

1985

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Recommended Citation

Calvin William Sharpe and Jack G. Day, *Discussion: Impasse Resolution*, 35 Case W. Rsrv. L. Rev. 385 (1985)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol35/iss3/6>

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DISCUSSION: IMPASSE RESOLUTION

Moderator:

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Panelists:

JACK G. DAY

Chairman

Ohio State Employment Relations Board

ARVID ANDERSON

Chairman

New York City Office of Collective Bargaining

MR. MARVIN FELDMAN: The comment I have pertains to the Act's being cumbersome for the people who work under it. Many of the units are involved in collective bargaining for the first time, especially the Fraternal Order of Police, the International Association of Firefighters, and some of the school districts that want to resolve the problems themselves rather than call on their international representatives.

As a result, when a factfinder walks into a situation, he now finds himself faced with thirty-five or forty issues from the employer and the union, who had never been involved in collective bargaining prior to this, because many of the units are in areas where the state has not been involved in collective bargaining previously and many of these groups on both the management side or the labor side do not want outside counsel. Because of the statutory time limits, the parties not being advised of collective bargaining prior to this time, the multitude of issues, and the time element, it is difficult to make the parties understand that collective bargaining means change.

I am wondering if the State Employment Relations Board has any mechanism that can limit the number of issues at least in the initial contract confrontation under the statute.

Further, many of the employees in bargaining units and employers realize that if the unit is a safety force the parties are entitled to

a conciliation session. As a result, they are using the factfinding procedure as a first step and not as the final one.

This is the problem created by the parties' pragmatic approach to the situation which, perhaps, someone insulated in the ivy walls of your office, Judge Day, may not realize, nor be confronted with. I am just wondering if this problem can be addressed, at least for first-time bargaining situations.

JUDGE JACK G. DAY: I don't think it can be addressed under the statute as it stands unless, peripherally, you might be able to reach it under the management rights section which deals with permissive and mandatory subjects but is followed by an exception which states that except as these rights may affect wages, hours, and in terms of conditions of employment. I can think of no management right that does not affect wages, hours, terms and conditions of employment. That is our only avenue.

What you are asking for is a sophistication in bargaining, which many of these units will not have had because they have not bargained prior to this time. I would suspect that police and fire fighters have bargained more than many of the other units. As a matter of fact, without being precise in the way one ought to be when quoting statistics for proof, my impression from watching the certifications through the Board is that the police and firemen seem to be voting for representation probably more often than any other single category except, perhaps, school teachers.

MR. FELDMAN: I am thinking about a fourteen-man police department, which has three units: radio dispatchers, all patrolmen with the rank of sergeant and above, and all others below the rank of sergeant. The three units at the bargaining table represent separate communities of interest who have never bargained before. They each have thirty-seven issues to discuss.

There is a limit as to what should be spent by the state and both parties in collective bargaining. However, each group is set in its ways. The employer's representative is accountable to some legislative body. The sergeants have four people to deal with, the patrolmen have seven, and the dispatchers have three. We as factfinders have final authority, but we can't get the different groups to understand that collective bargaining means change. The point is that I wish the factfinding process could be limited in some way; it would really help us.

JUDGE DAY: I really don't know how to answer that, because I have no knowledge of what the answer is. It's like describing the

problems of peace and then saying, "I have nothing to say about how to resolve these difficulties." In time, as expenses mount and public opinion is agitated, the parties may decide that it is better to resolve some of these issues than to let them proliferate. That sounds like a situation in which the possibilities of an alternative process have stifled collective bargaining.

The situation is similar to that with the War Labor Board which really interfered with collective bargaining: people would refuse to yield on the ground that the Board was going to decide the issue. That same process may be going on in our system. Marvin, frankly, I have no answer to it. Maybe Mr. Anderson does.

MR. ARVID ANDERSON: There is an approach that could be tried, but I won't guarantee it would work. When there are a multiplicity of issues and a limited amount of time, you may ask whether the parties can focus on *economic* issues only. Then you can either reserve jurisdiction on the other issues, if the parties will permit it, or suggest that they bargain over these later, once they have agreed to the economic package.

JUDGE DAY: Mediation is a possibility in any stage in our process. Maybe you would want to mediate, although some people find a mediating arbitrator an abomination.

MR. ANDERSON: That's true. It may be, but we believe in it.

PROFESSOR CALVIN WILLIAM SHARPE: Let me suggest, Mr. Feldman, that your question does overlap with points that will be made in the next segment relating to unit determination. It maybe that you will get more relief, if you are not totally satisfied at this point, during that segment of the discussion. Yes, Professor Drotning.

