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# Labor Artibitration in Public Agencies: An Unconstitutional Delegation of Power or the Waking of a Sleeping Giant - United Transportation Union v. Southern California Rapid Transit

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# NOTES

# LABOR ARBITRATION IN PUBLIC AGENCIES: AN UNCONSTITUTIONAL DELEGATION OF POWER OR THE "WAKING OF A SLEEPING GIANT?"

*United Transportation Union v. Southern California Rapid Transit*[1]

## I. INTRODUCTION

The use of arbitration to resolve labor disputes has become an irreplaceable method of dispute resolution in private enterprises and corporations all over the United States. Arbitration's popularity has come about partially from a realization of the utility of arbitration and partially from government pressure through the enactment of federal statutes. However, the government itself has resisted the imposition of arbitration to resolve disputes between its agencies and their employees. This Note will address some of the issues involved in private arbitration of public agency labor disputes.

## II. FACTS AND HOLDING

The controversy leading to this case arose out of a maternity leave dispute between Southern California Rapid Transit (District), a public agency, and the United Transportation Union (Union) regarding one of the District's employees.[2] Cyndi Ortega was a part-time employee of the District and a member of the Union.[3] On June 10, 1989, Ms. Ortega began a pregnancy-related leave of

1. 9 Cal. Rptr. 2d 702 (Cal. Ct. App. 1992).
2. *Id.* at 703. Rapid Transit is a government controlled public transportation service. *Id.* at 706.
3. *Id.* at 703. Ms. Ortega was a bus operator. *Id.*

absence from her job in accordance with government regulations.[4] Her leave was not to exceed four months.[5] Due to the necessity of a Cesarean birth, Ms. Ortega's physician did not release her to return to work until November of 1989, more than five months after her leave of absence began.[6] When her four month absence period had lapsed, the District began taking action regarding Ms. Ortega's extended absence.[7] In October, 1989, the District wrote Ms. Ortega a letter requesting her to return to work.[8] In the letter, the District informed Ms. Ortega that, as a part-time employee, she was not covered under Article 31 of the Union's collective bargaining agreement which addressed employee leaves of absence.[9] The District also informed Ms. Ortega that she would be considered to have resigned from her job if she did not return to work immediately.[10]

On behalf of Ms. Ortega, the Union set in motion grievance proceedings against the District as provided in the collective bargaining agreement.[11] After grievance remedies were exhausted, the Union demanded arbitration of the dispute pursuant to the agreement, but the District refused to honor this demand.[12] The Union then filed a petition in California state court to compel the District to arbitrate the dispute.[13] The District denied the existence of an arbitrable dispute since it deemed Ms. Ortega to have "constructively resigned" her position.[14] In addition, the District argued that since it was a public agency, it could not be compelled to arbitrate a labor dispute.[15] In agreeing with both of the District's arguments, the trial court denied the Union's petition to compel arbitration on March 29, 1991,[16] and the Union appealed.[17]

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4. *Id.* Specifically, the leave of absence was permitted by California Government Code § 12940. *Id.*

5. *Rapid Transit,* 9 Cal. Rptr. 2d at 703.

6. *Id.* The court does not address the issue of whether Ms. Ortega's physician unnecessarily held back a release for her to return to work. *Id.*

7. *Id.*

8. *Id.* Rapid Transit had also sent Ms. Ortega a letter in September to notify her that her four month leave period was over at that time. *Id.*

9. *Id.* In Article 31 § 1(d), the collective bargaining agreement provides that pregnant employees are allowed leaves of absence of up to one year. But, Article 50, which addresses part-time employees, does not adopt any of Article 31's provisions. *Id.*

10. *Rapid Transit,* 9 Cal. Rptr. 2d at 703. Ms. Ortega did not return to work until November pursuant to her physician's advice. *Id.*

11. *Id.*

12. *Id.* The collective bargaining agreement provided for arbitration of all disputes in Article 26, "Filing Claims-Procedure-Limitations." Specifically, § 7 of Article 26 states, "If the claim is not satisfactorily settled and the Union desires, the claim may be submitted to arbitration upon the Union's request." *Id.* at 705.

13. *Rapid Transit,* 9 Cal. Rptr. 2d at 703.

14. *Id. See also* Footnote 3 of the court's opinion. *Id.* at 705 n.3.

15. *Rapid Transit,* 9 Cal. Rptr. 2d at 706.

16. *Id.* at 703.

