BEYOND THE STRIKE: A PROPOSAL FOR EXPERIMENTATION WITH SUBSTITUTES

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To many, unions and collective bargaining mean strikes, and that's all there is to it. To some others, notably legislators, the seemingly inevitable link can be severed effectively in public employment by a legal ban on the strike. Paradoxically, both views may be wrong.

Substitutes for the strike may be developed which perform its salutory functions of making *both* sides bargain responsibly without imposing the heavy costs it often inflicts upon participants and the public. The widespread unacceptability of the strike, for reasons both good and bad,[1] make the active search for such substitutes eminently worthwhile.

I. FUNCTIONS OF THE STRIKE IN COLLECTIVE BARGAINING

In the United States public labor policy makes collective bargaining the preferred method for resolving disputes between employers and organized groups of employees over wages, hours and working conditions. Federal law and some state statutes require such bargaining in the private sector when a majority of employees in an appropriate unit select an organization to represent them. Although the law *compels* bargaining, democratic and libertarian notions underlie the requirement—for example, parties most directly affected know their problems and needs best and can resolve their differences to their mutual satisfaction and achieve stable accommodations better than solutions imposed by necessarily more remote officials. Once parties are compelled to meet and bargain, their exchange of information and argument is expected to achieve agreement. In part, that outcome results from the difficulty of arbitrary decision in face to face discussion and in the presence of data and logic. And those of us who participate or observe the process testify that bargaining frequently works that way. In part collective bargaining success may derive from the legal requirement to bargain in good faith. But few would dispute that most often bargainers act fairly reasonably because the alternative to responsive and responsible bargaining in much of the private sector is the strike.

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[1] For example, private employees' strikes cost employers money because of lost sales; many public employee strikes save employers money because no sales are lost but payroll is reduced. The difference makes inopposite arguments for use of the traditional strike based upon private analogy. Also, some argue, there is no "market" sanction in the public strike situation; but others would argue that citizens weigh the costs of early settlement against the value of lost public services and, indeed, choose through their representatives to purchase or forego public employees' services according to the value placed upon them. An example of a poor reason is: all public employee services are essential (although some are pretty much the same as those provided in other places by private employees who *are* permitted to strike).

The strike, it must be understood, disciplines *both* sides.[2] Employees lose wages and the employer loses production, and sales, and sometimes customers. Before either side precipitates a strike it must weigh such losses against the cost of agreement. If both sides run risks of substantial loss, they feel pressure toward settling on terms that also serve the needs of the other.[3] It is not an actual strike that makes bargaining proceed reasonably; indeed, strikes in the private sector are rare.[4] Rather it is the possibility of a strike and its attendant hazards that keep the demands and responses of both sides within bounds.[5]

In all but three states statutes or court decisions ban public employee strikes. That state of affairs probably will persist for a considerable period into the future. Whether the reasons are good or bad,[6] the common disapproval of public employee strikes must be taken as given. Another given is that the ban does not work, even in sectors where those who now strike, notably school teachers, regarded the device as unthinkable in the not-so-recent past. They, and other public employees, use the device because they have seen it work in the private sector and believe that they possess no other method to attain employer recognition and responsive bargaining—with or without statutes requiring bargaining. Whether that employee and union perception is accurate or not, it is a fact of life, which imprisonment and fines—actual or threatened—seem unable to change. Quite a few disinterested observers, myself included, agree that without some sanction to fill the strike's role, many public employers, especially the uninitiate, will not bargain responsively.

What is needed, then, is a device or devices which serve the beneficial purposes of the strike (make bargaining "go") but lack its baleful characteristics—extensive disruption, undue[7] hardship to non-contestants, and —not least—is acceptable enough to the community to be made legal.

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[2] This is the ideal situation, to which there are exceptions. For example, a strike will not deter an employer with ample stocks not vulnerable to picketing or union members with ample alternative employment opportunities.

[3] Frequently concessions on different subjects are sought by union and employer. To take an example I have observed, an employer conceded a guarantee of job security in trade for union agreement to relax craft jurisdictional lines. Note that the value of both concessions would be very difficult to estimate — bargaining often is rough and ready.

