1983


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COLLECTIVE BARGAINING IN THE REAGAN ERA: A MANAGEMENT PERSPECTIVE*

William C. Zifchak**

American labor-management relations, in particular the institution of collective bargaining, has faced many challenges in the twentieth century. Certainly “crisis” or “concession” bargaining, as we have experienced recently in the bread-and-butter sectors of the economy, is not a new phenomenon. For example, shortly after the Korean War, unions in the garment and textile industries made significant wage concessions.1 Job security concerns, precipitated by plant closings and technological changes, led to the formation of the Armour Automation Committee in 1959.2 During the 1973–75 recession, employees in the airline industry agreed to wage freezes.3 However, the challenge posed by the current economy is the most serious one of the post-War era, and stems from the confluence of four phenomena: first, a deep, and possibly prolonged, recession; second, the internationalization of competition in trade and commerce, especially with respect to commodities such as automobiles, rubber, steel and textiles which, heretofore, were the staple of our economy; third, rapidly advancing industrial technology; and, fourth, a bona fide “laissez-faire” philosophy on the part of the Reagan Administration toward industrial relations.

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1. See Mitchell, Recent Union Contract Concessions, 38 UCLA INSTITUTE OF INDUS. REL. WORKING SER. (Feb. 1982).

2. The Armour Automation Committee was established as part of Armour’s collective bargaining agreements with the Packinghouse and Meat Cutters Unions. Its purpose was to cushion employees against the consequences of automation or other operational changes to the extent possible without hampering management’s flexibility. See Livingston, Avoidance and Settlement of Strikes and Contract Disputes, 1968 PROCEEDINGS OF NEW YORK UNIVERSITY TWENTIETH ANNUAL CONFERENCE ON LABOR; G. SCHULTZ and A. WEBER, STRATEGIES FOR THE DISPLACED WORKER (1966).

This paper presents, from the perspective of a management attorney, a diagnosis of the institution of collective bargaining in its current economic and political context, a prognosis as to any perceptible short-term or long-term trends, and will comment upon the psychology that management is bringing to the 1982–83 bargaining table.

To summarize my views at the outset, first, the principal consequence of the Reagan Administration’s overall labor and economic policies is that this year, and for the duration of this Administration, virtually every negotiation will proceed *sui generis*. The only “pattern” will be that there will be no “patterns,” certainly not in the traditional sense. Thus, while we will continue to see many employers achieving necessary wage concessions, in stark contrast, there will be many employers, sometimes in the same industry, continuing to grant wage increases in the 7 to 9 per cent per annum range. This scenario will also work in reverse; for example, in the trucking industry where the wage freeze negotiated on a national basis has been rejected on the local level in favor of even greater concessions. Second, the Administration’s economic policy increasingly will compel management and labor to redirect their energies in negotiations toward the issue of economic viability of the basic enterprise and thus job security for the workforce. Third, the Reagan Administration’s political philosophy will cause the collective bargaining process to assume a greater role in enforcing our labor and fair employment laws.

**THE POLITICAL AND ECONOMIC CLIMATE FOR BARGAINING**

*Reagan’s Labor Policy: “Laissez-Faire”*

One of the few refreshing aspects of the Reagan Administration has been its steadfast “laissez-faire” approach to private labor-management relations and collective bargaining. President Reagan has made it very clear that labor and management must fashion their own solutions to their individual economic problems. He has stated publicly his opposition to corporate bail-outs such as those granted to

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4. See note 61 infra.
Lockheed and Chrysler under previous administrations. He has declined to pursue any executive or legislative initiatives to ease the pressures from foreign competition.

This is the sharpest change in attitude toward labor-management relations by a presidential administration in the past fifty years. Presidents Roosevelt and Truman not only intervened in major labor disputes, but their administrations set the ground rules and tone for labor relations through legislation and executive orders. Both administrations, faced with wars that disrupted the economy, found it necessary to invoke wage stabilization programs. While President Eisenhower was much less active on this score, he did from time to time appeal to industry for wage-price restraint, and intervened in a major steel strike. Under the Kennedy Administration we had voluntary wage-price guidelines—"guideposts"—and the President personally intervened in the steel and other disputes. The Johnson Administration similarly resorted to guideposts and jaw-boning, and frequently invoked the personal prestige of the President.

President Nixon was very assertive in major labor-management disputes, assembled a strong and aggressive Labor Department, and, of course, imposed the first mandatory wage-price controls since the Korean War. President Carter also resorted to ill-fated voluntary wage-price controls and frequently resorted to jaw-boning measures.

The Reagan Administration, however, has made a sharp break from the previously prevailing philosophy that it is essential for a presidential administration to formulate or influence labor policy and to impose its views, including substantive ones when necessary, on collective bargaining. Consistent with his political and economic philosophy, Reagan's labor policy is to leave the parties to their own devices within the existing statutory framework. The fact that a hands-off approach is being adhered to during a period of economic crisis and during a critical year in the three-year bargaining cycle accentuates this break with tradition.

This reluctance to intervene in major labor-management disputes is not dysfunctional. It is entirely consistent with the

7. See, e.g., UAW Bill on Local Content for Autos Opposed by Administration Officials, 41 DAILY LAB. REP. (BNA) at A-4 (March 24, 1982).
fundamental tenet of our national labor policy that the parties bargain in private and reach voluntary agreement on substantive terms and conditions of employment. In the last several months, we have seen truly remarkable evidence that the collective bargaining process can function in an imaginative and productive fashion in the face of economic crisis, without the need for governmental intrusion. Indeed, one can make a persuasive case that crisis brings out the best in collective bargaining; it is, by definition, a problem-solving process. Economic crisis puts great pressure on both parties to be creative and innovative in satisfying their mutual needs. While governmental mediation can be an important and necessary device for helping the parties to perceive their mutual interests and thereby to reach agreement, I remain unconvinced that there is anything that a national administration can contribute, substantively, to the bargaining process. Our recent experience with wage freezes and pay-price controls, for example, demonstrates that it is folly for an administration to dictate contract terms.

