The Role of Interest Arbitration in a Collective Bargaining System *

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This article traces the development of interest arbitration, a method of resolving disputes over new terms and conditions of employment. The American experience with interest arbitration is contrasted with that of Australia and Canada. The author also surveys the structure and impact of U.S. state and federal interest arbitration statutes and considers the operation and effectiveness of federal "emergency" dispute legislation. Professor Morris suggests that interest arbitration can be very useful in promoting mature industrial relations, so long as it is viewed as an adjunct to rather than a substitute for the collective bargaining process.

I
INTEREST ARBITRATION IN HISTORICAL PERSPECTIVE

An assessment of interest arbitration logically begins with an appraisal of its historical relationship to the wider but ever changing collective bargaining scene, for the industrial relations system in the United States has always been dominated by the practice of collective bargaining. With only minor exceptions, collective bargaining has generally included and depended upon the right to strike. It has also depended upon labor unions and employers making their own bargain on the terms and conditions of employment, though often with the aid of

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governmental mediation or conciliation. While the process entails negotiation and compromise, which the law now requires to be in good faith, motivations for reaching an agreement are more likely to be a function of the confrontation of economic power inherent in the collective bargaining relationship. That is the way union-management accommodation is usually achieved within the private enterprise economy prevailing in the United States. That is the norm. But in the historical development of our collective bargaining system there have been a limited number of situations and industries where interest arbitration has been used either as a substitute for collective bargaining or as an adjunct to the bargaining process.

If we were to look back only upon the fifty-year history of the American Arbitration Association, we might easily conclude from the relative distribution of known cases that arbitration of rights disputes is what labor arbitration is all about. Until the last few years—before arbitration of interest disputes in the public sector achieved wide acceptability—that conclusion would have been generally true; the only important exceptions were the long-standing history of voluntary interest arbitration in the local transit and printing industries, the temporary practices under National War Labor Boards, and the occasional ad hoc interventions by Congress in national railway labor disputes. But viewing a longer span of industrial history, one perceives interest arbitration to have been the initial and, for an extended period, the only type of arbitration used in the settlement of labor disputes. During the period of industrial resurgence following the Civil War, trade unions often tried to utilize arbitration as a substitute for strikes, although usually without much success. References to that intended usage occurred before labor organizations and the collective bargaining process had achieved a stage of sophistication in which definition of terms was very meaningful. Today it is important to distinguish between interest disputes, which are concerned with achieving settlement of new terms and conditions of employment, and rights disputes, which are concerned with achieving interpretation, application, and/or enforcement of established terms and conditions of employment as to an individual employee or a group of employees. The familiar grievance

2. H. MILLIS & R. MONTGOMERY, ORGANIZED LABOR: THE ECONOMICS OF LABOR 710 (1945) [hereinafter cited as MILLIS & MONTGOMERY]; see notes 408-411 infra.
3. Id. For a discussion of the legal implications of some of the Pressmen's arbitration cases, see text accompanying notes 436-62 infra.
4. See text accompanying notes 464-89 infra.
5. See text accompanying notes 496-506 infra.
6. The distinction between "rights" and "interests" is basic in the classification of labor disputes and in views as to arbitrability. Disputes as to "rights" involve the interpretation or application of laws, agreements, or customary practices, whereas disputes as to "interests" involve the question of what shall
under an existing collective agreement is the most common example of rights arbitration. But substantially all of the early examples of labor arbitration—examples antedating the Railway Labor Act and the Wagner Act—would now be classified as instances of interest arbitration.

Illustrative of some of the early efforts to obtain arbitration was a resolution passed at the first congress of the National Labor Union in 1866 calling for the appointment of "an Arbitration Committee to whom would be referred all matters of dispute arising between employers and employees." Similarly, the Knights of Labor in 1869 endorsed as a major objective the persuasion of employers "to agree to arbitrate all differences which may arise between them and their employees . . . that strikes may be rendered unnecessary." While neither of those early industrial unions achieved their arbitration goals, several international unions affiliated with the less romantic and ideologically neutral American Federation of Labor established interest arbitration as a substitute for strikes in their respective industries. At the turn of the century, the union which represented local transit workers (now called the Amalgamated Transit Union), together with many of its local affiliates, began to arbitrate the terms of new collective bargaining contracts. Between 1900 and 1949 over 600 wage cases were thus arbitrated; and in the second half of this century the use of arbitration to determine wages and other conditions continues to flourish in the local transit industry. Also at the turn of the century, the first International Arbitration Agreement in the printing industry was executed, and within a very few years such agreements became applicable throughout the entire industry. The printing industry agreements worked reasonably well for twenty years, but gradually became less ef-

be the basic terms and conditions of employment. This nomenclature is derived from the Scandinavian countries, which have treated the distinction between rights and interests as basic in their labor legislation. Sweden, for instance, has permanent national labor courts whose jurisdiction is carefully restricted to disputes concerning "rights" under collective agreements.


Interests and rights disputes in the railroad industry in the United States are referred to as "major" and "minor" disputes. Major disputes . . . present the large issues about which strikes ordinarily arise . . . they seek to create rather than to enforce contractual rights . . . [M]inor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment contract. They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so.


7. 2 HISTORY OF LABOR IN THE UNITED STATES 98 (J. Commons et al. eds. 1921).
Significantly, however, the Pressman's Union continued to rely heavily on such agreements, though recent events have lessened their institutional importance and may even have signalled the total demise of interest arbitration in the printing industry. I shall have more to say about the legal implications of some of the pressmen's arbitration cases later in this article. Interest arbitration was also being used during the early part of this century in other industries, such as in stove-molding, general foundry work, and the machinists' trade; but the most enduring examples were in local transit and printing.

The first quarter of this century also witnessed several efforts within the railroad industry to apply interest arbitration; these efforts had been stimulated by federal legislation. The first legislation in this area was the Arbitration Act of 1888—generally considered the earliest federal labor law—which Congress enacted following the great railway strikes of the 1870's and 1880's. That Act provided for voluntary boards of arbitration, although none were ever established. However, the Act's investigatory provisions gave President Cleveland a basis for the notable report on the causes of the Pullman strike of 1894, recommending, among other things, procedures for conciliation and a form of compulsory arbitration in the event conciliation failed. The Erdman Act of 1898 did not provide for compulsory arbitration, though it did establish mediation procedures which could culminate in arbitration, but either party had the right to reject arbitration. The carriers had been initially opposed to arbitration, but by 1906, when the railroad unions were in a position to exert formidable economic power, the carriers also became increasingly interested in arbitration. Consequently several interest disputes were settled by this method. In 1913, Congress strengthened railway mediation procedures by passage of the Newlands Act, and from 1913 to 1918 the Board of Mediation established under that Act settled 58 of the 71 disputes in which it participated. Six of those settlements were achieved through arbitration.

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10. See NAA PROCEEDINGS, 1973, supra note 9, at 35-53; see notes 412-414 infra.
15. Act of June 1, 1898, ch. 370, 30 Stat. 424. See also Millis & Montgomery, supra note 2, at 732-33.
16. Millis & Montgomery, supra note 2, at 731.
Nonetheless, by 1916 the operating unions had become disenchanted with arbitration. They considered some of the recent awards unsatisfactory, but their foremost concern was the eight-hour day, which the carriers did not regard as an appropriate subject for arbitration. The four operating brotherhoods joined forces and threatened a nationwide strike; President Wilson intervened and, when his efforts proved unavailing, turned to Congress. This represented the first instance of an “interest” dispute in the railroad industry being settled by Congress.\footnote{A practice which has increased dramatically in recent years; see text accompanying notes 496-505 infra.} The resulting Adamson Act\footnote{Act of Sept. 3, 5, 1916, ch. 436, 39 Stat. 721.} gave the unions their eight-hour day, but, behaving like a typical board of arbitration, Congress did not give the unions everything they had requested.\footnote{H.D. Wolf, The Railroad Labor Board 9-10 (1927), quoted in Millis & Montgomery, supra note 2, at 733-34.} These examples of early railway labor legislation were forerunners of later Congressional intervention, some of which would be designed to strengthen mediation and encourage arbitration and some of which would intrude directly for the purpose of effecting settlements of nationwide railway labor disputes in order to avoid strikes. Those legislative efforts will be examined later in a review of national emergency disputes.

This country's most pervasive private sector experiences with interest arbitration have occurred under wartime conditions. In 1918, during World War I, the first National War Labor Board was created to regulate industrial relations in war related industry.\footnote{Millis & Montgomery, supra note 2, at 138.} Although the Board's primary function was to provide mediation and conciliation, it often intervened directly in the establishment of substantive conditions and thus represented a form of interest arbitration. Its decisions were final and binding. Although the process was not compulsory arbitration in a legal sense, public opinion was so strongly opposed to any interruption of production that a no-strike policy, supported only by a simple pledge from organized labor, prevailed. During World War II, the second National War Labor Board was established with a similar purpose. The second Board's record will be examined later in connection with an attempt to assess the effect which compulsory arbitration conditions may have on the practice of collective bargaining.

The last items in this historical overview are examples of state compulsory arbitration statutes, which will be noted only briefly. In 1915 Colorado passed a statute which provided for arbitration of disputes in industries affecting the public interest; strikes and lockouts in such industries were prohibited while the state Industrial Commission was investigating and conducting hearings.\footnote{Ch. 180, § 29, [1915] Laws of Colo. 20th Sess.} Probably the most
famous of the early state statutes was the Kansas Act of 1920, which established a Court of Industrial Relations and prohibited strikes in certain key industries where the court was authorized to determine wages and working conditions. The United States Supreme Court held that Act violative of the substantive due process provision of the Fourteenth Amendment, and the state legislature thereafter abolished the Industrial Court in 1925. Following World War II, eight states enacted laws providing for compulsory arbitration and prohibiting strikes in certain vital industries, mostly public utilities. The arbitration procedures under these statutes were utilized extensively for about five years, the heaviest usage occurring in the states of Indiana, New Jersey and Wisconsin; but these laws ceased to be important after 1951, when the Supreme Court ruled in a Wisconsin case that the subject matter was preempted by the National Labor Relations Act.

II

UNITED STATES INDUSTRIAL RELATIONS: A COLLECTION BARGAINING SYSTEM

The foregoing overview of early United States experiences with interest arbitration serves to underscore a conclusion that is usually unquestioned—that arbitration has not been widely used to settle interest disputes in this country. The examples of interest arbitration catalogued above, except for those occurring during wartime, represented only minute segments of the total dispute settlement picture. Third party settlement of disputes involving new terms and conditions of employment, whether using governmental or private arbitrators, has historically been the exception, not the rule.

That truism puts the United States industrial relations system in proper perspective. Ours is fundamentally a collective bargaining system in which we have enshrined the right to strike as the cornerstone in the system's structure. Both the Supreme Court and the Congress

have reaffirmed and protected the fundamental role of strikes in the system. In the Clayton Act of 1914 Congress provided for protection against federal court interference with the right of employees "singly or in concert" to cease to perform any work or labor, a theme which was extended by the Norris-LaGuardia Act of 1932. The Supreme Court, speaking through Chief Justice Taft in 1921, described the strike as a "lawful instrument in a lawful economic struggle . . . between employer and employees as to the . . . division between them of the joint product of labor and capital." In 1935, Congress wrote into Section 13 of the National Labor Relations Act a guarantee that, except as expressly stated therein, the Act was not to be construed "to interfere with or impede or diminish in any way the right to strike." The declaration of national labor policy contained in Section 1 of that Act was, and still is, the encouragement of "the practice and procedure of collective bargaining," which the Supreme Court on numerous occasions has reminded us means private ordering by unions and employers without governmental interference in the substantive content of the settlements. In *H.K. Porter Co., Inc. v. NLRB*, the Court reaffirmed "that the National Labor Relations Act is grounded on the premise of freedom of contract." Although it recognized that such freedom was not absolute, it stressed that the Act was based on "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." The system thus contemplates that the parties, at least in the private sector, will arrive at those terms through a process of "collective bargaining," which the Court defined in a frequently quoted passage from Justice Brennan's majority opinion in *NLRB v. Insurance Agents' International Union*:

31. 29 U.S.C. §§ 101-115 (1970). The Norris-LaGuardia Act also gives recognition to arbitration as one of the preferred means to settle labor disputes: Section 8 conditions the issuance of a restraining order or injunction on a showing that the complainant has made "every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." *Id.*, § 108 (1970).
34. *Id.*, § 151 (1970).
37. 397 U.S. at 108.
It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.39

Another celebrated passage from that opinion states that “the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining.”40 A less known passage from the same opinion presents the long view of the bargaining process—an optimistic description by Archibald Cox to the effect that as the collective bargaining relation matures, “Lilliputian bonds control the opposing concentrations of economic power; they lack legal sanctions but are nonetheless effective to contain the use of power.”41 According to Professor Cox, the force of economic fear, responsiveness to government and public opinion, and even moral principle in time “‘generate their own compulsions, and negotiating a contract approaches the ideal of informed persuasion.’”42

Although the ideal is often achieved in collective bargaining, too often it is not, in which event the public and the economy may—if not directly then in the long run—suffer more than the immediate parties. Can collective bargaining ever approximate Professor Cox’s ideal model? And even if the answer were yes, can it be done with reasonable consistency? Will it ever develop to the point where strikes will not seriously disrupt the life of the community, and settlements will not exert excessive inflationary pressure on the nation’s economic equilibrium? A. H. Raskin, a sympathetic and knowledgeable observer of American industrial relations, has thrown down the gauntlet to the system:

The more ludicrous the whole performance becomes, the more insistently learned scholars explain why it makes sense and why any

39. Id. at 488-89.
40. Id. at 495.
41. Id. at 489.
42. Id. at 490; Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1409 (1958).
community action to protect itself by substituting reason for the unrestrained exercise of force in settling labor disputes represents a stab in the back for Nathan Hale, Paul Revere and all the other apostles of American liberty.

It is past time to arise and proclaim that the emperor has no clothes. It is my conviction that, when all the people have to suffer because of the willfulness or ineptitude of economic power blocs, it is an affirmation—not a denial—of democracy to provide effective government machinery for breaking deadlocks.

The question, in my estimation, is not whether to do it but simply how. I see no reason why in this institution alone, of all the facets of our society, we should exalt the right to make war as the hallmark of industrial civilization when we seek to exorcise it everywhere else, even in the global relations of sovereign powers.43

Many perhaps less knowledgeable but no less concerned observers—civic leaders, economists, politicians, and ordinary citizens—are searching urgently for ways to eliminate strikes. They argue that strikes are a luxury which the economy or specific communities cannot afford; they echo the plea for reason in place of force. While their objective may be salutary, they are doomed to disappointment, for most of them are looking in the wrong places for the wrong thing. They are seeking a talismanic device—perhaps compulsory arbitration or its final-offer variation—which they hope will usher in an era of peaceful labor relations; or perhaps they are only looking for a device to be used in a limited area, for instance the public sector, and even then perhaps only in dispute situations deemed deleterious to the public health, welfare, or safety. There is ample evidence, drawn from experience in this country and from democratic industrial nations abroad, that exclusive reliance on legislative formulas for resolving labor disputes is never sufficient. This is not to say that all legislation in this area will be futile. It is only to point out the limitations of such an approach, and the fact that, given the tradition of American industrial relations, only those legislative devices which assist collective bargaining are likely to be of value.

Among the relevant traditions is the role of the strike. Strikes have always been an essential element in collective bargaining in this country, even in the public sector where they are generally illegal.44 In the recent Postal Service negotiations for example, although a mechanism for compulsory arbitration existed in the law,45 the media-read-

44. See J. BURTON & C. KRIDER, THE INCIDENCE OF STRIKES IN PUBLIC EMPLOYMENT (1975) [hereinafter cited as BURTON & KRIDER].
ing public anticipated the possibility of a strike rather than an arbitration proceeding in the event of a breakdown in negotiations. It was the de facto ability of the workers to strike which influenced the parties toward settlement. One could easily supply his own favorite illustrations of strikes and threats of strikes that have shaped public sector settlements; the private sector needs no proof. Must we then despair of eliminating or substantially reducing the incidence of strikes? I would hope not. Although the freedom to strike has traditionally been essential to operation of the collective bargaining system, strikes of excessive number and duration ought to be viewed as symptoms of grave malfunctions within the system.

The task facing serious students of the problem is to diagnose the ailments and recommend appropriate cures to improve the health of the system. But in applying an intended cure, one must be careful not to kill the patient. That aphorism provides the frame of reference for this analysis of interest arbitration. Accordingly, in attempting to fit interest arbitration into the industrial relations system, or any part of the system, it is important to recognize that it is a collective bargaining system. Any proposed cure, whether it be interest arbitration or some other technique for impasse resolution, will be meaningful only if molded to fit within the system rather than designed to replace it. Governmental machinery designed to break deadlocks by substituting “reason” for force will surely fail unless such machinery also reinforces and strengthens the collective bargaining process. In other words, the postulate I advance is that for an impasse resolution device to operate successfully and for an extended period, it must encourage and complement the bargaining process, not supplant it. A corollary of this proposition is that if bargaining were substantially supplanted, it is likely that the community would eventually face a new wave of strikes or be forced to buy its peace at the price of outrageous settlements that neither the economy nor a particular community could afford.

I have not yet distinguished between collective bargaining in the private and public sectors, nor have I separated consideration of interest arbitration into those neat and familiar categories. Eventually, it will be necessary to note some of the features which do represent differences between the two sectors. Many of the apparent differences, however, relate only to jurisdictional diversities and historical time lags; public sector employees are only lately attempting to do what private sector employees have been doing with varying degrees of success for

at least a hundred years.47 Attention to the dissimilarities between the private and public sectors at this stage of the analysis would unnecessarily detract from the universal characteristics of the entire collective bargaining system.

III

THE UNIVERSAL ROLE OF THE STRIKE

At the 1975 national AFL-CIO convention one delegate expressed the overwhelming sentiment of that body in opposition to a proposal favoring compulsory arbitration as an alternative to strikes by public safety personnel. He said: "We must always have the right to strike. Without it, you have no freedom. That's the only thing that we have going for us in the labor movement."48 That feeling of a right to strike runs deeply through the ranks of workers in Western democracies. France and Italy guarantee the right in their constitutions,49 and in those countries the right is as much political as economic. Other democracies, including the United States, regulate the right to strike and even prohibit its exercise under a variety of circumstances,50 but within defined limits strike activity is protected.51 The United States Supreme Court has never construed the outer limits of the right to strike, although the Court in Dorchy v. Kansas52 declared that "[n]either the common law, nor the Fourteenth Amendment, confers the absolute right to strike."53 Yet, regardless of the uncertainty of the Constitutional underpinnings, workers in the United States, like workers in other democracies, share the attitude of the AFL-CIO delegate that the right to strike is a fundamental freedom. Otto Kahn-Freund observed: "Workers will go on strike, whatever the law may have to say about it. The common law of conspiracy was as impotent to suppress strikes as was the French legislation against coalitions, and as were Pitt's Com-

52. 272 U.S. 306 (1926).
53. Id. at 311.
bination Acts to suppress trade unions." American workers in the public sector have proved that proposition repeatedly. Australian workers have done the same.

Professor Kahn-Freund also equated the right to strike with both collective bargaining and the very existence of trade unions, declaring:

Effective collective bargaining is impossible where the workers do not have the freedom to stop work collectively, and trade unionism cannot exist and function if effective collective bargaining is impossible.

Even assuming that he is correct, it would not necessarily follow that a high rate of strike activity is indicative of either a strong labor movement or a healthy collective bargaining relationship. Sweden and West Germany, both of which can rightly claim strong trade union movements and thriving collective bargaining systems, boast of low strike rates and comparatively moderate rates of inflation. Australia, which has a strong labor movement and a compulsory arbitration system, has a high rate of strike activity (currently greater than that of the United States) and a high rate of inflation. The United Kingdom, which operates under a collective bargaining system with a strong and vocal labor movement, also sustains both a high rate of strike activity and a high rate of inflation. Caution is necessary in extrapolating conclusions

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55. Burton & Krider, supra note 44, at 139.
56. See text accompanying notes 113-122 infra.
57. Kahn-Freund, supra note 54, at 53.
58. Regarding Australia, Federal Republic of Germany, Sweden, United Kingdom and United States, consider the following tables:

(1) Relative Frequency of Industrial Disputes in 1973:

<table>
<thead>
<tr>
<th>Country</th>
<th>*Economically Active Population† (millions of persons)—work force</th>
<th>*Industrial Disputes (millions of working days lost)</th>
<th>Relative Frequency (Working days lost per person in work force)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>5.53</td>
<td>2.63</td>
<td>.493</td>
</tr>
<tr>
<td>Fed. Rep. of Germany</td>
<td>27.23</td>
<td>.56</td>
<td>.021</td>
</tr>
<tr>
<td>Sweden</td>
<td>3.41</td>
<td>.12</td>
<td>.035</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>25.72</td>
<td>7.20</td>
<td>.280</td>
</tr>
<tr>
<td>United States</td>
<td>82.89</td>
<td>27.94</td>
<td>.337</td>
</tr>
</tbody>
</table>

* Source: International Labour Office, Yearbook of Labour Statistics 3-44, 793-804 (1975). The incidence of strikes in Australia increased even more dramatically in 1974; see text accompanying note 144 infra.
† Population figures are for 1970.

(2) Percentage Change in Consumer Price Index:

<table>
<thead>
<tr>
<th>Country</th>
<th><strong>CPI</strong> June 1974</th>
<th><strong>CPI</strong> June 1975</th>
<th>Percentage Rise</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>138.0</td>
<td>161.2</td>
<td>16.8%</td>
</tr>
<tr>
<td>Fed. Rep. of Germany</td>
<td>127.2</td>
<td>135.4</td>
<td>6.4%</td>
</tr>
<tr>
<td>Sweden</td>
<td>131.7</td>
<td>145.6</td>
<td>10.6%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>148.7</td>
<td>187.6</td>
<td>26.2%</td>
</tr>
<tr>
<td>United States</td>
<td>126.3</td>
<td>138.1</td>
<td>9.3%</td>
</tr>
</tbody>
</table>

(Consumer Price Index computed on a base of 100 in 1970.)
from these raw observations, for a variety of factors contribute to the widely differing results. But at the very least, the data suggest that strikes are no respecters of systems and that a simple formula for the regulation of excessive strike activity and seemingly irresponsible inflationary pressures is probably non-existent. The example of Australia, which has experienced three quarters of a century of compulsory arbitration, provides meaningful information for our study. Inasmuch as most advocates of compulsory arbitration advance the prospect of eliminating strikes as their chief argument, the Australian story should be especially relevant.

IV

THE AUSTRALIAN EXPERIENCE WITH
COMPULSORY ARBITRATION

It will be useful to contrast the United States collective bargaining system with this mature but fundamentally different kind of industrial relations model: compulsory arbitration in Australia. In addition to yielding conventional information about how this long-established interest arbitration system has operated, this exploration may shed light on certain strike phenomena that suggest universal conclusions that might be drawn about the role of strikes in democratic industrial economies.

A. Historical Development

Although the Australian compulsory arbitration system is not a single system, but a complex of overlapping state and federal systems with theoretically separate jurisdictions for settlement of industrial disputes, the federal statutory procedures and those in each of the six states share the same general approach and methodology for determination of wages and working conditions. At the federal level there is a Conciliation and Arbitration Commission.59 In the six states there

** Source: United Nations, Dept. of Econ. & Soc. Affairs, 29 Monthly Bulletin of Statistics, Table 60 (December, 1975). For further discussion on Australia, see text accompanying note 145 infra.

59. Conciliation and Arbitration Act, 1904-1974 (Australia). Originally there was but a single tribunal, the Commonwealth Court of Conciliation and Arbitration; but as a result of a 1956 High Court decision, R. v. Kirby; Ex parte Boilermakers' Society of Australia, 94 C.L.R. 254 (1956), the conciliation and arbitration functions were separated from the enforcement functions of the statute. The Court considered enforcement to be an exercise of judicial power which, under the separation of powers doctrine, could not be vested in a quasi-legislative body, but rather must be exercised by a constitutional court with life-tenured judges. This separation of the enforcement function from the tribunal which renders the statutory award has contributed to the inflexibility of the system and may have been an important factor in the breakdown of formal compliance procedures in the last decade. See notes 119-122 infra. See also Mills, The Practice of the Commonwealth Industrial Court in Strike Cases, 7 Australian Lawyer 137 (1968).
are separate and independent industrial tribunals: four states—New South Wales,60 South Australia,61 Western Australia,62 and Queensland63—have conciliation and arbitration commissions more or less similar to the federal model; the states of Victoria64 and Tasmania65 have wages boards, which were not originally established to arbitrate disputes but which evolved in such a fashion that they too engage in a form of interest arbitration.66 These arbitration systems now cover substantially every employee classification in the country.67

Statutory conciliation and arbitration processes have played vitally important roles in the regulation of industrial relations, but their current roles are quite different from their original purposes and from their operation in early years. The introduction of compulsory arbitration came in the aftermath of a series of devastating strikes in the early 1890's which had very nearly wrecked the Australian economy. The trade union movement, which had been almost crushed, was understandably disillusioned with the strike weapon and anxious to find other means to achieve its goals. The two-fold means settled upon were political action and compulsory arbitration, programs which went hand in hand. The Australian Labor Party was formed, and with the help of other groups in society willing to substitute adjudication for industrial warfare, compulsory arbitration—which had already been tried in New Zealand—was adopted.68

The first arbitration acts were passed by the states, but in the Commonwealth Constitution of 1901, which federated the country, a key provision, Section 51 (xxxv), vested in the Commonwealth Parliament the power to make laws with respect to:

Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state.69

60. Industrial Arbitration Act, 1940-1968 (New South Wales).
63. Industrial Conciliation and Arbitration Act, 1961-64. (Queensland).
64. Labour and Industry Act, 1958 (Victoria).
65. Wages Board Act, 1920 (Tasmania).
66. Address by Douglas Smith of the Australian National University, at Southern Methodist University School of Law, Dallas, Texas, April 14, 1974. See also LOEWENBERG supra note 27, at —.
67. COMMONWEALTH BUREAU OF CENSUS AND STATISTICS, LABOUR REPORT No. 54, at 136-137, indicates that 40.1 per cent of all employees are covered by federal awards and 43.3 per cent by state awards and determinations. See H. GLASBEK & E. EGGLESTON, CASES AND MATERIALS ON INDUSTRIAL LAW IN AUSTRALIA 133 (1973).
68. Higgins, A New Province for Law and Order, 29 HARV. L. REV. 13 (1915); J. PORTUS, AUSTRALIAN COMPULSORY ARBITRATION, 1900-1970, at 4-7 (1971) [hereinafter cited as PORTUS].
69. Constitution, § 51, (xxxv), (Australia, 1901).
This single clause provides the principal\textsuperscript{70} basis for federal regulation of labor relations and was the constitutional authority for passage of the Commonwealth Conciliation and Arbitration Act of 1904\textsuperscript{71} and its many subsequent amendments. The limiting language of “conciliation and arbitration,”\textsuperscript{72} “industrial disputes,”\textsuperscript{73} and “disputes extending beyond the limits of any one state,”\textsuperscript{74} have proved immovable roadblocks to the development of a comprehensive system of federal labor relations.\textsuperscript{75} Section 51(i) of the Constitution authorizes the Commonwealth to make laws “with respect to trade and commerce with other countries, and among the states,” language similar to the Commerce Clause in the United States Constitution; and Section 51(xxix) provides for Commonwealth power as to “matters incidental” to its enumerated powers. But neither the Parliament nor the judiciary—unlike their counterparts in the United States—has seen fit to extend the scope of federal labor regulation beyond the bare bones of a conciliation and arbitration system limited to the prevention and settlement of interstate disputes,\textsuperscript{76} which literally has meant \textit{actual disputes in be-}

\textsuperscript{70} For a discussion of other sources of Commonwealth power to regulate industry see \textsc{J. Macken}, \textit{Industrial Law: The Constitutional Basis} 24-31 (1974) [hereinafter cited as \textsc{Macken}]; \textsc{E. Sykes \& H. Glasbeek}, \textit{Labour Law in Australia} 451-81 (1972) [hereinafter cited as \textsc{Sykes \& Glasbeek}].

