

## AMERICA'S LABOR RELATIONS SYSTEM: THE LAW AND THE PRACTICE

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### DOCTRINE

The material contained herein was originally the subject of a series of lectures given by the writer at the Institute of Labor Law, Istanbul University, in February-March 1970, at the request of the Director of the Institute, Professor Dr. Kemal Demirel. It is hoped that the writer has been able to shed some additional light on the ways in which our country has attempted to meet its problems and challenges arising from the interaction of an organized and labor representatives with respect to organizing, bargaining collectively, and resolving industrial disputes. It is not the purpose, nor the intent, of the material contained herein to be offered as Turkish professionals interested in labor relations or facing the answers to their problems and challenges. The material has been offered in the spirit of cooperation between our two countries, with explanations as to its methods and techniques and laws governing American labor relations, with the understanding that the Turkish professional can review, analyze, discuss, and modify, and even discard, if he so desires, any of this material as not possibly being adaptable to the Turkish system. If any of it has proved helpful, however, our joint efforts will have been deemed successful. On my part, I can only reiterate my sincere appreciation for the opportunity to present information about the American system by writing to all of my Turkish colleagues and particularly Professor Kemal Demirel and Professor Kemal Demirel's (Çok teşekkür ederim).

## **AMERICA'S LABOR RELATIONS SYSTEM: THE LAW AND THE PRACTICE**

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### **PREFACE**

The material contained herein was originally the subject of a series of lectures given by the writer at the Institute of Labor Law, Istanbul University, in February-March 1979, at the request of the Director of the Institute, Professor Dr. Kenan Tunçomağ. It is hoped that the writer has been able to shed some additional light on the ways in which one country has attempted to meet its problems and challenges arising from the interactions of management and labor representatives with respect to organizing, bargaining collectively, and resolving industrial disputes. It is not the purpose, nor the intent, of the material contained herein to be offered to Turkish professionals interested in labor relations as being the answers to their problems and challenges. The material has been offered in the spirit of cooperation between our two countries, with explanations as to the methods and techniques and laws governing American labor relations, with the understanding that the Turkish professional can review, analyze, dissect, and modify, and even discard, if he so desires, any of this material as not possibly being adaptable to the Turkish system. If any of it has proven helpful, however, our joint efforts will have been deemed successful. For my part, I can only indicate my sincere appreciation for the opportunity to present information about the American system by saying to all of my Turkish colleagues, and particularly, Professor Toker Dereli and Professor Kenan Tunçomağ — Çok teşekkür ederim!

### Distinctive Features of the Law

Any discussion of the American labor relations system must begin with a consideration of the distinctive features of American labor law, characteristics which make it different from labor law in other countries. Two which seem most important are:

1. Different procedures, regulations, policies, and organizational oversight bodies exist for both the public and private sectors of the economy; and
2. The substantive rules of the workplace are left to management and labor to jointly work out, with only the procedures followed in the relationship being regulated.

In other words, American labor law leaves considerable latitude for the parties to determine their own working relationships, with monitoring or regulating agencies involving themselves only when these relationships falter or break down.

American labor law is comprised of an amalgam of the four distinct types of law found in the United States, i.e., constitutional, statutory, administrative, and common law, and has been built up over the past 200 years of the country's existence. Examples of each type of law which one finds in the American labor law system would be :

#### *Constitutional law :*

The First Amendment to the U.S. Constitution assures management and the union's rights of free speech during organizing drives and similar situations requiring their respective opinions to be voiced in competing for the employees' loyalty or membership;

#### *Statutory law :*

The National Labor Relations Act of 1935, as amended by the Labor-Management Relations Act of 1947 (Taft-Hartley) and the Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin) determine the rules and procedures of labor-management relations for

most of the private sector, while the Railway Labor Act of 1926 governs such relationships in the railroad and airline industries;

*Administrative law :*

The hearing of unfair labor practice charges or of arguments with respect to determination of the appropriate bargaining unit is the responsibility of the National Labor Relations Board under the Act, and such rulings issued as a result of these deliberations become law;

*Common law :*

The practice of management and labor in some phase of collective bargaining, unless contrary to statute law, will often be upheld by a court simply because it is the prevailing practice.

These, of course, represent only one or two examples in each case of the types of law from which the American labor relations system has evolved, but should serve as indications of the way in which America views the function of labor law. Daniel Quinn Mills, of Harvard's School of Business Administration, sums it up as:

- 1., to facilitate and protect private voluntary arrangements, such as the private labor agreement;
- 2., to resolve disputes, such as exist in unfair labor practice charges or in grievance procedures and arbitration;
- 3., to establish minimum standards for employment, as for example, the minimum wage and health and safety standards<sup>1</sup>.

**Major Labor Laws Governing U.S. Labor Relations and Collective Bargaining**

With respect to the private sector of the economy, there are

1) Daniel Quinn Mills, **Labor - Management Relations** (New York : McGraw - Hill Book Company, 1978), p. 295.

basically five laws which govern the collective bargaining activity". These are:

1. Railway Labor Act of 1926, governing labor relations activity in the railroad and the airline industries;
2. Norris-LaGuardia Act of 1932, the Anti-Injunction Act, which governs the conditions under which injunctions can be issued in labor-management disputes;
3. The National Labor Relations Act (Wagner Act), passed in 1935, governing labor relations in most of the private sector of the economy not covered by the Railway Labor Act;
4. The Labor-Management Relations Act of 1947 (Taft-Hartley) which includes the Wagner Act generally as Title I, and amends certain provisions of that act and adds other new provisions;
5. The Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin) which makes provision for monitoring and control of the procedures governing the union management's use and application of membership dues, retirement plan accounts, investments, etc.; union elections, office holding, etc.

In addition, there are approximately 39 states which have some type of statute authorizing or regulating collective bargaining for employees in the public sector employment area, covering state, county, municipal, and tax district employees<sup>3</sup>. Further, collective bargaining in the federal sector is carried out under provisions of Executive Order 10988, issued by President Kennedy in 1962;

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2) Edwin F. Beal, Edward D. Wickersham, and Philip K. Kienast, **The Practice of Collective Bargaining** (Homewood, Illinois; Richard D. Irwing, Inc., 1976, Fifth Edition), p. 132. The reader is also referred to pp. 134 - 135 for an excellent chart tracing the emergence of American labor relations law.

3) Eugene C. Hagburg and Marvin J. Levine, **Labor Relations: An Integrated Perspective** (St. Paul, Minn.: West Publishing Company, 1978), p. 223.

Executive Order 11491, issued by President Nixon in 1969; and Executive Order 11838, issued by President Ford in 1975.

#### **Other Labor Legislation Affecting Employees**

There is other legislation which affects U.S. workers, but which is not designed to govern the collective bargaining relationship directly. There are laws governing minimum wage and overtime payment standards (Fair Labor Standards Act); prevailing wages for construction workers (Davis-Bacon Act); overtime pay on federal nonconstruction contracts (Walsh-Healey Act); non-discrimination in employment with respect to hiring, promotion, etc. (Civil Rights Act of 1964); and many others which the interested reader can refer to by consulting most American labor relations textbooks<sup>4</sup>, but which are not necessary to detail further here in the context of collective bargaining-related regulatory activity.

#### **General Comments About the American Labor Relations System**

It can be seen from the above, therefore, that the labor relations system found in the U.S. is not one, but several systems. It can be divided broadly into the private and public sectors, and then further subdivided. In the private sector, the Railway Labor Act governs rails and airlines industrial relations; the Wagner Act/Taft-Hartley Act/Landrum-Griffin Act applies to most of the rest of the private sector, and establishes minimum conditions for the National Labor Relations Board to accept jurisdiction in industrial disputes<sup>5</sup>, which conditions can broadly be considered to refer to large firms or small firms, with the determinant being the "total annual volume

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4) See Mills, **Labor - Management Relations**, pp. 302 - 303 for brief descriptions of these and other such legislation.

5) Taft - Hartley Act, Sec. 6 is the vehicle by which the NLRB is empowered to make rules and regulations to carry out their responsibilities, in the manner prescribed by the Administrative Procedure Act. The Board policies set forth in 1958 remain in effect at the present time. For an excellent discussion of NLRB jurisdiction, see Benjamin J. Taylor and Fred Witney, **Labor Relations Law** (Englewood Cliffs, New Jersey: Prentice - Hall, Inc., 1971), pp. 225 - 240.

of sales or purchases." These standards are different for different businesses, and there is a general constraint that, to accept jurisdiction in a case, the NLRB must be convinced that the "effect on commerce" is substantial, or must "affect national defense." Landrum-Griffin further, in Section 701, gives to the individual states the right to hear cases which the NLRB declines to regulate. That Act also, in Section 9, makes special provisions for controlling labor-management relations in the construction and building industry.

As mentioned previously, in the public sector collective bargaining relationships are governed at two levels. The Presidential Executive Orders control the bargaining activity of U.S. governmental employees. Regulation of labor-management relations between public sector employees at state, county, municipal, and tax district levels is left to each individual state to address. The states are free, under the American system, to institute laws governing collective bargaining in the public sector, or to refrain from issuing such laws. Currently, about 39 states have some form of collective bargaining law impacting their public sector employees, and these laws carry a wide range of differing provisions with respect to determination of the appropriate bargaining unit, exclusive representation, unfair labor practices, arbitration of rights and interest disputes, the use of mediation, registration of unions or of collective bargaining agreements, and many other common issues of labor relations.

#### **Initiating the Bargaining Relationship**

The collective bargaining relationship in America starts with recognition of a union by management of an enterprise, private or public. Such recognition activity is always preceded by a decision of some of the enterprise employees that they will seek union representation.

There are essentially two methods of establishing union recognition. The first, *without governmental intervention*, allows the union to obtain employee signatures on petitions or authorization cards, and present them to the employers, asking for recognition as the exclusive bargaining representative. If the employer wishes, he can consent to holding an election among his employees, and if the

union is chosen by the majority of those voting, the union is recognized, and bargaining may begin<sup>6</sup>.

The second method is *through governmental intervention*, initiated again, however, by employees asking for representation and having cards or petitions presented to the employer. In this case, however, the employer does not agree to a consent election, and a hearing is held before a representative of the appropriate oversight agency, depending upon whether the employer is in the private or the public sector. The oversight agency makes a determination as to the appropriate bargaining unit, determines if the union or an intervenor union has the required "showing of interest", and directs that an election be held if it is satisfied that the requirements for an election have been met. It oversees the election, and certifies the results to the employer and the union, and if a union wins the election, the bargaining process begins<sup>7</sup>.

In determining the "appropriate bargaining unit," the oversight agency will make its decision by taking into consideration the "community of interest" shared by the workers which the union or the employer propose as the bargaining unit, any bargaining history existing between the employer and the union seeking recognition, the presence of craft or professional workers in the proposed unit, and a number of other considerations<sup>8</sup>.

Upon the completion of such hearings, and if a decision is made to have an election conducted, then other criteria become important. The petitioning union must have had at least 30% of the employees in their proposed bargaining unit who have signed cards authorizing the union to represent them<sup>9</sup>. If a second union wishes to put in a bid to represent the employees, it is considered to be an "intervenor"

6) Taft - Hartley Act, Sec. 9 (6) (4). Also, see Mills, p. 316( and Beal et al., p. 174.