17. *Id.*

The California Court of Appeals, Second District, reversed the trial court's decision.[18] In doing so, the Court of Appeals held: (1) the Union's petition to compel arbitration should have been granted as Ms. Ortega's case is a claim, dispute, or controversy arising out of the application and interpretation of the terms of the collective bargaining agreement;[19] (2) the District's contention that the federal policy preferring resolution of labor disputes through arbitration only applies to private organizations and not government entities is an incorrect assumption;[20] and (3) the District did not waive its right to object to arbitration in court by completely complying with pre-arbitration grievance procedures.[21] This Note will discuss the Court of Appeal's second holding relating to the District's status as a public agency.

## III. LEGAL BACKGROUND

The movement toward the arbitration of labor disputes was approved by the United States Supreme Court in a series of cases commonly referred to as the "Steelworkers Trilogy."[22] In these cases, the Court held that there is a presumption in favor of arbitrating labor disputes pursuant to collective bargaining agreements,[23] and that there is a general public policy favoring the use of arbitration to resolve such disputes.[24] However, all of the employers in the "Steelworkers Trilogy" cases were private organizations.[25] When a public entity or agency is the employer, the presumption in favor of arbitrating labor disputes pursuant to collective bargaining agreements has created considerable controversy. Although the U.S. Supreme Court has not ruled on this issue, many state appellate and high courts have come to conflicting conclusions on this issue.[26]

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18. *Id.*

19. *Id.* at 706.

20. *Id.*

21. *Id.*

22. United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

23. *Warrior & Gulf*, 363 U.S. at 578.

24. *Id.* at 583.

25. *American Mfg.*, 363 U.S. at 564; *Warrior & Gulf*, 363 U.S. at 574; *Enterprise Wheel*, 363 U.S. at 593.

26. *See* Taylor v. Crane, 595 P.2d 129 (Cal. 1979); Dearborn Firefighter's Union v. City of Dearborn, 231 N.W.2d 226 (Mich. 1975); Acting Superintendent of Sch. v. United Liverpool Faculty Ass'n, 369 N.E.2d 746 (N.Y. 1977); Harney v. Russo, 255 A.2d 560 (Pa. 1969); City of Warwick v. Warwick Regular Fireman's Ass'n, 256 A.2d 206 (R.I. 1969); Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786 (Utah 1977); State v. City of Laramie, 437 P.2d 295 (Wyo. 1968).

### A. California Decisions

Since the instant case arose in California state courts, a brief review of California decisions on the issue of arbitration of labor disputes by public agencies is in order.

The District based its argument against arbitration of labor disputes involving public agencies on the case of *Service Employees International Union v. County of Napa*.[27] In *Service Employees*, a civil service employee of the state was denied a merit salary step increase due to poor job performance.[28] The employee filed a grievance with the county which was heard and denied.[29] Next, the Service Employees Union became involved in the dispute, and it contended that the denial of a salary increase was subject to arbitration under the County's collective bargaining agreement with the Union.[30] When the County refused to arbitrate, the Union filed a motion to compel arbitration in district court.[31] The district court proceeded to deny the Union's motion.[32]

The California Court of Appeals affirmed the district court's decision.[33] First, the court decided that government entities and agencies were not covered by the "Steelworkers Trilogy" principles because the Labor Management Relations Act (LMRA), upon which those decisions were based, did not include the government in its definition of "employer."[34] Consequently, only private entities were subject to the presumption in favor of arbitration for resolving labor disputes.[35] Second, the court determined that arbitration in public employment forums does not carry the same general or historical acceptance as it does in private corporations due to constitutional limitations.[36] The court explained that most state constitutions, including California's, have general clauses in them vesting governmental power in chosen representatives.[37] In addition, many state constitutions, including California's, have specific clauses granting counties broad

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27. 160 Cal. Rptr. 810 (Cal. Ct. App. 1979).

28. *Id.* at 812. The merit salary step increase was provided for in the "Memorandum of Understanding" agreement between the Union and Napa County which was approved by the county council. The increase was only given to employees whose performance was considered satisfactory. *Id.* at 811.

29. *Id.* at 812.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 816.

34. *See* Labor Management Relations Act (LMRA), 29 U.S.C. § 152(2) (1988). *See also* Lodge 2424, Int'l Ass'n of Machinists and Aerospace Workers v. United States, 564 F.2d 66, 71-72 (Cl. Ct. 1977).