\textsuperscript{71} \textsc{Macken}, \textit{supra} note 70, at 27-28.

\textsuperscript{72} “The words 'conciliation' and 'arbitration' not only pre-empt the capacity of the Commonwealth parliament to legislate directly in the field of labour law, they also have an important bearing on the type of arbitral tribunals which can be set up pursuant to the Commonwealth statute and they impose strict limits on the powers of any such tribunals.” \textit{Id.} at 40. “[A]rbitration' connotes that the function of an arbitrator is a judicial function which can only be exercised between the parties to a dispute. . . .” \textsc{R. v. Commonwealth Court of Conciliation and Arbitration; ex parte Whybrow \& Co.}, 11 C.L.R. 1, 25 (1910). “[D]ispute connotes the existence of parties taking opposite sides, to which I would add that the word 'arbitration' connotes the same idea. In the nature of things an industrial dispute may be prevented from coming into existence by various means, but the only means which the Parliament is authorized to employ are conciliation and perhaps arbitration.” \textsc{Australian Boot Trades Employees' Federation v. Whybrow \& Co.}, 11 C.L.R. 311, 317-318 (1910).

\textsuperscript{73} \textsc{Macken}, \textit{supra} note 70, at 57-63.

\textsuperscript{74} \textit{Id.} at 64-68.

\textsuperscript{75} See generally \textsc{Sykes \& Glasbeek}, \textit{supra} note 70, at 385-433 and cases cited therein. As Mr. Justice Moore, President of the Conciliation and Arbitration Commission has stated, “the villain of the piece, if there is a villain, is the Australian Constitution by which our forefathers gave very precise powers to the federal Parliament in industrial matters but did not include, for instance, the power for the federal Parliament to legislate directly on industrial matters.” \textit{Address to Industrial Relations Society of New South Wales, Aug. 8, 1973} (text reproduced in \textsc{Macken}, \textit{supra} note 70, at 201-05).

\textsuperscript{76} “. . . Parliament has adopted a cautious, if not conservative, approach to using the [Commerce] power, confining legislation to enlarging the powers of the Conciliation and Arbitration Commission in the maritime, stevedoring and aircraft industries [only].” \textsc{Macken}, \textit{supra} note 70, at 28. Contrast this with \textsc{NLRB v. Jones \& Laughlin Steel Corp.}, 301 U.S. 1 (1937).
ing between parties in more than one state. It is not surprising, therefore, that legal conflicts have frequently occurred between the federal and state systems. Yet, despite the broad areas of potential conflict, in practice the tribunal which resolves a particular dispute will usually be determined by the kind of award (state or federal) that traditionally covers the industry in question. Although accommodation is almost always achieved, it is often through resort to such adroit means as creation of a "paper dispute" and the contrivance of an interstate dispute within an essentially intrastate industry. Such practices are common.

B. Operation of the System

This is not the place to describe the detailed workings of the Australian system, but I will comment in broad terms on the manner in which the system operates. I shall refer to the federal and state procedures as a single system, which it has largely become.

Despite its imperfections, the overall plan has proved to be a durable, if not always effective, instrument for regulating industrial relations. Although it has not fulfilled all of the principal objectives for which it was created, it has developed other virtues worth noting and preserving. It is presently undergoing a major transformation—more in the manner in which the procedures are being used than in the basic statutory structures. The latter seem firmly established and are not likely to be materially altered. A conciliation process together with governmental arbitration tribunals having the capacity to issue awards will surely continue as prominent features on the industrial landscape, but their usage has already changed and will likely undergo even greater change in the future. Although employers and unions still operate within the statutory forms, they are relying increasingly upon direct negotiations, often punctuated by industrial action (generally intermittent strikes) to settle their disputes.

80. See Sykes & Glasbeek, supra note 70, at 435-438. As Dixon, J. wrote in R. v. Portus; Ex parte Federated Clerks Union of Australia, 79 C.L.R. 428, 439 (1949): "The time has gone by when the unreality of paper disputes formed a subject of enquiry or consideration, and at this date it would be 'unreal' to attempt to insist on a quantitative standard of disputants across the border as a condition of the extension of a dispute beyond a State."
81. Interview with J. Halfpenny, Secretary of Amalgamated Metal Workers Union, Victoria, in Melbourne, Australia, June 9, 1974. See also Laffer, Does Co-
In examining contemporary usage, reference to the overall development of the arbitration system is essential. Historically, the arbitration system fostered the growth of both unions and employers' associations. Both are principal parties to the arbitration proceedings and are essential to the orderly operation of the system. From the beginning, the entire legislative program has overtly favored trade unionism, for it is the unions who initiate the disputes (usually by filing of a "log of claims") and present the cases. Technically, the arbitration awards (though not the awards of the wages boards of Victoria and Tasmania) cover only union members. However, the terms of the awards can be and generally are extended to non-union employees. There are also other advantages which union members are given over non-union employees, such as the ability to seek direct enforcement of an award and certain employment preferences. Union preferences for employment opportunities represent the most common form of Australian union security.

Although total union membership is comparatively high, the union movement is fragmented into approximately 300 different unions. Because of the laws' requirements regarding union registration, each union enjoys a theoretical monopoly over the employee classifications and industry groupings which it represents. The coverage...
of awards and the division of industry into areas of union representation are relatively inflexible; in fact they are based on almost the same craft and classification divisions that existed early in the century. This system protects weak unions. But there is an active trend toward merger of unions, and as direct negotiations supersede arbitration—which now seems to be happening—timid unions and those which represent employee groups with little economic leverage will be encouraged to affiliate with stronger unions. It is worth noting that several of the large unions are headed by militant left-wing leadership. These unions are quick to use industrial action to press their demands, and some of their officers often express a lack of faith in both compulsory arbitration and the economic system. The militant leadership carefully tries to avoid the appearance of compromise or cooperation with employers, though their actions seem acutely tuned to eliciting favorable responses to worker dissatisfaction over bread-and-butter issues and other rank-and-file wants. During the late sixties and early seventies when the employment market was tight, these unions often tested the right to strike and were soon convinced that direct negotiations yielded more than compulsory arbitration.

From its inception, one of the tenets of the Australian system has been that the parties should be encouraged to reach their own agreements with the aid of governmental conciliation; indeed, conciliation has always been an integral part of the dispute settlement procedures. The procedural emphasis, however, is on conflict resolution, for notwithstanding the Constitutional mandate for “prevention” as well as for “settlement” of disputes, the statutory processes stress settlement. The basic instrument which records the terms and conditions of employment—just as the collective bargaining contract does in the United States—is the award that results from the adversary, quasi-judicial arbitration process. Even when the parties negotiate and agree upon terms without third party determination, a fairly common procedure today, they generally incorporate the results into a consent award, thereby making it a statutory instrument and not simply their own mutual agree-

93. Interview with J. Halfpenny, supra note 81.
94. Clarkson, supra note 82, at 20; Yerbury & Isaac, supra note 77, at 426-28.
At an earlier period, when settlements depended less on industrial action and almost entirely on third party decisionmaking by members of the arbitration commissions, conciliation often tended to be ineffective. Many Australian scholars have noted the chilling effect which the availability of compulsory arbitration had on the conciliation process. Douglas Smith described a tendency of unions to avoid "real bargaining" at the conciliation stage, "for they felt that if they made a concession at that stage it would be used against them if the matter went to arbitration." Arbitration thus assumed a far greater significance than conciliation, at least until unions began to rely more heavily upon work stoppages or threat of stoppages to achieve settlements.

An often voiced criticism of the arbitration system is that it has been particularly inflexible with regard to working conditions at the establishment level. The statutory conciliation and arbitration machinery is not well suited to solving problems peculiar to a single establishment, or for that matter to a single employer. The industry arbitration awards tend to provide for minimum conditions and resemble in their effect the collective bargaining agreements commonly negotiated at industry levels in Western Europe. In Australia there is usually minimal contact at the shop level between the employer and the union or any other form of employee organization, although that situation seems to be changing, with the shop steward in many establishments now assuming a more important role. But there is still only a minimal level of formal bargaining and virtually no arbitration concerning local conditions other than over matters relating to union security.

The patterns are being modified, however, and new approaches more nearly resemble American collective bargaining than the tradi-

95. SYKES & GLASBEEK, supra note 70, at 649.
96. See note 66 supra.
97. Yerbury, Union/Management Relations at the Shop Floor, 15 J. IND. REL. (Australian) 28 (1973); Yerbury & Isaac, supra note 77, at 443-44; Fisher, Plant Level Relationships: The Role of the Tribunal, 14 J. IND. REL. (Australian) 264 (1972); Mccarney, Plant Level Relationships: The Shop Steward, 14 J. IND. REL. (Australian) 272 (1972); Moth, Industrial Relations in the Plant—A Study of Evolution Within the System, 14 J. IND. REL. (Australian) 282 (1972); Hince, Unions On the Shop Floor, 9 J. IND. REL. (Australian) 214 (1967).
98. Unlike the continental countries of Western Europe, there are no works councils. For a survey of European works councils, see Balfour, Workers' Participation in Western Europe, in PARTICIPATION IN INDUSTRY 181 (C. Balfour ed. 1973); Blanpain, The Influence of Labour on Management Decision Making: A Comparative Legal Survey, 3 IND. LJ. 5 (1974).
99. See note 97, supra, and Grunfeld, supra note 92, at 345-46.
100. See SYKES & GLASBEEK, supra note 70, at 739-49; Martin, supra note 89, at 180-82.
The arbitration process itself has been neither flexible nor innovative regarding subject matter of awards; hiring, firing, lay-offs, seniority, job assignments, organization of work, welfare and pension plans, and many other subjects that are common mandatory subjects of bargaining in the United States have almost always been treated as managerial prerogatives in Australia. Among the reasons for such a restrictive approach, at least at the federal level, is the perceived Constitutional restraint on the jurisdictional authority of the

101. Interview with Paul Zorzi, Industrial Relations Manager, Co-operative Bulk Handling, Ltd. (North Freemantle, West. Austl.) at Armidale, N.S.W., May 25, 1974. Illustrative of the new "collective bargaining" type agreements is the "Registered Agreement" (under Western Australian Arbitration Act) No. 14, 54 W. Aus. Ind. Gazette 524 (Requested May 24, 1974) between Hamersley Iron Pty. Ltd. and various Western Australian branches of the following: Australian Workers’ Union; Amalgamated Metal Workers’ Union; Electrical Trades Union; Federated Engine Drivers and Fireman’s Union; Carpenters and Joiners, Bricklayers and Stoneworkers Industrial Union; Plumbers and Gasfitters Employees Union; Operative Painters and Decorators’ Union; Australian Society of Engineers; and Australian Transport Workers Union.

102. Questions on which North American unions expect to have a say and, if possible, spelled out in the contract (such as dismissals, disciplinary action, seniority claims, transfers, etc.) are not generally prescribed in a clear way in Australian awards. There is virtually a presumption that the employer has sole discretion in these issues. For example, to be rid of a ‘troublemaker’ all the employer needs to do is give a week’s notice of dismissal. The employer’s right at common law to hire and fire is virtually unimpaired under Australian compulsory arbitration. . . . Isaac, supra note 82, at 33.

In Reg. v. CTH Indus. Ct. Ex parte Cocks, 43 A.L.J.R. 32 (1968), the High Court per Barwick C.J., Taylor and Owen J.J., stated:

[The kind of relationship to which . . . 'industrial matters' refers by the expressions 'employer' and 'employee' is . . . in substance the relation called at common law 'master and servant.' This, of course, means that there never could be an industrial dispute simply as to whether it should or should not be permissible for an employer in any particular industry to employ independent contractors in performing relevant work outside the employer’s factory or workshop and that a dispute as to any such question would actually be an industrial dispute. . . .]

Id. at 33.

See C. Mills & G. Sorrell, Federal Industrial Laws (1968): "[A]wards do not, in general impose any restrictions on the right of an employer to select, transfer, promote, regress, suspend or dismiss staff. It is for the employer to decide who is the best man for a particular job, and unless it can be shown that the appointee is one who should not be placed in charge of men the employer's right to select his own supervisors must be maintained. . . ." Id. at 131 and cases cited therein. “[T]he Commission will not ordinarily interfere with the common law right of an employer to 'hire and fire' . . . .” Id., citing Australian Meat Industry Employees’ Union v. Peter Dargin, 53 C.A.R. 1 (1944). "In the earlier cases it was said that the Arbitration Court would not alter classifications or gradings established by the employer; it would only determine appropriate rates and conditions for those gradings. . . ." Id., citing Australian Railways Union v. Victorian Railways Commissioner, 23 C.A.R. 708 (1926). In a later case involving the same parties, applying the principle of the traditional rights of management, the Arbitration Court refused to require that railway gangers be supplied with watches; Australian Railways' Union v. Victorian Railways Commissioners, 44 C.A.R. 619 (1941).
Conciliation and Arbitration Commission. But there are other reasons attributable to the fact that arbitration, almost by definition, operates outside the area in which the employers and employees normally confront each other. Thus, it is an awkward device for solving shop-level problems or providing a detailed code to govern employee relations at the place of work. It is not surprising that Australian employers complain about the recalcitrance of the trade unions to agree to rationalization programs or to productivity bargaining. There is no statutory format for such bargaining, and hence there is insufficient incentive for it. There is also a lack of adequate enforcement machinery for agreements reached outside the confines of the arbitration award format. In the absence of legal machinery, however, many progressive employers and unions are developing their own direct negotiation practices, de facto collective bargaining agreements, and formalized grievance procedures. Heretofore, these did not commonly exist under the impersonalized award system. Most employers prefer not to call the new practices "collective bargaining," for in Australia that term—especially among employers—carries the same pejorative connotation as does "compulsory arbitration" in the United States.

Settlement of industrial disputes, whether achieved through formal arbitration procedures or through direct negotiation and conciliation, most often has assumed the form of an award. An award, whether the result of third party determination or consent of the parties (i.e., a "consent" award or a "registered agreement"), is the only rele-

103. Whether the Commonwealth Arbitration and Conciliation Commission has jurisdiction or not largely turns on whether or not a dispute is "genuine" and "interstate." See Constitution § 51 (xxv) (Austl.). The High Court has with some regularity found disputes not to be "interstate" and thus outside the ambit of the Commonwealth System. E.g., Caledonian Collieries Ltd. v. Australasian Coal and Shale Employees' Federation [No. 1] 42 C.L.R. 527 (1930) and [No. 2] 42 C.L.R. 558 (1930). Likewise, where there is no "dispute," the High Court axiomatically holds that the Commonwealth Commission has no jurisdiction; see George Hudson Ltd. v. Australian Timber Worker's Union, 32 C.L.R. 413, 435 (1923). For a comprehensive treatment of the constitutional basis of the Commonwealth labor law, see Macken, supra note 70.


105. See Sykes & Glasbeek, supra note 70, at 647-57.

106. See note 101 supra. Bob Hawke, President of the Australian Council of Trade Unions, in an interview with the author, readily recognized "that there has been a distinct move . . . to more collective bargaining, and correspondingly the significance of the Commission has diminished." He stressed, however, that the Commission has "a very significant role still," though the system "has been mixed for a long time. This is what most commentators about the Australian industrial relations scene don't seem to have understood, that we've had collective bargaining sitting along side the arbitration system for a very, very many years. . . ." (Melbourne, July 8, 1974).

vant instrument, other than the individual, employment contract which is capable of being directly enforced by legal process. But there are serious attendant problems with the award format. Private or informal agreements between unions and employers, unlike American collective bargaining agreements, are not legally enforceable; at least that is the accepted assumption on which the industrial relations community operates.

Enforcement of compulsory arbitration awards has posed serious problems throughout the history of the statutory procedures, and today the country seems further from an acceptable solution than ever. Various devices have been used to achieve compliance with awards. At times, and in some state jurisdictions even today, strikes in violation of awards have been directly outlawed by statute. More commonly, a strike is deemed unlawful only if the arbitration tribunal has inserted a "bans" clause in the award, in which event court enforcement and levying of penalties for contempt become possible. Employer compliance with awards has never posed problems other than those associated with the conventional legal proceedings required for enforcement of an award. On the other hand, strikes in breach of an award or to protest the inadequacy of an award, whether or not union initiated, have posed problems that have defied solution.

The history of federal strike prohibition procedures and how they have been applied should be of special interest to American observers, particularly those who would naively equate compulsory arbitration with an iron-clad, no-strike system. Until 1930, federal legislation prohibited strikes directly. In that year, following an election in which strike penalties had been the principal campaign issue, the Labor Party was voted into power. In 1935, however, the High Court held that the Arbitration Court could include a provision in an award imposing a penalty for breach of the award. And beginning in 1950, "bans clauses" (i.e., no-strike provisions) were included in the awards. In 1951 the Act was construed to allow injunctions against strikes in

109. Id. See also Sykes & Glasbreek, supra note 70, at 647-57.
111. Sykes & Glasbreek, supra note 70, at 544-46.
112. Thomson, supra note 110.
113. Id. at 1.
114. Id. at 2.
115. See note 59 supra.
breach of a bans clause and to allow levying of penalties.\textsuperscript{117} Strikes are not of recent origin; they have commonly occurred throughout the entire history of the Conciliation and Arbitration Act, and penal sanctions against them have never been wholly effective.\textsuperscript{118} During the 1950's and throughout the 1960's, union opposition to the penal provisions and to the heavy fines imposed as a result of strike action steadily increased.\textsuperscript{119} The matter came to a head in 1969 with the jailing of the secretary of a major union and the union's refusal to pay the large fine levied against it for a strike in breach of an award. Such fines again became a heated political issue, and the government—the conservative Liberal-Country Party government (not the Labor Party, which did not regain national power until 1972)—acquiesced in a moratorium on the use of legal sanctions against striking unions.\textsuperscript{120} A minor procedural change was made in an amendment to the Act to provide for a "cooling off" period before penalties could be levied against striking unions;\textsuperscript{121} otherwise the penalty provisions remained in the statute. Yet employers and the government no longer apply for penal sanctions. It is a fact of political life that strike penalties have become unenforceable.\textsuperscript{122}

Although compulsory arbitration was intended to prevent strikes, it obviously was never very successful in doing so.\textsuperscript{123} Australia's strike rate over the last fifty years has been consistently high by international standards, and in the last few years even high by American standards.\textsuperscript{124} When strikes do occur, they are usually settled by direct negotiations\textsuperscript{125} rather than through the arbitration machinery. This is not how the system was intended to operate.

Although the early planners' expectation that compulsory arbitration would render work stoppages unnecessary proved erroneous, their expectation as to another feature of the system proved correct. They

\begin{itemize}
  \item \textsuperscript{117} See R. v. Metal Trades Employers' Association; \textit{Ex parte} Amalgamated Engineering Union, 82 Commw. L.R. 208, 58 Austl. Argus L.R. 93 (1951); Thomson, \textit{supra} note 110, at 2.
  \item \textsuperscript{118} Laffer, \textit{supra} note 81, at 161; Thomson, \textit{supra} note 110, at 4.
  \item \textsuperscript{119} See tabulation of fines imposed against striking unions, 1956-65, in Laffer, Elements of Australian Compulsory Arbitration: A Reassessment, reproduced in Isaac, \textit{supra} note 82, at 17. See also Mills, The Practice of the Commonwealth Industrial Court in Strike Cases, 7 Australian Lawyer 137 (1968); Laffer, \textit{supra} note 81, at 161.
  \item \textsuperscript{120} Thomson, \textit{supra} note 110, at 4.
  \item \textsuperscript{121} \textit{Id}.
  \item \textsuperscript{122} Interview with J. Macken, Q.C., at Sydney, June 17, 1974. Grunfeld, \textit{supra} note 92, at 346 n.68, reported that "only about 35 of the 500 federal awards currently contain 'bans clauses.'"
  \item \textsuperscript{123} Laffer, \textit{supra} note 81.
  \item \textsuperscript{124} See notes 144-145 infra; Taylor, Conciliation and Arbitration Down Under, 2 Personnel Mgmt., June, 1972, at 27.
  \item \textsuperscript{125} Laffer, Dispute Settlements: A View From Australia, in ABA Section of Labor Relations Law, 1974 Proceedings 137 (1974).
\end{itemize}
anticipated that the system would lead to a more equitable distribution of wages and conditions of employment. H. B. Higgins, father of the system and first president of the Conciliation and Arbitration Court, introduced the concept of the "basic wage," which was deemed the wage required for the basic needs of an average man and his family in a civilized community. Eventually this concept evolved into a national minimum wage. Other wages became related to the basic or minimum wage, and now substantially all wages are interrelated in an intricate fashion, depending on such factors as the identity of the industry, employee classification, and the skill and responsibility required for the particular job. Wage extremes in Australia are less pronounced than in the United States, and the award system has tended to reduce wage differentials among industries and among firms in the same industry. This leveling effect, widely acclaimed as a positive feature of the system, does represent meaningful progress toward the concept of "wage justice" envisioned by the founders. In setting wages, the tribunals take into account the "public interest," meaning the economic effect of the awards. Historically, awards have tended to be normative rather than accommodative, a practice which may

127. Sykes, Labour Arbitration in Australia, 13 AM. J. COMP. L. 216, 231 (1964);
Portus, supra note 68, at 24-28.
129. Whitaker, supra note 88, at 95.
130. See note 126 supra. See also Taylor, supra note 124, at 27.
132. "Normative" in the sense that the Arbitration Commission is charged with making awards in the national interest instead of merely seeking to "accommodate" the parties before it. See Duffy, Compulsory Conciliation—The Albertan Experience 14 J. IND. REL. (Australian) 29, 33 (1972). See also H. Woods & S. Ostry, Labour Policy and Labor Economics in Canada 93-94 (1962). "Normative arbitration . . . attempts to impose a 'just' solution on the parties, taking into account the merits of the case rather than the power situations of the parties or the acceptability of the terms to both sides." Isaac, supra note 82, at 20. Grunfeld lists four guiding principles which the Arbitration Commission purports to follow in determining wage claims:

1) the principle that a reasonable subsistence wage "floor" should be placed under all employees; 2) the principle of basic comparative wage justice, i.e., that the rate for a class of job should be the same for that class of job irrespective of the profitability of the employing organization; 3) the principle that the differences between basic rates and differentials for different classes of jobs should be consistent within and among plants and employing organizations; and 4) the principle that over-award payments are not forbidden even in theory by the arbitration system.

Grunfeld, supra note 92, at 340.
133. Accomodative arbitration results in an award which embodies substantially the terms which the parties themselves would have reached, bearing in mind their bargaining powers. The 'rules of evidence' of a purely judicial procedure, if not abandoned, are diluted and the main objective of arbitration is to find something close to a mutually acceptable solution. The award is
have contributed substantially to the dissatisfaction that unions and workers have displayed toward many awards over the last two decades.

The conciliation and arbitration system certainly has achieved a more equitable distribution of economic benefits than would have been the case without it. The federal arbitration machinery provides a flexible means to set national minimum wages, and the annual National Wage Case has turned the Australian Conciliation and Arbitration Commission into a de facto incomes tribunal, though one with only limited authority. This authority is limited more by practice than by law, simply because wages and working conditions are no longer set primarily by governmental arbitration. They are now usually arranged by direct negotiations. Thus, the wage increases awarded in the 1974 National Wage Case represented only a small fraction of the total increase in national wages. According to some observers, this system has proved more inflationary than a pure collective bargaining system would have been, because the Australian wage fixation procedure has become a multi-tiered process. Here is the typical scenario: (1) Direct negotiation produces a wage increase in one of the major segments of the economy (e.g., in the metal industry), the effects of which then "flow on" to employees in other industries. (2) The National Wage Case follows. (In 1974, the bellwether Amalgamated Metal
Workers Union\textsuperscript{138} engaged in a series of strikes to obtain a wage increase while the hearing in the National Wage Case was actually in progress.) The National Wage Case adds an additional increment to that "total" wage, and is put into effect directly by other parties through a "flow on"\textsuperscript{139} to other awards, including formal state awards and consent awards in both the federal and state systems. This increment thus becomes applicable to virtually all employees throughout the country. (3) Over-award settlements providing for further increases are also commonly negotiated or granted on top of the minimum wages provided in the awards.\textsuperscript{140}

C. Outlook for the Future

As a non-Australian, I am naturally hesitant to form judgments about how Australian industrial relations should operate and cautious about making predictions as to how it will operate in the future. Nevertheless, the observations reported here are as objective as possible considering my affection and respect for the Australian nation and people. My vision of the system and its future has nothing to commend it except the fact that I have been an outsider looking in; therefore my range of vision and its perspective are somewhat different from those of an Australian examining the system, but the subject viewed is the same.

In Australia a free-wheeling form of collective bargaining has grown up within the compulsory arbitration system. Strikes became even more common than they had been once it was demonstrated and acknowledged that penal sanctions were not sufficient to deter strike action. Since an arbitration award, by definition, is the product of a third party, a strike in violation of such an award does not carry the same moral onus as a strike in violation of one's own agreement. As Professor Kahn-Freund observed: "Workers will go on strike, whatever the law may have to say about it."\textsuperscript{141} While there are some possible deterrents to strike action, it is easy to conclude that in Australia, despite the noble intentions and good will originally invested in the compulsory arbitration system, the law could not contain workers and unions who felt they were not getting their fair share through the award process.

