In a procedural sense, arbitration resembles factfinding. The arbitrator is usually hired on an *ad hoc* basis, has some other primary occupation, and is selected by the parties from candidates submitted by some government or nonprofit agency. As in factfinding, the parties attend a hearing, present evidence and arguments or written post-hearing briefs. One significant difference between the procedures arises from the fact that an arbitration award is binding whereas a factfinding recommendation is advisory. Therefore the arbitrator need not give the same degree of attention to acceptability as he might be inclined to do if his decision were only advisory.

Arbitration, like factfinding, is considered an alternative to the strike. Although it is not common for statutes to provide for the use of arbitration upon petition of either party after an impasse has been reached, arbitration is provided for in the federal statute covering postal employees and in approximately a dozen states, usually for disputes involving firefighters and policemen. The private sector statute does not provide for arbitration although the parties may voluntarily renounce their right to strike and resort instead to arbitration if they so desire. For example, the United Steel Workers Union and ten major steel companies recently adopted an experimental negotiating agreement which provided for the arbitration of certain unresolved items if it became necessary.\(^6\)

Arbitration is usually invoked as a last resort following mediation and possibly also factfinding. For example, Congress has authorized arbitration of disputes on the railroads when all other prior attempts to resolve the dispute have failed. There are various forms of arbitration, some of which are attracting considerable attention at present. One of these is called *med-arb*, which is a contraction of the words mediation and arbitration. This is a process in which the parties: "agree in advance that all decisions, whether reached by mediation or arbitration become part of the mediator-arbitrator's award and are final and binding. None of the decisions go back to the parties for acceptance or rejection."\(^7\)
Another form of arbitration has been identified as final-offer arbitration. Under this arrangement the arbitrator is limited to choosing the offer of either management or labor as a whole without modification. He may not select a compromise position as would be possible under conventional arbitration. A variation of final-offer arbitration was adopted by the Michigan legislature in dealing with disputes of firefighters and policemen. Under that statute, the arbitrator must choose the position of either party on each economic issue, in contrast to the all-or-nothing situation in Wisconsin.

Other Dispute Settlement Tools

In addition to mediation, factfinding, and various forms of arbitration used alone or in combination with other techniques, several other procedures have been suggested in the literature about dispute resolution and some have been tried in the private or public sector. These include the nonstoppage strike, continuous bargaining, and the use of the referendum. A nonstoppage strike is one in which the workers continue to work but receive progressively less pay as the strike continues. In turn the employer is also penalized comparable amounts in order to increase his incentive to reach a settlement.

Continuous bargaining, as the name implies, consists of bargaining during the life of the agreement and voluntarily amending the terms of the agreement prior to its expiration date. It differs from conventional crisis bargaining in which settlements are reached only after threat of a strike and at the last possible moment. This form of bargaining was attempted in the steel industry in the early part of the last decade. The referendum is discussed by Wellington and Winter as a possible tool for use in resolving municipal labor disputes. They note that a group such as the San Francisco Chamber of Commerce can threaten to circulate petitions for such a referendum as a means of persuading public employees to moderate their demands.

Strikes

To complete the litany of dispute resolution procedures, mention should be made of the strike. In the private sector this is the usual way in which disagreements are resolved. Except when the national emergency dispute procedure is invoked, the strike is protected in the private sector as the legitimate means to be used by workers in pursuing better contract terms. In the public sector, however, the strike is banned in most jurisdictions and other procedures have been introduced as substitutes. Even so, in a few states (Hawaii, Pennsylvania and Alaska) some categories of public employees have been given the right to strike, subject to certain constraints.
PRESENT STATE OF PUBLIC SECTOR DISPUTE RESOLUTION

At present, public sector dispute resolution is in flux. Descriptions which are accurate today soon become obsolete. Furthermore, the changes being introduced are not uniformly applied. Different paths are being followed by different government bodies, and different procedures are being devised for application to different occupations.

Police and Firefighters

Municipal law enforcement and fire protection services have their own pattern. Originally, police unionism was actively discouraged by municipal management. When this tactic did not succeed, policemen learned that, although they had the constitutional right to form unions, they did not have the right to force recalcitrant employers to bargain with them in the absence of legislation requiring the employer to do so. Firefighter unionism did not encounter the same degree of resistance and has progressed further than police unionism. But, because both groups are considered to be essential, military-type discipline organizations, regulated by the same commission, they tend to be treated alike when labor relations legislation is being formulated.