7) Mills, p. 315, and Beal et al., pp. 180 - 184, give further details

8) Taft - Hartley Act, Sec. 9 (b). See also Sec. 9 (c) (5) with reference to consideration of the extent of unionization of the proposed unit.

9) Benjamin J. Taylor and Fred Witney, **Labor Relations Law** (Englewood Cliffs, New Jersey: Prentice - Hall, Inc., 1971). pp. 182 - 183. See also Beal et al., 180 - 184.



and is only required to present a 10% "showing of interest" among the respective employees. The election is monitored and conducted by the appropriate oversight agency, which controls the election process and assures that only the employees designated by the oversight agency as being in the "appropriate unit" have the right to vote in the election. The ballot will provide for a selection by the employee from among one or more of the initiating and intervening unions, as well as a possible vote for "no union," which choice must be on the ballot to give the employees the right to reject unionization if they so desire. To be final on the first ballot, the winning choice must receive the votes of 50% + 1 vote OF THOSE VOTING IN THE ELECTION. If such a choice is not made, a runoff election is held as soon as possible after the first election, in which the employees choose from among the two highest vote-getting choices from the first election. Once a determination has been made that the election results are valid, the oversight agency certifies the results, and announces them to the employer, the employees, and the interested unions. If one of the unions was selected, it is then free to request the employer to begin the bargaining relationship. If the unions are defeated, no bargaining is conducted, and no new election can be held for at least one year<sup>10</sup>.

#### FORMATION OF THE COLLECTIVE AGREEMENT UNDER U.S. LAW

##### **Establishing the Collective Bargaining Relationship**

As can be seen from the immediately foregoing discussion, there is no American equivalent to the "invitation to bargaining" found in Turkish law, whereby rival unions are informed by mail as to the intentions of a union to bargain, and the concurrent announcement through the press of the decision to bargain collectively. The bargaining relationship is established in America in the manner previously described. However, it is appropriate to discuss some of the matters discussed earlier within the context of certain basic considerations present in Turkish labor law.

10) Taft - Hartley Act, Sec. 9 (c) (3) and Sec. 9 (e) (2).

### Legal Capacity to be a Party to Collective Bargaining

Certain fundamental differences exist between Turkish labor law and American labor law with respect to the legal capacity to be a party to collective bargaining. Under American labor law, the union which wins a representation election is recognized as the exclusive bargaining agent, not only for those employees who are members of the union, but FOR ALL EMPLOYEES IN THE APPROPRIATE BARGAINING UNIT. As a *quid pro quo* for the right to be the exclusive bargaining agent, American law requires that such an agent represent all of the affected employees.<sup>11</sup>

In the private sector, there are *no* requirements for unions to be registered with any agency *prior* to being active in seeking recognition. All unions are required, however, to comply with federal reporting and disclosure requirements set forth under Landrum-Griffin<sup>12</sup> with respect to their constitution, by-laws, officers, finances, investments, assets, etc., which requires their doing so *within 90 days* after first seeking recognition. In the public sector, however, unions generally are required to register with the appropriate state oversight agency prior to engaging in collective bargaining activity. This requirement evidently is considered to be appropriate where the tax-paying citizens' interests are involved, as would be the case where collective bargaining occurred, and where the general public is considered to have the right to know which organisations are doing business with elected officials of the community.

As regards the legal capacity of an employer representative to be a party to collective bargaining, in the private sector freedom of choice is left to individual employers to determine if they wish to bargain individually as a company, or join an employer association (as in the coal and construction industries in the U.S.). Further,

11) Taft - Hartley Act, Sec. 9 (a), "Representatives and Elections." For an interesting discussion on infringement of individual freedoms and the concept of exclusive representation, see George Schatzki, "Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?", *University of Pennsylvania Law Review*, 123:4, April 1975, pp. 897 - 938.

12) Landrum - Griffin Act, Sec. 207.

the employer is free to choose whomever he wishes to conduct his bargaining negotiations, be it an employee (personnel manager, finance vice-president, etc.) or an attorney hired from outside of the company, or an interested consultant. In the public sector, each agency conducting bargaining negotiations is free to choose its bargaining representatives also. At the federal level, the respective agencies of the federal government conduct their own negotiations. At the state, county, or municipal level, each entity is free to bargain with unions certified as bargaining agents by the state oversight agencies, with one proviso. That one restriction generally has to do with the requirement that no two separate levels of government (e.g., a city and a county, together) can bargain with one local union of a national union under the terms and conditions of a single contract. In other words, a local of a single police union (for example, the Police Benevolent Association) is free to bargain with a city for its police officers, and with a county for its county sheriffs, but such bargaining can only be done in separate negotiations, resulting in separate contracts.

Aside from the legal capacity to be a party to collective bargaining, there also is the consideration of authorization for collective bargaining. Which organizations are authorized to enter into such agreements, and what are the constraints with respect to exclusivity as a bargaining agent? For the employees, the union selected by a majority plus one vote of the employees voting in a valid representation election then becomes the authorized agent, and further, is the sole bargaining agent for the employees in the unit. No other union can represent those employees. However, that union *must* represent *all* of the employees in the bargaining unit, even though certain of those employees may not be members of the union serving as the bargaining agent. For the employer, any employer where a union has won an election to represent the employees is authorized to enter into collective bargaining agreements, and in fact, is required by law (Wagner and Taft-Hartley Acts) to bargain in "good faith", which means to enter into such negotiations with good intent to try and negotiate an effective agreement<sup>13</sup>.

13) Taft - Hartley Act, Sec. 8 (d).

However, just as American labor law in both the private and public sector make provisions for certification of unions as exclusive bargaining agents authorized to enter into collective negotiations, so too does the law usually provide for de-authorization through "decertification" proceedings. Such decertification elections are conducted by the oversight agency in much the same manner as the original "certification" elections, and arise as a result of a petition from either the employer or a group of employees who wish to have the authorized union removed from that classification<sup>14</sup>.

Once the oversight agency has certified the results of a representation election, however, bargaining can begin at any time thereafter. The parties are free to select bargaining dates, times, and locations. Certainly, a union winning the right to serve as the exclusive bargaining agent of a group of employees is usually interested in beginning negotiations quickly. An employer who delays coming to the bargaining table after a valid election and certification, however, risks having an "unfair labor practice charge" filed against him by the union, in accordance with the provisions of the Taft-Hartley Act, under Section 8 (a) (5), "failure to bargain in good faith". Therefore, extended delays in beginning negotiations are unusual.

### **Collective Negotiations**

Since there are no country-wide or even industry-wide negotiations in the U.S., there is no question concerning who should be parties to negotiations. The parties are those employers and recognized unions directly connected with the appropriate bargaining units in question. Further, with respect to duration of collective negotiations, there are essentially no time limits which govern except in certain unusual cases. Negotiations continue once started, until either the successful completion of bargaining resulting in an agreement, or until impasse is reached, indicating that the parties are unable to agree on a contract. The only time-frame-related concerns are those wherein that party desiring to modify or

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14) Taft - Hartley Act, Sec. 9 (c) (1) and Sec. 9 (e) (1).

terminate an existing labor contract must notify the other party in writing at least 60 days prior to the expiration of the contract<sup>15</sup>; and in the case where "a national emergency"<sup>16</sup> is considered to be a possibility because of the nature of the industry (coal, petroleum, etc.) and the impact of a failure of the parties to reach agreement, the emergency provisions of the Taft-Hartley Act can be invoked, requiring an "80-day cooling-off" period. In such a case, the President of the U.S. would convene an Inquiry Board, the Board would conduct hearings into the dispute, and make a report to the President. In the meantime, the parties would return to work for a 60-day period, at the end of which time the NLRB would hold an election among the workers for selection of either the employer's last offer or the union's last position, during the ensuing 15-day period. The NLRB must then certify the results within 5 more days, at the end of which time the 80-day period is ended, and either an agreement has been reached through a favorable vote of the employees on the employer's offer, or the union is free to strike. A report of the entire proceedings must be made by the President to Congress, with such recommendations as he desires. Congress has the option of passing specific legislation dealing with the dispute, or of doing nothing and letting the parties resolve the matter among themselves. These provisions with respect to time frames are only applicable to the private sector, however.

No such emergency provisions exist regarding negotiations in the public sector. If impasse cannot be resolved by mediation, various states have differing provisions for resolution. Certain states have provisions which resemble the above-mentioned Taft-Hartley "emergency dispute resolution" provisions; others have one or a combination of several types of dispute resolution mechanisms, including factfinding, voluntary arbitration, "superconciliation" (as New York State's Public Employment Relations Board terms its renewed mediation efforts after initial mediation and arbitration/factfinding efforts have failed), gubernatorial executive orders, or legislative enactments.

15) Taft - Hartley Act, Sec. 8 (d) (1).

16) Taft - Hartley Act, Sec. 206 - 210.

When a collective agreement has been reached, the parties are generally free to document the agreed-to provisions in whatever form they wish. There is no standard form, and labor contracts in the U.S. have a large variety of provisions included which have been negotiated. The agreement is always a written document<sup>17</sup>, however, signed by a number of representatives from both parties. The duration of the agreement can be for 1, 2, or 3 years. No registration of the agreement is required in the private sector, while the public sector arrangements usually require that the labor contract be filed with the appropriate oversight agency.

#### **Disputes Arising During Negotiations (Interest Disputes)**

When such disputes arise in the private sector, mediation efforts by employees of the Federal Mediation and Conciliation Service<sup>18</sup> are available, and are usually invoked. If the efforts of the mediators are unsuccessful, however, strike or lockout may occur, always of course considering that such action must conform to whatever legal requirements exist governing such actions. The parties are free to continue negotiations or refrain from such action during any such lockout or strike, unless, of course, the "emergency dispute" provisions of the Taft-Hartley Act are instituted. In that instance, dispute resolution mechanisms could consist of injunctions, executive orders to return to work, or seizure of the plant, factory, mines, etc., by the government, to be run by federal troops until an agreement is reached between the affected union(s) and employers(s).

In the public sector, various states have differing provisions<sup>19</sup>. These were identified previously as running the full gamut from mediation to compulsory (usually advisory) arbitration, with the latter generally being required when the parties cannot agree and the governmental agency's budget submission dates are close at hand.

17) Taft - Hartley Act, Sec. 8 (d).

18) Taft - Hartley Act, Title II, Sec. 201 - 203.

19) Beal et al., pp. 467 - 470 and Taylor and Witney, pp. 528 - 529 provide further discussion of public sector dispute settlement, and the latter book also contains excellent material on federal sector matters.

Such dispute resolution arrangements are generally not satisfactory to unions in the public sector, since a municipality or county bargaining team may choose to drag out negotiations until the date is close at hand by which they must submit the following year budget. They can then invoke the criticality of the budget submission date as the reason for taking the dispute to arbitration in order to get a decision quickly. Since the states which have public sector bargaining laws invariably provide for the appropriate legislative body (city council, county school board, county commission, or state legislature) to have the final determination on ratification of any such agreement, employer negotiators usually have more options in decision-making with respect to such agreements. They obviously have more control over the results of negotiations because of such time constraints and legislative control over final agreements.

Since this section deals only with interest disputes, the question of rights disputes will not be addressed here. In both the private and public sectors, rights disputes are invariably settled through an appropriate grievance procedure requiring arbitration as the final and binding step. Details with respect to such disputes will be discussed later in this presentation.

