

1-14-2013

# Two Models of Interest Arbitration

Martin H. Malin

*IIT Chicago-Kent College of Law*, [mmalin@kentlaw.iit.edu](mailto:mmalin@kentlaw.iit.edu)

Follow this and additional works at: [http://scholarship.kentlaw.iit.edu/fac\\_schol](http://scholarship.kentlaw.iit.edu/fac_schol)

 Part of the [Dispute Resolution and Arbitration Commons](#), and the [Labor and Employment Law Commons](#)

---

## Recommended Citation

Martin H. Malin, *Two Models of Interest Arbitration*, 28 Ohio St. J. on Disp. Resol. 145 (2013).

Available at: [http://scholarship.kentlaw.iit.edu/fac\\_schol/742](http://scholarship.kentlaw.iit.edu/fac_schol/742)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

# Two Models of Interest Arbitration

Martin H. Malin\*

## I. INTRODUCTION

Collective bargaining legislation came relatively late to the public sector in the United States. For much of the twentieth century, courts were hostile to public employees who desired to form and join labor unions. As late as 1963, almost three decades after enactment of the National Labor Relations Act guaranteed private sector employees the right to form and join labor organizations,<sup>1</sup> the Michigan Supreme Court upheld the City of Muskegon's prohibition on its police officers joining labor unions.<sup>2</sup> Although many public sector unions formed primarily to represent members in civil service and similar administrative proceedings and to lobby the government on their members' behalf, courts equated public sector unions with their private sector counterparts. In the judicial view of the early and mid-twentieth century, allowing public employees to join unions would lead inevitably to work stoppages. "[E]ven though actually existing public sector unions had all formally renounced strikes and did not strike, and even though most were willing to forgo traditional collective bargaining and did not engage in traditional formal bargaining, courts insisted on seeing unions as institutions that inevitably struck and bargained. . . ."<sup>3</sup>

The fear that allowing public employees to join unions would lead inevitably to public worker strikes can be traced to the Boston police strike of 1919.<sup>4</sup> Frustrated by stagnated wages in a time of high inflation, intolerably long shifts, and having to stay overnight in police stations marked by decrepit conditions, Boston police officers secured a charter from the AFL-CIO. The Boston police commissioner responded by prohibiting membership in the union and suspending nineteen police officers who he believed were union officials. The membership responded with a strike of three-fourths of the police force. Law and order broke down for several days, particularly in downtown Boston and South Boston. Massachusetts Governor Calvin Coolidge mobilized the State Guard to restore order and patrol the streets

---

<sup>1</sup> See 29 U.S.C. § 157 (2006).

<sup>2</sup> *AFSCME Local 201 v. City of Muskegon*, 120 N.W.2d 197 (Mich. 1963).

<sup>3</sup> JOSEPH E. SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW AND THE STATE 1900-1962* 82 (2004).

<sup>4</sup> This discussion of the Boston Police Strike is adapted from MARTIN H. MALIN ET AL., *PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS* 216 (2011).

while a replacement force composed primarily of World War I veterans was recruited and trained.

"[A]lthough the Boston police strike was as atypical as it was dramatic, it contributed far more than any other single event to the peculiarly American view that public sector labor relations were entirely distinct from private sector labor relations."<sup>5</sup> President Franklin Delano Roosevelt, who signed into law the National Labor Relations Act, which grants private sector workers a right to strike,<sup>6</sup> declared:

[M]ilitant tactics have no place in the functions of any organization of Government employees . . . [A] strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those sworn to support it, is unthinkable and intolerable.<sup>7</sup>

President Reagan referred to the Boston police strike when he fired striking air traffic controllers in 1981.<sup>8</sup> The overwhelming majority of jurisdictions prohibit strikes by all public employees. The federal government makes it a felony for its employees to strike.<sup>9</sup> Even in the small minority of jurisdictions that recognize a public employee's right to strike, employees must meet more extensive procedural requirements before they may strike than exist in the private sector. At times, courts in public employee right-to-strike jurisdictions have rejected private sector rules because of a paramount concern of minimizing the risk of work stoppages. For example, although private sector employers may unilaterally change wages, hours, and working conditions after they have bargained to impasse,<sup>10</sup> the Pennsylvania Commonwealth Court has prohibited public employers in that state from making unilateral changes even at impasse unless the union strikes, out of concern that unilateral changes will provoke unions to strike.<sup>11</sup>

Declaring strikes illegal does not mean that strikes will not occur. Janet Curry and Sheena McConnell found no significant difference in strike

---

<sup>5</sup> SLATER, *supra* note 3, at 14.

<sup>6</sup> See 29 U.S.C. §§ 157, 163 (2006).

<sup>7</sup> Letter from Franklin Roosevelt to the president, National Federation of Federal Employees (Aug. 16, 1937), *quoted in* *Norwalk Teachers' Ass'n v. Bd. of Educ.*, 83 A.2d 482, 484 (Conn. 1951).

<sup>8</sup> See SLATER, *supra* note 3, at 37.

<sup>9</sup> 18 U.S.C. § 1918(3) (2006).

<sup>10</sup> See *NLRB v. Katz*, 369 U.S. 736 (1962).

<sup>11</sup> *Phila. Hous. Auth. v. Pa. Lab. Rel. Bd.*, 620 A.2d 594 (Pa. Commw. 1993).

## TWO MODELS OF INTEREST ARBITRATION

incidence or duration between jurisdictions where public employee strikes are lawful and those with no collective bargaining statute and a strike prohibition.<sup>12</sup> My own study found that strike incidences actually declined after Illinois and Ohio legalized public employee strikes in 1984.<sup>13</sup> By far, the most effective antidote for public employee strikes is to provide the parties with a right to resolve their bargaining impasses through arbitration. For example, in the most recent empirical study of the effects of interest arbitration, Thomas Kochan and colleagues found that in the thirty years following New York's adoption of interest arbitration for police and firefighters, there was not a single complete work stoppage.<sup>14</sup> In contrast, despite very heavy penalties for illegal strikes and the availability of non-binding fact-finding, New York experienced 33 teacher strikes during the same period.<sup>15</sup> Others have found similar effects of interest arbitration in virtually eliminating public employee strikes.<sup>16</sup>

Traditionally, discussions of interest arbitration have divided the process into three models. Under conventional interest arbitration, the arbitrator is empowered to issue an award adopting either party's final offer or crafting a result between the final offers. Final offer package arbitration limits the arbitrator to selecting the entire final offer of one of the parties. Final offer issue-by-issue arbitration limits the arbitrator to selecting the final offer of one of the parties with respect to each issue but allows the arbitrator to select different parties' final offers with respect to different issues.<sup>17</sup>

This Article provides an alternative approach to the models of interest arbitration. It suggests that interest arbitration may be viewed as a part of the parties' collective bargaining process or it may be viewed as a method for adjudicating disputes over terms and conditions of employment. Part II discusses the relative advantages and drawbacks of reliance on a right to strike versus reliance on interest arbitration as the primary method of impasse resolution. It finds several disadvantages to interest arbitration. Part III develops the competing models of interest arbitration as a part of the

---

<sup>12</sup> Janet Currie & Sheena McConnell, *The Impact of Collective-Bargaining Legislation on Disputes in the U.S. Public Sector: No Legislation May be the Worst Legislation*, 37 J.L. & ECON. 519 (1994); See also Robert Hedon & Robert Stern, *Do Public-Sector Strike Bans Really Prevent Conflict?*, 42 INDUS. REL. 493, 505-507 (2003).

<sup>13</sup> Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 361-79 (1993).

<sup>14</sup> Thomas Kochan et al., *The Long Haul Effects of Interest Arbitration: The Case of New York State's Taylor Law*, 63 INDUS. & LAB. REL. REV. 565, 569 (2010).

<sup>15</sup> *Id.* at 570.

<sup>16</sup> See Malin, *supra* note 13, at 330 & n.79.

<sup>17</sup> See MALIN ET AL., *supra* note 4, at 643-44.

collective bargaining process and as a method of adjudication. Part IV suggests that the adjudication model exacerbates the disadvantages of interest arbitration. Part V concludes that interest arbitration should be regarded as a part of the collective bargaining process and provides some consequences of this conclusion.