When legislation was first passed in some states it provided policemen and firefighters with the right to petition neutral third parties for advisory opinions. After a few years’ experience with this procedure, protective service employee organizations became dissatisfied, and then, contrary to other groups such as teachers, rejected the use of the strike and turned instead to arbitration. Some strong firefighter or police unions have secured this right to refer disputes to arbitration.

In localities where police and firefighter unionism is weak, there is either no legislation, or legislation that culminates in factfinding. In other localities, such as Illinois, firefighter and police unions in the larger cities engage in collective bargaining without the benefit of statutory protection. A survey of the country would find thousands of police and firefighters in each of these situations. Even so, the trend in recent years seems to be toward reliance on arbitration, although only about twelve states have reached that point.

Teachers

In the last fifteen years, the legal framework for resolving disputes involving teachers has changed substantially, but teacher union attitudes have changed to an even greater degree. Only a minority of the fifty states have passed statutes giving teachers the right to form unions, request certification elections, file unfair labor practice charges, and use third-party help in the resolution of disputes about the terms of new agreements. Despite this, however, bargaining has spread rapidly.
The third-party procedure included in most statutes enacted in the 1960s included mediation and factfinding, procedures which were endorsed by the teacher organizations at that time. More recently, teachers have tended to ignore factfinding in some situations and instead have struck or threatened to strike. In states in which there are no bargaining statutes covering teachers but where the teachers' union is strong, teachers have undertaken to strike in order to gain higher wages and other improvements in their contracts. For these reasons it is difficult to characterize the present stage of teacher bargaining. In some states without legislation, strong teacher unions are solving impasses by means of strikes. In other states without legislation where teacher unions are weak, very little bargaining may take place. In still other states which have passed legislation including the use of factfinding to resolve disputes, the procedure is being ignored by strong unions and is being relied upon by weak ones. This varied situation may lead teachers to turn to the system used in the Canadian Federal Service under which employees may choose between arbitration and the right to strike, options which are considered at some length later in this paper.

Other Municipal Employees

The bargaining framework for other municipal employees is similar to the situation covering teachers, described above. Typically, there is either no legislation or legislation that provides for factfinding as the terminal step for the resolution of disputes about the terms of a new agreement. And, like teachers, strong unions of municipal employees in park, street, and sanitation departments have turned to the strike regardless of whether it is illegal or whether they are entitled instead to initiate factfinding. Weaker unions may rely upon factfinding where it exists, while weak unions in jurisdictions where there is no legislative protection may not engage in bargaining or may do so in a somewhat restrained fashion and must be prepared after relatively brief discussion to accept the management offer.

In general it can be said that municipal management has not regarded municipal employment, except in the case of police and firefighters, as sufficiently essential to warrant consideration of arbitration. Nor have the unions pressed for arbitration because they believe that they should have the right to strike instead. In those states where legislation exists, it provides for factfinding but in recent years has gone unused, for the same reasons that the teachers have abandoned it.

Federal and Postal Employees

Civil service federal employees are covered by executive orders which, since 1962, have provided them with the right to engage in collective bargaining in a somewhat limited fashion. Bargaining was first introduced as a
form of nonadversary employee participation. Subsequently this approach was amended to conform more closely to the patterns followed in other jurisdictions. It is important to note that the scope of bargaining in this sector is limited and that wages, pensions and items covered by civil service are excluded from bargaining.

Insofar as impasse resolution is concerned, the initial procedure terminated with a review of a factfinding decision by the cabinet officer in charge of the department. Subsequently this system of bargaining within a department without central controls was abandoned. Impasses in negotiating new agreements could be referred to a neutral impasse panel which could make binding awards subject to appeal to a top government management body composed of the Secretary of Labor, the Chairman of the Civil Service Commission, and a representative of the President. The terminal step under this procedure is more management-oriented than some of the other procedures previously discussed and may represent a transitory arrangement which will be abandoned in favor of one patterned after the one adopted for use in the postal service.

Postal employees were originally covered by the same system as civil service employees but were given separate and more favorable treatment by Congress after they engaged in a wildcat strike that spread across the nation. These employees have been covered by the private sector legislation for most purposes but have been given binding arbitration as the terminal step in the dispute resolution procedure. As yet it has not been invoked, but it is significant to note that the largest employer in the United States is subject to arbitration in the establishment of wages if the employer and the union cannot reach agreement.

