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**ANALYSIS OF THE U.S. POSTAL SERVICE'S CURRENT COLLECTIVE  
BARGAINING MODEL AND POSSIBLE ALTERNATIVES**

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**EXECUTIVE SUMMARY**

Negotiations under the current collective bargaining model for the U.S. Postal Service result in a lower percentage of contract settlements compared to the private sector. This is a symptom of the “chilling effect” of conventional arbitration – the byproduct of rules that provide bargainers too little incentive to reach agreement and too little cost to avert impasse.

Negotiations are much more successful under the private sector model because bargainers hold powerful economic weapons in reserve throughout their talks. Strikes, lockouts, and their variants cannot be used unless impasse occurs. Because these weapons are so extreme, risk-averse parties often make compromises.

But the private sector model poses difficult trade-offs. Benefits include its high success rate and recent track record of enabling employers and unions to adapt to competitive market conditions. However, the model is not failsafe. When economic weapons are used, dispute costs can devastate employers, unions, and employees. Though strikes now occur less frequently, they are more violent. Even when work stoppages are settled, employees are often left embittered.

The private sector model poses unique hazards in the context of nationwide mail delivery. A work stoppage involving the Postal Service’s 770,000 bargaining unit employees would be unprecedented in scale. Jobs and businesses tied to this enormous work force would be endangered. In addition, widespread use of just-in-time logistics, inventory management systems, and consumer billing would further externalize huge strike costs to the public.

Also, under the Railway Labor Act considered in the Transformation Plan, unions enjoy the right to secondary picketing. This enables them to transform local strikes into national emergencies. Using rail industry experiences, the smallest and most isolated postal union could shut down the entire mail system by picketing large mail centers. In a 1986 rail dispute involving 200 workers, this kind of crisis occurred. Ironically, Congress ordered arbitration to end this national emergency dispute, even though it lacked statutory authority to compel this process.

Final offer interest arbitration, used by some state and local governments for essential employees such as police and fire fighters, would improve the current model without risking the high cost of work stoppages. Unlike conventional arbitration, which permits arbitrators to compromise impasse positions, this method limits an arbitrator to choose one of the parties’ final offers. This ruling derives from objective factors related to comparable employment relationships. Parties formulate their offers according to these metrics or risk a total loss at arbitration. This method results in more settlements than conventional arbitration. Even when impasse occurs, parties enter arbitration having made concessions, and arbitrators may mediate settlements at this late stage.

## **I. STATEMENT OF WORK**

This report (1) analyzes the collective bargaining model currently utilized by the Postal

Service and its employee unions, (2) describes possible alternative models that may have application for resolving issues relating to the terms and conditions of employment, and (3) assesses the positive and negative attributes of the current model and all alternative models.

## **II. ANALYSIS OF THE COLLECTIVE BARGAINING MODEL CURRENTLY UTILIZED BY THE POSTAL SERVICE AND ITS EMPLOYEE UNIONS**

*A. Legal Overview:* Currently, the Postal Service and its employees operate under laws that are patterned after the National Labor Relations Act (NLRA, amended by the Taft-Hartley Act). This is the main law that regulates private sector collective bargaining. The Postal Service bargaining law provides for employee election of union representation, as well as bargaining for labor agreements. However, in a major departure from the NLRA, employees do not have the right to strike, nor does the Postal Service have a right to lockout. Instead, under 39 U.S.C. § 1207(b), if the parties reach impasse in negotiating terms for a labor agreement, they must submit to interest arbitration.<sup>1</sup> This process authorizes a single arbitrator, who is selected either by an employer and union representative, or the Federal Mediation and Conciliation Service, to decide on the disputed term or terms for a new agreement. For this report, it is important to note that Section 1207(b) provides for “conventional arbitration,” a method that gives an arbitrator decision-making latitude. This differs significantly from “final offer” arbitration.

*B. The Parties’ History of Contract Negotiations and Use of Interest Arbitration:* The General Accounting Office (GAO) has chronicled and analyzed the history of contract negotiations and use of conventional interest arbitration by the Postal Service and its employees’

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<sup>1</sup> See Appendix for pertinent excerpt of the statute.

unions. In the most recent study,<sup>2</sup> the GAO concluded: “[W]hen contract disputes cannot be settled between postal labor and management, they must be settled by a third party through binding arbitration. As a practical matter, postal labor and management have had long-standing adversarial relations.”<sup>3</sup>

This assessment followed a more detailed GAO analysis of the Postal Service’s use of interest arbitration.<sup>4</sup> To summarize, this study observed that since 1978 conventional interest arbitration has been used to resolve bargaining deadlocks that occurred during contract negotiations for three of the four major unions, including APWU, NALC, and Mail Handlers. These arbitrations occurred in 1978, 1984, and 1990 with APWU and NALC, and in 1981 with Mail Handlers.

According to a postal official, negotiations over issues such as outsourcing damage the relationship between the Service and union leadership at the national level. Union officials are greatly concerned over this issue and others. They want job security for their members.

The 1997 GAO Report reached three main conclusions about the overall bargaining relationship between the Postal Service and its unions: (1) there is a continued need to improve labor-management relations, (2) a presidential commission should study, evaluate, and propose specific solutions to address workplace difficulties, and (3) Congress, the Postal Service and

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<sup>2</sup> *Deteriorating Financial Outlook Increases Need for Transformation* (February 28, 2002), available in Westlaw at 2002 WL 462069 (F.D.C.H.)(GAO Rep’t 02-355).

<sup>3</sup> *Id.*

<sup>4</sup> *U.S. Postal Service B Little Progress Made in Addressing Persistent Labor-Management Problems* (October 1, 1997), 1997 GAO/GGD 98-1, available in Westlaw at 1997 WL 740760, in Report to the Chairman, Subcommittee on the Postal Service, Committee on Government Reform and Oversight House of Representatives. The Report’s primary conclusion was that the Postal Service and its unions rely heavily on interest arbitration to settle many contract negotiations.

affected unions and management associations, as stakeholders, should jointly focus on strategies to improve the Service.<sup>5</sup>

More recently, in testimony before the President's Commission on the United States Postal Service, William Burrus, President of the American Postal Workers Union, evaluated the parties' negotiating history. In general, he viewed the bargaining process as productive, noting:

All the emphasis that is placed on interest arbitration may be misleading. More often than not, the parties reach agreement without proceeding to arbitration. In the 33 years since the passage of the PRA, there have been 85 separate collective bargaining agreements between the Postal Service and postal unions. Of those agreements, 61 have been voluntary and 24 have been arbitrated. In the case of the APWU, we have been party to 34 collective bargaining agreements, 27 of which have resulted from voluntary agreements. This record demonstrates the effectiveness of the system of collective bargaining [emphasis in original].<sup>6</sup>

While it is irrefutable that "more often than not, the parties reach agreement without proceeding to arbitration," the effectiveness of this system is doubtful when judged against the experience of employers and unions in the private sector who negotiate contracts for large bargaining units. There is no precise way to measure how many of these large units bargain new contracts each year. However, strike data from the U.S. Department of Labor's Bureau of Labor Statistics offer a useful comparison. Among private sector bargaining units with 1,000 or more employees, only 19 strikes occurred in the U.S. in 2002.<sup>7</sup> Respectively in 2000 and 2001, there were 39 and 29 strikes.<sup>8</sup> These statistics are a very good though not perfect gauge of the frequency of impasse in bargaining relationships that are similar to those involving the Postal

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<sup>5</sup> These points are stated in their entirety in the Appendix.

<sup>6</sup> Statement of William Burrus, President of the American Postal Workers Union, in testimony before the President's Commission of the United States Postal Service (April 29, 2003), Chicago, IL.

<sup>7</sup> See Table 1, "Work Stoppages Involving 1,000 or More Workers, 1947-2002," U.S. Dep't of Labor, Bureau of Labor Statistics, available at <http://stats.bls.gov.news.release/wkstp.t01.htm>.

Service. They leave little doubt that impasse is a rare event for large bargaining units in the private sector.

In contrast, conventional interest arbitration – the strike substitute for postal workers – occurs with much more frequency. Using APWU’s aforementioned data, impasse has occurred in 28 percent of negotiations (24 out of 85 contracts). This is not to denigrate the conclusion that the current collective bargaining system for the Postal Service is effective to some degree, but taking the broad view of all large private sector bargaining relationships, the postal experience leaves much room for improvement.

To put this experience in its proper context, the high use of conventional interest arbitration under Section 1207(b) does not reflect poorly on the individuals or organizations who utilize this process. As this report shows (*see* Part IV[A] below), conventional interest arbitration has a chilling effect on the bargaining process. A leading authority on this dispute resolution method explained this problem:

If either party . . . anticipates that it will get more from the arbitrator than from a negotiated settlement, it will have an incentive to avoid the trade-offs of good faith bargaining and will cling to excessive or unrealistic positions in the hope of tilting the arbitration outcome in its favor. This lack of hard bargaining will occur because of a significant reduction in the costs of disagreement. Not only will there be no strike costs, the uncertainties associated with continued disagreement are reduced because of the usual compromise outcome. . . .

In other words, since conventional arbitration imposes much smaller costs of disagreements than strikes, there is little incentive to avoid it. The logical conclusion of this line of reasoning is that when arbitration is available it will have a “narcotic effect” upon the parties, transforming them into arbitration addicts who habitually rely upon arbitrators to write their labor contracts.<sup>9</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> Peter Feuille, “Final Offer Arbitration and the Chilling Effect,” *Industrial Relations* (Vol. 14, No. 3) October 1975, pp. 302-310, at 304.

### **III. THE RAILWAY LABOR ACT AS A POSSIBLE ALTERNATIVE MODEL**

Because the Transformation Plan appears to contemplate adoption of the Railway Labor Act (RLA) as an alternative to the current system of collective bargaining, it is important to consider this possibility in objective terms. The strengths and drawbacks of the RLA model are now set forth.

#### *III[A]. The Transformation Plan Considers Adoption of the Railway Labor Act:*

Transformation Plan: April 2002 sets forth three alternative blueprints for the next generation Postal Service. The Government Agency model would refocus the Postal Service by abandoning its efforts to adapt to market conditions. The result would be a much smaller Service that provides essential deliveries. The Postal Service would become a pure government agency, solely funded by taxpayers. On the other end of the spectrum, the Postal Service would be a fully privatized entity (called Privatized Corporation). A board of directors would manage the entity as a private corporation, with private funding replacing all public financing. This model envisions that “[e]mployees would no longer be under any form of civil service, and private sector labor and employment laws would apply.”<sup>10</sup> Commercialization (also called Commercial Government Enterprise), the option favored in the Transformation Plan, “carries the businesslike transition” that is currently in place “to the next level but stops short of private ownership.”<sup>11</sup> The Plan concludes that a “new labor model would be probable.”<sup>12</sup>

The Commercial Government Enterprise sets forth this roadmap:

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<sup>10</sup> United States Postal Service Transformation Plan: April 2002, at vii.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*



An efficient postal enterprise should be accountable for its total performance, preferably including all cost-causing components. While the Postal Service currently negotiates with its bargaining unit employees over most conditions of employment, some employee benefits, including retirement and certain aspects of health benefits, are fixed by law. These statutory constraints distort the bargaining process because large elements of total employee cost are excluded from the bargaining table. This limitation on the bargaining process should be corrected so that the entire compensation package is on the table at the same time.

***Additionally, cooling off and mediation procedures similar to those for essential services under the Railway Labor Act should be provided. In the mediation stage, criteria for decision should be provided, similar to those under other models involving essential services, so that explicit consideration is given to the effect of labor contracts on the enterprise, its customers, and the public interest. Consistent with the Railway Labor Act, failure of the mediation process could lead to strikes and lockouts as in the private sector [emphasis added].<sup>13</sup>***

This report now examines the main public policy arguments for and against providing the Postal Service and employees a right to use economic weapons under the RLA.

