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THE BRITISH AND AMERICAN EXPERIENCES FROM THE PERSPECTIVE OF A NEUTRAL

Eric J. Schmertz*

In the New York Times Business Section of July 3, 19881 the following quote was attributed to Harvey Miller, speaking to the court as Texaco's chief bankruptcy lawyer: "I'm beginning to wonder, Your Honor, whether the Bankruptcy Code was misnamed. Maybe it should have been called the Attorneys' and Investment Bankers' Relief Act."2

With apologies to Mr. Miller, deregulation in the United States could conceivably be characterized as the Neutrals' Full Employment Act.3 In simple, if not simplistic terms, for the neutral, deregulation in the labor relations field in the United States, has meant a more intense and more challenging effort to reconcile the need for increased efficiency and productivity in the face of increased competition from the removal of subsidies or other economic supports, with the legitimate needs of the employees and the unions representing them for job security.

The neutral has played an important role in this reconciliation—or if you will, structuring of a "delicate but sensible balance" between the two. It is not only capable of providing additional and more enlarged services to the labor-management community, but should be so utilized.

Of course, deregulation, with attendant increased competition; with the removal of governmental subsidies or incentives; with the elimination of cost-plus contracts; with an end to exemptions from antitrust laws has led to certain predictable and traditional manage-

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2. Id.
3. See F. Elkouri & E. Elkouri, How Arbitration Works, 4 n.14 (4th ed. 1985) (stating that neutrals should be used in the collective bargaining process); see also Wirtz, Role of Federal Government in Labor Relations, 51 L.R.R.M. 70, 78 (1962) (there are a growing number of neutrals being utilized in the negotiations process).
rial actions to reduce costs and to increase efficiency. The neutral as mediator, fact-finder and arbitrator, has dealt with those actions both during the term of collective bargaining agreements and in the negotiations for new or successor contracts. What we have seen are more employee dismissals, for poor productivity, for failure to adhere to work rules, changes in work practices previously tolerated but no longer economically supportable; increased layoffs not only when available work falls off but when economic conditions turn downward generally; more attention to competence and ability and less to seniority; more subcontracting of bargaining unit work if it can be produced less expensively outside; more combining of job titles and classifications to get a fuller days work for a days pay, often by one rather than two employees (with the second placed on lay-offs); restudies of job incentive programs and piece work rates, with wages tightened and duties broadened in an effort to increase productivity at less cost; contemporary proposals for two tier wage structures (one for new employees and the other for those with greater seniority); across the board wage decreases and employer

4. See Kahn, The Theory and Application of Regulation, 55 Antitrust L.J. 177, 180 (1986) (the deregulatory effect on the telecommunications field would be expressed in a public opinion as "catastrophic," at best); See also Kaldahl, Let the Process of Deregulation Continue, 50 J. Air L. & Com. 285, 288 (1984) (deregulation of the airline industry created greater competition pursuant to Congress' intent); McDonald, Airline Management Prerogative in the Deregulation Era, 52 J. Air. L. & Com. 869, 919 (1987) (the competition resulting from the airline deregulation forced many airlines to merge or acquire other airlines to soften the competitive edge from nonunion airlines).

5. See Kaldahl, supra note 4, at 295 (deregulation has resulted in massive employee layoffs within the airline industry).

6. See Kahn, supra note 4, at 178 (regulation had the effect of stifling innovation which resulted in poor productivity. Kahn believed this was somewhat remedied by the implementation of deregulations.).

7. See Kaldahl, supra note 4, at 287 (labor unions have made many work-rule concessions in an attempt to save airline carriers from grave financial losses).

8. See Jansonius and Broughton, Coping with Deregulation: Reduction of Labor Costs in the Airline Industry, 49 J. Air L. & Com. 501, 503-504 (1984) (airline carriers have attempted to make concessions with labor unions to enable more flexible and efficient use of employees, including reduction in crew size).


10. See Jansonius and Broughton, supra note 8, at 535-536 (the two-tier wage structure is an innovative way for the airlines to gradually reduce labor costs without having to reduce wages of current employees. Essentially, the airlines set the salaries, not the unions, of new employees at a range comparable to nonunion airline employee wages. There are a few people who believe that this system will ultimately cause employee resentment between employees completing the same tasks but receiving different compensation); see also Card, The Impact of Deregulation on the Employment and Wages of Airline Mechanics, 39 Indus. & Lab. Rel. Rev. 527, 531 (1986).
demands for "give backs" of previously agreed to but costly benefits.

Some of these moves may be consistent with the collective bargaining agreement, and some may not. In addition, some may be new contract terms sought at negotiations. Generally, such moves are opposed by the unions, ideologically, politically or in sincere and pragmatic disagreement with the short term economic rationale. From the standpoint of the neutral, the threshold question is whether those moves are violative of an existing collective bargaining agreement, or whether in the give and take of contract negotiations, all, or some or none find their way into the collective bargaining agreement.

Disputes arising from these actions are grist for the mills of the private labor management arbitrator in the United States. Also, over 90 per cent of our collective agreements provide for arbitration as the means of settling disputes over the application and/or interpretation of the contract. Such disputes are being handled by private arbitrators with overwhelming acceptance by the parties. Substantial contractual justice is being done by that grievance resolution process, and there is no reason why it is not fully suitable to any increase in those types of issues as a direct result of deregulation.

The new challenge to the neutral is the role he or she may play as a mediator or fact-finder (and in some rare instances as an interest arbitrator) in contract negotiations over new contract terms where the employers' demands for these operational changes clash with the unions' mandate to protect jobs, seniority rights, longevity (with attendant pension benefits) and to negotiate the steady improvement of the economic conditions of employment. This paper will discuss this new challenge, But first it will deal with the traditional grievance dispute over whether or not an employer has violated the contract during the contract term, by any of the above actions.

During a contract term, operational changes that violate the negotiated agreement, may not be sustained even if, as a result of de-
regulation for example, there is a basic and bona fide economic need or pressure for it. The arbitrator's job is to interpret and enforce the contract, irrespective of the economic consequences, and even if deregulation during the contract term has generated new and possibly unexpected economic problems for the employer. The employer's remedy is not through arbitration but rather through negotiations with the union for contract changes reflective of the new economic realities.