\textsuperscript{138} The Metal Trades Award, the principal vehicle for the National Wage Case, has traditionally performed a central trend-setting role. Grunfeld, \textit{supra} note 92, at 336.


\textsuperscript{141} Kahn-Freund, \textit{supra} note 54, at 5.
Thus, it is no longer possible to regard Australian industrial relations as an operational example of compulsory arbitration. The body and the parts of the compulsory machinery still exist, but they are not being utilized as the primary means for determining wages and working conditions; nor are they able to provide a firm and effective mechanism for settling labor disputes. While few employers wish to acknowledge that what has emerged is collective bargaining, and while most trade unionists and government labor officials still use the rhetoric of compulsory arbitration, the country's labor disputes are currently being conducted within a form of collective bargaining. But, it is a form peculiar to the Australian system and a form that is still taking shape.

The Australian public and employers have good reason not to like what is happening, and one often hears nostalgic pleas for returning to the "good old days" of compulsory arbitration. But when the penal sanctions in the award system became meaningless, strikes became more popular. With the pressure of an almost full-employment economy and a high rate of inflation, dispute settlement in the early seventies involved the spectacle of collective bargaining gone wild—it was doing-what-comes-naturally in an industrial relations setting. Strikes sometimes occurred as spontaneous reactions to minor grievances,142 but more often were organized union efforts to keep wages in line with or slightly ahead of the spiraling cost of living. The strikes were especially disruptive because of their relative unpredictability. There were no contract termination dates or notices similar to those under Taft-Hartley Section 8(d)143 giving lead time warning to employers and their customers that a strike might be in the offing. The transformation in the functioning of the arbitration system had left the parties without an adequate receptacle in which to put their agreements. In 1973, Australian strikes accounted for approximately 50% more man-days lost per worker than strikes in the United States for the same period,144 and during the first three months of 1974 the strike rate in Australia increased five-fold over what it had been in the same quarter of the previous year.145 "Australia crippled by strikes" was a common newspaper headline that year,146 and indeed vital services in many of the major cities were in serious jeopardy. The improvement in the strike picture for 1975 must be attributed to the recession and

142. Isaac, supra note 82, at 34.
144. See note 58 supra.
145. 5,623,000 working days were lost during the first quarter of 1973 as compared with 24,831,000 working days lost in the first quarter of 1974. Australian Bureau of Statistics, Industrial Disputes I (March, 1974).
high rate of unemployment.\textsuperscript{147} Hopefully, the Australian industrial relations community will eventually be able to structure the direct bargaining process into more orderly channels. Acceptance of legal enforceability of collective agreements, whether labeled "consent awards" or "collective contracts," would go far toward stabilizing the new system, but I have little reason to believe that this will happen in the foreseeable future.

The existing conciliation and arbitration commissions are not likely to be abandoned, though their function has been modified. Australia is probably fortunate in having developed a tradition of governmental intervention in wage settlements, for the federal Conciliation and Arbitration Commission could be adapted to administer an incomes policy should that be warranted.\textsuperscript{148} During slack economic periods, reliance on the arbitration tribunals will probably increase, for unrestricted collective bargaining accompanied by strikes may not seem so attractive when unions have little economic power. The weaker party in industrial relations has traditionally preferred arbitration to economic confrontation. Some weak unions will thus probably continue to rely on arbitration or "flow on" even during improved economic periods. And the National Wage Case, now an established annual institution, will surely continue to adjust the country's minimum wages and serve as a leveling force between wage extremes among different companies and industries.

The federal arbitration system, especially in the context of the National Wage Case, offers an unparalleled opportunity to provide a forum for centralized bargaining. If labor and management can achieve sufficient maturity in their bargaining relations, the National Wage Case, with support from the highly respected President and Deputy Presidents of the Commission, could become the balance wheel in a reasonably stable industrial relations operation.\textsuperscript{149}

\textsuperscript{147} Unemployment through the first three quarters of 1974 averaged 5.6%. This figure is best understood when compared with the 1972 unemployment rate of 0.9%. Inflation, as expressed by changes in the cost of living index, was charted at an average rate of 16.6\% throughout most of 1975. Mr. Justice Moore, President of the Arbitration Commission, warned of increasing inflationary pressures during post-1975 years, since wage boosts had averaged 32\% while prices had risen during the comparative period at a rate of 16.7\%. The \textit{Australian Weekly News}, February 12, 1976.


\textsuperscript{149} \textit{See generally} Laffer, supra note 125. Malcolm Frazer (see note 151 infra), when he was Shadow Minister for Labour, told the author that he would be "in favor of moving to a situation where most [significant wage] changes take place at one time of the year to avoid leapfrogging and the relativity problem—which is only a further stimulus for others." He indicated support for the establishment of "national guidelines within which industry regulation could be undertaken and set, and the Arbitration Commission might have a significant part in making up those sensible guidelines." He stated
such a maturity will undoubtedly require more unity and agreement within the trade union movement on objectives—both ultimate and short-range—than presently exists; these conditions may be difficult if not impossible to attain. On the employers' side, a candid recognition that the clock will not turn back is certainly required, along with a realization that penal sanctions will not make compulsory arbitration work, even if it should become politically feasible to return to reliance on such sanctions. It probably will also be necessary for employers to be willing to bargain away some of their cherished managerial rights, and perhaps even to grant meaningful forms of worker participation. But a trade-off of some of those rights for enforceable agreements and productivity bargaining could conceivably provide the catalyst for a revitalization of the system.

Problems of constitutionality and federalism may inhibit the government's role in the revitalization process, yet obviously the government could play a large and important role. Although Australia's newly elected Liberal-National Country government possesses the political power to make significant revisions in the Commonwealth industrial relations system, it is to be hoped that it will not do so without first attempting to reach an agreement with responsible trade union leadership on common objectives. Failure to achieve cooperation on new labor legislation could evoke the kind of opposition that proved disastrous to the 1971 British Industrial Relations Act. However, if labor and management should evidence a willingness to cooperate in the national interest, the existing conciliation and arbitration machinery could provide a framework for a stable and efficient system, albeit one with a good measure of direct bargaining and some legal strikes; it might also ensure meaningful moratoria on strikes and lockouts for specified time periods. To achieve these objectives, management will certainly have to give up some managerial rights, but the quid pro quo for extended strike moratoria—as well as for realistic productivity bargaining—might be well worth the exchange.

I am hopeful and cautiously optimistic that in time there will emerge from the present mixture of conciliation, compulsory arbitra-

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that he favored a policy which would include "a national conference to try and establish [such] guidelines which would be followed for industry awards or agreements." (Melbourne, July 4, 1974.)

150. MACKEN, supra note 70, at 173-79.

151. As a result of the general election held on December 13, 1975, the Liberal Party and National Country Party now control 72% of the seats in the House of Representatives and 55% of the seats in the Senate. AUSTRALIAN WEEKLY NEWS, January 15, 1976. The new Prime Minister is Mr. Malcolm Frazier.

tion, and direct bargaining a workable and reasonably efficient new industrial relations system. I shall not know what to call the system nor how to classify it, but such problems are to be expected from the land of the platypus, kangaroo, koala, and kookaburra. Like those creatures which defied conventional classification, the new system will be uniquely Australian. It may look strange, but I think it will work.

V

INTEREST ARBITRATION IN THE PUBLIC SECTOR

It now becomes necessary to make a distinction between interest arbitration in the public and private sectors. As public sector collective bargaining ages and matures, however, differences between the sectors tend to blur. A more meaningful distinction would focus on the essentiality of service rather than on the legal personality of the employer. Transit employees, for example, become neither more nor less essential when they begin working for a public employer. The same is true of key hospital personnel. What difference does it really make whether they are employed by a city-owned hospital, a private non-profit hospital corporation, or a private for-profit hospital corporation? If police and firefighters should not be permitted to strike it is mainly because of the essentiality of their services, not because they are public employees. If police and fire services were provided by private companies pursuant to municipal franchises, as is most often the case with public utilities, a strike by such employees would be no less crippling. Are key power plant operators employed by a private utility company non-essential by virtue of the legal personality of their employer? It is true that collective bargaining within a competitive profit-motive industry is different from bargaining with a publicly owned monopoly; but is the latter substantially different from bargaining with a privately owned but publicly regulated monopoly? And what shall we conclude about bargaining with an “essential” but non-regulated industry?

Having asked those questions and having noted that the differences between the public and private sectors may be more theoretical than real for purposes of collective bargaining,153 it is still necessary to yield to the conventional classifications and consider the two sectors individually. Separate treatment is necessary if for no other reason than the fact that the statutory jurisdictions are different. Private sector industrial relations are regulated almost entirely under the Labor Management Relations Act154 and the Railway Labor Act,155 both fed-

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153. But see notes 313-21 infra. See also Edwards, The Developing Labor Relations Law in the Public Sector, 10 DUQ. L. REV. 357, 358-64 (1972).
eral statutes; the public sector is regulated by each state and many municipalities, with federal employees covered by federal statutes and executive orders. The public sector does not want for variety, at least until such time as federal legislation pre-empts the state labor relations laws.

A. State and Local Experience

In conjunction with the increasing acceptance of public employee bargaining, interest arbitration has been growing in popularity. Almost every state allows public employees some form of bargaining and union organizational rights, and twenty-seven of these states currently provide for some type of public sector interest arbitration—they are Alaska,\textsuperscript{156} Connecticut,\textsuperscript{157} Delaware,\textsuperscript{158} Hawaii,\textsuperscript{159} Indiana,\textsuperscript{160} Iowa,\textsuperscript{161} Maine,\textsuperscript{162} Massachusetts,\textsuperscript{163} Michigan,\textsuperscript{164} Minnesota,\textsuperscript{165} Montana,\textsuperscript{166} Nebraska,\textsuperscript{167} Nevada,\textsuperscript{168} New Hampshire,\textsuperscript{169} New Jersey,\textsuperscript{170} New York,\textsuperscript{171} Oklahoma,\textsuperscript{172} Oregon,\textsuperscript{173} Pennsylvania,\textsuperscript{174} Rhode Island,\textsuperscript{175} South Dakota,\textsuperscript{176} Texas,\textsuperscript{177} Utah,\textsuperscript{178} Vermont,\textsuperscript{179} Washington,\textsuperscript{180} Wisconsin,\textsuperscript{181} and Wyoming.\textsuperscript{182} Interest arbitration is also provided independently by a growing number of municipalities, including Vallejo and San Francisco, California; New York City, New York; and Eugene, Oregon.\textsuperscript{183}

\begin{itemize}
  \item \textsuperscript{156} ALASKA STAT. \S 23.40.200 (1972).
  \item \textsuperscript{157} CONN. GEN. STAT. ANN. \S\S 7-472, 7-473 (Supp. 1976).
  \item \textsuperscript{158} DEL. CODE ANN. tit. 19, \S 1310 (1975).
  \item \textsuperscript{159} HAW. REV. STAT. \S 89-11 (Supp. 1974).
  \item \textsuperscript{160} IND. STAT. ANN. \S\S 26-6-4-9, -11 (Burns Supp. 1976).
  \item \textsuperscript{161} IOWA CODE ANN. \S 90.1 (Supp. 1976).
  \item \textsuperscript{162} ME. REV. STAT. ANN. tit. 26, \S\S 965(3), 965(4), 979-D (1974).
  \item \textsuperscript{163} MASS. GEN. LAWS ANN. ch. 150E (Supp. 1975).
  \item \textsuperscript{164} MICH. COMP. LAWS \S 423.233 (Supp. 1975).
  \item \textsuperscript{165} MINN. STAT. \S\S 179.69 (Supp. 1976).
  \item \textsuperscript{166} MONT. REV. CODES ANN. \S 59-1614(9) (Supp. 1975).
  \item \textsuperscript{167} NEB. REV. STAT. \S 48-810 (1974).
  \item \textsuperscript{168} NEV. REV. STAT. \S 288.200 (1975).
  \item \textsuperscript{169} N.H. REV. STAT., \S 273-A-12 [GERR F-108; 51:3814] (1975).
  \item \textsuperscript{170} N.J. REV. STAT. \S 34:13A-7 (1965).
  \item \textsuperscript{171} N.Y. CIV. SERV. LAW \S\S 205, 207 (McKinney Supp. 1975).
  \item \textsuperscript{172} OKLA. STAT. ANN. tit. 11, \S 548.7 (Supp. 1975-76).
  \item \textsuperscript{173} ORE. REV. STAT. \S\S 243.742-.762 (1975).
  \item \textsuperscript{174} PA. STAT. ANN. tit. 43, \S\S 217.4, 2101.804 (Supp. 1975).
  \item \textsuperscript{175} R.I. GEN. LAWS ANN. \S 36-11-9 (Supp. 1975), \S\S 28-9.1-7, -9.2-7, -9.3-4, -9.4-10 (1969).
  \item \textsuperscript{176} S.D. COMP. LAWS ANN. \S 9-14A-a (Supp. 1975).
  \item \textsuperscript{177} TEX. REV. CIV. STAT. ANN. art. 5154c-1 (Supp. 1975).
  \item \textsuperscript{178} UTAH CODE ANN. \S 34-20a-7 (Supp. 1975).
  \item \textsuperscript{179} VT. STAT. ANN. tit. 21, \S 1733 (Supp. 1975).
  \item \textsuperscript{180} WASH. REV. CODE ANN. \S 41.56.450 (Supp. 1975).
  \item \textsuperscript{181} WIS. STAT. ANN. \S 111.77(3) (1974).
  \item \textsuperscript{182} WYO. STAT. ANN. \S 27-269 (1967).
  \item \textsuperscript{183} VALLEJO, CAL., CHARTER \S\S 809, 810 (1969). For judicial interpretations of these charter sections Fire Fighters Union, Local 1186 v. City of Vallejo, 12 Cal. 3d
Before examining the arbitration statutes, another trend should be noted. Although most states still prohibit strikes by public employees, there is a movement toward legalizing these strikes, at least for non-safety personnel. Right-to-strike legislation now exists in Alaska,\(^{184}\) Hawaii,\(^{185}\) Minnesota,\(^{186}\) Montana,\(^{187}\) Oregon,\(^{188}\) Pennsylvania,\(^{189}\) and Vermont.\(^{190}\) Considerations of public health, safety, and welfare determine which employees are permitted to strike. In each of these states except Montana, mediation and/or fact-finding must be utilized before the strike is legal, and various procedures, including injunctions, are available to protect against danger to the public health, safety, and welfare.

In contrast to the few states which have legalized some public employee strikes, the overwhelming majority of states expressly prohibit all such strikes regardless of occupational classification or impact on the public.\(^{191}\) Three states not only positively prohibit the strikes but also expressly outlaw collective bargaining agreements: Texas,\(^{192}\) for all employees except policemen and fire fighters where the municipality has adopted a statutory procedure by referendum; North Carolina\(^{193}\) and Tennessee,\(^{194}\) for all employees. Although most states authorize public employee collective bargaining by statute, some do so by executive orders or regulations,\(^{195}\) some by case law,\(^{196}\) some by attorney

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\(^{184}\) ALASKA STAT. § 23.40.200 (1972).

\(^{185}\) HAWAII REV. STAT. § 89-12 (Supp. 1975).

\(^{186}\) MINN. STAT. ANN. § 179.64 (Supp. 1976).

\(^{187}\) MONT. REV. CODES ANN. § 41-2209 (Supp. 1975).

\(^{188}\) ORE. REV. STAT. § 243.726 (1975).

\(^{189}\) PA. STAT. ANN. tit. 43, § 1101.1003 (Supp. 1975). However, guards and court employees are prohibited from striking: \textit{id.}, § 1101.1001. There is no strike provision for policemen or firefighters.

\(^{190}\) VT. STAT. ANN. tit. 21, § 1730 (Supp. 1975).

\(^{191}\) See generally U.S. Department of Labor, \textit{SUMMARY OF STATE POLICY REGULATIONS FOR PUBLIC SECTOR LABOR RELATIONS} (1975).


\(^{194}\) There is no statute, but the Tennessee Supreme Court has held that counties and municipalities have no authority to enter into collective bargaining agreements. Weakley County Municipal Elec. System v. Vick, 309 S.W.2d 792 (1957).


general's opinion,¹⁹⁷ and others by a combination of attorney general's opinion and case law.¹⁹⁸ The District of Columbia follows a Commissioner's Executive Order.¹⁹⁹ Considering the focus of this paper, I shall not attempt to review the wide variety of procedures, other than interest arbitration, that are applicable to public sector bargaining and impasse resolution. It suffices to note that some states provide no procedures whatever,²⁰⁰ whereas at the other extreme some make available several different procedural devices to assist the parties in resolving their interest disputes.²⁰¹

There are considerable variations among the interest arbitration statutes. But before examining the statutory patterns, some general features should be noted. The most marked procedural contrast is found between conventional arbitration and final-offer arbitration. The most familiar format is voluntary interest arbitration, in which arbitration functions as a terminal resolution of the contract dispute similar to its use in the private sector.²⁰²

It may be assumed that voluntary interest arbitration may be used legally in any state that permits the negotiation and signing of binding public employee collective agreements. And in some states where there is neither statutory nor applicable case law specifically enabling voluntary interest arbitration, this procedure could be used through provisions in collective bargaining agreements. In the seven states allowing some or all public employees a limited right to strike,²⁰³ voluntary binding arbitration is also available to the disputants, often predicated on a failure of fact-finding or mediation. In Alaska,²⁰⁴ New Jersey,²⁰⁵ and Oregon,²⁰⁶ the parties may request voluntary binding arbitration at any point in the negotiations.


¹⁹⁸. Louisiana: Opinion of Special Council to Attorney General, 4-3-72; New Orleans Firefighters Ass'n Local 632 v. City of New Orleans, 204 So. 2d 690 (1967).
²⁰¹. E.g., Hawaii, Iowa, Michigan, Minnesota, Oregon, Pennsylvania, Rhode Island and Wisconsin.
²⁰². See Part VI infra.
²⁰³. See notes 184-90, supra.
States providing compulsory—or "legislated"—arbitration for at least some categories of public employees are Alaska, Connecticut, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, Wisconsin.

207. Much has been said in recent years on the pros and cons of legislated arbitration. A prime controversy arises over binding arbitration imposed by legislative enactment, generally called "compulsory arbitration." The word "compulsory" is unfortunate; when that word appears to describe legislated arbitration, the reasoning process of many city officials and union representatives disappears.

We pay taxes decreed by legislatures, but do not refer to "compulsory" taxes. Employers do not describe workmen's compensation as "compulsory" workmen's compensation, but it is. The recent Occupational Safety and Health Act is about as "compulsory" as one can get, but it is not so designated.

"Compulsory arbitration" is simply a process of dispute settlement directed by a legislature.


214. *Minn. Stat. Ann.* § 179.69 (Supp. 1976), applicable to any person whose state or local employment duties involve work or services essential to the health or safety of the public: *id.*, § 179.63(11); supervisory and confidential employees, principals and assistant principals: *id.*, § 179.65(6).


217. *N.Y. Civil Serv. Law* § 209.4 (McKinney Supp. 1975), applicable to state and local (excluding New York City) police and firefighters.


221. *S.D. Comp. Laws Ann.* § 9-14A-2 (Supp. 1975), applicable to state and local police and firefighters. This statute was recently held unconstitutional. See text accompanying notes 368-71 *infra*.

222. *Utah Code* Ann. § 34.20a-7 (Supp. 1975), applicable to firefighters.

Compulsory arbitration is becoming especially common in statutes applicable solely to police and firefighters. The newest and an increasingly popular variation of compulsory arbitration is final-offer arbitration. This is known under a variety of names, including "last best offer," "forced choice," "either-or," and "one-or-the other" arbitration. In the "total package" format each party submits to the arbitrator its last bargaining offer, from which the arbitrator must make a binding selection without modification. Another variation is the "issue-by-issue" format, in which the arbitrator is not obligated to select the final offer of either party in its totality but may select final positions on an issue-by-issue basis.

A hybrid form of interest arbitration which is drawing an increasing number of proponents is mediation-arbitration or "med-arb." It has been successfully applied in various public and private sector contexts, including nursing, longshoremen, newspaper, printing, and restaurant disputes. As the term implies, this procedure combines techniques: a mutually selected neutral is given the authority to assume the role of arbitrator and issue a final decision in the event he is unsuccessful in mediating. While none of the public sector statutes expressly provides for "med-arb," several have procedures (e.g. tripartite panels) which have frequently been adapted to achieve a "med-arb" effect. As Rehmus has noted, "the interest arbitration process is evolving as less and less a judicial proceeding and more and more a search for accommodation." Responsible neutrals interact with the parties, either directly through their representatives or indirectly through the party members on the panel, and thus are often able to assist the parties in reaching their own agreements. "[I]n the hands of skilled [neutrals] the interest arbitration process is a continuation of, rather than a replacement for, the negotiation process."
1. The Nature and Structural Patterns of State Interest Arbitration Statutes

Four major aspects of the state interest arbitration statutes will be examined: (a) extent of coverage; (b) initial impasse resolution procedures (mediation and fact-finding); (c) the arbitration process (divided into composition of panel, format of offers, internal procedure, existence of standards, and allocation of cost); and (d) the degree to which an award is final and binding. The general model to which the majority of these statutes conform will be briefly described, after which variations will be noted.

a. Extent of Coverage

The extent of public employee coverage can be analyzed along state and municipal lines, as well as by employee classification (e.g., policemen, firefighters, teachers, and other state and municipal employees).

All states with some form of interest arbitration allow arbitration of local firefighter disputes, and all of these except Wyoming and Utah allow the same for local police. Although the majority allow arbitration of state firefighter and police disputes, Connecticut, Oklahoma, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming do not. Teachers are allowed to arbitrate in about half the states in this group. Alaska, Delaware, Massachusetts, Michigan, New York, Oklahoma, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming do not include such a right in their statutes. Connecticut authorizes only local teacher arbitration.

The Texas statute is unusual in that it requires a local referendum before a local jurisdiction is brought under its coverage. Coverage may also be revoked in the same way.

b. Initial Impasse Resolution Procedure

A majority of the interest arbitration states provide for exhaustion of mediation and fact-finding before arbitration. There are, however, a number of variations in this practice. Oregon provides for both steps, though they may be omitted if the parties agree, in which case

232. See notes 157-179 supra.
234. CONN. GEN. STAT. ANN. § 10-153f(c) (Supp. 1976).
the dispute can proceed directly to arbitration. Texas, Michigan, and Wisconsin provide for initial mediation but not fact-finding; Maine is similar in this respect, but both parties must request fact-finding for it to occur. A further variation appears in Nebraska, where teachers have to exhaust both procedures but police and firefighters apparently do not. The states that do not require either mediation or fact-finding are Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, and Wyoming.

It has been argued that mediation is usually ineffective when the prospect for certain arbitration exists. However, it is also generally agreed that a contract written by the parties themselves, with necessary compromises and adjustments, will be better tailored to their individual needs and therefore more acceptable than one written by a neutral third party, regardless of the neutral's reputation and expertise. Thus, mediation can and does serve an important function, but it is not sufficient for the parties to know in the abstract that they can write a better contract than an arbitrator; they must also have the incentive to do so. Consequently, the best arbitration procedures may in the long run be those which are the least attractive to the parties; if so, mediation would assume even greater importance.

c. Arbitration Process

After the parties have exhausted preliminary statutory requirements, the final impasse resolution process is generally arbitration. Each division of the arbitration process will be discussed separately.

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238. Tex. Rev. Civ. Stat. Ann. art. 5154c-1, § 9 (Supp. 1975). As Texas had no mediation service when the Act was passed (and still does not), mediation is only prescribed if "a mediator can be appointed by agreement of the parties or by an appropriate agency of the state."
243. State employee disputes must initially be submitted to conciliation and fact-finding. R.I. Gen. Laws Ann. § 36-11-8 (Supp. 1975). However, teachers and municipal employees may agree to eliminate these initial procedures, R.I. Gen. Laws Ann. §§ 28-9.3-9, -9.4-10 (1969); and there are no conciliation or fact finding procedures applicable to policemen and firefighters (id., §§ 28-9.1-7, -9.2-7).
(1) The arbitration body is normally a tripartite board. A majority of states allows each party to choose one arbitrator, and the two thus chosen appoint the neutral chairman.\(^{246}\) If the two cannot agree, there are several variations in the manner in which the neutral is selected. The most common approach is for the public employment agency to choose. In Wyoming, however, the district judge sitting where the dispute is located chooses;\(^ {247}\) in Oregon, the parties are given a list of seven possible arbitrators and alternately cross off names until three remain;\(^ {248}\) in Washington, each party submits three names to the public labor director who chooses one for each party, and these two arbitrators then appoint the neutral.\(^ {249}\)

An alternative to the tripartite panel is the single arbitrator. Iowa,\(^ {250}\) Minnesota,\(^ {251}\) Oregon,\(^ {252}\) and Rhode Island (for state employees, not including policemen, firemen, or teachers)\(^ {253}\) allow the parties to have a single umpire, and Wisconsin\(^ {254}\) requires it. In Wisconsin, the public labor body submits a list of five possibilities to the parties, who then alternately cross off names until one is left.

Nebraska offers another alternative: a Court of Industrial Relations which hears the disputes.\(^ {255}\)

(2) Interest arbitration may be either conventional or final-offer. Conventional arbitration is the format made familiar by habit and tradition. The arbitrator, or panel of arbitrators, hears the evidence and renders a "reasonable" award. The award's format is thus fashioned by the arbitrator according to his own best judgment, though it will almost always be based on express or implied statutory standards. Such an award may contain bits and pieces of the positions of both parties; it may be the result of compromise or splitting the difference; it may even be an affirmation of the position, or positions, of either party on one or more issues. However, so long as at least one of the parties believes that the arbitrator will merely split the difference, there may be little incentive for hard bargaining. In fact, the farther apart the parties are at impasse the better from the vantage point of the party

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251. MINN. STAT. § 179.72 (Supp. 1976).
254. WIS. STAT. ANN. § 111.77(3) (1974).
with such an attitude. This practice contributes to the “chilling effect” that is often cited in opposition to compulsory arbitration. Another objection to conventional arbitration is that too much authority is given to the arbitrator—an “outsider”—so that awards may be either too high or too low in relation to the parties’ expectations or to their ability to comply.