[4] In 1968, 5,045 work stoppages accounted for .28 percent of total working time. U.S. BUREAU OF LABOR STATISTICS, DEP'T. OF LABOR, BULL. NO. 1646, ANALYSIS OF WORK STOPPAGES, 1968, at 13 (1970).

[5] Many believe that the absence of such strike-imposed constraints contributed to the breakdown of bargaining in the railroad industry where, until the recent past, strikes were nationwide in scope and hence not tolerated although not legally prohibited as a general rule.

[6] Many academic labor relations specialists believe that public employee strikes will become more acceptable and, eventually, legal as some are in Hawaii and Pennsylvania. That may very well be. My own view is that the strike is an overly blunt weapon in both sectors, but especially in the public realm. I am not avid for banning it in either area. My concern is to develop more satisfactory devices for all concerned. Ideally, such substitutes would be so preferable that banning the traditional strike simply would not be a matter for consideration.

[7] Of course, what is "responsive" or "undue" depends upon value judgments. By "unre-

Such devices are needed at least equally in higher education where collective bargaining takes place. The strike device is unacceptable to many professors, administrators, students, officials and the public at large, even in bargaining with private universities and colleges subject to the National Labor Relations Act which affirmatively protects the right to strike. In this traditionally calmer realm, the winds of militance have begun to waft, intensified by tight and reduced budgets and resultant anxiety about job security.

II. Alternatives to the Strike

Alternatives to the strike have been actively sought. Quite a few public employee statutes offer protection against management unfair labor practices, mandatory recognition of and bargaining with unions representing majorities, machinery for establishing majority status, mandatory mediation of bargaining disputes, and mandatory fact-finding by neutrals with recommendations designed to mobilize public support for the settlement determined in that procedure. While such devices do reduce strikes, particularly over recognition, employees and unions feel they can do as much and more with the strike. Indeed, enactment of such statutes frequently results from strikes. Employees and unions feel that even recognition under such statutes frequently is hollow because the public managers, from habit and the pressure of costs and citizen resistance to tax increases, will not bargain meaningfully. Useful though the described devices are, they are not substitutes for the strike and in the absence of strike-like pressure, do not work at full effectiveness.

So, proposals have been made to provide a strike substitute in the sense of a device to terminate dispute or in the sense of a goad to effective bargaining. A brief description may help the uninitiate.

A. *Arbitration*

Voluntary use of industrial arbitration has spread rapidly since World War II, largely without aid from the law. Its phenomenal growth and acceptance have been utterly remarkable in a period when distrust and criticism dog most institutional arrangements. For the most part this success story attaches to determination of grievances involving the interpretation of provisions in existing collective bargaining agreements. The device has been little used to resolve disputes over what those contract terms should

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sponsive" bargaining I do not mean conduct so blatant as to violate the legally imposed obligation to bargain in good faith. Rather, I mean bargaining with less desire to achieve agreement than is common among private employers faced with a union that has the right to strike. "Undue" hardship means difficulties disproportionate to the responsibility and opportunity of the afflicted person's role to bring about a settlement and whose interest in the outcome may be mobilized adequately by less extreme means.

be.[8] In contract interpretation disputes, the parties voluntarily agree to the process and select the arbitrators or at least decide the method of their selection. Compulsory arbitration for new contract terms imposes both the process and the arbiters and, to pass constitutional muster, standards of decisions, although they tend to be quite approximate.

Nonetheless, compulsory arbitration of new contract terms when negotiations deadlock continues to be proposed as a means of averting disruptions in production or services regarded as unacceptable. In the fairly recent past, Congress twice has forbidden stoppages and decreed compulsory arbitration where nationwide railroad strikes impended. In 1972, it came close to another such enactment, but with notable reluctance. Whether a device succeeds or fails, helps or hinders, when applied to the tangled labor relations of this distressed industry probably tells little about its utility elsewhere.

Prescribing meaningful standards, finding neutrals knowledgeable in the financial aspects of the institutions concerned, and translating pay awards beyond budgetary limits into actuality constitute only the most obvious difficulties of the compulsory arbitration regime.