A short explanation of the arbitration system in the United States is in order at this point. The arbitration system is a private system, utilizing private arbitrators, and applicable to virtually all collective bargaining agreements, whether in the public or private sectors. As a result a vast private adjudicatory system for the settlement of grievances is well established and well accepted by the participants, and there is very little governmental activity or intervention in that phase of our labor law. We know that arbitration of grievances is a characteristic of the labor law in other countries, but that much of the activity is undertaken by governmental officials.

14. Id. at 481 (citing Goodyear Tire & Rubber Co., 6 Lab. Arb. (BNA) 681, 687 (1947) (McCoy, Arb.); see, e.g., Potlatch Corp., 79 Lab. Arb. (BNA) 272, 276 (1982) (O'Connell Arb.) ("An acceptable definition of [the doctrine of reserved rights] is that management's authority is supreme in all matters except those it has expressly conceded in the collective agreement and in all areas except those where its authority is restricted by law."). (quoting P. Prasow and E. Peters, Arbitration and Collective Bargaining 31 (1970));

It is a well recognized arbitral principle that the Collective Bargaining Agreement imposes limitations on the employer's otherwise unfettered right to manage the enterprise. Except as expressly restricted by the agreement, the employer retains the right of management. This is known as the Reserved Rights Doctrine; it lies as the foundation of modern arbitration practice.


15. “[T]he arbitrator will be able to look at the issue objectively; accordingly, a reasonable decision based upon the true merits of the dispute can be expected.” F. Elkouri & E. Elkouri, supra note 3, at 5; “The question of interpretation of the agreement is for the arbitrator.” Id. at 30.


17. “Studies of grievance arbitration indicate that most issues in public sector arbitration do not differ from private sector issues and that arbitrators tend to apply the same standards in both areas.” F. Elkouri & E. Elkouri, supra note 3, at 10; “[T]he parties in state and local government have leaned heavily upon private industry's arbitration experience. A formidable case could be made that the parties have virtually adopted the grievance arbitration mechanism from private industry.” Id., n.39 (quoting Krislov and Peters, Grievance Arbitration in State and Local Government: A Survey, 25 Arb. J. 196, 205 (1970).

18. Arbitration between management and labor has always been a product of private contract. The law has played a limited role in arbitration and there has been only a small percentage of cases where the courts have become involved. F. Elkouri and E. Elkouri, supra note 3, at 23 n.2; (“The uniqueness enjoyed by arbitration as a system of industrial jurisprudence is that it is the creature of the parties. It is created by them, and its limits, rules, and regulations are established and may be changed by them.”)
charged with mediation and arbitration responsibilities.

The system is well established, well accepted, and universally utilized to handle disputes over the application and interpretation of existing collective bargaining agreements during the term of those agreements. For all intents and purposes it had eliminated the strike and the lockout during the contract period. Also, a vast body of private procedural and substantive law and rulings has developed which accord management and labor a predictability, a stability, and sensible answers to most of the kind of difficulties which arise during the contract term.

It has been said that there is no legal stare decisis in American labor arbitration. Of course that is technically true since one arbitrator is not absolutely bound to follow the rulings and reasonings of other arbitrators. But as a practical matter it is not true. Over the years a consistent body of substantive rulings, on virtually all types of disputes, arising out of collective interpretations have developed so that the parties should now be able to anticipate the kind of decisions that would be forthcoming and that will apply to issues generated by deregulation. Below are some examples which illustrate the

19. See also F. Elkouri & E. Elkouri, supra note 3, at 4 for a discussion on how collective bargaining, mediation, fact-finding, and arbitration work as separate stages in the labor-management relationship to help eliminate strikes and lockouts during the contract period.


21. See In re Armour Agricultural Chemical, 47 Lab. Arb. (BNA) 513, 517 (1966) (Larkin, Arb.): “It is well known that there is no role of stare decisis applicable in the arbitration process. Each case must be decided on the basis of the peculiar facts, circumstances and contract language involved;” but see F. Elkouri & E. Elkouri, supra note 3, at 414: “Diverse views exist concerning the use of prior awards as precedents in the arbitration of labor-management controversies.”

22. “[P]ublished awards are not binding on another arbitrator, but the thinking of experienced men is often helpful . . .” S.H. Tress & Co., 25 Lab. Arb. (BNA) 77, 79 (1955) (Ross, Arb). See also National Lead Co., 20 Lab. Arb. (BNA) 470, 474 (1957) stating that prior awards “may be referred to for advice and for statements of the prevailing rule and standard.”

23. “Prior awards can be of value to parties engaged in the negotiation of collective bargaining agreements. Knowledge of how specific clauses have been interpreted by arbitrators will help negotiators avoid pitfalls in the use of agreement language.” F. Elkouri & E. Elkouri, supra note 3 at 416; see also Crane Carrier Co., 47 Lab. Arb. (BNA) 339, 341 (1966) (Merrill, Arb.) (“While no arbitrator ought slavishly to follow precedent, it is desirable that, in problems of contractual application, like language should receive like construction, as a
well-settled nature of much of what is presently done in the field of grievance arbitration in the United States.

Generally speaking we know what to do and what to expect in disciplinary cases. We know what "just cause" and "burden of proof" mean and we know which offenses and misconduct by employees warrant summary dismissal and which require the application of progressive discipline. We know which offenses are employment related and hence of legitimate concern to an employer and which are unrelated to the employment setting and therefore im-


25. It is very difficult to generalize on the application of the doctrine of 'burden of proof' in the field of arbitration. The burden of proof may depend upon the nature of the issue, the specific contract provision, or a usage established by the parties. In many cases the arbitrator simply gets the facts and decided the issue without any express indication that he is thinking in terms of burden of proof.

F. Elkouri & E. Elkouri, supra note 3 at 324-325; see also Tenneco Oil Co., 44 Lab. Arb. (BNA) 1121, 1122 (Merrill, Arb.) (1965); "Part of the difficulty in talking about burden of proof is that the term means several different things and is often used without careful definition. It can mean the burden of pleading the burden of producing evidence and the burden of persuasion." R. Fleming, The Labor Arbitration Process 68 (1965).