*III[B]. The Right to Strike and Other Economic Weapons – Advantages of the Private Sector Model:*

1. Congress Has Repeatedly Favored “Free Collective Bargaining” Over Government Imposed Contracts. Private sector models for collective bargaining (NLRA and RLA) provide employees to right to form, join, and act in concert through labor unions. These laws regulate subjects that employers and unions negotiate. Parties are required to bargain over wages, hours, and other terms and conditions of employment. However, the regulation of bargaining imposes these fundamental limits: (a) neither party is compelled to agree to specific terms nor enter into a contract, and (b) the government’s role is strictly limited to refereeing the negotiation process, as distinguished from arbitrating or otherwise legislating agreements for parties who reach impasse.

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<sup>13</sup> *Id.* at 73.

Thus, “[f]ree collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress. . . .”<sup>14</sup> This policy reflects bipartisan consensus that explicitly rejects a governmental role in setting terms of a labor agreement. Sen. Robert Taft (R.-Oh.), a chief architect of the 1947 Taft-Hartley Act, explained:

[I]f we impose compulsory arbitration, or if we give the Government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy. If we give the Government power to fix wages, I do not see how we can take from the Government the power to fix prices; and if the Government fixes wages and prices, we soon reach the point where all industry is under Government control, and finally there is a complete socialization of our economy.<sup>15</sup>

The Senator added: “I feel very strongly that so far as possible we should avoid any system which attempts to give to the Government this power finally to fix the wages of any man. Can we do so constitutionally? Can we say to all the people of the United States, ‘You must work at wages fixed by the Government?’ I think it is a long step from freedom and a long step from a free economy to give the Government such a right.”<sup>16</sup>

A system of free collective bargaining necessarily rejects the use of compulsory arbitration. Reflecting upon hundreds of emergency labor disputes during World War II, Congress explicitly rejected a permanent role for government as arbitrator,<sup>17</sup> concluding: “It is

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<sup>14</sup> *New York Telephone Co. v. New York State Dep’t of Labor*, 440 U.S. 519, 551 (1979) (J. Powell, dissenting).

<sup>15</sup> 93 Cong.Rec. 3835-36 (1947).

<sup>16</sup> 93 Cong.Rec. 3836 (1947).

<sup>17</sup> See S.Rep. No. 105, 80th Cong., 1st Sess., pp. 13-14, noting: “Under the exigencies of war the Nation did utilize what amounted to compulsory arbitration through the instrumentality of the War Labor Board. This system, however, tended to emphasize unduly the role of the Government, and under it employers and labor organizations tended to avoid solving their difficulties by free collective bargaining.”

difficult to see how such a system could be operated indefinitely without compelling the Government to make decisions on economic issues which in normal times should be solved by the free play of economic forces.”<sup>18</sup> Thus, Sen. Taft concluded:

That means that we recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither side is bound by a contract. . . . [W]e have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining. We have done nothing to outlaw strikes for basic wages hours, and working conditions after proper opportunity for mediation.<sup>19</sup>

This structure has remained intact. Even with its considerable power to interpret rules for economic weapons, the Supreme Court has reaffirmed this legislative vision of free collective bargaining: “Congress also intended, by its limited regulation, to establish a fair balance of bargaining power. That balance, once established, obviates the need for substantive regulation of the fairness of collective-bargaining agreements: whatever agreement emerges from bargaining between fairly matched parties is acceptable.”<sup>20</sup>

2. Economic Weapons Held in Reserve During Bargaining Result in an Extremely High Percentage of Successful Negotiations. Presented with the perils of a nationwide strike wave in 1946-1947, a Republican Congress intending to curb union power nevertheless refused to abandon a bargaining model that was backed by the use of economic weapons. Sen. Taft summarized this sentiment: “[W]e recognize freedom to strike when the question involved is the improvement of wages, hours, and working conditions, when a contract has expired and neither

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<sup>18</sup> *Id.*

<sup>19</sup> 93 Cong.Rec. 3835 (1947).

<sup>20</sup> *New York Telephone Co. v. New York State Dep’t of Labor*, 440 U.S. 519, 552 (1979) (J. Powell, dissenting).

side is bound by a contract. We recognize that right in spite of the inconvenience, and in some cases perhaps danger, to the people of the United States which may result from the exercise of such right. In the long run, I do not believe that that right will be abused. In the past, few disputes finally reached the point where there was a direct threat to and defiance of the rights of the people of the United States.”<sup>21</sup>

Congress also perceived that economic weapons held in reserve by unions and employers would energize the bargaining process so that both parties would enter into agreements to avoid the much larger cost of impasse. The Supreme Court explained: “Having protected employee organization in countervailance to the employers’ bargaining power, and having established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes, the Act also contemplated resort to economic weapons should more peaceful measures not avail.”<sup>22</sup>

The paradox of a bargaining system based on economic weapons is that it results in successful negotiations because it confronts parties with unacceptable costs for reaching impasse. The Supreme Court explained this theory in its seminal *Insurance Agents* decision:

The parties . . . still proceed from contrary and . . . antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.<sup>23</sup>

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<sup>21</sup> 93 Cong.Rec. 3835-3836 (1947).

<sup>22</sup> *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 318 (1965).

<sup>23</sup> *NLRB v. Insurance Agents*, 361 U.S. 477, 488-489 (1960).

### 3. Congress Considered and Rejected Compulsory Arbitration for Vital Industries

Affecting the Public Interest. A strike wave in 1946-1947 that dealt a severe blow to the U.S. economy led to a public outcry for strong limits on the right to strike. Although the 80<sup>th</sup> Congress, under new Republican control, enacted significant strike controls, it explicitly considered and rejected the idea of compulsory arbitration as a strike substitute even for vital industries. Sen. Taft justified this view: “It is suggested that we might do so in the case of public utilities; and I suppose the argument is stronger there, because we fix the rates of public utilities, and we might, I suppose, fix the wages of public-Utility workers. Yet we have hesitated to embark even on that course, because if we once begin a process of the Government fixing wages, it must end in more and more wage fixing and finally Government price fixing. It may be a popular thing to do. Today people seem to think that all that it is necessary to do is to forbid strikes, fix wages, and compel men to continue working, without consideration of the human and constitutional problems involved in that process.”<sup>24</sup>

Also, Congress avoided a slippery slope of defining industries that are so vital as to warrant compulsory arbitration. Sen. Taft continued: “If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining.”<sup>25</sup> A pure model of free bargaining was chosen out of concern that the provision for compulsory arbitration as a

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<sup>24</sup> 93 Cong.Rec. 3835-3836 (1947).

<sup>25</sup> See also S.Rep.No. 105, 80th Cong., 1st Sess. 13-14, 28 (1947).

terminal step in the negotiation process would encourage parties to rely on this external mechanism: “We did not feel that we should put into the law, as a part of the collective-bargaining machinery, an ultimate resort to compulsory arbitration, or to seizure, or to any other action. We feel that it would interfere with the whole process of collective bargaining. If such a remedy is available as a routine remedy, there will always be pressure to resort to it by whichever party thinks it will receive better treatment through such a process than it would receive in collective bargaining, and it will back out of collective bargaining. It will not make a bona-fide attempt to settle if it thinks it will receive a better deal under the final arbitration which may be provided.”<sup>26</sup>

4. The Expansion of Employer Economic Weapons Since the 1980s Has Made Private Sector Collective Bargaining More Responsive to Market Conditions. Although the National Labor Relations Act and Railway Labor Act have not been changed by the Congress for decades, judicial doctrines that interpret these laws have been altered, in some cases with dramatic implications. *United Steelworkers, Local Union 14534 v. NLRB*<sup>27</sup> is a case in point. In negotiations for a new contract, the employer proposed a 30% cut in wages and a 50% reduction in medical insurance and vacations. The union was willing to consider these extreme concessions, but only if the company justified them by demonstrating need. Thus, the union requested that the employer disclose its finances. The company refused this request, terminated negotiations after four meetings with the union, and unilaterally implemented its offer. The union went on strike when the agreement expired. The company immediately countered by hiring

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<sup>26</sup> *Id.*

<sup>27</sup> 983 F.2d 240 (D.C. Cir. 1993).

permanent replacements.

Due to a change in how federal courts interpret a doctrine that requires employers to disclose financial records to unions in the course of bargaining for wage concessions, the D.C. Circuit Court of Appeals ruled that a company's claim of "competitive disadvantage" during contract negotiations is legally different from a claim of "inability to pay." Thus, the employer did not breach its duty to bargain by refusing to provide the union this information. The court, therefore, rejected the union's contention that this was an unfair labor practice (ULP) strike, and ruled that the strike was economic.

This ruling meant that the Company was under no duty to reinstate strikers, unless these employees unconditionally ended their strike and agreed to work under terms and conditions that were unilaterally imposed by the employer. Moreover, the duty to reinstate did not arise until a replacement worker vacated his or her position. This policy change was a potentially significant development in collective bargaining because it linked employer demands for difficult concessions, and a narrower duty to disclose financial information, to a reduced basis for finding that a strike is caused by an employer's unfair labor practice.

Research studies confirm the representativeness of this anecdotal account of concessionary bargaining. This is particularly true in industries that have either labor- or product-market overlaps with the Postal Service. A 1994 study of the trucking industry concluded: "Since 1978 real wages among all nonsupervisory employees have declined more than 24%. By 1990 real wages in the trucking industry had returned to 1962 levels."<sup>28</sup> In

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<sup>28</sup> Michael H. Belzer, "The Motor Carrier Industry: Truckers and Teamsters Under Siege," in Contemporary Trends in Collective Bargaining in the Private Sector (Paula Voos, ed., 1994), pp. 259-302, at 284.

telecommunications, “[b]etween October 1993 and March 1994, the industry’s major employers announced downsizing plans that will eliminate 98,000 jobs.”<sup>29</sup> In the highly unionized airline industry, “the stability that existed under regulation no longer exists, and deregulation has meant uncertainty and insecurity for many in the industry.”<sup>30</sup>

More broadly, “[w]ith increased competition from outside the domain of traditional collective bargaining agreements, broad bargaining structures no longer (take) wages out of competition, and companies (seek) unique plant-level solutions to new competitive threats.”<sup>31</sup> Considering empirical evidence that the Postal Service compensates employees well above natural market conditions, provision of economic weapons would likely pressure unions to be more responsive to labor market competition.<sup>32</sup>

5. Major Competitors of the Postal Service Operate Under the Private Sector Model. The Postal Service’s competitors in package delivery operate successfully under private sector collective bargaining laws. UPS has consistently grown its business, notwithstanding its long-time bargaining relationship with the Teamsters union. This relationship has been strained in the past decade. In 1994, a localized one-day strike took place after management insisted that

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<sup>29</sup> Jeffrey Keefe and Karen Boroff, “Telecommunications Labor-Management Relations after Divestiture,” in Contemporary Trends in Collective Bargaining in the Private Sector (Paula Voos ed., 1994), pp. 303-273, at 361.

<sup>30</sup> Nancy Brown Johnson, “Airline Workers Earnings and Union Expenditures under Deregulation,” Industrial and Labor Relations Review, Vol. 45, No. 1 (October 1991), pp. 154-165, at 164.

<sup>31</sup> Robert J. Flanagan, “Macroeconomic Performance and Collective Bargaining: An International Perspective,” Journal of Economic Literature, Vol. 37 (September 1999), pp. 1150-1175, at 1170.

