

broad spectrum union activity and, whilst this is not the core of the average union official's work, it is how it is perceived by women. Their interrupted pattern of wage work, the fact that they do the shopping at lunch time and dash home at knocking off time means that they are immune to the influences which bear upon the socialisation of men in the work place. This means that the unions must not only identify the work place and acquire "agents" to act within and upon its women occupants; it means that they must sally forth into the marketplace. Which means, I would suggest

finally, what I would term "shop-front" action: a "presence" in Citizen's Advice Bureaux, in vacant shops (and there are likely to be a lot of those in the next few months) in neighbourhood law offices and in public libraries. Women will become involved in the labour movement if they are given a role within it and can see their sisters prominent in its activities. The route to this is an emphasis upon caring roles, which should not be too difficult for unions to produce, given that it is, public opinion and the Prime Minister to the contrary, their reason for existence. ☉

# Impasse Procedures: THE AMERICAN EXPERIENCE

\* DON J. TURKINGTON

## INTRODUCTION

Recent American industrial relations have been characterized by experimentation with alternatives to the strike. Much of this experimentation is the result of public sector workers gaining access to collective bargaining while continuing to be denied access to the strike. In the United States, as in many countries, governments have taken the view that their employees should not strike. Considerations of public service, sovereignty and representative democracy, essentiality of government services and of the lack of some private sector restraints underlie this view.<sup>1</sup>

The emergence of public sector unions and collective bargaining presented a dilemma. Either these unions would be relatively powerless or they would break the law. Procedures to promote genuine bargaining or, in the event of an impasse, to provide an acceptable settlement were seen as the way out of the dilemma. An examination of some of these procedures is the subject of this paper. Such an exam-

ination is particularly relevant to a country like New Zealand where most strikes in both private and public sectors are illegal.

## MEDIATION

Sometimes an attempt is made to distinguish between conciliation and mediation. Conciliation is seen as the passive role of facilitating the procedure of bargaining and of attempting to keep the parties

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<sup>1</sup>—An examination of these procedures lies outside the scope of this paper. For discussion of some of them see, for example, Jack Stieber, "A New Approach to Strikes in Public Employment," in Carl H. Madden (ed.), *Strikes and the Public* (Chamber of Commerce of the United States, Washington, D.C., 1970) pp. 20-28.

talking. Mediation is, in addition, seen to involve the active role of suggesting compromises and alternative solutions. In the U.S., as in New Zealand, these roles are largely inseparable and we will make no such distinction.<sup>2</sup> Mediation, in this traditional sense, is sometimes called "tactical mediation" and is widely supported.<sup>3</sup> It frequently appears successful, if only because of its widespread use in disputes which of necessity must end. Most disputes arise with a view to settlement and, because of the absence of a quantifiable test of efficiency, it is not clear whether mediation leads to more or less conflict than would otherwise result. Moreover, mediation is relatively costless, flexible and easy to apply. It is further assistive rather than assertive. Kerr suggests its potential contributions lie in reducing irrationality, removing nonrationality (clarifying understandings of "reality"), exploring solutions, assisting in the graceful retreat and in "saving face," and in raising the cost of conflict by focusing public wrath, by threatening retribution and so on.<sup>4</sup>

Despite its apparent success and its widespread use in public and private sectors, mediation does not invariably remove or even reduce the level of conflict. The same could of course be said of all devices of conflict regulation. While, as noted, mediation can under certain circumstances impose costs on the parties, these circumstances are rare. Normally, the mediator is merely an advisor in no position to increase the costs of disagreement to the parties. Thus, particularly where conflict has positive values for one or both of the parties, the mediator may be unable to promote settlement. He may even encourage conflict. An unskilled mediator may increase irrationality and nonrationality, suggest un-

workable "solutions" and prevent graceful retreats. Even when he is skilled, the mediator may aid the parties to fight as well as to retreat. Further, clarified understandings of "reality" need not necessarily be more conducive to settlement than the earlier-held misconceptions. And even when skilled, the mediator may be used to make the situation appear different from what it really is, a tactic Kerr calls "for-the-record" mediation.<sup>5</sup> An example is where his participation convinces the public of the good faith of attempts to reach settlement and so makes it easier to strike.