The foregoing review of the type of dispute resolution procedure that exists for different occupational groups employed by different public sector bodies illustrates the diversity of procedures that have been adopted. It further shows that the actual practices may differ from those called for in the legislation. In general, a review of existing patterns shows that, despite the present preeminence of mediation and factfinding, there seems to be a trend toward arbitration or the right to strike or both. Before examining these two more extreme alternatives, the possible explanations for the declining use of mediation and factfinding are explored.

**EVALUATION OF DISPUTE RESOLUTION TECHNIQUES**

**Mediation**

For mediation to succeed, a corps of knowledgeable mediators is needed. They must be individuals with the personality and skill to persuade
the parties to settle. One theory of mediation is based on the idea that the parties want to settle but that there is faulty communication between them and they are therefore unable to reach a mutually satisfactory point. Under these circumstances, the mediator is able to help by making the proposal as if it were his own suggestion; both parties can then agree to it without feeling that they had given into the other side. This fortuitous outcome does not happen too often except in new, small negotiations in which the bargainers are relatively unsophisticated.

More frequently, the mediator has the task of persuading one or both of the parties to reduce their actual goals and to come up with a new solution. He knows that the position of each side represents an amalgam of differing views and that in effect he has some support from some members of each team who are not enthusiastic supporters of the majority view. For example, some members of management who are concerned with hiring in a tight labor market may be pleased to make a further concession in the hiring rate—raising it may increase costs, but at least it makes hiring easier. The same spectrum of views exists on the union side—older workers may have different preferences than younger workers.

Also, the mediator must have a pocketful of new solutions that will permit the parties to gracefully slide from their present positions to ones that lead to settlements. For example, mediators can suggest that past service pension credits be funded over thirty years instead of twenty and that the money saved be used to provide extra vacation and holidays.

Over the years the task of the mediator becomes more difficult for several reasons: (1) the parties learn more about the process and eventually there are very few new solutions that a mediator can offer; (2) the parties may be communicating perfectly and do not need the mediator as a go-between; (3) for their own internal political reasons they may not want to reach a solution voluntarily; (4) most mediators have extensive private sector experience but limited public sector experience and are handicapped by lack of knowledge about the industry. Probably the most important reason, however, that mediation will not be accepted as the terminal step of a procedure is that the mediator lacks power and the procedure itself lacks finality.

There appears to be a continuing role for mediation in the public sector similar to the one that it fills in the private sector. It is a way of assisting smaller, less knowledgeable managements and unions. Also, mediators are able to serve as face-savers in situations where neither management nor union negotiators can afford to initiate compromises. But mediation, standing alone, is insufficient. In the private sector, it is followed by strikes when agreement is not reached. In the public sector there must also be some additional tool which follows mediation and can be used to resolve disputes which could not be mediated.
Factfinding

Factfinding is the dispute resolution tool that usually is invoked in the public sector after mediation fails. Unfortunately, factfinding also suffers from the same lack of finality as does mediation. Typically, it has been found that unions and managements in the public sector accept most recommendations of the factfinder. Initially, partial acceptance of the recommendations was not of great concern to unions or managements who attempted in turn to bargain up or down from the recommendations but found them useful as a basis for settlement. Over the years, however, some unions have claimed that management acceptance of factfinding recommendations was diminishing and that it was pointless to use the procedure if management would not abide by the results.

Management, in turn, would point to strong unions that struck instead of initiating factfinding procedures as provided for in the statute. In any event, without assessing where the blame lies, it is fair to conclude that factfinding is a tool with limited life and that its lack of finality will lead to its abandonment. The fault may not lie in the technique, per se, but may flow from the fact that it only fits in an environment in which unions are not militant and public employers regard factfinding recommendations in the same light as judicial findings.

It also should be pointed out that unions have found that the cost of going to factfinding is about the same as that of going to arbitration. Therefore, if they pay the same amount for each type of third party judgment, they might as well seek a judgment that is binding on management. If they win, management must comply instead of bargaining down. Management, in turn, would prefer a less restrictive advisory decision to a binding one.

It should be noted that, despite its lack of finality, factfinding may play a significant role when it is coupled with either the right to strike as in the recently enacted health care industry legislation, or where it is followed by arbitration, as is the case in the amended New York City procedure. This suggests that the importance of an advisory tool such as factfinding is increased by being put into the next-to-last position in contrast to being the terminal step.

