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THE IMPACT ON PUBLIC SECTOR COLLECTIVE BARGAINING

R. Theodore Clark, Jr.*

The impact of the "new" labor relations policy on state and local public sector collective bargaining has two dominant themes: (1) less federal interference with and regulation of state and local labor relations and collective bargaining by the Federal Government; and (2) less federal assistance, both financial and otherwise. These two themes are not attributable solely to the Reagan Administration. There were clear signs that these policies represent trends that began prior to Reagan's election.

IMPACT OF LESS FEDERAL REGULATION

Public employers have welcomed the theme of less federal regulation of state and local government collective bargaining. Evidence of less federal regulation can be seen on several fronts. In National League of Cities v. Usery,1 individual cities, states and organizations brought an action against the Secretary of Labor challenging the validity of the 1974 amendment to the Fair Labor Standards Act2 which extended the statutory minimum wage and maximum hour provisions to state employees and their political subdivisions.

A three-judge federal district court dismissed the complaint for failure to state a claim upon which relief could be granted. On direct appeal to the United States Supreme Court, five members of the Court held that Congress did not have the authority under the Commerce Clause to extend the Fair Labor Standards Act to state and local government employees "in areas of traditional governmental functions."3 The Court concluded that the FLSA amendments would result in a "congressionally imposed displacement of state decisions" which would "impermissibly interfere with the integral governmental functions of these bodies."4 The Supreme Court recently extended its

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3. 426 U.S. at 852.
4. Id. at 851.

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analysis in *National League of Cities* to *United Transportation Union v. Long Island Rail Road*.\(^5\)

While the Supreme Court's recent decision in *United Transportation Union* indicates that there are some definite limits to the reach of the decision in *National League of Cities*,\(^6\) the underlying holding that the federal government does not have the constitutional authority to regulate directly the traditional terms and conditions of employment of state and local government employees was not disturbed.

In a similar vein, in the recent Supreme Court decision in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*,\(^7\) the Court held that the Urban Mass Transit Act of 1964 does not provide a union with a federal cause of action for alleged breaches of Section 13(c) of that Act.\(^8\) The Court observed that "Congress made it absolutely clear that it did not intend to create a body of federal laws applicable to labor relations between local governmental entities and transit workers."\(^9\) Rather, Section 13(c) was designed "to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law."\(^10\)

Congress has been reluctant to pass new regulatory legislation. Subsequent to *National League of Cities*, there has been no serious consideration given to enacting federal legislation which would regulate state and local government collective bargaining for the past several years. It is doubtful that Congress will enact any such comprehensive legislation during the 1980's. Although there may be legislation enacted concerning public sector pension plans, the subject of pensions is not strictly a labor relations matter.

The impact of this "hands-off" policy will be increased attention to public sector labor matters at the state level. This attention will result in state legislatures and state judiciaries becoming the primary focal point for public sector labor relations issues during the 1980's. Gerald McEntee, the new AFSCME President, has admitted that the drive for a federal law lessened efforts at the state level during the 1970's.\(^11\) It now appears that major public sector unions such as

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5. ___ U.S. ___, 102 S. Ct. 1349, (1982). The Court held that a state owned railroad engaged in interstate commerce "is not an integral part of traditional state activities generally immune from federal regulation under *National League of Cities*." *Id.* at ___, 102 S. Ct. at 1354.

6. *Id.* at ___, 102 S. Ct. at 1353–54.

7. ___ U.S. ___, 102 S. Ct. 2202.


9. ___ U.S. ___, 102 S. Ct. at 2209.

10. ___ U.S. ___, 102 S. Ct. at 2210.

AFSCME will concentrate most of their efforts at the state level. The result should be more legislative efforts at the state level.

