

# INDUSTRIAL RELATIONS IN THE PUBLIC SECTOR

## U.S.A

### WILLIAM B. GOULD

The modern American labor law system relating to collective bargaining and industrial relations has emerged from a swirl of common-law, anti-trust and statutes relating to labor injunctions, damage actions and criminal prosecutions. The modern labor law framework is to be found principally in the National Labor Relations Act of 1935 (initially called the Wagner Act) which has been amended in principal respects on two occasions in 1947 and 1959. It covers the private sector, explicitly excluding the public sector which is the subject of separate legislation at federal, state, and local levels but the National Labor Relations Act's procedural and substantive framework have had an influence on most public sector labor legislation.

Because of the National Labor Relations Act's doctrine of preemption which is rooted in the Supremacy Clause and the Commerce Clause of the Constitution and provides for the dominance of federal law where Congress has legislated in detail, most labor law relating to the private sector is federal law. Collective bargaining in railways and airlines is covered by a separate federal statute, the Railway Labor Act of 1926. Most public sector law is state or local law.

The National Labor Relations Act establishes a system of unfair labor practices to determine codes of behavior and conduct between labor and management in their dealings with one another in both organized and unorganized facilities (most of the disputes arising out of the Act arise out of union organizational campaigns) and representation elections are conducted by secret ballot usually at the plant where the employees are employed, though some are on neutral ground or conducted through mail or post. Under the Railway Labor Act where virtually all the elections are by mail, the National Mediation Board which, as its title implies, mediates disputes as well, conducts representation elections to determine whether workers wish to be represented by a union or not. The National Labor Relations Board, one of the New Deal administrative agencies created by President Franklin D. Roosevelt, conducts the elections and resolves so-called unfair labor practice disputes - a function which is not performed under the Railway Labor Act.

Orders issued by the NLRB are not self-enforcing and enforcement is obtained through the circuit courts of appeals, the level of the federal judiciary which is just below the United States Supreme Court. The same pattern exists for public sector law. When labor or management does not comply with an order which has been enforced, contempt proceedings (which can involve both civil and criminal penalties) take place before the courts and not the Board or comparable public sector labor agencies. Since the 1947 Taft-Hartley amendments to the Act, the Board is essentially split into two sections, the so-called judicial side of the Board which consists of a five member Board with its principal offices in Washington DC. On the other side, also with its offices in Washington DC, is the prosecutorial side of the Board which is headed by a General Counsel. Both the five members of the Board including its Chairman as well as the General Counsel are appointed by the President of the United States, with the advice and consent of the United States Senate as provided for by the Constitution. Generally speaking, this structure is also replicated in the public sector.

However, public sector administrative agency structure in the United States remains a patchwork of disparate legislative regimes, varying dramatically from state to state. For example, Illinois has the odd distinction of possessing a trifurcated labor board. The Illinois collective bargaining act, fraught with political haggling among regional cliques and interest groups, resulted in separate boards - one dealing exclusively with teachers, the other two geographically divided between Cook County and the rest of the state. Illinois' belated entry (did not enact public sector legislation until the 1980s) is in stark contrast to other industrial states like New York, which was among the forerunners in this area, and which possesses a single centralized authority to administer its law.

Unlike most countries, the public sector labor management relations system was slow to evolve. In the early 1960s only Wisconsin had a public-sector labor law statute which was of any significance or breadth. In 1962 Wisconsin authorized the creation of an administrative agency, the Wisconsin Employment Relations Board, modeled after the NLRB whose expertise was presumed to be superior to that of courts of general jurisdiction, whether at the federal or state level.

In 1962 President John F. Kennedy promulgated Executive Order 10988 which provided for a modified form of collective bargaining. It also contained arbitration, which though traditionally binding in the private sector by virtue of the Taft-Hartley amendments to the National Labor Relations Act which made collective bargaining agreements enforceable, were advisory at the level of federal sector public employees.