#### THE SCOPE AND COVERAGE OF COLLECTIVE AGREEMENTS IN AMERICAN LABOR LAW

##### **The coverage of the collective agreement in terms of employee categories**

Because of some differences in the definitions of "scope and coverage" between American and Turkish labor law, it is appropriate here to define "employee" and identify the employee categories subjected to a collective agreement.

In the American private sector, under the National Labor Relations Act (NLRA), an employee is defined as "any employee" unless the NLRA explicitly excludes them from coverage in a

collective agreement<sup>20</sup>. Therefore, *all* those persons in the employ of an enterprise who are determined to be in an "appropriate bargaining unit" are covered by the collective agreement reached between their employer and the union which is authorized to represent them. Employees *do not have to be members of the union* selected as the exclusive bargaining agent. The employee categories covered by an Agreement are those identified as filling the occupations identified as being in the "appropriate bargaining unit" during oversight agency hearings prior to the election<sup>21</sup>.

However, there are some exclusions from coverage in a collective agreement. With respect to an agreement covering the "appropriate bargaining unit", obviously excluded will be those employees who are not identified as being in that unit because their occupations fall outside of the requirements for inclusion. Further, the law requires that "craft" employees be included in the unit unless members of that craft vote to be excluded; and professional employees are to be excluded, unless they vote themselves to be included. Plant guards must always be excluded from other units in a plant, although they may have their own unit. Managerial and supervisory employees dealing with the employees in a unit cannot be in a unit, by virtue of not falling within the meaning of the term "employee" to which the NLRA applies<sup>22</sup>. Also, those employees who serve in a "confidential" relationship to management with respect to administration of the Agreement cannot be in the "appropriate bargaining unit". These may be secretarial, clerical, or administrative category employees who have access to information concerning management's actions, or strategies; such information could adversely affect management's position with relationship to the union if such information were to be made available to the union as a result of the confidential employee's interests being represented by the union. Also normally excluded by virtue of their occupation and responsibilities within the company would be the personnel or industrial relations staffs<sup>23</sup>.

20) Taft - Hartley, Sec. 2 (3).

21) Taft - Hartley Act, Sec. 9 (b), in conjunction with Sec. 2 (3).

22) Taft - Hartley Act, Sec. 2 (11) and Sec. 2 (3).

23) NLRB Rules and Regulations.



So much for discussion of those excluded from a specific bargaining unit. There are also other categories of employees who are, more broadly, excluded from the protection of the law itself<sup>24</sup>. The largest single group of such workers are agricultural employees. Also excluded are employees of small interstate and all intrastate enterprises, "small" being determined by the criteria established by the National Labor Relations Board for accepting jurisdiction of firms engaged in interstate commerce<sup>25</sup>. Also excluded from coverage under the Wagner/Taft - Hartley/Landrum-Griffin Acts are all employees of governments, regardless of whether the governmental entity is the federal government, a state government, county, city, or tax district entity. (As pointed out previously, such employees may or may not be covered by the federal Executive Orders or by their respective state's public sector employee labor legislation.) Private contractors are also excluded from coverage under the law, because their status would be that of an employer, even if they were considered to only be employing themselves, since their contractor status would allow them to hire other employees. Another category excluded from coverage under the law are individuals employed by parents, husbands, or wives. Further, domestic servants are also outside of the protection of the law governing labor relations. Essentially, what determines the definition of a covered "employee" is determined by the definition of an "employer", since employees who are employed by persons or organizations not meeting the criteria for determination as an "employer" under Taft - Hartley, Sec. 2 (2), are thereby excluded from coverage.

The "territory" of the collective agreement is covered next<sup>26</sup>.

24) Taft - Hartley Act, Sec. 2 (3) and NLRB Rules and Regulations should be reviewed together to obtain a comprehensive view of the interrelationships between exclusions from coverage of the law and exclusion from a bargaining unit.

25) Taft - Hartley Act, Sec. 14 (c) and NLRB Rules and Regulations. Also, refer to Footnote No. 5 above.

26) Hagburg and Levine (Footnote No. 3 above) have an excellent discussion on the structure of collective bargaining at pp. 43-49. See especially their Table 6 on pp. 44-45 for a detailed listing of the types of 'employer units' in a variety of industries, the

This section includes considerations of plant and multiplant collective agreements, and variations on the Turkish concept of an industry-wide collective agreement. Whether a collective agreement covers one plant, multiple plants, or subdivisions within a plant is determined by the make-up of the appropriate bargaining unit. Examples of types of units would be:

- a. All employees of a company in all of its plants
- b. All employees in a single plant
- c. Separate groups of employees within a plant
- d. Separate groups of employees throughout several plants in a company,

subject to the exclusions identified previously.

The various types of negotiation relationships which are present in American labor relations collective bargaining are:

- a. One company/one union
- b. One company/multiple unions (as in coalition bargaining or when mergers occur and the successor firm must honor previous agreements)
- c. Multicompany (employer associations)/one union (as in the coal industry)
- d. Multicompany (employer associations) / several unions as with garment workers)

In other words, there is no single pattern of collective bargaining. It will vary from company to company, industry to industry, region to region, union to union. The structure of bargaining is left to the determination of the parties, and will be influenced by the nature of the industry, the geographic location considerations, types

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numbers of agreements, and the numbers of workers covered. Also, for detailed coverage of the differences between **coalition bargaining** and **coordinated bargaining**, see: Abraham Cohen, "Coordinated Bargaining and Structures of Collective Bargaining", *Labor Law Journal*, June 1975, p. 379; George H. Hildebrand, "Coordinated Bargaining: An Economist's Point of View", *Labor Law Journal*, August 1968, p. 524; and Philip Schwarz, *Coalition Bargaining* (New York State School of Industrial and Labor Relations: Ithaca, N.Y.), 1970.

of employees to be covered, and structure of the bargaining party's organization.

"Pattern bargaining" is a type of bargaining wherein a single national union, e.g., the United Auto Workers, will first negotiate with one of the auto companies, like General Motors, and then try to get the same benefits from the other companies in that industry. As such, pattern bargaining is a bargaining strategy, rather than being a bargaining structure<sup>27</sup>.

The American labor relations system does not have anything comparable to industry-level, nationwide bargaining such as can be found in Turkey. Except as noted above, bargaining may be done for a company/union agreement covering all employees of a company nationwide, but local supplements to the national agreement will be negotiated in each case, over issues considered to be only of interest and affecting employees of the local plant. The closest the American system comes to having industry-level, nationwide bargaining would probably be the negotiations between the United States Postal Service and the Postal Workers. This is because of the peculiar nature of the relationship resulting from the former U.S. Postmaster General's office (a federal agency) being phased out and the postal service being created in its place, with all of its facilities, resources, regulations, and bargaining relationships. The Postal Service is now a public, non-profit corporation. Such a change altered the control of its labor relations activities, since as a government agency it was subject to the Executive Orders, but as a consequence of being a public, non-profit corporation, it now comes under the National Labor Relations Act definition of "employer" and is subject to NLRB oversight<sup>28</sup>.

As for "regional, industry-wide" negotiations, the closest the American system comes would be perhaps in the transportation industry, where groups of employers negotiate with the Teamsters Union for a region-wide contract, e.g., West Coast, New England.

27) William H. Miernyk, **The Economics of Labor and Collective Bargaining** (Boston: D.C. Heath and Co., 1965), pp. 291-295. provides an in-depth view of pattern bargaining.

28) See Beal et al., pp. 483-484, and Hagburg and Levine, 186-187.

Midwest, etc. Finally, with respect to an "industry-level, city-wide" arrangement, New York City finds several employers in the garment industry negotiating for its members in that city alone. There are, of course, innumerable examples which could be given of the large variety of bargaining relationships and structures which exist in the U.S., and it is difficult to limit discussions of such relationships to one or two examples as representative of all American labor relations. Furthermore, the arrangement or pattern of such bargaining relationships changes over time, since the parties are free to determine their own approaches to bargaining, and modifications are made quite frequently when the parties believe the relationships would benefit from such changes.

#### THE EXPIRATION (TERMINATION) OF THE COLLECTIVE AGREEMENT IN AMERICAN LABOR LAW

##### **Durations and Expiration of the Collective Agreement**

Generally, the parties are free to determine when they wish to renew negotiations. Contracts in the U.S. usually are of one-year, two-year, or three-year duration. Some contracts in the past have run for as long as five years, but today most of the employers and unions do not like to be committed for that period of time. The reluctance to negotiate such relatively long-term contracts is found on the part of both management and the unions. Such contracts carry the risk of having wages frozen during a period of rapidly rising living costs, and unions look bad in the eyes of their members if that occurs. Management, under such long-term commitments, is faced with fixed labor costs in the form of required annual wage increases, regardless of its profitability picture.

One approach to offsetting the disadvantages of a long-term contract is by negotiating a contract and making provisions for re-opening the master contract at periodic intervals for the purpose of re-negotiating wages and benefits of an economic nature. This arrangement is not uncommon, and is often utilized in place of negotiating entire contracts at shorter intervals. One other

interesting example is, however, the agreements between New York newspaper publishers and the Typographers Union No. 6, negotiated in 1975 and 1976 and calling for a 10-year duration. There still has not been enough experience with such long-term contracts to determine if they will continue or spread.

Although the term or duration of a collective agreement is not regulated in American labor law, there are certain requirements with respect to termination or modification of such agreements. Taft-Hartley<sup>29</sup> requires that a party desiring to terminate or modify an existing contract must serve the other party with written notice of the proposed termination or modification at least 60 days before the expiration date or agreed reopening date of the contract; or, if the contract contains no expiration date, 60 days before the time it is proposed to make such termination or modification<sup>30</sup>. Secondly, the initiating party must offer to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed changes<sup>31</sup>. Lastly, the initiating party must notify the Federal Mediation and Conciliation Service, and any state or territorial mediation service operating where the dispute occurs, that a dispute exists, if no agreement has been reached 30 days after the initial notice was served under the 60-day requirement<sup>32</sup>.

In Turkey, the system provides for individual labor contracts for employees. In the United States, there are no individual labor contracts<sup>33</sup>. It may be implied that the offering of a job and the acceptance by the employee constitute a labor contract, but the execution of a written document between employer and employee

29) Taft - Hartley Act, Sec. 8 (d).

30) Taft - Hartley Act, Sec. 8 (d) (1).

31) Taft - Hartley Act, Sec. 8 (d) (2).

32) Taft - Hartley Act, Sec. 8 (d) (3).

33) Two sources worth reviewing however for their perspective on such individual contracts are M.H. Dunahee and L.A. Wrangler, "The Psychological Contract" *Personnel Journal*, 53: 7 July 1974, pp. 518 - 526, and Edgar H. Schein, *Organizational Psychology*, 2nd Ed. (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1970).

is unusual except for certain professionals. Therefore, when employees subject to a collective agreement are no longer formally covered by the agreement due to its having expired, they usually will continue on their jobs while the union / employer continue negotiations. While they continue working, they receive the same benefits and pay as when the contract was in effect. If they strike, however, their pay and benefits cease until the contract is re-negotiated. There is no further requirement by the employer of work to be performed, and the employee has essentially given up his acceptance of the job he formerly held, IN THE ABSENCE OF ANY KIND OF CONTRACT.

