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HAROLD NEWMAN'S CLOUDY CRYSTAL BALL

"Quando la vita vi da dei limoni fatta delle limonate."

Giancarlo Pellegrino Suriano-Siboletti (1976)

Count Suriano-Siboletti's pleasant prescription that if life is giving you lemons, you should make lemonade is the kind of sensible advice that keeps away unpleasant things like ulcers and hypertension. I have tried to keep this wise counsel in mind during the past few months because the administration of the interest arbitration panel has been made increasingly difficult by advocates who insist with tiresome redundancy upon having the courts reexamine dorsally and ventrically and yet again, the constitutionality of the interest arbitration amendment and PERB's administration of it. (When I suggested some time ago in this column that there are attorneys who think that "stare decisis" is not legal doctrine at all but an aria in Verdi's opera "La Forza del Desino", some of my readers thought I was being humorous.)

The court challenges aside, we are plagued in grievance arbitration by advocates who have little inclination to let the arbitrator rather than the courts decide arbitrability questions. This should not be a problem in interest arbitration because there is, of course, no question of binding interest arbitration taking place under the statute, if mediation and fact-finding fail to resolve the impasse, and my Board has reserved to itself the determination of mandatory and non-mandatory subjects in scope of bargaining questions arising under the police-fire interest arbitration amendment. This raises an interesting question. My Board ruled in the matter of Yorktown[1] and in Board of Higher Education of the City of New York[2] that it accepted the private sector rule in NLRB v. Borg-Warner Corp.,[3] that a party may propose for agreement matters that are not mandatory subjects of negotiations, but may not press such a proposal to the point of insistence. The PERB Board held in the Board of Higher Education case that carrying a non-mandatory issue into fact-finding is too far. Clearly, in police-fire interest arbitration our panel understands that the arbitrators are precluded from taking up subjects which my Board has held non-mandatory and are resisted by one of the parties. Further, if under PERB Rules 205.5 and 205.6 a question of arbitrability has been raised through the Improper Practice route, the arbitrators may not rule on the challenged subject pending determination by the PERB Board. But what of fact finders? Since under the PERB ruling in Board of Higher Education[4] it is an improper practice to insist on a non-mandatory subject at fact-finding, what should the fact finder do if the subject does not appear as either mandatory or non-mandatory on that lengthy list that Muriel Gibbons has given the panel?

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1 Matter of Yorktown Faculty Association, 7 PERB ¶3030 (1974).

2 Matter of Board of Higher Education of the City of New York, 7 PERB ¶3028 (1974).

3 NLRB v. Borg Warner Corp., 35 US 392 (1955).

4 Supra.

can exist until an insistence upon non-mandatory subjects during or after fact-finding. The PERB Board's decision also states in part "There is no procedure for declaratory judgments concerning scope of negotiations. The omission of such a procedure is not inadvertent. The policy underlying the Taylor Law is that public employers and employee organizations representing public employees should negotiate with each other and enter into written agreements (CSL §200). Those agreements may, but need not, extend to non-mandatory subjects of negotiations (Matter of Susquehanna Valley School District at Conklin [Susquehanna Valley Teachers Association] 37 NY 2d 614). Frequently demands which may involve non-mandatory subjects of negotiations are resolved in the give-and-take of negotiations at the bargaining table. Agreements so arrived at, which are as likely to benefit one party as the other - and most frequently both - are to be preferred to the litigation before us of scope of negotiations questions that declaratory judgment procedures would encourage. It is only when demands for non-mandatory subjects of negotiations impede or inhibit the bargaining process that the legal processes of this Board ought to be invoked."

We would emphasize that we encourage parties to negotiate over non-mandatory subjects. We do not believe that employers and unions should be inhibited from negotiating over whatever they wish to negotiate about. Indeed, it may frequently happen that an employer may wish to negotiate over and agree on a non-mandatory subject and wish to use it as a *quid pro quo* for a mandatory subject on which he is not prepared to agree. We leave it to the skill and perception of the neutral to cut his way through the mandatory and non-mandatory thicket to the final consummation of the agreement. What is important is that mediators, fact finders and arbitrators be thoroughly conversant with the Board's rulings thus far and with court decisions which impact on this question.

Ralph Vatalaro, Eric Lawson, Mark Beecher and I recently held an informal meeting with panel members from the Buffalo area. Some of them expressed interest in getting more detailed analysis of Board determinations on mandatory and non-mandatory subjects of negotiations. Muriel Gibbons has struggled since last year's panel meeting in Elmsford to produce some kind of material more detailed than the lists of mandatory and non-mandatory subjects that she provides the panel with now. It is simply not feasible. I think any panel member who gets more than a case or two a year from the PERB ought to be a subscriber to Official Decisions, Opinions and Related Matters, Public Employment Relations Board of the State of New York. It is a necessary reference for our mediators, fact finders and arbitrators and the $75 annual cost should not be a bar to purchase. Except for the panel members who have the books available because they teach at colleges and universities which have them in their libraries, everyone should subscribe. Subscriptions are obtained by writing to Argus-Greenwood, Inc., 1031 Broadway, Albany, New York 12201.

The compilation is not light summer reading. We do not propose you climb into a hammock with it and toss a breezy novel to the ground. But it is an essential reference work for panel as well as our staff. In any event, it is far easier to read than most of the work currently published on our field. Unlike most of those, it does not describe fact-finding by logarithm or unfair labor practices by square root. You will not find a regression analysis on a single page. You may even discover excerpts from a case in which you were involved and the lemons will dissolve into lemonade.

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