35. *Service Employees*, 160 Cal. Rptr. at 814.

36. *Id.* (citing *Liverpool*, 369 N.E.2d at 749).

37. *See* CAL. CONST. art. II, § 1. *See also* U.S. CONST. art. I, § 1, which states, "All legislative powers herein granted shall be vested in a Congress of the United States . . . ."

power over their employees,[38] as well as clauses restricting the delegation of that power to private parties.[39] As such, the court explained, the delegation to private arbitrators of the power to resolve labor disputes in the public sector is a violation of the California Constitution.[40]

Finally, the *Service Employees* court determined that forcing arbitration on an unwilling public entity serves "no sound public policy."[41] The court adopted the view that whatever was not expressly included in the bargaining agreement was not intended to be subject to arbitration.[42] Specifically, since there was no clause providing for arbitration of grievances involving denials of salary increases, such grievances are excluded from resolution by an arbitrator.[43] Thereafter, the *Service Employees* court denied compulsory arbitration of the public agency employee's grievance against his employer.[44]

The Union in the instant case based its argument in favor of arbitration on the California Supreme Court's decision in *Taylor v. Crane*.[45] In *Taylor*, a police officer was fired for violating a police regulation restricting the use of firearms in the course of duty.[46] Pursuant to his employment contract, the officer invoked grievance proceedings against the City of Berkeley.[47] After grievance proceedings failed to resolve the dispute, both parties agreed to submit the case to arbitration.[48] The arbitrator reduced the punishment of the officer to a temporary suspension, but the city refused to honor the arbitrator's decision.[49] The Berkeley Police Officer's Union filed suit on behalf of the officer to force the city's compliance with the arbitrator's decision, but the district court denied the requested relief.[50] However, the California Supreme Court reversed the lower

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38. CAL. CONST. art. XI, § 1(b) provides that each county's "governing body shall provide for the number, compensation, tenure, and appointment of [its] employees."

39. CAL. CONST. art. XI, § 11(a) provides: "The Legislature may not delegate to a private person . . . [p]ower to . . . [c]ontrol . . . [o]r interfere with county or municipal [m]atters . . . ."

40. *Service Employees*, 160 Cal. Rptr. at 814-15.

41. *Id.* at 815.

42. *Id.* at 816.

43. *Id.* The court noted that arbitration of disputes is a matter of contract, so a party cannot be forced to arbitrate a dispute which is not expressly provided for in the collective bargaining agreement. *Id.*

44. *Id.* In its discussion, the *Service Employees* court also distinguished Taylor v. Crane, 595 P.2d 129 (Cal. 1979), which was decided by the California Supreme Court earlier the same year. *Id.* at 815.

45. 595 P.2d 129 (Cal. 1979).

46. *Id.* at 130-31. The officer, Charles Crane, shot and wounded a person he suspected was burglarizing his friend's car. Mr. Crane was off-duty at the time of the incident. *Id.* at 130.

47. *Id.* at 131. The officer's employment contract was a "Memorandum of Understanding" agreement between the police officer's union and the city similar to the agreement in *Service Employees*. *Id.* at 133.

48. *Id.* at 131. The arbitrator was an independent California attorney. *Id.*

49. *Id.*

50. *Id.* The district court determined that under the city's charter, the city manager had the exclusive power to discipline city employees, and that a private arbitrator's ruling conflicted with that power. *Id.* *See supra* notes 38, 39.

court by compelling the City of Berkeley to honor the arbitrator's decision.[51]

In finding for the Union, the California Supreme Court rejected the city's argument that resolution of this particular dispute by arbitration was impermissible.[52] Specifically, the *Taylor* court concluded that in the absence of a prohibition of arbitration in the collective bargaining agreement, the issue was subject to compulsory arbitration.[53] The court went on to note the public policy advantages of resolving labor disputes through arbitration, including the easing of burdens on the courts and the quick, inexpensive resolution of such disputes.[54]

Finally, the court rejected the city's "unconstitutional delegation of power" argument.[55] Under the collective bargaining agreement, the city manager retains the power to initially impose discipline on city employees.[56] Only after the initial proceedings fail does the arbitration provision take effect, so there is no "total abdication" of disciplinary authority to a private arbitrator.[57] According to the court, since the city still had power to set the terms and conditions of employment while the arbitrator simply resolved individual issues, the city's power over its employees remained intact.[58] Based on the previous arguments, the *Taylor* court held that the City of Berkeley must comply with the arbitrator's decision to reduce the officer's punishment to a suspension.[59]