Whether exaggerated or not, these criticisms provided the impetus for the development and encouragement of final-offer arbitration as an alternative form.\textsuperscript{256} The rationale behind final-offer arbitration is that each party will be afraid to lose completely, for there can be no splitting of the difference because both parties at impasse submit to the arbitrator the last offer made to each other and the arbitrator must choose the more reasonable. As Stern, Rehmus, Loewenberg, Kasper, and Dennis have observed:

One of the claimed advantages of final-offer-by-package arbitration over conventional arbitration is that the parties know that they may be penalized heavily if they do not formulate realistic positions. Theoretically, the parties will reach settlements more often under such a system and, in cases where agreement is not reached, they will be closer together so that the arbitrator will have less room for error.\textsuperscript{257}

As mentioned previously, there are now two distinct forms of final-offer arbitration: total package and issue-by-issue; both have advantages and drawbacks. Total package produces the highest degree of fear because each final offer must be viewed in its entirety as to its reasonableness. A party may have the best offer on every issue but

\textsuperscript{256} Stern, supra note 227, at 79, report that the Wisconsin decision to adopt the little known and untried system of final-offer arbitration rather than conventional arbitration was attributable primarily to the preference of public employee union leaders who believed that the “all-or-nothing consequences would bring greater pressure to bear on management to make offers that would provide the basis for settlement through direct negotiations than would conventional arbitration.” Regarding the changeover from conventional arbitrations to final-offer in Michigan, the authors report that “(o)ne major concern was that [conventional arbitration] diminished the parties’ efforts to resolve their own disagreements in the course of collective bargaining,” but it was also asserted by some critics that “conventional arbitration resulted in giving arbitration panels too great an opportunity to render excessively high economic awards.” \textit{Id.} at 41. \textit{See also id.} at 184.

Final-offer arbitration was part of the “arsenal of weapons” proposed in 1971 by the Nixon Administration in H.R. 3596 to deal with emergency labor disputes in the transportation industry. Other “weapons” included in the bill were a 30-day extension of the cooling-off period and partial operation. Woodley, \textit{Emergency Labor Disputes and the Public Interest: The Proposals for Legislative Reform, 17 St. Louis L. Rev. 47, 61-62 (1972). For a discussion of the final-offer procedure see id. at 66-71. For an early discussion of the utility of final-offer as a form of compulsory arbitration see Stevens, \textit{Is Compulsory Arbitration Compatible with Bargaining?}, 5 Ind. Rel. 38, 44-50 (1966). See note 512, infra.

\textsuperscript{257} Stern, supra note 227, at 184.
one, and still lose. This process supposedly produces harder bargain-
ing and closer offers once they are submitted.

The fact that a party might lose an entire contract due to a single
issue prompted the development of the issue-by-issue format, which al-
allows the arbitrator to pick the most reasonable offer on each issue. Al-
though issue-by-issue submission appears to be more equitable than the
total package approach, the element of fear is not as great. Under the
former, the parties theoretically will tend to submit more issues for res-
olution but will not feel as compelled to bargain forcefully over each
issue.258

In my view, total package final-offer arbitration would seem to of-
fer greater incentive to the parties to engage in real bargaining. How-
ever, the result under such a “sudden death” procedure may prove un-
attractive or even inequitable. The arbitrator may be presented with
a choice of undesirable alternatives, often because of the mixture of
a single unreasonable item in an otherwise preferable package.259

The majority of states specify that conventional arbitration is to
be used, although issue-by-issue final offer arbitration is becoming an
attractive alternative; Connecticut,260 Iowa,261 Massachusetts,262 and
Michigan263 have adopted that system. Wisconsin has chosen total
package final-offer arbitration, but its statute also allows the parties to
choose conventional arbitration.264 Eugene, Oregon, has devised a re-
finement on total package arbitration which allows the parties to submit

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258. “Although the evidence is very slim, it appears that final-offer-by-package ar-
bitration [in Wisconsin] brings the parties closer together than do the procedures in
[Michigan (final offer issue-by-issue) and Pennsylvania (conventional arbitration)].”
Id. at 184-86. Charles Rehmus, at the recent Society of Professionals in Dispute Reso-
lution (SPIDR) meeting, reported on a study of experience under the Michigan and Wis-
sconsin final offer statutes covering police and firefighters:

Michigan’s experience during a 38-month period using conventional arbitration
revealed an average of four requests per month. During the first 20 months
of final offer arbitration, this rate has not changed to any great degree. On
the other hand, the type of final offer employed may make a difference. In
Wisconsin, which uses package final offer, 15% of the negotiations result in
requests for arbitration. Michigan employs issue by issue final offer on eco-
nomic items. In this state, 25% of the negotiations result in petitions for arbi-
tration. This 10% differential can be attributed to the greater risk associated
with package final offer.

4 SPIDR NEWSLETTER 1 (January/February 1976).

259 See Witney, Final-Offe r Arbitration: The Indianapolis Experience, 96
MONTHLY LAB. REV. 21 (May, 1973) [hereinafter cited as Witney], which describes a
final offer award in which the arbitration board was not satisfied that the decision was the
right one because, due to the mixture of issues, neither proposal was deemed entirely
reasonable. But see Long & Feuille, supra note 183.

two final offers, the theory being that this will increase uncertainty as to each party's final position and thereby enhance bargaining possibilities and reasonableness in the offers.\textsuperscript{265} Another alternative has been adopted by New York, which offers issue-by-issue arbitration but in the conventional rather than the final-offer format.\textsuperscript{266}

(3) The actual procedures for arbitration are fairly standard: a hearing is held shortly after the panel is chosen; the chairman gives reasonable notice to the other arbitrators and the parties; the chairman presides and is empowered to take testimony from witnesses; documentary as well as other evidence is allowed. The proceedings are generally informal, although the panel has the power to administer oaths, require attendance and testimony under subpoena, and may apply to the appropriate court for contempt orders. A record is kept and transcripts are available.\textsuperscript{267}

One crucial aspect of the procedure, often overlooked, is the encouragement of continued negotiation during the actual arbitration process. Procedures in the new Connecticut statute\textsuperscript{268} are worth noting in this respect, for the statute incorporates several devices which seem to invite informal mediation by the neutral arbitrator and also seem to be designed to encourage the parties to modify their proposals as the hearing progresses. The arbitration panel is given an extended opportunity to weigh the parties' positions, not only against statutory standards but also against educated estimates of what the parties consider to be the zones of acceptability. Specifically, the parties are required to set forth contract language and alternative language as to each others' proposals, after which the panel issues a statement on the unresolved issues; the parties then file briefs, and at a fairly late stage in the proceeding file their statements of last best offers on each unresolved issue. Within twenty days thereafter, the panel issues its award, treating each unresolved issue as a separate question to be decided. The Connecticut statute thus attempts to institutionalize practices already common, albeit on more of a de facto basis, in those states which have accumulated experience with final offer arbitration. Rhemus reports that "any experienced negotiator knows [that] a fixed and unalterable 'final offer' is ordinarily a contradiction to the terms of good-faith bargaining. This is simply because the parties' so-called 'final'
offers frequently are not and will not stay final."\(^{269}\) His study revealed that "flexibility in the timing and nature of final offers is obviously an open invitation to the arbitrators to mediate. The data suggest that they are doing so."\(^{270}\)

Michigan\(^{271}\) and Massachusetts\(^{272}\) have an extremely flexible procedure for accommodating further negotiation. Once the process has begun, the arbitration panel can remand the dispute to the parties for up to three weeks of further negotiations. Negotiations may continue throughout the entire arbitration period.

A further source of encouragement for continued bargaining is the nature of the process itself. Under either conventional or final-offer arbitration, if a party feels that its position will be unacceptable to the neutral arbitrator, it can attempt to reach an agreement before the award is rendered. That party can receive the requisite information either from "reading" the panel or from its partisan arbitrator. The informality of the process is conducive to feedback and helps the parties to gauge their progress.\(^{273}\)

To the extent that the statutes allow it, one of the most effective ways for bargaining to continue is for the panel to assume a "med-arb" role. As previously noted, under med-arb, the neutral arbitrator also acts as mediator to encourage settlement.\(^{274}\) Iowa, however, specifically prohibits mediation roles for the arbitrators. Under statutes which are silent on the point, the system may nevertheless be geared toward med-arb. To illustrate, Michigan, Pennsylvania, and Wisconsin may be compared. Michigan and Pennsylvania have tripartite panels, whereas Wisconsin provides for a sole arbitrator. Pennsylvania utilizes the conventional approach, as opposed to final-offer in Michigan and Wisconsin; however, Michigan's final offer plan is issue-by-issue, while Wisconsin's is total package. A recent study\(^{275}\) of these procedures con-

\(^{269}\) Rhemus, Is A "Final Offer" Ever Final?, in NAA PROCEEDINGS, 1974, supra note 266, at 78.
\(^{270}\) Id. at 79.
\(^{271}\) MICH. COMP. LAWS § 423.237a (Supp. 1975).
\(^{272}\) MASS. GEN. LAWS ANN. ch. 150E (Supp. 1975).
\(^{273}\) Experience has demonstrated that responsible neutrals through a process of interaction with their panel members and with the parties' representatives do actually achieve a genuinely close understanding of the legitimate interests and expectations of both parties to the dispute. Hence, they often are able to mediate or to set a framework in which the parties negotiate their own settlement. Even if not, the process is considerably more than a judgment from what has been characterized as that of an "itinerant philosopher." It appears that in the hands of skilled individuals the interest arbitration process is a continuation of, rather than a replacement for, the negotiation process. Rhemus, supra note 229, at 311.
\(^{274}\) See text accompanying note 229 supra.
\(^{275}\) STERN supra note 227, at 180-82.
cluded that Michigan was best suited for med-arb, Pennsylvania next, and Wisconsin ill-suited for the process.

Michigan was deemed best suited for med-arb because of its tripartite panel and its issue-by-issue selection. First, this structure makes it easier for the neutral to convey his feeling about a disputed issue to one of the partisan arbitrators, who in turn can inform his party that the neutral is leaning the other way. When that party modifies its offer to suit the neutral, the neutral can then play the same game with the other party. In this way, an effective neutral can draw the parties even closer. Interest arbitration by this method is almost purely accommodative in form and probably also in result. In a sense, it is a continuation of the bargaining process.

Pennsylvania's panel structure also facilitates the flow of information. However, its shortcoming is that the arbitration form is not issue-by-issue. It naturally is easier to mediate one issue at a time than an entire package. Also, the absence of a final-offer format puts the parties under less pressure to modify their positions. Wisconsin was found to be the least suited for med-arb because it lacks convenient channels for two-way communication, having only one arbitrator and using a total package approach.276

An important statistical conclusion from the study is that although about the same number of awards were rendered in Wisconsin and Michigan during the period examined, twice as many cases were submitted to arbitration in Michigan as in Wisconsin.277 Wisconsin's use of the total package final-offer approach seemed to produce greater reluctance to resort to arbitration; yet, the med-arb possibilities in Michigan may in the long run counterbalance this difference.

(4) Most of the state legislatures have considered it important to include statutory standards to guide the panel and minimize its discretion. However, three states—Alaska, Pennsylvania, and South Dakota—do not include any standards. The statutes which contain criteria are usually quite specific. For example, Michigan lists the following standards for the arbitration panel to follow:

(a) The lawful authority of the employer. (b) Stipulations of the parties. (c) The interests and welfare of the public and the financial ability of the unit of government to meet those costs. (d) Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally: (i) In public employment in comparable communities. (ii) In private employment in

276. *Id.* at 180-83.
277. *Id.* at 183. Also see text accompanying note 258 supra.
comparable communities. (e) The average consumer prices for goods and services, commonly known as the cost of living. (f) The overall compensation generally received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received. (g) Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings. (h) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or private employment. 

Variations of these criteria are numerous. Minnesota and Nevada do not specify any factor other than financial ability of the employer to pay, though other “normal” criteria may be used in Nevada. Wyoming requires its panel to follow the Uniform Arbitration Act. Several statutes omit reference to cost of living analysis and overall compensation, specifically those of Connecticut, Iowa, Nevada, New York, and Texas. Massachusetts, New York, Rhode Island, and Texas require consideration of such factors as hazards, and physical and mental qualifications and skills.

Washington, although requiring comparisons with other private and public employees, limits that study to one geographical area—employees on the West Coast. Texas limits comparison to private sector employees in the same labor market area.

What criteria are most often utilized by arbitrators in public sector interest disputes? Published awards reveal generous citation of various standards as bases for determination, but the standard most commonly applied to public sector employment is comparison with similar occupational groups in comparable localities. A comparability

289. E.g., City of Birmingham, 55 Lab. Arb. 716 (1970) (Roumell, Arbitrator); City of Marquette, 54 Lab. Arb. 981 (1970) (Barstow, Arbitrator); Arlington Educa-
standard thus takes advantage of collective bargaining which has been achieved by employees and employers outside the bargaining unit in issue.

The most troublesome standard is that of "ability to pay." Just what does it mean? Surely it does not mean that the total resources of the governmental body and its taxpayers are insufficient to fund an award. It generally means that the difference between the revenues that the public employer estimates it will receive during the contract period and the amount it is willing to spend in the area is insufficient to fund the award. This is usually a question of priorities. Answers to the question are illustrated by knowledgeable observers from the four states with the most extensive experience in public sector interest arbitration. Commenting on the extent to which inability to pay was a factor in the arbitration proceeding, Charles Rehmus (Michigan), James Stern (Wisconsin), Joseph Loewenberg (Pennsylvania), and Arvid Anderson (New York) offered the following observations:

**MR. STERNS:** In Wisconsin, inability to pay has not been pleaded seriously by many cities or counties. It's not that they aren't poor, but their experience in pleading it before arbitrators has been generally unsuccessful, so they have not relied heavily on it.

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292. *Id.*
MR. REHMUS: In Michigan, ability to pay—or more precisely, inability to pay—has often been raised in an almost frivolous context. . . . It is argued that [a] self-imposed budgetary limitation operates as an inflexible limit, wholly preventing us from awarding wages any higher than can be afforded within the limits of this budget. . . . Arbitrators simply have not accepted this argument.

There are times, however, when inability to pay is raised in a legitimate and crucial form; for example, when a school district can prove that it is in a deficit situation on either a cash or accrual basis. . . . A legitimate inability-to-pay argument creates a tendency for the arbitrator to spread the period of time over which a community is given to become comparable with other communities. Rarely, however, has an arbitrator suggested that inability to pay legitimizes substandard wages or reductions in real earnings over the long run.293

MR. LOEWENBERG: Ideally, if the parties in Pennsylvania are following the timetables provided in the act, which often they do not do, the whole negotiation process, including the award, is completed before the budget has been finalized. Then, of course, it is a matter of inserting the proper amounts in the budget and raising the necessary revenues from whatever source. The argument of inability to pay is raised very often, and I do not think its effect has any more emphasis in Pennsylvania than in the other states. The instances of an arbitrator’s reducing an award because of inability to pay are not prevalent. Where we do get low economic awards, and we do have some awards on a statewide basis that are low, it seems to me not so much a matter of inability to pay as of regional differences in wages and similar factors.294

MR. ANDERSON: . . . Whether or not there is a strike route or the arbitration route, collective bargaining agreements are not self-implimenting. Therefore, the money to honor that agreement, if one is reached or the arbitration award issued, has to be found. . . . So, ability to pay is involved in the situation. Where is the funding to come from? The fact is that the bargaining process heightens the issue of how public services are going to be funded, which services are more important, what priorities should be established. Therefore I think bargaining serves a salutary public purpose in helping to stimulate public policy decisions.295

Determining what effect arbitrators should give to the “public interest” in formulating their awards is like asking whether arbitrators should dispense “equity.” An argument has been made that arbitration in the public sector distorts the political process and upsets priorities that should properly be within the purview of the legislature. How-

293. Id.
294. Id.
295. Id.
ever, once a legislative judgment in favor of binding arbitration has been made, that should be the overriding consideration and should ordinarily dispose of the political distortion argument. Unless a particular award is so unrelated to specific statutory standards and evidence in the record that a reviewing court would be compelled to set it aside or modify or remand it, the award should be deemed "in the public interest." To ask more of the arbitrator, to ask him to dispense abstract justice, would probably lead to a system of normative rather than accommodative awards. In time, this could undermine the process. The evidence to date indicates that legislated arbitration has not produced a brand of misguided industrial justice imposed by an outsider without responsibility. According to Arvid Anderson, a long-time observer and participant in the system, what has been developing is "the use of third-party assistance with the possibility of finality, or arbitration, if other means fail. What has been evolving is not 'mediation to finality,' to use Willard Wirtz's phrase, but what the Kagels call 'med-arb to finality.'"296 If the awards should ultimately fail to command broad acceptability, legislated arbitration may indeed prove only an adjunct to, rather than a substitute for, strike action. The Australian experience seems to support that prognosis.297

(5) The cost of arbitration and its allocation between the parties is another important factor to be considered, because costs may have a deterrent effect on proceeding to arbitration. If there is little cost involved, the parties may go to arbitration more easily, with less incentive to bargain out their dispute. This is a situation common in arbitration of "minor" disputes ("rights" disputes) under the Railway Labor Act.298

The typical state statute requires the parties to share the cost of arbitration equally.299 Nebraska reduces the costs somewhat because the judges on the Court of Industrial Relations are paid by the state.300

296. Id. at 63. "Interest arbitration in New York City has been concerned with accommodation, adjustment, and acceptability rather than formal win-lose adjudication, as is the emphasis in most contract rights disputes. Words such as accommodation, adjustment, and acceptability—are they not synonymous with compromise? And are not arbitrators criticized for compromising awards? The answer is yes, but compromise is the essence of collective bargaining, and compromise may be just what the arbitration of new contract terms calls for." Id. (Italics in original). See also note 229 supra.

297. See Part IV supra.


300. Neb. Rev. Stat. § 48-806 (1974). For any industrial dispute not within the jurisdiction of the Court of Industrial Relations, the parties may agree to have the C.I.R. arbitrate the dispute. In such a case, costs are imposed on the parties. Id. § 48-820.
In Michigan, the state shares the cost of arbitration with the two parties.\(^{301}\) In Pennsylvania the state is also involved, paying all the costs in security guard and court employee arbitrations.\(^{302}\) The public employer in Pennsylvania also pays for the neutral in firefighter and police disputes.\(^{303}\) In Alaska, the allocation of costs is provided for by the arbitration award.\(^{304}\)

d. Finality of Award

Although most states provide that an award of the arbitration panel is final and binding,\(^{305}\) there are significant alternatives. Maine, for example, authorizes only an advisory opinion on wages, pensions, and insurance, but a final and binding decision on other matters.\(^{306}\) Michigan allows only economic issues to be arbitrated, and it is the panel’s responsibility to determine what issues are economic.\(^{307}\) In Rhode Island, the awards for policemen and firefighters are binding,\(^{308}\) whereas awards concerning state employees are advisory on wages but binding on other matters;\(^{309}\) awards concerning teachers and local employees are binding as to all matters except money expenditures.\(^{310}\) Pennsylvania considers an award only advisory if enabling legislation is required.\(^{311}\) Oklahoma offers the novel alternative of a binding award if the public employer accepts it.\(^{312}\)

2. Observations on State Public Sector Experiences

The several states and municipalities which have provided such excellent laboratory conditions to test new dispute settlement methods and variations of old methods deserve commendation. Their programs, with boldly pragmatic features, offer a refreshing approach to

\(^{303}\) Id. § 217.8 (Supp. 1975).
\(^{304}\) Alaska Stat. § 09.43.100 (1973).
\(^{305}\) See discussion of judicial enforcement of “final and binding” awards in Part V, D, 2, accompanying notes 387-406 infra.
\(^{309}\) Id. § 36-11-9 (Supp. 1975).
\(^{310}\) Id. §§ 28-9.3-12, -9.4-13 (1969).
\(^{312}\) Okla. Stat. Ann. tit. 11, § 548.9 (Supp. 1975). See City of Tulsa and IAFF Local 176, GERR No. 541, B-3 (1974), where arbitrator Rohman noted that the panel kept in mind the nonbinding nature of the award “to avoid an exercise in futility.” For a variation of this approach, see the recently enacted New Hampshire statute, N.H. Rev. Stat. Ann. § 273-A-12 [GERR F-108; 51:3814] (1975), which allows voluntary arbitration, i.e. binding fact finding by a neutral; but if either party rejects the factfinder’s recommendations, the matter is submitted to the Legislature for resolution.
problem-solving in an area where there are usually more hard problems than good answers. Experiences under these programs, particularly those in essential services, have prompted a number of studies and much commentary. Most of the reports are favorable. Loewenberg, Walker, Glasbeek, Heppel, and Gershenfeld, in their excellent international work on compulsory arbitration, are especially sanguine. They conclude:

In the short run compulsory arbitration in the public sector seems to have passed its tests. Most analysts and participants are satisfied with the process. Serious collective bargaining with a substantial number of settlements continues despite the availability of arbitration. Strikes are virtually unknown among employees covered by compulsory arbitration legislation. Arbitrators have not stripped management of their rights and authority. The costs of arbitration awards do not appear to be higher than settlements reached by parties in similar


314. Compulsory interest arbitration however, has its critics. For example, strong opposition has been expressed by some public sector officials, including mayors. According to Sam Zagoria, there are mayors who would rather take a strike and retain a semblance of control over the final terms of settlement than surrender all through arbitration by an impartial outsider. GERR 631, A-3 (Nov. 10, 1975). Response to a recent Milwaukee arbitration illustrates this view. After an arbitrator granted the police a 19% pay increase over the next two years, Milwaukee mayor Henry W. Maier commented: "We simply can't take the kind of beating we've been getting from outside third-party arbitrators and fact finders who have no understanding of our capacity to pay." GERR 633, B-8, 9 (Nov. 24, 1975).

315. Loewenberg, supra note 27, at ___.

316. See also Wheeler, An Analysis of Firefighter Strikes, 26 Lab. L.J. 17 (Jan., 1975).
circumstances. The public seems satisfied; at least there has been no great public outcry against the procedure. Perhaps the most telling evidence of success is the increasing adoption of arbitration as an impasse procedure. That fact indicates not only acceptance of the principle, but also satisfaction with the initial experience.\(^{317}\)

I fully agree with this report on the results of recent state experience, and join in encouraging further experimentation with the process. But I am mindful that the results reported are only “short run.” I would urge considerable caution before extrapolating those findings, which relate primarily to the special circumstances of the protective services, to other areas of public employment. Nevertheless, I too would stress the positive aspects of new and improved arbitration procedures, for they have been extraordinarily successful in the few years in which they have been used. The available data suggest that legislated arbitration, particularly for essential public services, should be favorably considered for adoption by other states.

Such data may even indicate that compulsory interest arbitration sometimes actually compels harder bargaining by the parties, since it eliminates the economic power disparities of the strike. In those cases, to paraphrase Walter Reuther, the power of persuasion may be as powerful or maybe greater than the persuasion of power. The arbitration process itself may also be tailored to encourage negotiation. Final-offer arbitration, med-arb, and increased costs provide incentives which may force the parties to attempt in good faith to exhaust bargaining and mediation before resorting to arbitration. The desire of the parties to negotiate a contract which they must live with is still the greatest incentive to bargain.

There is little question, therefore, that interest arbitration, properly structured and skillfully employed,\(^{318}\) can be a useful dispute-settlement device in the public sector, particularly where public safety, health, or welfare is at stake.\(^{319}\) However, in reviewing the limited history of public sector interest arbitration in the several states which have tried it, caution is necessary against reading too much into the success story. Aside from the fact that experiences have been too brief

\(^{317}\) Loewenberg, supra note 27, at —.


\(^{319}\) There seems to be nothing comparable to the threat of a work stoppage (and in some cases an actual stoppage) to spur the give-and-take of good faith bargaining. However, given the conventional wisdom—that interruptions of certain essential services cannot be tolerated and that in other negotiating contexts the parties may prefer to avoid work stoppages—there is a need for some type of impasse process which provides for a binding outcome and simultaneously protects union and management negotiating interests in an even-handed manner.

to provide hard data, there are other factors which must be taken into account when attempting an evaluation.

First, most of the experience has been with public safety employees who have never had the legal right to strike nor, as far as the public is concerned, the moral right. Their unions welcomed and lobbied for compulsory arbitration, which they viewed not so much as a substitute for the right to strike, but as a substitute for powerless collective bargaining or public employer unilateral action. Thus, the newer procedures command the confidence of the affected unions much as interest arbitration commands the confidence of private sector unions who use it by choice.

A second significant factor regarding the public sector experience concerns the manner in which arbitration decisions have been reached and the standards which have been used to achieve those decisions. As noted, most of the statutes specify standards; but whether they do or not, the decision-making process has almost invariably contained two main ingredients: (1) The process has been accommodative rather than normative. The arbitrators' efforts to achieve "acceptable" decisions, often using med-arb and prolonged final-offer techniques, point to the fact that they have conscientiously attempted to produce settlements which the parties would have achieved themselves had they been able to do so through collective bargaining. (2) The decisions reached, regardless of purported standards, are inevitably achieved by putting the affected employees where they belong in relation to the larger industrial relations scene. Consciously or unconsciously, the process is almost entirely a comparability determination.\footnote{See text accompanying notes 278, 286, 287, and 289 supra.} This follows naturally from the fact that most of the legislated arbitration programs have thus far involved relatively small groups of employees, so that award standards have ultimately been governed by values prevailing in the outside world where wages and conditions are largely determined, directly or indirectly, by conventional collective bargaining. So long as arbitrators have access to measurable external standards with which they can compare the interests of the groups whose contracts they are determining, assuming that the arbitrators are capable and sensitive, their awards should and likely will be reasonably acceptable.

Under such circumstances, compulsory arbitration procedures, especially those varieties which most nearly simulate bargaining and mediation, can be viable substitutes for traditional collective bargaining with the right to strike. This is particularly true for employees whose services are so essential that the community cannot afford the danger of their going on strike. But whether the same salutary results would
prevail in another type of environment is an entirely different question. It does not automatically follow that compulsory interest arbitration would be as successful for groups which have traditionally relied on strikes (whether legal or de facto) or for groups whose services are not critical to the health, safety, or welfare of the community.

Nevertheless, further experimentation and extension should be encouraged. In choosing a legislated arbitration plan, can it be determined whether any particular format is superior to the others? Several researchers and commentators have explored and debated the relative merits of conventional versus final-offer arbitration and issue-by-issue final-offer versus total package final-offer approaches, but I am unable to express any preference on the basis of existing evidence. There are too many variables affecting the data, the most important of which is that in practice the statutory format has proved to be less important than the manner in which the parties and the neutral use it. Whatever the procedure, numerous reports from experienced neutrals and from knowledgeable participants and observers point to the conclusion that even after the arbitration process is well under way an extension of the bargaining and mediation process generally continues, spurred on by informal assistance or stimulus from the neutral.\footnote{See notes 229, 268-275, and 296 supra. This observation was confirmed by experienced neutrals at the Wingspread Conference.} Thus, if the procedure ultimately assumes a med-arb character, it probably makes little difference—except for convenience factors—which arbitration format is used. Perhaps the best format is simply the one with which the community and the parties are most comfortable. But whatever the statutory device—conventional, final-offer total package, final-offer issue-by-issue, or some other variation—it should afford ample opportunity for continuous bargaining and mediation, including med-arb opportunities.