Nor does experience under several state statutes mandating arbitration of contract-making disputes in local public utilities[9] or by declaration of the War Labor Board during World War II[10] persuade that such an approach is promising.

Yet so many factors in state and local public employment and higher education differ from these earlier situations that arbitration's potential in these new settings cannot be readily assayed. Experience may evolve adaptations not now foreseen or demonstrate that the anticipated difficulties are manageable and, in any event, less forbidding than the consequences of strikes. While I myself am not sanguine, I would rather assess fresh experience than continue to haggle over the debatable lessons to be drawn from stale examples with quite different attributes.

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[8] Richard U. Miller, *Arbitration of New Contract Wage Disputes: Some Recent Trends*, 20 IND. & LAB. REL. REV. 250 (1967).

[9] The opinions of responsible spokesmen for industry and labor, which emerged from these consultations, show substantial unanimity of opposition to the statute on the ground that it weakens the vitality of the collective bargaining process by making agreements between labor and management more difficult to reach. (The two published studies of the statute resulted in similar conclusions. . . .)
REPORT OF THE [New Jersey] GOVERNOR'S COMMISSION ON LEGISLATION RELATING TO PUBLIC UTILITY LABOR DISPUTES (1954), excerpted in M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT 680 (1969).

[10] "Experience, particularly the War Labor Board experience during the forties, confirms that a statutory requirement . . . [for] arbitration has a narcotic effect on private bargainers. . . ." WILLARD WIRTZ, LABOR AND THE PUBLIC INTEREST 52 (1964).

B. *Choice of Last Best Offers—"Either-Or" Arbitration*

"Either-Or Arbitration," advanced by Carl Stevens[11] and proposed by President Nixon in his now-abandoned emergency dispute proposals, differs importantly from "normal" compulsory arbitration. In the "normal" version the parties argue their respective positions and seek to buttress it with data; the arbitrators appointed by the public authorities can choose either position or some intermediate point, the usual outcome. But under the "either-or" formula the parties would present the best offer they want to make and the arbiters must choose the one that is most "reasonable." By ruling out a compromise award, parties arguably face pressure to make the most appealing proposal rather than the inflated proposals common in normal contract-term arbitration offered in the expectation of scaling down by the arbiters. Thus, it is urged, bargaining will be more realistic and the parties will come closer to making acceptable proposals.

But objections abound: bargainers may indulge in brinksmanship; the arbiters will not be able to reject unpalatable parts of proposals; the results will be less realistic than now achieved by the "compromise" technique.

But no one knows.

C. *The Non-Stoppage and Partial Strike*[12]

I have proposed that two related devices—the non-stoppage strike and the graduated strike—be prescribed by law. When a union and public employer bargain to impasse and exhaust mediation and fact-finding, a union could declare a "non-stoppage strike;" employees would continue to do all of their work—but, initially, lose ten percent of their take-home pay. This and an equal amount contributed by the employer would go into a Public Purposes Fund controlled by a labor-management-public board (with non-officials in the majority) to apply the amounts to unbudgeted public purposes. If the dispute continued, the union could elect to increase the amounts by ten percent increments. These amounts would put pressure on the immediate parties to bargain responsively; those parties and the amounts involved would put pressure on other more remote public officials to decide budget and appropriation issues pertinent to the dispute. The device provides sufficient time for the pressure to spread to those officials who must become involved.

If after a specified period the non-stoppage strike does not work, a graduated strike would be authorized. An actual stoppage would be permissible, but only for a portion of the week—initially one-half day a week

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[11] C. Stevens, *Is Compulsory Arbitration Compatible with Bargaining?*, 5 IND. REL. 38 (1966). Neal Chamberlain says that it had a brief vogue under the Weimar Republic, where it failed. N. CHAMBERLAIN, THE LABOR SECTOR 640-41 (1965).