In short, while one can make a case that President Reagan should be taking other steps to alleviate some of the systemic pressures on American industry and, indirectly, collective bargaining, the determination not to interfere directly in that process is the preferable approach. While there may come a point in the future where presidential intervention in a labor dispute is indispensable, the Reagan policy of laissez-faire, reversing the trend of past Administrations, will serve as a reminder to future Administrations that intervention should be the exception, not the rule.

Economic Policy

Unfortunately, the Administration's non-interventionist labor relations posture has been accompanied by economic policies that, thus far, have led us into a deep recession: industrial output is down, 112 plants were closed in the first quarter of 1982 alone, and unemployment is hovering near 10 percent. Some aspects of the current economic malaise were in the making long before the election of Ronald Reagan, however. For example, the deregulation of the

11. As a practical matter, it is relatively small business that is most adversely affected by the laissez-faire philosophy and, in particular, the substantial personnel cutbacks at the Federal Mediation and Conciliation Service (FMCS). The great majority of FMCS trouble-shooting takes place at this level. Major disputes of national scope, warranting the intervention of the FMCS Director, are a small minority.

Collective Bargaining in the Reagan Era

trucking\textsuperscript{13} and airline industries\textsuperscript{14} has wreaked havoc not only in those industries, but also in those satellite industries directly dependent upon them. Intense competition from foreign manufacturers of steel, autos, textiles and electronics is a phenomenon that has been evolving steadily over time, but until recently industry paid little heed.

The only good news to come out of the economy is the rapid deceleration in, and the leveling off of, inflation. For this, the Administration can take the lion's share of credit. Disinflation, together with its handmaiden, increased unemployment, has had, and will continue to have, a tremendous psychological and practical effect at the bargaining table.

\textit{Governmental Retrenchment}

The Administration's determination to cut spending on domestic programs, notably those in the labor sector such as OSHA,\textsuperscript{15} the NLRB,\textsuperscript{16} and the EEOC\textsuperscript{17}—its politically motivated intention to shrink the existing body of labor-related regulations and to ease off on litigation to enforce remaining regulations and statutes—is also having a substantial impact at the bargaining table. In the 1970's, social legislation such as the Occupational Safety and Health Act of 1970,\textsuperscript{18} and the Employee Retirement Income Security Act,\textsuperscript{19} relegated collective bargaining to a back seat in effecting many terms and conditions of employment. This trend has done an about-face. Today, many labor unions feel compelled, in the guise of private attorneys-general, to find the means to ensure that the legislative and

\begin{footnotes}
\item[13.] The trucking industry was deregulated under the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1981). The Teamsters Union has lost over 500,000 members since that time. In June 1981, the Union estimated that approximately 416 unionized motor carriers have gone out of business since deregulation, and 100,000 union members have been laid off as a result. 113 DAILY LAB. REP. (BNA) at A-3 (June 12, 1981). At the same time, over 6,500 new companies, largely nonunion, have been created. Nonunion Rivals and Dissent Are Troubling Teamsters, N.Y. Times, May 16, 1982, at A1, col. 1. See note 67 infra.
\item[15.] The Occupational Safety and Health Administration was created to administer the Occupational Safety and Health Act of 1970 § 7, 29 U.S.C. § 656 (1976).
\item[16.] The National Labor Relations Board was created in 1935 by the National Labor Relations Act (Wagner Act) § 451, 29 U.S.C. § 153 (1976).
\end{footnotes}
administrative protections existing for their members on paper continue to be enforced in fact. Furthermore, cutbacks in other programs, such as CETA, have caused unions to look either to collective bargaining or to the state legislatures for solutions to the problems of employee displacement and retraining.

**IMPACT ON CURRENT COLLECTIVE BARGAINING**

How has the political and economic setting just reviewed affected the institution of collective bargaining? As one might expect, quite substantially. However, there is wide variation in the degree and nature of the impact. The strength of collective bargaining is that every bargaining relationship, much like a marriage, is sui generis: collective bargaining allows the parties in each relationship to structure that relationship according to their unique mutuality of interest. Particularly in this field, therefore, it is overly simplistic to strain to find “trends” with universal application. The average or mean in labor relations, the “prototypical” contract, rarely exists in reality. To illustrate the point, the Labor Department reported that 1982 first-quarter wage increases “averaged” 2.2%; however, factoring out the Teamsters’ and Auto Workers’ settlements, which involved wage concessions, the rate of first-year wage increase for sixty-two other major contracts was 7.8%. It is doubtful whether any real-life employer in this period actually negotiated a 2.2% wage increase. These statistics also illustrate that agreements granting union concessions, while they monopolize the headlines, are still not the norm.

Nevertheless, there are certain symptoms that are appearing with some frequency. Indeed, if the economy continues on its current course, these symptoms will surface with greater rapidity.

**Bargaining Table Dynamics**

1. **Shift in Psychology.** There are several symptoms of a perceptible shift in power at the bargaining table. Labor unions are increasingly on the defensive, while management is becoming more aggressive. Recent statistics on work stoppages show that 1981 was the most peaceful period in many years. There is no question that

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23. *Federal Mediation and Conciliation Service Annual Report* (1980) shows that the percentage of closed cases involving strikes, 12.9% in fiscal 1980, was the lowest since the 11.4%
the current bargaining climate this year is such that it has allowed for a major increase in employer assertiveness which only a year ago would have appeared unseemly and counterproductive. Increasingly, employers in dire financial straits are going to their unions and making demands to reopen existing contracts and to secure economic and managerial concessions. The unions in these situations have become defenders of the status quo.