PROFESSOR JOHN DROTNING: A problem that comes up concerns the issue of final offers. The parties submit the offers five days prior to the hearing, but the conciliator, under the statute, still can mediate. If the conciliator mediates, but isn't successful in getting the parties to agree, but is successful in getting one side to modify, for instance, the union drops from a ten percent to seven percent increase which is a more realistic demand in the eyes of the neutral than the ten percent, then that increases the probability that the conciliator will accept the union's mediated demand. Management then says, "Look, we predicated our three percent offer on the ground that we knew, or expected, or anticipated that the union would ask for ten percent. That figure was unreasonable. As a result, you would have to go to three, and we do not want you to view

the union's modified demand from ten to seven as their final offer, instead you must consider the ten."

I have been in that situation, and I don't know what the answer is. I don't know whether I should view the final offers as those put into SERB five days prior to my hearing, or whether I can go ahead and mediate—maybe not make it, but certainly put one side or the other into a more reasonable posture than they might have been initially. In fact, then they may be in a more reasonable posture than their opponent.

That's my problem. It is a very real problem I face, and I don't know the answer.

JUDGE DAY: I don't know that SERB can give you an answer. Under the statute, as I read it, you cannot compromise your award. If you cannot mediate the issue, you must choose one offer or the other.

PROFESSOR DROTNING: I would revert to looking at their initial submissions to SERB. I could not view any unilateral modification by one party or the other as their final offer.

JUDGE DAY: I believe that is what a reading of the statute will support. I don't know how that particular issue would get to the SERB Board. It might get to a court if your award attempted a compromised solution, and a party appealed it under section 2711.

PROFESSOR DROTNING: Could a union, during or after a hearing, submit to me [the conciliator] a revised final position in writing which differed from the initial position submitted to SERB?

JUDGE DAY: I see your point, and I think your question is a little bit like asking can you sue the Bishop of Boston for veracity, which you clearly can.

The question is: Can you recover? I don't know if the union in your question would be able to find a common pleas court that would agree that the compromise settlement satisfies the statute's approach. However, it's worth trying, I presume, but it wouldn't come to us.

PROFESSOR DROTNING: Thank you.

PROFESSOR ROGER ABRAMS: I wanted to raise with Mr. Anderson the role of the neutral, either factfinder or arbitrator, as being legislative as opposed to adjudicative, because I think that may be one of the more controversial issues that you raised in your suggestions.

As a neutral, I would feel very uncomfortable seeing myself in a legislative role.

First of all, there is the question of legitimacy: who elected me?

Second, as a neutral, I would feel more comfortable as an adjudicator, matching the facts of the case against the statutory standards, than taking personal responsibility for determining what I, think the parties deserve.

Finally, neutrals never know enough about local problems, particularly the intricacies of the parties' relationship, and I'm going to come in and "legislate," for them? I'll come in and adjudicate but at least I can say I had to do it; I had no choice; it's what the statute required.

MR. ANDERSON: Whatever makes your psyche happy is fine. But I suggest to you that the last reason is the reason why you should not be primarily an adjudicator. You don't know enough, not being in the situation; therefore, you are dealing essentially with a delegated legislative authority. You may be called a conciliator, but you may have to adjudicate. Essentially you are allocating public resources and determining conditions of employment.

I am saying you are performing a process which is more akin to a legislative function than a judicial function. If you don't like the analogy, live with the problem as best you can. But you are seeking a solution.

I respectfully suggest that you explore, if given the opportunity, what the parties want, but only at arm's length. That's the way you have to play it. But you may be able to discover areas of acceptability, if you attempt to mediate or explore the impact of your decision on other important forces. You will be more sensitive to the parties' concerns, for example, of their ability to pay and pay-range patterns. That's why I am saying it is more likely to be an effective role.

MR. KEITH ASHMUS: I have a concern about the notion that there ought to be some kind of a document attached to a mutually agreeable dispute settlement.

The statute, as I read it, just talks about whether the settlement is mutually agreed upon. In connection with a situation involving police, for example, I can think of reasons why both parties would be interested in agreeing to not having a conciliator decide for them but still not, perhaps, of having the finality of the strike option. For a number of years we have had settlements in Ohio without anything more final than mediation involved. In light of this practice, I wonder where this notion comes from.

It really does worry me that the statute requires factfinding to

take place on nonsafety issues. That is the first thing I try to avoid in almost all situations, with wholehearted agreement from most of the unions.

JUDGE DAY: Frequently we find people contesting over whether or not they do have a superceding MAD (mutually agreeable dispute settlement). In the *Columbus* case, the city said, "We have a mediation process." The union says, "Nonsense, we do not have a superceding MAD."