I will, however, advance an alternative legislative possibility, one which fits the do-it-yourself approach toward which the parties should be encouraged. In addition to a prescribed legislative format, a statute could also contain a provision that would allow the parties, by mutual agreement, to substitute any other form of binding impasse resolution procedure. Permitting the parties to develop a tailor-made plan of their own choosing would provide more options and thereby enhance the acceptability of the final product.

The limited experience of the various U.S. states with modern legislated arbitration programs adds useful data to our stock of knowledge about the essential attributes of interest arbitration.
B. United States Postal Service

The impasse procedures applicable to the United States Postal Service also fall in the category of public sector interest arbitration. With some oversimplification, it might be said that in basic form the Postal Reorganization Act of 1970\(^{322}\) combined the National Labor Relations Act with a system of binding arbitration to resolve impasses and avoid strikes, which are prohibited. Though various features of the Postal Act differ from the NLRA, this study is concerned only with the Act's impasse procedures. Under the Act, employees have the right to organize and bargain collectively for wages, hours, and working conditions.\(^{323}\) Although the Act prohibits strikes, it attempts to ensure adequate procedures for resolving disputes by combining voluntary negotiation, mediation, fact-finding, voluntary arbitration, and binding compulsory arbitration.\(^{324}\)

These procedures are invoked in the following manner. A party desiring to terminate or modify the current collective bargaining agreement must notify the other party of the proposed change not less than 90 days before expiration of the contract. Unless agreement is reached within 45 days, the party originally filing notice must notify the Federal Mediation and Conciliation Service that a dispute exists. Until this point, the parties presumably are still engaging in collective bargaining as in the private sector. Bargaining then continues for a second 45-day period. If during this period the parties are unable to reach a compromise agreement, they may decide among themselves on procedural rules for dispute resolution, including arbitration by a third party. If the parties reach such an agreement, the subsequent impasse provisions provided in the Act do not become operative. If at the end of the second 45-day period impasse still exists and the parties have failed to agree to binding resolution procedures, the FMCS establishes a three member fact-finding panel which submits a fact-finding report, with or without recommendations, within 45 days.

The procedure then shifts from fact-finding to mediation. Another 45-day period begins, and a concentrated effort is made to bring the parties to agreement. If mediation fails, then the final step of compulsory and binding arbitration becomes operative. Ninety days after the expiration or modification date in the current agreement, an arbitration board is convened. It is created much like the fact-finding committee, but with no members from that committee. The issues for resolution are submitted by the parties, but if the parties cannot agree on the issues, the fact-finding panel will submit them. The arbitration

\(^{323}\) Id. § 1209.
\(^{324}\) Id. §§ 410, 1206, 1207.
board holds appropriate hearings and within 45 days issues an award, which may conform with or depart from the earlier decision of the fact-finding panel. This award is final and binding on the parties and becomes part of their collective bargaining agreement.

It is significant that, with the exception of wartime and ad hoc emergency legislation, the Postal Reorganization Act was the first Congressional endorsement of compulsory arbitration. The specter of a nationwide strike of 650,000 employees in over 32,000 offices of the Postal Service motivated Congress and the Executive Branch to provide what was perceived as a practical impasse resolution mechanism.\(^3\)

There have been three national agreements negotiated thus far under the statute, the most recent of which was concluded in July, 1975.\(^2\) Prior to the signing of that agreement, there was sufficient public discussion of a postal strike to suggest that the possibility of a de facto strike may also have contributed to the successful conclusion of the collective bargaining process.\(^1\) The only time the formal procedures prescribed in the Act were invoked was during the 1971 negotiations for the initial national agreement, when fact-finding was conducted with apparent success.\(^8\)

C. Canadian Experience

Canadian experiments\(^8\) with public sector interest arbitration preceded those of the United States. I will not attempt to examine all of the Canadian programs but will attempt to highlight some of the most important statutory plans, especially federal legislation.

During the Canadian general election of 1963, collective bargaining rights for members of the Federal Public Service became an issue of some import. A government committee report was filed in 1965 recommending binding arbitration for resolution of interest disputes in the public service.\(^3\) Soon thereafter, the Postal Service employees struck, although they had no express right to do so under Canadian law. The committee report did not specifically recommend the right to strike for federal employees, yet Parliament could not ignore the obvious: "essential" workers were no longer afraid to strike. Following exten-
sive study, the Public Service Staff Relations Act— the “Canadian Plan”—was passed. It was an effort to balance the competing interests of (1) the government as employer; (2) the employees in retaining their economic weaponry; and (3) the public in being protected from loss of essential services. A unique procedural mechanism was incorporated into the Act to balance those interests. This was a combination of two tested alternatives for dispute resolution: conciliation, which includes a limited right to strike; and final and binding arbitration under which the right to strike is forfeited. The choice of methods is vested exclusively in the bargaining agents (unions), and is to be exercised prior to the commencement of negotiations.

Under the Act, if conciliation and right to strike is chosen, those employees who will not be permitted to strike (i.e., "designated" employees who perform jobs deemed “necessary in the interest of the safety and security of the public”) must be identified. Within twenty days after notice to bargain is given, the employer furnishes the Public Service Staff Relations Board (PSSRB, charged with administering the Act) and the bargaining agent a list of prospective designated employees. The bargaining agent is free to accept the list or file objections. The parties are left to agree on the list, but if their efforts are unavailing the PSSRB will step in and make the determination.

Once the designation issue is settled, bargaining over the contract may begin. If at any time during the proceedings impasse is reached, the conciliation process comes into play. A conciliation officer is appointed by the PSSRB to assist the parties in reaching an agreement; if his efforts are fruitless, the entire matter is referred to the Chairman of the PSSRB, who will consider establishment of a formal conciliation board. If the Chairman determines that such action will facilitate the resolution of the dispute, a tripartite board is constituted to hold hearings and ultimately issue a report. If no settlement is reached after the conciliation board has reported, the parties are forced to wait seven days before resort to economic action. If the union decides to strike, the work stoppage is limited to “non-designated” employees. This exhaustive conciliation procedure is designed to promote negotiated settlements.

The second alternative under the Act is final and binding arbitration. The statute gives the arbitration tribunal, which is chosen in the usual manner, some legislative direction as to what standards it should consider in making an award. These include the needs of the Cana-

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dian Public Service for qualified employees, terms and conditions of employment reasonably commensurate with the qualifications required, the nature of work performed and responsibility assumed, and conditions of employment in similar occupations in the private sector. The tribunal must keep itself abreast of the most recent rates of pay and other terms and conditions of employment prevailing inside and outside the public service. The Pay Research Bureau is an independent governmental body statutorily charged with this duty. The Bureau, under the administrative jurisdiction of the PSSRB Chariman, advises the parties as to prevailing wages and working conditions and in this way provides them with a basis for rational bargaining. The arbitration tribunal need not publish reasons for its award as long as it acts on a reasonable basis.

The choice by the bargaining agent of final and binding arbitration for impasse resolution forecloses the right to strike. If this procedure is invoked, the scope of the arbitration award is limited to rates of pay, hours of work, leaves, and discipline standards. The tribunal is expressly forbidden to deal with standards, procedures, and processes governing appointment, appraisal, promotion, demotion, transfer, layoff, release, or any other term not properly a subject of negotiation prior to impasse. The PSSRB Chairman is empowered, at the request of the parties, to appoint a conciliation officer to assist in negotiations. If impasse does result, either side may take the initiative in requesting that arbitration begin. Of twenty such requests in 1974, fourteen were made by union bargaining agents and six by public employers.  

What practical impact have these procedures had on the process of collective bargaining in the Canadian Public Service? There have been ten legal walkouts since the inception of the plan. Additionally, though prohibited by the express language of the statute, there have been fifty-two local strikes, over half of which have occurred in the last two years. This comparatively small number of strikes has been attributed to the lateral character of unit organization and the attractiveness of the statutory arbitration alternative.

The Canadian Postal Service has been involved in a number of these strikes, both legal and prohibited, the most recent of which halted mail service for three months. Suggested causes for the Postal Service's high degree of strike activity include: its status as one of the few units vertically organized, yet including workers on a national basis; interunion rivalries; displeasure with economic issues in selected areas; and existence of maverick employee groups in Quebec.

332. 7 PSSRB ANN. REP., supra note 330, at 132 (1973-74).
By far the most popular method of impasse resolution has been final and binding arbitration, for which 91 of the 108 federal bargaining units have opted to date. 334 The existing bargaining units are for the most part organized laterally to include employees performing similar tasks regardless of employer or geographic location. 335 The resulting diversity in make-up of particular units may partially explain why the arbitration/no-strike route has been more attractive to union leaders. Though the overwhelming majority of the units have chosen arbitration, only thirteen percent of the signed agreements under the plan have been the result of arbitration awards. 336 For the most part (sixty percent), final agreements have been negotiated by the parties without resort to intervention by a third party. Conciliation or mediation has accounted for 20 percent of the signed agreements, and five percent were reached after issuance of the conciliation board report. 337 Thus, in practice, the statute has made substantial progress toward the goal of increasing the number of negotiated settlements while promoting a relatively stable environment for collective bargaining.

The apparent achievements under the plan have not silenced criticism of its procedures. 338 The process for identifying essential "designated" employees after the bargaining agent has selected the conciliation/right-to-strike alternative has been criticized as being too lengthy. The parties have accused each other of stalling tactics during this phase, and some wildcat strikes have occurred. Additionally, standards for deciding who is an "essential" employee have tended to crumble at the edges. To resolve these problems, both the PSSRB, in a report issued by its Chairman, Jacob Finkelman, and the bargaining agents have offered proposals. The Finkelman Report 339 recommends elimination of the employer's preliminary listing of designated employees. It proposes instead that the employer present its list six months prior to expiration of the current contract, and also recommends an increase in mediation efforts by Board neutrals concerning designation issues. The bargaining agents have counterproposed a delay in the selection of the conciliation/strike or arbitration/no-strike options until impasse is reached in actual contract negotiations; if at this point the union

334. LOEWENBERG, supra note 27, at —.
335. SPIDR, supra note 333, at 1.
336. LOEWENBERG, supra note 27, at —.
337. Id.
338. See Crispo, Collective Bargaining in the Public Service, 16 CAN. PUB. ADMIN. 4-13 (Spring, 1973). See also SPIDR, supra note 333, at 1, 7, 8.
339. J. FINKELMAN, EMPLOYER-EMPLOYEE RELATIONS IN THE PUBLIC SERVICE OF CANADA, PROPOSALS FOR LEGISLATIVE CHANGE, PART I (1973) [hereinafter cited as FINKELMAN]. Parts II and III were published in 1974; Part II is a shorthand guide to the proposals in Part I; Part III is a draft bill for submission to Parliament.
chooses conciliation, designation discussions would begin.\textsuperscript{340} Chairman Finkelman has strongly opposed this change, predicting that potentially lengthy designation disputes would produce "disastrous results" from impatient employees.

Another major area of criticism of the existing plan is the limited scope of the binding arbitration awards. The unions have alleged that management is reluctant to bargain outside the range of proper subjects for arbitration (i.e., wages, hours, leaves, and discipline standards) when it knows in advance the limitations in the procedure for impasse resolution. The Finkelman Report disputes this, but recommends broadening the scope of arbitrable issues to include "compensation, standards of pay, and procedures relating to the administration of compensation."\textsuperscript{341} In addition, the Finkelman Report, "with some hesitation," proposes that an alternative form of arbitration, "final offer selection," be made available where the parties agree to establish procedures by which the arbitrator will be governed.\textsuperscript{342} Also currently before Parliament are counterproposals by the bargaining agents to broaden the scope of bargainable issues to include lay-off and recall, job classification, pension systems, and promotion standards. Approval of at least some of these subjects of bargaining is expected.\textsuperscript{348}

Another change recommended by the Finkelman Report would give the public employer the right to lock out employees under the same circumstances and subject to the same limitations as presently apply to a lawful strike. The right to strike would also be clarified so that the only legal strikes would be those called or authorized by the certified bargaining agent, assuming other statutory conditions had been met.

Adjustments in any procedure governing the dynamic process of collective bargaining are to be expected after eight years of experience. Overall, the Canadian Federal Service plan seems to operate successfully—a judgment grounded in the scheme's firm commitment to negotiated settlements, while leaving intact, with limitations favoring the public interest, the economic weapons available to the parties. The PSSRB plan may be contrasted with that of the Ontario Civil Service under a 1972 statute, the Crown Employees Collective Bargaining Act,\textsuperscript{344} which denies the right to strike. The history under that Act has been far from peaceful.\textsuperscript{346} Since its enactment, Ontario's Civil Service employees have campaigned vigorously for the right to strike and the alternative choice of arbitration, so far without success.

\textsuperscript{340} SPIDR, \textit{supra} note 333, at 2.
\textsuperscript{341} FINKELMAN, \textit{supra} note 339, at 164.
\textsuperscript{342} Id. at 171-72.
\textsuperscript{343} SPIDR, \textit{supra} note 333, at 8.
\textsuperscript{345} LOEWENBERG, \textit{supra} note 27, at —.
This review of the Canadian experience is of necessity selective, but other legislative measures worth noting are two 1973 British Columbia statutes. After the failure of the now defunct B. C. Mediation Commission Act of 1968,846 the province enacted the Public Service Labour Relations Act847 for employees of the provincial government, and the Labour Code848 for all other employees, both private and public sector, including police and firefighters. Both acts protect the parties' rights to resort to strike or lock-out. The Public Service Labour Relations Act provides for two collective agreements applicable to each bargaining unit: a "master" collective agreement covering all unit employees, and a "subsidiary" agreement for each specific occupational group.849 In the event the parties cannot agree on a contractual matter, either submitted by the parties or required by the Act, a mediator will be appointed to make recommendations for resolution of the impasse. Following mediation, if the parties are still unable to agree, they may submit the matters in dispute to final and binding arbitration or may resort to strike or lock-out. Both the Public Service Labour Relations Act and the Labour Code are administered by the Labour Relations Board.

Under the Labour Code, firefighters, police, and hospital unions which have bargained in good faith may elect final and binding arbitration by a single arbitrator or a panel. If such a union has so elected, economic weapons may not be used.850 A two-day strike of 300 firefighters in 1974, which went unresolved despite extensive mediation and inquiry by the Minister of Labour, was finally settled by ad hoc legislative action that terminated the strike and placed the striking employees in a merged bargaining unit under an existing collective agreement.851 The legislation also amended the Labour Code to provide for a 21-day cooling-off period for disputes in essential services.852

One other provision of the Labour Code relating to interest arbitration, Section 70,853 allows the Labour Relations Board to write the first contract between an employer and a newly certified union when the parties have failed on their own to conclude an agreement. Both sides are given an opportunity to present evidence, and the Board will

350. Id., ch. 122, § 73.
then fashion an agreement for a statutory period not to exceed one year. This “trial marriage” is arranged for the purpose of getting the parties over the initial period of distrust and bitterness which often characterizes initial contract negotiations in any collective bargaining setting. Unions have been suspicious of the provision, looking upon it as an opening wedge to compulsory arbitration.\textsuperscript{554}

In its initial “first contract arbitration” opinion, the Labour Relations Board stated that the “trial marriage” procedure would be used only as a “last resort,” and that the primary method of impasse resolution would remain the strike or lock-out.\textsuperscript{555} The Board said Section 70 would be “used sparingly . . . with the definite objective of getting a collective bargaining relationship under way.” Even where Section 70 is used, the Board will continue to encourage voluntary negotiation and settlement. In one hearing it directed the parties to repair to an adjoining room with two members of the Board panel and continue to negotiate.\textsuperscript{556} Through this form of “med-arb,” the parties were able to reach agreement on most outstanding issues. Though a few questions remained unresolved, the Board indicated that it had obtained a much clearer idea of the realistic requirements of the parties, aiding it in fashioning the balance of the agreement. The Board has stated that in a Section 70 case it will look for terms “which reflect a fairly general consensus of what should be in a collective agreement, as tailored to the requirements” of the parties.\textsuperscript{557} This unique use of interest arbitration as a remedial bargaining measure will be worth monitoring.

Canadian experiences with compulsory arbitration legislation at the national and state levels illustrate a rich variety of methods which can be applied to the resolution of interest labor disputes. Fundamental to Canada’s most successful programs is the continuing recognition of the advisability of each side retaining its economic weaponry to the extent commensurate with the public welfare, unless yielded consensually.

\textbf{D. Legal Aspects of Public Sector Interest Arbitration: Observations on Constitutionality and Enforceability}

With compulsory and voluntary interest arbitration appearing in an increasing number of public employee statutes in the United States, various constitutional and other legal questions have surfaced.


\textsuperscript{355} Teamsters Local 351 v. London Drugs Ltd. 6 (April 24, 1974).

\textsuperscript{356} \textit{Id.} at 12.

\textsuperscript{357} \textit{Id.} at 13.
1. Constitutional Questions

Constitutional objections to binding interest arbitration in the newer public sector statutes have been raised in nine state courts of last resort. In seven cases, the arbitration provisions have been ruled valid, though without unanimous agreement on reasoning; the Supreme Court of South Dakota has held the state's compulsory arbitration provisions unconstitutional, and the Colorado Supreme Court followed suit in invalidating a city charter amendment applicable to compulsory interest arbitration for police collective bargaining disputes. Two major objections have been raised, though not always in the same case: (1) improper delegation of legislative authority to the arbitration panel, and (2) lack of sufficient standards to check arbitral discretion. Other contentions, which have been more easily dealt with by the courts, include home-rule violations, violation of the "one man, one vote" principle, due process infringement, and violation of the taxing power.

The first of the modern cases was State ex rel. Fire Fighters Local 946 v. City of Laramie, where the Wyoming Supreme Court in 1968 held that the public arbitrators did not make law, they merely executed it. Their power was deemed only administrative in nature and not an interference with municipal functions; hence there was no improper delegation of authority. The Court made no legal distinction between public and private arbitration.

The Rhode Island court used a different approach when it examined its statute in City of Warwick v. Regular Firemen's Association. It held that the arbitrator had been endowed with a portion of the state's sovereignty in order to deal with public employee disputes, and could therefore be called a "public officer." The arbitration panel was thus a "public board or agency." Consequently, there was no improper delegation to a private, as opposed to a public, board. This approach has been criticized because "[a]rbitrators are in theory neutral, a status inconsistent with subjugation to one of the disputing parties. Furthermore, in those jurisdictions where one member of the tripartite panel is appointed by and in fact 'represents' the employees, it strains logic to refer to him as a 'public officer.'" No other state has adopted the reasoning of the Warwick case.

358. A recent opinion by the Iowa Attorney General should also be noted. He upheld the constitutionality of Iowa's binding arbitration statute, stating that the object of the legislation was clear; inasmuch as there were sufficient statutory guidelines, there was no improper delegation of legislative authority. He relied on the cases discussed in this section. GERR 630, B-1 (Nov. 3, 1975).
In *City of Biddeford v. Teachers Association*, Maine's Supreme Judicial Court had difficulty finding concrete reasons for upholding the validity of its statute, perhaps due to the lack of acceptable precedent. However, it looked to public policy and concluded that since public employees were denied the right to strike found in the private sector, an alternative mechanism to provide impartial adjudication of impasses was a rational legislative goal to be accorded great weight. The court noted that the legislature might well conclude that arbitrator "agents" could facilitate accomplishment of that goal and could therefore be delegated the necessary authority.

Pennsylvania and Nebraska have authorized arbitration procedures for certain public sector employees in their state constitutions. In Pennsylvania, however, such authorization is in the form of an amendment representing an exception to an anti-delegation section. Such amendment was required because a prior arbitration enactment had been declared unconstitutional under that section. With such constitutional protection, the Pennsylvania Supreme Court, in *Harney v. Russo*, found no objection to the present arbitration statute. Nebraska's constitution establishes a Court of Industrial Relations to handle certain employee disputes, and the Nebraska Supreme Court held that delegation of authority to this tribunal was not improper in *School District of Seward Education Association v. School District*.

New York and Michigan both affirmed the constitutionality of their statutes in 1975. The issues in the two cases were the same, but the Michigan court had considerably more difficulty upholding its statute than did the court in New York. The New York Court of Appeals, in the companion cases of *City of Amsterdam v. Helsby* and *City of Buffalo v. New York State Employment Relations Board*, summarily dismissed the improper delegation argument, deciding simply that "... there is no constitutional prohibition against the legislative delegation of power, with reasonable safeguards and standards, to an agency or commission established to administer an enactment." Since the New York Taylor Law contains specific standards to guide the arbitrators, the delegation was sustained.

In Michigan, however, the delegation question sparked a lively debate between the four sitting justices; they split evenly in their answers, thus affirming the lower appellate court's decision that the statute was

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364. 188 Neb. 772, 199 N.W.2d 752 (1972).
366. *Id*.
367. 332 N.E.2d at 293.
constitutional. In the companion cases of *Dearborn Fire Fighters Local 412 v. City of Dearborn* and *Police Officers Association of Dearborn v. City of Dearborn,* Justice Levin advanced the improper delegation argument by striking at the independence of the arbitration panel:

> What is sound in the exercise of judicial power and the quasi-judicial power of the grievance arbitrator, when applied to interest arbitration in the **public** sector, is not consonant with a core concept of a representative democracy: the political power which the people possess and confer on their elected representatives is to be exercised by persons responsible (**not independent**) and accountable to the people through the normal processes of the representative democracy.

He summarized the alleged deficiencies in the statute by citing improper selection of the arbitrators, absence of accountability to a governmental appointing authority, ad hoc panels precluding assessment of responsibility, and the cost of the procedure. In rebuttal, Justices Coleman and Williams relied on legislative policy designed to assuage employee tempers after the legislature had proscribed strike activity. Williams applied four criteria to test the constitutionality of the act: (1) proximity to the elective process of those performing the delegated duty; (2) sufficiency of standards of delegation and judicial review; (3) length of tenure and character of job; and (4) nature of power delegated. His only objection was to an alternate method of selection whereby the two chosen arbitrators of the parties selected the third arbitrator. He referred particularly to the fact that there was “little or no accountability” implicit in this procedure. Nevertheless, he decided that specific standards did exist, that length of tenure is not critical due to the professional character of the arbitrators, and that the grant of power was narrow and the issues well-defined because of the prior negotiations by the parties.

The South Dakota compulsory arbitration statute for policemen and firemen was held invalid as being an unconstitutional legislative delegation of municipal power in *City of Sioux Falls v. Fire Fighters Local 814.* The decision turned on a constitutional provision, similar to that of Pennsylvania, which restricted state interference with municipal monies. While Pennsylvania enacted a constitutional amendment that expressly permitted arbitration panels to settle disputes of the type in question, South Dakota has no such provision. Therefore,

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370. *Id.*
371. 231 N.W.2d at 235.
in citing a previous case\textsuperscript{374} which had held that setting salaries was a legislative function of a city, the state supreme court held the arbitration of salary disputes at the municipal level invalid.\textsuperscript{376} It remains to be seen whether South Dakota will adopt a constitutional amendment to restore compulsory arbitration for employees in the protective services.

The most recent decision on the constitutionality of compulsory public sector interest arbitration was rendered by the Colorado Supreme Court in \textit{Greeley Police Union v. City Council of Greeley}.\textsuperscript{378} The court invalidated a portion of a charter amendment which provided for compulsory binding arbitration of all unresolved municipal-police union labor disputes arising from collective bargaining. It relied on constitutional authority\textsuperscript{377} in holding that binding arbitration constituted an unlawful delegation of legislative power. It stated:

A contrary holding, in our view, would seriously conflict with basic tenets of representative government. Fundamental among these tenets is the precept that officials engaged in governmental decision-making (e.g., setting budgets, salaries, and other terms and conditions of public employment) must be accountable to the citizens they represent. Binding arbitration removes these decisions from the aegis of elected representatives, placing them in the hands of an outside person who has no accountability to the public.\textsuperscript{378}

The second major constitutional issue regarding binding interest arbitration in the public sector concerns the question of adequate standards. Various courts have addressed this issue. All of the higher courts which have approved compulsory interest arbitration have recognized a need for such standards. Nevertheless, the Pennsylvanina court sustained a statute which contained no express standards; in \textit{Harney},\textsuperscript{379} it relied on the phrase, "in accordance with the law" in the constitutional amendment, and held that language sufficient to limit arbitral discretion:

To require a more explicit statement of legislative policy in a statute calling for labor arbitration would be sheer folly. The great advantage of arbitration is, after all, the ability of the arbitrators to deal

\begin{footnotes}
\item[374.] Schryver v. Schirmer, 84 S.D. 352, 171 N.W.2d 634 (1969).
\item[375.] The lower court had also held the arbitration section of the statute invalid, but ruled that the severability clause saved the remainder of the law. City of Sioux Falls v. Sioux Falls Fire Fighters, Local 814, 85 L.R.R.M. 2066 (S.D. Cir. Ct. 1973). The Supreme Court, however, decided that the entire statute was affected because the statute involved the total concept of binding arbitration, and that the act was wholly independent. - S.D. - , 234 N.W.2d at 38.
\item[376.] -P.2d - (Colo. 1976).
\item[377.] Colo. Const., Art. XXI, Sec. 4; Art. V, Sec. 35.
\item[378.] See note 371 \textit{supra} at -.
\end{footnotes}
with each case on its own merits in order to arrive at a compromise which is fair to both parties.\textsuperscript{380}

In the Biddeford case,\textsuperscript{381} the Maine court split evenly over the lack of explicit standards. Three judges found the general legislative policy statements in the act insufficient; the other three found no unconstitutional delegation of legislative authority. In the other states, enumerated standards provide a basis for the statute's validity. The existence of such standards serves the dual purpose of confining the arbitrator's discretion and holding him as accountable as possible to legislative desires, and ultimately to the people.

The claim of "home rule" violation was also raised in the Michigan\textsuperscript{382} and New York\textsuperscript{383} cases; both courts held that the arbitration statutes were general in nature and applicable to all political subdivisions, overriding municipal power to legislate on the subject matter. Regarding the claim of violation of the taxing power, most of the courts have held that although an increase in taxes may be necessary to implement an award, the actual raising of taxes is still a subject of municipal or state discretion. The Pennsylvania court, however, in dicta in the Harney case,\textsuperscript{384} indicated that the court could raise the tax ceiling or adjust the budget in order for an award to be implemented. A Fourteenth Amendment claim of violation of equal protection, due to the absence of "one man, one vote" selection procedures for the arbitration panel, has been raised in two states. The Pennsylvania\textsuperscript{385} and New York\textsuperscript{386} courts both ruled that an arbitration panel is not subject to the "one man, one vote" representation standard.