Tactical mediation is obviously no panacea for conflict. It is also obvious that the argument that use of mediation should be general because at most it will leave the level of conflict unchanged from what it would otherwise have been is incorrect. Mediation can frequently reduce conflict but at times other procedures should supplement it or be used instead of it. Tactical mediation is widely used in the private sector and increasingly so in the public sector. The Federal Mediation and Conciliation Service was involved in about 20,000 mediation cases in the fiscal (June) year 1976,<sup>6</sup> the vast majority of which involved disputes of interest.<sup>7</sup> In that year, public sector cases increased by nearly 70 per cent,<sup>8</sup> partly reflecting the heavy reliance placed on mediation in public sector collective bargaining statutes.

A form of mediation rapidly gaining in popularity is what Kerr calls "preventive tactical mediation"<sup>9</sup> and the FMCS calls "preventive mediation"<sup>10</sup> or "technical services and assistance."<sup>11</sup> This deals with the relationships of the parties in general, attempting to shape them in a way which will minimize future conflict. It typically involves training, consultation and "prob-

2—This stance is adopted in much of the conceptual literature on mediation. See Charles M. Rehmus,

"The Mediation of Industrial Conflict: A Note on the Literature," *Journal of Conflict Resolution*, Vol. 9, March 1965, p. 119 and William E. Simkin, *Mediation and Dynamics of Collective Bargaining* (Bureau of National Affairs, Washington, D.C., 1971) pp. 25-27.

3—Clark Kerr, "Industrial Conflict and its Mediation," *American Journal of Sociology*, Vol. LX, Nov. 1954, p. 236.

4—Kerr, *op. cit.*, pp. 236-239.

5—*Ibid.*, p. 239-240.

6—See *Federal Mediation and Conciliation Service Annual Report No. 29*, Fiscal Year 1976, U.S. Government Printing Office, Washington, D.C., p. 27.

7—The FMCS limits its involvement in rights disputes to "exceptional grievance disputes." For the case for wider use of mediation in U.S. grievance procedures generally see William H. McPherson, "Grievance Mediation Under Collective Bargaining," *Industrial and Labor Relations Review*, Vol. 9, January 1956, pp. 200-212.

8—See *FMCS Report No. 29*, p. 18. It should be noted that state and local agencies provide a high proportion of neutral services in the public sector.

9—Kerr, *op. cit.*, p. 243.

10—J. Curtis Counts, "The Potentials and Limitations of Mediation as an Impasse-Resolving Technique," in *Collective Bargaining Today: Proceedings of the Collective Bargaining Forum—1969* (Bureau of National Affairs, Washington, D.C., 1970) pp. 313-315.

11—*FMCS Report No. 29*, ch. V.

lem-solving" activities. As a long-term effort to change attitudes of the parties, its efficiency in regulating conflict is even more difficult to ascertain than in the case of tactical mediation. Despite this, technical assistance activities of the FMCS rose by nearly 100 per cent in the three fiscal years ended 1976.<sup>12</sup> One-quarter of these activities are now in the public sector.<sup>13</sup>

