



# bulletin

FOR MEDIATORS / FACT FINDERS

PUBLISHED BY THE NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

JANUARY 1977  
(Vol. 8, No. 1)

## HAROLD NEWMAN'S CLOUDY CRYSTAL BALL

"And, behold, I come quickly; and my reward is with me, to give every man according as his work shall be."

Revelation 22:12

Despite certain administrative responsibilities with regard to both grievance and interest arbitration, our milieu is really mediation. The State of New York does not permit PERB conciliators to arbitrate in either the public or private sectors. We pray, however, never to be parochial. As the defendant urges in Gilbert and Sullivan's "Trial by Jury":

"You cannot eat breakfast all day,  
Nor is it the act of a sinner,  
When breakfast is taken away,  
To turn your attention to dinner.  
And it's not in the range of belief,  
That you could hold him as a glutton,  
Who, when he is tired of beef,  
Determines to tackle the mutton."

A friend of mine once suggested while we enjoyed a pleasant sojourn in Boston, that the last word of the Massachusetts memorial to Wendell Phillips which reads, "When the Muse of time shall be asked to name the greatest of them all, she shall dip her pen into the sunlight and write across the clear blue sky-Agitor", should be changed to-Arbitrator. With his membership in that hallowed profession, we suspect he was sincere.

We are not prepared to go that far in extravagant admiration of the profession and its practitioners. Nevertheless, most of the arbitrators we know - and we know many - are a highly civilized group. We certainly believe in the arbitration process, rights and interest. Alas, arbitrators and arbitration are currently being rather cruelly knocked about.

When the United States Supreme Court in the famed *Steelworkers Trilogy* decisions<sup>1</sup> established a presumption of the arbitrability of labor disputes, arbitration had seemed to come upon its Golden Age. The process had been blessed by the highest court in the land and the arbitrators were anointed. The decisions of the NLRB and the courts which followed over the years vastly expanded the importance of arbitration. We took note of the decisions such as *Boys Markets*,<sup>2</sup> the landmark case in which the Supreme Court held that the courts might not bar injunctive relief against the strike where the grievance leading to the work stoppage was subject to arbitration under the contract and the employer was willing to proceed to arbitration. Again, we noted a number of cases insuring survival of arbitration rights after company mergers or even after the liquidation of businesses.<sup>3</sup> Expanding the NLRB's splendid bow to arbitration in the *Spielberg* case in 1955,<sup>4</sup> we had *Collyer* in 1971,<sup>5</sup> and former NLRB Chairman Miller came to Albany and spoke at length to the PERB staff about the Board decision in *Collyer* to defer to the contractual procedure

<sup>1</sup> *Steelworkers v. American Manufacturing Co.*, US SupCt-1960, 46 LRRM 2414; *Steelworkers v. Warrior and Gulf Navigation Co.*, US SupCt-1960, 46 LRRM 2416; *Steelworkers v. Enterprise Wheel & Car Corp.*, US SupCt-1960, 46 LRRM 2423.

<sup>2</sup> *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, US SupCt-1970, 74 LRRM 2257.

<sup>3</sup> *John Wiley & Sons v. Livingston*, US SupCt-1964, 55 LRRM 2769.

<sup>4</sup> *Spielberg Mfg. Co.*, NLRB-1955, 36 LRRM 1152.

<sup>5</sup> *Collyer Insulated Wire*, NLRB-1971, 77 LRRM 1931; *Fiano Workers v. Kimball Co.*, CA7-1964, 56 LRRM 2644.



where an unfair labor practice charge also involving a contractual issue has been filed with the Board prior to arbitration. The sun shone warm and bright on arbitrators and arbitration. Of course, there have been some critics. Paul R. Hays, himself a former arbitrator and law professor and then a judge of the United States Court of Appeals, savagely criticized arbitrators and arbitration in the Storrs Lectures at Yale in 1964. The eminence of Judge Hays predictably brought a great outcry from the arbitration profession and there were reply salvos from Saul Wallen and Peter Seitz among others. But when the tumult and the shouting died, arbitration emerged unscathed. If Hays' attack was equivalent to the roar of a French '75, most of the other critics did not succeed in firing more than petty birdshot.<sup>6</sup>

Now perhaps, with the Supreme Court's holding in *Gardner-Denver*<sup>7</sup> that arbitration might not serve well in Title VII discrimination cases and with the devastating decision by Justice Lumbard evaluating the arbitrator and his Award in *Holodnak*,<sup>8</sup> followed by the U. S. Supreme Court decision in *Hines*,<sup>9</sup> there has been a dimming of the glow of the arbitrator's halo.

Few professional arbitrators we believe would quarrel with the court on the decisions we have cited. We must confess, however, that we have some uneasiness about articles and addresses which suggest substantial restriction in the areas in which the expertise of the professional arbitrator may be called upon. We are not fearful that our friends who are full-time arbitrators may become eligible for food stamps. There are, we believe, more than twenty thousand rights arbitration cases heard every year. Our concern is that there appears to be an irrational tendency on the part of otherwise sound and sensible persons to make scattergun attacks on arbitration.

We, certainly, are not seeking to further reduce the areas in which the expertise of arbitrators can be utilized. But, we do believe, that an arbitrator no matter how gifted in rights arbitration may not be totally comfortable or totally effective in interest arbitration. (That this is an opinion shared by many arbitrators is demonstrated by the fact that many of them decline to serve on our interest panels. This, I would assure the cynical is not, with few exceptions, because we pay for the interest arbitration at the PERB rate and not at the arbitrator's fee.)