Traditionally, however, it has been thought that the addition of an extra step tends to diminish the importance of what was formerly the last step. It appears, however, that this generalization is one that should be reconsidered. For example, if a school board in a rural area in which the union is weak decides to reject most of the factfinder's recommendations, and this is the last step in the procedure, there is little that the union can do about this board action. If, instead, the union had the right to petition an agency to appoint an arbitrator to decide whether the previously issued factfinder's recommendations should be made binding on the parties or amended in some fashion, the
board might have been willing initially to accept the factfinder's recommendations more fully.

Critics of such a multi-stage hearing procedure might suggest that the parties would agree to omit the factfinding step and proceed directly to arbitration. It is doubtful that public managements would find such a step desirable and probably would resist it. Also, by statute or administrative rulings, the procedure can be arranged so that access to arbitration requires that the parties first try to resolve the dispute through factfinding. Finally, it should be noted that, to the degree the arbitrator takes cognizance of the factfinding recommendations issued in the case before him, he can be expected to follow along the same path rather than to carve new ground. This tendency would further increase the significance of factfinding. (The recently enacted Massachusetts statute covering police and firefighters provides a multi-step hearing procedure of this nature in which binding arbitration follows factfinding if a dispute is not resolved.)

Arbitration

The usual charge against the use of arbitration to resolve disputes about the terms of new agreements is that it causes collective bargaining to atrophy. In effect, it is seen as a substitute for bargaining—one to which the weaker party will turn quickly and repeatedly in preference to bargaining. Many years ago Secretary of Labor Willard Wirtz said, in support of this line of reasoning: "experience—particularly the War Labor Board experience during the '40s—shows that a statutory requirement that labor disputes be submitted to arbitration has a narcotic effect on private bargaining, that they turn to it as an easy—and habit forming—release from the obligation of hard, responsible bargaining."14

More recent experience, however, challenges this conclusion. Although it may be premature to call any of the arbitration experiments successful, the so-called "narcotic" effect has not emerged as a significant problem in such states as Pennsylvania, Michigan and Wisconsin in the three or more years that each of these states has permitted arbitration as a means of resolving firefighter and police disputes. Furthermore, it should be noted that for some time several scholars have questioned on theoretical grounds the ready acceptance of the idea that arbitration spells the end of bargaining.15

Even though there is not current evidence to support the charge that the advent of arbitration spells the end of bargaining, there is the question of what mixture of bargaining and arbitration is best. Is it better if only 1 percent of the disputes are resolved by arbitration, rather than 10 percent, or 20 percent, or is the 1 percent figure too low? For example, it could be argued that the process is too costly and that a record of 1 percent suggests that small unions do not use arbitration because of cost considerations. To the
degree that a high value is placed on self-settlement, it can be argued that a low percentage is superior to a higher one. But, such arguments probably apply to comparisons on the order of 10 percent usage in contrast to 30 percent usage.

One possible standard against which to measure the use of arbitration is the use of the strikes in the private sector. There, it is believed that a few strikes are needed to make the threat of a strike credible enough to force the parties to agree. In the private sector, there are about 3,000 such strikes in the negotiation of about 50,000 agreements annually—the strike occurs in approximately 6 percent of the situations. This is a rough estimate and it is preferable to suggest that in the private sector, strikes occur in about 5 to 10 percent of the annual contract negotiations.

In a forthcoming study of the impact of arbitration on the bargaining process and outcome, based on a sample of police and firefighters in Pennsylvania, Michigan and Wisconsin, it was found that arbitration was used to resolve disputes in 10 to 30 percent of the negotiations, depending on the year, the state, the type of arbitration involved, and the nature of the processes that preceded it. This utilization rate exceeds the strike rate and quite possibly means that the effect of arbitration on the process and outcome of bargaining differs from that of the strike. However, research efforts have not yet enabled us to make a definitive statement about such differences. Remarks about this point are therefore limited to speculative generalizations which may not hold up when further information is obtained. With that caveat in mind, attention is directed to further criticisms of arbitration.

