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"Interest" Arbitration Revisited

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"INTEREST" ARBITRATION REVISITED†

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In the years that the National Academy of Arbitrators has been in existence, we have often talked about the difference between "rights" and "interests" arbitration.[1] And in doing so we have invariably wound up assuring ourselves that arbitration of "rights," *i.e.*, the determination of grievances which arose out of the ongoing terms of the contract, was a true act of statesmanship, while arbitration of "interests," *i.e.*, the determination of the substantive terms of a new contract, was unsound, unwise, and probably un-American.

The essence of what I have to say today is that it is time to rethink our position on "interest" arbitration, though I would prefer that experimentation take place in a voluntary, non-governmental context. It is not so much that we were clearly wrong in our prior conclusions, as it is that it is not clear that we were right, or if we were, that the conditions which warranted that conclusion are the same. The labor relations process is a dynamic one in which neither the problems nor the remedies can remain static.

Perhaps it is wise to start the analysis with a review of why we have always thought there was such a difference between "rights" and "interest" arbitration.

The "rights" which we were determining under contracts were, after all, but interpretations of an agreement which the parties had

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[1] The literature on the subject of "interest" arbitration is extensive. For discussions of the subject, see, e.g., Aksen, *The Impetus To Contract Arbitration in the Public Area*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-FOURTH ANNUAL CONFERENCE ON LABOR 103 (1972); Boynton, *Industrial Collective Bargaining in the Public Sector: Because It's There?*, 21 CATHOLIC U.L. REV. 568 (1972); Feller, *The Impetus To Contract Arbitration In the Private Area*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-FOURTH ANNUAL CONFERENCE ON LABOR 79 (1972); Hines, *Mandatory Contract Arbitration—Is It a Viable Process*, 25 IND. & LAB. REL. REV. 533 (1972); McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972); Sinicropi & Gilroy, *The Legal Framework of Public Sector Dispute Resolution*, 28 ARB. J. (n.s.) 1 (1973); Stevens, *The Analytics of Voluntary Arbitration: Contract Disputes*, 7 IND. REL. 68 (1967).

written. They had, therefore, reached an understanding about where their basic interests lay and our decisions were therefore tolerated only within the limits of the contract. Moreover, there were advantages to both companies and unions in getting the rules of the game established under impartial auspices. It tended to remove some of the inevitable capriciousness within any system and the results were rarely devastating.

"Interest" arbitration, on the other hand, was regarded as a much more "iffy" proposition. The "rules of the game" were very vague indeed. Were profitability or unprofitability proper criteria, and, if so, how were they to be applied? What about the cost-of-living, comparative wage scales and fringes, foreign competition, employment in the industry, inflation, and relative positions in the wage and salary hierarchy? We did not, and in the absence of agreement of the parties, still do not, I suspect, know how to deal with those questions. Thus "interest" arbitration is hard to implement. But on further reflection at least two serious questions arise: 1) have we exaggerated the difficulties involved in "interest" arbitration; and/or 2) have conditions changed so that regardless of the difficulties we ought to rethink our whole attitude towards "interest" arbitration? I am inclined to think that the answer to both questions is "yes," and most of the rest of what I have to say is an attempt to justify my conclusions.

When I was writing articles in the labor law field I would occasionally persuade a faculty colleague totally outside the labor field to read something I had written before it was published. One insight I gained from this was the realization that the great self-evident truths on which "experts" in any field nurture themselves are not as self-evident to other people who work in a different field. I never had much success, for instance, in explaining to them just why "interest" arbitration was more difficult than the extraordinary range of economic and social problems with which courts and administrative agencies already deal. How, I ask you, have you convinced others that the whole economic structure of public utilities is properly considered in determining rates, but wages cannot be determined except through bargaining which may culminate in a strike? Would you contend that the public has no interest in wage rates, which must be considered in the rate determinations, or no interest in uninterrupted service?