26. See Huntington Chair Corp., 24 Lab. Arb. (BNA) 490, 491 (1955) in which Arbitrator McCoy explained:

Offenses are of two general classes: (1) those extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline; (2) those less serious infractions of plant rules or of proper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc. which call not for discharge for the first offense (and usually not even for the second or third offense) but for some milder penalty aimed at correction.

27. Regarding the second category of less serious offenses arbitrators have recognized the application of corrective or progressive discipline. See, e.g., Michigan Seamless Tube Co., 24 Lab. Arb. (BNA) 132, 133-34 (1955), in which Arbitrator Ryder stated:

If the employer so chooses, and it is common practice in industry, the employer may adopt a corrective approach toward penalty, by making second and third offenses of the same nature, or of another nature, cumulative in terms of the degree of severity of penalty imposed for each of the subsequent proven offenses so as to dissuade any further commissions.

28. See Industrial Finishing Co., 40 Lab. Arb. (BNA) 670, 671 (1963) in which Arbitrator Daughtery stated: "It is settled rule of arbitration that a company has the right unilaterally to issue and enforce rules that (1) do not conflict with any provision of the parties' agreement or of law and (2) are reasonable related to the safe, orderly, and efficient operation of the company's business." See also Federal Machine & Welder Co., 5 Lab. Arb. (BNA) 60, 68-69 (1946) (Whitting, Arb) (the employer's right to formulate and enforce proper working rules where the contract between the parties is silent on the issue).
mune from discipline. We know, albeit with some consternation, that discipline is applicable to circumstances where employees fail to measure up through no fault of their own and even in the absence of misconduct or neglect, such as in cases of inability to meet work standards, chronic and uncontrollable absenteeism due to bone fide illnesses, and incompatibility with others in the work force.

We know what the majority of arbitrators think about issues involving seniority and ability where layoffs, recalls, promotions and transfers are involved. The parties may now anticipate that most arbitrators will accord a presumption to management's decision on the matter of ability unless the evidence shows that management's decision was arbitrary, capricious, unreasonable or unsupported by rational evidence.

We know what to expect in connection with the use and application of past practice. Generally speaking past practice which is inconsistent with the express, unambiguous terms of the contract must give way to the contract terms and cannot be relied upon when challenged. Past practice in the face of unclear or ambiguous con-

29. See Inland Container Corp., 28 Lab. Arb. (BNA) 312, 314 (1957) in which Arbitrator Ferguson held:

The general rule is that an employee upon being employed by a company, places himself under the jurisdiction of the employer so far as their joint relationship is concerned. While it is true that the employer does not thereby become the guardian of the employee's every personal action and does not exercise parental control, it is equally true that in those areas having to do with the employer's business, the employer has the right to terminate the relationship if the employee's wrongful actions injuriously affect the business.

30. See Byer-Rolnick Corp., 45 Lab. Arb. (BNA) 868, 872 (1965) (Arbitrator Ray held that when a company feels that one employee clearly has greater ability to perform the work than another employee with more seniority, it may layoff the senior employee).

31. See Cleveland Trencher Co., 48 Lab. Arb. (BNA) 615, 618-619 (1967) in which Arbitrator Teple explained:

At some point the employer must be able to terminate the services of an employee who is unable to work more than part time, for whatever reason. Efficiency and the ability to compete can hardly be maintained if employees cannot be depended upon to report for work with reasonable regularity. Other arbitrators have so found, and this Arbitrator has upheld terminations in several appropriate cases involving frequent and extended absences due to illness.

32. See Mead Corp., 79 Lab. Arb. (BNA) 464, 467 (1982) in which Arbitrator Williams held that the employer properly discharged an employee for fighting with another employee. "The Employer has the right to establish rules and punish those who violate them. There was no evidence that its application of discipline for fighting has not been even-handed."


34. Id.

35. See Phelps Dodge Copper Prods, Corp., 16 Lab. Arb. (BNA) 229, 233 (1951) in which Arbitrator Justin stated:

Plain and unambiguous words are undisputed facts . . . An arbitrator's function is
tract language is treated as probative evidence of what that contract language means or was intended to mean when negotiated and hence may be heavily relied upon. And where a consistent practice has been followed in the absence of any contract language on the subject, the parties should expect an arbitrator to treat that practice as an addition to the contract and as a course of conduct upon which either or both sides may rely as a condition of employment. Clearly, these rules will come into play in connection with the elimination of or changes in practices because of deregulation pressure. I think we know the expected rulings on subcontracting, on supervisory employees performing bargaining unit work, and by the assignment of the duties of one classification to employees differently classified. In each instance it is appropriate if there is a contract not to rewrite the Parties' contract. His function is limited to finding out what the Parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used.

36. See Webster Tobacco Co., 5 Lab. Arb. (BNA) 164, 166 (1946) in which Arbitrator Brandschain stated:

There would have to be very strong and compelling reasons for an arbitrator to change the practice by which a contract provision has been interpreted in a plant over a period of several years and several contracts. There would have to be clear and unambiguous direction in the language to effect such a change.

Accord Duquesne Brewing Co., 54 LA 1146, 1149 (Krimsly, 1970).

37. See Alpena General Hospital, 50 Lab. Arb. (BNA) 48, 51 (1967) in which Arbitrator Jones noted that, "It is generally accepted that certain, but not all, clear and long standing practices can establish conditions of employment as binding as any written provisions of the agreement."

38. See Shenango Valley Water Co., 53 Lab. Arb. (BNA) 741, 744-45 (1975) in which Arbitrator McDermott explained management's right to subcontract:

In the absence of contractual language relating to contracting out of work, the general arbitration rule is that management has the right to contract out work as long as the action is performed in good faith, it represents a reasonable business decision, it does not result in a subversion of the labor agreement, and it does not have the effect of seriously weakening the bargaining unit or important parts of it.