These recent constitutional challenges reveal that the state courts are placing considerable faith in legislative expressions favoring public interest arbitration. But as the South Dakota and Colorado decisions and the Michigan debate indicate, interest arbitration is not without its constitutional problems. The constitutional problems which have arisen, however, may be curable by amendment of a state's constitution—a process which may not be unreasonable if compulsory arbitration is deemed to be a preferred method for resolution of interest disputes, particularly in the essential services where the public does not recognize a right to strike.

\textsuperscript{380} 255 A.2d at 563 (1969).
\textsuperscript{384} 255 A.2d at 565.
\textsuperscript{385} Id. at 564.
\textsuperscript{386} 332 N.E.2d at 293.
2. Judicial Enforcement

As noted earlier,187 the arbitration panel's award is normally final and binding upon the parties. It is also normal statutory procedure to allow a party access to the judicial system for enforcement of an award. Most states also provide for access to the courts in order to contest an award, although typically the grounds for appeal are narrow.

An award may be challenged for modification or vacation. Wisconsin's statute is illustrative of both. Its modification section states:

(1) In either of the following cases the court in and for the county wherein the award was made must make an order modifying or correcting the award upon the application of any party to the arbitration:

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award;

(b) Where the arbitrators have awarded upon a matter not submitted to them unless it is a matter not affecting the merits of the decision upon the matters submitted;

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

(2) The order must modify and correct the award, so as to effect the intent thereof and promote justice between the parties.188

As to vacation of the award, the Wisconsin statute allows these grounds:

(1) In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud or undue means;

(b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

(2) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.189

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187. See Part V, A, 1, d, and notes 305-12, supra.
189. Id., § 298.10 (1958).
About half of the interest arbitration states have substantially the same provisions. Some states specify that the award must be supported by competent, material, and substantial evidence on the record as a whole. Others provide for vacation when fraud is the determining factor or if the award is in violation of state or municipal law.

The remaining states specify somewhat different criteria. For example, the Washington statute provides that the sole question for review is whether the award was arbitrary or capricious; South Dakota allows an appeal de novo. At the other extreme, Nebraska, Oklahoma, and Pennsylvania simply provide that the award is final and binding, and no provision for appeal is contained in the statute.

There is a dearth of cases on judicial enforcement, perhaps because the modern statutes provide full and fair procedures which seem to produce acceptable awards. In two fairly recent cases, however, the courts were called upon to review the arbitration panels’ use of statutory standards. In City of Providence v. Local 799, the argument was made that the Rhode Island statute made no provision for judicial review. However, the court did review the award and examined one of the standards which the arbitrators had used: comparison of wages and working conditions for firefighters as against skilled workers in the building trades or workers doing work similar to that of firefighters. It concluded that the arbitrators’ comparison was accurate and affirmed the award. In Caso v. Coffey, a lower court in New York found that the arbitration panel had not considered the employer’s ability to pay when it rendered its award. Although the employer had not


made an argument based on inability to pay, the court found that ability to pay was one of the statutory criteria; it therefore remanded the case for a further hearing. The court also found an infirmity in the absence of a record, which made it impossible to determine whether the award was based on substantial evidence, one of the standards for review.

When a constitutional claim is in issue, a court will scrutinize an arbitration award regardless of whether the claim falls under one of the specified grounds for review. This situation arose in two recent cases, *City of Alpena v. Alpena Fire Fighters Association* and *City of Washington v. Police Department*. The Michigan court in *City of Alpena* stated that, "[o]ur conclusion that plaintiff's claimed errors are not reviewable under [the statute] does not necessarily mean they are beyond appellate scrutiny. Where the errors alleged are of constitutional magnitude, the allegations are reviewable." The court then decided that allegations of failure to make findings of fact, failure to base an award on statutory criteria, and failure to maintain an adequate record were sufficient to merit review under a denial of due process claim, although the court eventually decided that the claim was meritless. Similarly, the Pennsylvania court in *City of Washington* allowed review of a claim based on denial of due process, even though the statute specifically stated that there shall be no appeal to any court. The court restricted review to questions of jurisdiction, regularity of proceedings, excessive exercise of powers, and constitutional questions.

VI

**Interest Arbitration in the Private Sector**

Our attention now shifts to the private sector, where collective bargaining has reigned supreme and where the underlying statutory law is almost exclusively federal law. Is there a place for interest arbitration in such an environment? History supplies part of the answer, and experimentation suggests that given the right conditions interest arbitration can augment collective bargaining in advantageous ways. But the evidence also serves notice that too much should not be expected from interest arbitration, for our industrial relations system is fundamentally dependent on private ordering by unions and employers; interest arbitration can only be a supplement, not an alternative.

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405. 224 N.W.2d at 674.
A. Voluntary Interest Arbitration

In the search for improved methods of settling interest disputes, the use of arbitration on a voluntary basis as an adjunct to the collective bargaining process has much to commend it. This form of interest arbitration is of course both an old and new device. Old usage suggests both strengths and pitfalls. New usage, particularly the steel industry Experimental Negotiating Agreement, suggests a promise of things to come.

1. Local Transit and Printing Industries

As discussed in the brief historical section above, interest arbitration has been more successful and more acceptable to all parties concerned in the local transit industry than in the printing and newspaper publishing industry. Although most local transit is now part of the public sector, interest arbitration developed while that industry was largely under private ownership. Arbitration there had a high degree of acceptability to management and unions. At the 1973 meeting of the National Academy of Arbitrators, able spokesmen for the Amalgamated Transit Union and the transit employers (now mostly public employers), Herman Sternstein and John A. Dash respectively, described the factors which have made the system work.

Sternstein:

...Is arbitration a viable substitute for a community-crippling strike? In transit where Amalgamated is the bargaining agent, strikes are almost unknown. ... [S]trikes by Amalgamated locals occur almost only when the employer refuses to arbitrate.

...When arbitration has been used to resolve a dispute over new contract terms, subsequent contracts are negotiated. Arbitration does not become a crutch relied on in contract after contract.

...[A]rbitration awards in transit have been responsible for many of the employees' most significant advances. For example, in 1934 the five-day, 40-hour week was established, with maintenance of pay; in 1942, equal pay was obtained for women doing the same work as men; and a trustee, funded, actuarially sound pension plan was established by arbitration in 1945.

...[E]xisting prejudices against voluntary arbitration of new contract terms have no factual basis. Such attacks as have been mounted in the transit industry have in reality been directed at results

407. BNA LABOR RELATIONS YEARBOOK 32 (1973) [hereinafter cited as BNA]. See Section 2 infra.

in a particular case, by the party who felt aggrieved. They have not offered a challenge to the process, which continues to be viable.  

... [M]ost Amalgamated contracts contain arbitration clauses applicable on a continuing basis to all disputes. ...  

The voluntary, continuing clause can and should be distinguished from compulsory arbitration, established by law or by an outside power. In our private governments, we can live with arbitration which is required as a result of our mutual agreement to forego the opportunistic advantage of a temporary increase in economic power. But we can also abolish it if it fails to allow acceptable and durable results. Knowledge of the existence of the power to change and to abolish contract arbitration is one of the essential elements in making contract arbitration in transit acceptable where compulsory arbitration is not. It reflects the human desire to have alternatives.  

... If there is a most important key to successful arbitration, it must be acceptability.  

... [W]hen I speak of acceptability as the key to successful arbitration, I have in mind primarily those collective bargaining situations which meet certain conditions.  

First, the relationship between the employer and the union must be mature. ...  

Second, acceptability cannot be applied to situations where, for whatever reasons, wages and working conditions have been substandard. ...  

Third, acceptability cannot be applied where there has been a drastic change in management or in union representation or leadership. ...  

Finally, the viability of our national economy is based on progress by those in the work force, not retrogression. Acceptability has not and should not be used to justify retrogression. ...  

The standards used in making awards in particular contract arbitration cases are vital to the process. ...  

Whatever devices neutral arbitrators used in this area ... their awards ultimately were worthless unless the economic relationships they achieved proved to be acceptable and durable.\textsuperscript{409}  

\textit{Dash:}  

Throughout most of this long history of interest arbitration, transit was a private industry, and interest arbitration in that era was voluntarily accepted by an individual company and by an individual local union, in certain situations, as an acceptable alternative to the use of economic force. Arbitration in the private transit industry was literally an extension of the collective bargaining process. An arbitrator who served in an interest arbitration involving a privately owned transit system was always probing for what we term the "area

\textsuperscript{409} \textit{Id.} at 11-18.
of acceptability.” He was trying to define that area of wage increase and fringe package change which, as best he could judge, would approximate and would be in the ball park of what the parties themselves would have done had they bargained to a conclusion.

Now that judgment, of course, required an assessment of the relative economic power of the parties. Beneath the velvet glove of rhetoric in our interest arbitration cases in those days, there was always the mailed fist of economic power. This was true on both sides of the table.410

John Dash then commented on the new posture of interest arbitration in public sector transit, stressing the unique example the industry could provide because of its long history of using that technique. He contended that the new public sector awards “must consider the rights and interests of the employees in perspective, so that the end result places the workers involved in a fair relationship to their neighbors. . . . [I]n that determination, force plays no part.”411

The record of interest arbitration in the printing and newspaper industry has not attracted similar praise. For example, John Bacheller, Jr., speaking at the same National Academy meeting,412 drawing upon his experience with newspaper contract arbitration, stated that he viewed interest arbitration “as the tranquilizer that relieves anxiety and pain while substantially reducing the parties’ ability to engage in willful self-determination.”413 It is in fact true that in recent years the terminal arbitration device in the newspaper industry has failed to command the support of all parties in interest. It is therefore logical to conclude that the awards often failed to represent what the parties would have negotiated for themselves, or at the least what one of the parties realistically believed would have been negotiated had there been ordinary collective bargaining. Such dissatisfaction was exacerbated by the obstacles that employers were encountering in their attempts to withdraw from terminal arbitration procedures. I shall comment later on the legal significance of those efforts in connection with three cases involving terminal arbitration clauses in Pressmen’s contracts.414

In contrasting these experiences of the local transit and the printing industries, it is possible to conclude that interest arbitration was a viable means to achieve collective bargaining objectives without disruptive economic action where the parties maintained their options and employed the procedure voluntarily. I do not have at my disposal suf-

410. Id. at 23.
411. Id. at 29.
412. Id. at 48.
413. Id. at 48.
414. Section 3, beginning at note 429 infra.
icient empirical data to suggest whether any significant portion of the industrial relations problems which have plagued the newspaper industry for so many years, especially those relating to automation and manning, can be traced to any inflexibility or related shortcoming of the interest arbitration process. I suspect, however, that many of those problems are endemic to the structure of both the industry and the unions, so it is not likely that arbitration could have been any more successful than direct collective bargaining. But arbitration might have contributed to the postponement of realistic confrontation of those problems by the parties. The matter seems worthy of further inquiry, for other evidence, such as that from Australia and from some examples of interest arbitration in the public sector in the United States (limited though it may be), suggests that arbitration, when divorced from meaningful collective bargaining, tends to be inflexible in the face of localized work-related problems. If so, the use of arbitration in the newspaper industry may have hindered the development of appropriate means to cope with new technological problems.

2. Steel Industry Experimental Negotiating Agreement

In April 1973, the steel industry and the United Steel Workers made a significant contribution toward advancing the use of interest arbitration in the private sector when they joined in an Experimental Negotiating Agreement (ENA).415 The industry had a checkered history of bitter strike activity, much of it dating to the decades which preceded formal recognition under the Wagner Act.416 As recently as 1937, serious violence and death were associated with union organization in the industry. In the "Memorial Day Massacre" that year, ten workers were killed by the Chicago police in connection with a strike in Little Steel.417 Even after the industry was fully organized, long and costly strikes occurred frequently. The last nationwide strike was in 1959, although the threat of another lingered with each contract termination.

The 1959 strike lasted for 116 days, until it was enjoined under the Taft-Hartley Act National Emergency procedures. No strike has since occurred, but the recurrent threat of a strike created a pattern of stockpiling and hedge-buying by customers to ensure a sufficient supply of steel in the event of a strike. Stockpiling would occur before the expiration of the contract; this in turn would spawn increased do-

415. See BNA, supra note 407.
416. F. DULLES, LABOR IN AMERICA 166-83 (3rd ed. 1949).
mestic production as well as increased imports from foreign steel producers.\textsuperscript{418} Steel Workers' President I. W. Abel described the pattern:

The stockpiling had its impact not only on our bargaining and on our successes at the bargaining table, but it also had a tremendous impact on the ups and downs of production and employment. This resulted in a "feast or famine" or "boom-bust" treadmill for our members in the basic steel industry. Most steelworkers enjoyed steady work and many worked overtime just prior to the negotiating periods and during the negotiating period. But then came the peaceful settlements, the working off of stockpiles, partial plant shutdowns and prolonged layoffs.\textsuperscript{419}

Domestic sales also declined during the next boom period due to continued inroads made by foreign producers. Elimination of the strike threat and subsequent elimination of the boom-bust cycle would help both sides of the collective bargaining equation.

The first offer of binding arbitration in exchange for the right to strike was advanced by the major steel companies in 1967.\textsuperscript{420} The proposal was rejected by the USW's International Executive Board. In President Abel's opinion, the rejection was based on the novelty of arbitration at the time, the absence of a guarantee that favorable contract provisions would not be subject to arbitration, and the absence of a bonus to the employees representing or symbolizing the benefits that management would receive from eliminating the boom-bust cycle. All three defects were corrected in the 1973 agreement.

The 1968 negotiations were conducted under the old procedure. However, to avert a nationwide strike, the parties agreed to submit the incentive wage issue to arbitration. This gave both parties some limited experience with interest arbitration.\textsuperscript{421}

In 1971, the boom-bust cycle produced its worst effects. One full month before the expiration of contracts there were extensive layoffs and plant shutdowns. After settlement, some USW members went jobless for as long as seven months, and about 108,000 job opportunities were lost due to the record level of imported steel. Stockpiling in 1971 cost the ten largest steelmakers about 80 million dollars.\textsuperscript{422} The stage was set for renewed interest in arbitration as an alternative to the strike. In mid-1972, the companies again approached the USW with an arbitration proposal. High level negotiations continued until March, 1973,

\begin{itemize}
  \item \textsuperscript{418} Abel, \textit{Steel: Experiment in Bargaining}, 80 \textit{American Federationist} 2 (July, 1973) (hereinafter cited as Abel).
  \item \textsuperscript{419} Id.
  \item \textsuperscript{420} Id.
  \item \textsuperscript{421} Id.
  \item \textsuperscript{422} See Aikens v. Abel, 373 F. Supp. 425, 429 (W.D. Pa. 1974).
  \item \textsuperscript{422} Abel, supra note 411, at 2.
\end{itemize}
when basic agreement was reached. The union then called an expanded convention, and the ENA was formally ratified in April, 1973.\footnote{423}

The major feature of the agreement is arbitration for all national issues that remain unresolved following the usual collective bargaining.\footnote{424} This procedure replaces the strike or threat of strike. However, the agreement permits strikes over local issues when authorized by the president of the United Steel Workers. This is implicit recognition of the characteristic inflexibility of interest arbitration with regard to local problems, such as those which plagued the newspaper industry. The agreement also includes other features: (1) a guaranteed annual minimum wage increase of 3 percent from 1974 to 1977, although negotiation may produce higher figures; (2) a one-time bonus of $150 to every employee as of August 1, 1974, granted by the companies in recognition of the production savings anticipated from the elimination of stockpiling; (3) a guaranteed cost-of-living adjustment; and (4) exclusion of certain express items from the negotiation and arbitration process (local working conditions and past practices, the union shop and checkoff provisions, minimum wage increase and bonus, no-strike and lockout provisions, and management rights issues). The agreement allows negotiation on wages, pension, vacations, insurance, health and safety, and other economic and fringe benefit areas. In the event of impasse, an arbitration panel would be established consisting of five members: one appointed by and representing each of the parties, with no voting rights; and three neutrals appointed by agreement of the parties, two of whom are required to be thoroughly familiar with collective bargaining agreements in the steel industry. The agreement provides for the usual arbitration hearing, with each party paying its own arbitrator and sharing the cost of the three neutrals and of the proceedings.

The union's negotiation and ratification procedure for the ENA were attacked on several grounds in \textit{Aikens v. Abel},\footnote{425} an action brought by a group of dissident USW members seeking an injunction against negotiations and possible arbitration under the ENA. Plaintiffs wanted any new agreement to be subject to a referendum of USW's rank and file membership, and an underlying issue was the union's authority to give up the right to strike.

The court found no legal infirmity in the union's negotiation of the ENA, and held that the "representative democracy" which gave a bargaining committee the power to negotiate new contracts did not vio-

\footnote{423. \textit{Id.} at 3.} \footnote{424. BNA, \textit{supra} note 407, at 32.} \footnote{425. 373 F. Supp. 425 (W.D. Pa. 1974).}
iate the duty of fair representation or prevent the union negotiating committee from bargaining away the right to strike. Federal District Judge Teitelbaum concluded:

If the unspoken premise behind [plaintiff's] thinking is that a union's legally recognized right to strike is so important, so hard won, that no one, not even the union's representative leadership nor even, presumably, the membership themselves, can give it up, this Court disagrees. In any system of self-government, in theory and in practice, even the most precious of rights may be waived, always assuming that the system's established procedures for making such a decision are followed.

The emotion-laden term, right to strike, inevitably recalls the bloody and bitter historical struggle for parity that was waged by union members against the steel companies. No one, and especially one with roots in the Pittsburgh area, belittles the importance of the right to strike; brave men died to win it. No one discounts their sacrifice. But it is symbolic of the changes wrought by time that this dispute is being resolved by means of civilized debate in a court of law, rather than by recourse to the violence and recrimination which characterized labor relations in the recent past. . . . This Court does no more than permit the ENA negotiating procedures to proceed as, at least potentially, an evolutionary step forward in labor relations.

The injunction was denied and negotiations proceeded under the ENA.

The 1974 negotiations under the ENA demonstrated that the parties were acting under intense pressure to develop a contract without resort to arbitration. As they approached the April 15 deadline, both sides became aware that arbitration might tend to be an all-or-nothing process. Originally it was thought the two sides might resolve most of their major differences and then turn over a few loose ends to outside umpires. R. H. Larry, vice-chairman of U. S. Steel and chief negotiator for the steel industry, reports that it would have been difficult to isolate areas of disagreement: if one side balked on one point, the opposition would probably have pulled back on another; eventually, the whole thing could have “unraveled.”

The ENA itself, in section E (5)(d), provided important impetus to meaningful bargaining:

In order to encourage frank discussions between the parties during negotiations those conversations which occurred and proposals made during such negotiations shall not be referred to in connection with the

427. 373 F. Supp. at 437.
presentation of any issue to the Panel, except as the parties agree otherwise.\textsuperscript{429}

As might have been expected, arguments had been advanced that the existence of terminal arbitration would dampen collective bargaining. However, all parties expressed the hope that all-out bargaining would continue. There was still pressure on the union negotiators to obtain better contracts, stemming especially from their relinquishment of the right to strike. Elliot Bredhoff, USW's attorney, commenting on a psychological factor which hinders employee acceptance of arbitration as a substitute for the strike, pointed to "the vast gulf that many workers perceive as existing between their own interests and life styles and those of arbitrators. Moreover, workers derive an important measure of self-respect from the knowledge that a strike enables them to deal with management as an equal by threatening 'to bring it to its knees.'"\textsuperscript{430} I. W. Abel, recognizing that there are problems and dangers inherent in contract arbitration, saw in the arbitration itself substantial pressure for agreed settlement:

\begin{quote}
It is only natural for both sides to prefer a settlement shaped by themselves, and not by a third party. The parties themselves know the problem best. A third party dictating the terms of a settlement might not be aware of technical problems that may, unwittingly, stem from an imposed settlement. The need to formulate contract conditions that are workable and acceptable to both sides will serve as additional pressure to resolve issues independent of the arbitration machinery that has been established.\textsuperscript{431}
\end{quote}

The 1974 negotiations produced a contract without resort to the ENA arbitration procedures. Union spokesmen have described it as a "very favorable" contract, and management's R. H. Larry said: "We came out about where we would have, had we been faced with a strike or a lockout."\textsuperscript{432} This illustrates that, at least on this first occasion, the threat of arbitration was comparable to that of the strike.\textsuperscript{433}

\textsuperscript{429} BNA, supra note 407, at 37.

\textsuperscript{430} Id. at 46.

\textsuperscript{431} Abel, supra note 418, at 6.

\textsuperscript{432} McManus, supra note 428, at 30.

\textsuperscript{433} An enlightening exchange between R.H. Larry and Bernard Kleiman, two men who were deeply and personally involved in recent steel industry collective bargaining, appeared in the Duquesne Law Review. R.H. Larry commented:

\begin{quote}
... The emphasis was on negotiations, and not on arbitration. In exchange for certain precommitments, the parties substituted the right to resort to arbitration for the right to resort to strike or lockout. They did not agree to call on arbitrators to make their bargain for them, any more than an agreement which allows strikes or lockouts if negotiations fail is an agreement to have a strike or lockout.

The agreement involved real risks to the interests of both parties, and it was this fact that they relied upon to prod them into reaching agreement by
\end{quote}
Because of the inflated state of the economy at that time, the cost of the contract may have seemed enormous, but elimination of the strike threat and the boom-bust cycle certainly represented a significant economic cushion. I. W. Abel foresaw long term industrial relations benefits:

We believe this unprecedented experiment will prove there is a better way for labor and management to negotiate contracts. The new procedure will not only relieve both sides of the pressures of a potential shutdown, but will also offer us a genuine opportunity to achieve results equal to those obtainable when the threat of a strike exists.\textsuperscript{434}

The parties have agreed to bargain again under the ENA in 1977.\textsuperscript{435}

The steel industry and the United Steel Workers seem to have achieved a maturity in their bargaining relationship which permits interest arbitration to serve as a valuable adjunct to the collective bargaining process. The ENA suits the peculiar problem of the steel industry and would not necessarily be as well suited for other unions and other industries. However, the industrial peace which accompanies the ENA process might make it a desirable goal for other industrial relations partners, in which event the device may become "the evolutionary step forward in labor relations" to which Judge Teitelbaum referred.

3. \textit{Legal Problems}

Enforcement of and bargaining about voluntary interest arbitration clauses pose intricate legal problems. What effect does Section 301

\underline{collective bargaining} on their own. The right to force arbitration presents different risks from the right to force a strike or lockout, but, nevertheless, very real risks... Neither party could be comfortable about what the arbitrators might do. It is now a matter of historic fact that the parties reached agreement on their own, just before the deadline date on which either could have taken the other to arbitration. And I can personally testify that the last three nights were as sleepless as if the parties had been racing a deadline for strike or lockout.


Bernard Kleiman, USW General Counsel, added:

... The union did not forfeit its right to strike... Rather, the union temporarily traded one economic weapon (the right to strike) for another (interest arbitration).

In the circumstances which exist in the steel industry it is the union’s judgment that interest arbitration is at least as potent as the strike threat. The union does not hold this view with respect to the other thousands of employers with whom it bargains; hence, the ENA has not been offered to those employers. It may well be that the union will conclude at some future time that in the steel industry the strike would be a more meaningful weapon than interest arbitration. In such event, the union is free in subsequent negotiations to reject the ENA and to revert to the strike weapon.

...[The ENA combines the latent pressures of the right to strike with the active pressures of interest arbitration.


of the Labor Management Relations Act\(^436\) have on enforcement? Is there an obligation to bargain about such clauses? The jurisdictional and procedural compartments which separate the National Labor Relations Board and the federal district courts have tended to obscure the essential issues underlying those questions.\(^437\)

\(a\). Enforcement Under Section 301 of the Labor Management Relations Act

The Pressmen's contracts provided the raw material for development of the law in this area. The first major ruling appeared in *Boston Printing Pressmen's Union v. Potter Press*\(^438\) in which a federal district court refused to issue a mandatory injunction enforcing a clause in a collective bargaining contract providing "that all questions regarding a new contract and scale to become effective at the expiration of this Agreement, which cannot be settled by conciliation, shall be decided by arbitration. . . ."\(^439\) Judge Wyzansky's opinion, which was wholly endorsed and affirmed by the First Circuit, found no authority for such enforcement in either Section 301 of the Taft-Hartley Act or the United States Arbitration Act.\(^440\) He viewed the clause as "perilously close" to orthodox compulsory arbitration, characterizing it as quasi-legislative arbitration and therefore unenforceable.

*Potter Press* was decided just prior to the Supreme Court's 1957 *Lincoln Mills*\(^441\) decision, which construed Section 301 as a Congressional mandate for the judicial creation of a common law of the collective bargaining contract. Although rights arbitration clauses were thus granted full enforcement—indeed given preferential treatment by the Court—the enforceability of interest arbitration remained unsettled for a decade after *Potter Press*. The cases were fairly evenly divided until 1968, when the Fourth Circuit, in *Winston-Salem Printing Pressmen v. Piedmont Publishing Co.*,\(^442\) tipped the balance in favor of enforceability. The facts there were essentially the same as in *Potter Press*, but Judge Sobeloff, writing for a unanimous panel, rejected the *Potter Press* rule in light of more recent Supreme Court decisions, holding that such an arbitration clause was not against national labor policy and was entitled to enforcement. The court was not persuaded by the


\(^{439}\) Id. at 554.

\(^{440}\) Id. at 556-57.

\(^{441}\) Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

\(^{442}\) 393 F.2d 221 (4th Cir. 1968); accord, Chattanooga Mailers' Union, Local 92 v. Chattanooga News-Free Press Co., 524 F.2d 1305 (6th Cir. 1975).
company's argument that judicial enforcement would mean that "there
would never be and there could never be an end to this contract." Judge Sobeloff found it sufficient that "the contract will surely end
when both parties agree to terminate it and in some instances when
either of the original signatories is removed from the scene." The latter prospect was hardly comforting for either employers or unions
who might want to withdraw someday from such an arbitration arrange-
ment.

The surface logic of the Piedmont case is unimpeachable, for the
Supreme Court had already refused to recognize any distinction among
contracts "between any employer and a labor organization" for pur-
poses of enforcement under Section 301. The Court's decision in Re-
tail Clerks v. Lion Dry Goods had even enforced an agreement be-
tween an employer and a minority union not entitled to exclusive rep-
resentation; and in John Wiley & Sons v. Livingston the Court had
allowed enforcement of an arbitration agreement against a non-signa-
tory successor employer. Section 301 certainly seemed applicable to
enforcement of a voluntary agreement to arbitrate future wages and
other terms of a new contract.

