The Importance of Impasse Resolution Procedures to Recent Revisions of Wisconsin Public Sector Labor Law

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I was honored to be invited to the Ohio State Journal on Dispute Resolution's 2012 symposium entitled "The Role of ADR Mechanisms in Public Sector Labor Dispute: What is at Stake, Where We can Improve & How We can Learn from the Private Sector" and subsequently to the 2012 Annual Public Sector Labor Relations Conference of the Wisconsin Employment Relations Commission (WERC) to speak on the subject of recent developments in Wisconsin public sector labor law. The following blends my remarks at those meetings. It is mainly an eye-witness report. I was a member of the WERC staff from 1965 to 1973 and, by appointment of the Governor, a member of the Commission from 1973 to 1976; and I have maintained a labor mediation and arbitration practice in Wisconsin since leaving that agency. Most of the observations and impressions below are based upon my participation in the events and developments to which I refer. Others that occurred before my time are mainly based on my conversations with participants who were themselves participants and witnesses.

I. INTRODUCTION

During 2011, Wisconsin's newly elected Governor Scott Walker signed two bills which, in effect, prohibited collective bargaining on behalf of most state and local government employees in Wisconsin, with the exception of certain protective services, emergency medical, and municipal public transportation workers. The story of that enactment is a complicated one, requiring speculation regarding underlying political strategies, that will continue to receive considerable attention elsewhere. Such analysis is not the purpose of this article. Rather, I would examine the history 37of public sector unionism and labor law in Wisconsin and contend that a material and ironic factor supporting the passage of those bills was the chronically controversial nature of the nation's oldest public sector labor law, and that impasse resolution provisions were the main source of that instability.

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My suggestion, grounded on that analysis, is that a law based less on private sector labor law and more on dispute resolution processes applied in public policy making negotiations should be considered.

II. HISTORY: BEFORE MY TIME

Collective bargaining by unions of public employees began in Wisconsin long before the passage of any supportive laws, apparently in the mid-1930s. I have seen labor contracts covering public works workers in rural counties from that era. I imagine that snow removal was an empowering capacity. The American Federation of State, County and Municipal Employees (AFSCME) was founded there in 1936, and AFSCME Local One is still active in Madison.[1] The Madison Board of Education was responding respectfully to organized teachers, and the Legislature paid attention to the Wisconsin State Employees Union, on the basis of political pragmatism. Where contracts were not entered into, employer personnel policies reflected the need for productive workers and supportive constituents.

While there were some high profile battles with unions in the Wisconsin private sector during the decades preceding the passage of the nation's first public sector labor law in Wisconsin in 1959, it was not an era of public employee strikes. The pressure that brought forth that unprecedented law was generated by political activism, and not the perception that it was required to restore order. A sympathetic Legislature and Governor, Gaylord Nelson, were elected. They enacted a very brief statute,[2] essentially replicating Section 7,[3] the basic employee rights provision of the National Labor Relations Act (NLRA), which covered private sector collective bargaining on the national level. It included no provisions for representation procedures, unfair labor practices, or agency administration, and no right to strike.[4] The rhetoric of the unions at the time included complaints of second-class citizenship compared to their private sector counterparts, and this what they achieved initially.

Historians suggest that withholding the right to strike, even from unions apparently not inclined to strike, and even by political leaders strongly supportive of unionism in the public sector, may have been attributable to the traumatic effect on the nation of the Boston police strike of 1919. Accounts indicate that it was broadly perceived with a sense akin to terror and that it

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[1] AFSCME, *An AFSCME History Timeline* (2012), http://75.afscme.org/history.

[2] WIS. STAT. § 111.70 (1960).

[3] *See* 29 U.S.C. § 157 (2006).

[4] WIS. STAT. § 111.70 (1960).

left scars that remained for decades, influencing political leaders of all persuasions to reject the possibility of legal strikes by public workers (It seems to have propelled Calvin Coolidge, who was the Governor of Massachusetts during the strike, to the Presidency; a point that may have been observed by Ronald Reagan at the time of the flight controllers (PATCO) strike, or by Governor Walker for that matter).

III. RECENT HISTORY: AS I OBSERVED IT

The Wisconsin law was substantially amended in 1961, adding representation procedures and prohibited practices and administration by the Wisconsin Employment Relations Board.[5] However, the right to strike, and thus the threat of a strike that drives collective bargaining in the private sector, was still not provided.[6] Maybe this was attributable in part to the events of 1919 in Boston. Probably, there was bipartisan concern that the combination of such empowerment and political activism promised an undesirable political domination by the unions. In any case, mediation and fact-finding were provided as substitutes for the right to strike, although the law as amended generally adhered to the NLRA model.