<sup>32</sup> See Jeffrey M. Perloff and Michael L. Wachter, “Wage Comparability in the U.S. Postal Service,” Industrial and Labor Relations Review, Vol. 38, No. 1. (Oct. 1984), pp. 26-35. The authors concluded: “[B]etween 1969 and 1983 wages for clerks and mail handlers increased 21.9 percent faster than wages for nonsupervisory, nonagricultural, private sector workers.” *Id.* at 33.



individual drivers deliver 150 pound packages.<sup>33</sup> Then, in 1997, the company endured a two-week strike over pension and part-time employment issues.<sup>34</sup> Still, this was the only nationwide work stoppage in the parties' history.<sup>35</sup> Federal Express, formed around an air transportation system (in contrast to UPS' earlier trucking model), has bargained agreements – albeit in great acrimony – with its pilots' union.<sup>36</sup>

*III[C]. The Right to Strike and Other Economic Weapons – Disadvantages of Private Sector Model:*

1. Economic Weapons Are Heavily Tilted in Favor of Employers. The private sector model of collective bargaining is expressly premised on the belief that employers and employees should possess equality of bargaining power. Although Democrats and Republicans have had strong differences on many basic issues of collective bargaining, they have agreed on this core value. When Sen. Robert Wagner (D.- N.Y.), architect of the 1935 NLRA, introduced his bill for private sector collective bargaining, he emphasized that “[t]he primary requirement for cooperation is that employers and employees should possess equality of bargaining power.”<sup>37</sup> Twelve years later, after his Republican counterpart, Sen. Robert Taft, offered landmark legislation (Taft-Hartley Act) to amend the NLRA by restraining union excesses, this view was

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<sup>33</sup> “United Parcel Service of America: One-Day Teamsters Strike To Cost Firm \$50 Million,” Wall Street Journal (Feb. 9, 1994), at B-4.

<sup>34</sup> Glenn Burkins and Martha Brannigan, “Pension Fund Lies at the Heart of the Walkout,” Wall Street Journal (Aug. 6, 1997), at A-2.

<sup>35</sup> *Id.*

<sup>36</sup> Douglas A. Blackmon, “FedEx Compromises With Its Pilots, Says Union,” Wall Street Journal (Dec. 12, 1997), at A-4.

<sup>37</sup> 78 Cong. Rec. 3679 (1934).

reaffirmed: “It seems to me that our aim should be to get back to the point where, when an employer meets with his employees, they have substantially equal bargaining power, so that neither side feels that it can make an unreasonable demand and get away with.”<sup>38</sup>

Today, however, there is overwhelming evidence that this balance is upset. Here are prime examples:

! Employers go beyond usual business justification in hiring permanent striker replacements by using strikes as pretexts for severing bargaining relationships.<sup>39</sup>

Employers exploit strikes by over-hiring replacements, and then petition the NLRB for a decertification election. Section 9(c)(3) of the NLRA exacerbates this

problem by automatically disqualifying a replaced striker from voting in an election that occurs anytime after the first anniversary of a strike.<sup>40</sup>

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<sup>38</sup> See S. Minority Rep. No. 105, 80th Cong., 1st Sess., § 2, at 10 (1947), reprinted in 1 NLRB, Legislative History of the Labor-Management Relations Act of 1947, 1005-1006 (1948).

<sup>39</sup> See Michael H. LeRoy, “Severance of Bargaining Relationships During Permanent Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to Amend Section 9(c)(3) of the NLRA,” U.C. Davis Law Review, Vol. 28 (1996), 1019-1086.

<sup>40</sup> See *Jeld-Wen of Everett, Inc.*, 285 N.L.R.B. 118 (1987), and *E.A. Nord Co.*, 276 N.L.R.B. 1418 (1985), two decisions involving the same replacement-severance strike. The union and the employer had a 40-year bargaining history, but when contract negotiations failed to produce a new agreement, approximately 500 employees walked off their jobs on July 14, 1983. The company operated with approximately 700 striker replacements and crossover employees. Management consultants represented the company throughout the strike. As early as September 8, the company informed the union that it had reason to doubt that the union had majority support in the bargaining unit (now swelled with replacement strikers), and that it was therefore withdrawing recognition. Eventually, the union put this assertion to a test by petitioning for an NLRB election on April 11, 1984, just three months before its striking members would become ineligible under § 9(c)(3) of the amended NLRA. The election was held July 11, 1984, only three days before the ineligibility rule would have barred replaced strikers from voting.

The management consultants used unethical tactics to influence replacement workers to vote against the union. During pre-election meetings, they announced that any replacement worker who voted in the decertification election would be eligible to win one of five raffle tickets worth \$252. Replaced strikers were expressly excluded from this raffle, and the raffle winnings were explicitly equated to “the amount of Union dues strikers pay to the

! Under a Railway Labor Act precedent, employers not only have a right to hire permanent striker replacements; but in addition, may offer seniority-linked benefits held by strikers – such as shift, bid routes, and domicile – to fellow strikers who abandon the picket line. After the dispute ends, and eventually, the replaced strikers return to work, they begin at the bottom of the seniority list for these perks. Thus, strikers are not only subjected to intense competition from outside job-seekers, but are encouraged by the law to take hard-earned employment benefits from faithful strikers. Before a 1989 Supreme Court decision, this form of preferential treatment to employees who quit a strike would have been judged by courts as an unlawful form of anti-union discrimination.<sup>41</sup>

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Union each year.” Testimony from replacement workers who attended pre-election meetings run by the consultants indicated that the consultants equated voting “yes” for union representation with the loss of jobs for replacements, bankruptcy for the company, and closure of the mill.

As a result of this campaigning, the decertification election had a “carnival atmosphere.” Evidence showed that a management consultant released hundreds of replacement workers at a time to report to the polls; as these workers waited in line to vote, they repeatedly heckled union representatives who were lawfully challenging voters and frequently shouted anti-union remarks. The administrative law judge concluded that “[a] fair election [could not] be conducted under such circumstances” and set aside the election results.

A second election was held, although not until almost one and a half years after the first election. The employer then objected to the eligibility of 464 economic strikers who voted in the election on the ground that the strike was continuing, and had lasted over a year, and therefore, § 9(c)(3) disqualified all these voters. By the time ballots were counted on July 31, 1987<sup>8</sup> more than three years after the first tainted election occurred <sup>9</sup> employee interest in the union was a moot point.

<sup>41</sup> See Justice Brennan’s pointed dissent in *TWA v. Ind. Fed. of Flight Attendants*, 489 U.S. 448-49 (1989):

The employer’s promise to members of the bargaining unit that they will not be displaced at the end of a strike if they cross the picket lines addresses a far different incentive to bargaining unit members than does the employer’s promise of permanence to new hires. The employer’s threat to hire permanent replacements from outside the existing workforce puts pressure on the strikers as a group to abandon the strike before their positions are filled by others. But the employer’s promise to members of the striking bargaining unit that if they abandon the strike (or refuse to join it at the outset) they will retain their jobs at strike’s end in preference to more senior workers who remain on strike produces an additional

! Prior to a 1986 change in labor law, an employer could lawfully lockout workers to protect property, or affect the timing of an inevitable labor dispute to inconvenience employees. *Harter Equipment* fundamentally changed the lockout doctrine.<sup>42</sup> The employer locked out workers because they rejected management's proposal for wage concessions. Notably, these employees promised not to strike while they continued to bargain. The employer locked them out anyway, hired permanent replacements, and continued business as usual. Eventually, the company decertified the union. Employees and their union were thrown out of the workplace simply because they rejected a bargaining proposal. This ruling imposes a potentially prohibitive cost on unions and employees who peacefully reject a management bargaining proposal.<sup>43</sup> This, and related developments, have prompted experts to wonder whether collective bargaining is little more than collective begging.<sup>44</sup>

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dynamic: now there is also an incentive for individual workers to seek to save (or improve) their own positions at the expense of other members of the striking bargaining unit. . . . Such a 'divide and conquer' tactic thus strike(s) a fundamental blow to union . . . activity and the collective bargaining process itself.

<sup>42</sup> 280 N.L.R.B. 597 (1986).

<sup>43</sup> In finding that the employer did not commit any unfair labor practice by locking out and replacing workers, the NLRB majority stated that "the use of temporary employees reasonably serves precisely the same purpose served by the lockout, i.e., bringing economic pressure to bear in support of a legitimate bargaining position." By the majority's reasoning, the fact that the employer was the aggressor was irrelevant. At bottom, "the Union or its individual members have the ability to relieve their adversity by accepting the employer's less favorable bargaining terms and returning to work." Board Member Dennis, in a forceful dissent, showed how the majority expanded this doctrine far beyond previous doctrinal limits when she concluded that the "use of replacements under the instant facts is . . . inherently destructive of employee rights . . ." She reasoned that "unlike *Brown Food Store*, all the company's employees desired to continue working. In such a case . . . to deny them work which is then offered to nonunion replacements, solely because of their collective bargaining efforts, would seem clearly discriminatory and in the nature of a reprisal for section 7 activities."

2. An Increasing Number of Large Regional or National Employers Hire Permanent Striker Replacements. In a departure from a calmer period of labor-management relations, more regional and national employers respond to strikes by continuing operations with permanent striker replacements. When one employer in an industry engages in this practice, others follow this example (e.g., food processing industry [Geo. A. Hormel, Monfort of Colorado, Cook Family Foods, and Diamond Walnut]; paper products [Boise Cascade and International Paper]; newspapers and printing presses [Detroit Free Press, Chicago Tribune, New York Daily News, Pittsburgh Press, San Francisco Chronicle, and Doraville Press]; coal and copper mining [Phelps Dodge, A.T. Massey, Decker Coal, and Pittston Coal Group]; airline and bus carriers [Continental Airlines, United Airlines, TWA, Eastern Airlines, American Airlines, and Greyhound]; tire makers [Titan Tire Corp., Continental General Tire, Bridgestone/Firestone, and Pirelli Armstrong]; assorted manufacturers [Peterbilt, Oregon Steel/CF&I, Colt Industries, and Ravenswood]; and professional sports [major league umpires and NFL football players]).

3. Although Large Strikes Occur Less Frequently They Are Increasingly Violent, Especially When Permanent Replacements Are Hired. Since 1947, the Bureau of Labor Statistics has tracked the frequency of strikes involving 1,000 or more employees. From 1947 through 1981, 200-450 of these large strikes occurred annually. Since then, this range has sharply declined to 20-50 strikes per year.<sup>45</sup>

This remarkable reduction is almost certainly due to greater employer willingness to hire

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<sup>44</sup> Samuel Estreicher, "Collective Bargaining or Collective Begging?: Reflections on Antistrike Breaker Legislation," *Michigan Law Review*, Vol. 93 (Dec. 1994), pp. 577-606.

<sup>45</sup> See Table 1, "Work Stoppages Involving 1,000 or More Workers, 1947-2002," U.S. Dep't of Labor, Bureau of Labor Statistics, available at <http://stats.bls.gov.news.release/wkstp.t01.htm>.

permanent striker replacements. While strike statistics suggest, on the surface, a new era of labor-management harmony, a closer examination shows that replacement worker strikes are much more disorderly and violent than the non-replacement variety. Replaced strikers in diverse industries have threatened replacements and customers,<sup>46</sup> sabotaged equipment,<sup>47</sup> littered roads with tire-puncturing jack rocks,<sup>48</sup> blocked work entrances,<sup>49</sup> damaged cars transporting replacements to work<sup>50</sup> and attempted to force these cars off the road while giving chase,<sup>51</sup> and, less frequently, have rioted,<sup>52</sup> shot,<sup>53</sup> bombed,<sup>54</sup> burned,<sup>55</sup> assaulted,<sup>56</sup> and killed.<sup>57</sup> Occasionally,

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<sup>46</sup> *International Ass'n of Machinists v. Eastern Air Lines*, 121 B.R. 428, 431 (S.D.N.Y. 1990) (describing replaced strikers calling passengers "'scab' and 'cheap ass' while telling them to have a shit flight, [and] that they would be 'killed' and not to forget their 'body bag'"); *Keco Indus., Inc.*, 276 N.L.R.B. 1469, 1474 (1985) (describing replaced striker who struck car of employee crossing picket line with rock and who confronted driver and his passengers by yelling, "I'll blow your fucking heads off").