2. Mood of Management. The sponsors of this conference asked me to comment on the mood among management representatives in the current political and economic climate. While on the one hand most employers have welcomed the laissez-faire approach to collective bargaining, on balance, management is deeply discouraged by economic developments. I am confident that all employers would prefer to be in the position of deflecting union demands to share in increasing profits, as opposed to being in a fiscal position where they are obligated to demand concessions from the union. While there are a few opportunistic companies that may try to take advantage of what is perceived generally to be a period of retrenchment for union benefits, most employers approach the situation pragmatically. Employers who are suffering financially and who are truly in need of concessions will seek them with considerable vigor. Pragmatism will be the strategy for those who are doing well and who will be most injured by a strike. Profitable employers will try to keep increases to a minimum, not necessarily because the bargaining climate is conducive to a good settlement, but because the uncertain state of the economy makes it imperative.

Most union leaders have been reacting to demands for concessions in responsible fashion; indeed, they are taking advantage of the overall environment to secure substantial gains in job security. This may be far more significant in the long run than wage concessions. Even with healthy employers, unions for the most part have not been greedy, particularly where there is a wide fluctuation in the financial status of competitors in the industry. Overall, unions have demonstrated surprising flexibility. This is one factor that has contributed to the demise of pattern bargaining.

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I should digress briefly to comment upon the impact of the Reagan Administration's handling of the PATCO strike on collective bargaining. In the public sector, the PATCO experience might very well lead some employers to engage in "hard-ball" tactics. In the private sector, on the other hand, our experience has been that PATCO has had no real impact. While a small minority of employers have found some fleeting solace in the President's stance toward the Air Traffic Controllers Union, the grim reality of a recessionary economy has dominated management's agenda.

Topics of Bargaining

Certain economic factors that now exist will be with us for so long that many of the concepts being introduced in bargaining will become more and more ingrained. Some of these concepts were due to surface in any event; however, the state of the economy presided over by the Reagan Administration is such that it has expedited that otherwise evolutionary process.

1. Job Security. What has fast become the principal concern of most unions is job security for the bargaining unit. The viability of the employing enterprise is the top priority of management. In periods of full employment it was a rule of thumb that unions would trade higher wage increases in exchange for layoffs of junior members, knowing that the latter could secure employment elsewhere. Now, however, widespread unemployment, the spectre of continuing recession, foreign imports and the age of robots, has forced even the most senior members of the bargaining unit to concern themselves with job security. In almost all of the publicized cases involving concessions, some variation on the job security concept has been agreed to by management as a quid pro quo for concessions. Indeed, job security has become such a prevalent subject in the wake of the auto negotiations that many unions are seizing the initiative to secure strong job security measures without regard to whether the employer is demanding, or needs, concessions; for example, in the electrical industry negotiations. The implications of all of this for long-term management flexibility is alarming: to a substantial degree employers may be mortgaging their futures in return for short-term

27. Id.
concessions. Moreover, job security commitments have been deemed fully enforceable in a court of law.

Unions have not had great success in tackling the problem of job security at the legislative level. For example, while many bills restricting the rights of employers in closing plants have been introduced in Congress, none have made it out of committee. The chances for such legislation are nonexistent under the current Administration. The "domestic content" legislation, which would require major automobile manufacturers, both domestic and foreign, to produce most of their automobile components in the United States, and which had an early strong showing of support, probably will not become law. Likewise, the movement in the steel industry for import quotas, supported by the Steelworkers Union, probably will fail. Accordingly, unions are turning to collective bargaining for solutions. Some of the limitations on layoffs, plant closings, subcontracting or "outsourcing," and foreign imports that are appearing with increasing regularity in contemporary collective bargaining agreements, were unheard of only a few years ago.


30. Recent decisions teach that employers cannot take job security guarantees cavalierly. The Sixth Circuit has held that a publisher's promise of lifetime job security in exchange for a union's agreement to the use of computer technology is enforceable. The court rejected the employer's defense that the commitment did not survive the expiration of the underlying collective bargaining agreement and, alternatively, was extinguished when the company went out of business. Heheman v. E.W. Scripps Co., 661 F.2d 1115 (6th Cir. 1981), cert. denied, 102 S. Ct. 2272 (1982). A federal district judge recently held The Singer Company liable for over $2 million in damages for reneging on a commitment to modernize its plant in exchange for union wage concessions. Local 461, IUE v. The Singer Company, 540 F. Supp. 442 (D.N.J. 1982).

31. For example, joint committee hearings were held in the previous Congress on the Ford-Riegle Bill (H.R. 5040, S. 1608) (96th Cong.), which would have required advance notice of plant closing and assistance to dislocated employees and affected communities. Similar bills are pending in the current Congress. E.g., H.R. 1037 ("Plant Relocation Bill"); H.R. 565 ("Plant Closing Bill").

32. In contrast, two states, Maine and Wisconsin, have passed laws regulating plant closings, and three other states, California, Minnesota, and Connecticut, have comparable legislation under active consideration. Maine requires 60 days' notice of closings to employees, the municipality and the state and also requires severance pay based on seniority. ME. REV. STAT. ANN. tit. 26, § 625-B (Supp. 1981). Wisconsin also requires 60 days' notice. WIS. STAT. ANN. § 109.07 (West Supp. 1981). See also, State Legislatures Take Steps to Ease Impact of Plant Closings on Communities, 23 DAILY LAB. REP. (BNA) at C-1 (Feb. 3, 1982).


34. The AFL-CIO Industrial Union Department recently surveyed 101 major collective bargaining agreements negotiated in the past two years. Seventy per cent of the agreements contained limits on subcontracting, seventy-nine percent had clauses addressing the topics of plant closings, work transfers, and technological change. 28 DAILY LAB. REP. (BNA) at A-6
Provision for retraining of dislocated employees is a growing trend. This is one area where the government has a role; namely, subsidizing such efforts in order to spread the cost of retraining over a large base of employers. Another alternative is for management to buy-out the workforce with large severance payments or equivalent benefits.

One of the more radical approaches to the job security problem, where the only alternatives are substantial wage concessions or plant closing, is the sale of the facility to the workforce. This solution will not achieve widespread popularity with big labor, however, because it puts unions in competition with themselves. More significantly, ownership of the means of production is a concept anathema to the philosophy of the American labor movement.