#### Med-Arb (Mediation-Arbitration) and Arb-Med (Arbitration-Mediation)

Mediation imposes little pressure on the parties to settle. The med-arb procedure is intended to increase that pressure. It involves a person or panel mediating the bargaining or negotiating process and arbitrating issues not resolved by that process. The presence of a third-party is seen as an incentive for the parties to reach their own settlement since, should they fail to do so, a settlement will be imposed. While there is a strong preference in the literature for negotiated settlements, this reasoning assumes that the parties will also prefer their own settlements to arbitrated ones. But this need not be so, especially where one party is much weaker than the other. Indeed, one of the arguments against interest arbitration is that its very presence may discourage bargaining and increase the reliance on arbitration (the "narcotic effect").<sup>14</sup> Clearly, the effect of med-arb on bargaining is ambiguous.<sup>15</sup> As Aaron points out, it can work only if the parties are determined to reach settlement but require third-party involvement because they need new ideas or need a face-saver.<sup>16</sup> Under such circumstances, ordinary mediation and other procedures are also likely to work although the potential for face saving may be greater under med-arb or arbitration-mediation.

Another case of the overlap of impasse settlement procedures is arb-med or arbitration-mediation.<sup>17</sup> In jurisdictions

where compulsory arbitration has been adopted, it appears that arbitrators do mediate. Indeed, some arbitration statutes, as in Michigan, invite arbitrators to mediate.<sup>18</sup> Proponents of this procedure argue it allows the parties to retain a sense of direct participation in the outcome of the arbitration process. While evidence is difficult to gather and is seldom presented, several authors claim that arb-med is effective in narrowing differences or producing voluntary settlements.<sup>19</sup>

The nature of med-arb and arb-med makes it difficult to establish the extent of their use. But that these expressions have been coined only recently suggests increased popularity. The proliferation of collective bargaining statutes in the public sector, particularly those providing for arbitration, undoubtedly accounts for much of this increased use.

#### FACT FINDING

Fact finding and mediation have common or at least similar potential functions. The processes differ in procedure and degree. Fact finding involves a person or panel evaluating information presented by the parties to an impasse and making public but not binding recommendations for settlement. There are of course variations. The fact finder may collect information himself, recommendations may not be made public or not be made at all and so on. Fact finding is usually intended to follow mediation.

The case for fact finding incorporates several elements already mentioned and runs as follows:<sup>20</sup> The parties to an impasse benefit from the findings of fact and the recommendations of a third party who indicates what he believes the "facts" of the situation are and what interpretation and conclusion ought be drawn from them. The recommendations are accepted as a substitute for conflict. The preparation for

12—*Ibid.*, p. 40.

13—*Ibid.*, p. 44.

14—See John C. Anderson and Thomas A. Kochan, "Impasse Procedures in the Canadian Federal Service: Effects on the Bargaining Process," *Industrial and Labor Relations Review*, Vol. 30, April 1977, pp. 283-301.

15—Proponents of med-arb argue that any arbitrated outcome from it is more predictable than under conventional arbitration and that this predictability further promotes settlement by the parties. Supporting evidence is as yet lacking.

16—Benjamin Aaron, "Procedures for Settling Interest Disputes in the Essential and Public Sectors: A Comparative View," in Morley Gunderson (ed.), *Collective Bargaining in the Essential and Public Service Sectors* (University of Toronto Press, Toronto and Buffalo, N.Y., 1975) p. 140.

17—See *Ibid.*, p. 140 and Charles M. Rehmus, "Is a 'Final Offer' Ever Final?" *Monthly Labor Review*, Vol. 97, Sept. 1974, pp. 43-45.

18—See Rehmus, *op. cit.*, p. 44.

19—See Aaron, *op. cit.*, p. 140 and Rehmus, *op. cit.*, p. 44-45.

20—This draws from Edward B. Krinsky, "An Analysis of Fact Finding as a Procedure for the Settlement of Labor Disputes Involving Public Employees," Ph.D. thesis, University of Wisconsin, 1969, ch. 3.

fact finding makes each party aware of the strengths and weaknesses of its own and its opponent's position which, in turn, makes each more conciliatory and receptive to resolution of the dispute. The publication of the fact finder's recommendations informs the public of the situation and of the solution to it and the public then exerts pressure on the parties to accept that solution.