<sup>47</sup> See "Fuels PP&L, Decker Offering \$500,000 for Info on Coal-Strike Sabotage," Electric Utilities Weekly (May 2, 1988), at 20 (reporting on sabotage of two electrical transformers and power lines likely committed by strikers and causing approximately \$750,000 in damage).

<sup>48</sup> See *International Union, United Mine Workers v. Bagwell*, 114 S. Ct. 2552, 2554 (1994) (levying \$64 million civil coercive contempt fines against union for, *inter alia*, littering county highways with jack rocks); "Mine Workers Chief Says Pittston Strike Underscores Need for Overhaul of Labor Law," Daily Labor Report (BNA) No. 160, at A-9 (Aug. 19, 1989) (reporting Pittston official's account that strikers had destroyed 3,000 tires since strike began).

<sup>49</sup> See *Domsey Trading Corp.*, 310 N.L.R.B. 777, 809 (1993) (stating that replaced strikers blockaded bus carrying replacement workers and pushed leaving workers' bus away from plant, causing it to appear "that this strike more resembled a battlefield"); "Hormel Strikers Close Plant Again," New York Times (Feb. 1, 1986), at 54 (reporting that strikers barricaded entrances of plant with their cars, forcing its closure).

<sup>50</sup> See *Circuit-Wise, Inc.*, 308 N.L.R.B. 1091, 1100 (1992) (reporting that replaced striker damaged car crossing picket line with pipe); *Mohawk Liqueur Co.*, 300 N.L.R.B. 1075, 1091 (1990) (reporting that replaced strikers sprayed replacements' cars with paint solvent as they crossed picket line).

<sup>51</sup> See *Gibson Greetings, Inc.*, 310 N.L.R.B. 1286, 1303 (1993) (asserting that replaced striker tried to force replacement's car off road); *Cook Striker Gives Alford Plea*, Daily Independent (Ashland, Ky.), Dec. 24, 1993, at 7 (reporting striker's conviction for wanton endangerment after attempting to drive replacements off of road).

<sup>52</sup> See William Serrin, "Hormel Plant Shuts as Troops Arrive and Strikers Thin Ranks," New York Times (Jan. 22, 1986), at A12; and William Serrin, "Hormel Reopens Plant As Guardsmen Bar Strikers," New York Times (Jan. 23, 1986), at A12.

replacement workers have been violent.<sup>58</sup>

4. Work Performed by Striker Replacements Causes Serious Injury or Death to the Public and Irreparable Damage to Long-Standing Business Relationships: Recent research into Bridgestone/Firestone Corporation's hiring of permanent striker replacements in 1995 presents strong evidence that these workers were responsible for manufacturing a large number of defective tires that eventually killed or harmed consumers.<sup>59</sup> Bridgestone/Firestone paid millions of dollars in settlements to consumers and others injured by their defective tires. As an

<sup>53</sup> See "Two Striking Greyhound Drivers Arrested on Federal Firearms Charges," Daily Labor Report (BNA) No. 72, at A-4 (Apr. 13, 1990) (reporting that two replaced strikers were arrested on federal charges in connection with two shooting incidents near St. Louis); "Shots Fired at Cook's; No Injuries Reported," Grayson Journal Enquirer (Grayson, Ky.), Dec. 22, 1993, at 1 (describing shots fired at trailer during strike).

<sup>54</sup> E.g., "Report from the Picket Lines: Rubber Strike Starting to Burn," Labor Trends (Dec. 3, 1994), at 1 (reporting that striker was charged with bombing home of replacement in Polk County, Iowa).

<sup>55</sup> See *Chicago Tribune Co. v. NLRB*, 965 F.2d 244, 246 (7th Cir. 1992).

<sup>56</sup> *Diamond Walnut Growers, Inc.*, 312 N.L.R.B. 61, 64 (1993) (reporting that replacement worker was "severely beaten" by two or three men who were probably replaced strikers); *General Chem. Corp.*, 290 N.L.R.B. 76, 77 (1988) (describing baseball bat violence and shouting of "motherfucker" by strikers); "San Francisco Newspaper Employees Ratify Five-Year, Strike-Ending Pacts," Daily Labor Report (BNA) No. 218, at A-12 (Nov. 15, 1994) (reporting that guard was stabbed in abdomen during strike); "Union-Represented Driver Killed During Strike at San Francisco Papers," Daily Labor Report (BNA) No. 214, at A-9 (Nov. 8, 1994) (reporting that strikers pulled replacement driver from truck and beat him [death reported in headline was accidental electrocution and unrelated to strike violence]).

<sup>57</sup> See "Williams Calls for Quick Legal Action in Picket Line Deaths in Alabama Strike," Daily Labor Report (BNA) No. 173, at A-5 (Sept. 9, 1993) (reporting on replacement strike in Alabama in which two strikers were killed by tractor-trailer crossing picket line at high rate of speed); and "Shooting Investigation," Champaign-Urbana News-Gazette (July 24, 1993), at A8 (reporting shooting death of striker replacement as he crossed picket line to work for Arch Mineral Corp. in West Virginia).

<sup>58</sup> See *United Steelworkers v. Phelps Dodge Corp.*, 833 F.2d 804, 807 (reporting that replacements attacked strikers by slashing their tires, breaking striker's jaw with rifle butt, and making threatening calls to striker's wife); *International Paper Co.*, 309 N.L.R.B. 31, 40 (1992) (stating that nonstriker attacked replaced striker with baseball bat).

<sup>59</sup> See Alan B. Krueger & Alexander Mas, "Strikes, Scabs and Tread Separations: Labor Strife and the Production of Defective Bridgestone/Firestone Tires," available in Princeton University Industrial Relations Section Working Paper No. 461 (Jan. 2002), at [www.irs.Princeton.edu/pubs/pdfs/461revised.pdf](http://www.irs.Princeton.edu/pubs/pdfs/461revised.pdf).

outgrowth, Ford ended its century-old business relationship with the struck company. As these defective tires became the subject of national attention, Bridgestone/Firestone's stock market valuation plummeted from \$16.7 billion to \$7.5 billion.

5. In Response to Increasing Hiring of Permanent Striker Replacements, Unions Disrupt and Impair Employer Operations with On-the-Job Activities Such as "Work-to-Rule" Slowdowns. Some unions include an "in-plant strategy" as part of their economic arsenal. One common tactic is to slow down work by scrupulously following employer or government safety rules. To illustrate with a Railway Labor Act example, when United Airlines pilots were upset with protracted contract negotiations, they supported their bargaining demands by slowing their jets to a crawl as they taxied from runways to gates.<sup>60</sup> This greatly disrupted flight operations. Nevertheless, United had no practical remedy for this concerted activity.

In a more recent example, during the 2002 labor dispute between the Pacific Maritime Association and International Longshore and Warehouse Union, President Bush intervened when a concerted slowdown at 28 key ports by dockworkers prompted employers to respond with a lockout. Following a judge's order to reopen the ports and resume normal operations, dock workers moved freight at about 75% - 80% normal speed. Neither a federal judge nor the President could do anything to quicken the pace of work.

6. In Another Response to Increasing Hiring of Permanent Striker Replacements, Unions under the Railway Labor Act Disrupt and Impair Employer Operations with Partial and Intermittent Strikes. An increasingly germane economic weapon for unions who operate under

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<sup>60</sup> See Susan Chandler, "Air Travelers Face Chaos," Chicago Sun-Times, Nov. 16, 1993, at 1.



the Railway Labor Act is the intermittent strike,<sup>61</sup> partial strike,<sup>62</sup> or quickie strike.<sup>63</sup> These limited-scale strikes are important because they reverse a long trend of sharply declining strike activity.

For unions and their members, the specter of replacements appears to have raised strike costs to a nearly prohibitive level. However, when a union limits a strike in duration or scope, it shifts the cost of a labor dispute from employees to employers. Aptly named CHAOS or HAVOC, these limited strikes disrupt an employer's business. To illustrate, the mere threat of a CHAOS strike causes an employer's customers to make alternative arrangements. A quickie strike or partial strike makes the threat a reality, thereby intensifying the economic effect. But an abrupt end to the strike precludes the employer from hiring permanent replacements.

This tactic was used with great success by the flight attendant's union at Alaska Airlines, in response to that employer's hiring of permanent striker replacements in 1979. After their labor agreement became amendable in October 1990, the AFA and Alaska Airlines commenced negotiations that lasted three years under the auspices of the National Mediation Board. In May 1993 the NMB terminated its mediation, announced a thirty-day cooling-off period, and released the parties to engage in self-help. The union implemented a limited CHAOS campaign, involving twenty-four AFA members who took part in short duration work stoppages. The airline responded by preventing the strikers from returning to work and threatening to replace them.

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<sup>61</sup> Usually, this is a short strike, followed by a return to work, and more short work stoppages.

<sup>62</sup> This is either a strike by a small and usually select group of employees; or a work stoppage by many or all employees but only for selected periods, for example, a mass refusal to accept overtime assignments.

<sup>63</sup> This is a strike of very short duration, for example, for an hour or during a meeting scheduled by management.

This set the stage for a court ruling on the scope of an employer's response to CHAOS.<sup>64</sup> The union went to court seeking an injunction to prevent the airline from carrying out this threat. A federal judge ruled for the union when it determined that CHAOS work stoppages are protected under the Railway Labor Act. In addition, the court limited an employer's use of self-help methods in responding to CHAOS.

Recent research on this re-emerging union tactic shows a paradox.<sup>65</sup> Partial and intermittent strikes are not protected under the NLRA, but are fully protected under the RLA. Accounting for this developing schism in federal labor policy is impossible since there is no legislative history or other policy or logic to justify these differing policy approaches under two analogous labor laws.

This much is clear, however. Current policy under the NLRA forces employees either to gamble on a high-risk traditional strike that exposes them to permanent replacement, or to engage in a short-term work stoppage— and risk being fired— to put economic pressure on an employer. For workers under the Railway Labor Act, partial and intermittent strikes are virtually cost-free activities that impose enormous losses on employers whose businesses depend on reliable service and scheduling.

#### 7. Secondary Picketing and Work Stoppages Are Lawful under the Railway Labor Act.

This means that in a labor dispute involving a union and employer, pickets may be maintained against neutral employers who are not parties to the primary dispute. When unionized employees

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<sup>64</sup> *Association of Flight Attendants v. Alaska Airlines*, 847 F.Supp. 832 (W.D. Wash. 1993).

<sup>65</sup> Michael H. LeRoy, "Creating Order out of CHAOS and Other Partial and Intermittent Strikes," *Northwestern University Law Review*, Vol. 95 (Fall 2000), pp. 222-270.

of the neutral employer honor these picket lines by refusing to cross them, strikes spread like a contagion.

This right to enmesh neutral employers and their employees greatly magnifies union economic power. A 1986 labor dispute involving the small Guilford Railroad Co. and 200 of its employees demonstrates the huge impact of secondary picketing.<sup>66</sup> When the company proposed to eliminate jobs, the national rail employees union who represented these workers set up pickets at major rail centers across the nation. After union workers at neutral railroads honored those pickets, this isolated labor dispute threatened to shutdown the nation's transportation system. Meanwhile, President Reagan, acting pursuant to the RLA, formed an Emergency Board to break the impasse between the union and company. While this action halted the union's strike and secondary picketing, it failed to produce a settlement.