The American system of labor law contains a number of characteristics which are relatively unique and peculiar by international standards. In the first place, the National Labor Relations Act excludes from its coverage public employees, agricultural workers, domestic servants, managerial and supervisory employees and some employees of enterprises of the Indian Tribes. The statutory scheme of both the National Labor Relations Act and the Railway Labor Act as followed insofar as all of the public sector statutes confer exclusivity of representation upon a labor organization if it garners the support of a majority of employees within an appropriate unit or grouping of them. Expression of majority support can be manifested through secret ballot box elections conducted by the administrative agency in question or through other manifestations of support such as authorization cards executed by employees or employee petitions. All workers included in the unit whether members of the union or not, are governed by the wages, hours and working conditions negotiated by the union under the collective bargaining agreement with the public employer. Sometimes in industries like professional sports and entertainment the individual contracts of employment will play a major role in the salaries although even under such circumstances generally the parties will have agreed to a minimum salary in the collective bargaining agreement itself. Such individual bargaining is the exception and not the rule in the public sector as well.

Employees are grouped together as part of one appropriate unit usually in one plant or facility but also at the company level and - where there is consent by both sides - on a multi-employer or industry-wide basis. The key consideration in determining whether employees constitute an appropriate unit is whether they enjoy a "community of interest" with one another. This community of interest test has governed both the private sector and the public sector. Indeed, as noted above and below, much of the law and practice in the public sector is borrowed and derived from the National Labor Relations Act itself.

International labor standards in the form of the International Labor Organization (ILO), Conventions and Recommendations - even those relating to the right to organize and engage in collective bargaining - have little relevance to the American labor law scene in either the private or the public sector. The reasons for this are numerous, but one of the traditional justifications for the refusal to ratify in the United States has particular applicability to the public sector i.e., the United States in a federalist system and the national government cannot bind the states on such matters. Since public sector labor law is principally state and local labor law, this argument has particular resonance in this arena.

Except for the strike issue it can be said that the confluence of the Constitution and public sector labor law protection mean that most of the ILO standards are adhered to - at least in those jurisdictions where labor law protections have been enacted.

Of course insofar as the law is concerned, the tardiness of collective bargaining in the public sector is fundamentally attributable to the fact that the National Labor Relations Act excluded all public sector employees from its coverage and left such workers to utilize state labor law, local ordinances and federal law like the Executive Order 10988.

The legal concept of sovereignty made it difficult for unions in that it held that government was supreme and that public employees had no rights which could be asserted against their employer without the employer's consent. A second idea very much related to this was that elected officials could not delegate their responsibilities to others. Collective bargaining and arbitration were considered to be inconsistent with the Democratic process and the idea that officials were responsible only to the voters and not to trade union was thereby promoted. Moreover, some of the job protection associated with negotiated grievance arbitration machinery in the private sector was already contained in the civil service legislation prior to the advent of unions in the public sector.

Another obstacle to the development of collective bargaining in the public sector involved some of the peculiar problems in adapting the model of collective bargaining developed in the private sector to the business of negotiating terms and conditions of employment in the public employment arena. The identity of the employer was and is a fundamentally vexatious problem. Unlike the private sector, decisions involving a

public employer relate to a budget making process and the decisions which are inevitably political involving both budget allocations and tax decisions. Even where the difficulties in identifying the employer that negotiates at the table as a party responsible for raising the necessary revenues that are required as the result of a bargained-for agreement with the union are overcome, frequently supplementary appropriations are provided to local governments by the state legislature. Accordingly, an "end run" process is encouraged by this phenomenon.