Another alleged defect in arbitration is that it takes authority away from appointed or elected managers and as such is inefficient. This criticism differs from the old saw of improper delegation. Presumably, that question is settled—governments can legally delegate wage setting authority to arbitrators and give them statutory standards for guidance. The question posed here is whether or not this delegation to an arbitrator so weakens the management authority structure that it causes inefficiency.

Despite claims of management that it may do this, there is little evidence offered in support of the claim. It should be kept in mind that once the concept of collective bargaining has been adopted, the authority pattern is modified and arbitration only involves a further minor shift. The authority of management is subject to challenge by the union under a system of collective bargaining and the granting of the final word to an arbitrator may not represent a further erosion. It may even strengthen management in situations where it faces a very strong union.

One question frequently raised about arbitration is whether unions will comply with awards. On the whole, the answer seems to be that they will.
Noncompliance is rare and where it has occurred it has taken the form of avoiding the arbitration procedure, rather than striking in defiance of an award. Possibly this excellent record is attributable to the fact that unions usually have been the driving force in securing the adoption of the arbitration system by state legislatures and therefore have felt morally bound to go along with the results of the system. If arbitration were imposed over the objections of the union covered by the procedure, they well might not go along with it and noncompliance would then be a serious problem.

Another criticism of arbitration is that it might change the wage patterns and possibly raise wages more than would otherwise be the case. One possible effect is that arbitration will not affect wages on the average very much, but it will reduce the dispersion. The existence of arbitration may make it more difficult for pattern setters to establish new patterns and to innovate—because of the weight given to comparisons of wages and fringes paid elsewhere—but it also will help unions in situations where they have lagged behind the pack. It should be noted at this point that there are a variety of arbitration arrangements and they may have different consequences.

Final-offer arbitration on individual economic issues—which is carried out on an issue-by-issue basis—should deter usage of arbitration to a greater degree than conventional arbitration. The all-or-nothing effect associated with unmodified final-offer arbitration should, at least theoretically, pose the greatest deterrent to the use of arbitration. Initial applications of the three systems in Wisconsin, Michigan and Pennsylvania lends some support to this theory. It should be noted, however, that other differences in the procedure make it impossible to determine how much of the greater deterrent effect is associated with the form of arbitration and how much is associated with other differences in the procedures.

A further question about final-offer arbitration is whether it brings the parties closer together than conventional arbitration. A charge leveled against conventional arbitration is that it encourages the parties to hold firm, make no compromises and maintain a large gap between their positions with the hope that the arbitrator will favor a position in the middle—and the more extreme your position, the closer the arbitrator's position will be to your actual goal.

When the parties are faced with an arbitration in which the arbitrator must select that final offer which he believes to be the more reasonable, the pressure is on each party to come a little closer than his opponent to the solution which he thinks the arbitrator will regard as the more equitable. If the management thinks that the arbitrator would find a 6 percent wage increase to be proper, and the union is asking for 10 percent, it might decide to defend 4½ percent, calculating that it could safely win at that level.

If the union, however, were asking 8 percent, the city might decide to
argue for 5 percent, and if the union were asking for 7 percent, the city might well want to offer 5½ percent. Theoretically, this pressure to converge will lead the parties to settle without arbitration. But even if they do not settle, the nature of the process should make the gap smaller than in conventional arbitration where just the opposite pressure prevails.

Under some circumstances, final-offer arbitration by each issue may not differ appreciably from conventional arbitration, while in others it may not differ from final-offer package arbitration. Where it stands depends on the number of issues and the degree to which tradeoffs are possible between issues. For example, if the union is asking for more holidays and more vacation time, the arbitrator in a final-offer-by-issue case could grant one of the two demands and thereby make an award that had identical financial consequences as a conventional arbitration award in which the arbitrator reached a compromise position on each issue. On the other hand, if there were only one issue at stake, there would be no difference between a final-offer package and final-offer by each issue, but both would differ substantially from conventional arbitration.

One criticism voiced about final-offer arbitration is that it may force the arbitrator to choose between two unreasonable positions—or at least between two offers which each contain undesirable items. There does not seem to be a ready answer to this defect except to note that it is the price the parties pay for failure to resolve the dispute themselves and thereby avoid the use of arbitration. And, the higher the price of failing, the more likely the parties are to avoid the use of arbitration and the situation in which this problem can arise. In Wisconsin, for example, this problem has arisen in fewer than six cases in a three-year period, during which about 400 police and firefighter contracts were renegotiated under a final-offer arbitration system. This suggests that the problem, although perplexing when it appears, is not likely to appear very often.