## II. RESOLVING PUBLIC SECTOR BARGAINING IMPASSES: STRIKES VERSUS INTEREST ARBITRATION

As discussed above, a driving force behind public sector labor relations legislation is the avoidance of public employee strikes and the strongest antidote for public employee strikes is interest arbitration. Thus, in determining what labor relations model to adopt, lawmakers have to evaluate the advantages and disadvantages of providing a right to strike versus providing for interest arbitration.

### A. Right to Strike

As the Boston Police strike demonstrated, some public employee strikes can have devastating consequences for the public. It is not surprising that strikes by police and firefighters are almost universally prohibited in the United States,<sup>18</sup> and that police and firefighters are the public sector occupations most likely to have rights to interest arbitration.<sup>19</sup> However, as the 1981 air traffic controllers strike demonstrated, employers and the public are capable of coping with strikes that might intuitively appear to pose risks of devastating consequences. Most strikes by public employees produce inconvenience rather than disaster and tend to be of modest duration.

For example, in Illinois, public employee strikes occur predominantly in public education. A large majority of those strikes are resolved in ten or fewer days, with less than 10 percent taking more than 20 days to resolve.<sup>20</sup> Nevertheless, there are outliers which can cause major damage to the public welfare. Since educational employees in Illinois gained the right to strike effective January 1, 1984, there has been one such outlier; a strike by thirty teachers against the Homer School District in rural Champaign County in 1986. The strike began on October 17, 1986, and did not end until after the end of the school year. The resulting contract did not resolve two of the

---

<sup>18</sup> *But see* Firefighters Local 1494 v. City of Coeur d'Alene, 586 P.2d 1346 (Idaho 1978) (holding firefighter strike after contract expiration not to be illegal).

<sup>19</sup> *See* Malin, *supra* note 13, at 329 & n. 78.

<sup>20</sup> *Id.* at 381. For updated data, see *infra* tbls 1 & 2.

## TWO MODELS OF INTEREST ARBITRATION

issues that precipitated the strike. The students lost essentially a year of schooling, the school district lost considerable state aid and ultimately had to merge with another district, and most of the striking teachers never returned to their jobs.<sup>21</sup> Policymakers choosing between a right to strike and interest arbitration must determine whether to run the risk of an outlier strike such as Homer.

A second concern that has been voiced with respect to a right to strike for public employees is that it distorts democratic processes. This concern was raised most forcefully by Harry Wellington and Ralph Winter in their classic work, *The Unions and the Cities*.<sup>22</sup> Because issues concerning public employees' wages and working conditions also raise issues of public policy, Wellington and Winter cautioned, we must be concerned when unions are given an avenue of access to public decisionmakers, collective bargaining, that is not open to other interest groups. Coupling that exclusive avenue of access with a right to strike greatly magnifies union political power because when public employees strike, a large group of public officials' constituents will clamor for a quick settlement and cause officials to concede to union demands. Thus, granting public employees a right to strike excessively empowers them in a decisionmaking process from which other interest groups have been excluded.<sup>23</sup>

Experience in the four decades since Wellington and Winter published their thesis has not borne out their fears. Public officials have not automatically caved into strikes and strike threats and the public has shown itself to have greater resilience.<sup>24</sup> Depending on the political and economic climate, strikes and strike threats can backfire on unions and unions appear to recognize this and behave accordingly.<sup>25</sup>

---

<sup>21</sup> See *id.* at 397–98; Tim Mitchell & Rebecca Mabry, *Two Decades Later, Homer Teachers Strike Still Sore Subject*, THE NEWS-GAZETTE, (Dec. 12, 2006), <http://www.news-gazette.com/news/education/2006-11-12/two-decades-later-homer-teachers-strike-still-sore-subject.html>.

<sup>22</sup> HARRY H. WELLINGTON & RALPH K. WINTER, JR., *THE UNIONS AND THE CITIES* (1971).

<sup>23</sup> *Id.* at 24–29, 167–70, 202.

<sup>24</sup> See Malin, *supra* note 13, at 321–25; Jeffrey H. Keefe, A Reconsideration and Empirical Evaluation of Wellington's and Winter's *The Unions and the Cities*, paper presented to The World Congress of the International Labor and Employment Relations Ass'n, North American ISLSSL & International Ass'n of Labor Law Journals' Workshop, Philadelphia, July 2, 2012, at 11 (observing that at the time of Wellington and Winter's thesis only 0.1% of public employees had a right to strike but by 1990, 21% did and suggesting that the growth in the right to strike indicates that it did not have the catastrophic effects that Wellington & Winter predicted).

<sup>25</sup> See *infra* notes 32–37 and accompanying text.

### B. Interest Arbitration

Much of the literature assessing interest arbitration focuses on whether it has a so-called “chilling effect” and “narcotic effect.” The chilling effect refers to the potential for interest arbitration to chill, i.e. inhibit, collective bargaining. The theory is that parties will inflate their positions on the assumption that an arbitrator will issue an award at a midpoint between the parties’ final offers. They will fear that making concessions in negotiations will undermine their positions before the arbitrator. The narcotic effect refers to the potential for parties who resolve their contract through interest arbitration to use interest arbitration again to resolve future contracts. Interest arbitration is said to be habit forming.

Most contracts negotiated under threat of going to interest arbitration settle. That leads some to conclude that interest arbitration does not chill collective bargaining. The rate of usage of interest arbitration, however, exceeds the rate of resorting to strikes and a higher percentage of contracts negotiated in right-to-strike regimes settle without a strike than the percentage in interest arbitration regimes that settle without resort to arbitration. Consequently, whether one believes that interest arbitration chills bargaining depends on how one spins the data rather than on the data itself.<sup>26</sup>

There is no consensus among the empirical studies with respect to the narcotic effect of interest arbitration.<sup>27</sup> Kochan and colleagues’ recent study of police and firefighter interest arbitration in New York State found that usage rates declined from an average of 26% for firefighters and 31% for police between 1974 and 1976 to averages of 7% for firefighters and 9% for police between 1995 and 2007.<sup>28</sup> They see the decreasing use of interest arbitration as arguing against a narcotic effect,<sup>29</sup> but also observe that several cities, such as Buffalo, Rochester, and Syracuse, are heavily dependent on interest arbitration to establish their contracts.<sup>30</sup>

The focus on alleged chilling and narcotic effects distracts from a more serious drawback to interest arbitration, one that may account for the process’s higher usage rates and repeat customers. Resorting to interest arbitration allows union leaders and public officials to avoid being held accountable by their constituents. They can blame unfavorable or unpopular

---

<sup>26</sup> See Malin, *supra* note 13, at 331 & ns 82–85.

<sup>27</sup> See *id.* at 331–32 & n.86.

<sup>28</sup> Kochan et al., *supra* note 14, at 570–71 & fig. 1.

<sup>29</sup> *Id.* at 571.

<sup>30</sup> *Id.*

## TWO MODELS OF INTEREST ARBITRATION

results on the arbitrator and avoid responsibility for hard decisions that they might otherwise have to make in collective bargaining. Indeed, it is this lack of accountability that has led a minority of courts to invalidate interest arbitration statutes as improperly delegating governmental decisionmaking authority to a private individual.<sup>31</sup> To the extent that public officials and union leaders are unable to resist the temptation to offload responsibility to an arbitrator, arbitration usage rates will exceed strike rates and to the extent that such offloading of responsibility successfully provides political shelter, the parties will be tempted to repeat the exercise in subsequent negotiations.