Finally, the earliest public sector unions were generally occupational groups representing teachers, transit or sanitation workers and the skilled trades. While bargaining is fragmented occupationally, there are difficulties in the bargaining process because the employer rather than the union must resolve competition between various working groups and classifications involved. In the private sector this is one of the reasons why there has been a disproportionate amount of discord and disputes in industries like maritime, construction, printing and newspapers. Complicating the problem of fragmentation in the public sector further was the existence of government-wide classifications and working conditions mandated for them often by legislation. Finally, was the seemingly insoluble problem of the right to strike; an obstacle to the growth of unions and collective bargaining in the public sector. It is guaranteed in the private sector with certain limited exceptions such as certain kinds of secondary boycotts and so-called national emergency strikes effecting the health and safety of the nation. Was the strike weapon as a method for resolving differences between the parties which had been so well accepted in the private sector properly applicable to the public sector? Distrust of the unions and their willingness to use this weapon retarded their acceptance in the public sector.

In recent years state and local legislation has grown considerably. At the end of 1998, 6.9 million workers at all levels of government were unionized, comprising 37.5 percent of total government employment. This growth contrasts to the largely stagnant private sector workforce which has declined steadily since 1955.

41 of the 50 states in the Union have fairly comprehensive legislation protecting the right of public employees to both organize and bargain collectively. Through some states provide that the public employer is only required to "meet and confer" with the union, the obligation to meet and confer is in most circumstances the rough practical equivalent of the duty to bargain in good faith which has evolved under the National Labor Relations Act itself. The same trend prevails at the federal level for federal employees, notwithstanding the fact that federal employees have no right to negotiate wages. At the federal level Congress has replaced the Executive Order initially promulgated by President Kennedy with the Civil Service Reform Act of 1978.

One reason for the swift and continued growth of public sector unions is the unwillingness of public employers to campaign as vigorously and aggressively against unions as their private sector counterparts do. This appears to be attributable to the greater political sensitivity of public employers which frequently do not wish to antagonize unions or union voters.

However, many state governments have been slow or reluctant to subscribe to the venerable tradition of protecting the rights of collective bargaining. Maryland, despite adhering to a long-standing executive order promoting the rights of collective bargaining, only recently codified this policy in legislation. Stranger still, New Mexico recently allowed its collective bargaining laws to expire, leaving its workers there high and dry without protective legislation.

The Postal Reorganization Act of 1970 created an independent entity within the executive branch of the federal government and postal employees were subject to the National Labor Relations Act. This growth contrasts to the largely static private sector union workforce. However, prohibitions against strikes by federal employees apply to postal workers and therefore the Postal Reorganization Act provides for its own dispute resolution procedures which culminate in arbitration. Striking federal employees can be punished not only with dismissal, but also with felony criminal charges (the strike is discussed in more detail below).

The development of unions and collective bargaining in the public sector seems to have been promoted by a number of factors. The first is that teachers became particularly active and that two large organizations, the American Federation of Teachers and the National Education Association were in competition with one another for their membership. As more men came into public education in the 1960s at the junior high-school level and sometimes below the pressure for more wages seems to have mounted.

Second, the enactment of state statutes modeled after the National Labor Relations Act promoted collective bargaining was helpful. In part, this was the mirror-image of the agitation and social upheaval of the 1960's of which employees (particularly in the public sector) were a part.

Third, public employees were deemed by the courts to have a constitutional right to union membership that was protected by freedom of association under the First Amendment. Even though most state statutes enacted legislation providing for the exclusive right of unions to bargain for all employees within the appropriate unit as in the private sector, the Supreme Court also held that union representatives have a constitutional right to speak at open school board meetings. And in 1985 the Court held that the Due Process Clause of the Constitution mandates that some pretermination process must be accorded public employees who can be dismissed only for cause. The Court has held that minority unions can be constitutionally denied access to teachers mailboxes and the inter-school delivery system thus, promoting the effectiveness of representation though exclusivity in the state's view. Moreover, the Supreme Court, again deferring to the very same interests relating to effective representation through exclusivity has held that the exclusion of non-members from "meet and confer" sessions on employment-related matters, which are not subject to mandatory collective bargaining is constitutional.

Labor law as it has evolved in the public sector has frequently provided more employees protection than its private counterpart. For instance, while supervisors are uniformly excluded in the private sector, they are frequently covered in the public sector so long as separate units and sometimes unions are provided. At the federal level under the Civil Service Reform Act of 1978 the supervisors are excluded from the right to organize and collective bargaining, just as they are under the National Labor Relations Act itself.