The notion of a "fact" is a difficult one and nowhere more so than in industrial relations.<sup>21</sup> Impasses indicate differences over what the facts are and/or how they should be interpreted. The fact finding procedure is intended to force the parties to learn the facts and the merits of each other's arguments. What the facts of a situation are is a matter of interpretation, just as is their meaning. The procedure will not necessarily produce the same facts for each party. Moreover, facts learned through the procedure may convince a party not of the merit of the opponent's position but of its lack of merit, and so widen differences. Even where, as Krinsky argues is common, the parties are at least aware of the facts,<sup>22</sup> interpretations of them may differ. The fact finder's interpretation will be accepted, other things aside, only if it coincides with that of the party or if its rationale causes the party to change its initial interpretation. The latter will not always be the case for neither the party nor the process is always rational. As Krinsky points out, fact finding is necessarily a subjective rather than purely rational and objective process.<sup>23</sup> The facts do not speak for themselves. Decisions as to what they are, which are crucial and which approach should be used in arriving at recommendations all involve subjective judgments for which generally-agreed-upon criteria are lacking.

Should one or both of the parties be reluctant to accept the fact finder's recommendations, their publication may stimulate and focus public pressure so as to force acceptance. This process may, however, be subject to practical limitations. Often the public is not aware of the recommendations

or shows little interest in them. Moreover, in reality there is no such thing as the "public" but rather a diverse collection of interest groups. The parties may therefore receive both pressure and support, even to the extent that the "signals" from the "public" are quite ambiguous. Of course the purposes of parties directly or indirectly involved may be served by moving the disputes into the political arena, in which case the fact finding may have served a "for-the-record" or face saving function. Even where public opinion is mobilized and unambiguous, it may promote resistance rather than acceptance. A party which feels it is in the "right" and has been consistently discriminated against may now be confirmed in this opinion.

Fact finding has a long history in the private sector, being used under the emergency board procedure of the Railway Labor Act, 1926 and the Taft-Hartley Act, 1947 (which excludes recommendatory powers). In recent times it has been widely adopted in the public sector so that by January 1976 30 of the 37 states with public employee collective bargaining statutes had provided for it.<sup>24</sup>

#### Conventional and Final-Offer Arbitration

The fact finder's recommendations are advisory. Some see the solution to the problem of acceptance in making them binding, in other words, in arbitration. This involves the submission of an impasse to a third party who, after receiving information presented by the parties, makes a binding decision or award. That party may be a person or panel, appointed on a permanent or case-by-case ("ad hoc") basis. The procedure may be jointly agreed by the parties ("voluntary") or be laid down in legislation ("compulsory"). The main use of conventional arbitration in the U.S. has been in the settlement of grievances.<sup>25</sup> Interest arbitration is opposed on several grounds. It is said that the parties, especially in the private sector, are reluctant to have an "outsider" determine the conditions of employment,<sup>26</sup> especially if in all

21—See Don J. Turkington, *A Conceptualization of Industrial Conflict* (Occasional Paper in Industrial Relations, No. 17, Victoria University of Wellington, 1976) pp. 13-14.

22—Krinsky, *op. cit.*, pp. 69-70.

23—*Ibid.*, pp. 85-86.

24—See *FMCS Report No. 29*, p. 18.

25—The bases for acceptance of grievance arbitration are explored in Don J. Turkington "Grievance Arbitration and Conflict Regulation," mimeograph paper, 1977—available from author.

26—See Fred Witney, *The Collective Bargaining Agreement: Its Negotiation and Administration* (Report No. 25, Indiana University School of Business Bureau for Business Research, 1957) pp. 114-115.

probability he is "inexpert."<sup>27</sup> In the public sector, arbitration is seen as a delegation of the responsibilities of government which is inimical to representative democracy.<sup>28</sup> Furthermore, interest arbitration may promote extreme positions in negotiations rather than compromise (the "chilling effect"); and produce continued or increased reliance on it in future negotiations (the "narcotic effect") or, in contrast, lose its effectiveness as unions or employers become aware of its short-comings and attempt to circumvent it by using other tactics (the "half-life effect").<sup>29</sup>

The existence of the chilling and narcotic effects will obviously limit the chances of settlement through collective bargaining (or, as some put it, limit the chances for "good faith" bargaining). The implicit assumption is that a mutually agreed settlement is preferable to an arbitrated one (presumably because the parties will accept responsibility for something of their own creation).