**IMPACT OF LESS FEDERAL FINANCIAL ASSISTANCE**

The recent cutbacks in federal financial assistance for state and local public sector labor matters has both micro and macro impacts. On the micro side, the Reagan Administration's policies have diminished the services administered by the Federal Mediation and Conciliation Service (FMCS). FMCS has been willing consistently to assign mediators to assist in resolving public sector disputes where it receives a joint request and where there is no viable state mediation agency available to provide assistance. The assistance of FMCS mediators in resolving public sector collective bargaining impasses has been invaluable to the parties. In many states, including Illinois and Florida, FMCS has been the only source of professional and competent mediators. This finding is reflected in statistics which show that for the fiscal year 1980 FMCS was involved in 131 cases in Florida and another 127 cases in Illinois.\(^1\)

Unfortunately, there are some ominous signs on the horizon which suggest a further diminished role for the FMCS. The Government Accounting Office (GAO) has questioned the legal authority of FMCS to provide mediation assistance for state and local public sector bargaining disputes.\(^2\) While FMCS properly rejected the GAO's conclusion,\(^3\) the ability of FMCS to provide mediation assistance to the state and local public sector is becoming a matter of some increasing concern. For example, in the mid-1970's FMCS had approximately 315 mediators while today FMCS has only about 250 mediators nationwide. As a result of budget cutbacks, this figure will drop to 230 by 1984. While the number of federal mediators has been cut by about one-third, the mediation responsibilities entrusted to FMCS have grown considerably. Congress has directed the FMCS to assume responsibility for both federal sector collective bargaining impasse situations arising under Title VII of the Civil Service Reform Act,\(^4\) and impasse situations involving hospitals arising under the National Labor Relations Act.\(^5\) It will be increasingly difficult for FMCS to provide mediators to aid in the resolution of state and local

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4. 5 U.S.C. §§ 1101, 7119(a) (Supp. III 1979). This section provides that "The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance."
5. See § 8(g) 29 U.S.C. § 158(g) (1976).
government collective bargaining impasses. Developments with respect to the Intergovernmental Personnel Act of 1970 illustrate other micro side impacts.\textsuperscript{17} Although IPA funding is relatively small, IPA has had a positive impact on public sector personnel and labor relations practices. IPA expenditures have provided much of the impetus for public sector training efforts at the state and local level in collective bargaining, labor relations, and contract administration. In keeping with the trend toward less federal regulation, IPA funds have been drastically reduced and it is unlikely that they will be restored in the near future.

On the macro side, there has been a substantial cutback in direct financial assistance to states and local governments. In 1979 almost 17\% of the federal budget went to state and local governments.\textsuperscript{18} Today, less than 15\% of the federal budget is devoted to grants-in-aid and other financial assistance to states and local governments.\textsuperscript{19} The increases in government spending that marked the mid-1960's and early 1970's have given way to more stringent government spending of the 1980's. The financial exigencies that we are currently experiencing will be part of the landscape for a long time, regardless of the political party in power.

The ramifications of this change on labor relations and collective bargaining at the state and local level have been dramatic. Most important, public management and public unions will no longer be able to look to the federal government to solve their financial problems or to bail them out. A few years ago Arnold Weber formulated what he referred to as "Weber's Law":

"[Weber's Law] is that union and management public bargaining agents, when confronted with fiscal stringency in their own unit will always attempt to shift the cost to one political subdivision higher. . . . You have seen it in education. You have seen it in law enforcement. You have seen it in transit."\textsuperscript{20}