Sometimes special categories of employees such as residents and interns in hospitals previously excluded from the National Labor Relations Act have been covered in the public sector in states like California. (By virtue of a 1999 ruling today the NLRB includes such employees as well.)

Similarly, California, for instance, has provided collective bargaining protection for graduate student instructors in state universities as employees within the meaning of public sector legislation. Though the NLRB has had cases before it for many years, it has not resolved this issue in the private sector.

The duty to bargain issues arising in the public sector resemble those in the private sector in that they relate to wages, hours and working conditions - although wages cannot be bargained in the federal sector. But there are special issues such as the question of whether, for instance, the police can wear firearms and whether they are required to live in the area for which they have responsibility to police. The Supreme Court, in interpreting the Civil Service Reform Act, has assumed that the adversarial system which prevails in the private sector has applicability to the public sector. Grievance arbitration machinery so common in the private sector as it relates to so-called rights disputes involving interpretation of the collective bargaining agreement, has been accepted in the public sector as well. And the state judiciary has adopted the same general stance of deference toward such private systems of dispute resolution as has been true in the private sector.

The greatest conundrum in the public sector relates to the question of whether public employees should have the right to strike. Most jurisdictions including at least 37 of the states as well as the federal government prohibit striking either by common law or by statute. In some jurisdictions there is a limited right to strike which permits workers other than so-called essential employees such as police, fire-fighters, and prison-guard workers to strike, sometimes only after the exhaustion of impasse procedures which are designed to resolve disputes about new contract terms.

The substantive provisions of these state laws differ. For example, example only Alaska, Hawaii, Idaho, Illinois, Minnesota, Montana, Ohio, Oregon, Pennsylvania, Vermont and Wisconsin offer limited striking rights. Limitations are imposed in a large part due to the public safety concerns implicated by the absence of those employed in often-crucial public services. Ohio, for example, imposes extensive mediation before the right to strike will be granted. Frequently, state courts will have injunctive powers to prevent illegal strikes. Sometimes, as in New York, the law imposes monetary sanctions on unlawful strikers.

The argument on behalf of the right to strike for public sector employees is that it is impossible for the collective bargaining process to operate without the possibility of strikes. That is to say, unless the employer is faced with an actual shut-down and an inability to operate, it has no genuine incentive to compromise and negotiate in good faith. Moreover because the line between the private and the public sector is often difficult to draw sharply, an absolute prohibition appears to be arbitrary. For instance, during the 1966 transit strike in New York, public employees on one bus line were prohibited from striking altogether by state labor legislation because they were within the public sector but employees on another line, operating on nearby streets, were protected in their right to strike because they were employed by private operators of public utilities which are covered by the National Labor Relations Act itself.

Cutting against the argument of arbitrariness as a basis for allowing public employees to strike is the view that since the line is difficult to draw between industries which are essential and those which are not, the doubt should be resolved in the other direction. Most commentators have stated that police and firefighters should not have the right to strike. But after this there is little consensus about where the line should be drawn. Many teacher disputes which have arisen in the United States have stirred controversy about the propriety of the strike in public education. Is a strike of teachers one which affects the health and security of the community? How long must the strike be to qualify? Woven into this is the fact that in an era when both parents are working there is increased concern about the well-being of the children during the school day when school is not in session due to the strike.

If one group of workers have a particular process through which to resolve their dispute as a kind of substitute for the strike itself, such as compulsory arbitration, a generous award may have the affect of cutting into the available resources for wage-increases for others. It can be said that there are instances where a generous arbitration award for police and fire-fighters have encouraged strikes by other workers who are forbidden to strike, notwithstanding that fact that they are not as essential as police and firefighters. And on the issue of essentiality, it may be that a garbage strike in July is something very different from one in January or February.