The potential for testing these effects depends largely on the availability of data. In many cases testing can at best be only indirect. Anderson and Kochan found some evidence of their existence in the Canadian federal service experience.<sup>30</sup> But the nature of the public sector makes such a result not surprising or even very illuminating. In that sector, the chances of settlement through collective bargaining are from the start limited by the inability to credibly threaten or use conflict tactics. Even in the Canadian federal service, where a conciliation-then-strike option exists, the potentially strongest unions (those in activities designated essential to public safety and security) are denied the right to strike. Weak unions might be expected to display a preference for arbitration. Any movement

away from negotiation to arbitration or other procedures may reflect the initial inexperience of the parties and a desire to experiment.<sup>31</sup>

Of course the prime concern of American public sector legislation has not been to encourage the use of collective bargaining *per se* but rather to regulate conflict by providing procedures. The relevant question therefore is whether or not arbitration has led to more or less conflict than would have occurred in its absence (or in relation to other procedures), one that is very difficult to answer but is regrettably seldom even asked.<sup>32</sup>

This said, some states have in recent times expressed a preference for collective bargaining, or at least for negotiated settlements, in the public sector. Final-offer arbitration<sup>33</sup> was first proposed as a means of overcoming the alleged chilling and narcotic effects of conventional arbitration in 1966.<sup>34</sup> Its theory assumes that conventional arbitrators make compromise decisions or "split the difference." This encourages the parties to present extreme positions to the arbitrator rather than to compromise during negotiations. The potential costs of disagreement are low relative to the possibility-of-strike situation. Bargaining is discouraged and arbitration encouraged.

Final-offer arbitration attempts to inject some of the compromising effects of the strike into the procedure. It compels the arbitrator to choose between the final offers submitted by the parties, so eliminating the possibility of compromise. The costs of disagreement are raised as the party risks selection of its opponent's offer. Both are therefore induced to develop "reasonable" positions, a process that should result in them being so close together that they will

27—See Neil W. Chamberlain, "Strikes in Contemporary Context," *Industrial and Labor Relations Review*, Vol. 20, July 1967, p. 611.

28—See George H. Hildebrand, "The Resolution of Impasses" in Dallas L. Jones (ed.), *The Arbitrator, Arbitrators, and the Courts: Proceedings of the Twentieth Annual Meeting of the National Academy of Arbitrators* (Bureau of National Affairs, Washington D.C., 1967), p. 291 and Raymond D. Horton, "Arbitration, Arbitrators, and the Public Interest," *Industrial and Labor Relations Review*, Vol. 28, July 1975, pp. 497-507.

29—Anderson and Kochan *op. cit.*

30—Ibid.

31—Feuille concludes that, "There does not seem to be any consensus in the literature about the impact of a requirement to arbitrate on the incentive to bargain." (Peter Feuille, "Analyzing Compulsory Arbitration Experiences: The Role of Personal Preferences," *Industrial and Labor Relations Review*, April 1975, Vol. 28, p. 435).

32—A suggestion of awareness of this question is contained in the conclusion of Hoyt N. Wheeler, "Compulsory Arbitration: A 'Narcotic Effect'?" *Industrial Relations*, Vol. 14, February 1975, p. 120.

33—Also called either-or, last-offer, last-best, one-or-the-other, or forced-choice arbitration.