The court in *Service Employees* distinguished the *Taylor* decision in two respects.[60] First, the *Service Employees* court noted that the collective bargaining agreement and city charter in *Taylor* expressly provided for arbitration review of employee disciplinary matters.[61] In addition, the *Service Employees* court declared that the City of Berkeley initially agreed to the "significant participation" of an arbitrator, while Napa County never accepted an arbitrator as part of the grievance resolution process.[62] Therefore, the *Service Employees* court was able to distinguish *Taylor v. Crane*, a strikingly similar case.[63]

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51. *Taylor*, 595 P.2d at 136.

52. *Id.*

53. *Id.* Note that the exact opposite conclusion was reached by the *Service Employees* court which prohibited arbitration of public agency labor disputes in the absence of express provisions allowing arbitration to resolve the particular issue.

54. *Id.* at 135.

55. *Id. See supra* note 39.

56. *Taylor*, 595 P.2d at 134-35.

57. *Id.* at 135 (citing Kugler v. Yocum, 445 P.2d 303 (Cal. 1968)).

58. *Id.* at 136. The court states that "the arbitrator's role is confined to interpreting and applying terms which the employer itself has created or agreed to . . . ." *Id.*

59. *Id.*

60. *Service Employees*, 160 Cal. Rptr. at 815.

61. *Id.* The *Service Employees* court also noted that the collective bargaining agreement in that case did not provide for arbitration of salary increase issues. *Id.*

62. *Id.* (quoting Taylor v. Crane, 595 P.2d at 135).

63. *Id.*

### B. Other State Court Decisions

Outside of California, the high courts of several other states have grappled with the issue of compulsory arbitration of public sector labor disputes.[64] Like the decisions of the California state courts, these other state court decisions are highly inconsistent with each other; some have held that arbitration is preferable in public as well as private sector labor disputes,[65] while others have held that such decision making by private arbitrators is prohibited.[66] But, there is one common thread that weaves its way through all of these cases: the importance placed upon the constitutional issue of delegating legislative power to resolve public sector disputes through private arbitrators.[67]

Such delegation of legislative power to private individuals was consistently considered unconstitutional until the rise of the administrative agency concept earlier this century.[68] Administrative agencies inevitably changed the view that government powers cannot be delegated, and, as such, the courts have had to keep up with the modern trend toward allowing such delegation of power in accordance with the Constitution.[69]

In addition to the California Supreme Court decision in *Taylor*, two other state supreme courts have held such delegation of power to private arbitrators to be constitutional. In *State v. City of Laramie*,[70] the local firefighters union filed suit against the city to compel the city to comply with the Wyoming statute governing relations between state and municipal governments and their employees.[71] The city defended its refusal to comply with the statute on the ground that the statute required an unconstitutional delegation of public authority to private arbitrators.[72] The Wyoming Supreme Court disagreed with the city in upholding the statute.[73] First, the court held that arbitration is not a municipal function since arbitration concerning public employees is not fundamentally different from arbitration in business and industrial settings.[74] The court also held that arbitration panels do not make the law, but merely execute it; therefore,

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64. *See supra* note 26. *See also* Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239 (1987).

65. *See, e.g., Harney*, 255 A.2d at 560; *Warwick*, 256 A.2d at 206; *Laramie*, 437 P.2d at 295.

66. *See, e.g., Dearborn*, 231 N.W.2d at 226; *Liverpool*, 369 N.E.2d at 746; *Salt Lake City*, 563 P.2d at 786.

67. *See* U.S. CONST. art. I, § 1.

68. 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 46-48 (1965).

69. *Id.*

70. 437 P.2d 295 (Wyo. 1968).

71. *Id.* at 298. *See also* WYO. STAT. § 27 (1965), which sets forth a collective bargaining agreement plan for Wyoming state and municipal governments and their employees.

72. *Laramie*, 437 P.2d at 299. The Wyoming Constitution states: "The legislature shall not delegate to any special commissioner . . . any power to make, supervise, or interfere with any municipal improvements . . . moneys, property or effects, . . . or to perform any municipal functions whatever." WYO. CONST. art. III, § 37.

73. *Laramie*, 437 P.2d at 301.