Evidence from the current economic downturn strongly suggests that interest arbitration is being used to avoid accountability for hard decisions. In Illinois, almost all public employees except for law enforcement and fire protection have a right to strike. Almost all strikes occur in public education. Under the Illinois Educational Labor Relations Act, before a union may strike, it must give advance notice of intent to strike to the employer and the Illinois Educational Labor Relations Board.<sup>32</sup> Table One presents data on strikes and strike notices in the education sector in Illinois before and after the economy crashed in 2008.<sup>33</sup>

**Table One: Strikes and Strike Notices Under the IELRA**

| Year      | Strikes | Strike Notices |
|-----------|---------|----------------|
| 1998-1999 | 9       | 43             |
| 1999-2000 | 9       | 43             |
| 2000-2001 | 7       | 50             |
| 2001-2002 | 10      | 40             |
| 2002-2003 | 7       | 47             |
| 2003-2004 | 10      | 46             |
| 2004-2005 | 4       | 36             |
| 2005-2006 | 5       | 36             |
| 2006-2007 | 3       | 24             |
| 2007-2008 | 9       | 34             |
| 2008-2009 | 1       | 11             |
| 2009-2010 | 4       | 13             |
| 2010-2011 | 2       | 23             |
| 2011-2012 | 5       | 19             |

---

<sup>31</sup> See, e.g., *Cnty. of Riverside v. Super. Ct.*, 66 P.3d 718 (Cal. 2003).

<sup>32</sup> 115 Ill. Comp. Stat. § 5/13 (2012).

<sup>33</sup> All information concerning strikes and strike notices was provided to the author by the Illinois Educational Labor Relations Board and is current as of June 21, 2012.

One of the strikes in 2009–2010 was in higher education (at the University of Illinois) and two of the strikes in 2011–2012 were in higher education (at the University of Illinois at Chicago and Southern Illinois University at Carbondale). Four strike notices that were not followed by strikes in 2011–2012 were also in higher education (University of Illinois-Springfield, Kennedy-King College, City Colleges of Chicago and Rock Valley Community College) and four strike notices in 2010–2011 were in higher education for different bargaining units at Southern Illinois University — Carbondale, one of which led to the strike in 2011–2012.

Strikes in K–12 education are likely to be much more politically sensitive than strikes in higher education. A strike at a state university or local community college does not attract the attention of hundreds to tens of thousands of parents, depending on the size of the school district, who suddenly have to make alternate arrangements for their children. The data makes clear that when the economy crashed, unions of educational employees stopped striking. In the four school years since the economy crashed, public K–12 education in Illinois has seen one strike in 2008–2009, three in 2009–2010, two in 2010–2011 and three strikes in 2011–2012. Moreover, as Table One makes clear, there has also been a dramatic decrease in the number of strike notices. Except for an outlier year of 2006–2007 when there were only twenty-four strike notices filed, the pre-2008 strike notices ranged from thirty-two to fifty each year. In 2008–2009 there were only eleven strike notices and there were only thirteen the following year. Although the number increased in the following year, several of those were in higher education; the number of K–12 strike notices dropped back the next year and the numbers remained at least 50% below the number of notices in the years prior to 2008. In other words, educational employees' unions were not only refraining from striking, they weren't even threatening to strike.

Strike duration also changed markedly as the economy crashed. Table Two presents data on strike duration obtained from the Illinois Educational Labor Relations Board.

While strikes lasting a week or longer were common before the economy crashed, strikes thereafter were generally settled in a matter of days with two outliers (Ottawa Township High School and Illini Bluffs Community Unit School District) as the only exceptions. This record is even more remarkable considering the environment for K–12 negotiations. Although decreases in government revenue generally lag the drop in the economy and the lag was probably extended by the availability of federal stimulus money, it is likely that by 2009–2010 and certainly by 2010–2011 that the parties were negotiating in a concessionary environment.

TWO MODELS OF INTEREST ARBITRATION

**Table Two: Strike Duration under the Illinois Educational Labor Relations Act**

| Year      | Employer                               | Strike Days         |
|-----------|--|---------------------|
| 2005-2006 | Mendota CUSD 289                       | 13                  |
|           | Farmington CUSD 265                    | 5                   |
|           | Chicago Ridge SD 127.5                 | 7                   |
|           | Trisco CUSD 176                        | 4                   |
|           | Decatur SD 61                          | 8                   |
| 2006-2007 | Wolf Branch Dist 113                   | 8                   |
|           | Mendota Tsp HS Dist 280                | 1                   |
|           | Neoga CUSD 3                           | 11                  |
| 2007-2008 | Hardin Co CUSD 1                       | 13                  |
|           | Grundy County Spec Ed Coop (aides)     | 1                   |
|           | Grundy County Spec Ed Coop (sp ed ees) | 3                   |
|           | Earlville CUSD 9                       | 4                   |
|           | Nippersink SD 2                        | 6                   |
|           | Cahokia CUSD 187 (sec/clerical)        | 9                   |
|           | Cahokia CUSD 187 (tchrs)               | 9                   |
|           | Cahokia CUSD 187 (service workers)     | 9                   |
|           | Harlem UD 122                          | 5                   |
|           | 2008-2009                              | Consolidated SD 158 |
| 2009-2010 | Kankakee SD 111                        | 4                   |
|           | Ottawa Twp HS Dist 140                 | 16                  |
|           | Prairie-Hills Elem SD 144              | 3                   |
|           | Univ. of Ill                           | Unknown             |
| 2010-2011 | Mahomet-Seymour CUSD 3                 | 2                   |
|           | Danville CUSD 118                      | 3                   |
| 2011-2012 | UIC                                    | 3                   |
|           | Illini Bluffs CUSD 327                 | 6                   |
|           | Zion-Benton TWP HS                     | 4                   |
|           | Rockford SD 205                        | 2                   |
|           | SIU-C                                  | 5                   |

In Ohio, most public sector employees also have a right to strike, but must first utilize non-binding fact-finding. Strikes are allowed only if at least one party rejects the fact-finder's recommended settlement by a supermajority vote.<sup>34</sup> In Ohio, most public sector strikes occur in education, although the predominance of education in public sector strike activity is not as strong as in Illinois.<sup>35</sup> Ohio had a total of 209 strikes during the fourteen year period through Fiscal Year 2008, which ended on June 30, 2008, or an

<sup>34</sup> OHIO REV. CODE ANN. § 4117.14 (c)(6)(A), (D)(2)(West 2012).

<sup>35</sup> See [Ohio] State Empl. Rel. Board, Ann. Rep. 2010 at 11 (showing a total of 211 strikes since the Ohio public sector collective bargaining statute took effect on April 1, 1984 through 2010, of which 147 were in education).

average of approximately fifteen strikes per year.<sup>36</sup> As the economy declined, so did the number of strikes, with only two in Fiscal Year 2009 and none in Fiscal Year 2010.<sup>37</sup> It appears that in Illinois and Ohio, parties bargaining under a right-to-strike regime are taking responsibility for the hard decisions necessary to conclude agreements in hard economic times.

The utilization rate for interest arbitration by Illinois public safety workers paints a very different picture.<sup>38</sup> Proceeding to an interest arbitration hearing is not as politically visible as threatening to or actually engaging in a strike. Members of the public hit by layoffs, decreased hours of work, and decreased income are not likely to notice a petition for interest arbitration and certainly less likely to notice such a move as they are to notice and react to a strike which closes their public schools. On the other hand, reductions in government revenue can be expected to make police and firefighter collective bargaining challenging. Consequently, the decisions necessary to conclude a collective bargaining agreement probably became hardest when federal stimulus money ran out in 2010. Table Three presents the data.

**Table Three: Illinois Interest Arbitration for Law Enforcement and Firefighters**

| Year | Requests | Arbitrator Appointments | Awards | No Award on File | Open |
|------|----------|-------------------------|--------|------------------|------|
| 2005 | 67       | 26                      | 11     | 15               | 0    |
| 2006 | 79       | 46                      | 27     | 18               | 1    |
| 2007 | 73       | 38                      | 19     | 19               | 0    |
| 2008 | 74       | 45                      | 26     | 17               | 2    |
| 2009 | 74       | 51                      | 27     | 18               | 6    |
| 2010 | 113      | 98                      | 36     | 39               | 23   |
| 2011 | 98       | 75                      | 7      | 10               | 58   |

The data reflect that as stimulus money was drying up in 2010, resort to interest arbitration was increasing dramatically. Not only did filings increase from seventy-four in the prior year to 113, but arbitrator appointments, i.e., cases that did not settle shortly after filing prior to appointment of an arbitrator, just about doubled, from fifty-one to ninety-eight. Although the number of filings and appointments declined in 2011, the number of appointments was still 50% higher than what it was in 2009. This is not surprising. In tough economic times, it is easier politically for union leaders

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> All information concerning interest arbitration was provided to the author by the Illinois Labor Relations Board and is current as of February 3, 2012.