2. Non-Union Workforce. In addition to initiatives in the area of job “preservation,” unions have tried to make the most out of


Examples include: A & P’s agreement with the Food and Commercial Workers to re-open a new subsidiary 20 to 25 stores previously closed by the company, 104 Daily Labor Rep. (BNA) at B-2 (May 28, 1982); B.F. Goodrich’s commitment to the Rubberworkers that its Akron facility would remain open for the next three years, 85 Daily Labor Rep. (BNA) at A-10 (May 3, 1982); International Harvester’s agreement with the UAW that it would give six months’ notice of permanent plant shutdowns and 60 days’ notice of subcontracting decisions affecting 10% of the workforce or 100 workers, id. at A-8; GM’s rescinding of four announced plant closings, its two-year moratorium on outsourcing-related plant closings, and its pilot “lifetime employment guarantee” program, 58 Daily Labor Rep. (BNA) at E-1 (Mar. 25, 1981); the rubber industry’s agreement with URW to establish “early action committees” to deal with plant closings and a commitment to allow the Union president “direct access” to chief executives with regard to plant closing questions, 93 Daily Labor Rep. (BNA) at A-3 (May 13, 1982); Ford’s agreement to a two-year moratorium on outsourcing-related plant closings, and a “Guaranteed Income Stream” for laid-off workers with more than 15 years seniority, 31 Daily Labor Rep. (BNA) at A-6 (Feb. 16, 1982); the agreement by Armour & Company, which has closed 24 plants in the last 10 years and reduced its workforce by 45% in the last 3 years, and Wilson, with the Food and Commercial Workers, that they will not close any plants for the next 12 months, 243 Daily Labor Rep. (BNA) at AA-1 (Dec. 18, 1981).

35. Rockwell International and the UAW are setting up a pilot retraining program for aerospace workers, funded by a $300,000 grant from the U.S. Department of Labor. 57 Daily Labor Rep. (BNA) at A-6 (Mar. 24, 1982).

36. For example, in October 1981 General Motors sold its Clark, New Jersey bearings plant to members of Local 736, UAW, under an employee stock ownership plan, for $53,000,000. Serrin, In Experiment in Jersey, Workers Buy a Factory, N.Y. Times, Apr. 27, 1982, at B1, col. 1. The International opposed the deal because at the time it appeared that General Motors was attempting to undermine its national agreement with the UAW. Id. More recently, A & P Company has agreed to sell four stores in Philadelphia to members of the United Food and Commercial Workers, Locals 1357 and 56, to be funded in part by company contributions. 104 Daily Labor Rep. (BNA) at B-2 (May 28, 1982). National Steel has been negotiating with the Independent Steelworkers Union as to the possibility of selling one of its three principal steelmaking facilities to its 11,500 employees under an employee stock ownership plan. Wall St. J., Mar. 3, 1982, at 16, col. 2.
economic adversity by seeking concessions from employers in the area of job "acquisition." Union organizing efforts have been experiencing decreasing success of late. With management concentrating on economic survival, it has been easier for unions to secure pledges of employer neutrality on the issue of organization of their non-union workers, even from employers, such as General Motors and General Electric, who historically have resisted this concept. 37 Thus, one way unions have been coping with their own economic problems due to the decline in dues-paying membership is by minimizing employer opposition to renewed organizing drives. In a variation, the Teamsters secured a commitment in the new National Master Freight Agreement against "double-breasting," a device whereby an employer sets up separate union and non-union companies. 38

The principle of "equality of sacrifice," 39—a matching of union and non-union, white collar, concessions—together with the pledges of organizational neutrality by certain employers, will allow unions to make greater strides in organizing non-union, white collar employees. Management can avoid this by instituting a policy of "equality of job security." They must take precautions to install job security protections equivalent to those being granted to the unions. If a non-union worker is required to grant concessions but is receiving no job security in exchange, he will be more receptive to unionization, not less. It is instructive to note that for the first time in over forty years of UAW blue-collar representation, white collar workers at General Motors recently approached that union concerning the possibility of organization. 40

3. Gain Sharing. Many unions have taken the opportunity to introduce the concept of "gain sharing," that is, tying employee compensation to corporate profits, because of current economic conditions. Historically, "gain sharing" or profit sharing has been

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38. 23 DAILY LAB. REP. (BNA) at D-4 (Feb. 3, 1982); 251 DAILY LAB. REP. (BNA) at C-3 (Dec. 31, 1981).

39. Simply put, "equality of sacrifice" means that non-union white collar workers are required to sacrifice the same wages and/or benefits as the unionized blue collar workers lose through givebacks.

40. See UAW Targets GM Salaried Workers for All-Out Organizing Campaign, 100 DAILY LAB. REP. (BNA) at A-1 (May 24, 1982); GM's Salaried Workers Reported Seeking Union, N.Y. Times, May 15, 1982 at 8, col. 6.
anathema to most of the labor movement, and to management as well. In prior years, the auto industry consistently rejected the Auto Workers' demands for profit sharing. In the auto negotiations, however, profit sharing was an essential component of the ultimate package at both Ford and General Motors, and has become de rigeur in other leading concession packages.\textsuperscript{41} It is too soon to tell, however, whether profit sharing will emerge as a common employee benefit in healthy companies; witness the strong opposition of professional football, which remains highly profitable, to sharing a fixed percentage of its gross receipts with the NFL Players Association.\textsuperscript{42}

In short, profit sharing may prove to be a concept that is viable primarily where an employer is in financial straits, in order to justify a wage freeze or roll-back by affording a form of insurance to employees who suspect that the company may improve its financial position after contract ratification.