After the RLA cooling-off period expired, Congress took the unusual step of enacting legislation to extend the RLA's moratorium by sixty days. When the parties were still at impasse following this extension, Congress passed an extraordinary law. First, it legislated the substantive terms to the parties' unsettled labor agreement. Realizing that some implementation issues might remain, Congress also ordered the parties to submit these matters to binding arbitration.

The company sued to challenge the imposition of this labor contract on it by the Congress; but a federal appeals court rejected the railroad's arguments against compulsory arbitration. In the same dispute, the U.S. Supreme Court upheld the right of unions under the Railway Labor Act to engage in secondary picketing (for more details, *see* Appendix, *Burlington*

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<sup>66</sup> *See Maine Cent. R. Co. v. B'hd of Maintenance of Way Employees*, 835 F.2d 368 (1<sup>st</sup> Cir. 1987).

*Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*<sup>67</sup>).

This labor dispute offers lessons for the Postal Service and its unions. For example, a rural postal union, after having gone on strike, could lawfully picket large, urban mail centers. The 1995 interest arbitration for the tiny postal nurses union suggests a more dramatic use of this power.<sup>68</sup> Suppose that union went on strike and sent pickets to key mail centers around the country. The same kind of national disruption to rail service that occurred in 1986 would likely result for mail delivery.

*III[D]. Assessment of the Railway Labor Act:* Most scholarly assessments of the Railway Labor Act were published from the 1950s to the early 1980s. Examining the nation's experience with RLA emergency boards, which are invoked after mediation fails, a leading study concluded that these boards "have had such a wildly varied history that both friends and foes of the Act can find ample ammunition for their views."<sup>69</sup> In particular, "the dispute settlement record was good in the 1926-40 and 1953-60 periods; it was certainly poor in the 1940s and 1960s, but few if any alternative policies would have looked good in those years; and the developments in the 1971-76 period are genuinely encouraging."<sup>70</sup> However, this positive appraisal was tempered: "Yet, critics can justifiably point to the excessive number of boards appointed over the years— certainly far more than the framers ever expected; the repeated failure of boards to settle critical

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<sup>67</sup> 481 U.S. 429 (1987).

<sup>68</sup> Testimony of George R. Fleischli, Before the President's Commission on the USPS (Chicago, IL, April 29, 2003), "Strengths and Weaknesses of the Current Collective Bargaining Process: Interest Arbitration."

<sup>69</sup> Donald E. Cullen, "Emergency Boards Under the Railway Labor Act," in The Railway Labor Act at Fifty: Collective Bargaining in the Railroad and Airline Industries (Benjamin Aaron et al., eds. 1977), pp. 151-186, at 185.

<sup>70</sup> *Id.*

disputes in the 1940s and 1960s, [and] the evidence that often little bargaining occurred before boards were appointed in national disputes. . . .”<sup>71</sup>

**IV. FINAL OFFER INTEREST ARBITRATION AS A MIDDLE GROUND ALTERNATIVE TO THE CURRENT COLLECTIVE BARGAINING MODEL AND RAILWAY LABOR ACT**

*IV[A]. Critique of Conventional Arbitration.* When the current model of conventional interest arbitration was legislated in 1978, public sector collective bargaining was in an early stage of its development. While conventional arbitration used by the Postal Service has remained unchanged, at least twenty-one states now provide various forms of interest arbitration for governmental employees (e.g., state, county, and municipal employees). As in the case of the Postal Service, these laws deny employees the right to strike because a work stoppage would harm the public.

Table A (*see* Appendix) shows the type of arbitration system adopted by these states. Some, like the Postal Service, use conventional arbitration. In general, this method does not provide any express constraint on arbitrator decision-making. Thus, an arbitrator may settle a bargaining impasse by selecting either party’s offer, or fashioning a compromise, or creating a novel resolution. As previously discussed, this method is problematical because it imposes too little cost on bargainers for failing to make tough choices and compromises.<sup>72</sup> Since strikes and

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<sup>71</sup> *Id.*

<sup>72</sup> Empirical evidence on this assertion is mixed. Consistent with this theoretical proposition, a 1975 study found that under a conventional arbitration system for firefighters, management bargainers were less likely to modify their wage offers. The study also found that this arbitration system contributed to a greater gap in impasse positions. Hoyt N. Wheeler, “An Analysis of Fire Fighter Strikes,” *Labor Law Journal*, Vol. 26, No. 1 (Jan. 1975), pp. 17-20. Similar studies indicated bargainer reliance on third party intervention in conventional arbitrations systems in New York and Massachusetts. *See* Thomas A. Kochan, “Correlates of State Public Employee Bargaining Laws,” *Industrial Relations*, Vol. 12, No. 3 (July 1978), pp. 431-449; and David B. Lipsky and Thomas A. Barocci, “Final Offer Arbitration and Public Safety Employees: The Massachusetts Experience,” in *Proceedings of the Thirtieth Annual Winter Meeting* (Barbara D. Dennis, ed., 1978), pp. 65-76. For evidence that conventional interest arbitration does not reduce bargaining, *see* Joseph R. Grodin, “Arbitration and Public Sector Labor Disputes: The Nevada

lockouts are illegal in these collective bargaining systems, bargainers do not have to deal with the dire consequences of economic weapons. Thus, a rational bargaining response is to make no meaningful concessions and proceed to arbitration. Even worse, where bargainers expect an arbitrator to render a compromise decision, there is incentive to inflate their offers in anticipation of a split decision.

*IV[B]. Final Offer Arbitration As An Alternative Conventional Arbitration.* In contrast to the Postal Service's use of conventional arbitration, some states utilize a final offer system. This method limits an arbitrator to select one of the parties' final offers. The arbitrator cannot make a compromise decision. This dispute resolution method divides into two main classes: (a) final offer by issue, and (b) final offer by package. In the former, when multiple issues are presented for decision, the arbitrator decides each issue on its merits. However, in the latter, the arbitrator chooses an entire package of final offers.

In theory and in practice, final offer systems are superior to conventional interest arbitration.<sup>73</sup> Because the arbitrator has no power to compromise bargaining positions, the parties have less incentive to inflate their positions. In addition, these systems energize the bargaining process by creating a severe penalty. The party whose offer is rejected loses everything that remains unsettled on the bargaining table. Thus, as parties approach arbitration they minimize

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Experiment," Industrial and Labor Relations Review, Vol. 28, No. 1 (1975), pp. 89-102. The author's conclusion that conventional bargaining helps bargaining, in J. Joseph Loewenberg, "Compulsory Arbitration for Police and Fire Fighters in Pennsylvania in 1968," Industrial and Labor Relations Review, Vol. 23, No. 3 (April 1970), pp. 367-379, is limited by the one year sample and the finding that two-thirds of the observed negotiations resulted in a settlement. This last finding is better interpreted as over-reliance on arbitration.

<sup>73</sup> For results that show that final offer arbitration either improves or encourages bargaining, see Daniel Gallagher and Richard Pegnetter, "Impasse Resolution Under the Iowa Multi-Step Procedure," Industrial and Labor Relations Review, Vol. 32, No. 3 (April 1979), pp. 327-338; and Gary Long and Peter Feuille, "Final Offer Arbitration: 'Sudden Death' in Eugene," Industrial and Labor Relations Review, Vol. 27, No. 2 (Jan. 1974), pp. 186-203.

their prospects for losing by making offers that they believe the arbitrator will exclusively select.

This process adds another critical limit on arbitrator decision making by removing subjectivity in selecting an offer. The law directs the arbitrator to base the award on one or more objective criteria (e.g., ability of employer to pay, and cost-of-living for employees). At the heart of this list, the arbitrator must consider which offer is most comparable to wages, hours, and terms and conditions of similarly situated employers and employees. The comparison can embrace private- and public-sector employment, or be limited to one type of work setting.

This focuses bargainers on relevant data for labor market conditions, employee compensation, and employer ability-to-pay in comparable jurisdictions. A party who assesses these metrics unrealistically increases its risk for losing at arbitration. Again, the logic of final offer arbitration is to severely penalize unrealistic bargainers. As a consequence, it deters reliance upon arbitrators to settle their contract negotiations.

*IV[C]. Flexibility of Final Offer Arbitration Systems.* State laws provide a range of final offer bargaining systems for essential employees (typically, police and fire fighters). Three types are highlighted.

1. Wisconsin's Final Offer Package System.<sup>74</sup> Some states increase the stakes for bargainers by using final offer package systems. This approach addresses a potential flaw in a final offer by issue system: bargainers may bring multiple issues to arbitration in anticipation that the arbitrator will select the employer's offer on one issue (e.g., health insurance) and select the union's offer on another issue (e.g., wages).

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<sup>74</sup> W.S.A. 111.77 (settlement of disputes in collective bargaining units composed of law enforcement personnel and fire fighters). *Also see City of Manitowoc v. Manitowoc Police Dept.* (1975) 236 N.W.2d 231, 70 Wis.2d 1006.

Thus, a final offer by issue system provides a backdoor method for the arbitrator to compromise the parties' bargaining positions, albeit with less latitude than in a conventional system. To be clear, nothing in this system requires an arbitrator to behave this way. A rational bargainer must understand that the arbitrator could rule for one party on all of the disputed issues, especially if data from comparable jurisdictions support this approach.

A final offer package approach remedies this problem. By way of illustration, suppose that an employer and union are at impasse, respectively, over wages (2.5% increase compared to 4.5% increase), health insurance (\$200 monthly contribution by employee compared to \$100 monthly contribution), overtime (paid after ten hours worked in a day, compared to eight hours), length of shift (12 hours compared to 8 hours), vacation pay (2 weeks compared to 4 weeks), and number of paid holidays (13 compared to 16). With so much at risk if this entire package is rejected by the arbitrator, a party feels intense pressure to moderate its final offer package. Assuming that the opposing bargainer is just as risk-averse, that party feels great pressure to reciprocate.

2. Iowa's Final Offer Fact-Finder System.<sup>75</sup> There is no guarantee that a final offer system will work every time. Not only can bargainers reach impasse, but they may be far apart. Iowa's final offer system contemplates this possibility by adding a "last ditch" frame of reference for the parties – a step involving neutral fact-finding (adapted from the Railway Labor Act). Iowa law enables the arbitrator to select either of the parties' final offers, or the resolution suggested by the neutral fact-finder.<sup>76</sup> This system appears to address two scenarios that other

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<sup>75</sup> I.C.A. ' 20.22 (public employment relations collective bargaining).

<sup>76</sup> See I.C.A. ' 20.22(3) (public employment relations collective bargaining), providing:



final offer systems overlook. First, both parties may have impasse positions that are manifestly unreasonable, putting the arbitrator in the position of selecting the least unworkable offer. The fact-finder, who serves as a voice of reality for parties at this terminal stage of bargaining, may provide the arbitrator with a more reasonable resolution of the dispute. In addition, both of the parties' final offers might harm the public interest. The fact-finder's approach could address this bargaining impact.

3. Illinois' Final Offer Arbitration System.<sup>77</sup> Illinois provides a final offer by issue system for police and fire fighters. In a variation, it narrows the usual scope of bargaining (i.e., wages, hours, and terms and conditions of employment). The law removes from arbitration a list of inherent managerial rights. The effect of this provision is to make these permissive rather than mandatory subjects of bargaining. Consequently, parties cannot bargain to impasse nor proceed to arbitration on these matters.<sup>78</sup>

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The submission of the impasse items to the arbitrators shall be limited to those issues that had been considered by the fact-finder and upon which the parties have not reached agreement. With respect to each such item, the arbitration board award shall be restricted to the final offers on each impasse item submitted by the parties to the arbitration board or to the recommendation of the fact-finder on each impasse item.