And on closer examination, is the difference between "interest" and "rights" arbitration as sharp as we say it is? We all know that labor agreements are frequently written in ambiguous terms because the parties chose that path in the hope that a day of reckoning would never come. It is no surprise to any of us that in

permanent umpire situations the parties have often preferred vague contract language, whose interpretation will be left to a trusted umpire, rather than bog-down in negotiations over something on which they cannot exactly agree.

Finally, it is simply not credible to say that "interest" disputes are not arbitrable when we see the courts dealing with infinitely more complex social questions, like the integration of schools and the right to an abortion. If there is a good reason for further avoiding "interest" arbitration, it cannot be that such disputes are too difficult. It would strike much nearer to the truth to say that in a complex economy like ours the bargaining mechanism, however imperfect, is more likely to reach a result which is viable than any set of third-party decisions. If this is the real reason, perhaps we need to look again at how the climate of bargaining is changing.

The American scene in the year 1973 is very different from the industrial world which most of us have known over the past quarter century.

Until very recent years we were far and away the most sophisticated industrialized nation in the world. We were blessed with great natural resources; a tremendous, coherent domestic market; a technology superior to any in the world; a strong creditor position in world markets; the most respected currency in the world; and an enormous self-confidence about our capabilities.

Today's world looks very different, some of it, certainly, permanently so. The resurgent German and Japanese industrial economies can hold their own against us anywhere, and with England now in the common market, a unified Europe can be an enormous market and competitor. Our natural resources are dwindling, and in areas like oil, iron ore and paper pulp we now depend heavily on imports. Our domestic market remains intact, except that foreign competition is much stiffer. Our technology is superb, but the pressure for greater productivity continually erodes the employment base, and government, which furnished so much of the increased employment in the last ten years is now cutting back or looking for technological aid in displacing costly employees. Our creditor position in world markets has changed to a serious debtor position for which we have not so far found a remedy. Our currency is under serious international pressure. And our self-confidence has been replaced by self-doubts.

There are a number of other changes in our society which deserve attention in thinking about "interest" arbitration.

The role which the federal government plays in the economy from its tax power base is incalculable. Whether one is talking employment (direct or indirect), purchasing power as it impacts

on private industry, subsidies of wide-ranging enterprises, or the current economic controls, we are in a whole new world. Incidentally, there are a good many distinguished economists with affiliations in both major political parties, who believe that economic controls of some kind are due to be with us almost permanently. The fact that one finds highly placed spokesmen in both Labor and Management who openly acknowledge the need for such controls perhaps speaks to us more eloquently than anything else about our changed circumstances.

Another new dimension of our labor-management scene is union organization of public employees, which is now widespread.

A big argument at the outset of the advent of public employee unionism was, and to some extent still is, whether the strike was a legitimate weapon against public employers. Though such strikes remain illegal in most jurisdictions, their use has not been eschewed. Some of us argued that such a development was inevitable—indeed it had a precedent in Western Europe where public employees had long been organized. Nevertheless, we would do well to remember that George Taylor,[2] that wise and good friend to whom so many of us owe a debt we can never repay, was adamantly opposed to the use of the strike against public employers.

This is not the place to argue either public employee unionism or the use of the strike. But it may be the place to point out the employment of the strike in the public sector is inevitably going a long ways to convince the public that the strike may not be the most rational way to settle labor disputes. If we have learned any lesson from these last turbulent years, it is that the public vastly prefers order to chaos. The spectacle of cities strangling in trash and garbage because the municipal government and the employees union cannot come to terms, or the closing of public schools for intolerable periods during the school year cannot continue. Increasingly people are going to ask why, when other kinds of disputes are settled in an orderly fashion, labor disputes, particularly in the public sector, cannot be.

It is an oversimplification, of course, to suppose that there is no problem in resolving public disputes once we resort to what Willard Wirtz[3] rather whimsically called "mediation to finality." If that was all there was to it, we would have gone to public employee "interest" arbitration long ago. What do you do if, however

[2] The late professor emeritus, Wharton School of Finance, University of Pennsylvania; Chairman, National War Labor Board, 1945.