This has led to one of the major areas of dispute in American labor relations, namely, the status of an employee on strike with reference to his continuing right to a job. There is no question of the right of an employee engaging in a strike because of an employer unfair labor practice to retain the right to his job, and he cannot be permanently replaced. Otherwise an employer could engage in an unfair labor practice, cause the employees to go on strike, replace them permanently, and then ask the oversight agency for a new election on the basis that the union did not represent the employees in the bargaining unit (since the replacement employees would obviously vote the union out, or they would no longer have their jobs if they didn't!)

However, an economic striker, under a 1968 NLRB rule, has a right to be reinstated if his job opens up again<sup>34</sup>. This rule is based on a 1967 decision of the U.S. Supreme Court that requires a company to reinstate strikers not rehired at the termination of a strike because of the low level of production<sup>35</sup>. The Board therefore reasoned that a striker remains an employee even though he is not reinstated immediately after a strike is concluded. This raises the question, of course, of the difference, if any, between a permanently replaced economic striker and one who is not rehired immediately after a strike because of low production levels, and would mean that there can be no such things as permanent replacement of economic strikers.

34) See *Laidlaw Corporation*, 171 NLRB 175 (1968).

35) *NLRB vd. Flettwood Trailer Company*, 389 U.S. 375 (1967).

Most often, however, when an agreement has expired, the workers are not replaced, and when a contract is finally negotiated, the benefits are either made retroactive to the date of the expired agreement, or some mutually agreed upon arrangement transpires. This varies, inasmuch as the employer and the union are always free to negotiate whatever terms and conditions of an agreement as they desire to make. During the interim period when there is no contract, it frequently occurs that the parties signed a letter of intent to negotiate a new contract, and therefore, the provisions of the old agreement are in force until the new one is signed, or until an impasse occurs and strike action takes place.

The only instance that this writer can think of where a cancellation of a collective agreement would be called for would be in those situations where the employees vote in a decertification election, duly called by the oversight agency, and where the results of the election require the authorized union to be decertified. If that union were decertified, then any such documents which it had been a party to would have no further force and effect, since it would no longer represent the employees of the bargaining unit in matters of "wages, hours, terms and conditions of employment."<sup>36</sup>

As for extending the duration of a collective agreement, the parties are free to execute letters of agreement or intent to extend the contract; to agree to make any new contract retroactive to the expiration date of the old agreement; or, generally, to agree between themselves as to the desirability of extending the old agreement.

One other point with respect to the expiration or termination of a validly existing contract should be considered. That is the situation where a rival union is desirous of replacing the union which is recognized as the certified bargaining agent. In those cases where a valid contract for a fixed period of three years or less exists, the contract will act as a bar to an election for the period covered by the contract. Therefore, no rival union can

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36) Taft - Hartley Act, Sec. 8 (d) and Sec. 9 (e).

force an election and immediately negotiate a new contract in that situation.

If the contract runs for more than three years, and an outside union wishes to force an election to represent the employees and negotiate a new contract, the contract acts as a bar to an election sought by the outside party for only three years following the effective date of the contract. In other words, if there is an existing contract covering a five year period, the contract acts as a bar for only the first three years of the contract. Further, a contract with no fixed period of duration does not act as a bar at all<sup>37</sup>.

However, NLRB rules require that when a representative union has been certified by the Board, it is binding for at least one year, and petitions for elections will be dismissed up to the end of the certification year. If during the year, the certified union and the employer enter into a valid contract, the contract becomes controlling, and the "contract-bar" rule comes into effect for the life of the contract.

Under the rules of the NLRB, a petition for election may be filed at least 60 days, but no more than 90 days, before the expiration of a contract<sup>38</sup>. This filing period makes it possible to upset a contractual relationship only at an appropriate time, and frees both an employer and a union coming up to a negotiation, from also having to contend with a representation campaign from a rival union at the same time as they should be preparing for negotiations.

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37) For a compact presentation of specific NLRB Rules and Regulations, readers are referred to: National Labor Relations Board, **A Layman's Guide to Basic Law Under the National Labor Relations Act** (U.S. Government Printing Office: Washington, D.C., 1968). For specific discussion of the so-called "contract bar" doctrine, see Beal et al., p. 183, and pp. 10-11 of the immediately above-mentioned NLRB Guide.

38) Beal et al., p. 183, and NLRB Rules and Regulations.



## RESOLUTION OF LABOR DISPUTES IN AMERICAN LABOR LAW

### Types of Labor Disputes

Again, differing from Turkish labor law, American labor law makes no distinction between "individual" and "collective" labor disputes. If an American employee covered by a collective agreement has a dispute concerning wages or fringe benefits, the grievance procedure found in the collective agreement is followed. If the organization which employs the worker does not have a collective bargaining agreement, it may have a grievance procedure which the employee can follow. If it does not have such a procedure, the employee has access to the civil courts under one of the various Acts governing wages, hours, discrimination, and the like. Such grievances, of course, must constitute an alleged violation of the rights of workers on the job, not merely represent a complaint which an employee may have about something which dissatisfies him. Grievances, to meet the normally accepted definition under American law, can occur in one of several forms:

- as a violation of the collective bargaining agreement, if one exists;
- as a violation of federal or state law
- as a violation of employer past practice
- as a violation of company rules
- as a violation of management's responsibility<sup>39</sup>.

Since there are no requirements in American labor law as in Turkish law governing the distinction between an "individual" and a "collective" labor dispute, any dispute with respect to relations or representation between the employer, the employee, and the exclusive bargaining agent is subject to one of the laws governing collective bargaining relations.

39) Mills, p. 201.

### **Interest disputes versus rights disputes**

American labor law, as Turkish law, distinguishes between these two types of disputes<sup>40</sup>. When a collective bargaining agreement is in existence, which sets forth the terms and conditions of working relations between the employees in the appropriate bargaining unit and the employer, any difference of opinion concerning either party's alleged misinterpretation, misapplication or violation of the contract is considered to be a "rights" dispute. The interpretation is that the labor agreement has conferred certain rights upon the parties, to which they both have agreed in negotiations.

However, if a collective bargaining agreement is not yet in existence, and the parties are still in the process of negotiating such an agreement, and if they do not agree on the terms and conditions to be included therein, then an "interests" dispute is considered to exist. The interpretation here is that there is obvious disagreement over the respective interests of each party in determining what constitutes acceptable conditions under which they will interact in the work environment.

### **Mediation and conciliation**

Mediation, of course, is the process by which a neutral party attempts to aid the two disputing parties in reaching a settlement of the issues on which they disagree. Those involved in mediation have no power or authority to order or dictate a settlement of any kind. Conciliation, as it is used in American labor relations, is something slightly less than mediation, in that it only involves an attempt to get the two parties to at least meet and discuss their problems. For that reason, since American labor law requires the parties to a dispute to meet with each other, the original meaning of conciliation has changed, and today, it is generally considered to be almost synonymous with mediation. Mediation in the U.S. is normally carried out by the employees of the Federal Mediation and Conciliation Service, created by Title II of the Taft-Hartley Act, or by mediators from any of the various state mediation agencies in existence. The parties are free to use whichever service they wish.

40) Hagburg and Levine, pp. 93-94

As mentioned previously, when a collective agreement is about to expire, the party wishing to modify, terminate, or renegotiate the contract must notify the Federal service and any state mediation services in the area where the dispute exists, if the dispute has not been resolved 30 days before the expiration date of the agreement. There are approximately 300 mediators of the FMCS with offices in most major cities in the U.S. They are professional mediators who are usually drawn from experienced labor and management representatives who opt for employment in mediation at either state or national level<sup>41</sup>.

Upon notification to the appropriate office that only 30 days exist before expiration of a valid contract, the appropriate agency head (FMCS Regional Director or State Director of Mediation Services) will appoint one of his mediators (usually called "commissioners") to assist in settling the dispute. The parties can reject the assigned mediator, if they so desire, and another will be appointed to replace him. Once appointed and accepted, however, the mediator generally continues to be active in attempting to get the parties to reach agreement until a new contract is agreed upon. He stays active until he feels he can no longer be of assistance, and there is no specific duration stated for his services.

If the process has been successful, the parties reach agreement, and upon the signing and ratification of the contract, the services of the mediator are no longer required and he removes himself from the case. If the parties have not reached agreement, the mediator remains active as long as he feels he can contribute something, even during a strike, lockout, or other work stoppage. If the assigned mediator has not been successful, on occasion the Director of the FMCS or the State Director of Mediation Services will step in and attempt to use his office to get the parties to agree. This is unusual, however, and usually occurs only in the event of a dispute in large firms or industries, or where a national emergency may be imminent.

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41) Mills, p. 188 - 189, and Hagburg and Levine, pp. 91-93. Worthwhile reading with respect to the Federal Mediation and Conciliation Service is an article by the former Director of the Service; William E. Simkin, "Code of Professional Conduct for Labor Mediators", *Labor Law Journal*, 15:10, October 1964, pp. 626 - 637.

### Arbitration

Arbitration as a dispute resolution process is widely used in the U.S., and is found in a variety of forms, and in combination with other dispute resolution mechanisms<sup>42</sup>. There is voluntary arbitration, compulsory arbitration, binding arbitration, advisory arbitration, and a relatively new approach termed med-arb, or mediation-arbitration.

Voluntary arbitration is used most frequently in the resolution of rights disputes, but is hardly ever used in interests disputes. It is considered voluntary, inasmuch as it has generally been agreed upon by the parties in the labor agreement that, as a last step in the grievance procedure, when no resolution of the grievance has occurred, the parties will invoke the provision for taking the grievance to a third party neutral to resolve the dispute. Since the parties voluntarily have included such an arbitration step in their labor agreement, the decision of the arbitrator is usually binding on both parties. Approximately 98% of the collective bargaining agreements in America contain a grievance procedure for the resolution of such rights disputes, and approximately 95% of those procedures call for binding arbitration, as a last step.

Compulsory arbitration is found most frequently in the public sector, where state and local governments which have authorized the collective bargaining process for public employees, also will generally include a provision for the parties to be forced to submit their dispute to a third party for resolution. More will be said about public sector dispute resolution later, when the entire process of collective bargaining in the public sector is discussed.

Binding arbitration requires that both parties agree to be governed by the decision of the arbitrator, while advisory arbitration

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42) For perhaps the best and most complete discussion of the arbitration process, with case citations, the reader is referred to the definitive text, Frank Elkouri and Edna Elkouri, **How Arbitration Works**, 3rd Ed., (Washington, D.C.: Bureau of National Affairs, 1973). Also, the **Arbitration Journal**, publication of the American Arbitration Association, contains excellent in-depth material. Also, Robben W. Fleming, **Labor Arbitration Process** (Urbana, Ill.: University of Illinois Press, 1965) is worthy of review.

essentially consists of the third party neutral hearing a dispute, and then offering his opinion as to how the dispute should be resolved. His opinion and "award" serves as a guide for the parties, although it is not necessary for them to accept it.

The most recent variation of arbitration, called med-arb, has been tried in a number of states in America, in public sector disputes over interests. In this process, a mediator is called into the dispute, attempts to resolve it through aiding the parties to come to their own agreement, and if not successful, is asked by the parties to arbitrate the dispute and make an award.