I want to hold on to something Mr. Anderson said about legislation and adjudication. This distinction has always seemed to me to be a fuzzy concept. Judges legislate all the time. If they say "yes," then it's legislation; and if they say "no," it's legislation. Indeed, the legislature expects them to do this. Otherwise, how do you get content in generalizations? The judges have to do it. In situations like this parties come to us and say "We have no MAD." The other side says "Hold on! Yes, we do." Somebody has to decide whether it is or is not. If you have this responsibility of deciding whether there is a MAD, then it is incumbent upon you to give some reasons for your decision. One aspect of those reasons is: does the agreement provide for a final settlement? That's as far as we have gone. I would think that is a fair interpretation of the total thrust of the Act.

The thrust of the Act is, it seems to me, that there be no strikes in the safety forces and there be a limited right to strike by non-safety forces. That being the case, I doubt very much that one could make a sufficient case for the proposition that the parties to a safety force agreement could bargain away the strike impediment. Would you agree with that?

I had this argument from a management representative at a public hearing, and he said, "Absolutely, we can do whatever we like." I asked, "Would you include the right to strike; you know we are talking about policemen? He said, "Oh no, that is a different matter."

MR. ASHMUS: Change of the statute makes the common law of Ohio effective, and strikes are otherwise illegal.

JUDGE DAY: I don't know if that answers your question, but you see, these duties are thrust upon us. Obviously, whatever the parties can do for themselves is imminently fairer than anything we can do for them. But sometimes the parties do not arrive at settlements; they arrive at impasse.

MR. ASHMUS: I guess in *Columbus* you could have decided, "I

don't think there really was an agreement," without deciding that whatever agreement there was, was almost improper because it lacked finality.

JUDGE DAY: Well, we think that we have an obligation to give guidance to the parties. One of the functions of precedent is to have some impact upon future controversies of the same kind. We are trying gradually to build a fabric of precedent which will help decide some of these issues so that parties will not be back; and if we take a totally innocuous course, we have not done very much.

PROFESSOR ABRAMS: Mr. Anderson and Judge Day, have there been any citizens' councils appointed?

JUDGE DAY: Not that I know of.

PROFESSOR ABRAMS: Do you foresee the formation of any citizens' councils—a lovely innovation?

JUDGE DAY: I don't have any basis for making a judgment on that. Sometimes things happen that we don't know about. If there is a MAD, it should be registered with us, but parties don't always do what they are supposed to do, and they may be out in the boon-docks creating councils all over the place. I have never heard of any.

MR. ALAN WOHL: I am concerned about the final offer, because that as a procedure, seems to force the parties to simply underplay what they might be willing to accept, and it interferes with the negotiation process. I would like to hear your comments on that.

JUDGE DAY: Mr. Anderson has far more experience than I in this particular field. I have no doubt at all that it interferes, in some measure, with the bargaining process. But by the time you get to conciliation, it is assumed that bargaining has been pretty well exhausted. To the degree that it is not so, mediation, at that point, is in order. Maybe it ought to be that you should be allowed to compromise an interest arbitration issue, but I think that it is a reaching reading of the statute to say that our Act allows it. Although I believe in what you would call a liberal jurisprudence, I do think the legislature is entitled to tell us what we are to do and that we are obligated to do it.

MR. ANDERSON: I certainly won't quarrel with that. Again, with Professor Abrams' comments about not adjudicating and Professor Drotning's comments, if you are confined in your role as a conciliator to selecting between final offers issue by issue, obviously your role is more that of an adjudicator than that of a mediator. At

least with issue by issue, you have something to work with, and you might do some exploring of acceptabilities.

While in Professor Drotning's illustration there was no consent to a modification, it is conceivable that there might be certain circumstances where there might be a modification permitted, if not of one offer, perhaps, then, of another. You never know until you ask. Anybody who spent any time mediating knows if you accept what people tell you the first hundred times you ask them, then you don't belong in the business. So you have to try to be persistent about that, and try to find a solution.

MR. RICHARD ROSS: Mr. Anderson, based on your experience in multiple jurisdictions, what happens when the parties agree to MAD and then the electors in a home jurisdiction decide to vote to change that procedure?

MR. ANDERSON: I don't know enough about the problems of the Ohio statute, but I assume that ultimately that problem is going to be one that SERB would have to accept because, while the Ohio Act permits MADs, Judge Day's comments imply that they must meet particular standards: whether they cover particular periods of disputes, whether they can be repealed retroactively, or whether the agreement is bound for a particular time. There are all kinds of questions to ask. I don't have a ready answer to that.