74. *Id.* at 300.

no unconstitutional delegation of authority occurs when private arbitrators settle public agency disputes.[75]

A similar conclusion was reached, but for different reasons, in *City of Warwick v. Warwick Regular Firemen's Ass'n.*[76] In this case, as in *Laramie,* the City of Warwick challenged the constitutionality of compulsory, binding arbitration agreements between the city and the Firemen's Association made pursuant to provisions in Rhode Island state statutes.[77] The city argued that private arbitrators may not exercise unconstitutionally delegated legislative power in accordance with the state constitution.[78] The Rhode Island Supreme Court, in reversing the lower court, concluded that the powers exercised by the arbitrator were not unconstitutional since the arbitrators were public officers who collectively constituted a governmental agency.[79] Since the sovereign allocated power to arbitrators without retaining any supervision over the exercise of that power, the arbitrators were considered to be an independent public agency.[80] So, even though the *Warwick* court's conclusion was the same as that in *Laramie*, the logic used to find constitutional the delegation of power to the arbitrators was very different.

The supreme courts in a number of states have declared that compulsory arbitration of labor disputes between public agencies and their employees is an unconstitutional delegation of power to private parties.[81] The leading case supporting this view is *Dearborn Firefighter's Union v. City of Dearborn.*[82] In *Dearborn,* the City of Dearborn and the Union were in the process of negotiating a new labor agreement when the parties reached an impasse.[83] When negotiations and mediation failed to produce a solution, the Union initiated arbitration proceedings pursuant to a Michigan statute.[84] The city refused to choose any delegates to serve on the arbitration panel as the statute required, and the Association filed suit to get the city to comply with the terms of the statute.[85] In reversing both lower court decisions, the Michigan Supreme Court held the compulsory arbitration statute unconstitutional.[86] In a plurality opinion, the court determined that the arbitrators were entrusted with the authority to determine the

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75. *Id.* at 301. A similar argument was set forth in Taylor v. Crane. *See supra* note 58.

76. 256 A.2d 206 (R.I. 1969).

77. *Id.* at 207. *See* R.I. GEN. LAWS § 1956, chap. 28-9.1-9 (1956).

78. *Warwick,* 256 A.2d at 209. (citing *Opinion to the Governor,* 162 A.2d 802 (1960)).

79. *Id.* This reasoning has been criticized as "beg[ging] the question and reduc[ing] the analysis of the issue to a reason-free debate over labels." *Dearborn,* 231 N.W.2d at 232.

80. *Warwick,* 256 A.2d at 210.

81. *See supra* note 66.

82. 231 N.W.2d 226 (Mich. 1975).

83. *Id.* at 228.

84. *Id. See* MICH. COMP. LAWS § 423.231 (1963).

85. *Dearborn,* 231 N.W.2d at 228. Under the terms of the statute, the Association and the city were each to appoint delegates to the panel who would then choose further panel members themselves. Therefore, the city's refusal to appoint delegates halted the entire arbitration process. *Id.*

86. *Id.*

outcome of public policy matters concerning the terms and conditions of employment, the proper standards to which public employees are held, and the allocation of public revenues.[87] The plurality concluded that such matters were not judicial, but legislative in nature.[88] As such, the statute's approval of private arbitrators not subject to the political process was an unconstitutional delegation of legislative power.[89] In other words, these matters were public issues which should have been decided by public officials who are accountable to the public.[90]

A dissenting opinion, written by Justice Williams, did not view the delegation of public authority to the arbitrator as an open and shut case of an unconstitutional statute.[91] Justice Williams preferred to employ a balancing test which weighed the public policy favoring arbitration of labor disputes against the dangers of entering sacred legislative territory as protected by the Constitution.[92] Using this balancing test, the arbitration method in *Dearborn* was constitutional because: (1) the panel chairman was selected by a public commission; (2) the arbitration was conducted subject to specific standards and was subject to immediate judicial review; (3) the arbitration panel itself was subject to public scrutiny which made it publicly accountable to some extent; and (4) the arbitrators had limited, well-defined powers.[93]

The New York Court of Appeals has also had the opportunity to decide the public agency arbitration issue. In *Acting Superintendent of Schools v. United Liverpool Faculty Ass'n*,[94] (relied on by the California Court of Appeals in *Service Employees*), an elementary school teacher was placed on involuntary leave of absence after refusing to comply with procedures required upon her return from a medical leave of absence.[95] The Liverpool Faculty Association instituted grievance proceedings against the school district on behalf of the teacher.[96] After the proceedings failed to resolve the dispute, the Association demanded arbitration of the matter pursuant to the collective bargaining agreement, but the school district refused to comply.[97] The school district was granted a stay of arbitration by the district court.[98]

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87. *Id.*

88. *Id.*

89. *Id. See also* MICH. CONST. art. VII, §§ 22, 34.