The fact-finding procedure, briefly, was a sort of advisory interest arbitration. Public employers and unions that were found to be at impasse, usually following a failed mediation effort, submitted positions on unresolved issues to a neutral third-party fact-finder, probably someone practicing labor arbitration. The fact-finder, following a hearing, issued an advisory opinion as to how such issues should be resolved.

This process appeared to be successful for a few years. At first, there were very few strikes. But it lacked the capacity to impel closure that is inherent in the threat of a strike, and its underlying theory was ambiguous. Was the fact-finder's responsibility to advise the parties how they should settle the outstanding issues, or how they would settle were they to adhere to the settlement patterns of their peers, or was it to provide a new text from which they might negotiate toward settlement? Mainly, the parties settled their negotiations bilaterally or with the assistance of mediators, and Wisconsin began to experience a greater frequency of public sector strikes.

There were never as many strikes in Wisconsin as in some other states that had, by this time, enacted more-or-less similar laws. But there were some, and I would say that the threat of an illegal strike replaced statutory fact-finding as the prevailing impasse resolution strategy. Mediators

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[5] *Id.*

[6] *Id.*

discussed that threat with the parties, instead of the possibility of fact-finding, and the state courts, for reasons of their own, often rather than acting on the illegality of strikes, ordered the parties to mediation, sometimes performed by the judge. Indeed, far more often than otherwise, the contemplation by the parties of such a strike brought about closure in the negotiations. That is how it worked in the private sector as well, so in a peculiar way the public sector unions seemed to achieve the parity that their rhetoric had demanded.

Ramifications of this achievement were demonstrated when unions suffered some substantial losses as the result of actually going on strike. Firefighters' unions learned that cities could not possibly close down the fire service during a strike and that the unions would be viewed as responsible for placing the substitutes, not to mention the general community, in serious danger. In 1974 the small Hortonville School District replaced striking teachers, and neither massive political efforts or legal strategies could save their jobs or their local union.

It was first the Firefighters' Union and then the Wisconsin Education Association Council that led the advocacy in the Wisconsin Legislature for interest arbitration to be the next method of impasse resolution. But municipal employers were not so sure, and neither were some larger local teachers' unions that believed that gaining the right to strike was still their best strategy.

The last-best-offer all-disputed-items-as-a-package type interest arbitration that was eventually adopted, first for the protective services in 1971, and then for other local government bargaining units in1977,[7] clearly functioned as a strike substitute. Strikes virtually disappeared from the state and the threat of arbitration seemed to precipitate settlements at about the same rate as the threat of strikes in the private sector. Nevertheless, I have always found interest arbitration to be problematic.

First of all, interest arbitration turns enormous political power—the power to set the labor costs of a unit of government—over to an unelected individual: the arbitrator. Such authority is inherently controversial as a matter of political theory, and inevitably uncomfortable as a matter to be explained to the general public. As such an arbitrator, I know the limits of my accountability, as well the limits of my competence. The determinations typically made by labor arbitrators interpreting collective bargaining agreements are as different from those made in interest arbitration as legislation is from enforcement. Whatever the rationale for interest arbitration and however unable we are to come up with a better strategy, it

[7] *See* WIS. STAT. § 111.10 (2010).

seems destined by its nature to remain controversial as an element of public policy.

As a matter of union policy, it raises other issues. As noted above, it created something of a rift between components of the Wisconsin labor movement that believed that they would achieve more without interest arbitration, notably large teachers' union locals, and organizations that were less confident of bargaining power on the bargaining unit level. More importantly, in my view, it elevated the role of the statewide labor organizations that were positioned to influence the provisions of the interest arbitration law relative to the role of the local bargaining units. This redistribution of power within the union structure was reinforced by the need to gather data and present it well that is essential to success in interest arbitration and was obviously mainly a statewide function. With interest arbitration, the need for organizing and solidarity in order to accomplish workplace improvements was subordinated to the need for data management and presentation skills provided by experts. In that sense it seemed quite conflicted with orthodox concepts of strength based on local concerted efforts and shared risk taking that have characterized American unionism.

Moreover, the emphasis on politics in the Capitol that seems inherent in interest arbitration places the collective bargaining regime squarely in the state's political environment. That brings me back to the controversial nature of interest arbitration. A cursory review of forty years of interest arbitration in Wisconsin reveals the passage and repeal of numerous significant features of interest arbitration. Examples included the enactment and repeal of a provision for mediation by the arbitrator, a number of revisions of the subjects of bargaining covered by that process, the imposition and repeal of a complicated formula referred to as "Qualified Economic Offer" intended to reduce the potential impact of arbitration on government budgets,[8] and a number of revisions of the statutory "factors" that served as criteria for selecting a final offer. A provision that allowed strikes by non-police and fire employees where that was agreed to in a labor agreement, or both parties withdrew their final offers in arbitration, was never utilized. The process remained in a state of flux. Revisions reflected the preferences of the political party in power. As Wisconsin politics grew more polarized along with those of the nation in general the revisions were correspondingly substantial.