39. See Stewart-Warner Corp., 22 Lab. Arb. (BNA) 547, 551 (1954) in which Arbitrator Burns explained management's right to assign work out of the bargaining unit: "In the absence of a specific prohibition or limitation to the contrary it must be assumed that (transfer, allocation or assignment of work out of the bargaining unit) are reserved and retained powers of management and . . . not subject to arbitration."

40. See R.C.A. Communications, Inc., 46 Lab. Arb. (BNA) 833, 837 (1966) in which Arbitrator Shipman explained management's right to assign work to different classes to employees:

The determination as to which group of employees particular work is to be assigned is a basic managerial function. In the absence of clear proof that it is discriminatory or capricious or otherwise contrary to the collective bargaining agreement and the rights and obligations of the parties thereunder, the Company's determination should not be reversed.
prohibition. If not, and largely because these circumstances are matters which the parties should have anticipated and could have dealt with in writing their contract, the farming out of bargaining unit work, its assignment among different classifications and its performance by non-bargaining unit employees is presumptively allowed if founded in legitimate economic or business need, unless the evidence shows either a managerial intention to destroy the bargaining unit or if as a consequence there is substantial damage to the bargaining unit.41 Apply this, if you will to unexpected economic damages due to deregulation.

While there may be more debate over the rule of external law in the application and interpretation of contracts, those questions are also reasonably well settled or at least foreseeable in terms of the approach expected by the arbitrator. If the parties plead external law, for example, Equal Employment Opportunity legislation, Occupational Health and Safety legislation, Unemployment and Workers Compensation provisions, new legislation and court rulings regarding compulsory retirement, and even legislated deregulation, the parties thereby have given the arbitrator the authority to consider those laws in deciding the contract issue even though those laws are not expressly a part of the collective bargaining agreement. On the other hand where the external law is not introduced as part of the case, it should not surprise the parties if the arbitrator confines his decision to the four corners of the contract and the contract language, notwithstanding any external law to the contrary,42 leaving it to the courts to factor in the external law when and if the arbitration decision is subject to enforcement. So legislated deregulation is not before the arbitrator, only the practical impact of deregulation. My own view is a conservative one. It is mainly, that the application and interpretation of collective bargaining agreements ought not to involve an arbitrator’s interpretation of other external law not incorporated expressly or by reference into the contract or the case. But this is not a major problem because ultimately one way or the other, as part of the arbitrator’s decision or by court ruling in actions to implement an award, the determinativeness of external law will be made known and will prevail.

We continue to wrestle with the matter of finality between traditional provisions of a collective bargaining agreement which provide for seniority based on longevity and various affirmative act-

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41. See infra notes 56-58 and accompanying text.
42. See F. Elkouri & E. Elkouri, supra note 33, at 325-26.
tion plans which are designed to give accelerated employment opportunities to minorities who previously were denied access to the workplace such as blacks and women. When layoffs take place, the seniority provisions of the contract bring about the layoffs of those with the least seniority, and in most instances that means the blacks and women for whom the affirmative action programs were designed. Judicial attacks on the contract have not prevailed at present, yet I am sure that we have not heard the last on this very difficult issue, especially as this matter heats up from the impact of deregulation.

My view is that as these types of cases increase and become more intense, and as the adversariness between management and labor heightens, at least publically, all of the consequence of pressures resulting from deregulation (or other comparable factors such as industries unionized for the first time; industries whose economies are controlled by governmental grants; or recessions creating private or public fiscal crises). Similarly, a few years ago in the City of New York, such matters can and have been handled as “garden variety” contract application or interpretation disputes, well or not so well,

43. See F. Elkouri & E. Elkouri, supra note 3, at 557 (“Recognition of seniority is the most significant type of restriction placed by many agreements upon the layoff right.”) (Footnote omitted). See also Id. at 610-614 (for a general discussion of seniority provisions); Id. at 557-561 (for a general discussion of seniority provisions in action during a layoff).

44. See U.S. Commission on Civil Rights, forward to “Last Hired, First Fired: Layoffs and Civil Rights,” Hearing Before the United States Commission of Civil Rights at iii (October 12, 1976):

In the mid-70’s, this nation was faced with . . . recession, and unemployment. Recent gains of minorities and women in the work force were eroded as seniority-based layoffs soared. . . . Once again, minority and women workers bore an unfair share of the burden; once again, the practice of “last hired, first fired” took its toll. See, e.g., Firefighter Local Union No. 1784 v. Stotts, 467 U.S. 561 (1987) (Employer filled 50% of his job vacancies with black workers in an effort to conform with affirmative action policies. Subsequently a layoff was necessary. That layoff resulted in a larger proportion of black workers getting laid off because they were the last hired and had the least seniority). Cf. W.R. Grace & Co., 461 U.S. 757 (1983) (Women were retained after they replaced male workers during a strike. The women were assigned positions with greater seniority then the returning men. This, during a subsequent layoff, men were laid off in a greater number than the women. The court affirmed an arbitration award granting damages to the men for violation of seniority provisions.)

45. See, e.g., Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), cert. granted, 471 U.S. 1014 (1985) (upheld a collectively bargained for affirmative action plan which afforded minority teachers greater protection from layoffs than their white counterparts); Firefighters; 467 U.S. 561 (1984) (Court held that the contract seniority system provision must be followed, even when a larger proportion of black workers than white workers would be laid off because the black workers were hired last); W.R. Grace, 461 U.S. 757 (1983) (upheld arbitration award that employees were entitled to damages for breaches of seniority provisions in a collective bargaining agreement during a lay off).
but exclusively by arbitration, leaving to collective negotiations the question of contract changes to meet the changed circumstances.

But what is much less well settled and what remains controversial and I think at best experimental in the United States is the use of arbitration to resolve bargaining deadlocks over the terms and conditions of the collective bargaining agreement when direct bargaining between management and labor for first or successor contract fails. And that includes new contract issues arising from deregulation. I would like to discuss that subject matter not just in a factual way, but by giving you some of my personal views, by telling you of my experiences with interest arbitration, by calling attention to certain ad hoc situations with which I have been connected, to draw some analogies between the public and private sectors, and finally to advance some suggestions, applicable I think to the deregulation issues.