Another form of arbitration which has occasioned comment in recent years is “med-arb.” As explained previously, when med-arb is used in the private sector, it means that at the outset of negotiations the parties have voluntarily agreed to forego the strike or lockout and instead to be bound by the terms of an award made by a neutral person whom they have selected. This format excludes the rank and file from participation through the ratification procedure because the award is binding upon the parties and does not require membership approval to become effective.

Med-arb is a powerful tool and is rarely used in the private sector for several reasons. The parties are reluctant to give up their right to use economic pressure and to reduce membership participation in negotiations. Also, few neutrals have sufficient experience and acceptability to be granted this power by the parties. It was used successfully in the 1970 San Francisco Bay
area nurses negotiations and perhaps will turn out to be particularly suited for use in essential industries in which there have been strikes in the past and in which the parties wish to avoid another round of strife.18

Med-arb differs from voluntary arbitration in that the parties expect the arbitrator to mediate most issues and to issue an award which reflects, for the most part or entirely, agreements reached by the parties themselves. The mediator is able by judicious hints and prompting to persuade one or both of the parties that a particular position should be abandoned and that the arbitrator would be more inclined to support one of the parties if it took a more moderate position. Sam Kagel, the neutral most closely associated with the development of this procedure, stresses that it is primarily mediation and works because the mediator has clout—that is, the ability to make a binding award gives the mediator sufficient authority to be persuasive on most issues.

Med-arb in the public sector could be carried on in the same fashion as it is in the private sector if the parties agreed to try the procedure. It is more likely to occur, however, in jurisdictions in which the statute calls for binding arbitration. Under that situation, med-arb only means that the arbitrator spend some time attempting to persuade the parties that they should work out some or all of the issues themselves rather than force him to issue an award. Theoretically, agreed-upon awards are superior to imposed awards because the parties are more likely to agree upon solutions which cause no subsequent administrative problems and because the parties are thought to be more willing to abide by solutions which they helped to devise, rather than solutions designed by a third party.

The success of med-arb when tried in the public sector in a situation in which the statute calls for arbitration and makes no mention of med-arb will depend on the degree to which one values agreed-upon settlements relative to imposed settlements. By mediating, the arbitrator may be weakening the bargaining process that preceded the ad hoc med-arb effort. The parties may not try as hard as they otherwise might if they know that the arbitrator subsequently will be conducting confidential mediation sessions at which they make concessions in order to gain their objectives on other items.

An interesting variant of med-arb has been tried in a few instances in Michigan where the statute covering police and firefighters provides for final-offer arbitration by economic issue and also for a tripartite panel. In that situation the panel members representing each side have the opportunity to sound out the neutral arbitrator in an executive session and then amend their final offers to conform more closely to a position favored by the neutral.19 Although this same format could be followed if conventional arbitration were involved, the neutral arbitrator seems to have greater mediating power when he is prevented by statute from selecting a compromise position and can only select such a position if one of the parties adopts it as its amended final offer.
Med-arb also could be tried if the statute calls for final-offer package arbitration and permits amendment at the hearing. It may be difficult to amend final offers at a public hearing, and it should be noted that the tripartite panel arrangement facilitates mediation by the panel members in executive session. Theoretically, the neutral has even greater mediatory power in dealing with the partisan arbitration panel members under a system which requires that he must choose between one package or the other, rather than do so for each issue, or compromise as he sees fit as under conventional arbitration. The partisan panel member runs the risk of losing everything if he is not responsive to the hints of the neutral when the system requires the neutral to pick one final offer in its entirety without modification.

A quite different approach to the question of how well the various forms of arbitration work emphasizes their nonuse and gives little weight to whether the settlement is an agreed-upon one as in med-arb, or an imposed one, as is the case when the arbitrator does not mediate but functions in a judicial manner. From this point of view, an arbitrator should not mediate. If the parties have not resolved their dispute and have referred it to him, he should protect the integrity of the procedure and render his award in arm’s-length proceedings based on evidence presented in open session. If the award turns out to be punitive because the arbitrator must choose the final offer of one of the contending parties, and both offers contain unsatisfactory elements, the party that loses presumably will learn a lesson and in the future will bargain more effectively and be less likely to go to arbitration again; if forced to arbitration again this party may formulate a much more sensible final offer that will be devoid of unreasonable elements.