## TWO MODELS OF INTEREST ARBITRATION

to have arbitrators impose wage freezes or benefits concessions than for the leaders to agree to them themselves. It is also politically easier for public officials to have arbitrators impose wage increases and reject benefit concessions than to agree to them themselves. Negotiators are less accountable to their constituents in interest arbitration regimes than in right-to-strike regimes.

A second drawback to interest arbitration derives from its inherently conservative nature. In an early interest arbitration award, Arbitrator Whitney McCoy summarized the interest arbitrator's role:

In submitting the case to arbitration, the parties have merely extended their negotiations — they have left it to this board to determine what they should, by negotiation, have agreed upon. We take it that the fundamental inquiry, as to each issue, is: what should the parties themselves, as reasonable men, have voluntarily agreed to?<sup>39</sup>

In other words, the interest arbitrator's task is to come up with the contract that the parties would have agreed to had their negotiation process not broken down. Of course, arbitrators are not mind readers. The best they can do is search for objective indicators. The indicator most commonly looked to by arbitrators is the agreements reached by comparable parties. Except where expressly modified by statute, comparability tends to drive interest arbitration awards, particularly with respect to wages and benefits.<sup>40</sup>

A second major indicator of what agreement the parties would have reached had their negotiations not broken down is what agreements they reached in the past. It is often said that there are no breakthroughs in interest arbitration, that is that arbitrators are extremely reluctant to deviate from the status quo.<sup>41</sup> As Kochan and colleagues observed:

---

<sup>39</sup> Twin Cities Rapid Transit Co., 7 Lab. Arb. Rep. (BNA) 845, 848 (1947) (McCoy, Arb.).

<sup>40</sup> See ELKOURI & ELKOURI, HOW ARBITRATION WORKS 1407 (Alan Miles Ruben ed 6th ed. 2003) ("Without question the most extensively used standard in interest arbitration is 'prevailing practice.' [A]rbitrators, in effect, require the disputants indirectly to adopt the end results of successful collective bargaining or arbitration proceedings of other similarly situated parties."); Arvid Anderson et al., *Public Sector Interest Arbitration and Fact Finding: Standards and Procedures*, in 2 LABOR AND EMPLOYMENT ARBITRATION § 48.05(2) (Tim Bornstein, Ann Gosline & Marc D. Greenbaum eds.) ("The most significant standard for interest arbitration in the public sector is comparability of wages, hours and working conditions.").

<sup>41</sup> See Malin, *supra* note 13, at 333-34.

Experience demonstrates in New York and elsewhere that arbitrators are reluctant to break new ground in their awards and would prefer to leave innovative approaches to the parties. The conservative nature of arbitration suggests that only in rare cases will significant changes be achieved on critical contemporary issues if left to arbitrators to handle on a bargaining unit level.<sup>42</sup>

The conservative nature of interest arbitration may inhibit innovation in collective bargaining. A party resisting change may do so knowing that it is highly unlikely that an arbitrator will impose a change on an unwilling party. The inhibition may be exacerbated in final offer package arbitration where a party advocating a significant change may be likely to drop its proposals out of fear that including them could prompt the arbitrator to award the other party's package.

A third drawback to interest arbitration is its tendency to suppress and redirect conflict rather than resolve conflict. Robert Hebdon and Robert Stern compared public employee bargaining units in Ontario that had a right to strike to those that instead used interest arbitration to resolve bargaining impasses.<sup>43</sup> They found significantly higher rates of grievance arbitration in units where strikes were prohibited and interest arbitration substituted.<sup>44</sup> The one exception arose in the few cases where there actually was a strike, suggesting that where relations are poor, the conflict carries over from contract negotiation to contract administration.<sup>45</sup> However, in the general case, they found, that prohibiting strikes and substituting interest arbitration, rather than resolve conflict, primarily redirected it to contract administration where grievance arbitration provided the next most effective conflict mechanism.<sup>46</sup> Hebdon found similarly that prohibiting strikes, with or without interest arbitration, in the U.S. public sector led to significantly greater rates of grievance arbitration and unfair labor practice proceedings.<sup>47</sup>

Policymakers deciding whether to rely on a right to strike or interest arbitration to resolve impasses in collective bargaining thus have to balance the disadvantages of interest arbitration against the risks posed by strikes to

---

<sup>42</sup> Kochan et al., *supra* note 14, at 582.

<sup>43</sup> Robert P. Hebdon & Robert N. Stern, *Tradeoffs Among Expressions of Industrial Conflict: Public Sector Strike Bans and Grievance Arbitrations*, 51 *INDUS. & LAB. REL. REV.* 204 (1998).

<sup>44</sup> *Id.* at 214.

<sup>45</sup> *Id.* at 215.

<sup>46</sup> *Id.* at 217-18.

<sup>47</sup> Bob Hebdon, *Toward a Theory of Workplace Conflict: The Case of U.S. Municipal Collective Bargaining*, 14 *ADVANCES IN INDUS. REL.* 33, 60-61 (2005).

## TWO MODELS OF INTEREST ARBITRATION

the public welfare. With respect to law enforcement and fire protection, the consensus choice is that the risks posed by strikes are unacceptable. The consensus breaks down with respect to other public employees.

When policymakers decide that the risks of public sector strikes outweigh the negative aspects of interest arbitration, they should be sensitive to whether different models of interest arbitration ease or exacerbate those negative aspects. The next section develops these models.

### III. BARGAINING VERSUS ADJUDICATION MODELS OF INTEREST ARBITRATION

Most discussions of models of interest arbitration focus on advantages and disadvantages of the conventional, final offer package and final offer issue-by-issue approaches. In this section, I suggest an alternative view of diversity in interest arbitration. Interest arbitration may be conceived of as a quasi-judicial adjudicatory proceeding or it may be conceived of as a continuation of the collective bargaining process.

#### *A. The Bargaining Model of Interest Arbitration*

Statutes that protect the right to strike do so on the assumption that a robust right to strike will result in fewer strikes. In a right to strike statutory scheme, the strike is something to be feared, not celebrated. Fear of the strike reflects not only the loss of income experienced by the strikers and the disruptions experienced by the employer, but also the unpredictability of the strike. The desire to avoid strikes motivates parties to reach agreement at the bargaining table. Assistance in reaching agreement is provided through third party mediation. In right-to-strike regimes, strike threats, actual strikes and mediation are part and parcel of the collective bargaining process.

Under a bargaining model of interest arbitration, interest arbitration substitutes for the right to strike. As a strike substitute it is to be feared rather than celebrated. The outcome of interest arbitration must be unpredictable so that a mutual desire to avoid arbitration will motivate parties to work through their differences and reach agreement on terms of a contract. Moreover, the arbitrator serves to assist the parties in reaching agreement by mediating, turning to arbitration and an imposed result as a last resort.

Although not essential to a bargaining model of interest arbitration, a common feature is for the arbitration to be tri-partite, with each party appointing a member of a three-arbitrator board chaired by a mutually-selected neutral. Kochan and colleagues describe how such a model operates in New York State:

In virtually all arbitration cases in New York, after the formal hearings are concluded, the tripartite panel goes into "executive session," where negotiation and mediation are common features of the process. In some cases these negotiations often produce a settlement or a unanimous award. In other cases, the negotiations serve to narrow the differences between the parties on some of the issues but not sufficiently to produce a unanimous award. The arbitrators we interviewed also told us that executive sessions sometimes resulted in tacit agreements, but political factors dictated the need for the neutral chair to write an award and for one of the parties to offer a dissent.<sup>48</sup>

Another strong example of interest arbitration as a part of the bargaining process is police and firefighter arbitration in Pennsylvania. Like its counterpart in New York, Pennsylvania police and firefighter interest arbitration is tri-partite.<sup>49</sup> Following the formal hearing, the three arbitrators meet in executive session where "the neutral will wheedle and arm-twist, exhort and extort, sometimes with both party-appointed arbitrators present, sometimes in separate caucuses, in the effort to achieve, to the greatest extent possible, a consensus among his or her party-appointed colleagues."<sup>50</sup> The resulting award that is the product of a compromise among the parties represented by their partisan members of the panel, merely sets forth the terms without any supporting rationale and without disclosing actual votes among the panel.<sup>51</sup>

Pennsylvania's system encourages the parties to continue the bargaining process and the effort to optimize the outcome for both sides at the arbitration stage. By establishing a tripartite panel, the statute empowers and suggests that the neutral seek to craft a compromise between his or her colleagues on the panel. The bare bones procedure, requiring only that the neutral obtain a second vote, without mandating a selection between the parties' "final" offers, either on an overall or issue-by-issue basis, enables the neutral to promote compromises among the party-appointed arbitrators. The absence of a requirement for a written opinion, and the custom of forgoing one, furthers the mediation mindset. Requiring a rationale for the outcome makes the neutral arbitrator the author and thereby the owner of the award. In Pennsylvania, there may not *be* a rationale, other than that the

---

<sup>48</sup> Kochan et al., *supra* note 14, at 580.