What is especially interesting I think in this latter circumstance is that despite the heightened public adversariness between unions and employers as a result of the economic consequences of deregulation (and other similar conditions creating new economic exigencies), there has been a growing recognition by labor and management that a new cooperativeness, a new policy of accommodation, a new look at their contractual relationships, is needed to tackle what is essentially a mutual problem—to keep the employer competitive (with American and foreign competitors) and at the same time maintain the collective bargaining relationship and the integrity of union representation of the employees (a critical component in our free society). And, as the parties may not be able, politically or otherwise

46. See Zifchak, Collective Bargaining in the Reagan Era: A Management Perspective, 1 Hofstra Lab. L.F. 1, (1983): “[T]he 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 workplace.” Id. at 2. “Reagan’s labor policy is to leave the parties to their own devices within the existing statutory framework.” Id. at 3. “[H]is reluctance to intervene in major labor-management disputes is not dysfunctional. It is entirely consistent with the fundamental tenant of our national labor policy that the parties bargain in private and reach voluntary agreement on substantive terms and conditions of agreement.” Id. at 3-4. “[C]ollective bargaining allows the parties in each relationship to structure that relationship according to their unique mutuality of interest.” Id. at 6. See also Hugh & McCarthy, Collective Bargaining in the 1980s—Comments and Observations, 1 Hofstra Lab. L.F. 23 (1983): “This majority view contends that an immediate positive aspect emerging from our nation’s deteriorating economic condition has been an increasing awareness by labor and management of the need to cooperate in countering mutual problems, such as foreign competition, energy shortages, and plant and product obsolescence.” (citation omitted). But see id. at 47. (Some argue this mutual cooperation attitude is here to stay, but others argue unions are only making concessions to stay in business and the adversarial attitude will return when prosperity returns).
to structure that accommodation or partnership for "mutual problem solving" publicly, because of resistance from stock holders,47 unimaginative management or demanding union leadership or members, a neutral, who can assume public responsibility for recommending or ordering that structuring, and thereby legislate what the parties privately or even confidentially wish to achieve can and in my view should play that institutional role.48 This was used well during the recent recession in the United States resulting in what has been referred to as "concession bargaining,"49 but which I prefer to deem a mutual effort at reconciling mutually troublesome economic problems for the mutual survival of the collective bargaining relationship as we know it.

For example, where changes in operations, including "givebacks" may be jointly recognized as needed, but where in fairness some of the resultant savings should be redirected to improve some of the employee benefits, and where the vitality of the basic collective bargaining relationship is to be maintained if not strengthened, the participation of the neutral with the vested authority and responsibility, can be most constructive in fashioning the imaginative answers and formulae which the parties want and need but are unable to agree upon directly and publicly. However, traditionally, management and labor have joined in opposition to third party resolution of contract terms. Hence, while the well-accepted and widely employed grievance arbitration system has virtually eliminated strikes, lockouts, and other interruptions of normal work schedules during the term of the collective agreement—as the quid pro quo for the contractual "no strike" clause—management and labor have generally rejected its use as a substitute for the strike when they are unable to negotiate a first or successor contract.50

47. See e.g., Cookes' Crating, Inc., 289 NLRB No. 140 (July 2, 1988) (Stockholders refused to collectively bargain with a union because he was afraid it would put the company out of business).
49. See generally Leddy and Wolf, The New Bargaining Ballgame: Concessions, Closings, Successors and Chapter 11, in RESOURCE MATERIALS: LABOR AND EMPLOYMENT LAW (Panken 1986) (for a general discussion of concession bargaining in response to the recent recession); Hugh & McCarthy, supra note 46 at 23-24 (a general discussion of concession bargaining); Zifchak, supra note 46 (For a general discussion of concession bargaining during the recent recession).
50. See Daniels, The Origins and Impact of Deregulation, 1 Hofstra Lab. L.F. 63, 79 (1983), "[M]any public employers, if forced to choose between the right to strike and interest arbitration as a means of resolving collective bargaining impasses, would also opt for the right
In my judgment, the reasons too long held by both management and labor in support of this latter position are either not or no longer true, or the conditions on which they are based have so significantly changed as to warrant a reappraisal of the validity of that position. The reappraisal need not be agonizing.

Let me be precise. I am talking about agreements to arbitrate that are mutually, privately, and voluntarily arrived at by the parties as part of their negotiations, either at the time the deadlock arises or as an institutional part of their contractual agreement to cover such future situation. I am not talking about, nor do I advocate, compulsory arbitration of contract terms mandated by legislation or by executive or other governmental fiat. Rather, my proposal—and what I see in the decades ahead—is a pragmatic use of arbitration to resolve contract terms based on the private agreement of the parties involved, either for ad hoc issues or as part of their continuing contractual relationship. In short, the arbitration forum for new contract terms should be something initiated by the parties and thereafter retained as part of their exclusive jurisdiction, to be dealt with as they see fit; a governmentally imposed system would deprive the parties of this essential control and flexibility.

The impetus for an adjudicatory system for the resolution of labor-management bargaining disputes comes from the existing law in the public labor relations sector in the United States. Private sector collective bargaining continues to be based, for the most part, on economic warfare with the strike a key if not the ultimate weapon in that free-for-all struggle, and with less regard for (and no legal obligation to consider) the merits of the issues in dispute. The public sector arbitrator under laws that prohibit strikes in public employment and substitute arbitration as a final adjudicatory step, is required to base and justify his decision or recommendation on such rational and relevant standards as:

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\text{[C]omparison of wages, hours, fringe benefits, conditions, and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions, and characteristics of employment of other employees performing similar work and other employees generally in public or to strike.} \]

(Footnote omitted).

51. See C. Updegraff & W. McCoy, Arbitration of Labor Disputes 13 (1946) ("It may be repeated that in a true sense arbitration must be voluntarily agreed upon and that so-called 'involuntary arbitration' has not in general been accepted.").

private employment in New York City or comparable communities.

[O]verall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays, and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received.

[C]hanges in the average consumer prices for goods and services, commonly known as the cost of living.