At first, Piedmont did not appear to be an insurmountable obstacle
to a party's withdrawal from an interest arbitration agreement, for ar-
bitrators in the past had generally been reluctant to order retention of
an interest arbitration clause over the objection of one of the parties.
As Arbitrator Haughton had written in a 1949 award, forced retention
of such a clause would not accord "with a system of collective bargain-
ing which in essence is based on voluntarism and freedom of con-
tract." This position was widely adhered to for more than 20 years.

In the early 1970's, however, several arbitrators awarded terms
of new contracts that included provision for future contract arbitration
despite overt opposition from one of the parties. Consequently, the
combination of Section 301 enforcement and the tendency of arbi-
trators to order inclusion of such clauses tended to "lock in" unwilling
parties to a form of compulsory arbitration. Therefore, both unions
and employers would henceforth think twice before entering into a new
agreement to arbitrate future terms of a collective contract, for the
duration of such a contract might prove to be the industrial relations
equivalent of forever.

443. 393 F.2d at 226-27.
444. 369 U.S. 17 (1962).
446. 13 LAB. ARB. 115, 125 (1949).
447. NAA PROCEEDINGS, 1973, supra note 9, at 48.
b. Permissive or Mandatory Subject of Bargaining

Not surprisingly, legal action concerning interest arbitration clauses shifted to the National Labor Relations Board. Was such a clause a mandatory subject of bargaining? If not, a party could easily avoid agreeing to this form of arbitration. But could a party, pursuant to an existing clause providing for arbitration of all unresolved contract issues, also refuse to submit to arbitration a dispute over the inclusion of such a clause in a new contract?

These questions were presented to the full Board in *Columbus Printing Pressmen*. Since 1947, the union and the employer in that case had included an interest arbitration clause in their collective contract providing for arbitration of any dispute regarding new contract terms that could not be settled by negotiation. In 1970, however, the employer sought to delete the clause, but the union disagreed and submitted the issue to arbitration, resulting in retention of the provision in the ensuing contract. In 1973, at the conclusion of the contract term, all issues were agreed upon in negotiations except the question of retention of that clause. The union proposed to arbitrate the issue, but the employer declined. The NLRB found that the union had insisted to point of impasse that the employer agree to the clause. If the clause were a mandatory subject of bargaining the union could so insist; but if it were a permissive subject, the union's insistence to point of impasse would constitute a refusal to bargain in violation of the Act. Such was the teaching of *Borg-Warner*. The four-man Board majority held that the clause was a non-mandatory (i.e., permissive) subject of bargaining, because it "does not pertain to settling terms of wages, hours or other conditions of employment in the contract being negotiated."

Chairman Murphy dissented, contending that regardless of whether the clause was mandatory or permissive, the union was not in violation of the duty to bargain. She did not elaborate on how bargaining to impasse on a non-mandatory subject would not be a refusal to bargain in view of the firmly entrenched *Borg-Warner* doctrine. Nonetheless, she presented an appealing case for treating interest arbitration as a mandatory subject, noting that public policy favored "voluntary resolution of disputes and the elimination of economic warfare which in-

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450. 219 N.L.R.B. No. 54 at 20 (Admin. Law Judge opinion), 89 L.R.R.M. at 1556.
interferes with the free flow of commerce. . ."451 She said she was "somewhat puzzled by the emphasis placed upon strike and lockout as essential aspects of collective bargaining under the Act."452

The majority, however, by adopting the Administrative Law Judge's decision, reasoned that the parties have respective rights and obligations under the bargaining provisions of the statute (Sections 8 (a)(5), 8(b)(3), 8(d), and 9),453 and therefore "insistence to a point of impasse in derogation of such status is violative of the bargaining obligation." The supporting rationale was that the union was insisting on "a proposal which in effect limited the employer's bargaining representative in bargaining," and that consequently the proposal was a non-mandatory subject.454

Mrs. Murphy's response was that there was nothing unlawful in the substitution of "so-called quasi-legislative action by an impartial individual for arm's-length dealings between the parties," and that there was nothing inherently improper in the union's attempt to obtain adherence to a clause in its contract. She stated she was not impressed by the argument that the parties may be "locked into" the agreement, for she did "not propose to rule on the need to continue such clause in existence, or find that the failure to submit the matter to arbitration pursuant thereto is itself violative of the Act."455 However, she said nothing about the applicability of Section 301 to the failure of a party to submit such a dispute to arbitration—the situation in Piedmont.456

In any event, the Board's remedy required that the union refrain from insisting that the matter be submitted to arbitration. This raises a further question: if the union were to file a Section 301 enforcement action in federal court, would such filing be deemed an unfair labor practice and/or a violation of the Board's order?

c. Accommodating Section 301 and the Duty to Bargain

Neither the majority opinion nor the dissent in Columbus Printing Pressmen adequately explored the consequences of the determination that interest arbitration was a non-mandatory subject of bargaining. The Board's decision must be read in connection with Section 301 enforcement of arbitration under the general rule of Lincoln Mills and the specific holding of Piedmont concerning interest arbitration. Although the dissent in Columbus Printing Pressmen carefully avoided stating

451. 89 L.R.R.M. at 1561.
452. Id. at 1562-63.
453. Id. at 1558.
454. Id.
455. Id. at 1564.
456. 393 F.2d 221 (4th Cir. 1968).
whether “failure to submit the matter to arbitration” would be an unfair labor practice, determination of that issue would command only academic interest if a mandatory injunction under Section 301 were available to require submission of the matter to arbitration. On the assumption that Piedmont is a correct expression of the law, it would follow that submission of such a clause to arbitration would be specifically enforceable in a Section 301 action, unless the 301 action conflicted with an NLRB determination. It is in this sense that the Board’s determination of non-mandatory status has its most important consequences. As the Supreme Court indicated in Carey v. Westinghouse, an NLRB ruling takes precedence over an arbitration award in a Section 301 action where the same matter is in issue in both proceedings. Thus, in New Orleans Typographical Union, Local 17 v. NLRB, the Fifth Circuit recognized that an NLRB determination as to a jurisdictional dispute between rival unions takes precedence over a Section 301 action enforcing arbitration as to the same subject matter. Accordingly, if the Board determines that a party has refused to bargain by insisting to point of impasse on arbitrating whether or not an interest arbitration clause should be retained, added to, or inserted in a collective contract—because such a clause is a non-mandatory bargaining subject—a federal district court should defer to the Board and refuse to enforce arbitration as to the future inclusion of such a clause. In other words, an interest arbitrator should not, absent the consent or waiver of both parties, have authority to incorporate a non-mandatory subject of bargaining into a contract. Such a limitation on the arbitrator's authority would be no greater than that which Section 8(d) and case law thereunder already impose on the parties in their ordinary collective bargaining negotiations.

It would be anomalous to bind parties to an agreement on an issue which was not submitted by mutual consent to arbitration and about which the Act does not require them to bargain; to do so would expand involuntarily the mandatory scope of bargaining. Although the interest arbitrator would have no authority, absent agreement of the parties, to decide whether an interest arbitration clause should be included in the contract, if he has their agreement and he decides in favor of the clause, the clause would be enforceable under Section 301, the same as any other contractual provision. But a party should no more be forced against his will to submit this permissive bargaining subject to binding arbitration than he should be forced to an impasse on such a clause in ordinary collective bargaining. The latter would be an unfair

458. 368 F.2d 755 (5th Cir. 1966).
labor practice as a violation of the duty to bargain; the former should be no less.

This conception of the nature of the interest arbitration clause should not be equated with the view that such a clause is against public policy, a conclusion which the dissent in *Columbus Printing Pressmen* seemed to draw from the majority's opinion. On the contrary, Administrative Law Judge Feldsman, whose rationale in *Mechanical Contractors Association of Newburgh* was adopted by the *Columbus Printing Pressmen* majority, emphasized the virtues of interest arbitration, notwithstanding his holding that such a clause was a non-mandatory subject of bargaining:

None of this is to say or imply that a substitution of quasi-legislative arbitration for collective bargaining or a symbiosis of the two is impossible or undesirable. By their consent labor and management can decide for themselves to accomplish this end. But such consent must be sought and not exacted, meaning only that the proponent of arbitration is required to respect and accept the other side's firm rejection and its consequent demand that collective bargaining alone be pursued to arrive at new contract terms.

The accommodation of Section 301 and the duty to bargain suggested herein preserves the voluntary nature of collective bargaining while encouraging the use of interest arbitration, either as an aid to or as a substitute for the bargaining process. An NLRB or a judicial determination that an interest arbitration clause is a mandatory subject of bargaining would induce just the opposite effect. Parties would be less likely to agree to interest arbitration if they assumed that it would mean adoption of the clause in virtual perpetuity. On the other hand, private sector experience reviewed here suggests that these clauses can be extremely useful; indeed, reliance on voluntary interest arbitration may even signify a mature and stable union-management relationship. But if the parties are afraid to agree to interest arbitration lest they be locked in at a later date, after they may have lost confidence in the system, the "peaceful judicial type procedure" which Mrs. Murphy sought "in place of economic warfare" would not likely prevail.

In the final analysis, although not fully articulated in the *Columbus Printing Pressmen* decision, interest arbitration is a non-mandatory subject precisely because its proponent seeks to force the other party to agree to modify collective bargaining procedures guaranteed by the Act. Although the parties may mutually agree to such a modification, to allow a union to strike to achieve that result or an employer to hold out or force a strike as the price of achieving or avoiding that result,

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461. Id. at 15.
is the antithesis of free collective bargaining. An interest arbitration clause is analogous to the strike-ballot clause which the employer sought from the union in *Borg-Warner*. That clause involved a change in the bargaining agent's authority, just as insistence on interest arbitration by an employer would involve the union's forfeiture of its right to strike for new terms and conditions of employment. The Act mandates the collective bargaining process, which includes the union's right to strike. It also includes the employer's right to hold out and lock out. Insistence on relinquishment of either of these rights modifies the statutory scheme and thus represents a refusal to bargain.

**B. Federal Emergency Disputes Legislation**

The right to strike and the right to lockout being the principal economic weapons traditionally available to the parties in a labor dispute, it is recognized in the U.S. private sector that some work stoppages are natural phenomena within the industrial relations system. The negative effects of occasional work stoppages are usually deemed a reasonable price to pay for the advantages of industrial self-government. However, on three separate occasions since 1926, Congress has delineated certain “emergency” circumstances where the adverse impact to the public from a resort to the traditional economic weapons would be so great that alternative dispute resolution procedures were mandated. Interest arbitration, whether voluntary or compulsory in form, was included as an important part of each such Congressional effort.

**1. National War Labor Board**

Perhaps the easiest type of emergency to conceptualize is a prolonged work stoppage during a state of actual war. In 1940, as the defense effort was mobilizing prior to United States entry in World War II, strikes occurred in certain key industries. In response to a felt need for a body to adjust labor disputes in those industries, President Roosevelt in 1941 created the National Defense Mediation Board (NDMB). This tripartite Board issued public recommendations for settlement but was without power to order enforcement. Employing mediation as its primary tool, during its ten month existence the NDMB

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464. Exec. Order No. 8,716, 3 C.F.R. 914 (1938-1943 Compilation). The NDMB was composed of eleven presidential appointees, four from management, four from labor and three neutrals, one of whom was to be chairman. Id. § 1(a). For a comprehensive report on the task it accomplished see U.S. BUREAU OF LABOR STATISTICS,
handled 118 disputes, three of which required presidential intervention by way of seizure.\textsuperscript{465} A bitter dispute in the coal mines over the union shop issue, the subsequent resignation of the CIO members from the Board, and the events at Pearl Harbor combined to end the usefulness of NDMB's efforts.

The NDMB was replaced on January 12, 1942 with the National War Labor Board\textsuperscript{466} (WLB), created following an emergency meeting of top management and union leaders who had signed a no-strike, no-lockout pledge and recommended that the President establish a body to engage in dispute settlement.\textsuperscript{467} The WLB was tripartite in form, consisting of twelve appointees: four from labor, four from management, and four representing the public interest. The executive order establishing the WLB outlined the wartime bargaining process. Direct negotiation was the recommended technique for dispute adjustment, and in the event of continuing impasse conciliation was to be attempted. Failing these stages, the case would be referred to the WLB, which could apply mediation or impose arbitration.\textsuperscript{468} Technically, the WLB could only function as a voluntary mediation and arbitration agency.\textsuperscript{469} Because its entire structure was based on the no-strike, no-lockout pledge, the WLB was fundamentally without legal status, and its orders were unenforceable\textsuperscript{470} and unreviewable.\textsuperscript{471}

To facilitate administration, the WLB established thirteen regional boards and several industry commissions. Jurisdiction was asserted


\textsuperscript{466} Exec. Order No. 9,017, 3 C.F.R. 1075-76 (1938-1943 Compilation). See G. Taylor, \textit{Government Regulation of Industrial Disputes} (1948), for an excellent discussion of WLB activities by its former vice-chairman and later chairman. Also see U.S. Dep't of Labor, \textit{The Termination Report, National War Labor Board} (3 vols., 1946), for a detailed account of the WLB's work.

\textsuperscript{467} On the advice of the National Association of Manufacturers, U.S. Chamber of Commerce, American Federation of Labor, and Congress of Industrial Organizations, the President invited twenty-four people to the six-day meeting. Their decisions and recommendations, though not legally binding, had great psychological effect on companies, employer associations, and unions. The agreement permitted the Smith bill (H.R. 4139, 77th Cong., 1st Sess., (1941)), which prohibited all strikes in the defense industries, to expire without becoming law. \textit{See} Witte, \textit{Industrial Conflict in Periods of National Emergency}, in \textit{Industrial Conflict 434} (A. Kornhauser, R. Dubin, A. Ross eds. 1954).

\textsuperscript{468} Exec. Order No. 9,017 \S 3(c), 3 C.F.R. 1075 (1938-1943 Compilation).

\textsuperscript{469} W. Simkin, \textit{Mediation and the Dynamics of Collective Bargaining} 257 (1971) [hereinafter cited as Simkin].

\textsuperscript{470} Kiriloff v. Bendix Aviation Corp., 11 CCH Lab. Cas. 69, 312 (E.D. Pa. 1946).

\textsuperscript{471} Employers Group of Motor Freight Carriers, Inc. v. NWLB, 143 F.2d 145, 147 (D.C. Cir. 1944), \textit{cert. denied}, 323 U.S. 735 (1944); NWLB v. United States Gypsum Co., 145 F.2d 97 (D.C. Cir. 1944), \textit{cert. denied}, 324 U.S. 856 (1945).
over all of industry with the exception of the railroads and airlines. Emergency disputes in those two industries, which operated under the Railway Labor Act,472 were handled by fifty-one special emergency boards set up by the National Railway Labor Panel.478 The WLB operated on a case-by-case basis in the tradition of the common law. Substantive decisions relied on the organic executive order as well as historical patterns and precedents in collective bargaining. Mediation to compromise and mediation to voluntary arbitration were also used.474 As a result of the use of these techniques, the WLB evolved “a common law of the wartime shop,” pertaining especially to such subjects as union security, grievance procedures, wages, fringe benefits, and retroactivity.475

The early history of WLB operations was distinguished by a good record of voluntary settlements. Prior to enactment of the War Labor Disputes (Smith-Connally) Act476 in 1943, only eight seizures of the situs of a dispute had been made.477 Pearl Harbor and the integrity of the commitments made to the no-strike pledge and to the idea of the WLB undoubtedly contributed to this record. However, the WLB function was complicated after October 2, 1942, when the President delegated to it wage stabilization authority.478 Subsequently, the Board divided its functions into “disputes” and “stabilization” divisions. Though the stabilization policies and their limiting effect on wage increases changed the character of the Board’s mediation effort, WLB mediation was always fundamentally different from peacetime mediation. William Simkin described the process:

It should be recognized at the outset that this was mediation with reserve powers not normally available in peacetime mediation. The

473. For a description of the activities of some of those special emergency boards see Levinson, Railway Labor Act—The Record of a Decade, 3 LAB. L.J. 13-20 (January, 1952) [hereinafter cited as Levinson].
474. SIMKIN, supra note 469, at 258-59.
477. See J. BLACKMAN, PRESIDENTIAL SEIZURE IN LABOR DISPUTES 261-62 (1967) [hereinafter cited as BLACKMAN], for a complete listing of location, date, principal operating agency, authority and reasons for the seizures. See also Witte, Wartime Handling of Labor Disputes, 25 HARV. BUS. REV. 169, 174 (Autumn, 1946) [hereinafter cited as Witte].
478. Exec. Order No. 9,250, 3 C.F.R., 1938-1943 Comp., p. 1213-16 (1968). The WLB was given broad discretion in implementing the stabilization program. Id. Titles II and III. Further guidelines were established in Exec. Order No. 9,328, 3 C.F.R. 1267-68 (1938-1943 Compilation), which directed industry to “hold the line” on wages and salaries. For a discussion of a technique used to implement those orders, see Note, Incentive Plans Under the National War Labor Board, 100 U. PA. L. REV. 242-60 (1951).
reserve power held by a tripartite mediation panel was the certainty of recommendations to the National Board or to a regional board and a subsequent Directive Order if the parties did not agree. Undoubtedly this had some influence on the parties. The most realistic negotiators preferred to settle to avoid delays. However, if the power factors were quite unequal, the weaker party was inclined to wait for a recommendation, hoping for a better deal than could otherwise be obtained. It was common practice for the tripartite mediation panel to disclose to the parties its tentative recommendations to the Board. Many settlements were agreed to when the recommendations became known informally, often with minor revisions to make the agreement more palatable to one side or the other.479

The War Labor Disputes Act did not significantly alter the Board's legal status, though it did provide Congressional recognition of WLB authority in labor controversies480 and affirmed the seizure powers of the President.481 Forty seizures were made during the life of the Act.482 It should be emphasized that forced compliance with WLB directive orders through seizure seldom occurred. Of the 20,000 cases decided by the WLB in nearly four years of operation, 95 per cent of the directive orders were accepted by the parties without delay.483 The other five percent were distinguished by short delays and, sometimes, strikes. Seizure was involved in a miniscule number of cases.

Strike history under the WLB is revealing. Between 1942 and 1946, the number of strikes per year averaged 4,282; this, with two exceptions, exceeded the total for any previous year since 1881 when strike figures were first recorded.484 However, duration of the strikes and man-days idle were substantially below the peacetime average,485 and few large strikes occurred. Man-days idle expressed as a per-

479. SIMKIN, supra note 469, at 262.
480. War Labor Disputes Act, ch. 144, § 7(a), (b), 57 Stat. 163 (1943).
481. Id. § 3; wherein the President was authorized to take possession of and operate for the United States Government, "any plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort. . . ." The WLB was authorized, upon application of the government operating agency, to order changes in terms and conditions of employment, "upon approval of the President . . ." Id. § 5.
482. See BLACKMUN, supra note 477, at 263-78.
483. See SIMKIN, supra note 469, at 261.
484. By year, the number of strikes was as follows: 1942—2,968; 1943—3,752; 1944—4,956; 1945—4,750; 1946—4,985; five-year average—4,282. The two exceptions were 1917, when 4,450 strikes occurred, and 1937, when there were 4,740 strikes. See BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, HANDBOOK OF LABOR STATISTICS, 1968, at 301 (1968).
485. Id. Average duration (in calendar days) of strikes was: 1942—11.7; 1943—5.0; 1944—5.6; 1945—9.9; four-year average—8.1days; peacetime average (1927-1941)—21.8 days . Man-days idle (expressed in millions of days) per year from strikes were: 1942—4.18; 1943—13.50; 1944—8.72; 1945—38.00; four-year average—16.1 million man-days idle; peacetime average (1927-1941)—21.8 million man-days idle.
centage of total working time during the 1942-1944 period averaged only 0.1 percent. This was the lowest average of strike incidence ever recorded for a three-year period except for the three-year period at the beginning of the Great Depression.\textsuperscript{486} In 1945-46, as the WLB began to wind down its activities, strike incidence rose appreciably.\textsuperscript{487} Although that fact probably reflects the subsidence of war-related patriotism, which had been equated with the no-strike pledge, it also strongly reflects the degree to which the parties had come to rely on the WLB for arbitration of their disputes, or alternatively, the effect the WLB had on the collective bargaining process. Willard Wirtz drew the conclusion that, "[e]xperience—particularly the War Labor Board experience during the '40's—shows that a statutory requirement that labor disputes be submitted to arbitration has a narcotic effect on private bargainers, that they turn to it as an easy—and habit forming—release from the obligation of hard, responsible bargaining."\textsuperscript{488}

Whether the arbitration system built by the WLB is characterized as voluntary or compulsory (and knowledgeable writers have argued both sides of the issue), it did impair the ability or the willingness of the parties to settle through bargaining. The Wirtz view probably represented the popular conception that the WLB tended to paralyze the collective bargaining process. By contrast, former WLB Chairman Edwin E. Witte pointed to another side of the evidence:

[T]he great majority of the collective bargaining agreements of wartime were negotiated directly between the parties, without the War Labor Board's having to settle even a single issue. . . . In the cases referred to the Board, moreover, it was rare that the parties were in disagreement on all issues. Typically, they had worked out most of the provisions of their agreement, with only a relatively few issues referred to the Board for decision.\textsuperscript{489}

The WLB functioned during an exceptional historical period. Its experience may therefore prove of far greater consequence to legal historians than to students attempting to predict the future usefulness of interest arbitration. The War Labor Board did, however, compile a

\textsuperscript{486} Id. For 1929-31, the average was .08.

\textsuperscript{487} Id. Compare 1945 with 1946 in these categories: (a) Number of strikes: 1945—4,750; 1946—4,985. (b) Average duration (calendar days): 1945—9.9; 1946—24.2. (c) Workers involved (millions): 1945—3.47; 1946—4.60. (d) Man-days idle: 1945—38,000; 1946—116,000. (e) Man-days idle as a percentage of total working time: 1945—.47; 1946—1.43. Herbert Northrup has called 1946 "the greatest strike year of American history" with good reason. H. Northrup, Compulsory Arbitration and Government Intervention in Labor Disputes 22 (1966) [hereinafter cited as Northrup].


\textsuperscript{489} Witte, supra note 477, at 177.
significant record in achieving the essential goals of minimizing work stoppages in important industries and guaranteeing consistent effort in continuous wartime production. That may be some evidence of the effectiveness of compulsory arbitration in the settlement of private sector emergency disputes. An appraisal of the overall cost to the collective bargaining system of such “ad hoc” settlement procedures is considered in the next section.

2. National Emergency Disputes

In two major labor statutes Congress has circumscribed resort to economic weaponry in order to protect the public interest: the national emergency dispute procedures of the Railway Labor Act (RLA); and those of the Labor Management Relations Act of 1947 (Taft-Hartley Act).

a. RLA Emergency Dispute Procedures and Collective Bargaining

Emergency disputes in the railroad and airline industry are to be resolved through step-by-step procedures provided for in Section 10 of the RLA. This involves the following process: The parties are required to give 30 days notice of an intended change in the existing agreement. The three-member National Mediation Board (NMB) attempts to mediate the dispute; if mediation fails, the NMB suggests voluntary interest arbitration. If arbitration is declined, the NMB gives notice that its efforts have failed, and for 30 days thereafter no change may be made in rates of pay, rules, or working conditions. If the NMB believes that the dispute “threatens substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service,” it notifies the President, who in turn may appoint an emergency board to investigate and report within 30 days. After the creation of such a board and for 30 days after it has made its report to the President, the status quo must be maintained—no change may be made in existing conditions and no work stoppage may occur.

Prior to 1941, during the period in which the RLA was regarded as a "model act," there were no occasions when the parties refused to accept the emergency board recommendations for settlement. Since 1941, however, the effective terminal step has not been the emergency board but non-statutory Presidential involvement or, with increasing regularity, "ad hoc" legislation by Congress. 494

Initially, the Act contemplated a scheme in which mediation and voluntary arbitration would be central techniques for interest dispute resolution. The Section 10 emergency board and Presidential intervention provisions, which in effect constituted compulsory "advisory" arbitration, were to be rarely used. To the extent that the RLA procedures were designed to provide a true incentive for expeditious agreement, they have proven to be imperfect substitutes for economic action. Since 1941, and especially in recent years, the more important railroad disputes have found at least one of the parties pursuing its interest to the fullest extent of the RLA procedures, and thereafter often to "ad hoc" legislation. Increased reliance on third party efforts to induce or compel "agreement" has stunted the growth of mature and efficient collective bargaining relations in the railroad industry.

This can be illustrated by considering the way in which the RLA emergency dispute procedures have worked in practice. Prior to 1963, though the President had convened more than 150 emergency boards, all disputes had been resolved without resort to ad hoc legislation by Congress. 495 The President had come to occupy a pivotal role in compelling agreement to avert a work stoppage, using every available means at his disposal, including seizure. In 1963, however, President Kennedy was forced to refer the firemen-manning dispute to Congress for settlement. 496 This dispute had been brewing since 1959, when the carriers had filed notice of intent to change certain work rules unilaterally. The issue ultimately reached the President, who set up a fifteen-member Presidential Railroad Commission to study the problem. This commission reported in early 1962, whereupon the President convened an emergency board which reported in May of 1963; but the parties still failed to reach an agreement. The President then convened a six-member Presidential Rail Commission. Its efforts also

494. For accounts of the wartime and post war-disputes and the increasing Presidential involvement; see Levinson, supra note 466; Kaufman, Emergency Boards Under the Railway Labor Act, 9 LAB. L.J. 910-20 (1958). Between 1916 and 1963 there had been no instances of "ad hoc" legislation by Congress. In the last twelve years there have been nine occasions; see text accompanying notes 496-504 infra.

495. See Woodley, Emergency Labor Disputes and the Public Interest: The Proposals for Legislative Reform, 17 ST. LOUIS L. REV. 47, 53-54 & notes 31-34 (1972) [hereinafter cited as Woodley].

proved unavailing, especially in resolving issues concerning the use of firemen on diesel locomotives and the size of road and yard crews. Thereafter, Congress for the first time since 1916, imposed a legislative settlement in a railroad labor dispute. It passed an act which established a seven-member Rail Arbitration Board to arbitrate the diesel firemen and crew size issues. Work stoppages over these issues were prohibited for two years following the date of the arbitration award. Other issues (yard issues) were referred back to the parties for local negotiation or arbitration. President Johnson (aided by mediators George W. Taylor and Theodore Kheel) ultimately entered the negotiations and induced a settlement on the yard issues, averting a threatened strike.