90. *See* Kanowitz, *supra* note 64, at 299.

91. *Dearborn*, 231 N.W.2d at 252 (Williams, J., dissenting).

92. *Id.* at 267. Justice Williams believed that the issue was "what the people can or cannot give away" in the delegation of sovereign authority. *Id.*

93. *Id.* at 263.

94. 369 N.E.2d 746 (N.Y. 1977).

95. *Id.* at 748. The teacher, who was female, refused to submit to a medical examination by a male physician. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

The New York Court of Appeals affirmed the district court's conclusion,[99] but not on constitutional grounds. The court concluded that arbitration had not yet gained the acceptance in the public sector as it had in the private sector.[100] The court then held that arbitration was not applicable to the underlying dispute involved since the collective bargaining agreement did not "clearly and unequivocally" refer to involuntary leave of absence disputes.[101] The law, as interpreted by the New York court at that time, only allowed arbitration in the public sector between two willing, voluntary participants.[102] Therefore, arbitration could not be forced upon the school district.[103]

From this overview of the legal background in the area of public agency arbitration of labor disputes, it is difficult to find any consistent standards from which to make a correct decision. However, this is the background against which the *Rapid Transit* court had to decide whether Ms. Ortega's grievance was subject to compulsory arbitration.

## IV. THE INSTANT DECISION

In *United Transportation Union v. Southern California Rapid Transit*,[104] the California Court of Appeals first discussed the reasoning and conclusion of the *Service Employees* case.[105] First, Justice Croskey, writing for a unanimous court, noted that the District was relying on the *Service Employees* decision in arguing against arbitration of the Union's grievance on behalf of Ms. Ortega.[106] Justice Croskey then explained the reasoning of the *Service Employees* court in reaching its conclusion that arbitration cannot be a matter of compulsion in public sector labor disputes.[107] Next, Justice Croskey and the court completely rejected "the whole of the analysis" of the finding in the *Service Employees* case.[108]

To begin, the court noted that the general rule in California shows a preference for arbitration of disputes between local public agencies and their employees.[109] Citing the *Taylor* decision, the court set forth the advantages of resolving labor disputes through arbitration, such as an ease of the burdens on the courts and the quick, inexpensive resolution of labor disputes.[110] After referring

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99. *Id.*
100. *Id.* at 749.
101. *Id.* at 750.
102. *Id.* at 748.
103. *Id.* at 750.
104. 9 Cal. Rptr. 2d 702.
105. *Id.* at 706.
106. *Id.*
107. *Id. See* the discussion in "Legal Background," *supra* notes 27-44 and accompanying text, for a detailed synopsis of the court's reasoning in *Service Employees.*
108. *Rapid Transit*, 9 Cal. Rptr. 2d at 707.
109. *Id.*
110. *Id.*

to the historical preference for arbitration of labor disputes, as first stated in the "Steelworkers Trilogy," the court noted California's acceptance of this historical preference.[111] Next, Justice Croskey adopted the conclusion in *Taylor* that, in the absence of an express provision removing a particular issue from resolution by arbitration, the issue will be subject to arbitration if even broad provisions provide for it in the labor contract.[112]

The court went on to reject specific parts of the holding in *Service Employees*.[113] It rejected the restrictive definition given the word "employer" in accordance with the Labor Management Relations Act.[114] Instead, the court reiterated California's preference for arbitration of all labor disputes.[115] The court also stated its rejection of the reasoning of the New York Court of Appeals in *Liverpool* as relied upon by the *Service Employees* court.[116]

Finally, Justice Croskey concluded that the District was not an "unwilling public entity", and that the District had the opportunity to consider the potential consequences of the inclusion of a broad arbitration clause in its agreement with its employees.[117] The court stated that it considered the District's interpretation of the collective bargaining agreement to be incorrect, and ordered the district to submit Ms. Ortega's case to arbitration.[118]

111. *Id.*
112. *Id.*
113. *Id.* at 707-08.
114. *Id.* at 707; *see also* Labor Management Relations Act, 29 U.S.C. § 152(2) (1988).
115. *Rapid Transit*, 9 Cal. Rptr. 2d at 707-08.
116. *Id.* at 708.
117. *Id.*
118. *Id.*