34—See Carl M. Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" *Industrial Relations*, Vol. 5, February 1966, pp. 38-52. For a recent statement of the theory see Peter Feuille, "Final Offer Arbitration and the Chilling Effect," *Industrial Relations*, Vol. 14, October 1975, pp. 302-310.

make their own settlement. The risk of losing all is the "strikelike" mechanism which produces compromise in a way that conventional arbitration does not.

Actual final-offer arbitration procedures display considerable variation.<sup>35</sup> In particular, some involve package selection (one party's offer on all disputed issues must be selected), and others issue-by-issue selection (one or other party's offer on each issue is selected).<sup>36</sup> One procedure permits the parties to submit two final offers (a "final" and "alternative" offer).<sup>37</sup> Some procedures permit "final offers" to be changed, or at least be submitted, during the arbitration proceedings while others do not.<sup>38</sup> These variations may have different impacts on the negotiation process.

Final-offer arbitration involves a possible policy conflict.<sup>39</sup> As described in the theory it is intended to maximize the incentive for the parties to settle. But in so doing it may also maximize the chance of inequitable arbitration awards. If the policy makers' objective is to achieve the former, the conflict will concern them little. With the notable exception of package selection, many of the variants are intended to provide some balance between pressure to settle and quality (or "equitability") of award. Issue-by-issue selection reduces the risk (and costs) of disagreement but the potential for compromise by the arbitrator created may produce a more equitable award. It may also have greater face-saving quality than package selection. Where the final offer can be changed, continuing negotiation is possible (and even encouraged) during the hearing, so the process has a tendency to become one of mediation-arbitration. The possible effect of the two-offer procedure is ambiguous. On the one hand, it may create an even greater incentive to settle than does pack-

age selection by increasing the parties' uncertainty about which offer will be selected.<sup>40</sup> On the other hand, it may hamper negotiations before arbitration, as the parties must leave themselves sufficient room on the disputed issues to support not one, but two, final offers.<sup>41</sup> If the legislators' objective is to encourage negotiated settlements the policy choice is clear. The form which makes it most costly for the parties to disagree is to be preferred.

Most empirical tests of the effects of final-offer arbitration involve time series comparisons of the proportion of total settlements reached through arbitration or cross-sectional comparisons of the proportions of negotiation cases in which arbitration was invoked, or in which an arbitration award resulted, under conventional and final-offer systems. The time series analyses are hampered by a lack of observations, covering at most only a few years. This factor, along with the lack of homogeneity of the systems compared (and of the environments within which they operate) makes cross-sectional analysis hazardous. Feuille admits that the evidence of the existing literature is "incomplete" but concludes that "final-offer arbitration procedures appear to have less of a chilling effect on bargaining than do conventional arbitration procedures."<sup>42</sup> At the very least, however, the evidence is neither unambiguous nor compelling.

The popularity of both conventional and final-offer arbitration appears to be growing. Conventional interest arbitration in the private sector has largely been confined to the "essential" industries. Parties in some other industries are now giving it attention. By January 1976 21 states had provided for arbitration in some or all disputes in their public sector collective bargaining statutes.<sup>43</sup> While it cannot be taken as

35—For the literature on actual schemes see Feuille, "Final Offer Arbitration" and James L. Stern, Charles M. Rehmus, J. Joseph Loewenberg, Hirschel Kasper and Barbara D. Dennis, *Final-Offer Arbitration: The Effects on Public Safety Employee Bargaining* (Heath, Lexington, Mass. 1975).

36—A novel form of public sector arbitration is that of Nevada which gives the governor authority, at the request of either party and prior to the commencement of factfinding proceedings, to order the factfinder's award binding on all or any issues. For analyses of it see Joseph R. Grodin, "Arbitration of Public Sector Disputes: The Nevada Experiment," *Industrial and Labor Relations Review*, Vol. 28, October 1974, pp. 89-102 and Aaron, *op. cit.*, pp. 140-141.