<sup>77</sup> 5 ILCS 315/14.

<sup>78</sup> See 5 ILCS 315/14(I):

i) residency requirements in municipalities with a population of at least 1,000,000; ii) the type of equipment (other than uniforms and fire fighter turnout gear) issued or used; iii) the total number of employees employed by the department; iv) mutual aid and assistance agreements to other units of government; and v) the criterion pursuant to which force, including deadly force, can be used; provided, however, nothing herein shall preclude an arbitration decision regarding equipment levels if such decision is based on a finding that the equipment considerations in a specific work assignment involve a serious risk to the safety of a fire fighter beyond that which is inherent in the normal performance of fire fighter duties.

Under a different law, Illinois regulates collective bargaining for educational employees. Although this law resembles the private sector model by allowing for strikes and lockouts, it has a specific provision drafted in response to a crisis affecting the Chicago school system. A close examination shows that this amendment dramatically curtails the scope of bargaining for the school board and teachers union.<sup>79</sup>

The point is that a final offer interest arbitration system can be tailored to address the special needs of an employment relationship. Predictably contentious bargaining subjects, or matters of urgent public interest that also affect the employment relationship, can be overridden by the interest arbitration statute. As a result of the narrowed scope of bargaining, parties are more likely to bargain successfully over remaining issues.

One more feature of final offer arbitration deserves consideration. To further enhance

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<sup>79</sup> See Il. Stat. Ch. 115, 5/4.5(a) (Prohibited Subjects of Collective Bargaining), providing that:

[C]ollective bargaining . . . shall not include any of the following subjects. . . .

(2) Decisions to contract with a third party for one or more services otherwise performed by employees in a bargaining unit, the procedures for obtaining such contract or the identity of the third party, and the impact of these decisions on individual employees or the bargaining unit.

(3) Decisions to layoff or reduce in force employees (including but not limited to reserve teachers or teachers who are no longer on an administrative payroll) due to lack of work or funds, including but not limited to decline in student enrollment, change in subject requirements within the attendance center organization, closing of an attendance center, or contracts with third parties for the performance of services, and the impact of these decisions on individual employees or the bargaining unit.

(4) Decisions to determine class size, class staffing and assignment, class schedules, academic calendar, hours and places of instruction, or pupil assessment policies, and the impact of these decisions on individual employees or the bargaining unit.

(5) Decisions concerning use and staffing of experimental or pilot programs, decisions concerning use of technology to deliver educational programs and services and staffing to provide the technology, and the impact of these decisions on individual employees or the bargaining unit.

bargaining, these laws give the arbitrator flexibility to remand the matter to the parties for a brief period of continued negotiations.<sup>80</sup> In addition, some systems operate with behavioral norms that are not expressly part of the law. The arbitrator may be expected to caucus privately with each party to raise questions—perhaps, even doubts—about a parties’ comparability data or offer. These caucuses can be problematical, but as two expert arbitrators testified before the Postal Commission, this aspect of a final offer system can enhance the settlement process.<sup>81</sup>

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<sup>80</sup> See 5 ILCS 315/14(f):

At any time before the rendering of an award, the chairman of the arbitration panel, if he is of the opinion that it would be useful or beneficial to do so, may remand the dispute to the parties for further collective bargaining for a period not to exceed 2 weeks. If the dispute is remanded for further collective bargaining the time provisions of this Act shall be extended for a time period equal to that of the remand.

<sup>81</sup> See Testimony of George R. Fleischli, Before the President’s Commission on the USPS (Chicago, IL, April 29, 2003), “Strengths and Weaknesses of the Current Collective Bargaining Process: Interest Arbitration,” at p. 3, stating: “For many years, Wisconsin authorized the arbitrator to mediate, a procedure which served to ameliorate the impact of this rule and resulted in many settlements. For a number of reasons, this provision for ‘mediation / arbitration’ was removed from the statute.” For greater advocacy of this general method, see Testimony of Stephen B. Goldberg, Before the President’s Commission on the USPS (Chicago, IL, April 29, 2003), at pp. 2-3:

In the context of the U.S Postal Service, I suggest that fact-finding is likely to be useful in resolving collective-bargaining disputes only when the fact-finder serves as a mediator - and if the fact-finder is to be a mediator, let’s call him that. And, since mediation is a useful means of encouraging the Postal Service and its unions to take the responsibility of resolving their own disputes, rather than sending those disputes to an arbitrator, let’s make mediation required, rather than optional.

The next question is whether, in the event mediation is not successful in resolving all issues, and the matter must go on to arbitration, the same neutral should serve as both mediator and arbitrator. The advantages of having the same neutral serve in both roles - often referred to as “med-arb” - are two: (1) The neutral, because of his ultimate decisional authority, can, by hinting how he would exercise that authority, bring pressure on the parties to resolve many issues at the mediation stage; (2) Because the neutral will know the parties’ ultimate positions on those issues that are not resolved in mediation, the parties cannot retreat to their pre-mediation positions in arbitration, as they can when a different person serves as arbitrator. The result of this change should be to reduce the number of issues that go to arbitration, and to lessen the difference between the parties on those issues. This, too, would reduce the breadth of the arbitrator’s discretion.

While I tend to be favorable towards this proposal, because of its promise of increasing the role of the parties in determining the terms of the collective bargaining contract, I must acknowledge one nagging concern. If the same neutral

## V. CONCLUSIONS

Negotiations under the current collective bargaining model for the U.S. Postal Service result in a lower percentage of contract settlements compared to the private sector. A leading authority who has had experience with Postal Service interest arbitration offered this succinct criticism of the current process:

The criticisms that have been lodged against interest arbitration begin with the fact that it removes the ultimate decision-making authority from those who best understand the issues and are most directly affected by the proposed solutions. Most other criticisms fall into two categories, sometimes referred to as the “chilling effect” and the “narcotic effect.” The argument is that both parties will be reluctant to offer concessions in bargaining if they know that the other side can always invoke arbitration to extract more. That is followed by the argument that once the parties discover that arbitration is an acceptable alternative, they will abandon the difficult process of attempting to resolve their conflicting interests on their own.<sup>82</sup>

Because negotiations are much more effective under private sector models, alternatives such as the Railway Labor Act and the National Labor Relations Act deserve consideration. This is especially true when one considers that Postal Service competitors such as UPS and Federal Express operate profitably under these labor laws.

But private sector models pose unique hazards in the context of nationwide mail delivery. A leading expert explained:

As a practical matter, however, neither the Railway Labor Act model nor the

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is to serve as both mediator and arbitrator, the parties may be less willing, at the mediation stage, to reveal what their high, medium, and low priorities are for fear that if they don't get a deal in mediation, the mediator turned arbitrator will use that information against them. Since one of the keys to successful mediation is the parties' willingness to be candid with the mediator, a diminution in that candor could have negative consequences for the success of mediation.

<sup>82</sup> Testimony of George R. Fleischli, Before the President's Commission on the USPS (Chicago, IL, April 29, 2003), “Strengths and Weaknesses of the Current Collective Bargaining Process: Interest Arbitration,” at p. 4.

NLRA model can be applied to the Postal Service because neither Congress nor the American public would long tolerate a strike or lockout that shut down mail delivery. Thus, collective bargaining disputes in the Postal Service will inevitably be resolved by third-party intervention, and the real question before this Commission is whether the nature of that intervention should be determined on a case-by-case basis, as is the case when nation-wide disputes fall under the Railway Labor Act or the NLRA, or whether the nature of the third-party intervention for Postal Service collective bargaining disputes should be tailor-made for this unique organization.<sup>83</sup>

A work stoppage involving the Postal Service's 770,000 bargaining unit employees would be unprecedented in scale. Jobs and businesses tied to this enormous work force would be endangered.<sup>84</sup> In addition, widespread use of just-in-time logistics, inventory management systems, and consumer billing would further externalize huge strike costs to the public.

Some form of final offer interest arbitration would likely improve the current model without risking the high cost of work stoppages. This approach is routinely effective in police and fire fighter work settings. These occupations are analogous because they provide essential public services.

Final offer systems depart significantly from the current model of conventional arbitration, which inhibits real bargaining. Instead, they require an arbitrator to choose one of the parties' final offers. This choice derives from objective factors related to comparable employment relationships. Parties are left with a stark choice: Formulate their offers according to these metrics or risk a total loss at arbitration. Even when impasse occurs, parties almost always

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<sup>83</sup> Testimony of Stephen B. Goldberg, Before the President's Commission on the USPS (Chicago, IL, April 29, 2003), at p. 2.

<sup>84</sup> *E.g.*, Testimony of Gus Baffa, President of the National Rural Letter Carriers Association, Before the President's Commission on the USPS (Washington, DC, February 20, 2003), at p. 1, describing how rural carriers deliver hundreds of repair parts packages each week to farm customers such as Jim Folk, of Center, North Dakota, who rely on these essential deliveries to maintain their remote operations.

enter arbitration having agreed to certain concessions, and arbitrators occasionally mediate settlements over the narrowed range of stalemate issues at this late stage.

Compare this experience to the critical assessment of the current bargaining model offered by the Postal Service's Vice President of Labor Relations:

One of my personal frustrations is that often the parties in negotiations come very close to an agreement, but do not quite make it. Too often, in interest arbitration, the parties revert back to their initial negotiating positions, instead of building on the progress made in negotiations. This makes the process not only more time-consuming, but also increases the risk in a proceeding which decides very important issues to the future of the Postal Service.<sup>85</sup>

This account exemplifies the serious flaws of conventional interest arbitration, and demonstrates the high likelihood that a final offer format would almost surely push the parties over the usual last hurdle toward voluntary closure of the bargaining process.

An academic study by a Member of the Postal Commission provides a philosophical anchor for the main conclusion presented in this report. In a study of rail industry deregulation, Prof. Richard C. Levin reasoned: "In documenting the shortcomings of regulation, economists have typically compared the policy under scrutiny to an ideal social optimum. But, in the current enthusiasm for deregulation, few have paused to point out that in many regulated industries deregulation is unlikely to achieve optimality."<sup>86</sup> His analysis proceeded to identify "simple and workable regulatory policies that dominate the status quo. . ."<sup>87</sup>

So it is with this analysis. To conclude, the next logical step in reforming the collective

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<sup>85</sup> Testimony of Anthony J. Vegliante, Before the President's Commission on the USPS (Chicago, IL, April 29, 2003), at p. 6.

<sup>86</sup> Richard C. Levin, "Railroad Regulation, Deregulation, and Workable Competition," American Economic Association Papers and Proceedings, Vol. 71, No. 2 (May 1981), pp. 394-398, at p. 394.

<sup>87</sup> *Id.*

bargaining model for the Postal Service and affected unions— because the following policy is simple and workable— is some form of final offer interest arbitration. Even though the private sector model works for key competitors of the Postal Service, a final offer arbitration system would, in all likelihood, serve them well, too. More fundamentally, the Transformation Plan clearly states a preference that the Postal Service will become a Commercial Government Enterprise, not a Privatized Corporation. As long as the Postal Service provides essential delivery services to the public under the aegis of federal authority, the private sector model embodied in the Railway Labor Act will pose unacceptable risks. The 1970 postal work stoppage provides a compelling lesson.<sup>88</sup> Consequently, there is good reason to believe that just *one* more strike or lockout would be so intolerable to the nation that adoption of the Railway Labor Act would be judged a disaster, even if 100 successful negotiations preceded such a labor dispute.

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<sup>88</sup> *Id.* (recalling President Nixon's deployment of the National Guard in the 1970 postal worker strike).