Opponents of the right to strike for public sector employees state that by establishing some kind of demarcation line between essential and non-essential services, one is basically granting the right to strike as a matter of law where it would hurt the employer and prohibiting it where it would not. The example that I have given is, for instance, the lawn care at the governor's mansion and the gardener who mows the governor's lawn presumably performing a non-essential service. But this may simply allow the strike to take place where the strike is less important.

The pattern of trade unionism, based as it is frequently upon occupational categories, also is a matter of concern in connection with the strike. In multi-union industries the strike has often caused major problems and made them the "sick industries" from an industrial relations perspective. Classic illustrations of this proposition outside the public sector are newspaper, printing and maritime.

If a right to strike is granted to one union, how will other unions that are prohibited from striking react to picket lines in front of the municipal government's facilities? Woven into this consideration is the long-standing tradition on the part of workers not to cross a picket line. It is possible that the right to strike for certain employees could produce general strikes under certain circumstances, a result which most of the public and observers would not want to see materialize in the United States.

The major argument that has promoted some protection for the right to strike in the public sector is the fact that strikes are taking place in any event whether the law prohibits them or not. Even with the decline in strikes in the private sector over the past decades, strikes in the public sector continue to occur with some measure of frequency. According the right to strike to public sector employees would simply take into account the reality on the ground. Fines and contempt penalties on strikers, so goes the argument, may produce a lack of respect for the law and the judiciary. Even decertification of the strikers union, such as the tactic employed against the famous unlawful air traffic controllers strike in 1981, does not always work effectively.

Most of the recent discussion and debate about disputes in the public sector has shifted towards substitutes for the strike. Fact-finding is the most prevalent and well-tested of these methods. The virtue associated with fact-finding is that it is a judicial and formal proceeding in which the issues are addressed in a formal report with recommendations. The theory of the process is that the unreasonable party will have the weight of public pressure against it and will thus yield or modify its position. This is thought to be especially true in the public sector where parties are more sensitive to those who pay taxes and cast votes.

A substantial number of jurisdictions in the United States provide for fact-finding to resolve disputes about the new terms of contracts between the parties as a substitute for the strike and this is one of the options now made available in the federal sector, notwithstanding the fact that wages are not bargained in the federal sector. But fact-finding has not always worked as well as anticipated. Sometimes the recommendations get scant attention and thus the opportunity to galvanize support behind the recommendations in place consequent pressure on the resisting party is minimized. Sometimes the party that sees the report going against it will harden its position and the dispute will become more difficult to resolve as a result. Fact-finding,

of course, does not provide for finality the way that an arbitration award does. The most prominent sector where arbitration has been used at the federal level is in the United States Postal Service and the inadequacy of alternate measures under some circumstances is what has prompted the use of this procedure both at the federal level and in those states which have used compulsory arbitration.

Lately, there have been many social and economic trends faced in common by all the state collective bargaining regimes. Most prominently, the widespread belief that the private sector firms are capable of working more efficiently and cost-effectively, has led state governments to privatize and outsource much formerly public sector work. Where the jobs have not been formally outsourced, public sector agencies have frequently been forced to resort to other means to keep down costs, and to remain cost competitive with private sector providers. For example, some public sector employees have engaged in the hiring of temporary workers, thus supplanting their traditional union work force, and potentially undermining the bargaining efficacy of public sector unions.

The recent privatization trend has given rise to more work in the private sector which is technically under private control, but over which the contracting government agency possesses a great deal of authority. Such cases involving captured private employers are governed by the National Labor Relations Act, and employees enjoy the full panoply Guaranteed therein. *Management Training* 317 NLRB 1355 (1995). Moreover, private contractors who take over operations of unionized public employers are deemed successors within the meaning of the National Labor Relations Act and the bargaining obligation attaches to the new employer. *Lincoln Park Zoological Society* 322NLRB 263 (1996). These entities thus do not fall into a statutory vacuum, beyond the reach of collective bargaining legislation but they have diminished the significance of public sector labor law and increased the importance of the National Labor Relations Act.