<sup>49</sup> Matthew M. Franckiewicz, *Interest Arbitration in Pennsylvania*, in ARBITRATION 2009: DUE PROCESS IN THE WORKPLACE, PROCEEDINGS OF THE 62D ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 145, 147 (Paul D. Staudohar ed., 2010).

<sup>50</sup> *Id.* at 149.

<sup>51</sup> *Id.* at 150.

## TWO MODELS OF INTEREST ARBITRATION

outcome was one that both party appointed arbitrators believed their clients could live with.<sup>52</sup>

### B. *The Adjudication Model of Interest Arbitration*

Many interest arbitration statutes convey the impression that they are establishing systems of adjudication rather than collective bargaining. They often specify the factors that arbitrators shall apply in crafting their awards,<sup>53</sup> and some direct the relative weight to be applied to the listed factors.<sup>54</sup> Some temper the statutory push toward an adjudication model by expressly authorizing the arbitrator to mediate<sup>55</sup> and to remand to the parties for further negotiations,<sup>56</sup> while others expressly prohibit the arbitrator from mediating.<sup>57</sup>

One of the most forceful advocates of interest arbitration as an adjudicatory process was highly regarded arbitrator and former chair of the Federal Service Impasses Panel and Michigan Employment Relations Commission Robert Howlett. Howlett urged substituting interest arbitration for strikes and lockouts for all collective bargaining impasses:

In this country when there is a controversy or impasse between individuals or enterprises, the controversy is resolved through a judicial or quasi-judicial procedure. Labor disputes involving representation issues and unfair labor practices are submitted to such procedures. It is only in collective bargaining that resolution is through trial by combat.

Should not we, in this country, have become sufficiently civilized so that collective bargaining impasses, in both the public and private sectors, are to be settled by judicial or quasi-judicial procedures rather than through trial by combat?<sup>58</sup>

---

<sup>52</sup> *Id.* (emphasis in Original).

<sup>53</sup> See, e.g., 5 ILL. COMP. STAT. 315/14(h) (West 2012); IOWA CODE ANN. § 20.22(7) (West 2012); N.J. STAT. ANN. §34:13A-16(g) (West 2012); OHIO REV. CODE ANN. § 4117.14(g)(7) (West 2012).

<sup>54</sup> See, e.g., MICH. COMP. LAWS ANN. §423.239 (West 2012); OR. REV. STAT. § 243.746(4) (West 2012).

<sup>55</sup> See, e.g., N.J. STAT. ANN. § 34:13A-16(f)(3) (West 2012).

<sup>56</sup> See, e.g., 5 ILL. COMP. STAT. 315/14(f) (West 2012).

<sup>57</sup> See, e.g., IOWA CODE ANN. § 20.22(7) (West 2012).

<sup>58</sup> Robert G. Howlett, *Interest Arbitration in the Public Sector*, 60 CHI-KENT L. REV. 815, 836-37 (1984).

Howlett expressed his lack of concern for the effects such an adjudicatory approach to interest arbitration would have on the collective bargaining process. "If the public interest is better served by interest arbitration than by collective bargaining, damage to collective bargaining is immaterial."<sup>59</sup>

To find a marked contrast to Pennsylvania's approach to police and firefighter interest arbitration, one need only go across the Delaware River to New Jersey. In contrast with Pennsylvania which employs a tri-partite arbitration panel, the New Jersey statute for police and firefighter arbitration relies on a single neutral arbitrator.<sup>60</sup> Whereas in Pennsylvania the award, if any, is the product of mediation among the neutral and the two party-appointed arbitrators, in New Jersey, an arbitrator who mediates must be careful to separate the mediation from the adjudication that produces an award.

In *Township of Aberdeen v. Patrolmen's Benevolent Association Local 163*<sup>61</sup> the arbitrator, with the agreement of the parties, mediated their dispute before commencing a formal hearing. Mediation was not successful and the matter proceeded to a formal hearing.<sup>62</sup> Ultimately, the arbitrator adopted the union's final offer with respect to the economic issues in dispute.<sup>63</sup> In so doing, the arbitrator made reference to information provided during the mediation, which had not been introduced at the formal arbitration hearing, and to the employer's conduct during the mediation. New Jersey's intermediate appellate court vacated the award.<sup>64</sup>

The court observed that interest arbitration is significantly different from grievance arbitration. The former is more formal, arbitrators have less discretion and are constrained by statutory standards and their awards are subject to a more stringent standard of judicial review.<sup>65</sup> The court recognized that the statute expressly authorizes arbitrators to mediate.<sup>66</sup> Nevertheless, the court analogized the arbitrator to a trial court judge and mediation to pre-trial settlement negotiations, declaring that "it would be

---

<sup>59</sup> Robert G. Howlett, *Contract Negotiation Arbitration in the Public Sector*, 42 U. CIN. L. REV. 47, 57 (1973).

<sup>60</sup> N.J. STAT. ANN. § 34:13A-16(e)(1) (West 2012).

<sup>61</sup> *Township of Aberdeen v. Patrolmen's Benevolent Association Local 163*, 669 A.2d 291 (N.J. Super. App. Div. 1996).

<sup>62</sup> *Id.* at 291-92.

<sup>63</sup> *Id.* at 292.

<sup>64</sup> *Id.* at 292.

<sup>65</sup> *Township of Aberdeen v. Patrolmen's Benevolent Association Local 163*, 669 A.2d 291, 293 (N.J. Super. App. Div. 1996).

<sup>66</sup> *Id.* at 294 (citing 34 N.J. STAT. ANN. § 13A-16(f)(3) (West 2012)).

## TWO MODELS OF INTEREST ARBITRATION

unthinkable for a trial court to base its decision on information disclosed in pretrial settlement negotiations."<sup>67</sup> The court thus regarded interest arbitration as an adjudicatory process that stands apart from rather than as a part of the collective bargaining process.

In Pennsylvania, the arbitration award that typically results from the mediation process consists of a listing of the terms imposed on the parties and a generic statement that each term received the votes of at least a majority of the panel. Such an approach would be invalid in New Jersey.

The New Jersey statute specifies factors that interest arbitrators are to weigh in reaching their awards.<sup>68</sup> In *Hillsdale PBA Local 207 v. Borough of Hillsdale*,<sup>69</sup> the parties proceeded to interest arbitration over two issues, salary increases and the banking of compensatory time beyond a calendar year.<sup>70</sup> Evidence and arguments presented to the arbitrator focused on the wages and benefits paid to police officers in comparable communities and the financial impact of each party's final offer on the employer's fisc.<sup>71</sup> The arbitrator based his award on comparability and a finding that the employer had the ability to pay for the union's final offer.<sup>72</sup> The court held that, in so doing, the award was flawed.

The court interpreted the statute as mandating that the arbitrator address every factor listed therein. Although the arbitrator need not rely on every factor in deciding the case, an arbitrator who finds some of the statutory factors irrelevant must explain why.<sup>73</sup> Such a requirement, *inter alia*, enables a reviewing court to determine whether the arbitrator's resolution of the issues was reasonable and gave due weight to the relevant factors.<sup>74</sup>

Thus, the New Jersey courts appear to regard interest arbitration as an adjudicatory process akin to a trial or administrative agency hearing, rather than a continuation of the collective bargaining process. A 1996 amendment to the New Jersey statute codified *Borough of Hillsdale* by requiring the arbitrator to "indicate which of the [statutory] factors are deemed relevant, satisfactorily explain why the others are not relevant, and provide an analysis of the evidence on each relevant factor."<sup>75</sup> The 1996 amendment also

---

<sup>67</sup> *Id.*

<sup>68</sup> N.J. STAT. ANN. § 34:13A-16(g) (West 2012).