**APPENDIX**



**39 U.S.C. ' 1207. *Labor Disputes***

**(a)** If there is a collective-bargaining agreement in effect, no party to such agreement shall terminate or modify such agreement unless the party desiring such termination or modification serves written notice upon the other party to the agreement of the proposed termination or modification not less than 90 days prior to the expiration date thereof, or not less than 90 days prior to the time it is proposed to make such termination or modification. The party serving such notice shall notify the Federal Mediation and Conciliation Service of the existence of a dispute within 45 days of such notice, if no agreement has been reached by that time.

**(b)** If the parties fail to reach agreement or to adopt a procedure providing for a binding resolution of a dispute by the expiration date of the agreement in effect, or the date of the proposed termination or modification, the Director of the Federal Mediation and Conciliation Service shall direct the establishment of a factfinding panel consisting of 3 persons. For this purpose, he shall submit to the parties a list of not less than 15 names, from which list each party, within 10 days, shall select 1 person. The 2 so selected shall then choose from the list a third person who shall serve as chairman of the factfinding panel. If either of the parties fails to select a person or if the 2 members are unable to agree on the third person within 3 days, the selection shall be made by the Director. The factfinding panel shall issue after due investigation a report of its findings, with or without recommendations, to the parties no later than 45 days from the date the list of names is submitted.

**(C)(1)** If no agreement is reached within 90 days after the expiration or termination of the agreement or the date on which the agreement became subject to modification under subsection (a) of this section, or if the parties decide upon arbitration but do not agree upon the procedures therefor, an arbitration board shall be established consisting of 3 members, not members of the factfinding panel, 1 of whom shall be selected by the

Postal

Service, 1 by the bargaining representative of the employees, and the third by the 2 thus selected. If either of the parties fails to select a member, or if the members chosen by the parties fail to agree on the third person within 5 days after their first meeting, the selection shall be made by the Director. If the parties do not agree on the framing of the issues to be submitted, the factfinding panel shall frame the issues and submit them to the arbitration board.

**(2)** The arbitration board shall give the parties a full and fair hearing, including an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel or by other representative as they may elect. Decisions of the arbitration board shall be conclusive and binding upon the parties. The arbitration

board shall render its decision within 45 days after its appointment.

**(3)** Costs of the arbitration board and factfinding panel shall be shared equally by the Postal Service and the bargaining representative.

**(d)** In the case of a bargaining unit whose recognized collective-bargaining representative does not have an agreement with the Postal Service, if the parties fail to reach agreement within 90 days of the commencement of collective bargaining, a factfinding panel will be established in accordance with the terms of subsection (b) of this section, unless the parties have previously agreed to another procedure for a binding resolution of their differences. If the parties fail to reach agreement within 180 days of the commencement of collective bargaining, and if they have not agreed to another procedure for binding resolution, an arbitration board shall be established to provide conclusive and binding arbitration in accordance with the terms of subsection (C) of this section.

***U.S. Postal Service B Little Progress Made in Addressing Persistent Labor-Management Problems***  
**(October 1, 1997), 1997 GAO/GGD 98-1**

1. Continued Need to Improve Labor-Management Relations: Improving labor-management relations at the Postal Service has been and continues to be an enormous challenge and a major concern for the Postal Service and its unions and management associations. With the significant future challenges it faces to compete in a fast-moving communications marketplace, the Service can ill afford to be burdened with long-standing labor-management relations problems. We continue to believe that in order for any improvement efforts to be sustained, it is important for the Service, the four unions, and the three management associations to agree on common approaches for addressing labor-management relations problems so that positive working principles and values can be recognized and encouraged in postal locations throughout the nation, especially in locations where labor-management relations are particularly adversarial. Our work has shown that there is no clear or easy solution to improving these problems. However, continued adversarial relations could lead to escalating workplace difficulties and hamper the Service's efforts to achieve its intended

improvements.

The limited experience the Postal Service and its unions and management associations have had with FMCS in an attempt to convene a postal summit meeting, although not fully successful to date, nonetheless has suggested that the option of using a third-party facilitator to help the parties reach agreement on common goals and approaches has merit. The use of FMCS, as recommended in our 1994 report, was requested by the PMG in early 1996 and encouraged by the Chairman of the House Subcommittee on the Postal Service in March 1996. Although efforts to arrange a summit continue, the window of opportunity for developing such an agreement may be short-lived because of contract

negotiations

involving three of the four unions whose agreements are due to expire in November 1998. As previously mentioned, in 1994, after formal contract negotiations had begun for APWU, Mail Handlers, and NALC, these unions were generally reluctant to engage in discussions outside the contract negotiations until they were completed.

2. A second approach to improving labor-management relations was included in the postal reform legislation introduced by the Chairman of the House Subcommittee on the Postal Service in June 1996 and reintroduced in January

1997. Under this proposed legislation, a temporary, presidentially appointed seven-member Postal Employee-Management Commission would be established. The proposed Commission would be responsible for evaluating and recommending solutions to the workplace difficulties confronting the Service and would prepare its first set of reports within 18 months and terminate after preparing its second and third sets of reports. The Commission would include two members representing the views of large nonpostal labor organizations; two members from the management ranks of similarly sized private corporations; and three members well-known in the field of employee-management relations, labor mediation, and collective bargaining, one of whom would not represent the interests of either employees or management and would serve as the chair. Some concerns have been raised that the proposed Commission would not include representatives of the Postal Service or its unions or management associations, and thus the results of its work may not be acceptable to some or all of those parties. In July 1996, representatives of each of the four major unions testified before the House Subcommittee on the Postal Service that the Commission was not needed to solve labor-management relations problems at the Postal Service. They said that the affected parties should be responsible for resolving the problems.

3. Finally, the Government Performance and Results Act provides an opportunity for Congress; the Postal Service, its unions, and its management associations; and other stakeholders with an interest in postal activities, such as firms that use or support the use of third-class mail for advertising purposes and firms that sell products by mail order, to collectively focus on and jointly engage in discussions about the mission and proposed goals for the Postal Service and the strategies to be used to achieve desired results. Such discussions can provide Congress and the other stakeholders with opportunities not only to better understand the Service's mission and goals but also to work together to develop and reach consensus on strategies to be used in attaining such goals, especially those that relate to the long-standing labor-management relations problems that challenge the Service.

**TABLE A**  
**STATE INTEREST ARBITRATION LAWS<sup>89</sup>**

<b>Conventional Arbitration</b>		<b>Final Offer Arbitration</b>	
<i>State</i>	<i>Covered Employees</i>	<i>State</i>	<i>Covered Employees</i>
<b>Alaska</b>	Police, Firefighters, Prison, Hospital	<b>Connecticut</b>	Municipal and Teachers
<b>Maine</b>	State <sup>a</sup>	<b>Hawaii</b>	Firefighters
<b>Minnesota</b>	Police and firefighters, exceptions <sup>b</sup>	<b>Illinois</b>	Police and Firefighters <sup>c</sup>
<b>Nebraska</b>	All	<b>Iowa</b>	All <sup>d</sup>
<b>New York</b>	Police and Firefighters	<b>Michigan</b>	Police and Firefighters <sup>c</sup>
<b>New Jersey</b>	Police, Firefighters, Prison <sup>b</sup>	<b>Nevada</b>	Firefighters
<b>Oregon</b>	Police, Firefighters, Hospital, Prison	<b>Ohio</b>	Police, Firefighters, Some Hospital and Medical
<b>Pennsylvania</b>	Police and Fire Fighters	<b>Wisconsin</b>	Police, Firefighters, Municipal, and Teachers
<b>Rhode Island</b>	Police and Fire Fighters <sup>a</sup>		
<b>Vermont</b>	State		
<b>Washington</b>	Police and Firefighters		
<b>Wyoming</b>	Firefighters		

<sup>a</sup> Award is not binding    <sup>b</sup> Conventional or final offer    <sup>c</sup> Final offer on economic issues, conventional on others

<sup>d</sup> fact-finder=s recommendation may be adopted

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<sup>89</sup> Richard B. Freeman, "Unionism Comes to the Public Sector," Journal of Economic Literature, Vol. 24, No. 1 (March 1986), pp. 41-86, Table 15 at p. 72.

**EXCERPT OF FINAL OFFER INTEREST ARBITRATION AS IT APPLIES TO FIRE FIGHTERS AND POLICE IN ILLINOIS**

5 ILCS 315/14 Formerly cited as IL ST CH 48 & 1614 WEST=S SMITH-HURD ILLINOIS  
 COMPILED STATUTES ANNOTATED  
 CHAPTER 5. GENERAL PROVISIONS  
 OFFICERS AND EMPLOYEES

**ACT 315. ILLINOIS PUBLIC LABOR RELATIONS ACT**

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Current through P.A. 92-885 of the 2002 Reg.Sess.

& P.A. 93-1 of the 2003 Reg.Sess 315/14. Security Employee, Peace Officer and Fire Fighter  
 Disputes

**' 14. Security Employee, Peace Officer and Fire Fighter Disputes.**

**Sections (a)-(e) are not reproduced. The term “arbitration panel” really means “arbitrator.” Technically, the law provides for a tripartite model in which an employer and a union representative must sign an award (arbitration ruling). The “winner” at arbitration signs along with the arbitrator to make the ruling enforceable by a 2-1 vote. Usually, however, the parties waive the panel format and stipulate that a sole neutral arbitrator has authority to render an award. To be clear, the award simply states that the arbitrator adopts the either employer or union’s final offer. (f) At any time before the rendering of an award, the chairman of the arbitration panel, if he is of the opinion that it would be useful or beneficial to do so, may remand the dispute to the parties for further collective bargaining for a period not to exceed 2 weeks. If the dispute is remanded for further collective bargaining the time provisions of this Act shall be extended for a time period equal to that of the remand. The chairman of the panel of arbitration shall notify the Board of the remand. (g) At or before the conclusion of the hearing held pursuant to subsection (d), the arbitration panel shall identify the economic issues in dispute, and direct each of the parties to submit, within such time limit as the panel shall prescribe, to the arbitration panel and to each other its last offer of settlement on each economic issue. The determination of the arbitration panel as to the issues in dispute and as to which of these issues are economic shall be conclusive. The arbitration panel, within 30 days after the conclusion of the hearing, or such further additional periods to which the parties may agree, shall make written findings of fact and promulgate a written opinion and shall mail or otherwise deliver a true copy thereof to the parties and their representatives and to the Board. As to each economic issue, the arbitration panel shall adopt the last offer of settlement which, in the opinion of the arbitration panel, more nearly complies with the applicable factors prescribed in subsection (h). The findings, opinions and order as to all other issues shall be based upon the applicable factors prescribed in subsection (h).**

**(h)** Where there is no agreement between the parties, or where there is an agreement but the parties have begun negotiations or discussions looking to a new agreement or amendment of the existing agreement, and wage rates or other conditions of employment under the proposed new or amended agreement are in dispute, the arbitration panel shall base its findings, opinions and order upon the following factors, as applicable:

**(1)** The lawful authority of the employer.

**(2)** Stipulations of the parties.

**(3)** The interests and welfare of the public and the financial ability of the unit of government to meet those costs.

**(4)** Comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally:

**(A)** In public employment in comparable communities.

**(B)** In private employment in comparable communities.

**(5)** The average consumer prices for goods and services, commonly known as the cost of living.

**(6)** The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment and all other benefits received.

**(7)** Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

**(8)** Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

**(I)** In the case of peace officers, the arbitration decision shall be limited to wages, hours, and conditions of employment (which may include residency requirements in municipalities with a population under 1,000,000, but those residency requirements shall not allow residency outside of Illinois) and shall not include the following: I) residency requirements in municipalities with a population of at least 1,000,000; ii) the type of equipment, other than uniforms, issued or used; iii) manning; iv) the total number of employees employed by the department; v) mutual aid and assistance agreements to other units of government; and vi) the criterion pursuant to which force, including deadly force, can be used; provided, nothing herein shall preclude an arbitration decision regarding equipment or manning levels if such decision is based on a finding that the equipment or manning considerations in a specific work assignment involve a serious risk to the safety of a peace officer beyond that which is inherent in the normal performance of police duties. Limitation of the terms of the arbitration decision pursuant to this subsection shall not be construed to limit the factors upon which the decision may be based, as set forth in subsection (h).