PROFESSOR SHARPE: Yes, Mr. Brown.

MR. EARL BROWN (AMERICAN ARBITRATION ASSOCIATION): I think what I heard was a comment that to go from conciliation to mediation or vice versa was, in essence, a compromise. I'm just wondering if that doesn't suggest a lack of flexibility in conflict resolution. The real concern is to resolve the problem with a process or procedure that might, in some instances, use a little more flexibility in transferring from one procedure to the other to resolve the problems. I was just wondering if that would ever become a practice?

JUDGE DAY: I think you did not hear that we were not in favor of compromise. We were talking about whether an arbitrator faced with issue by issue arbitration under our statute could compromise by order. He can certainly compromise by mediation, he has the authority to do it. The time may come when what Professor Drotning suggests may come about, you do not have a fixed final offer, so that you can move a bit.

You can determine pretty early in mediation whether that is a possibility, and I would suppose that any arbitrator, conciliator

under our nomenclature, could or would explore that possibility. But I believe that if he cannot make it or if that refinement of our doctrine does not take place so that the final offer can be modified, then the arbitrator has no alternative other than to choose one offer or the other. That is the way I understand baseball arbitration to be. Either you take this offer or you take that offer; there is no in-between.

MR. ANDERSON: That's true; that's absolutely true.

PROFESSOR SHARPE: If there is no further response to that question, I have a question for Mr. Anderson about time tables. How would you amend the New York statute which, I understand does not carry any time tables, to establish reasonable time tables. I guess the bottom line question is what would be a reasonable time table to accommodate public sector interests in a dispute settlement?

MR. ANDERSON: A couple of brief comments. The New York statute didn't provide time tables because there were so many fragmented bargaining units in the state when the statute was enacted initially that it would have been literally impossible to establish time tables when the agency was trying to deal with almost five hundred units.

The Postal Service Act is an example of one that does have time tables. It has a fixed time table, and the parties have met the deadlines. I think they have a forty-five day procedure which is similar to the procedures of presidential emergency boards. If you look at the Railway Labor Act or the Postal Act, there are procedures which can be enacted; but if you have a very large number of bargaining units in your jurisdiction, you have a difficult task. Judge Day mentioned the possibility of a number of state units. If there are more than a dozen or so, you can have a hard time focusing, individually, if there are several organizations.

I would think one way of establishing time tables would be by a MAD agreement that meets the needs of that particular jurisdiction. You ought to spell out in the agreement if you need more time for mediation, or if you agree to waive certain steps. But if you have a fixed statute, it wonderfully focuses the mind. People do decide. The calendar is inexorable.

JUDGE DAY: Like the prospect of hanging.

MR. ANDERSON: That's right. It focuses. So put it in a statute. I would put a sixty- to ninety-day time table in the New York statute.

JUDGE DAY: Let me ask you, Arvid, what would you think of a process that left the demand for a mediation or factfinding up to one of the parties? That would keep the procedure from dragging on forever, presumably, and at the same time, put a maximum amount of flexibility into the Act. There would be a termination point as well as a reservation of power in the Board to step in if there was an emergency that required a quicker solution.

MR. ANDERSON: Your idea is in contrast with the Ohio statutory mandate that the state take the initiative. I don't see anything wrong with that, because it places a responsibility on the parties.

PROFESSOR SHARPE: Is there a way to interpret the notice provision in the Ohio Act so that the ninety days in the case of an initial agreement would not begin to run until a party filed a notice, with no particular restriction on when that notice should be filed? Would that solve the problem?

JUDGE DAY: I suppose the parties could deal with one another and postpone the deal to negotiate. I am speaking maybe out of turn, anything I say that sounds like a rule is not intended to be. I suppose they can bargain, get themselves to virtually an impasse in their bargaining, and then file a notice to negotiate, and then have sixty days or ninety days as in the initial agreement situation. I have not seen that yet, but the ingenuity of lawyers and others is such that I would be surprised if somebody didn't come up with that at some junction.

AUDIENCE PARTICIPANT: In the case where the fiscal policy as to retroactivity is concerned, it might not be good for the bargaining unit.

JUDGE DAY: Well, that is the trouble. This fiscal policy problem is one which motivates procrastination. I knew a fellow who talked about a tendency to accelerate delay. I think this is one of those concepts. We have the power, as I suggested earlier, to fashion a remedy which could take retroactivity into account. The *Columbus* judge did not buy that but, of course, the war is not over. That's just an opening salvo.

PROFESSOR SHARPE: If there are no further questions, we will now take a break, then we will come back for the presentations of Professor Knapp and Mr. O'Reilly.