<sup>69</sup> *Hillsdale PBA Local 207 v. Borough of Hillsdale*, 644 A.2d 564 (N.J. 1994).

<sup>70</sup> *Id.* at 567.

<sup>71</sup> *Id.* at 568.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 570-72.

<sup>74</sup> *Id.* at 571.

<sup>75</sup> MALIN ET AL., *supra* note 4, at 674 (discussing 1996 amendment).

directed arbitrators how to apply the statutory factor of “financial impact on the governing unit, its residents, and taxpayers.”<sup>76</sup>

An amendment enacted in December 2010 further solidified New Jersey’s police and firefighter interest arbitration as adjudicatory in nature, rather than a continuation of the collective bargaining process.<sup>77</sup> The Amendment eliminated party selection of the arbitrator; now the Public Employment Relations Commission (PERC) randomly selects the arbitrator from a special panel. Under the Amendment, when a party petitions for interest arbitration, mediation is terminated. Additionally, the parties must present written estimates of the financial impact of their final offers, and the award must issue within forty-five days of arbitrator appointment—prior law allowed 120 days. The award must address all statutory criteria and certify that the arbitrator took statutory limitations imposed by the local levy cap into account. The award may be appealed to PERC, which must: decide the appeal within thirty days, address all statutory factors, and certify that it took the levy cap into account. The statute caps arbitrator fees at \$1,000 per day and \$7,500 total, and it caps cancellation fees at \$500; it fines arbitrators \$1,000 per day for being late. The award may not increase base salary items by more than two percent of the aggregate amount expended by the employer in the twelve months immediately preceding expiration of the prior contract, and may not include base salary items and other economic issues that were not included in prior contract.<sup>78</sup> The cap on base salaries sunsets on April 1, 2014.<sup>79</sup>

In 2011, Nebraska amended its interest arbitration statute in a manner that resembles an adjudicatory rate-making proceeding rather than a continuation of the collective bargaining process. In Nebraska, the Commission of Industrial Relations (CIR), whose members are appointed by the Governor, performs interest arbitration. The new Nebraska Act provides detailed criteria for selecting an array of comparable communities and specifies the number of comparable communities to be selected. It mandates that if the employer pays compensation that is between 98% and 102% of the

---

<sup>76</sup> *Id.*

<sup>77</sup> 2010 N.J. Laws, ch. 105; see BIENNIAL REPORT OF THE NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION ON THE POLICE AND FIRE PUBLIC INTEREST ARBITRATION REFORM ACT AS AMENDED BY P.L. 2010 C.105 at 4-6 (2012) (describing the amendment’s changes).

<sup>78</sup> 2010 N.J. Laws, ch. 105; see BIENNIAL REPORT OF THE NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION ON THE POLICE AND FIRE PUBLIC INTEREST ARBITRATION REFORM ACT AS AMENDED BY P.L. 2010 C.105 at 4-6 (2012) (describing the amendment’s changes).

<sup>79</sup> *Id.*

## TWO MODELS OF INTEREST ARBITRATION

average of the comparables, including fringe benefits, the CIR must leave compensation unchanged. If the employer's compensation is below 98% of the average, the CIR is to raise it to 98%; and if it is above 102%, the CIR is to lower it to 102%. The targets are reduced to 95–100% during periods of recession, defined as two consecutive quarters in which the state's net sales, use taxes, and individual and corporate income tax receipts are below those of the prior year.<sup>80</sup>

The tendency to regard interest arbitration as an adjudicatory rather than a collective bargaining process is not only of recent vintage. For example, in 1978, the Massachusetts legislature significantly changed the interest arbitration procedure for the Massachusetts Bay Transit Authority (MBTA).<sup>81</sup>

As in most cities, rapid transit in Boston originally was provided by a private company. Since 1912, employees of the company, the Boston Elevated Railway, were represented by Amalgamated Transit Union Local 589. In 1947, the Metropolitan Transit Authority (MTA), the predecessor agency to the MBTA, acquired the Boston Elevated Railway. The MTA's enabling legislation authorized it to bargain collectively and to arbitrate unresolved disputes.<sup>82</sup> The Massachusetts legislature created the MBTA in 1964 as a successor to the MTA, that was qualified to receive federal funds under the Urban Mass Transportation Act (UMTA).<sup>83</sup> Section 13(c) of UMTA required that as a condition of the receipt of federal funds, the state must assure the Secretary of Labor that fair and equitable arrangements have been made to protect, among other things, the collective bargaining rights of the employees affected by the federal funds.<sup>84</sup>

For decades, the MBTA and its predecessor agency had in their collective bargaining agreements with Local 589 a provision that disputes over the negotiation of successor agreements would be submitted to a tripartite arbitration board, consisting of one arbitrator appointed by each party and a mutually selected neutral chair with experience in transit arbitration. The agreement did not specify criteria on which the board was required to base its decision. This process came in for public criticism, focused on the

---

<sup>80</sup> L.B. 397, 102d Leg. (Neb. 2011) (codified at NEB. REV. STAT. § 48-804, §48-818(2012)).

<sup>81</sup> I gratefully acknowledge Philip Boyle, Esq., of Morgan, Brown & Joy, LLP, who represented the MBTA for many years, for providing me with background on the 1978 statute.

<sup>82</sup> See Local Div., 589, *Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 620 & n. 1 (1st Cir. 1981).

<sup>83</sup> See *id.* at 620 n.2.

<sup>84</sup> 49 U.S.C. § 1609(c) (1988).

## TWO MODELS OF INTEREST ARBITRATION

average of the comparables, including fringe benefits, the CIR must leave compensation unchanged. If the employer's compensation is below 98% of the average, the CIR is to raise it to 98%; and if it is above 102%, the CIR is to lower it to 102%. The targets are reduced to 95–100% during periods of recession, defined as two consecutive quarters in which the state's net sales, use taxes, and individual and corporate income tax receipts are below those of the prior year.<sup>80</sup>

The tendency to regard interest arbitration as an adjudicatory rather than a collective bargaining process is not only of recent vintage. For example, in 1978, the Massachusetts legislature significantly changed the interest arbitration procedure for the Massachusetts Bay Transit Authority (MBTA).<sup>81</sup>

As in most cities, rapid transit in Boston originally was provided by a private company. Since 1912, employees of the company, the Boston Elevated Railway, were represented by Amalgamated Transit Union Local 589. In 1947, the Metropolitan Transit Authority (MTA), the predecessor agency to the MBTA, acquired the Boston Elevated Railway. The MTA's enabling legislation authorized it to bargain collectively and to arbitrate unresolved disputes.<sup>82</sup> The Massachusetts legislature created the MBTA in 1964 as a successor to the MTA, that was qualified to receive federal funds under the Urban Mass Transportation Act (UMTA).<sup>83</sup> Section 13(c) of UMTA required that as a condition of the receipt of federal funds, the state must assure the Secretary of Labor that fair and equitable arrangements have been made to protect, among other things, the collective bargaining rights of the employees affected by the federal funds.<sup>84</sup>

For decades, the MBTA and its predecessor agency had in their collective bargaining agreements with Local 589 a provision that disputes over the negotiation of successor agreements would be submitted to a tripartite arbitration board, consisting of one arbitrator appointed by each party and a mutually selected neutral chair with experience in transit arbitration. The agreement did not specify criteria on which the board was required to base its decision. This process came in for public criticism, focused on the

---

<sup>80</sup> L.B. 397, 102d Leg. (Neb. 2011) (codified at NEB. REV. STAT. § 48-804, §48-818(2012)).

<sup>81</sup> I gratefully acknowledge Philip Boyle, Esq., of Morgan, Brown & Joy, LLP, who represented the MBTA for many years, for providing me with background on the 1978 statute.