[T]he interest and welfare of the public [including ability of the employer to pay].

[S]uch other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits, and other working conditions in collective bargaining or in impasse panel proceedings. 53

I ask, is this not suitable to the new strains or aggravated strains resulting from deregulation?

Let me ask some other questions. From the standpoint of the private sector, and with full appreciation of how jealously it guards its prerogative to decide conditions of employment and not abdicate that responsibility to a “unaccountable” third party, 54 can it still be said that the traditional bargaining process with a resultant strike or lockout (the latter is more illusory than real as a management weapon) will produce a settlement more responsive to the financial condition of the company to the impact of deregulation or to the economy as it affects labor and management than an arbitrated decision, without a strike, based on the criteria enumerated and the evidence submitted by both sides material to that criteria? While a directly negotiated settlement without a strike is still the preferred result 55 (and even that is subject to reexamination where the parties


54. See, e.g., First Nat'l Maintenance v. NLRB, 452 U.S. 666 (1981) (Employer argued against collective bargaining because of his need for “unencumbered decisionmaking in the conduct of its business”); Fibreboard Paper Prods. v. NLRB, 379 U.S. 203 (1964) (employer argued against collective bargaining regarding a profit maximizing decision to contract work out); But See Hugh & McCarthy, supra note 46, at 24 (“Both unions and management are venturing into new ground, from mid-contract concessions to a more dominant role for unions in the management of corporations.”)

55. See Zifchak, supra note 46, at 20 (“There is no question that many employers are not waiting for contract expiration but instead are seeking early reopeners . . . [i]n some cases, labor and management have resorted to early bargaining in order to avoid a confronta-
are markedly uneven in their bargaining strength),\textsuperscript{56} I am no longer persuaded that management and labor should continue to hold unconditionally to the view that a directly negotiated settlement with a strike would still be preferred to privately agreed-to, or privately institutionalized, arbitration of unresolved contract terms, particularly when the divergent interests of job security and greater efficiencies and productivity collide.

Aside from the philosophical and early legal theories that public employment was a "privilege" and that strikes by public employees were acts of disloyalty to the Crown (under English common law)\textsuperscript{57} or the government—and hence proscribed—contemporary reasons for prohibited strikes by public employees include: (1) the essentiality of the services they render;\textsuperscript{58} (2) the effect that cessation of those services has on the public; (3) the fact that the government or employer is not a "for profit" organization and is less able to pass the cost of labor settlements onto the "consumer" (in the form of higher taxes);\textsuperscript{59} and (4) the fact that government, responsible for the delivery of governmental services, cannot "take a strike" or put the union to the "economic test" to the extent and under the same circum-

\textsuperscript{56} See Hugh \& McCarthy, supra note 46, at 37. "Today's economic climate has forced many unions to alter their battle plans. The "offensive game" strategy of the past two decades has been put on hold, and a "defensive game plan" has been called upon." "Labor's chief weapon, the strike, may have seemed like an advisable means to a desired end at a time when the economy was stronger. However . . . such a strike would be a long and bitter battle, largely fought from a position of weakness." Id. (footnote omitted).

\textsuperscript{57} See Commonwealth v. Hunt, 4 Metc. 111, 113, 121-122, 125 (Mass. 1842) (Declining to follow the old English common law doctrine that the banning together of workers to agree not to work is a criminal conspiracy.) See also D. Ziskind, One Thousand Strikes of Government Employees 232 (1940), "[T]he earliest strikes were branded as criminal conspiracies. Only after the circumstances of industrial production forced a repetition of strikes . . . and the courts adjusted their doctrine of criminal conspiracy . . . the strike itself became inherently lawful."

\textsuperscript{58} See D. Ziskin, supra note 57, at 222.

Government strikers have appreciated the fact that complete paralysis of a crucial public service might be socially harmful and that the wrath of the public might endanger the success of the strike; hence they have sought to avoid such situations. They have usually given advance notice of their intention to strike in the hope that concessions might be made in the interim, but also with the intention of avoiding criticism for crippling public services. Though they have yielded the advantage of a sudden and unexpected attack and have even offered to provide emergency services, the government strikers have not hesitated to make the need for their services felt. When this has involved public suffering, they have pleaded the necessity of drastic action to arouse the lethargic public to a realization of their own suffering.

\textsuperscript{59} See W. Catlin, The Labor Problem in the United States and Great Britain 524 (1935) (rate regulations prevent public business from raising their prices to offset an increase in wages, but private companies can reflect this additional cost in their prices).
stances as a private employer—nor, as a practical matter and for the same reasons, can the public employer utilize the “lockout.”

But are the distinctions real? Is a strike by employees of a private bus line on one avenue of a city less of an inconvenience to the public than a strike by bus drivers of city-owned buses a few blocks away? Is a strike by public employees working for the Parks Department, or those who paint bridges or repair streets, more damaging to the public interest than a strike by employees of a private milk company, food chain, or cemetery? Is a strike by municipal hospital workers any more critical to the welfare of hospital patients and the public than a strike of workers similarly employed in private hospitals and nursing homes located in the same municipality? Is a strike by public school teachers or sanitation workers that much more inimical to the public they serve than a strike at private newspapers, parochial schools, or private carting companies, or by over-the-road truckers or home heating oil deliverers? Strikes by fire fighters and police officers, considered by many to have no comparable counterpart in the private sector, may well be the exceptions that prove the rule, or at least the exceptions that raise doubts about the broadly based views on the public welfare distinctions between private and public employment.

Further, as to deregulation, I ask, can a private industrial enterprise, in fierce competition with others from deregulation and from foreign competition, realistically absorb a lengthy strike and shutdown; or increased costs, any more than a municipality or state?

60. See D. Ziskin, supra note 57, at 90, “A private employer may discharge his employees, hire others, and be entirely unaffected by the attitude of his former employees. A public official, however, may have to reckon with the support or opposition of his former employees in a future election.” “Municipalities have not been able to employ such tactics as readily as large private corporations because the ordinary civil-service rules and the usual budget requirements have presented many obstacles to emergency appointments and expenditures. Private employees can use the lockout device.” Id. at 223.