When rights disputes occur, the grieving party can invoke the arbitration process. The parties are always free to select any arbitrator of their choice, and some companies and unions which have continuing relationships will select individuals to serve as permanent "umpires," or arbitrators, who hear either every case going to arbitration between those parties, or will serve as one of a small group who rotate turns in hearing cases for the parties. The parties may also request the American Arbitration Association, a private, non-profit organization set up to aid parties in dispute resolution techniques, or the Federal Mediation and Conciliation Service, a federal government agency, to provide a list of names from which the parties can select one to serve as the arbitrator, each time a case goes to arbitration. This "ad-hoc" arbitration process is the one most frequently used by parties in the U.S., selecting a different arbitrator for every case which arises. The two agencies mentioned have lists of qualified arbitrators, certified by the respective agency, who make up what is called the Labor Arbitration Panel. When requested by parties to provide an arbitrator for a case, the agency requested will submit to both parties a list of perhaps five or ten names from their panel, usually selected at random. The parties will rank order the names as to their preferences for the arbitrator, and that name chosen highest in the list by both parties is requested to serve. If the parties cannot agree on a name, they may request a new list. If they still cannot agree, the agency will then usually appoint a member of their arbitration panel to serve as the arbitrator, and under the terms of the agreement between the parties and the rules of the agencies, the parties must accept the appointee. These panels are

comprised of private neutrals such as lawyers, university professors, or former business and labor representatives with long experience in labor relations. They receive their original appointment to the Labor Arbitration Panel through being recommended by labor and management representatives or other third party neutrals, and intensive investigation of their backgrounds with respect to their qualifications to hear labor disputes. After the arbitrator agrees to accept the case, he sets the hearing date, hears the arguments, and renders a decision (required within 30 days) which is usually binding on the parties.

#### Legal Basis for Arbitration

Arbitration is authorized and accepted in the U.S. as a result of a series of Court rulings looking favorably upon the process as a dispute settlement means. Perhaps the most important impetus to arbitration in the U.S. was given by the Supreme Court's rulings in the "Steelworkers' Trilogy," a series of three decisions handed down by the Court on the same day in 1960. The basis for these decisions, however, was found in the *Lincoln Mills*<sup>43</sup> case in June 1957, where the Supreme Court's decision held that arbitration provisions in collective bargaining disputes were deemed enforceable in the federal courts under federal law.

The "Trilogy" cases all involved the United Steelworkers of America and each decision demonstrated that private arbitration had received the full support of the Court, with each decision representing a different aspect of the validity of the arbitration process. The first of the three which we shall discuss was the *Warrior & Gulf Navigation*<sup>44</sup> case. The ruling here was that, in the absence of an express agreement provision which excluded arbitration, then the parties would be directed to arbitrate if a dispute arose. However, if the labor agreement expressly excluded a subject from the arbitration process, then no such directive would prevail. This places the initiative on the parties to specifically identify those types of issues

43) See *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

44) *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960).

or subjects which will not be subject to arbitration, and implies that all others are then appropriate subjects for arbitration if disputes arise concerning them. One additional interesting aspect of this ruling, however, is that it does not preclude a private arbitrator, once brought into the case, from ruling that the grievance should be dismissed on the basis of non-arbitrability. The effect is to assure that a dispute is not unnecessarily delayed by having it go through the court system for such a ruling. By forcing a subject to arbitration which is not specifically excluded from the agreement to arbitrate, the parties gain what they bargained for — namely a third party neutral, in an arbitration case duly considered, resolving a dispute for them, even though his decision may hold that, upon a hearing and review of the evidence, his determination is that the grievance is not arbitrable under the terms of the agreement. But the arbitration process is still validated, even in that instance.

The second case of the three was the *American Manufacturing Company*<sup>45</sup> dispute. Here, the Supreme Court, in reversing the lower court, held that federal courts are limited in determining whether a dispute is covered by the labor agreement; they have no power to evaluate the merits of a dispute. Therefore, even if a judge believes a grievance is completely worthless, it is not for him to decide, but rather, it is up to the private arbitrator to make the decision on the merits of the case. That arbitrator may feel the case is without merit, and if so, he has the authority to dismiss the grievance, but this is exclusively his duty and not the court's.

In *Enterprise Wheel and Car Corporation*<sup>46</sup>, the arbitrator's decision had been reversed by a court because the judge did not believe the decision was a sound one under the labor agreement existing. In reversing the lower court, the Supreme Court held:

Interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the ar-

45) *United Steelworkers of America v. American Manufacturing Company* 363 U.S. 564 (1960).

46) *United Steelworkers of America v. Enterprise Wheel & Car Corporation*, 363 U.S. 593 (1960).

bitration decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

The significance of this decision is that, even if a judge believes an arbitrator's award is unfair, unwise, and inconsistent with the contract, he has no alternative but to enforce the award. Parties, henceforward, cannot use the courts to set aside an arbitrator's award. As a result of this ruling, American courts may declare, on an appeal from an arbitrator's ruling, that the arbitrator may have been guilty of a procedural violation, or that he exceeded the authority given him under the labor agreement, but the case would have to be reheard in accordance with proper procedure, either by the same arbitrator or a different one if the parties so chose, but the courts could not make the decision on the merits of the case.

Summarizing then, we find that there is always a strong presumption of arbitrability, and in the face of an arbitration clause in the agreement, even if one or the other of the parties thinks the issue is not arbitrable, it will be left to the arbitrator to decide. He will do so on the basis of his interpretation of the facts in the case as they refer to the agreement itself. The award can be appealed to the Courts, but they generally will not intervene unless the arbitrator has been guilty of improper procedure, or has exceeded his authority as it is spelled out in the agreement. Because of the relatively greater expertise which has been built up by a highly trained corps of arbitrators in the U.S., the Courts have increasingly found themselves generally lacking in expertise in such labor matters, and would be even more reluctant to rule on substantive issues in labor cases<sup>47</sup>. Because this places the heavy responsibility on private arbitrators to demonstrate a high degree of integrity and professional competency, American arbitrators generally do not take this responsibility lightly. It is considered to be a signal honor to have won the confidence of both labor and management representatives, and most arbitrators, therefore, approach the conduct of the hearing and the deliberation of the evidence and testimony with considerable

47) *Mills*, p. 213.



rable gravity, recognizing that their decision is "final and binding" upon the parties.

Arbitration hearings are usually conducted under the rules of either the American Arbitration Association or the Federal Mediation and Conciliation Service, which address the subjects of hearing procedure, swearing of witnesses, consideration of evidence and testimony, and similar procedural matters. The parties jointly pay the fees and expenses of the arbitrator. He usually charges a flat fee for a hearing day and a similar fee for each day he spends in reviewing the evidence and testimony and fashioning his opinion and award, and whatever are "actual and reasonable" expenses, such as travel to the hearing, meals and lodging, etc.<sup>48</sup>.

#### **Interest Arbitration and Fact - finding**

The foregoing comments apply, obviously, to the resolution of rights disputes, where a valid collective bargaining agreement exists which the parties are expected to adhere to. It is appropriate however, to discuss the concept of interest arbitration as it is evolving in the United States. As indicated previously, interest arbitration is practically non-existent in the private sector, inasmuch as management realizes the shareholders of an enterprise do not want them to abdicate their responsibility to negotiate the best terms possible with respect to the utilization of the firm's resources. Also, unions likewise are reluctant to face a possible charge from their membership that they too abdicated their responsibility to negotiate the best terms possible for the members by giving that responsibility to a third party who obviously would not have the same interests as union members in getting as much as they could from management.

In the public sector, however, many state laws provide for such interest arbitration to be carried out in a variety of ways<sup>49</sup>. As stated earlier, most state laws which provide for collective bargaining for

48) Mills, p. 208 - 210.

49) Hagburg and Levine, pp. 227 - 228, and Beal et al., pp. 467 - 470 provide a good explanation of impasse procedures as found in the public sector. R. Theodore Clark, Jr., **Coping with Mediation, Factfinding, and Forms of Arbitration** is a brief review of practices typically encountered during impasse procedures.

employees in the public sector also provide compulsory arbitration as the last step in attempting to resolve interest disputes; in the way in which the compulsory arbitration is carried out however we find many variations. In such cases, "impasse" procedures are usually defined when the two parties cannot reach agreement. There are generally provisions in the state law which call for the dispute to go to arbitration by a certain date, usually 60 to 90 days before the date by which the governmental entity must submit its next year's budget to the next higher level of government, or to ratify it if the decision rests at that level. This gives the parties time to explain to the arbitrator their respective views and bargaining positions. He then provides a decision which is usually advisory only. This advisory opinion, which is not binding, is generally the basis for the respective legislative body's holding an open hearing in the community and ruling on the final negotiation between the parties. The reasons for the advisory nature of such a decision are due to the desires to preserve the right of sovereignty of the municipality, county, tax district, or state to determine its own budget and taxation or funds acquisition requirements, consistent with the wishes of the taxpaying citizenry whose business they are responsible for carrying out. There are several forms in which the arbitration activity can be found. It may be binding, but generally is not. It may be advisory, and generally is. The arbitrator may look at the respective final offers of the parties and select whichever one he feels to be most realistic; he may look at the respective final offers of the parties and select whichever specific individual issue proposal he thinks is most realistic; or he may fashion a proposal himself which lies somewhere between the two final offers of the respective parties.

Lastly, a word about fact-finding<sup>50</sup>. Although many of the state laws in America provide for "fact-finding" as a possible step in interest dispute resolution, it has been difficult to separate the process of fact-finding from that of advisory arbitration. Factfinding

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50) For a comprehensive review of not only factfinding but other types of dispute settlement mechanisms, see Thomas P. Gilroy and Anthony Sinicropi, **Dispute Settlement in the Public Sector: The States-of-the Art**, U.S. Department of Labor (U.S. Government Printing Office, Washington, D.C.), 1972.

falls midway between mediation, where the neutral tries to get the parties to come to an agreement themselves, and arbitration, where the neutral is empowered to make the decision for them. However, if arbitration takes the form of advisory arbitration, where the parties are not bound by the arbitrator's opinion but are only to be guided by it, then such arbitration seems synonymous with fact-finding, which is the appointment of a third-party neutral to hear an interest dispute and make a recommendation on the basis of the "facts" of the case. Such fact-finding may or may not require a recommendation from the neutral, but in any event, the "facts" as he sees them are essentially what the arbitrator looks for when he engages in his advisory arbitration with respect to interest disputes. In neither case does the neutral have any power to enforce his decision. He can only render an opinion on the basis of the evidence and testimony he receives, and it is then up to the parties, the legislative bodies, or the taxpaying citizenry themselves to determine if his opinion is worth accepting.

#### THE RIGHT OF PUBLIC EMPLOYEES TO ORGANIZE, BARGAIN COLLECTIVELY AND STRIKE IN AMERICAN LABOR LAW

##### **The Right of Public Employees to Organize**

A "public employee" in America is any person employed by a governmental agency, whether it be the federal government, state governments, county, or municipal governments. They are usually considered to be "civil servants" because the type of work they perform represents civic and governmental services to citizens: police and fire protection, garbage and trash collection, electric/water/gas/utilities services, public school teaching, and administrative work in governmental agencies. The U.S. government does not have employees engaged in manufacturing and production operations nor do the individual states.

In attempting to determine the categories of public employees having the right to organize, it must be recognized that there is no

single pattern of labor relations in the public sector in the U.S.<sup>51</sup> There is no federal law that applies to labor relations among state and municipal employees, so there are no necessarily uniform regulations. Each state establishes its own law governing public employees and the right to bargain collectively, and if it desires not to pass such a law, it is free to choose that path. In the federal government, no statute governs labor relations. Instead, as mentioned previously, Presidential Executive Orders provide the framework. Therefore, the United States is going through a period of transition, experimentation, and development of a public system for bargaining.