[12] For a fuller description and assessment consult Bernstein, *Alternatives in the Strike in Public Labor Relations*, 85 HARV. L. REV. 459 (1971).

with additional half days addable at specified intervals. (Or, an agency could convert a non-stoppage strike into an actual strike of equal degree whenever it could not afford the non-stoppage version.) Again gradual and potentially growing pressure would now more directly involve the citizen-taxpayer (the actual employer). Citizen involvement would stimulate official action. The taste of deprivation, without the bitterness of a total stoppage, might make larger allocations or higher taxes possible. With an actual though partial stoppage operating, political decisions would be more realistic than now; and officials would be spared the dilemma of bargaining under "illegal coercion" or blinking at the illegality. In a society where disrespect for law has become a major problem, substituting enforcible for non-enforcible law is desirable.

III. The Need for Experimentation

Faculty and administration in higher education may play a special role in exploring new methods of dispute resolution. Open-mindedness to new ideas, an inquiring turn of mind, attachment for rational processes, habits of experimentation, and respect for prescribed regulations peculiarly fit them to play a special pioneering role in testing new procedures.

For experimentation is needed. While debate may not have taken us quite as far as it can, further explication of proposed procedures probably will not suffice to persuade legislators to enact them. The factual basis for the arguments for and against particular schemes is sketchy at best.[13] So, for example, adverse assessments of compulsory arbitration (which I too have used) date back to World War II and the early 1950's, to say nothing of the fact that they involve, in one case, wartime experience among generally inexperienced bargainers, and, in the other, local public utilities. Whether one can generalize about them almost a generation later, can only be doubted. Two other more recent incidents in the railroad industry involve complexities and peculiarities that make evaluation terribly difficult, to put it mildly.

Moreover, experience teaches that union and employer arrangements, habits and conventions, economic conditions, and—not least—personalities to be found in bargaining relationships can vary enormously. Therefore it would be astonishing if one prescription for averting strikes worked equally well in so many variant situations. Some devices—such as mediation and fact-finding—in the hands of sensitive experts readily adapt to the peculiarities of particular situations. They are—or, in my judgment, should be—standard features in any statute or, indeed, private efforts to resolve difficult disputes where the parties unaided cannot do so.

[13] Some data will soon be published about the results of some procedures, *e.g.*, Michigan's fact-finding. The applicability of such experience, especially in the public sector, to other settings is at least open to question. Michigan's decades of experience with organized labor in the private sector and its impact upon elected officials find few parallels elsewhere.

But wariness about the adaptability of other methods with significant elements of coercion to *all* public employment or *all* higher education seems warranted. What works for police may foul out with teachers. And the arrangements and traditions of public school teachers differ in so many significant ways from those in colleges and universities (and, there are universities and universities) that equal success or failure for a particular dispute resolution technique at both sets of institutions seems unlikely.

So it would seem wise to test out a variety of devices in actual practice. Legislators, unions, public management and educational administrators will not, I have found, readily embrace a new procedure based on argumentation alone. Experience must be produced. But given the reluctance to enact procedures of general application, the need is for small scale experimentation with procedures that are most acceptable to the parties involved. Practice may tell which arrangements best fit particular kinds of institutions.

Perhaps plausible generalizations from such experience cannot be achieved; that is, too many variables spoil the correlations. But, without such limited experimentation the outlook for broader scale innovation seems poor.

In the public sector what is needed is legislation authorizing public bodies to enter into strike avoidance arrangements *by contract* for limited periods. (Whether experience developed under such voluntary arrangement will be transferable to a mandated scheme is an argument to be crossed later.) In private higher education, faculty representatives and administrators ought to recognize their special competence to test out new devices that go beyond the strike and that fit the special needs of educational institutions.

Would employers agree to such arrangements? One cannot be sure. In private higher education strikes are permissible but not likely, although some have occurred and been threatened. Whether or not fears of strikes will impel university administrators to negotiate effective strike substitutes is uncertain. The need for effective dispute resolution machinery in institutions with collegial traditions probably will be felt when the new pressures of bargaining come into play. Paradoxically in the public realm, where strikes are prohibited, apprehension of strikes provides a potent motivation to employers to seek new methods that provide better protection than bans.

Officials will not readily place their bets on legislation mandating any strike substitute—and cannot be expected to do so until the entrants, which are made to sound so spirited and promising in print, have a track record.