Considerable attention has been devoted here to various potential problems associated with the use of arbitration. It should be noted, however, that in actual current practice experience with these procedures is rather limited, and many of these potential problems have not emerged or only rarely have been troublesome. An overall judgment on the use of arbitration, however, will not be attempted here until the alternative to it—the right to strike—has been explored. The question facing society is not whether arbitration is a good tool to use but whether it is better than alternative tools to resolve disputes in particular public sector industries and occupations. We now turn, therefore, to a consideration of the use of strikes to resolve public sector disputes.

**Strikes**

The basic theoretical argument for the strike is that the threat of a strike is needed to compel agreement of the parties. This is the private sector model. Advocates of it simply argue that it can be transferred intact to the public sector. Opponents of this position argue that this is unsound because of
the differences between the public and private sectors. The primary difference cited by those who would not adopt the private sector model is the absence of the profit mechanism. A strike in the private sector reduces the income of the entrepreneur while leaving him with some fixed costs. His loss of sales and profit may make him more ready to settle, just as the workers’ loss of wages may make them more tractable.

In the public sector, closing down a public facility may inconvenience the public and in some instances may have substantial economic side effects, but usually the employer does not suffer loss of income. In fact, just the reverse occurs; he saves money. A teacher strike, for example, may balance a budget that was in a slight deficit position.

Another argument raised by those who oppose the use of the private sector model is that the government service is more likely to be a monopoly, a service for which there may not be alternative sources—police and fire service for example. This argument is not as persuasive as the first. There are also many services provided by private employers for which there may not be easily substitutable sources. For example, some cities rely on private firms for local transportation and for garbage disposal.

Also, the substitutability argument is in part intertwined with the question of essentiality. There are no close substitutes for a public library, but there is little objection raised to suggestions that librarians be given the right to strike. It seems more likely that the willingness to give librarians the right to strike stems not from any considerations of substitutability but rather from considerations of nonessentiality.

If one directly faces the question of essentiality, the conclusion may well be the one adopted in Alaska in which employees in those services deemed nonessential are given the right to strike. But essentiality is difficult to define. In Montana, nurses at a public hospital can strike provided that there are alternate hospitals to which patients can be referred. Also, essentiality will depend upon the degree to which a skeleton labor force of supervisors can maintain a minimum level of service which will eliminate the danger to the health and safety of the community even though the reduced services will cause a good deal of inconvenience.

It should be admitted, however, that even if it were possible to make distinctions among vital, less essential, and nonessential services and to give those in the last category the unrestricted right to strike, those in the middle a limited right to strike, and those in the first category no right to strike, such a system might be inequitable. In effect, society would be saying to individuals in the last group that their services would not be missed and therefore they may have the right to strike. But such a right is meaningless if the effect of withholding their services makes little or no difference. Finally, it should be noted that, conceptually, the granting of the right to strike is an admission
of a failure to devise a satisfactory substitute and quite possibly establishes a more adverse model of bargaining than is necessary.

Proponents of the right to strike in the public sector raise a quite distinct and separate argument which needs examination. They argue that if public employees have the right to strike, they will be less likely to use this right for two reasons: (1) they will be aware that they will not be rescued by a judge who will order them back to work; (2) an employer will be more willing to make a fair offer if he knows that his employees can strike. The first consideration may be more than compensated for by eliminating the deterrent effect of breaking the law. That is, the fact that the strike is illegal may prevent a greater number of strikes than are created in instances where workers undertake them, secure in the knowledge that they will be ordered back to work by a judge. In any event there is no evidence on which to judge the merits of these two positions.

As for the second argument, it is quite possible that the threat of third party arbitration may make an employer more willing to make a fair offer than the threat of a strike. For example, the negotiator for New York City said that in disputes involving what are known as management perogatives "the threat" of arbitration is an even greater spur to management's settlement motivation than a strike: "my fear of itinerant philosophers making judgments on policy determinations will likely keep my feet to the fire even longer than my fear of a walkout."20

Other Techniques

The use of "nonstoppage strikes" intrigues scholars but has little appeal to practitioners. A few instances of its use in the private sector have been reported, but the idea has not gained even limited acceptance. Its defect seems to be twofold. First, there are problems in designing penalty scales for each side which are comparable. How much revenue must be given up by an employer to match, for example, a 20 percent wage forfeit by employees? Second, if the escrow account into which penalty funds are diverted is one from which the parties cannot subsequently recapture all or part of the penalties when they eventually settle, they may be quite unhappy about making large donations to some third party, no matter how worthy it may be. If the funds can be recaptured, however, then the force of the penalty is greatly diminished and the plan no longer provides a powerful incentive to settle.