4. Worker Participation. Coupled with the concepts of job security and gain sharing is the heightened interest by unions in participating in the affairs and decision-making of management.\textsuperscript{43} The most conspicuous example of this is the seat held by UAW President Douglas Fraser on the board of directors of Chrysler. The Machinists and other unions have begun to make similar demands.\textsuperscript{44} While this phenomenon originally was thought of as window-dressing, it has triggered great interest in worker participation. Thus, labor-management committees on such subjects as productivity, safety and health, and quality of worklife, will emerge from the bargaining process with more regularity.\textsuperscript{45}

\textsuperscript{41} Profit sharing has been linked to wage concessions in the following 1982 packages, among others: B.F. Goodrich and Rubber Workers Local 289, N.Y. Times, May 3, 1982, at A16, col. 5; International Harvester and UAW, 85 DAILY LAB. REP. (BNA) at A-9 (May 3, 1982); GM and UAW, 58 DAILY LAB. REP. (BNA) at E-2 (Mar. 25, 1982); Ford and UAW, 31 DAILY LAB. REP. (BNA) at A-3 (Feb. 16, 1982); Braniff Airlines and airline unions, 48 DAILY LAB. REP. (BNA) at A-2 (Mar. 12, 1981). The agreement between Wheeling-Pittsburgh Steel Corp. and the USW requires the company to contribute preferred stock to an employee trust fund equal to the value of surrendered wages and fringes. Austin, \textit{Wheeling-Pittsburgh and USW Plan Swap of Preferred for Wage Rise and Other Pay}, Wall St. J., Mar. 29, 1982, at 4, col. 2. Similarly, the agreement between American Motors and the UAW calls for diverting of deferred pay increases into an "employee investment plan" that will pay off, with a minimum of ten percent investment in 1985. 97 DAILY LAB. REP. (BNA) at A-8 (May 19, 1982).


\textsuperscript{44} Riesel, \textit{Union Chiefs Distribute Wealth}, Inside Labor, Apr. 29, 1982.

\textsuperscript{45} E.g., Quality of Work Life Program set up by A & P Company and UFCW Locals 1357 and 56 in Philadelphia, 104 DAILY LAB. REP. (BNA) at B-2 (May 28, 1982); safety and health committee established by the Clothing Manufacturers Association and the ACTWU, 90
5. Management's Rights.  In seeming conflict with the unions' quest for a greater entrepreneurial stake and voice in the employing enterprise, employers have been using their economic difficulties as the rationale for recapturing important management rights which have eroded over the years. For example, employers have used job security as a carrot for securing greater control over staff assignments, overtime and work rules. These operational changes can make an employer more cost-competitive.46

6. "Watchdog" Topics.  Unions have been forced by economic and political pressures to enforce the statutory protections built into federal law in the last twenty years. They are using the collective bargaining process as a lever to pressure employers into complying with statutory and regulatory obligations. Indeed, in some cases, unions have sought further protections. For example, OSHA proposed in January 1982 that voluntary worker safety protection, including joint management-worker committees, be developed as an alternative to the OSHA inspection process.47 While unions vigorously criticized this proposal,48 they continue to negotiate the formation of safety and health committees. The agencies and courts have been receptive to union initiatives in this area by granting them access to sensitive safety and health and EEO records as an adjunct to the collective bargaining process.49 With more of their members unemployed, and the Reagan Administration declining to broaden the scope of available relief, unions will look to employers to provide additional support. This support will be either in the form of supplemental unemployment compensation benefits, as in the auto and electrical industries, or the more novel concept of job-sharing programs.

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48. 72 DAILY LAB. REP. (BNA) at A-5 (Apr. 14, 1982); Teamsters Express Concern over Voluntary OSHA Compliance Plans, 38 DAILY LAB. REP. (BNA) at A-4 (Feb. 25, 1982).
Traditionally, however, trade unions have not been comfortable in the role of private attorneys-general. If the Reagan Administration is replaced by a liberal Democratic administration in 1984 or 1988, the tendency to raise fair employment and safety and health issues should subside at most bargaining tables.

It is possible, with the shift at the NLRB toward a management orientation that the Board may revive the Collyer\textsuperscript{50} doctrine of deferral to arbitration of statutory issues that may be resolved by the arbitrator without the necessity for unfair labor practice litigation.\textsuperscript{51} This, too, would place greater pressure on unions to enforce statutory rights, because they would be obligated to arbitrate many issues of discipline or contract construction that might otherwise be pursued by the NLRB.

\textit{Blueprint for Successful Concession Bargaining}

Any employer who is committed to seeking substantial union concessions would be well advised to follow the parameters observed in the more successful negotiations:

(a) Marshall the economic facts to demonstrate the essential need for concessions.\textsuperscript{52} Make backup data and relevant corporate records available at the union's request. Emphasize the prospect of imminent operational change—layoffs, plant closings, subcontracting, or, the ultimate weapon, bankruptcy—to the extent prudent and provable, particularly where time is of the essence and a contract reopener is necessary. Indeed, these possible events can serve as an artificial deadline for reaching agreement. The auto industry negotiations demonstrated that while international union officials may be sufficiently astute to recognize the need for concessions, they need ammunition to help them win over the local membership and leadership.\textsuperscript{53} Even the dire threat of a declaration of bankruptcy may give a union the necessary incentive—and the political leverage with its membership—to reach an accord on concessions.\textsuperscript{54}

\begin{footnotesize}
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  \item \textsuperscript{50} Collyer Insulated Wire, 192 NLRB 837, 77 L.R.R.M. 1931 (1971).
  \item \textsuperscript{52} Requests for concessions by American Airlines and Allis-Chalmers were spurned for lack of proof of economic need. Developments in Industrial Relations, MONTHLY LAB. REV. at 48 (Feb. 1982).
  \item \textsuperscript{53} Holusha, Union Leaders Strain to Persuade Ford Rank and File, N.Y. Times, Feb. 10, 1982, at A15, col. 1.
  \item \textsuperscript{54} The federal courts have allowed employers to repudiate collective bargaining agreements in the course of Chapter XI proceedings upon a sufficient demonstration of need. For example, in In re Handy Andy, No. 5-81-00737-T (Bankr. W.D. Tex. Mar. 15, 1982), the
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(b) Avoid undue emphasis on jargon such as concessions, give-backs, or sacrifice, which immediately puts the union leadership on the defensive. Rather, emphasize the mutual interest of labor and management in maintaining the basic economic health, and thus the job opportunities of the employing enterprise. Similarly, where the negotiation is newsworthy, such as the automotive talks, avoid negotiating through the press. Even in the best of times, it is usually counterproductive to attempt bargaining in the press. In the sensitive context of concession bargaining, negotiating through the media can make it impossible to achieve an agreement.