37—See Gary Long and Peter Feuille, "Final-Offer Arbitration: 'Sudden Death' in Eugene," *Industrial and Labor Relations Review*, Vol. 27, January 1974, pp. 186-203.

38—For one that does see Rehmus, *op. cit.*

39—See Feuille, "Final Offer Arbitration," p. 309 and Charles Feigenbaum, "Final Offer Arbitration: Better Theory than Practice," *Industrial Relations*, Vol. 14, October 1975, pp. 311-317.

40—See Long and Feuille, *op. cit.*, p. 188.

41—See Feigenbaum, *op. cit.*, p. 313.

42—Feuille, "Final Offer Arbitration" p. 309.

43—FMCS Report No. 29, p. 18.

Indicative of a trend, the number of interest arbitration cases handled through the FMCS rose from only 16 in the fiscal year 1975 to 68 in the following year.<sup>44</sup> Much of the increase is attributable to the public sector. Final-offer arbitration also has its greatest popularity in that sector. At least five states (Iowa, Massachusetts, Michigan, Minnesota and Wisconsin) and one city (Eugene, Oregon) have statutory provision for it. Final-offer procedures have been negotiated in some private sector collective bargaining agreements, for example, those of major league baseball players, and of some university faculty and construction labourers and operating engineers.<sup>45</sup>

### The Nonstoppage Strike

Another proposal intended to produce the compromising effect of the strike without recourse to it is the "nonstoppage strike."<sup>46</sup> This proposal has a long history and takes many forms. Its essentials are that work will continue after an impasse has been reached and that the parties will be subject to a penalty. It is intended to impose some of the private costs of the strike while avoiding the external ones.

Such a procedure involves a conflict between effectiveness and acceptability. To be effective, it must impose costs approximating those which would have resulted from a strike but, should it do so, the parties would be unlikely to adopt it. Why would workers in particular voluntarily adopt a procedure which in effect would penalize them for working? Musgrave and Marceau, the first proponents of the nonstoppage strike, recognized this dilemma but disagreed on what should be done about it.<sup>47</sup> Musgrave emphasized the need to approximate the costs of strike in arguing that penalties be permanently forfeited.<sup>48</sup> Marceau, on the other hand, stressed the need for acceptance in sug-

gesting that penalty proceeds be refunded to the parties by making the settlement retroactive.<sup>49</sup> The reasons for acceptance of the procedure given by Goble<sup>50</sup> and McCalmont<sup>51</sup> are not compelling or, in some cases, even convincing. Many of the potential advantages apply to other impasse procedures which impose no direct penalty.

A further conflict exists between effectiveness and calculability. The more effective the penalties, in terms of their degree of approximation to the hypothetical costs of strike, the more difficult they are to calculate. The economic effects of a strike are seldom calculable with any accuracy after the event, let alone before.<sup>52</sup> To duplicate even some of them through the temporary or permanent forfeiture of wages (by workers) or revenue or net profit (by employers) presents major practical problems. This measurement problem would further limit the chances of the parties agreeing to the procedure in advance. The pressures of an actual strike obviously cannot be duplicated. Many of the proponents of the procedure, by suggesting arbitrary penalties often of equal proportional or dollar amounts, do not even attempt to approximate them.<sup>53</sup> An even remotely accurate formula for calculating penalties is likely to be so complex as to be unworkable and unacceptable. But one which is understandable and easy to administer is likely to be so arbitrary and inaccurate as to also fail to gain the support of the parties. Clearly, the nonstoppage strike will produce relative costs different from those which would have prevailed had a strike occurred. This is true of other impasse procedures but again they do not involve the directness of penalty.

In a nonstoppage strike workers receive

44—*Ibid.*, p. 50.

45—See Feuille, "Final Offer Arbitration," p. 305.

46—Also called the semi-strike or the statutory strike. References to the literature can be found in William H. Foeller, "Economic Evaluation of Strike Alternative Proposals," *Labor Law Journal*, Vol. 28, June 1977, p. 335 and in S. L. Stokes Jr., "Nonstoppage Strikes: Rationale and Review," *Labor Law Journal*, Vol. 20, February 1969, p. 80.