In the current climate, Weber's Law has been rendered inoperative. The ability to go to the next higher level, \textit{i.e.}, to seek funding from Uncle Sam, is simply no longer a viable option. An official of the National School Board Association was only stating the obvious when he recently observed that "school districts in the next several years will be more dependent on their own tax bases . . . ."\textsuperscript{21}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{17} 42 U.S.C. § 4701 (1976 and Supp. IV 1980).
\item \textsuperscript{18} 1981 STATISTICAL ABSTRACTS OF U.S. 246, Chart No. 418 (102 ed.).
\item \textsuperscript{19} \textit{Id}.
\item \textsuperscript{21} 962 G.E.R.R. 22 (May 10, 1982).
\end{enumerate}
\end{footnotesize}
The inability to obtain federal funding necessarily means that public management and public sector unions will have to solve their own problems. If there is a silver lining to the federal assistance cutbacks, it is the shared realization by public sector management and labor that they can no longer look to a higher level of government to solve their problems. The parties must learn to resolve their difficulties at the bargaining table. Labor and management from the public sector can learn from the precedent-setting pacts recently negotiated in the auto, trucking, rail and meat-packing industries. Evidence of public sector enlightenment is the recent agreement between the New York City Department of Sanitation and the Teamsters Union permitting two-man instead of three-man crews on sanitation trucks.22

The new reality will require that both unions and public sector management change their perceptions. Unions will have to be more receptive to the need to improve productivity and to ease restrictive and outdated work rules. Public sector management will have to be more innovative and aggressive in finding ways to provide public services in a more efficient manner, while balancing the need to be fair and equitable with their employees. Ideally the results of these changes will be the elimination of many of the excesses that were agreed to during the years of more liberal government spending.

**IMPACT OF PATCO STRIKE**

The Reagan Administration’s handling of the Professional Air Traffic Controllers’ Organization (PATCO) strike also must be considered in answering the question: Is there a new public sector labor policy? After the President’s termination of the 11,500 striking controllers in August 1981, much speculation ensued as to the impact that this action would have upon state and local collective bargaining. Many union leaders feared that governors, mayors, and school boards would take a similar hard line against striking employees. These fears, however, have proved unfounded. There have been no reports of en masse terminations of strikers. Public officials have purposely limited their acceptance of the Reagan model to mere rhetorical posturing.

22. Press Release, Office of the Mayor of the City of New York (April 19, 1982). This Press Release, in part, states:

The reduction of the three-man crews to two men on all rear-loading trucks will result in additional productivity savings of $18.3 million per year, and will free nearly 1,000 additional workers for savings programs, street-cleaning and other sanitation duties. The $18.3 million is in addition to the $7.2 million in productivity savings already realized by the two-man truck program.

When the program is fully implemented, the net annual productivity savings — after incentive payments to the workers — is estimated to be $25.5 million.
The weak impact of the PATCO episode on state and local collective bargaining has several explanations. For one, the 11,500 air traffic controllers represent less than 1 in 20,000 of the total population of this country. Other public sector employees, such as teachers, firefighters, and police officers represent a much higher percentage of the population. Politically, our governmental officials would be hard pressed to terminate a highly visible category of employees. Practically, the limitations may be even greater. President Reagan was able to rely upon both military air traffic controllers and vast federal resources to train new controllers. State and local governments do not possess these advantages nor are they equipped to meet the astronomical legal costs of defending against suits arising from the mass terminations. President Reagan's actions in the PATCO strike may still have some impact on the tone of state and local public sector collective bargaining, especially in terms of the willingness of public employees to strike. The President's termination of such a large group of striking employees, though, has not and probably will not serve as a model for state and local governments.

SUMMARY

The trends toward less federal regulation of state and local labor relations and less federal financial assistance began prior to the election of President Reagan. Since these two trends are philosophically in tune with Reagan's political philosophy, it is hardly surprising that they are more pronounced today than they were under President Carter. Reasonable people can and do disagree over their wisdom, but their reality is something that we must all accept, at least for the time being. The sharply reduced federal financial assistance has some positive aspects. The parties at state and local government bargaining tables now must resolve their own problems in a constructive and cooperative manner. Moreover, some of the excesses that were agreed to during the years of superabundance have been rung out of the system. As we look back at the present economic hard times in the public sector, we will find that the crisis-induced cooperation between public sector management and public sector labor provided much needed medicine to the institution of public sector collective bargaining.