[3] Former U.S. Secretary of Labor 1962-69.

justified the union's claim, the city is bankrupt? And suppose the taxpayers simply will not pass a millage increase.

It is obviously unfair to ask public employees to subsidize a public service by working under unfair conditions. Arbitration can be conducted under reasonable criteria. If the result is made binding the public has three choices: 1) pay the bill, 2) accept a diminution in services, or 3) find a way to increase the productivity of its public servants through the substitution of technology or otherwise. That still leaves a class of cases where the local public may be willing to let services deteriorate below a tolerable level because it has another alternative, as in certain school cases. Those cases are limited and are going to have to be resolved in a different manner. A number of state governors are proposing revisions in the tax structure to cope with the school problem, and some state courts have cast constitutional doubts on the present property tax as a way of financing public schools.

Some public employers will find this analysis as unacceptable as will the unions which represent their employees. Nevertheless, they assume a prerogative which is not wholly theirs. We are talking about public employment, and I emphasize the word "public." The service is one required by the public, paid for by the public, and consumed by the public. But the public cannot ethically require of its employees that they work at substandard rates while at the same time being deprived of their strike weapon. Likewise, the public can make intelligible decisions about the quality of the services it is willing to finance only if it is aware of, and willing to pay the going price for such services. There is no inherent right on the part of an employee organization to insist that the public finance a level of services which it is unwilling to pay for, though the state clearly has a right to require a minimum level of services.

If "interest" arbitration is justified in the public service, the question inevitably arises as to whether and to what extent this should extend to the private sector, particularly if the submission is voluntary. By and large both labor and management have been adamantly opposed to such an approach in the past. Some still are, but I am not so sure they should be, and the recent steel agreement represents a major breakthrough. There is an increasingly fine line between the public and private sectors. Large segments of industry are supported by government contracts. Others are simply government owned but privately operated. And in any event we are living in a brand new economic climate.

Arbitration of "interest" disputes is not a panacea, and if the

parties turn to it I am not so sure that it can, or should, last for too long a period. We know from the experience of the last twenty years that government, *qua* government is not a very good source of decision-making in these kinds of affairs. That is why I would prefer "interest" arbitration in the hands of independent professional arbitrators. It would give the process a flexibility which it cannot have in government hands, and it would give the parties a choice over their decision-makers.

We have, I think, been going through one of the great watershed periods in American history. Much as we would like to return to the past, we cannot do so. The collective bargaining process, including arbitration as we have known it, will not be immune from influence by the tides of change which now engulf us.

The year 1973 will be one of those years when major labor contracts will once again be open. Perhaps they will be settled without strikes, certainly some of them will. But what about those that will not? I would argue that they ought not to go to a crippling strike, and that the parties, of their own volition, ought to resort to arbitration. In this period of government economic guidelines, which I view as both necessary and desirable, I suspect the government ought to be invited to present its view before any such tribunal. The decision would be subject to government scrutiny in any event.

The suggestion before a National Academy of Arbitrators audience that "interest" arbitration be expanded will appear to some as a blatant appeal to self-interest, since it is the members of the Academy who would doubtless hear many of the cases. In truth, you and I know that arbitrators do not much like hearing "interest" cases. There have been too few benchmarks to mark the way, and too little confidence in our own wisdom to decide such cases. We may not have increased much in wisdom, but the other alternatives hold even less attraction at this moment in time.

I have always thought that there is one absolutely iron law about dynamic social processes. It is that things can never remain the same over long periods of time. Collective bargaining today is not the same process we knew in the post World War II days. Neither is the social or economic climate in which it exists. And in another twenty-five years, it will not be what it is now.

If I am right that now is the time for private parties to experiment much more broadly than they have in the past in "interest" arbitration, it may be that such experiments should be, and will be discontinued after a period. Time and events will change and even the good idea of today may be better discarded tomorrow.

It is time to revisit the precincts of "interest" arbitration. Some new neighbors have moved into the area and we ought to get acquainted with them.