## V. COMMENT

### A. Analysis of the Court's Reasoning in the Instant Decision

The *Rapid Transit* court was correct in requiring the District to submit to arbitration with the Union pursuant to the Union's grievance on behalf of Ms. Ortega.[119] This observation is based upon the California Supreme Court's precedent in requiring arbitration of such grievances in *Taylor*.[120] However, the *Rapid Transit* court gives little actual legal reasoning for its decision other than the rejection of the decision in *Service Employees*.[121]

Unlike the *Service Employees* court, the *Rapid Transit* court determined that public policy is best served by arbitration of public agency labor disputes.[122] In essence, the *Rapid Transit* court saw no difference between arbitrating labor disputes in the private sector and arbitrating similar disputes in the public sector as long as a collective bargaining agreement was involved.[123] The similarity between the public policies served in resolving both public and private labor disputes seemed to be the court's preeminent reason for requiring the arbitration of the Union's grievance against the District.[124] But, while public policy was good support for a judicial decision, it does not answer the legal questions raised which initially brought the case before a tribunal.

Most notably absent from the court's analysis was a discussion of the constitutional issues involved in the delegation of governmental power to a private arbitrator. While the court noted the *Service Employees* court's reliance on the unconstitutional delegation of power in its decision to deny arbitration,[125] the court did not explain why it rejected the *Service Employees* court's interpretation of this issue. There are some possible reasons why the court did not address this issue in more detail. First, the court could have been adopting the California Supreme Court's reasoning in *Taylor* on the constitutional issue.[126] Conversely, the court could have been avoiding the constitutional issue altogether. Given the many varied state court opinions on the issue, the court's reluctance to address it would not be surprising. However, it was precisely the delegation of power issue which made the legal reasoning of the *Rapid Transit* court less than satisfactory.

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119. *Id.* at 707.

120. *Id.*

121. *Id.*

122. *Id.* The court reasoned that arbitration is a "favored means of resolving labor disputes in this state [because it] eases the burdens on courts while resolving disputes quickly and inexpensively." *Id.* (citing *Taylor*, 595 P.2d at 129).

123. *See id.* at 708.

124. *Id.*

125. *Id.* at 706-07.

126. *See supra* note 58.

As such, a comparison of the other state court opinions on the constitutional delegation of power issue is necessary.

### *B. An Analysis of the Delegation of Power Issue in State Courts*

In *Taylor*, the California Supreme Court dealt with the delegation of power issue in much the same manner as the Wyoming Supreme Court in *Laramie*. In determining that private arbitrators were not exercising governmental authority in settling public sector labor disputes, the *Laramie* court held that such arbitrators merely execute the law but do not actually make it.[127] Similarly, the *Taylor* court determined that the arbitrator's role in settling these disputes was limited to interpreting and applying the employment terms which the government agency created and agreed to implement.[128] Therefore, grievance arbitration did not involve the making of general public policy, and arbitrators did not exercise any public policy-making power.[129] Both courts seem to have made the assumption that the limited amount of power given to an arbitrator resolving public sector labor disputes did not even raise a constitutional issue. While this argument makes sense given the facts of the *Taylor* and *Laramie* cases, grievance arbitrators may be given different amounts of personal discretion depending on the case involved. So, even if the discretion exercised by the arbitrators in *Taylor* and *Laramie* was not an unconstitutional delegation of governmental power, no precedential standard was set forth for guidance in future cases.[130] Because no standard was determined, the *Taylor* and *Laramie* courts' decisions regarding the constitutionality of using private arbitrators to resolve public sector labor disputes seemed incomplete.

By contrast, the courts in *Service Employees* and *Dearborn* both viewed the resolution of public agency labor disputes by private arbitrators as a clear violation of the Constitution.[131] The *Service Employees* court dismissed the argument that the arbitrators were not unconstitutionally exercising legislative power simply by emphasizing that "all power is vested in the people and their chosen representatives."[132] In *Dearborn,* the court offered a lengthy discussion about the constitutional issue, but determined that without public accountability, a private arbitrator's involvement in a public sector dispute was unquestionably unconstitutional.[133] The court gave a very narrow definition to "public

127. *Laramie*, 437 P.2d at 301.

128. *Taylor*, 595 P.2d at 136.