61. See Krislov and Peters, infra note 63.

62. See Schmertz, supra note 48, at 607 (1975) (pointing out that “[o]fficial recognition of the vital roles of these two groups in the affairs of the city is evidenced by a long history of legislation and policy dealing specifically with the organization employment and renumeration of the two uniformed forces.”); See N.Y. Civ. Serv. Law § 209 (McKinney, 1983); see also People v. Vizzini, 78 Misc. 2d 1040, 359 NYS 2d 143, 147 (1974) (“causing the City of New York to be deprived of the protection of its firefighters . . . bears the same relationship to a bona fide labor action as kidnapping does to babysitting.”).

Are ability to pay cost of living comparability with other employees similarly situated, quality and quantity of productivity, and other relevant and rational standards any different in the public or private sectors of our economy, to the unions, or to the employers and employees in both?  

If to ask these questions is not to answer them, they serve at least to make us reexamine the so-called distinctions between the public and private sectors on which I believe the acceptance of interest arbitration in one, and the rejection of it in the other, is principally founded. Specifically, if the distinctions are not real—or no longer as valid or compelling as before, particularly where deregulation has changed the rules of the game—it is logical to question whether there is any longer a viable reason to reject out of hand the use of arbitration of interest disputes in the private sector in the United States after direct bargaining has failed.

One example has remained with me vividly. In November 1973 I served as chairman of the impasse panel which ended the only strike of fire fighters in the history of New York City. My colleagues were Dean Michael I. Sovern of Columbia Law School (now President of Columbia University) and Professor Thomas Christensen of New York University Law School. In this bitterly contested matter, the panel kept its award within the then wage guidelines established by the Cost of Living Council and stipulated that the wage increases (5.5 percent) were conditioned on the implementation of specified productivity improvements. Demonstrating its concern in that case for the maintenance of a balance between the demands it considered legitimate and the bona fide problems of and constraints on management relating to the delivery of such vital government service, the panel said:

[W]e feel keenly our responsibility to justify wage improvements with substantially offsetting gains in productivity. . . . The wage increases we recommend are not only within the [national economic stabilization program] 5.5% guideline but are also geared to and dependent upon the substantial productivity gains recommended by the panel under the heading Productivity and Econom-

64. See Weisenfeld, supra note 63, at 42 (stating that “[g]overnment employees like their counterparts in private enterprise are subject to the same vicissitudes of insecurity of employment, rising prices, accident, illness, and old age. . . .”).
65. See note 62, supra.
66. On November 2, 1973, the Uniformed Firefighters Association demanded that the existence of an impasse be established and an impasse panel be created when the disputes could not be settled. See Schmertz, supra note 48, at 634-646.
Is that not a responsible formula for conditions resulting from deregulation? It should be noted that the arbitrators serving in the public sector are the same private practitioners of the arbitration profession who gained their initial experience from the private grievance arbitration, who continue to serve there as well, and who remain sophisticated and knowledgeable about private sector collective bargaining.

Further reference to arbitrators and the American arbitration profession is in order. A few hundred "professional arbitrators," who devote all or a substantial part of their time to this work, handle the bulk of arbitration cases in the United States. I know of no more conscientious, intelligent, dedicated, and ethical group. Their continued success and acceptability rest on their continued impartiality and competence. As they are mutually selected by the parties in virtually every case, either ad hoc or as impartial chairman, their capabilities, knowledge, and sense of fairness and justice are put to the test with each case. While awards of arbitrators occasionally are successfully vacated by appeal to the courts for error or exceeding authority, I know of not one instance in which a professional labor-management arbitrator has been found to have been corrupt, to have committed fraud, was willfully biased, or engaged in any other willful misconduct in the course of official duties. The profession functions "in a fishbowl" and has lived up to the confidence and trust the parties have placed in it and in each of its members.

There has now been a significant and voluntary public union acceptance of the process, the statutory requirement notwithstanding. I attach considerable importance to an event of about a few years ago in New York City and to its continuation thereafter. The

67. Uniformed Firefighters Ass'n, Docket No. BCBI-3-73, Decision No. B-7-73 (Nov. 21, 1973).
68. The National Academy of Arbitrators is a nonprofit, professional, and honorary association of arbitrators that was founded in 1947 to establish and foster high standards of conduct and competence for labor-management arbitrators and to promote the study and understanding of the arbitration process. The Academy conducts an extensive and highly important educational program through its various committees, study groups, and annual meetings. The proceedings of the annual meetings have been published by The Bureau of National Affairs, Inc. F. ELKOURI & E. ELKOURI, supra note 3, at 21. "The American Arbitration Association (AAA) is a private, non-profit organization which offers services and facilities for voluntary arbitration." Id.

"The Labor Management Institute (a Division of the American Arbitration Association) offers services as a neutral secretariat in arranging for bargaining and advises parties on techniques for resolution of conflicts that have been developed through experience in other industries and in other parts of the country." Id. at 22.
Transport Workers Union, which historically had a policy of "no contract, no work," and which regularly engaged in crisis bargaining with the Transit Authority and the City, agreed with the employer at the outset of bargaining that if a contract was not reached, the issues would be submitted to binding arbitration by the three public members of the Board of Collective Bargaining and for subsequent negotiations as well. To my mind this means that the essential fairness and substantial justice of interest arbitration has been recognized and voluntarily accepted, in the public sector at least, at a time of severe fiscal difficulties. Experimentation with a voluntary use of the process in the private sector is growing, but at a slow pace. The use of terminal arbitration in the New York City newspaper industry, in the airline industry and for a while in the contracts covering the steel industry are the best examples.

Now that I have expressed my admiration for arbitrators and the arbitration process, let me conclude with how I think arbitrators and neutrals can be even more helpful to management and labor in the United States, particularly with the inevitable increase in disputes from the effect of deregulation69 and in the bargaining for new contracts against that backdrop.