47—LeRoy Marceau and Richard A. Musgrave, "Strikes in Essential Industries: A Way Out," *Harvard Business Review*, Vol. XXVII, May 1949, pp. 286-292.

48—*Ibid.*, p. 289.

49—*Ibid.*, pp. 289-290.

50—George W. Goble, "The Non-Stoppage Strike," *Current Economic Comment*, Vol. 12, August 1950, p. 7.

51—David B. McCalmont "The Semi-Strike," *Industrial and Labor Relations Review*, Vol. 15, January 1962, pp. 195-197.

52—See Don J. Turkington *The Economic Effects of Industrial Conflict* (Occasional Paper in Industrial Relations No. 19, Victoria University of Wellington, 1976).

53—See, for example, Stephen H. Sosnick, "Non-Stoppage Strikes: A New Approach," *Industrial and Labor Relations Review*, Vol. 18, October 1964, pp. 74-76.

less than their normal income but are expected to maintain normal rates of output. Reaction in the form of quits, reductions in work effort and even in collective slow-downs appears likely and, in many cases, difficult for the employer to counteract. Furthermore, in many conflicts workers in particular rely on external costs to indirectly place pressure on the opponent (the employer) to settle on their terms. In these, a procedure which seeks to eliminate external costs would be most unattractive to workers.

Problems such as the above account for the limited use that has been made of the non-stoppage strike. Its only recorded application was in 1960 by Miami bus drivers

and the Miami Transit Company and that was abortive.<sup>54</sup>

### CONCLUSION

There is no one best way to resolve impasses. Some procedures are more suited to particular impasses than are others, suggesting that a range is desirable. The breadth of this range, as indicated by the procedures examined here, attests to considerable experimentation, especially in recent years, by policy makers and the parties themselves. But, however innovative and ingenious they may be, impasse procedures will not eliminate strikes. Acceptance of this is explicit in some public sector legislation which provides for limited access to the strike.<sup>55</sup> ⊙

# THE COAL MINES COUNCIL

\* RALPH RINTOUL

## FOREWORD

This paper is intended as an introduction to a disputes resolving procedure peculiar to the New Zealand mining industry. To the best of the writer's knowledge no previous attempt has been made to describe this industrial tribunal (Coal Mines Council). I could find no trace of any in-depth study on the value of this and other industrial decision-making bodies in New Zealand. It has not been possible therefore to draw comparisons. The opinions expressed are those of the writer, and not necessarily those of the Mines Department, Coal Mine Owners or Miners' Unions.

## INTRODUCTION

Underground Coal Mining is an uncomfortable and often dangerous occupation demanding special skills. It is a job few people want to do, and even fewer can do. Those that actually work at it have for generations been an independent, hard working group of men who think they are special, and in fact, they are.

Ever since Unions were formed Miners have been in the forefront in progressive rule making procedures, for better working standards and conditions. The Coal Mines Council came into being as an indirect

result of representations made to the Minister of Mines by the Miners National Council in a letter dated 13 November 1939 which read as follows:

"The Miners National Council ask the Government to set up a Commission to inquire into all aspects of the coal mining industry.

The intention of the resolution is that the trading and social sides of the industry should be investigated as well as the mining side."

The Government decided to appoint a Royal Commission to inquire into all aspects of the Coal Mining Industry. This

54—See McCalmont, *op. cit.*, pp. 191-192.

55—The Canadian Public Service Staff Relations Act, 1967 gives bargaining units the option of either the arbitration or the conciliation-board and strike route for settling strikes. (See Anderson and Kochan, *op. cit.*). By late 1976 seven states (Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania and Vermont) had granted a limited right to strike in the public sector. (See FMCS Report No. 29, p. 18).

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