During the session of the Wisconsin Legislature preceding Governor Walker's election, Democratic Party majorities passed and the Democratic

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[8] *See* Qualified Economic Offer, Budget Briefs from the Wisconsin Legislative Reference Bureau, Budget Brief 98–5 (June 1998), http://legis.wisconsin.gov/lrb/pubs/budbriefs/98bb5.pdf.

Governor, James Doyle, signed, numerous revisions to public sector labor laws sought by unions, including amendments adding coverage of the University of Wisconsin System and repealing the aforementioned QEO provision.[9] When it became the turn of the new Republican majorities and Governor, they reciprocated, and then some. Public sector collective bargaining law, and particularly its impasse resolution features, never came to rest and now that the process was to be determined, not by strengths or weaknesses at the bargaining table level, but at the Capitol, it was a vulnerable pawn in the larger game of party politics.

IV. THE FUTURE

My contention is that if there is to be a revival of public sector collective bargaining in Wisconsin it needs to look forward, beyond the private sector law, for a model and to identify an impasse resolution process that is more cognizant of public perceptions and public interests, and thus less controversial. At the same time, I would suggest returning to the venerable wisdom of emphasis on the capacity of bargaining unit members to develop bargaining power by acting in concert.

It is difficult for me to believe that where power exists, even without the support of the law, as it was prior to 1959 in Wisconsin, it will not function. Whether it is the ability to interfere with the efficiency and effectiveness of operations, like the snowplow operators of the 1930's, or the capacity to influence voters and elected officials, like the Madison teachers of the 1950's, it will be expressed in one way or another, and accommodated. That is a lesson of American history. That sort of power causes laws to be enacted; it is not derived from law.

Unless I am mistaken, there will be negotiations of some sort, in some places, over wages, hours and working conditions, and perhaps more broadly, which will benefit from assistance. We should be thinking creatively and imagining processes that learn from the past and do not attempt to replicate the private sector; the focus should be on looking for models that do not alarm the public or appear undemocratic. Let's consider negotiations that incorporate public involvement as may be found in other dispute resolution sectors. It seems essential to recognize that public sector labor negotiations are not transactions among private entities, but are processes that develop public policy. They influence the costs and efficacy of governmental institutions and programs.

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[9] *See* Act of Jun, 8, 2009, 2009 Wis. Act 21; Act of Jun. 29, 2009 Wis. Act 28; Act of Jul. 20, 2009 Wis. Act 34.

While the labor law developments to which I have referred were underway, a remarkable evolutionary process was also occurring in American dispute resolution—a development rooted in our labor relations tradition. Mediation was proliferating at an extraordinary rate throughout the legal system and in the development of public policies ranging from land use and urban planning to the promulgation of administrative rules, to the protection of the environment and beyond. Mediation, which mitigated the deficits of fact-finding, illegal strikes, and interest arbitration in Wisconsin, maintained its reputation for integrity and effectiveness, flourished, and acquired respect beyond its historic arenas.

Contemporary American dispute resolution, broadly defined, includes strategies for managing negotiations so as to incorporate public participation and engender public support for negotiated outcomes. Generally, mediation is a key element of those strategies. Of course, it may not be all that is needed. Mediation generally requires the existence of a worrisome next step, such as a trial or a strike or a vote. It usually functions as a method for avoiding the consequences of failing to agree. For the time being, and given current circumstances, however, I would urge emphasis on innovative mediation practices in public sector employment relations. At least in Wisconsin, thinking even further ahead seems premature.

V. POST SCRIPT

On September 14, 2012, not long after the submission of this piece to the Journal's editors, a Wisconsin Circuit Court determined that major portions of the recently passed collective bargaining law were in violation of the State and Federal Constitutions. That decision nullified the law's prohibitions on bargaining, but did not restore the interest arbitration provisions of the previous statute.[10] Almost immediately, Dane County, the City of Madison and The Madison Metropolitan School District initiated negotiations for extensions of their present labor agreements with unions representing their employees. The bargaining was rushed because motions to stay the Circuit Court's ruling pending appeals were filed. However, agreements were achieved, albeit with some hard swallowing on the part of the unions. On the other hand, the vast majority of local government employers apparently presumed that the stay would be obtained and continued on the course set before the *Madison Teachers, Inc. et al v. Scott Walker et al.* decision.

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[10] Madison Teachers, Inc. v. Walker., No. 11CV 3774, 2012 WL 4041495, at *27 (Wis. Cir. Ct. Sept. 14, 2012).

This very recent history seems relevant as evidence that, at least where local government leaders believe that organized employees should not be ignored, they will engage in earnest bargaining, as long as it does not violate the law. It seems to demonstrate how practical politics empower unions of local government employees and may even do so in the presence of statutory inhibitors and the absence of statutory impasse resolution procedures.