<sup>82</sup> See Local Div., 589, *Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 620 & n. 1 (1st Cir. 1981).

<sup>83</sup> See *id.* at 620 n.2.

<sup>84</sup> 49 U.S.C. § 1609(c) (1988).

tri-partite nature of the arbitration and the lack of any requirement that the neutral be a resident of Massachusetts or have any experience in state and local government finance. The process was portrayed as resulting in continuous expansion of wages and benefits to levels that were out of sync with those of other public employees in the state.<sup>85</sup>

As a result, chapter 405 of the Massachusetts Acts of 1978, among other things, abolished the tri-partite arbitration panel, replacing it with a single arbitrator who had to be a Massachusetts resident experienced in state and local finance. Local 589 complained to the Secretary of Labor that the statutory changes were inconsistent with the assurances that the State had provided pursuant to UMTA. The Labor Department responded that the complaint raised issues of interpretation of the parties' collective bargaining agreement and suggested that such issues be resolved under the agreement's arbitration provision. An arbitration ensued before William J. Fallon, which presented the question, "Whether the 1978 Amendments to Chapter 161A of the General Laws and the insistence of the MBTA in arbitrating interests disputes in accordance with those amendments, are in conflict with the 13(C) Agreements of the parties?"<sup>86</sup>

In answering that question in the affirmative, Arbitrator Fallon found that the statutory amendments changed the fundamental nature of the MBTA interest arbitration proceeding from part of the collective bargaining process to an adjudicatory process. He focused, *inter alia*, on the substitution of a single arbitrator for the tri-partite board:

Requiring interest arbitration before a single arbitrator rather than a tripartite board with a neutral and two partisan arbitrators, also represents an impairment in the collective bargaining provisions protected by the 13(C) agreement. The input of the partisan arbitrators to achieve an award that is reasonably acceptable, represents an irreparable loss to the process and converts it into more of an adversary proceeding than the extension of the collective bargaining process that it was.<sup>87</sup>

Tri-partite boards facilitate the use of interest arbitration as a continuation of the bargaining process, but they are not essential for interest arbitration to perform that role. The Federal Service Labor Management Relations Statute, which governs collective bargaining between federal

---

<sup>85</sup> E-mail from Philip Boyle, Esq., Morgan, Brown & Joy, LLP, to author (Feb. 8, 2012).

<sup>86</sup> Massachusetts Bay Transportation Auth. and Div. 589, Amalgamated Transit Union, Dispute Re: 13(C) Agreement 1 (Aug. 13, 1979) (Fallon Arb.).

<sup>87</sup> *Id.* at 28-29.

## TWO MODELS OF INTEREST ARBITRATION

agencies and unions representing agency employees, provides for parties to first resort to mediation to resolve impasses in collective bargaining. If mediation fails to resolve the impasse, either party may seek assistance from the Federal Service Impasses Panel (FSIP).<sup>88</sup> The statute empowers FSIP to “assist the parties through whatever methods and procedures . . . it may consider appropriate,”<sup>89</sup> and if that assistance does not produce settlement, to “take whatever action is necessary . . . to resolve the impasse.”<sup>90</sup>

One of the procedures FSIP uses is to delegate authority to an individual FSIP member to conduct a hybrid mediation-arbitration procedure, where the member mediates but if mediation fails to produce agreement, arbitrates and imposes terms.<sup>91</sup> In my experience as a FSIP member, I have found this procedure—even though conducted by a single neutral rather than a tripartite board—to be an effective means of integrating interest arbitration into the parties’ collective bargaining process.

The two models of interest arbitration developed in this section should be considered end points on a continuum. Most interest arbitration processes fall somewhere along the continuum, rather than at the ends. The next section evaluates the two models and urges that interest arbitration processes be structured to fall closer to the bargaining end of the continuum, rather than the adjudication end.

### IV. EVALUATING THE MODELS

As developed previously,<sup>92</sup> the disadvantages of interest arbitration of primary policy concern are: its use as a means by which union leaders and public officials can avoid accountability to their constituents for the hard decisions necessary to conclude an agreement, its inherently conservative nature which stifles innovation, and its tendency to divert rather than resolve conflict. Intuitively, it would appear that to the extent the arbitration process, or more precisely the mutual desire to avoid an arbitrated resolution, motivates the parties to reach an agreement, these drawbacks are mitigated.

When negotiators agree on the terms of the new contract, union leaders and public officials are accountable to their constituents for the decisions they have made. They are unable to blame an arbitrator for imposing terms

---

<sup>88</sup> 5 U.S.C. § 7119(b)(1) (2006).

<sup>89</sup> *Id.* § 7119(c)(5)(A)(ii).

<sup>90</sup> *Id.* § 7119(c)(5)(B)(iii).

<sup>91</sup> A GUIDE: TO DISPUTE RESOLUTION PROCEDURES USED BY THE FEDERAL SERVICE IMPASSES PANEL, available at [http://www.flra.gov/fsip\\_drpg](http://www.flra.gov/fsip_drpg).

<sup>92</sup> See *supra* Part II.B.

## TWO MODELS OF INTEREST ARBITRATION

agencies and unions representing agency employees, provides for parties to first resort to mediation to resolve impasses in collective bargaining. If mediation fails to resolve the impasse, either party may seek assistance from the Federal Service Impasses Panel (FSIP).<sup>88</sup> The statute empowers FSIP to “assist the parties through whatever methods and procedures . . . it may consider appropriate,”<sup>89</sup> and if that assistance does not produce settlement, to “take whatever action is necessary . . . to resolve the impasse.”<sup>90</sup>

One of the procedures FSIP uses is to delegate authority to an individual FSIP member to conduct a hybrid mediation-arbitration procedure, where the member mediates but if mediation fails to produce agreement, arbitrates and imposes terms.<sup>91</sup> In my experience as a FSIP member, I have found this procedure—even though conducted by a single neutral rather than a tripartite board—to be an effective means of integrating interest arbitration into the parties’ collective bargaining process.

The two models of interest arbitration developed in this section should be considered end points on a continuum. Most interest arbitration processes fall somewhere along the continuum, rather than at the ends. The next section evaluates the two models and urges that interest arbitration processes be structured to fall closer to the bargaining end of the continuum, rather than the adjudication end.

### IV. EVALUATING THE MODELS

As developed previously,<sup>92</sup> the disadvantages of interest arbitration of primary policy concern are: its use as a means by which union leaders and public officials can avoid accountability to their constituents for the hard decisions necessary to conclude an agreement, its inherently conservative nature which stifles innovation, and its tendency to divert rather than resolve conflict. Intuitively, it would appear that to the extent the arbitration process, or more precisely the mutual desire to avoid an arbitrated resolution, motivates the parties to reach an agreement, these drawbacks are mitigated.

When negotiators agree on the terms of the new contract, union leaders and public officials are accountable to their constituents for the decisions they have made. They are unable to blame an arbitrator for imposing terms

---

<sup>88</sup> 5 U.S.C. § 7119(b)(1) (2006).

<sup>89</sup> *Id.* § 7119(c)(5)(A)(ii).

<sup>90</sup> *Id.* § 7119(c)(5)(B)(iii).

<sup>91</sup> A GUIDE: TO DISPUTE RESOLUTION PROCEDURES USED BY THE FEDERAL SERVICE IMPASSES PANEL, available at [http://www.flra.gov/fsip\\_drpg](http://www.flra.gov/fsip_drpg).

<sup>92</sup> See *supra* Part II.B.

on them.<sup>93</sup> Furthermore, because arbitrators are very reluctant to deviate from the status quo in their awards, change and innovation will come only by agreement of the parties' negotiators. Finally, to the extent that bargaining issues are resolved by agreement, the parties' conflict is resolved rather than diverted to other forums such as grievance arbitration and unfair labor practice proceedings.

As a part of the parties' collective bargaining process, interest arbitration provides a substitute for the right to strike. Agreements are reached in right-to-strike regimes because the parties mutually desire to avoid such economic warfare, in part because strikes are inherently unpredictable. Thus, for the threat to go to interest arbitration to function comparably to the threat of strike, the outcome of an arbitration proceeding should also be unpredictable.