The nature of interest arbitration under our statute with its tripartite panels, cries out for the arbitrator with mediation/fact-finding experience. In the Report of the Kochan Committee<sup>10</sup> on the impasse procedures under the Police-Fire amendment, Tom Kochan and his colleagues stated, "The primary role of the tripartite structure was to extend the collective bargaining process to the executive sessions of the arbitration procedure and to work to achieving an award that was acceptable to the parties." Now, obviously, this could be a strange uncomfortable role for the arbitrator who has spent his life in conventional rights arbitration. We, therefore, decided to have separate interest and grievance arbitration panels and have sought for the former, arbitrators with mediation and fact-finding experience. We think that the Kochan Report demonstrates that this selection process works well.

<sup>6</sup> For a detailed analysis of Judge Hays position, see Klapper, Michael J., "The Scholarship of Paul Hays; a Critical Study, *Industrial and Labor Relations Forum*, Vol. 10, No. 3, October 1974, New York State School of Industrial and Labor Relations, Cornell University, Ithaca, New York 14853.

<sup>7</sup> *Alexander v. Gardner-Denver Company*, Daily Labor Report, February 19, 1974 (No. 34) at E-1. The Court stated in part,

"Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation...But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."

<sup>8</sup> *Holodnak v. Arco Corp. and UAW Local 1010*; 381 F Supp. 191 (D. Conn. 1974), aff'd in part and rev'd in part 514 F.2d 285 (2d Cir. 1975), cert. denied, 96 Sup. Ct. 188 (1976).

<sup>9</sup> *Hines v. Anchor Motor Freight, Inc.*; 96 Sup. Ct. 1048 (1976).

<sup>10</sup> Kochan, T.A., et al, *An Evaluation of Impasse Procedures for Police and Firefighters in New York State: A Summary of Findings, Conclusions and Recommendations*. Prepared for a PERB Symposium on Police-Fire Arbitration in Albany, December 1976.



Some observers of the work of our agency have suggested yet different ways of handling interest arbitration. Some have suggested a separate panel of arbitrators who would do nothing else but interest arbitration and would be given special training in such esoteric subjects as municipal finance. Apart from the fact that the setting up of such a panel with no other function for its members is virtually impossible, there is simply no need. We doubt if there is anyone on our interest arbitration panels who has not, as a fact finder, had substantial exposure to municipal budgets, tax rates, revenue sources, etc. Another proposal would avoid interest arbitrators altogether and rely on a kind of Administrative Law Judge in a labor court setting. We fail to grasp the advantage of such a scheme. We presume that what is being sought is shelter from political storm. If we believe in interest arbitration as a device to be utilized when all other efforts of conciliation fail (and we do so believe), then we must also argue that the State, the parties and the administering agency must take criticism for unpopular awards. Further, we have no evidence that interest arbitrators are more likely to be intimidated by union or employer than are rights arbitrators.

We would suggest to arbitrator friends disturbed by frequent criticism and by what may appear as a diminution by the courts of the acceptability of arbitration in some cases, that they keep in mind the words of the late Supreme Court Justice Robert H. Jackson. "There is no reason to doubt that this Court may fall into error as may other branches of the Government.... The Court differs however, from other branches of the Government in its ability to extricate itself from error. It can reconsider." (Mr. Justice Jackson then went on to cite the long list of cases in which the Supreme Court has reversed itself.<sup>11</sup>)

PLEASE NOTE. On January 6, 1977, the Board at the request of the Director of Conciliation agreed to close the mediation, arbitration and fact-finding panels and no further applicants will be accepted. Please do not invite anyone of your acquaintance, no matter how well-qualified, to make application.

FOR YOUR INFORMATION. A question often arises as to the relationship between the total Consumer Price Index and the medical costs part of the Index. The Bureau of Labor Statistics publishes the relative importance of the index components. The latest data are that medical care is 6.413% of the total. Thus, although the medical care component was at 191.3 (1967=100) in November as compared to the all items index at 173.8, the index for "all items less medical care" was at 172.7.

#### RECENT SETTLEMENTS

##### Agreement Between

Village of Scarsdale  
(Westchester County)  
and

Scarsdale PBA  
(Covers 42 Police)

December 6, 1976

Evelyn S. Brand  
Public Member &  
Chairman

Murray Steyer  
Employer Member

John R. Harold  
Employee Member

Also awarded that a  
contract be written.  
Last one written in  
1971.

##### Summary of Provisions

Salaries: 6/1/75 - up \$1,050; 6/1/76 - up \$1,200. First Grade Patrolman goes to \$15,450 on 6/1/75 and \$16,650 on 6/1/76. Proportionate increases to others.

Longevity: (New) \$150 at end of 10 years & \$200 at end of 15 years.

Overtime: Pay time and one-half - may accumulate up to 80 hrs. comp. time.

Personal Leave: 4 days.

Death Leave: Codified.

Sick Leave: Maximum accumulation limited to 180 days. Was unlimited. (Also codified)

Safety Screening: Awarded.

Clothing Allowance: Detectives raised to \$225.

Grievance: Binding arbitration and 10 days to file grievances.

Denied: Shorter work schedule, air-conditioned cars (have but not contractual), a no repair work clause, past practice clause, a stronger out-of-title clause, and welfare fund. Also denied or did not rule on other items.

<sup>11</sup> *Helvering v. Griffiths*, 318 U.S. 400.