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HAROLD NEWMAN'S CLOUDY CRYSTAL BALL

> "Sir, If I were to suggest that--in the interest of economy, quietness, encouragement of individual initiative and promotion of family life--all television broadcasting be banned for one day each week, would I be a lone voice?"
>
> R. A. Spalding, The Vicarage
> Babraham, Cambridge
> Letter to LONDON TIMES
> January 22, 1977

The good Reverend Spalding makes a suggestion that does not go far enough. All television broadcasting should be planned for a maximum of three days each week and not permitted for not more than ten hours a day. The dreadful state of most television programs can be traced, we believe, to the fact that no country including our own contains the talent necessary to produce worthwhile ideas and worthwhile scripts to meet the enormous time demands of broadcasting. The curse of too much production has led to what former FCC Chairman Newton Minow called the TV wasteland.

Perhaps, we should in all aspects of our lives seek to do less and do it better. We were reminded of this at the recent seminars conducted for the panel at Cornell ILR. This year's sessions dwelt primarily on the "ability to pay" question for fact finders and arbitrators. We examined such exotic matters as "debt service", "exempt evaluation", "percent of true value", etc. We had some serious concern before the seminars began that we would be locked into dull discussions because of the nature of the main topic. Au contraire! We have been congratulated by those attending the sessions on the excellence of the seminars and everyone seemed to find them both stimulating and very useful. We must confess, however, that we have some apprehension about the impact of the sessions.

It was not our intention to turn panel members in three days' time into experts in municipal finance. We hoped, instead, to be able to assist panel members in understanding how budgets are constructed--and further, to translate the Sanskrit of budget directors and comptrollers into everyday English. We also aspired to have panel members be as cynical as possible about the theory that all New York State municipalities are so poor that they cannot provide a penny in additional wages or fringes for their employees or, on the other hand, to be equally unwilling to accept as many unions charge, that Scrooge-like mayors and city managers have mountains of cash hidden in secret vaults for the sole purpose of denying just compensation to their employees. We hope that our purpose was achieved but we have received several letters from those who attended the sessions which fill us with alarm. We feel that the thought has entered the heads of a few PERB panelists that they now qualify as so expert in municipal or school board fiscal matters that they are prepared to make fact-finding awards that will suggest whether the municipality or county should seek to revise tax rates, institute a sales tax, etc. We would caution that any fact finder or arbitrator who suggests in writing the sources from which revenue is to be raised shall be condemned to eternal hellfire without hope of commutation or salvation.

Our friend the distinguished arbitrator, Alfred Brent, has stated that it is the function of the labor neutral to place bandaids on some of the social and economic wounds of the country. We believe that Al Brent is right--but caution!! Arbitrators, mediators and fact finders are not social engineers and cannot hope to provide more than the bandaids of which Al spoke. They work on tiny cuts and should not be involved in seeking to apply broad bandages. Indeed, we have recently pointed out in this column over the past several years that the courts are becoming increasingly uneasy about the ability of the arbitrator--(the expert in the law of the shop) to make judgments in other areas. *Gardner-Denver*/1 questioned arbitral competence to handle Title VII discrimination cases. *Hines v. Anchor Motor Freight Company*/2 cautioned as

/1 415 v.s. 36 (1974).

/2 96 Sup. Ct. 1048 (1976).

did *Holodnak*/3 that the courts would not bow to arbitration awards where unions did not meet, in the judge's view, the duty of fair representation. In a recent paper/4 Peter Seitz, the Cassandra/5 of the National Academy of Arbitrators, expressed his uneasiness about arbitrators overexpanding their role:

> "Arbitrators are in disagreement among themselves as to whether they should serve to fill up the interstices and flesh out the skeletal structures of public statutes. Some, with enthusiasm, seem to welcome the opportunity to play the role of a not-quite-frocked judge of a United States district court. Others, including myself, entertain grave doubts and apprehensions. For one thing, many of us are not lawyers; and although we are reputed to have developed some expertise at our trade, this does not mean that we possess the qualifications which are called for in a United States district court judge. There is another factor, however, of more significance. Normally and typically, we are private, professional practitioners selected by private disputants to decide disputes that arise in the workplace under a private collective agreement. We are not selected as arbitrators because we are deemed capable of molding and developing the details of a national policy the general character of which had been declared in an act of Congress. The filling in of the details and the development of national policy, it seems to me, should not be done by private persons like arbitrators, accountable only to private clients, but by public judicial courts or quasi-judicial agencies. The delegation of some incidents or functions of government to private instrumentalities in our kind of society may be inevitable, but I shudder at the possibility of any large expansion of such delegation. If the delegation is made to private arbitrators today to determine what congressional legislation means and how disputes as to its interpretation and application are to be decided, what private instrumentalities may be designated to participate in public law-making in the future?"

The judges in New York State adhere to the doctrine in *St. Mary's* v. *Catherwood*/6 that interest arbitration would be subject to more rigid overview by the courts than grievance arbitration. If one is functioning as an arbitrator in an interest matter such as those arising under the police/firefighter amendment, the criteria in the statute are not to be read as giving license to the arbitrator to give instruction to the government involved as to taxes to be imposed or to priorities to be given to specific projects. Fact finders, limited as they are to simply making recommendations not binding on the parties, are not likely to have their work subjected to judicial review. However, here again we must caution that it is the function of the fact finder to seek to provide the basis for an agreement and not to fantasize that he is Chairman of the National Council of Economic Advisors to the President of the United States.

Arthur B. Smith, Jr., who teachers labor law at Cornell ILR delivered a paper on Labor Arbitration of Public Education Contract Disputes last November in Binghamton./7 Art Smith argues forcefully that arbitrators in school district disputes are involving themselves too deeply in matters of educational policy--quite apart from the common "law of the shop" type cases. Professor Smith urges more substantial judicial review of such cases than now exists. If fact finders and arbitrators do not stay within the prescribed limits of their responsibilities to the parties and the process, we shall have very serious problems indeed. Each of us is human enough when involved in the conciliation of a dispute in either the private or public sectors to seek to repair the entire social fabric. Each of us is as Arvid Anderson says, an itinerant philosopher.

If we may return for a moment to the good Vicar of Babraham, Cambridgeshire, perhaps we can improve the economy, quietness, encouragement of individual initiative and promotion of family life by working with modesty and diligence at our conciliation responsibilities and seek not to heavily impact the public policy of the nation while making fact finder's recommendations at Unadilla Forks.

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We learned with shock and sorrow last week of the passing of Jack Hoelcle, a long-time member of the PERB panel. Jack was, apart from his fine professional skills and proper dedication to his work, a warm, fine gentleman. His early passing is a great loss to all who knew him.

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/3 381 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).

/4 Seitz, Peter, "The Götterdämmerung of Grievance Arbitration", Employee Relations Law Journal, Spring 1977 , Vol. 2, No. 4, Executive Enterprises, Inc., 10 Columbus Circle, New York, New York 10019.

/5 Peter Seitz suggests that he may be a Cassandra in drag. We refuse to refer to him as Jeremiah.

/6 26 N.Y. 2d 493, 311 N.Y.S. 2d 863 (1970).

/7 Smith, Arthur B., Jr., "Labor Arbitration of Public Education Contract Disputes in New York", Occasional Paper, No. 12, December 1976, Institute of Public Employment, New York State School of Industrial Labor Relations, Cornell University, Ithaca, New York 14853.