Continuous bargaining appeals to the rational side of all individuals—it is clearly much better to make decisions deliberately with full thought of their consequences than to make them in haste under pressure. However, very few adversaries will make the necessary concessions to enable them to reach agreement without such pressures. The ritual of bargaining is built on the
notion that it takes the threat of an imminent strike to persuade both sides to finally retreat from positions that they have firmly advanced for many weeks.

A change from the customary, adversary type of crisis bargaining to a problem-solving, continuous-bargaining framework requires a basic change in attitudes on the part of both management and union. This has come about in some industries after extended strikes and the growth of the idea that there must be a better way of resolving disputes. If the change to continuous bargaining is made, however, there still must be some method of resolving disputes. In this framework, that method would appear to be arbitration. The ten major steel companies and the United Steelworkers Union have adopted such a system and, at least at present, it seems to be working well.21

Continuous bargaining has several drawbacks which should be noted. It requires that the employer be willing and able to suffer additional costs in return for the willingness of the union to settle early. For example, in the 1970 negotiations, Armour & Company and the Amalgamated Meatcutters and Butcher Workmen’s Union agreed through informal, early, noncrisis bargaining to a settlement which was made effective about six months in advance of the scheduled contract termination date. In the steel industry, workers received a cash bonus payment for agreeing to forego the strike and to resolve matters by noncrisis negotiations subject to arbitration. The costs of advance settlement do not seem to be inordinate, however, and this should prove no barrier to wider adoption of this procedure.

Another problem is that the negotiators do not wish to bargain continuously, or at least they do not wish their constituencies to adopt a frame of mind which would require negotiators to resolve each problem as it arose by negotiating a change in the labor agreement. Both sides recognize that problems are constantly emerging and that there will always be some groups of workers who wish to renegotiate the contract. It is probably impractical to attempt to meet these constantly emerging and changing demands; yet if the fixed term agreement does not exist as a barrier to consideration of implementing changes immediately, rank and file groups can be expected to continually press for changes and in the process may promote a good deal of unrest on the shop floor.

Both of the above problems, however, seem minor compared to the basic one: bargaining today is a distributive problem—one side taking something from the other—rather than a mutually profitable problem-solving exercise. Until this basic attitude is modified, continuous noncrisis, nonadversary type bargaining will have only limited acceptance.

The current consensus about the use of the strike as the normal dispute settlement procedure is that most people regard strikes as wasteful and unwise. Politically, it does not seem to be acceptable today to most citizens.
In two instances where it has been adopted (Philadelphia and Hawaii school teachers), judicial interpretations of the law have been so restrictive that we really have not learned whether such a system is politically viable.

Factfinding seems to be falling out of favor because of its lack of finality. Nonstoppage strikes and possible use of the referendum are ideas which are not considered ready for center stage on grounds of impracticality. Continuous bargaining also falls into that category of interesting ideas that few people want to try.

For lack of a better alternative, it appears that arbitration of different types will be getting more and more attention in the coming years. In its few uses today in the United States, arbitration is working well; that is, compliance with awards is almost universal and its economic impact seems to be that of reducing wage dispersion in the way that the free market supposedly does when it is working well.

This does not mean that arbitration will be satisfactory in the long run. It is quite possible that there is no one ideal solution. Instead, we may oscillate between solutions. Strikes will be tried for a period, followed by arbitration for a period, and then, quite possibly, back to strikes or to some other substitute. Negotiators change, constituencies change, circumstances of management change, and the dispute resolution method that is appropriate today may be unsuitable tomorrow.

In any event, just as we sought substitutes for the use of the strike to settle questions of union recognition and grievances which arose during the life of an agreement—and to some degree we have been successful in that search—it seems we should continue to seek substitutes for economic strife in resolving arguments about the terms of new agreements in the public sector. Finally, it should be noted that there need not be a single solution: small cities may use different procedures than big ones; solutions that work for fire and police workers may not work for teachers, and procedures followed by counties and states may not be acceptable for application to federal employees.

REFERENCES