(c) Concessions will not be forthcoming unless management acknowledges the concept of "equality of sacrifice" throughout the non-union, white-collar sector of the company, to help overcome the hostility and distrust of the union. Ford Motor disarmed the UAW with the surprise announcement in December 1981 of a reduction in wages and benefits for its 63,000 salaried employees in North America.55 This contributed to a climate conducive to blue-collar concessions. In sharp contrast, attempts at early negotiations between International Harvester and the UAW were aborted, in part, because the company had granted six million dollars in year-end bonuses to its white collar managers just prior to the request.56 "Equality of sacrifice" should encompass not only the wages of non-union employees, which more than likely would have the greatest economic benefit for the company, but also the compensation of top management and shareholder dividends, which, while symbolic, will also be meaningful to unionized employees.

(d) To maximize the prospects for concessions, it is desirable to maintain, if possible, the level of take-home pay and to impose


56. A promise that no similar bonuses would be granted this year, coupled with a five percent wage cut for non-union employees, was forthcoming before the union was convinced to reopen. Williams, Harvester: The Crisis Grows, N.Y. Times, Apr. 7, 1982, at D1, col. 3; 46 DAILY LAB. REP. (BNA) at A-7 (Mar. 9, 1982). At General Motors the company announced a new bonus plan for executives the same day the agreement with the UAW was executed. The Company suspended the plan for the life of the contract when the union accused it of a "double cross." Holusha, Union View: Fair Sacrifice, N.Y. Times, Apr. 29, 1982, at A23, col. 1.
cost-saving measures in the areas of high-cost fringe benefits, especially paid time-off or work rules, or, at most, to freeze or defer scheduled pay or cost-of-living increases. General Motors' first ill-fated attempt at reopening failed precisely for this reason. The five dollar per hour wage cut sought from the UAW was unrealistic in view of the Company's 1981 profit performance and the rank-and-file's general distrust; thereafter, the Company's credibility decreased. By contrast, in the settlement between Goodrich and the Rubberworkers, URW President Stone was able to state publicly that the agreement was reached "without concessions" from the union, since the union exchanged general wage increases for the retention of its symbolic COLA package; what the union "conceded" was a diminution in the rate of increase in wages.

(e) Management should be prepared from the start to propose an imaginative, realistic job security program that will soften the opposition of the majority of bargaining unit members. This was the case at Ford Motor, and it worked very effectively. In contrast, requests for wage concessions by the A & P supermarket chain were rebuffed by the United Food and Commercial Workers in April 1982 precisely because A & P refused to propose any job security measures that would stem a recent wave of store closings. Unions increasingly are proposing job security commitments, and accordingly management, at a minimum, should analyze the various options available prior to seeking concessions from the union and at least be able to counter-propose a program of job security that the employer can live with. This latter point is particularly important: it appears that some employers are getting the short end of the concession stick by granting overly generous and often unrealistic job security measures in their eagerness for a "quick fix" of temporary wage concessions.

(f) Employers may find the least resistance to requests for concessions in the area of work rules. These changes can yield substantial savings in unit costs which are not highly visible to the union. For example, the United Electrical Workers finally achieved a

57. Holusha, GM Seeking to Slash Costs by $1,000 to $1,200 Per Auto, N.Y. Times, Jan. 17, 1982, at A24, col. 3.
58. 76 DAILY LAB. REP. (BNA) at A-6 (Apr. 20, 1982).
59. Id. at A-1 (Apr. 20, 1982). A similar rebuff was received by Kahn's and Company, a Cincinnati meat packer, from the UFCW. In contrast to Armour and the other industry leaders, who offered guarantees against plant closings, Kahn's not only demanded wage and fringe concessions but also a strong management rights clause, which implied that the Company was free to relocate in the absence of sufficient productivity. 23 DAILY LAB. REP. (BNA) at A-1 (Feb. 3, 1982).
settlement with American Standard after a seven month strike over the issue of wage concessions. The union was successful in achieving a $3.17 per hour wage increase over the contract term, but the Company also achieved its objective of major concessions on productivity and utilization of manpower.60

(g) Management should refrain from agreeing to union proposals which link wage concessions to a reduction in prices for the consumer, even though this may be a tempting political solution. The UAW and General Motors entered into such an agreement—termed an “historic initiative” by GM Chairman Roger Smith—which was later aborted.61 Aside from the practical problems inherent in this approach, there is serious doubt whether such an agreement would survive scrutiny under the antitrust laws.62

(h) Lastly, employers who have taken a mature approach to collective bargaining, spurned posturing and invective, maintained a continuing dialogue with their workforce and union leaders, and thus gained their respect, have the best chance of securing concessions when they are in trouble. Thus, International Harvester, which in the mid-1960’s had model labor relations and was able to avoid the repeated strikes that crippled Ford and GM, had a tough time securing concessions in 1982, even though the company was on the verge of bankruptcy, because it had alienated the union by inducing a six month strike in 1979.63 In contrast, Ford and UAW were able to achieve a landmark settlement, in large part, because the chief negotiators on each side had been laying the groundwork for several months.64

Short-term and Long-term Prospects

1. Pattern Bargaining. Many commentators sounded the death knell for pattern bargaining last winter when early opening of the auto industry negotiations was imminent and concessions

61. 7 DAILY LAB. REP. (BNA) at A-11 (Jan. 12, 1982).
64. Ford, UAW Officials Say That Japanese Trip and Employee Involvement Programs Were Crucial Factors in Settlement, 102 DAILY LAB. REP. (BNA) at C-1 (May 26, 1982).
appeared to be in the offing.\textsuperscript{65} In its place, we currently have decentralized, ad hoc bargaining. However, it is doubtful that we have seen the demise of pattern bargaining.\textsuperscript{66} Deviations from pattern bargaining historically have occurred in periods of economic adversity, and this time is no exception.\textsuperscript{67} The magnitude of deviation is now enhanced because the recession has hit each pattern setting industry hard during its bargaining year.