129. *Id.*

130. *See* Kanowitz, *supra* note 64, at 299. Kanowitz argues that the reasoning of the *Laramie* court "overlooks the precedential effect of an initial award upon negotiated and arbitrated settlements in other parts of the public sector . . . ." *Id.*

131. *Service Employees*, 160 Cal. Rptr. at 814; *Dearborn*, 231 N.W.2d at 241-42.

132. *Service Employees*, 160 Cal. Rptr. at 814 (citing CAL. CONST. art. II, § 1).

133. *Dearborn*, 231 N.W.2d at 241.

accountability" by equating it only with the citizens' right to vote.[134] Both the *Service Employees* and *Dearborn* majorities seem to have made very inflexible decisions. According to these courts, compulsory private arbitration of public sector labor disputes is never constitutional, even if the public agency is quite remote from the exercise of any real governmental power.

### C. An Alternative Solution

Justice Williams' dissent in *Dearborn* seems to be the most pragmatic view of the delegation of powers issue in the arbitration of public agency labor disputes.[135] Justice Williams based his opinion on Professor Frank Cooper's treatise STATE ADMINISTRATIVE LAW,[136] which set forth the basis for the "balancing test" advocated by Williams in *Dearborn*.[137]

Professor Cooper's treatise dealt with the delegation of governmental power to public agencies generally, not just in the labor arbitration area.[138] In effect, Professor Cooper rejected the view that specific standards could be set defining the limits of the delegation of power to public agencies consistently in every case.[139] Instead, he argued that there were "practical considerations" that should motivate a court's decision as to whether or not there has been an unconstitutional delegation of power in a case.[140] The considerations that seemed particularly applicable to the delegation of power to a private arbitrator were: (1) whether or not reference to established legal concepts has the effect of limiting discretion;[141] (2) whether or not judicial review is available to correct abuses;[142] (3) whether or not there is an obvious need for expertise in a particular area which the legislature does not have;[143] and (4) whether or not it is traditional in a particular field to delegate such power.[144]

Following this general pattern, Justice Williams refined Professor Cooper's considerations into a "balancing test" of public accountability applicable to the delegation of power to a private labor arbitrator.[145] The applicable criteria were: (1) the proximity of those performing the delegated duty to the elective process;

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134. *See id.* at 263 (Williams, J., dissenting), for an alternative view of "public accountability" of governmental employees.

135. Kanowitz, *supra* note 64, at 300.

136. COOPER, *supra* note 68, at 31-91.

137. *Id.* at 53. Professor Cooper believes that the "decision as to what limits shall be placed on such delegations must be predicated on a painstaking, case-by-case appraisal, weighing the advantages of such delegation against the hazards involved." *Id.*

138. *Id.* at 31-91.

139. *Id.* at 71-72.

140. *Id.* at 73.

141. *Id.* at 74.

142. *Id.* at 81.

143. *Id.* at 83.

144. *Id.* at 75.

145. *Dearborn*, 231 N.W.2d at 263 (Williams, J., dissenting).

(2) sufficiency of the standards of delegation and judicial review; (3) length of the tenure of arbitrators and character of the job; and (4) limits of the power delegated.[146] By using these criteria in future cases, courts can weigh the interests of public employer-employee relations, which are furthered by arbitration, against the necessary public accountability of the democratic form of government as required by the Constitution.[147] While courts and judges should not "balance away" constitutional guarantees, Justice Williams' view seems to be the most practical in terms of recognizing the need for realism and efficiency in the running of the government.

Consequently, instead of relying on the decision in *Taylor* or dismissing the constitutional issue altogether, the *Rapid Transit* court should have used Justice Williams' balancing test. The sufficiency of the criteria could have been determined from the collective bargaining agreement between the Union and the District. The criteria could then have been applied to decide whether the use of compulsory arbitration as provided in the agreement was a constitutional delegation of governmental power. Such a determination would have been a more satisfactory discussion of the issue than the *Rapid Transit* court chose to set forth.

## VI. CONCLUSION

There are differences between the resolution of labor disputes in private enterprises and in public agencies which should be recognized by courts in deciding when to mandate arbitration according to the terms of a collective bargaining agreement. But these differences are not great enough to discount compulsory arbitration of disputes as an effective resolution technique between government controlled public agencies and their employees. The court in *Rapid Transit* realized the advantages to the government agency and its employees in using arbitration to resolve labor disputes, and the court correctly mandated the use of arbitration in accordance with the terms of the collective bargaining agreement involved.

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146. *Id.*
147. *Id.* at 266.