RLA emergency dispute resolution procedures were thus extended to include compulsory arbitration through ad hoc legislation by Congress. A pattern may have been established, for since 1963 more than forty emergency boards have been created and on nine occasions the issues have ultimately been resolved by ad hoc Congressional intervention. Three such laws were enacted in the 1967 shopcraft wage dispute. The first two acts delayed what eventually became a two-day nationwide walkout, later resolved by the third act, which submitted the issue to a five-member special board for binding arbitration. In 1970, three more acts were passed: the first two postponed and then resolved another shopcraft dispute over wages and work rules; the third ended a one-day nationwide strike of 400,000 rail employees involving four unions embroiled in a dispute with Class I carriers over wages and work rules. Congress prohibited further striking for a period of three and one-half months and provided a 13.5 percent retroactive wage increase. Three of the four unions later settled with the carriers; the United Transportation Union (UTU), however, did not settle until after a selective strike of ten railroads. In view of the long established pattern of nationwide railroad bargaining, UTU's resort to selective strikes resulted in litigation in which the District of Columbia Court of Appeals held that the union could engage in such strikes provided impasse had been reached on a national level and that such strikes were designed to achieve a nationwide settlement.

498. See Kaufman, supra note 496, at 210-11.
499. For a summary of eight of these laws, see 118 Cong. Rec. 8519 (1972) (remarks of Congressman Lloyd). See also Kilgour, supra note 492.
In 1971, Congress again intervened to halt a nationwide railroad strike, this time of signalmen. The resulting statute prohibited strikes for several months and granted another 13.5 percent retroactive wage increase.\(^\text{504}\) Congress intervened once more in 1973, when 28,000 UTU members struck the Penn-Central in a dispute over reduction in size of the engine crew. The response was swift. A joint resolution noted the pendency of reorganization proceedings and the effect which even a short strike would have on resumption of the system's operations; the legislation halted the strike and required the Secretary of Labor to submit a comprehensive plan for reorganization of the rail transportation network in the Northeastern United States,\(^\text{505}\) from which the CONRAIL system ultimately resulted.

Reliance on Congressional intervention has seemingly become habit-forming, so much so that even the prospect of Congressional non-intervention may have a catalytic effect on serious bargaining. This apparently happened at the end of 1975 in a dispute between four shopcraft unions and the railroads; settlement was quickly reached after the Administration assured the unions that Congress would not be asked to settle the dispute. That assurance was given in exchange for the union's promise to give "appropriate notice" should they decide to strike.\(^\text{506}\)

Frequent ad hoc Congressional intervention has focused critical inquiry on the continuing usefulness of RLA procedures for resolution of emergency disputes. But the threshold question must be whether Congress itself is qualified to act as the impasse resolution tribunal for the special problems in these interest disputes. One Congressman, in describing his objection to Congress having such a role, emphasized that

... Congress is really the poorest equipped to make the decisions. None of the 535 Members in the House and the Senate are, to my knowledge, experts in either the railroad industry or airline industry, which are covered by the Railway Labor Act. Nor are they experts in the area of labor relations. This makes for the poorest sort of agreement that can possibly be reached ... [We] get just a cursory summation of the position of the parties. Upon this we are within a matter of 24 or 48 hours, called upon to make a decision and do something which is going to get the men back to work.\(^\text{507}\)

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In order to avoid the necessity of hastily passing ad hoc legislation, Congress has considered, but has not come close to adopting, various devices designed to achieve settlement of emergency disputes. Some of these will be outlined below. First, however, the existing procedures for emergency dispute settlement under the Taft-Hartley Act (LMRA) will be examined.

**b. LMRA Dispute Procedures**

Under the LMRA an "emergency" is defined as

... a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in [interstate] commerce or in the production of goods for commerce, [which] will, if permitted to occur or to continue, imperil the national health or safety. ...

The Act's procedures are triggered by a Presidential determination that such an emergency exists. Subsequent to this determination, a Board of Inquiry may be convened to compile information, including the parties' positions, pertinent to the dispute. The Board ultimately issues to the President and the general public a written report containing findings of fact and a statement of important issues and suggestions, but not a determination on the merits. On the basis of this report and other available information the President may order the Attorney General to obtain an 80-day injunction against the work stoppage in any federal district court having jurisdiction over the disputing parties.

The district court reviews the evidence to determine whether the strike or lockout meets the statutory conditions of breadth of involvement and peril to the national health or safety. District court approval of the Presidential determination is not automatic, as was evidenced in a 1971 decision, United States v. International Longshoremen's Local 418, wherein the court ruled that a grain elevator strike did not "affect an entire industry" and had only local and regional consequences; hence the requested injunction did not issue.

If, as in most cases, an injunction is granted, the Act requires the parties to continue bargaining over the disputed issues. After sixty days the Board of Inquiry reports the progress to the President and the public, including a statement of the employer's final settlement offer. If the dispute continues, within the next fifteen days the NLRB conducts a secret ballot vote of the employees as to the acceptability of

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509. Id. § 176.

510. Id. § 178.

the employer's last offer. The ballot result is certified by the NLRB to the Attorney General within the concluding five days of the injunction period. If the employer's final offer is certified as rejected and no settlement is reached, the injunction is automatically dissolved and the President submits the matter to Congress with his personal recommendation as to appropriate action. Although Congress may resolve the dispute by ad hoc legislation, the parties are under no further restraint until Congress acts.

Since its inception in 1947, these formal procedures for resolution of emergency disputes have been invoked by the President thirty-four times. Of these thirty-four instances, five were settled without a strike, twenty-eight required the issuance of injunctions to either halt or prevent a work stoppage, and in one instance the court ruled that the union had not ordered a strike.512 In another instance, in 1972, Congress enacted a joint resolution to end the West Coast longshoremen's strike, which began after the 80-day injunction had been lifted and continued for 134 days causing an estimated loss of 1.4 billion dollars in foreign trade.513

As with the Railway Labor Act, substantial criticism has been leveled at the Taft-Hartley emergency procedures. While a detailed discussion of the problem areas and the proposed remedies is beyond the scope of this article, the manner in which LMRA procedures rely on the injunction as the principal weapon in forcing the parties to compromise their positions can be explored. It is considered axiomatic that parties to collective bargaining negotiations rarely make substantial compromises until faced with a rigid deadline. Whether it be an 80-day injunction or a 60-day status quo period, experiences under both "cooling-off" approaches, including resort to post-injunction strikes and compulsory arbitration by Congress, illustrate the axiom. The bargainers come to regard third party intervention as "part of the process" and it has been used with increasing frequency in recent years to gain tactical or strategic bargaining advantage. As incentives for serious bargaining, these procedures are severely limited.

c. Reform Proposals

The main features of various proposals for permanent emergency dispute legislation will be reviewed. Given the scope of this study, it is appropriate to begin with the plan which would amend current laws to provide for compulsory arbitration.514 This plan usually calls for

512. See BNA, supra note 407, at 41-2.
513. See 118 CONG. REC. 8517 (1972) (remarks of Congressman Harvey).
514. For a general introduction to this technique of emergency dispute settlement, see Jones, Farmer & Feller, Compulsory Arbitration: Three Views, 51 VA. L. REV. 367 (1965).
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Presidential appointment of an impartial arbitration panel charged with imposing a settlement on recalcitrant disputing parties. The negative effect that such a procedure would generally have on the process of free collective bargaining has been noted many times throughout this article. Under RLA procedures, a de facto system of this type seems already to have been in operation. A variation on the compulsory arbitration theme calls for the establishment of a labor-management court or commission to take jurisdiction over national emergency disputes. Such a plan, however, would only change the nature of the arbitral selection process without overcoming the root problems of compulsory arbitration.

Governmental seizure of the locus of the emergency dispute has also been proposed. As pointed out in the review of War Labor Board experience, seizure was used before, during, and after our involvement in World War II. Recall the seizures by Presidents Wilson and Roosevelt during wartime. President Truman's seizure of the steel mills during the 1952 crisis was held unconstitutional by the Supreme Court.

Some observers would limit executive seizure to those crises in which there is no established legislative policy and executive action is

515. See Woodley, supra note 495, at 90-96. See also 113 Cong. Rec. 30349-50 (1967) (letter from Prof. Archibald Cox to Sen. Joseph Tydings), wherein Prof. Cox wrote:

[I]n a vast, diverse and complex economy with strong labor unions, one cannot mix judicial determination of wages and conditions of employment with free collective bargaining . . . . Litigation is essentially a non-creative process in labor relations. It tends to freeze existing practices and past relations . . . . These consequences of permanent dispute machinery became very apparent in World War II under the War Labor Board . . . . [T]hey would be greatly accentuated by the judicial character of the proposed tribunal . . . . [T]he mounting effect of the rigidities would intensify [and] be damaging to the economy . . . . [A]lthough a few unusually skilled individuals can combine the roles of mediator and arbitrator or mediator and fact finder on special occasions, the processes of mediation and conciliation, on the one hand, and judicial adjudication, on the other hand, cannot be mixed over any substantial period without substantial injury to both. The approach of the mediator is necessarily different from that of judge. The mediator is seeking to suggest some basis for agreement. He is particularly concerned with finding the points at which compromise is most likely. He must seek to appraise relative power of the parties rather than find an objectively fair and equitable decision. What he does as mediator and especially what he learns as mediator may rise to plague him as judge. Conversely, either his own or the parties' knowledge of the precedent and other limitations which will circumscribe him as judge will impair his effectiveness as a mediator . . . . [I]t would be a grave mistake to suppose that the orders of the proposed court would command complete voluntary compliance from the members of labor unions. Our own strikes by government employees, defiance of the War Labor Board and experience with compulsory arbitration in Australia all suggest that they would not.

Id. at 30350 (original emphasis).

essentially. Critics of seizure have stressed the side effects which the procedure has on the collective bargaining process—specifically on employee rights. By seizing the locus of the dispute, the employees' major economic weapon and source of bargaining power, the strike, is eliminated pro tanto and nothing substituted. There are also problems relating to managerial authority and private property rights. No President since Truman has requested such authority; and it is not likely, considering recent events involving relations between the Executive and Congress, that Congress would vote to grant it. Regardless of the political realities, the attendant administrative difficulties in securing the property, imposing interim working conditions, and effectively compensating for the seizure, strongly militate against adoption of such a plan.

Final-offer selection, which has now become familiar through state public sector experience, has also figured prominently in various proposals. As in the public sector, the final-offer device for emergency dispute resolution is designed to force each party to make a realistic appraisal of its position, the theoretical motivation being the risk that the other side's offer may be accepted if adjudged the more reasonable. In 1972, the Nixon administration advanced a comprehensive emergency dispute proposal which utilized final-offer selection as one of three alternative procedures to be made available to the President. Each side would submit two alternative final offers to a three-member neutral board which would make a final and binding selection. The offers could not be modified in any way by the board.

Another proposal has been advanced by the American Bar Association. Under this plan, a series of commissions would be established, each composed of officials representing labor and management in the concerned industry. The commissions would develop plans for handling emergency disputes within the particular industry. Creation of a Presidential Emergency Mediation Board and a Presidential Arbitra-

517. See Cox, Seizure In Emergency Disputes, in EMERGENCY DISPUTES AND NATIONAL POLICY 224, 242 (I. Bernstein, H. Enarson, R. Fleming eds. 1955) [hereinafter cited as Bernstein].


519. The alternative procedures were: (1) extension of the Taft-Hartley 80 day injunction (which would also replace the Section 10 procedures of the Railway Labor Act) for an additional "cooling off" period up to 30 days; (2) appointment of a three member board to determine conditions for partial operation; and (3) appointment of a panel to receive and select the most reasonable "final offer" from one of the parties to the dispute. S. 560, 92nd Cong., 1st Sess. (1971), referred Feb. 3, 1971, to Senate Committee on Labor and Public Welfare; H.R. 3596, 92 Cong., 1st Sess. (1971), referred Feb. 4, 1971, to House Committee on Interstate and Foreign Commerce.
tion Board was also recommended, with the arbitration board having power to make final and binding awards. The ABA proposal does not endorse the "either/or" model, but opts instead for a more flexible and conventional role for the arbitration board.\textsuperscript{520}

Other devices which have been suggested for emergency dispute resolution include the following: the selective strike (and its counterpart, partial operation); the statutory or non-stoppage strike; and prolonged extension of the 80-day "cooling off" (or the RLA 60-day status quo) period. When some or all of these or other procedures are combined with mediation, fact-finding, and/or further bargaining, and are alternatively prescribed or made available, they comprise an "arsenal of weapons" approach.\textsuperscript{521} The Nixon administration proposal included several such alternatives in order to provide the President with a choice of actions. The theory behind an arsenal of weapons plan is that the disputing parties will have greater incentive to achieve voluntary settlement without a prolonged work stoppage if they are uncertain as to the device which will be prescribed. Such flexibility in the use, or threatened use, of procedures is calculated to motivate parties to write their own collective agreements, relying on third-party or governmental determination only for the occasional hard negotiation.

The arsenal of weapons approach is by far the most attractive of the plans thus far advanced. But whether such a plan can be applied successfully as an adjunct to the collective bargaining process—i.e., used in such a way that collective bargaining will function normally without governmental intervention—will ultimately depend on the wisdom and nerve of the President and his advisers. It would be no better than a monolithic plan if reliance on third-party determination within the arsenal became so excessive that voluntary collective bargaining is stifled. The arsenal of weapons approach may indeed be useful, but it will not be a panacea. Other more fundamental changes, which I shall touch upon before closing this paper, will still be needed to improve the role and performance of collective bargaining in the American economy.

\section{VII}

\textbf{The Future Role of Interest Arbitration}

It seems certain that interest arbitration will continue to play an important role in the American industrial relations system. But the de-


\textsuperscript{521} For favorable view of this approach see Wirtz, \textit{The "Choice of Procedures" Approach to National Emergency Disputes}, in Bernstein, \textit{supra} note 517, at 149. Also
vice will prove to be neither the cure-all yearned for by some politicians and many critics of the existing system nor the substitute for collective bargaining which others fear. There are many imponderables in industrial relations, including unforeseen economic events and future political actions that could heavily influence the system’s future. Attempting to predict the future is risky business, and I bring no special credentials to the task. But assuming reasonable continuity of existing trends, a perceptive reading of the important signs of the past and present suggests a direction in which the American industrial relations system may be moving. Here are some of the questions to which we seek answers: What will be the extent and nature of interest arbitration? How widely will interest arbitration be used in the public sector? Will voluntary interest arbitration agreements become more common in the private sector? Will compulsory arbitration play a prominent role in the settlement of national emergency disputes?

In trying to answer such questions, this article must end where it began—with the premise that ours is fundamentally a collective bargaining system. To the extent that interest arbitration can be employed to improve collective bargaining it will serve as a valuable adjunct to the system. To the extent that it will be employed to replace collective bargaining it will likely fail, although it may take a long while for the public to be convinced of the true reason for the failure. It is unrealistic, however, to conceive of compulsory arbitration as a viable substitute for collective bargaining in the United States. We have no traditions to support a pervasive compulsory arbitration system, and there is no reason to believe that we could utilize such a system any more successfully than Australia—or even as successfully.

A. Public Sector

It is here that interest arbitration—even the compulsory variety—will likely be widely used. Inasmuch as there is no long-standing tradition of the right of public employees to strike, it is easier to construct a collective bargaining model which includes interest arbitration as a significant device for impasse resolution. Because the private sector model is ever present, such a device is most likely to be acceptable and to operate with reasonable efficiency if two conditions prevail: (1) the existence of an element of voluntary choice (real or apparent); and (2) an arbitration process that either encourages meaningful bargaining by the parties or closely approximates the bargaining process in its methods of operation and in the result it achieves. Med-arb combined with final-offer issue-by-issue arbitration seems to meet these require-

see Cullen, The Taft-Hartley Act In National Emergency Disputes, 6 IND. & LAB. REL. REV. 15 (1953); and A. Cox, LAW AND NATIONAL LABOR POLICY (1960).
ments, although other arbitration forms may function just as well if handled flexibly and skillfully.

The critical ingredient in a successful collective bargaining/arbitration mixture in the public sector, as it must also be in the private sector, is the nature of the relationship between the parties. A mature relationship based on mutual respect will be reflected in a more smoothly operating system and in settlements which represent reasonable compromises among the employees, the government employer, and the public interest. Given a mature relationship, the configuration of the particular legal structure used for dispute settlement purposes is not terribly important, for a wide variety of structures can be adapted to produce the appropriate collective bargaining document. If that relationship does not exist, then the most ingenious settlement device will, in the long run, probably fail.

I would not venture to suggest a universal prescription for resolution of public employee interest disputes. Conditions and traditions differ widely. The plan used for the Canadian Public Service employees has much to commend it; the injection of voluntary choice, conciliation, arbitration, limited use of economic weaponry, and strike-limiting devices to protect the public interest offer the kind of mix which seems to encourage the parties to bargain collectively and achieve acceptable settlements. The newer state programs in the United States, especially those which blend the right to strike for most employees with restrictions on that right for employees engaged in critical or essential services, may also prove promising. The most attractive program of this type would be one which makes available a variety of techniques, including private bargaining, mediation, fact-finding, med-arb, “cooling off” periods, and arbitration in various formats, with sufficient backing by judicial authority to enforce the rules and protect the public from danger.

In any plan where interest arbitration is to be used, whether compulsory or voluntary, it would be desirable for the enabling statute to prescribe a particular arbitration format, although the parties should also be given the option of selecting any other mutually agreeable format. For example, if the statutory plan calls for conventional arbitration but both parties prefer a final-offer selection plan, they should be allowed to make the substitution of their choice. In fact, they should be encouraged to reach as many procedural agreements as possible, for their experience in reaching any kind of agreement may carry over and make it easier for them to compromise and agree on substantive issues.

There may also be widespread dependence in the future on legislated interest arbitration where strikes of all employees, non-essential as well as essential, are entirely prohibited. This may even prove mod-
erately successful, particularly where there has not been a strike tradition among the affected employees. But it may be difficult to gauge the long-range efficacy of such broadly based legislated interest arbitration, for bargaining and mediation under such a plan may continue to be affected by undertones of strike threats.

**B. Private Sector**

Here, interest arbitration should play an increasingly important role, but on a voluntary basis. At this stage in industrial history, the steel industry Experimental Negotiating Agreement may represent the outstanding example of mature labor relations in the United States. But the ENA will work successfully only as long as the parties have confidence in it. Because the parties are well aware of the fragility of the device, they have ample incentive to make it work. It works best when it is used least. To this observer, the ENA is an exciting and promising phenomenon. It is only "promising" however, so one must still hope that the promise will be fulfilled. If we carefully define the promise, we may discover the direction in which the American collective bargaining system could be moving.

The real promise in the ENA is not in the interest arbitration procedure itself. Again I return to the point of beginning. Labor peace and stable and mature industrial relations will not be found in any single dispute-settlement mechanism. Nor will they be found in any combination of mechanisms, though various devices which have been examined can be extremely important in assisting the parties during their collective negotiations. In that sense, the procedure of the ENA is of vital importance. The exciting and promising feature of the ENA, however, is simply that the parties adopted it—that the steel industry and the United Steel Workers had reached a point where sufficient mutual respect existed between them and where conditions in their industry were such that they could agree to an arrangement whereby all parties, including the public, would benefit from continued production. They chose the ENA rather than resort to brute confrontation of power. They might have chosen some other device that would have been just as successful.

I would like to believe—and I do cautiously suspect—that the mutual respect, evidenced by the ENA itself and by the successful 1974 negotiations conducted thereunder, was not based entirely on the balance of great economic power, though that may have been its genesis and was undoubtedly a pre-condition. Also important to the relationship was a recognition on each side that the other side not only has a right to exist but that it is also proper that it does exist. When a relationship of such maturity is achieved, labor and management can
be more statesmanlike in their dealings and the public interest can be better served—a concept I shall discuss further in the conclusion to this article.

C. National Emergency Disputes

Interest arbitration may be useful in the future as part of an arsenal of weapons approach to the settlement of national emergency disputes. However, for reasons which have permeated this analysis, I do not recommend compulsory arbitration for many such disputes, although I recognize that there may be extreme occasions when such a device will appear necessary, in which event it is likely that it will be used either on an ad hoc basis or will be selected by the President from an arsenal of weapons made available by Congressional legislation. But if settlements are achieved in this manner too often, they may fail to reach the root cause of the dispute. A healthy bargaining relationship between the parties and some development along the lines suggested in the concluding section below, would be likely to yield more lasting results and at the same time produce settlements which are more consonant with the public interest.

Nevertheless, standby legislation to protect the public from the dangers that might be caused by critical and widespread work stoppages will probably be needed for a long time. It is important that the arsenal of weapons which such legislation would provide be reserved for true national emergencies and used sparingly. To do otherwise would be to weaken the collective bargaining system and make more difficult, if not impossible, the development of mature bargaining relationships in which full consideration is given to the national and public interest in the settlement of major labor disputes.

VIII

Conclusion

This discussion brings me to a commentary on the larger industrial relations scene, not limited to the future role of interest arbitration. Although this broader subject properly requires treatment in a separate article, the present study would be incomplete were it omitted. My view of the larger scene may explain why I cannot see interest arbitration standing alone as a means of substituting “reason for the unrestrained exercise of force in settling labor disputes,” a goal which A. H. Raskin and others have sought so earnestly. Yet I must warn the reader that this view—or more properly this glimpse—of the larger scene can be included here only as a subjective conclusion appended to the main theme of this study. It is my view that long-term stable
labor relations in the United States will not be achieved until the roles of the respective actors are widely understood and appreciated and certain attitudes toward those roles are modified. The late George W. Taylor perceived the heart of the problem while searching for the elements of a successful incomes policy:

The search for the answer is likely to be found, ultimately, I believe, through a greater degree of cooperative endeavor between representatives of labor, management, and the government than presently seems to be possible.522

Such "cooperative endeavor" is indeed difficult to achieve. But at the very least it should be the direction toward which we attempt to steer the system.

Many responsible observers have viewed the problem differently. For example, Neil W. Chamberlain decried the failure of national union politicians to take more responsibility for economic decisions than they had in the past. He reminded us that this is the age of "social responsibility,"523 and that unions may be led to reexamine their traditional stance at the corporate bargaining table. Recognizing that unions have traditionally argued that they can gain greater benefits for their members by remaining free to strike and by bargaining vigorously and selfishly for "more" for their members, he argued for a "significant shift in the way that labor unions view themselves, [for] without such a shift unions would run the danger of being regarded as dangerous anachronisms in a necessarily more coherent economy."524 Another common view was expressed by Douglas Soutar when he foresaw survival within our economic system only if there is "some swinging back of the pendulum to reduce union power."525

I respectfully dissent from both of those popular attitudes. Labor union power is not the central problem, nor is the need for greater national leadership in union decision-making, though both factors are important. A more fundamental problem is that of responsibility. Responsibility is associated with respect and one's place in the scheme of society.

Addressing the 1975 Congress of the DGB (German Federation of Trade Unions), Helmut Schmidt, Chancellor of West Germany, pub-


524. Id. at 26.

licitly thanked the unions for accepting comparatively modest wage settlements as part of a policy of cooperation with the government's efforts to stabilize the economy. The journalist who reported the event for the *Suddeutsche Zeitung* added the following perceptive comment:

> Despite external appearances West German trade unions are more powerful than their British, American, French or Italian colleagues . . . . People often overlook the fact that the many strikes in Britain and Italy are a sign of the weakness and not the strength in their trade unions.\(^{526}\)

A similar story may be told about the Swedish trade unions. It is a mistake to assume that strong unions must be more irresponsible because they are strong. The strength of the American trade union movement is not the most relevant factor in the search for stable and responsible industrial relations. More important than the strength of a union movement is its place in society, and it is here that the American industrial relations system displays its greatest weakness.

American unions are expected to act in a statesmanlike fashion; not to rock the economic boat, not to press for inflationary settlements, and above all they are expected to be concerned about the national economic welfare. While some union leaders might enjoy playing statesmen, most have probably never thought seriously about it, for they have been too busy surviving. Our system, both in its legal structures and in its social relations, fosters constant insecurity in unions and union leaders. This brief comment only touches on causes and symptoms, of that insecurity, and not all of the causes and not all of the symptoms.

Union insecurity, hence union militancy, may be traced to several sources. A prime source is the nature of the legal structures in which American unions must operate. For example, Taft-Hartley Act procedures, which deny union representation to employees unless they comprise a majority of an appropriate bargaining unit, encourage employers to manipulate the representation and collective bargaining process and to downgrade the role of unions in the industrial environment. Election procedures under the Act foster a hostile relationship between employers and unions before bargaining can even begin, and the relative impotence of the National Labor Relations Board to achieve prompt and effective enforcement of rights and obligations relative to organizational activity and collective bargaining\(^{527}\) provides most employers with the legal means to keep unions out of their establishments.

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The fact that only a fourth of the eligible workers in this country are union members attests to the wide success of their efforts.

Two additional factors which contribute to these problems are (1) the fragmented bargaining units which the system fosters, and (2) the ease with which many employers can avoid unionization simply by taking advantage of the radiation effect of collective bargaining (by approaching, matching, or in some cases even bettering the benefits achieved through collective union action). Policies of union-avoidance may be advantageous to individual employers, at least in the short run, but the cumulative effect of widespread hostility toward the concept of union representation, whether displayed at the shop level through a professionally organized anti-union election campaign or at the national level through massive public relations programs and lobbying, is bound to induce unions to be more militant than they otherwise would have to be. It is little wonder that unions and employers too often treat each other as enemies. The system breeds more adversity than is necessary, which is remarkable considering that American unions are not class-oriented like most of their European counterparts. The fact that the American labor movement is trying to work within the private enterprise system rather than destroy it should be a plus factor with American employers.

Let us address our attention and resources toward the elimination of the paranoic manifestations within the system. To generalize, but with recognition that there are significant exceptions, it is safe to conclude that American unions and their leaders tend to be insecure in their positions and uncertain about their role in society; even powerful union leaders have reason to feel that they are not “accepted.” Unions thus tend to pursue a policy of almost pure self-interest and militancy in order to survive and justify their existence. On the other hand, many employers and much of the general public seem to believe and behave as if unions are the embodiment of every evil in the economic system. If the country can find a way to reduce the factors which contribute to these mutually paranoic attitudes (which I believe is possible), we will have advanced toward a more rational industrial relations system. If unions attain sufficient security and are accepted as legitimate partners in the economy, they may be expected to assume a more socially responsible role in the national community. Reforms directed toward such goals would make for a healthier collective bargaining system, and would be more lasting, than any type of compulsory arbitration.

It would be encouraging to know if the Steel Workers and the steel industry, through their Experimental Negotiating Agreement, are indeed steering a course in the direction of joint and meaningful social
responsibility. The rest of the industrial relations community will be attentively watching their relationship and their experiment with interest arbitration. Hopefully other parties in the labor relations community will also develop the kind of mutual respect that makes an ENA agreement possible.