Periods of sustained economic growth and profit taking, which have characterized the post-war economy, are conducive to pattern bargaining. The premise of pattern bargaining is that employers have little or no incentive to compete based upon differences in labor standards; and unions similarly have great incentive to standardize their members' terms and conditions, even cutting across industry lines. Therefore, terms and conditions of employment in unionized sectors of the economy will tend to approach a common denominator, and employers will compete with each other on different grounds.

In contrast, in a deep recession, where each employer must retrench in order to remain competitive and minimize losses, labor costs are an obvious target for adjustment. They will not be adjusted according to any rigid formula, but only so much as in each case will render the employer more comparably competitive. Given the great disparity in economic conditions between General Motors, Ford, Chrysler and International Harvester, traditional pattern bargaining during the winter of 1982 in the auto and agricultural implements industries would have been an exercise in futility. However, it should be pointed out that in certain industries (e.g., meat packing, auto and rubber) there has been a rough pattern to the nature of concessions granted. Within this rough framework, each agreement has been largely tailored to the particular employer's needs.


\textsuperscript{66} See generally Auto Pattern Bargaining Described as 'Dead' for Industry's Negotiations During 1982, 219 DAILY LAB. REP. (BNA) at A-3 (Nov. 18, 1981).

\textsuperscript{67} This has already been the experience in the trucking industry, where as much as 75\% of the eight hundred unionized motor carriers have attempted, in local bargaining, to work out deviations from the Master Freight Agreement negotiated in January, setting a precedent for the anticipated break-up of national bargaining two years from now. Contributing to this "every man for himself" mentality, of course, is the deregulatory environment, which promotes local competition from non-union firms. Teamsters Face Tough Choice in Ailing Trucking Climate, J. of Comm., Apr. 29, 1982, at 1A, col. 2; Spector-Red Ball Freight Closing Should Prove Aid to Industry, J. of Comm., Apr. 27, 1982 at 1A, col. 2; Chicago Teamsters Accept New Contract, 77 DAILY LAB. REP. (BNA) at A-51 (Apr. 2, 1982), Trucker Walkout Could Signal Another Period of Labor Unrest, J. of Comm. April 2, 1982, at 1A, col. 3; Salpukas, Regional Truckers Debate Labor Costs, N.Y. Times, Feb. 25, 1982, at D1, col. 3.
Currently, the economy is in worse shape than most observers had anticipated. As long as this continues, there will be little or no pattern bargaining in the traditional sense. The only "pattern" is in the tendency toward "concession" bargaining. This pattern is a consequence of economic forces over which no single business or union has control. Once the economy returns to health, some form of pattern bargaining most likely will return. The pattern-setting industry, however, may change from the automotive industry to one with a healthier outlook.

2. Wage and Fringe Concessions and Contract Reopening. Although there is increasing evidence that employers are seeking to achieve wage and fringe concessions from labor unions, whether in the context of an early reopening of the contract or at the traditional contract expiration date,68 Professor John Dunlop69 has concluded that the phenomenon of concessions is an aberration and that there will be no emerging trend. In the past, employers have achieved reopeners and wage concessions in times of economic severity. While there is no question that this is the perfect climate in which to seek concessions, an employer still must make a persuasive demonstration of need before a union even will consider granting concessions. The case for concessions must be more compelling to achieve an early opener, as the recent rebuff by the unions in the depressed copper industry demonstrates.70 It is an astounding coincidence that many of the companies that secured early concessions are in the high profile, basic industries whose contracts were up for renegotiation in 1982. In each case, however, the depressed state of the industry has been undisputed. The traditional leadership role of these industries in setting a pattern for other sectors will have some spillover effect this year with respect to concessions, but there will be no pattern. The majority of recent settlements have been in the seven to nine percent range, and future settlements should remain in that range unless inflation further abates.71 The settlement in the troubled rubber

68. According to BNA’s REPORT ON LAYOFFS, PLANT CLOSINGS AND CONCESSION BARGAINING, FIRST QUARTER 1982, in almost 50% of collective bargaining agreements concluded in the first three months of 1981 (those that were studied), unions agreed to either a freeze or reduction in wages and benefits.

69. Remarks by Former Secretary of Labor Dunlop on 1982 Wage Developments, 36 DAILY LAB. REP. (BNA) at D-1 (Feb. 23, 1982).

70. 94 DAILY LAB. REP. (BNA) at A-8 (May 14, 1982).

71. E.g., the apparel industry and ILGWU — approximately 20% over three years, plus an additional cost-of-living adjustment increase capped at 25 cents, i.e., approximately 4%, 106 DAILY LAB. REP. (BNA) at A-10 (June 2, 1982); the petroleum refining industry and Oil, Chemical and Atomic Workers — 7.1% per year for two years, 28 DAILY LAB. REP. (BNA) at A-7 (Feb. 10, 1982); railroads and national railway unions — wage and fringe increases in excess of
industry called for cost-of-living increases over term that could exceed twenty-five percent, hardly a sacrifice on the union’s part. One can anticipate, further, that substantial wage increases will be secured in some of the major negotiations now in progress or coming up later in 1982—for example, electrical equipment, aerospace and communications.