Because there is no unified system for regulating public sector employees' collective bargaining activity, the categories of public employees having the right to organize will vary from state to state, and from governmental agency to governmental agency. Generally, the groups which have been organizing and with which governmental entities have been engaging in collective bargaining are police, firemen, public hospital workers, school teachers, public-supported university and college professors, utilities workers, garbage and trash collectors, postal workers, and administrative and clerical employees.

Under the American system, having the right to organize carries with it the concomitant right to bargain collectively; therefore all the employee categories identified above have both rights. Generally, the ways of concluding collective agreements in the public sector with respect to those groups of employees is the same as for bargaining in the private sector. There are some differences in the procedures, but generally, all public sector unions wishing to represent employees must first register with the appropriate labor relations oversight agency by filing information such as the union charter, constitution, by-laws, financial condition statements, names and addresses of officers, etc. A union complying with such registration requirements is then authorized to engage in organizing activity.

Upon engaging in negotiations, the parties are generally free to develop whatever bargaining arrangements they wish, and to

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51) Mills, p. 353.

bargain for whatever issues they choose, with some exceptions. There is no specified form which the agreement must take, but it must be in writing, and a copy must be filed with the oversight agency. Obviously, the parties to the agreement desire copies, but the number each requires is left up to the parties themselves to decide. The agreements generally include the same kinds of subjects which have been bargained as are found in the private sector, e.g., wages, hours, benefits, union security arrangements, management rights, seniority provisions, administration of the contract, identification of the bargaining unit, duration of the agreement, provisions for its renewal, etc. Again, the enabling legislation invariably identifies certain subjects which can be classified as mandatory, permissive, or prohibited subjects for bargaining, and these mostly follow the regulations found in the National Labor Relations Act<sup>52</sup>. For instance, bargaining for a "closed shop" is prohibited under Taft - Hartley, and no state law allows that as a permitted subject<sup>53</sup>.

#### **Categories of Public Employees Not Having the Right to Bargain Collectively**

Generally, where collective bargaining is allowed by either a state law or the Executive Orders, no public employee is excluded from the right to bargain collectively. The one category which is the exception is the armed forces of the U.S., where organizing and bargaining is not allowed. Two criteria govern exclusion from the bargaining unit of employees who would otherwise be entitled. Those criteria, as indicated earlier, are: (1) employment in a *managerial or supervisory* capacity, empowered to make decisions with respect to bargaining relationships and administration of the agreement, once negotiated; and (2) employment as a *confidential* employee, wherein the duties require a close working relationship with managerial employees or those charged with negotiation of the agreement or administration of the agreement. In this latter

52) Hagburg and Levine, pp. 52-53, and Taylor and Witney, p. 334, discuss these three categories, and provide examples.

53) Taft - Hartley Act, Sec. 14 (b).

category, for example, would fall the personnel relations or labor relations staff of an employer, accounting and finance employees having access to budget and taxation figures, secretarial and clerical employees who work closely with management and would have access to confidential information with respect to strategy, tactics, etc. in dealing with the unions. However, even in these two categories the safeguard exists that management must be able to prove to the oversight agency in appropriate bargaining unit hearings that employees whom they wish to exclude from the unit as either managerial or confidential employees actually perform in such sensitive positions.

### **The Right to Strike for Public Employees**

Treatment of the right to strike varies. Several states have given public employees the right to strike in a limited or qualified way. The criterion as to the granting of the right to strike is generally determined as "unless the work stoppage creates a clear and present danger to the health, safety, and welfare of the public"<sup>54</sup>. As one example of the application of this rule, Alaska has created four classes of employees for right-to-strike determinations. Those classifications are: (I) fire/police—may not strike; (II) Teachers/sanitation workers—may strike for a limited period; (III) utilities workers—may strike for a longer period; and (IV) clerical workers—may strike for an unlimited period. In other states, differing criteria are applied. In Oregon, for instance, certain groups of employees have the right to strike after completion of the dispute resolution procedures and notification of the intent to strike. Even here, however, if public health, safety, or welfare is endangered, the strike would be subject to an injunction. Vermont, for example, gave all municipal employees except teachers the right to strike so long as there was no danger to public health and safety. These are only a few examples, and it would not be possible here to list all of the various states' requirements<sup>55</sup>. Federal employees,

54) Hagburg and Levine, p. 228.

55) An interesting observation is that, despite many instances of public employees engaging in strike activity over the past se-

on the other hand, do not have any legal right to strike, whatsoever<sup>56</sup>.

Penalties for striking, where the right to strike is denied, run from the administering of fines to loss of jobs<sup>57</sup>. Fines against employees, fines against unions, fines against union officers, suspension from jobs, outright dismissal from jobs, retention of job but loss of tenure, loss of pay, loss of seniority, are all examples of such penalties. Generally, the authorities will stop short of arrests of violators, for perhaps a couple of reasons. One is that an arrest could carry a stigma later against the public employee which implies he is in the same class as a thief, rapist, burglar, etc., and it is generally considered that he should not suffer such a civil law or criminal law penalty for what is essentially a labor matter respecting an agreement between his employer and himself. Secondly, in those instances in America where widespread arrest powers were invoked, it is usually a condition of the union's signing a labor contract that those arrested previously have such arrest records re-

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veral years, it still remains true that the U.S. Supreme Court clearly enunciated the proposition that public employees do not have a right to strike. (See **United States v. United Mine Workers**, 330 U.S. 258, 67 S. Ct. 677 (1947). Hagburg and Levine point out (p. 149) that "this case has never been modified or overruled in the ensuing thirty years." For further study of this issue, see Robert B. Fowler, "Normative Aspects of Public Employee Strikes", **Public Personnel Management**, March - April 1974, p. 130; Anne M. Ross, "Public Employee Unions and the Right to Strike", **Monthly Labor Review**, March 1969, p. 15; Louis V. Imundo, Jr., "Strikes and the Strike Issue in Federal Government Labor - Management Relations", **Personnel Journal**, May 1973, p. 381; Robert O. Helsby, "A Political System for a Political World in Public Sector Labor Relations", **Labor Law Journal**, August 1973, p. 508; and John F. Burton, Jr., "Can Public Employees Be Given the Right to Strike", **Labor Law Journal**, August 1970, p. 474.

56) Taft - Hartley Act, Title III, Sec. 305.

57) See Hagburg and Levine, pp. 152 - 153 for examples of strike penalties, as well as Mills, pp. 364 - 366. Also, for a comparison between two states' handling of strike penalties, see "Strike Fines Vary Widely in New York and Wisconsin", **Government Employees Relations Report (GERR)**, No. 638 (Bureau of National Affairs: Washington, D.C.), January 5, 1976, pp. B-5-B-6.

moved and if they are still in jail or prison, to be released. Also, there is the very real question of the good it does to place such violators under arrest. If a school system has 50,000 teachers on strike, they are not in the classroom, where they should be. If they are arrested and put in jail, they are still not in the classroom, where they should be, so the dispute has not been resolved in the way desired by all, namely, to get the teachers back into the classroom and teaching. In the case of police strikes, one may properly raise the question, if the police are on strike, who is going to arrest the police and put them in jail? So, by and large, although arrests have been made periodically in American public sector labor disputes where the right to strike has not been given and yet has been violated, it is not considered that arrests are appropriate. So the penalties for violating any right-to-strike outlawed provisions have been left up to the individual states or territorial jurisdictions to make the determination as to what should be done.

#### **A Final Word**

What has been attempted in this relatively short presentation is to impart to the reader generally what the state of the American labor relations system is today. The point was made earlier that there is not one, but several, labor relations systems in effect: one for private sector labor relations generally; one for private sector railway and airline labor; one for construction labor in the private sector; one for public sector labor in the federal service; and a large number of separate systems throughout the individual states and territories for public employees in those governmental entities. Naturally, it is not possible to identify each and every deviation from the norm. What we have tried to do here is to provide a generalized overview of the American labor relations system, and emphasize its complexity and multiplicity. For those individuals who are interested in reading and studying further about these various systems, there are a number of labor relations texts, labor law reference books, encyclopedic reports, current labor happenings reporting systems, etc. available through various American publishing houses and labor agencies. Some of these reference sources have been identified throughout the various footnotes.



ANSWERS TO QUESTIONS RAISED BY PARTICIPANTS  
IN THE SEMINAR

Q: *What are the ways whereby the costs of the election (representation) are met?*

A: We must first define "costs", since there are expenditures made by the oversight agency, by the employer, and by the union in preparing for an election. Basically, the oversight agency bears the costs of the time their representatives spend in preparing for, conducting, and overseeing an election; they pay for the official announcements, posters, sample ballots, etc. which are provided, as well as the final ballots and other monitoring costs. The employer must provide locations for the election at plant or office locations, so any utilities, rent, and/or facilities costs are the employer's burden. The union, per se, has no costs except what they expend to lobby their members. One other cost which the employer incurs is that of preparation of the names and addresses of all the employees who are in the oversight-agency-determined "appropriate bargaining unit," which lists must be furnished to all the parties to an election, i.e., the oversight agency, and any participating union<sup>58</sup>.

Q: *Which employees are excluded from bargaining collectively?*

A: (The answer to this question was incorporated into the body of the material contained herein, at pp. 13, 14, 15, and 33). (Included are discussions concerning, among others, "supervisors", "employees", "employer", and "employer representative").

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58) This list is commonly referred to as the "Excelsior List", required as a result of the decision in **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966). The U.S. Supreme Court upheld the Board's names-and-addresses policy in **NLRB vs. Wyman-Gordon Company**, 394 U.S. 759 (1969).

Q : *As a follow-up to the previous question, if supervisors are excluded from bargaining, how are they compensated? Can they join unions? What happens to them if they cannot bargain and cannot join unions?*

A : "Supervisors" are excluded from inclusion in the appropriate bargaining unit in the private sector, since they are considered to be "managerial" employees. In the public sector, treatment of supervisors varies with the differing state laws. In either event, they can join unions of "supervisors", but inasmuch as the federal labor law does not require the employer to bargain with supervisors' unions, most of the state laws follow the same theme and allow them to form their own unions but will not require employers to bargain with supervisors' unions. In state jurisdictions which do not prevent supervisors from being members of an appropriate bargaining unit with other employees, they obviously are covered under the terms and conditions of any contract negotiated for the other employees in that appropriate bargaining unit. If they are considered management and not included in a unit, they invariably will be treated by the employer as management and will be compensated as such. If a supervisor feels he is not being treated fairly or compensated adequately, he is free, like any employee in America, to change jobs or seek other employment. Generally, American management has found it is in their best interest to consider supervisors as management and provide the same benefits to supervisors as they do to all other managerial employees.