As we experienced "concession bargaining" in such basic industries as the automobile, steel, coal and public employment during our recession a few years ago, the parties were confronted with economically painful circumstances which both understood required reductions in or moratoriums on certain economic benefits. Yet there were political and other reasons why direct agreement on concessions were not possible. The use of a neutral, with whom the parties have had experience, and in whom they have confidence, helped achieve the needed accommodation. My experience has persuaded me that the neutral can do it—and indeed the parties want and welcome it—by imaginative proposals, recommendations or even determinations for which he is prepared to assume responsibility. If he is privately retained for neutral roles throughout the bargaining relationship, he can continuously observe the dealings between the union and the employer, serve as consultant to both during contract negotiations, mediate disagreements during bargaining, help head off confrontational issues by conferences and labor-management committees before the

69. See Cohen, Emerging Problems for Future Deregulators, 53 Antitrust L.J. 185, 186 (1984): "Imposing policy constraints upon an industry tends to handicap some players more than others, and in competitive industries—presumably the point of deregulation—players with significant handicaps may not survive. Compensating for policy handicaps with additional regulations is extremely difficult and can produce serious problems."
pressures at the bargaining table are exerted, arbitrate grievances in the classical way during the contract term, and, if authorized, arbitrate new contract terms that the parties, and he as mediator, have been unable to resolve.

I have had two long term and successful experiences with this omnibus and multi-role arrangement. The first was my ten years as impartial chairman between the City of New York and its two fire unions. The second is my present and for the last ten years impartial chairmanship in the New York Nursing Home industry. In both settings I served as the contract grievance arbitrator; the mediator of contract negotiations; the fact-finder and arbitrator of unresolved contract issues; the impartial chairman of the administration of the contract, and, in my view, most innovatively, a continuing consultant to both sides for formal or informal “declaratory judgments” on what the contract would or would not permit, and how new contract arrangements could be introduced into the relationship with the greatest chance of success. All this resulted from economic conditions similar to the consequences of deregulation. And while the parties were publicly adversarial, if not antagonistic, privately they sought accommodations with which both could live and retain their respective integrities.

During the fiscal crisis of the City of New York, I helped to work out between the City and the fire unions, new firefighting techniques, which utilized less manpower and reduced costs, but which nonetheless protected the community and maintained basic employment. Phrases such as “adaptive response,” “tactical control units,” “weighted response index,” “flexible manning” and “relocation” were code names for significant manpower and operational changes which the parties agreed to, and which I am persuaded, because of their highly controversial nature, could not have been agreed to without neutral assistance. Regularly, I conferred with the Fire Commissioner and the officers and Executive Boards of the Unions to advise on the proscriptive or permitted nature of proposed actions. Though traditionalists oppose service as mediator and arbitrator by the same person, I find both roles simultaneously or sequentially to be highly useful and effective. Clauses I helped write as the mediator I interpreted later (and think correctly) as the Arbitrator, because I personally knew their meaning, intent and purpose. That I continued for ten years in those “free-wheeling” capacities, attests to the effectiveness and acceptability of the idea.

My experiences and roles in the nursing home industry have been even more varied. I began over a decade ago as the “factfinder”
appointed by the Federal Mediation and Conciliation Service under the health care provisions of the National Labor Relations Act. Because the contract negotiations were not ripe for factfinding, I transformed myself, with the agreement of the parties, into a mediator. Ultimately the contract was settled, part by negotiation, part by mediation, part by mediator recommendations, part by agreement for me to arbitrate "outstanding issues" at a later date, and part by reference of some issues to labor-management committees which I was to chair. But the most unusual role for the neutral in that setting was to resolve financial disputes, not between the employers and the Union, but between the employers and the State of New York over medicaid reimbursements.70

For years the State and the Nursing Homes were in bitter disagreement over the adequacy of public reimbursement for medicaid patients.71 Regularly, strikes took place or were seriously threatened because the Homes claimed they could not meet any of the Union demands unless the medicaid reimbursement rates were increased to pay for it.72 The State, which refused to participate in the bargaining, regularly claimed that the reimbursement to the Homes was adequate to cover the new labor costs and more importantly "deregulated" the reimbursement from repayment for actual costs to a complicated formula that ignored certain costs altogether or parts thereof.73 Under that circumstance bargaining impasses between the industry and the Union were inevitable. In my continuing neutral role, I persuaded the State Officials and the industry that for sensible labor relations with the union, in a service vital to the public welfare, the underlying financial dispute between the Homes and the State had to be resolved, or a mechanism for resolution had to be constructed. We did the latter.74 We established a Labor Cost Review Panel with authority during the labor contract term to decide the adequacy of medicaid reimbursement rates between the State and each Home.75 It was an arbitration panel, the parties were the State and the Home, but the other directly affected parties, if not

71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
"third party beneficiaries," were the Union and the industry and their collective bargaining relationship. With the establishment of the Panel, the Union and the Homes were able to negotiate new labor agreements, and, if the labor costs thereof exceeded the State's reimbursement rate, the Homes could appeal to the Panel for a determination and for an Award raising the rate to the adequate level. The State had the corresponding right to recover reimbursement monies that exceeded the costs, thereby preventing "windfall profits."

I was asked by all concerned to serve as the Chairman of the Labor Cost Review Panel, and did so for the several years it existed, in addition to other neutral capacities between the industry and the union which I already occupied. Decisions were rendered which both sides could accept, but which they could not have negotiated directly.

In my view, in both the fire contract and the nursing home agreement, the continuing services of the neutral in varied, even unique roles, played a major part in dispute resolution, contract negotiations, protection of the public interest as well as the legitimate interests of the parties. I think it brought unusual stability to relationships that had been volatile, acrimonious, and plagued by economic realities resulting respectively from "deregulation" of the Medicaid reimbursement arrangements and from a severe fiscal crisis with similar economic symptoms.

I would like to see each major industry and its unions experiment over a period of years with the use of an "institutional neutral" vested with the type of authority I possessed in my two foregoing examples, and not confined to arbitrating grievances arising from the contract or even contract terms at the time of formal collective bargaining. We may very well find a new and additional tool for dispute resolution that helps prevent strikes, confrontations and the disruption of services production and employment and which may be especially useful when new economic realities confront both sides as a result of deregulation.