One factor that militates against wholesale bargaining trends, and thus universal concessions, is the cyclical nature of collective bargaining. Most agreements run for three-year cycles. Many employers are enduring the recession under the weight of generous labor agreements that do not expire until 1983 or 1984: four million workers will receive deferred wage increases in 1982 averaging 6.3%, and another 3.5 million are due to receive cost-of-living increases. This cyclical pattern injects stability into the industrial sector. It is more important for industry to have labor stability and labor cost certainty than to have the capacity to adapt quickly to unforeseen fluctuations in the economy. One may take sharp issue with former COWPS Director Barry Bosworth, who has advocated legislation banning multi-year collective bargaining agreements. This would be an unmitigated disaster.

There is no question that many employers are not waiting for contract expiration but instead are seeking early reopeners. In the current economy, reopeners are a matter of common sense. But early bargaining, in contrast, is a technique that has wider application. In some cases, labor and management have resorted to early bargaining in order to avoid a confrontational atmosphere, and probable strike, at the contract expiration. The Experimental Negotiating Agreement, first established in the steel industry in 1973, whereby negotiation

30% over a 39 month term, 217 DAILY LAB. REP. (BNA) at A-4, (Nov. 10, 1981); Clothing Manufacturers Association and ACTWU—15.5% plus cost-of-living adjustments over 38 months, 90 DAILY LAB. REP. (BNA) at A-8 (May 10, 1982); Northwest Orient Airlines and BRAC—7% per year for three years, 94 DAILY LAB. REP. (BNA) at A-3 (May 14, 1982); United Airlines and the Machinists Union—18% over two years, 64 DAILY LAB. REP. (BNA) at B-2 (Apr. 2, 1982).

For the first five months of 1982, the median first-year wage gain was 7.8%. 104 DAILY LAB. REP. (BNA) at B-1 (May 28, 1982). The average first-year wage increase negotiated in calendar year 1981 was 9.6%. BNA, BRIEFING SESSIONS ON COLLECTIVE BARGAINING WORKBOOK, 1982, at 1.

72. 93 DAILY LAB. REP. (BNA) at A-2 (May 13, 1982).
74. MONTHLY LAB. REV. at 7 (May, 1982).
impasses were to be submitted to an impartial panel, is a notable example. The industry has requested early bargaining and it should prove interesting to see whether ENA, which was dropped in 1980, will be revived. In the longshoring industry, the shippers and the International Longshoremen’s Association used early bargaining in 1980 for the first time in history, and were successful in avoiding a strike for only the second time in twenty years. Teddy Gleason of the ILA made clear that the union welcomed early bargaining for the 1983 agreement.\textsuperscript{76}

In either context—concessions or strike-avoidance—successful early reopening is best predicated on a good bargaining relationship with the union. Confrontation bargaining is often a self-fulfilling prophecy.

3. \textit{Job Security}. Unquestionably, job security is, and will remain for many years, a principle issue in most negotiations. It is an area that many unions previously had neglected. All of the factors which were mentioned at the outset that have contributed to the economic predicament of industry are long-term, intractable conditions. It will take great wisdom and imagination on the part of government and industry to grapple with such issues as foreign competition and automation. In the interim, union membership will be demanding immediate solutions at the bargaining table. The challenge to management will be formidable: to grant only so much job security as it can expect realistically to afford in a period of economic adversity.

4. \textit{Future of COLA and GAI}. In the current economic slump, there is less incentive for unions to push for COLA. In the past these escalator clauses, especially in conjunction with negotiated actual percentage increases, have pushed wages and related fringes through the roof in many industries. As a consequence, employers in those industries are being priced out of domestic markets. This year, however, COLA and similar automatic wage increases, such as the UAW’s guaranteed annual increase (GAI), have been a logical target for concessions. In major 1982 negotiations, the unions have either deferred or waived COLA increases or, conversely, preserved them in exchange for a waiver of scheduled wage increases. Thus, at Ford, GM and American Motors, the UAW deferred cost-of-living increases but suspended GAI entirely for the life of the contract. The Rubber Workers and the Teamsters preserved COLA increases but gave up traditional non-COLA wage increases. The Machinists Union and United Airlines eliminated COLA while granting regular annual wage

\textsuperscript{76} \textit{ILA Praises New Stand on Accords}, J. of Comm., Mar. 8, 1982 at 1A, col. 6.
increases. Thus, the inflationary “double-dip” syndrome was broken in each case.

The question is raised whether current economic trends, together with the movement for concessions, will lead to the demise of the COLA concept. There are some who view the notion of “automatic” COLA increases as the antithesis of, indeed a substitute for, collective bargaining. They are hopeful that the trend in favor of such formulas has ended. Conversely, one can well argue that in periods of rampant inflation, COLA has proved an effective safety valve for avoiding labor unrest and thus preserving the stability of multi-year labor agreements. Of course, viewing industry as a whole, the price of that stability may be added inflation.

The current generation of workers is so imbued with the phenomenon of inflation and the COLA concept, and is sufficiently skeptical that inflation will ease for any length of time, that unions will continue to press for the COLA principle. In the automotive negotiations, COLA was deferred but not written out of the contract. This was the pattern in many other negotiations. From management’s point of view, the current economic climate is a good opportunity to attempt to tighten or eliminate COLA.

5. The Role of the States. One noteworthy development in response to the leadership vacuum of the Reagan Administration may be a growing willingness of state governments to intervene in crisis situations. Several states have passed legislation regulating plant closings. This trend will continue. Shortly after the recent International Harvester negotiations, it was announced that the State of Indiana had put together a $9.2 million loan guarantee package to keep open the company’s truck-manufacturing facility in Fort Wayne. Similar negotiations took place with the State of Ohio. It is likely that the states will begin to assert more of a leadership role in this area.

CONCLUSION

In conclusion, while the current Administration has contributed to the economic difficulties facing labor and management in this bargaining year, it has had the good sense not to interfere, but to allow the parties to reach an accommodation to their difficulties through collective bargaining. And while I am not optimistic about our current economic problems, I am confident that the collective bargaining process will continue to yield constructive solutions to these problems. It is up to management and labor to use the process wisely.