The further along the continuum toward an adjudicatory process the interest arbitration proceeding is situated, the more predictable the outcome will be. Statutory mandates, such as those found in New Jersey, that the arbitrator consider statutorily enumerated factors and explain in a written award how each factor was evaluated and if a factor was deemed irrelevant why, makes the outcome more predictable. Predictability is enhanced further if the award is subject to a robust standard of judicial review. Over time, a body of case law will develop that sets established precedents for parties to apply in subsequent proceedings.

It is often believed that greater predictability increases the likelihood of settlement in litigation. Why spend the resources to litigate if only to achieve a predictable result that is otherwise available through a settlement? But in collective bargaining, predictability of arbitration outcomes may actually inhibit resolution by agreement. Why enter into and thereby allow oneself to be held accountable for an agreement, if the arbitrator is likely to impose an expected result and can then be blamed for the outcome? The temptation to leave the resolution to the arbitrator will be even greater if a robust standard of judicial review enables the recipient of an award that deviates from the expected result to appeal, and have a reasonable chance of having the deviation corrected.

The more the interest arbitration process resembles adjudication rather than collective bargaining, the less likely it will be that the parties will resolve their conflicts by agreement. The emerging data from New Jersey since the 2010 amendments provides initial, if tentative, support for this proposition. Table Four presents the data available from the New Jersey PERC.

---

<sup>93</sup> Of course, that is not the case when the agreed-on terms are presented to the constituents in the form of an award, unless the award states that it is an agreed-on award.

## TWO MODELS OF INTEREST ARBITRATION

It is apparent that the settlement rate decreased markedly in 2011 and 2012, after the new law took effect. We cannot say whether and, if so to what extent, the 2010 enactment inhibited settlement because many of the cases resolved in 2011 and 2012 were begun prior to the effective date of the 2010 amendment, and thus were handled under the old law.<sup>94</sup> However, there are many reasons to believe that the 2010 amendments are inhibiting resolution by agreement.

**Table Four: New Jersey Interest Arbitration Experience Since 1993<sup>95</sup>**

| Year                | Number of Awards | Number of Appeals | Number of Settlements |
|---------------------|------------------|-------------------|-----------------------|
| 2012 (thru 4/30/12) | 9                | 5                 | 10                    |
| 2011                | 34               | 13                | 38                    |
| 2010                | 16               | 9                 | 45                    |
| 2009                | 16               | 5                 | 45                    |
| 2008                | 15               | 2                 | 60                    |
| 2007                | 16               | 1                 | 46                    |
| 2006                | 13               | 3                 | 55                    |
| 2005                | 11               | 0                 | 54                    |
| 2004                | 27               | 2                 | 55                    |
| 2003                | 23               | 2                 | 40                    |
| 2002                | 16               | 0                 | 45                    |
| 2001                | 17               | 0                 | 35                    |
| 2000                | 24               | 0                 | 60                    |
| 1999                | 25               | 0                 | 45                    |
| 1998                | 41               | 2                 | 42                    |
| 1997                | 37               | 4                 | 62                    |
| 1996                | 21               | 2                 | 35                    |
| 1995                | 37               | 0                 | 44                    |
| 1994                | 35               | 0                 | 56                    |
| 1993                | 46               | 0                 | 66                    |

---

<sup>94</sup> PERC's website reports the number of awards in 2011 and 2012 that were subject to the new law, *see* New Jersey Interest Arbitration Experience Since 1993, [http://www.state.nj.us/perc/NJ\\_PERC\\_Salary\\_Increase\\_Analysis\\_IA\\_1993.01.01\\_-\\_2012.04.30.pdf](http://www.state.nj.us/perc/NJ_PERC_Salary_Increase_Analysis_IA_1993.01.01_-_2012.04.30.pdf) but it is not clear what that means. The new procedures took effect for arbitration petitions filed after January 1, 2011, but the new law's cap on increases in base wages applies only to contracts expiring after January 1, 2011. It is not clear whether the numbers reported by PERC are for awards resulting from the new procedures or awards subject to the cap on base wage increases.

<sup>95</sup> *Id.*

First, the 2010 amendments cut off existing dispute resolution mechanisms, particularly mediation, when an interest arbitration petition is filed. Although the statute continues to authorize the arbitrator to mediate, the new procedures make it far less likely that such mediation will occur. The amendments treat the arbitration proceeding like a judicial or administrative agency proceeding in an important respect: just as the litigants in court or before an administrative agency are unable to select their judge or administrative hearing officer, under the new interest arbitration procedures, the parties are not allowed to select their arbitrator. Instead, PERC appoints the arbitrator by random selection. This means that if the parties are dealing with an arbitrator who they both trust to mediate they are doing so by chance rather than by design. Furthermore, even where the parties have sufficient confidence in the arbitrator to welcome arbitral mediation, the 2010 amendments make it highly unlikely that such mediation will occur. This is because the arbitrator must conduct a hearing, receive the parties' arguments and issue an award within forty-five days of the arbitrator's appointment or face a fine of \$1,000 per day that the award is late. Such a time frame simply leaves no time for mediation. It is possible that the reduced settlement rates for 2011 and the beginning of 2012 will turn out to be aberrations, comparable to the aberration experienced in 1998, but it is more likely that the pattern will continue, and perhaps worsen, as the amended procedures completely take hold.

## V. CONCLUSION

The fear of granting public employees a right to strike, a fear that except for law enforcement personnel and firefighters is largely unjustified, has led to the substitution of interest arbitration as a method for resolving impasses in collective bargaining. But interest arbitration has significant drawbacks. It enables negotiators to avoid responsibility and accountability to their constituents. It is an inherently conservative process that inhibits innovative solutions, and it tends to divert rather than resolve conflict.

Approaches to interest arbitration may be situated along a continuum from being a part of the parties' collective bargaining process to being a separate adjudicatory proceeding. The more an arbitration process is developed as part of the overall collective bargaining process, the more likely the process will ease the disadvantages of interest arbitration. The more an arbitration process is developed as an adjudication process, the more likely it will exacerbate the disadvantages of interest arbitration.

To develop the interest arbitration process as an extension of the collective bargaining process, policymakers should encourage arbitrators to

## TWO MODELS OF INTEREST ARBITRATION

mediate. Sufficient time should be allotted in establishing deadlines for the arbitration award to allow for mediation, and the parties should be authorized to extend those deadlines by agreement. The arbitrator should have authority to remand the dispute to the parties for further negotiations if the arbitrator determines that such a remand is appropriate. Tri-partite arbitration boards facilitate mediation but are not essential, as effective mediation can occur even where there is a single, neutral arbitrator.

Interest arbitration statutes should be designed such that the outcome of an arbitration proceeding will be unpredictable. Where statutes specify factors for the arbitrator to consider, something that may be necessary in many states to avoid having the statute voided as an unconstitutional delegation of sovereign authority,<sup>96</sup> the factors should be worded broadly to give the arbitrator as much discretion as possible. Prioritizing some factors over others should be avoided and the list should contain express authorization for the arbitrator to consider factors in addition to those expressly listed. Arbitrators should not be required to address expressly every factor; indeed, as with grievance arbitration, they should not be required to provide detailed reasons for their awards. At most, they should be required to indicate that they have considered all relevant factors in reaching the decision.

Judicial review of interest arbitration awards should be extremely narrow. As long as the arbitrator acted within the scope of his or her authority, was not biased and did not engage in willful misconduct, a reviewing court or administrative agency should defer to the award. The goal of interest arbitration should be to resolve a particular dispute, not to develop a body of precedent binding on future adjudications.

When interest arbitration is situated as an extension of the collective bargaining process, the disadvantages of resolving bargaining impasses through arbitration will be mitigated. Parties are more likely to reach agreement and, in so doing, have a better chance of innovating rather than replicating the status quo, and of resolving conflict rather than diverting it to contract administration. When parties resolve their bargaining disputes by agreement, they own the resolution and cannot avoid accountability by pushing responsibility off on the arbitrator.

---

<sup>96</sup> See, e.g., *City of Warwick v. Warwick Regular Firemen's Ass'n*, 256 A.2d 206, 211 (R.I. 1969).