Q : *Would you please discuss the concept of union security from the standpoint of the difference between union shop, agency shop, and "maintenance of membership" clauses, including the way they are legitimated through any voting procedures; and further, explain what is meant by "free-riders"?*

A : A "union shop" is an arrangement, bargained for in the collective agreement, whereby the employer is free to employ anyone he desires, but that employee must join the recognized bargaining agent union within 30 days after his employment,

or he must be terminated; an "agency shop" allows the employer to hire anyone he desires, and that employee, although not required to join the recognized bargaining agent union, must begin paying, usually within 30 days, an amount to the union approximately the amount of union dues. The employee under such an agency shop clause, however, does not have to be a member of the union, participate in union meetings, recognize strike calls, or engage in or be subject to any union activity. Since he is in the bargaining unit, however, the union must represent him as well as all employees in the bargaining unit, whether union members or not. This has given rise to the union argument that unless either a union shop or an agency shop is allowed to be negotiated, then the employees in the unit, who must be represented by the union by law, can enjoy all the benefits of unionization while not paying for any of them. This is what is meant by their being "free riders," i.e., they get for "free" what others must pay for. A "maintenance of membership" clause exists where employees who are members of the union when the contract is negotiated, or who join it later, even voluntarily, must "maintain their membership" for the duration of the contract. For such employees, there is an "escape" clause (10 to 15 days) at the beginning of a new contract where the employee can choose to withdraw or stay in the union. If not withdrawing from the union during that period, he is obligated to stay in until the end of the next contract, when the same conditions for withdrawal will be in effect. A "closed shop," although not asked about, was a form of union security whereby the employer was required to hire *only* from the union with which it had an agreement. Although the "closed shop" is outlawed by Taft-Hartley for most relationships, a modified "closed shop" arrangement is authorized through Landrum-Griffin<sup>59</sup> for the construction industry, because of the temporary nature of most construction work and the prohibitive costs to an employer to conduct mass employment advertising and retention of personnel staff. An "open shop" means that the employer can hire any employee he so

59) Landrum - Griffin Act, Sec. 705 (a).

desires and is not obligated to require the employee to join the union as a condition of employment. The choice is then up to the employee to join or refrain from joining the union. The Taft-Hartley Act<sup>60</sup> permits union security arrangements except in the so-called "right-to-work" states, where any form of required union membership is prohibited. Originally, that law required a vote by the employees to authorize such a "union shop" clause in an agreement. Although that requirement was later abandoned, the Act still authorized petitions for elections if employees wish to withdraw the union's right to such a clause after the agreement has taken effect, and on occasion, the NLRB will conduct such an election<sup>61</sup>.

*Q: Is there a requirement that collective bargaining agreements be approved by the members, and if so, how is this done?*

*A:* There are no actual legal requirements that an agreement be ratified by its members. However, the collective agreement is considered to be tentative until it is approved by a vote of the union membership. This vote may be conducted in any manner the individual union wishes. All that is finally required is that the union officials notify the employer of approval by the members. It is generally considered that if the employees in a bargaining unit are dissatisfied with the contract negotiated by their representatives, this dissatisfaction will be made known. If the union officials try to ignore it, the decertification process can be invoked; or, more simply, the rank-and-file union members can call an election and refuse to ratify a contract<sup>62</sup>.

60) Taft - Hartley Act, Sec. 14 (b).

61) Taft - Hartley Act, Sec. 9 (c) (1). For more detailed explanation of the various forms of union security, see Taylor and Witney, pp. 301 - 325, and Hagburg and Levine, pp. 63-64.

62) For an understanding of some of the problems of contract rejection by the members and its consequences, see Donald R. Burke and Lester Rubin, "Is Contract Rejection a Major Collective Bargaining Problem?", **Industrial and Labor Relations Review**, January 1973, pp. 820 - 833.

Q: *What are the ways to determine "multiplant bargaining units" and is there any need to hold elections in all of them?*

A: There are no legally constituted "multiplant bargaining units" except as the oversight agency determines that employees of an employer who work in a number of plants of that employer have a "community of interest" and should be combined into one unit for bargaining purposes. The single unit resulting from such oversight agency hearings, at least in the case of the NLRB, has been held by that body to be the appropriate form of collective bargaining. In such a case, only one union could be selected as the exclusive bargaining agent for members of the unit. Defining the bargaining unit is a prerequisite for election and certification purposes. Of course, although the law requires the NLRB to establish bargaining units, and they do so based on certain criteria which they try to consistently apply, the law does not require the employer and the union to utilize those units as the specific bargaining entities. There is nothing to prohibit the locals from coordinating and centralizing their bargaining activities, as for instance the large national unions arrange for, when negotiating with a major employer. For instance, representatives of the various locals of the United Automobile Workers belong to a council which coordinates and arranges for bargaining with General Motors or Ford Motor Company. Once a national agreement has been negotiated, the local units are then free to negotiate for local plant/local union matters, which are a supplement to the national agreement. Essentially, although the NLRB makes decisions about the units, they do not necessarily specify the form in which negotiations occur. The bargaining structure is generally left to the parties to work out. Naturally, once again, when a contract has been negotiated for a bargaining unit, all the members of that bargaining unit have the right to ratify such a contract in whatever fashion they choose — open election, written election, tacit agreement, mail ballot, in-person show of hands at union meetings, etc., or no election if they so wish<sup>63</sup>.

63) See Footnote No. 26 above for citations bearing on this question.

Q: *What is meant by "check-off" and how does it work?*

A: "Check-off" is a method whereby the employer collects the union dues from the members. Under such an arrangement, once negotiated in the contract, the employer will deduct the amount of dues from the employees' pay and forward the money directly to the union. Employees must, however, authorize the check-off through an individually-signed authorization, a requirement in federal law<sup>64</sup>, and this authorization must be given in writing each year by each union member. Again, this arrangement only covers the members of the bargaining unit, and obviously thereby, of the one union which is certified as the exclusive bargaining agent. If agreed, union initiation fees and assessments may also be deducted automatically in this way.

Q: *Can the parties terminate the contract by agreeing to do so before the expiration date?*

A: Yes, since they are generally free to negotiate in whatever manner they desire, and for whatever duration of time they wish. However, it must be a mutually-agreed-to termination; there can be no unilateral decision by either party to terminate the agreement prior to the termination date.

Q: *What precautions are taken during a strike for those types of work which are vital for the life of the plant? Are any workers allowed to work during the strike? What happens to the plant security?*

A: Generally, the striking union will provide for the "safe conduct" of those maintenance workers necessary to protect vital plant installations, if a picket line has been thrown up at the plant entrance. If not, and if the maintenance workers are not in the unit which is striking, then they continue their normal routine of work. If they are unit members, then generally the union officials will meet with the employer representatives and arrange for necessary maintenance functions to continue. Since supervisors, in the private sector, are considered to be

64) Landrum - Griffin Act, Sec. 302 (c) (4).

management and not part of the unit, they also usually will aid in the performance of appropriate maintenance precautions. Although the union may call all members out on strike, it is not desirous of crippling the plant, since to do so would deprive their members of jobs until the plant equipment could be repaired or replaced, if they were to get an early agreement and end the strike. Hence, both sides have the desires to protect the equipment which the workers run and which turn out the production from which the company profits. As for plant security, it has been previously pointed out that the law forbids guards from being in the same bargaining unit as the rest of the employees, and therefore, they would not be on strike with the bargaining unit members.

*Q : What is the status of an employee on strike? Can he get his job back? Do his benefits continue? Can he be replaced? If he can be replaced, doesn't this hurt the union's chances for making a prolonged strike a success?*

*A :* Reinstatement rights of workers differ with the reason for the strike<sup>65</sup>. If the strike results from an unfair labor practice charge against the employer, the employee has an unlimited right to reinstatement to his job. The NLRB, after hearing the unfair labor practice charge arguments, may order not only the reinstatement of the worker, but also award him full back pay and whatever other benefits to which he would otherwise have been entitled. Further, the reinstatement will take place even if the employer had replaced the striker in the meantime, and even if such reinstatement results in the necessity to discharge the worker who had been hired to replace the striker. The rationale for such action is that it occurred because an employer took action which is declared unlawful under American labor law, and the strike would not have occurred if the employer had not engaged in such an unfair labor practice. However, a different situation exists with regard to worker

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65) For an enlightening discussion on this question, see Taylor and Witney, pp. 374 - 378, as well as the cases cited previously at Footnotes No. 34 and No. 35.

rights if the strike is an "economic" strike<sup>66</sup>. This is a strike for higher wages, better working conditions, etc. Employees engaging in this kind of strike have only a limited right to reinstatement. The NLRB here will order the reinstatement of the striking worker only when the employer has not filled the job with a permanent replacement. They have no authority, however, to direct the reinstatement if a permanent replacement has been hired. However, in a 1967 decision, the Supreme Court held that a company is required to reinstate workers on strike at the termination of the strike, if they were not rehired "because of low levels of production." The NLRB, in 1968, determined that permanently replaced strikers must be rehired "as soon as vacancies open for which they are qualified," reasoning that the Court decision indicated that a striker remains an employee even though he is not reinstated immediately after the strike has concluded. This raises the difficult question of the difference between "permanently replaced" and "not rehired immediately because of low production levels."

Generally, employers will not replace employees on strike at the expiration of a contract if it is expected the strike will be ended in a relatively short period of time because of probability of reaching agreement between the two parties. As mentioned previously, it often occurs that the parties agree to continue wages and benefit provisions of the expired contract until the new one is negotiated.

With respect to the question of the union's chances being hurt for making a strike a success if striking workers can be replaced, that is more a question of strategy and tactics of labor/management relations than one of law. A reading of the many cases arising as a result of such activity will provide additional information with respect to voting rights in elections for bargaining agents, interest of the striking worker in his job during the ensuing twelve months after a strike begins, interest of the worker in his job for a longer period of time,

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66) Landrum - Griffin Act, Sec. 702, Amendment to Taft - Hartley Act, Sec. 9 (c) (3).



the criteria required by the NLRB to demonstrate a continuing interest in the job by the worker, and a number of other issues surrounding this question. Some of these issues also revolve around the possibility of a striking union being "frozen" out of a plant if replacement occurs, whether or not replacement workers have the right to vote in representation elections, the question of seniority rights under such conditions, and a host of other such issues, all of which would conceivably affect the striking union's chances for success.

*Q: What happens to the seniority of the striking worker?*

*A:* Again, this depends upon the agreement between the two parties to the agreement. If the strike is settled reasonably quickly, the terms of the new labor agreement will probably make provision for seniority as one of the bargained items. If the new contract is retroactive to the end of the expired agreement, then seniority will not be affected. Further, the answer to this question depends upon whether seniority is based upon company-wide, plant-wide, department-wide, or craft-or-occupation-wide considerations; and further, whether one talks about "protective" seniority considerations, e.g., in layoffs where the most senior employee is the last to be let go and the first to be recalled; "opportunity" seniority, which gives the most senior employee (within the specified "seniority" unit) the first chance to qualify for, or be offered, a better job; or "privilege" seniority, the employee's right to various benefits, e.g., sliding numbers of vacation days based on seniority as length of service, which is usually an absolute benefit, not dependent upon a relative standing with other employees.

*Q: How about shop stewards? Do they retain superseniority? What is their status during the strike and after the collective agreement expires?*

*A:* The superseniority of shop stewards is the protection from layoff or termination enjoyed by such shop stewards for the period of their holding such office. Inasmuch as the position is one bestowed upon the individual by his fellow union members, the expiration of the contract has relatively little bearing

on his status. Concurrent with his union stewardship status, he holds an "employee" status with the employer and works at his assigned job. He is granted release time from that job to pursue his duties as a steward, the terms of such release time usually being spelled out in the labor agreement. If the union members go on strike when an agreement has expired, he no longer has a job, like the other members of the bargaining unit who are on strike. If the ultimately negotiated agreement is retroactive, his benefits as an "employee" will be those of all the other employees in the bargaining unit. If the other union members want him to continue as a steward, they will select him. If they are selected, they will once again have superse- niority with respect to layoff or termination<sup>67</sup>.

*Q: What happens if the contract is violated?*

*A:* If the contract violation is alleged to be a misapplication, misinterpretation, or similar violation of an existing contract, a grievance can be filed. (Since it was previously stated that 98 % of labor contracts in the U.S. contain such grievance procedures, the answer is based on that assumption). If satisfaction is not received there, arbitration can be invoked. If the losing party at arbitration refuses to accept the arbitrator's decision, the winning party can proceed through the federal courts for relief. If the violation constitutes an unfair labor practice charge, the grieved party can appeal to the NLRB, which, if it upholds the complaint, can issue an order, which also can be enforced through the federal courts<sup>68</sup>.

*Q: How long is the duration of the arbitration process in the U.S.? Is there any legal requirement?*

67) For further information concerning shop stewards and their duties, responsibilities, obligations, election to office, etc., in the U.S. system, the reader is referred to: **AFL - CIO, AFL - CIO Manual for Shop Stewards**, Publication No. 75 (Washington, D.C., March 1974).

68) Taft - Hartley Act, Sec. 10, "Prevention of Unfair Labor Practices."

A: There are no legal requirements in rights dispute arbitration. However, the parties usually indicate in their labor contract the time limits governing a party's right to take a grievance to arbitration. Further, although there are no specified time limits with respect to the administrative processes governing the acceptance and assignment of an arbitrator, both the AAA and the FMCS (who appoint the arbitrators in almost all cases, or whose panel members are selected by the parties) request that arbitrators expedite dates for hearing the case, and then specifically require that the decision be rendered within 30 days of the hearing. The arbitrator may extend that time limit, however, if he so requests of the parties and if they consent.

Q: *Is the American dispute settlement machinery satisfactory, or does it contain areas that need improvement?*

A: It is probably safe to say that, in general, the parties to rights dispute settlements in the U.S. are satisfied with the mechanism that exists to resolve grievances. Since 98 % of labor agreements call for some type of grievance procedure, and approximately 98 % require binding arbitration as the terminal step in the procedure, the parties evidently are satisfied they are getting what they bargained for or they would not continue to call for such arbitration. However, as in any field, the professionals involved always feel improvements can be made. Increasing the numbers of qualified arbitrators; improving the acceptability of newer arbitrators; determining a method to screen out trivial grievances; reducing the ever increasing costs because of over-emphasis on filings of unnecessary briefs, requiring transcripts and similar procedures normally found in court cases; eliminating delays caused by parties being unwilling to accept untried but available arbitrators over experienced arbitrators whose case load is so heavy that the case cannot be heard for months; all these are some of the challenges facing the rights arbitration process in America.

With respect to interest arbitration, the only comments appropriate are with reference to the public sector, where it

is most common. There, there is no consistency from state to state of the manner of utilizing such arbitration, and both parties generally are dissatisfied with it. It exists only because no other dispute resolution mechanism with regard to bargaining impasses has yet been determined to be better. A lot still needs to be done with it.

Q: *Are the steps in the grievance procedure incorporated into the collective agreements too varied, or is there a uniform pattern?*

A: I believe it's accurate to say that the steps in the grievance procedure are quite standard. Most such procedures call for either 3, 4, or 5 steps, with binding arbitration usually comprising the last step. The time frames within which grievances must be filed and responses received from the appropriate level of the opposite party will vary slightly, but most require somewhere between five and ten days for such replies to actions initiated at each step<sup>69</sup>.

Q: *Does arbitration also work between an individual employee and the employer?*

A: Under collective agreements where grievance procedures end in binding arbitration, an individual employee is free to take his grievance through the various steps himself, or he can request the union to do it for him. If he chooses to do it himself, however, the union must be allowed to be represented AS AN OBSERVER ONLY, to protect the union's right to knowledge concerning matters ensuing between employees in the bargaining unit and the employer<sup>70</sup>. If no agreement

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69) U.S. Department of Labor, Bureau of Labor Statistics, **Characteristics of Agreements Covering 1,000 Workers or More, July 1, 1973**, Bulletin 1822 (Washington, D.C.: U.S. Government Printing Office, 1974), p. 64. Also, Hagburg and Levine, p. 73, has a table identifying steps in a typical grievance procedure, taken from the **AFL - CIO Manual for Shop Stewards**, identified in Footnote No. 67 above.

70) Taft - Hartley Act, Sec. 9 (a).

exists between a union and the employer, then the employee has no such procedure available to him unless the employer has voluntarily established such grievance mechanisms, and such practice is not widespread.

*Q: Do the arbitration awards have to be registered?*

*A:* There is no requirement that such awards be registered, but it is a widespread practice that they be made known to several agencies. Both the AAA and the FMCS require copies of the arbitrator's award to be filed in the appropriate Regional Office. Several reporting services, among them the Bureau of National Affairs, The Commerce Clearing House, Prentice-Hall Publications, and similar such private organizations maintain extensive files of awards, and make them available through services which are obtainable through subscription. These remarks apply primarily to arbitration awards in rights dispute cases. For interest disputes, since these are usually in the public sector, the various state oversight agencies usually require that copies of the award/opinion be filed with their offices.

*Q: Does America have the various union security arrangements in public sector bargaining arrangements?*

*A:* As identified previously in the discussion on public sector bargaining, the various states are free to establish whatever regulations they wish with respect to any aspect of collective bargaining in the public sector. Therefore, it is understandable to find that some states allow union shop provisions, while others do not. Some authorize union shop for some types of employees, but outlaw it for others. Alaska, e.g., allows it for public employees; Kentucky includes only firemen in one city; Vermont covers municipal employees; and it only applies to teachers in higher education in Washington state. There, also, an election must be held for the bargaining unit members, and further, if unit members object on the basis of religious beliefs, they are exempted from paying service fees. This type of varied arrangements is indicative of the general conditions in America in state, county, and mu-

nicipal bargaining, where there is no definable pattern with respect to union security arrangements. Overall, at least 21 states today have some provision for union security, but the nature of the arrangements differs from state to state<sup>71</sup>.

However, in the federal sector, the situation is completely different. Section 12 (c) of Executive Order 11491 reads :

Nothing in the agreement shall require an employee to become or to remain a member of a labor organization, or to pay money to the organization except pursuant to a voluntary, written authorization by a member for the payment of dues through payroll deductions.

Therefore, practically all forms of union security arrangements are prohibited. Dues checkoff is essentially the only form permitted.

*Q: Do the unions support their members on strikes through strike funds, both in the private and public sectors? What is the rate of strike benefits?*

*A: The unions do support their members on strikes through strike funds, both in the public and the private sectors. However, the amounts of any such benefits are minimal compared to the massive drain on the union treasury for such benefits. Many national union constitutions provide for the payment of strike benefits. A large-scale strike involving hundreds or thousands of workers would rapidly use up strike funds, and the total amount of benefit payments to workers is minimal compared to their actual subsistence needs<sup>72</sup>.*

*Q: Does the U.S. Supreme Court have any significant decisions with respect to the right to organize, bargain collectively, and strike for public employees?*

71) But see Arnold S. Zander, "Trends in Labor Legislation for Public Employees", *Monthly Labor Review*, V. 83, No. 12 (December 1960), which showed that even before 1960, more than 75 union-shop agreements had been negotiated.

72) For the interested reader, refer to Sheldon M. Kline, "Strike Benefits of National Unions", *Monthly Labor Review*, March 1975, pp. 17-23.

A: No. In the American political system, there is a clear-cut distinction between the rights of states and the rights accorded to the national government. States are free to pursue their own regulations with respect to labor relations for employees of governmental entities within those states, except for federal government employees in a particular state, who are, of course, still federal employees, regardless of the state in which employed. The closest to any such decisions of federal courts with respect to the rights of public employees to join unions is found in the Eighth Circuit Court of Appeals, which in 1969, gave its opinion of such rights<sup>73</sup>. The court ruled, in a unanimous decision, that the right of association is protected under the First and Fourteenth Amendments to the U.S. Constitution, and this applies to union membership, even in the public sector. Since other Appellate Courts may not rule the same if required to do so, conflicting rules governing public sector bargaining may eventually result in a Supreme Court decision.

Q: *Isn't there conflict between civil service laws and regulations and the scope of collective bargaining? Doesn't collective bargaining infringe upon the regulations set forth for public employees in the laws and in the American Constitution?*

A: There does exist some conflict. However, in the federal service, the Executive Order 11491 of President Nixon perhaps strengthens in many ways the civil service laws and regulations by assuring the Civil Service Commission a very active and influential role in establishing wages, working conditions, rules, regulations, etc. for public employees, whether in collective bargaining or not. It represents an accommodation to both the former system and the realities of collective bargaining. In the states, however, the civil service role has been increasingly supplanted by collective bargaining, and

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73) See **American Federation of State, County, and Municipal Employees, AFL - CIO v. Woodward**, 406 F. (2d) 137 (1969).

it is probable that state civil service systems will eventually become obsolete<sup>74</sup>.

*Q: Do public employee unions affiliate with public sector federations and national unions? Can public sector employees join private sector unions?*

*A:* To begin with, America does not have the concept of federations as is found in Turkey. Local unions affiliate with national/international unions, if they affiliate at all. Unions in the public sector may or may not affiliate with national unions. The decision is that of the individuals and the unions involved. For example the Professional Air Traffic Controllers Association is the only one of its kind, since Air Traffic Controllers are, by definition, employees of the federal government. No one else can belong. Therefore, they will have only federal employees in their membership. Other federal employees will belong to locals of the American Federation of Government Employees (AFGE), which only has federal government employees as members. Postal workers, however, are employees of the Postal Service, an independent agency of the federal government, and generally belong to one of seven unions, all of which are restricted to postal workers except one, the Laborers International Union, which has employees of private and public sector employers. Other unions in the public sector, for instance at state level, may be affiliated with either other unions of only government employees or those of only private sector employees, or of some combination thereof. For instance, the Teamsters Union has many locals with either private or public sector employees, and they encompass many different types of occupations.

*Q: What happens if adequate funds are not provided in the budget to accommodate public sector bargaining agreements?*

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74) See Hagburg and Levine, pp. 139 - 140, for additional discussion, and the results of a study with respect to such systems in John F. Burton, Jr., "Local Government Bargaining and Management Structure", *Industrial Relations*, May 1972, pp. 123 - 140.



A: Usually, if legislative bodies do not appropriate enough funds each year to accommodate what was agreed to in collective bargaining agreements, the appropriated amounts are prorated among the various governmental entities, and the amounts agreed to in the collective bargaining agreements are adjusted downwards, proportionate to the amounts that actually were appropriated. There is no appeal from this decision, inasmuch as the various legislative bodies, be they state legislatures, county commissions, county school districts, or city councils, are considered to have the final determination with respect to such governance of the particular government entity involved.

Q: *Is there any solidarity as represented by sympathy strikes, boycotts, etc., between public sector and private sector unions?*

A: Generally, there is very little solidarity between the respective unions. If both private and public sector unions are from the same international, such as the Teamsters or the Laborers International Union, there may be some efforts made to enlist support, but generally, the private sector unions have not been particularly anxious to support public sector unions and vice versa. The two sectors seem to feel that they have different problems, different relationships, and different aims from each other.