In the case of fire fighter, and fire department or fire district paramedic matters, the arbitration decision shall be limited to wages, hours, and conditions of employment (which may include

residency requirements in municipalities with a population under 1,000,000, but those residency requirements shall not allow residency outside of Illinois) and shall not include the following matters: I) residency requirements in municipalities with a population of at least 1,000,000; ii) the type of equipment (other than uniforms and fire fighter turnout gear) issued or used; iii) the total number of employees employed by the department; iv) mutual aid and assistance agreements to other units of government; and v) the criterion pursuant to which force, including deadly force, can be used; provided, however, nothing herein shall preclude an arbitration decision regarding equipment levels if such decision is based on a finding that the equipment considerations in a specific work assignment involve a serious risk to the safety of a fire fighter beyond that which is inherent in the normal performance of fire fighter duties. Limitation of the terms of the arbitration decision pursuant to this subsection shall not be construed to limit the facts upon which the decision may be based, as set forth in subsection (h).



***Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987)**

**In this excerpt, a unanimous U.S. Supreme Court upheld the right of unions under the Railway Labor Act to picket neutral employers, thereby magnifying a small and isolated labor dispute into one that threatened to shut the nation=s rail system. The excerpt relates the facts and a key portion of the Court=s 1987 decision, which held that federal courts lack jurisdiction to enjoin secondary pickets and strikes under the RLA.**

**Justice BRENNAN delivered the opinion of the Court.**

What began as a dispute over renewal of a collective-bargaining agreement between a small railroad in Maine and some of its employees expanded to picketing and threats of strike activity at railroad facilities around the country. A Federal District Court then enjoined the picketing of any railroads other than those involved in the primary dispute. The question we must decide is whether a federal court has jurisdiction to issue such an injunction.

**A. Facts**

Portland Terminal Company, subsidiaries of Guilford Transportation Industries, Inc. (Guilford). Guilford also owns two other railroads, the Delaware Hudson Railway Company, and the Boston and Maine Corporation. The Guilford system covers some 4,000 miles of track in the northeast United States, east from Buffalo to Maine, and north from Washington, D.C., to Montreal. The Guilford system is not as large, however, as some other railroads, and Guilford depends on other railroads to carry much of its traffic.

The crux of the dispute between Maine Central and BMW E was Maine Central=s decision, following its acquisition by Guilford in 1981, to abolish over a 5- year period the jobs of roughly 300 out of 400 employees represented by BMW E. The collective-bargaining agreement between BMW E and Maine Central expired in 1984, before the parties were able to reach agreement either on the problem of job losses or on various questions of wages, hours, and working conditions. A dispute "over the formation of collective agreements or efforts to secure them" is a "major dispute" in the parlance of railway labor law . . . and is governed by the Railway Labor Act (RLA), 44 Stat. 577, as amended, 45 U.S.C. ' 151 *et seq.* For over a year, the parties attempted to reach a settlement by following the detailed settlement procedures mandated by the RLA. On March 3, 1986, having exhausted these procedures, BMW E began a lawful strike against Maine Central and Portland Terminal. Two days later, BMW E lawfully extended the strike to Guilford=s other two railroad subsidiaries.

It first appeared to BMW E that its strike was having the desired effect of slowing traffic on Guilford=s lines. But Guilford=s supervisors took on some of the responsibilities of the striking

workers, and after several weeks the volume of traffic on Guilford's lines began to increase. BMW received information that led it to believe that Guilford was receiving financial assistance from other railroads (a belief that later proved mistaken), and observed non-Guilford locomotives moving on Guilford lines. BMW also perceived that Maine Central had become less willing to negotiate.

In early April, BMW decided to extend its strike beyond Guilford's subsidiaries. It first attempted to picket other railroads in the east with which Guilford interchanged a significant volume of traffic. This picketing was enjoined by two federal-court orders

On April 8, 1986, BMW notified the president of the American Association of Railroads of its plans to picket the facilities of other carriers and to ask other carriers' employees to withdraw from service until Maine Central's willingness to bargain increased. In addition, BMW began to picket "strategic locations through which Guilford's traffic flowed, such as Chicago," Brief for Respondents 4, and to picket the Los Angeles facilities of the Union Pacific Railroad Company, based on the belief (again later proved mistaken) that Union Pacific supervisors were assisting on Guilford lines.

On April 9, 62 railroads (not including petitioner Burlington Northern Railroad Company (Burlington Northern)), filed suit in the United States District Court for the District of Columbia, seeking a temporary restraining order against the picketing. Their request was denied the next day. . . . Meanwhile, also on April 9, Burlington Northern sought and obtained *ex parte* a temporary restraining order from the District Court for the Northern District of Illinois, enjoining BMW from picketing or striking Burlington Northern. The six other railroad petitioners here quickly filed notices of dismissal in the District of Columbia and then filed new actions against BMW on April 10 and 11 in the Northern District of Illinois. On April 11, that District Court issued temporary restraining orders in each of these cases enjoining BMW from picketing and striking the facilities of these seven railroads.

While these judicial proceedings were pending, Congress and the Executive Branch took steps to resolve the controversy. On May 16, 1986, pursuant to ' 10 of the RLA, 45 U.S.C. ' 160, the President issued Executive Order No. 12557, 51 Fed.Reg. 18429 (1986). Under this Order, Presidential Emergency Board No. 209 was convened and given the task of investigating the dispute and reporting to the President within 30 days. Section 10 provides that during this 30-day period, and for 30 days after the report is delivered, the parties to the controversy must return to and maintain the status quo prior to the dispute.

The Presidential Emergency Board issued its report and recommendations on June 20, 1986. Its recommendations are not binding, however, and the parties did not accept them. On August 21, 1986, Congress passed a joint resolution establishing an advisory board to perform a second investigation and make a report. Four weeks later, on September 8, this board advised Congress that it should enact legislation binding the parties to the recommendation of Presidential Emergency Board No. 209. Congress promptly passed a joint resolution to this effect on September 23, 1986, and seven days later the President signed the bill into law. Pub.L. 99-431,

100 Stat. 987. [FOOTNOTE 4: These developments do not moot this controversy. Because these same parties are reasonably likely to find themselves again in dispute over the issues raised in this petition, and because such disputes typically are resolved quickly by executive or legislative action, this controversy is one that is capable of repetition yet evading review. . . . ]

We granted certiorari . . . to resolve the Circuit conflict over the propriety of using the substantial-alignment test to narrow the definition of labor disputes under the Norris-LaGuardia Act, and to address, if necessary, the applicability of the RLA and ' ' 1 and 4 of the Norris-LaGuardia Act to secondary picketing.

**BRIEF EXCERPT OF THE COURT=S REASONING IN RULING THAT SECONDARY PICKETING IS NOT PROHIBITED UNDER THE RAILWAY LABOR ACT:**

Petitioners concede, as they must, that the RLA does not contain an express mandate limiting the scope of self-help available to a union once the RLA=s major dispute resolution procedures have been exhausted. They argue, however, that the drafters of the RLA did not need to insert an express prohibition of secondary picketing because in 1926 federal law clearly prohibited such picketing. Because language banning that which was already illegal would have been superfluous, petitioners construe the RLA to adopt the limits on self-help that existed at the time the RLA became law.

Petitioners read too much, however, into the silence of the Act. The RLA=s silence could just as easily signify an intent to allow the parties to resort to whatever self-help is legally available at the time a dispute arises. Faced with a choice between the ambiguity in the RLA and the unambiguous mandate of the Norris-LaGuardia Act, we choose the latter.

**GOVERNMENT OF ACCOUNTING OFFICE (GAO) ASSESSMENTS OF COLLECTIVE BARGAINING  
FOR THE U.S. POSTAL SERVICE AND ITS UNIONS**

**A. Excerpt From 2002 Study.**<sup>90</sup>

Further, when contract disputes cannot be settled between postal labor and management, they must be settled by a third party through binding arbitration. As a practical matter, postal labor and management have had long-standing adversarial relations.

**B. Excerpt From 1997 Study**<sup>91</sup>

Report to the Chairman, Subcommittee on the Postal Service, Committee on Government Reform and Oversight House of Representatives

*U.S. POSTAL SERVICE - LITTLE PROGRESS MADE IN ADDRESSING PERSISTENT LABOR-MANAGEMENT PROBLEMS*

Arbitration Used to Settle Most Contract Negotiations

In our 1994 report, we discussed the occurrence of past contract negotiations, which generally took place at the national level between the Service and the four labor unions every 3 or 4 years. Since as far back as 1978, interest arbitration has been used to resolve bargaining deadlocks that occurred during contract negotiations for three of the four unions, including APWU, NALC, and Mail Handlers.

Specifically, interest arbitration occurred in 1978, 1984, and 1990 with APWU and NALC, and in 1981 with Mail Handlers. The most recent negotiations occurred for contracts that expired in November 1994 for APWU, NALC, and Mail Handlers, during which interest arbitration was used to settle bargaining deadlocks. In the case of the Rural Carriers, whose contract expired in November 1995, negotiations resulted in the establishment of a new contract without the use of interest arbitration.

With APWU, NALC, and the Mail Handlers, the issues that arose in interest arbitration over their most recent contracts were similar to issues that have surfaced at previous contract negotiations. The issues focused primarily on the unions' push for wage and benefit increases and job security, in contrast to postal management's push for cost-cutting and flexibility in hiring practices.

According to a postal official, such negotiations over old issues that continually resurface have at times been bitter and damaging to the ongoing relationship between the Service and union

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<sup>90</sup> DETERIORATING FINANCIAL OUTLOOK INCREASES NEED FOR TRANSFORMATION (February 28, 2002), GAO 02-355, 2002 WL 462069 (F.D.C.H.)

<sup>91</sup> U.S. POSTAL SERVICE - LITTLE PROGRESS MADE IN ADDRESSING PERSISTENT LABOR-MANAGEMENT PROBLEMS (October 1, 1997) GAO/GGD 98-1, 1997 WL 740760 (F.D.C.H.).

leadership at the national level. Union officials also told us that a new issue B the contracting out of specific postal functions, also known as outsourcing B has caused the unions a great deal of concern, because they believe that it could affect job security for employees. In his comments on a draft of this report, the president of the Rural Carriers union stated that for the most recent collective bargaining agreement, the negotiating team, including postal and union representatives, held joint training sessions across the country and invited various state and local postal management and craft representatives to participate in the training. The Rural Carriers president believed that this training helped the parties to better negotiate and reach agreement on the language that was included in the most recent contract, which in this instance eliminated the need for the use of an outside arbitrator. Also, the president believed that the training helped provide both union and postal management officials a more thorough understanding of the contract=s requirements.

**Grievances Continue to Increase** In our September 1994 report, we discussed the problems associated with the grievance/arbitration process, which is the primary mechanism for craft employees to voice work-related concerns. As defined in postal labor agreements, a Grievance@ is Aa dispute, difference, disagreement, or complaint between the parties related to wages, hours, and conditions of employment.@ In our 1994 report, the problems we described included (1) the high number of grievances being filed and the inability of postal supervisors or union stewards to resolve them at the lowest organizational level possible and (2) the large backlog of grievances awaiting arbitration.

The process for resolving postal employees= grievances is similar to that used in many private sector and other public organizations. Generally, according to labor relations experts, a process that is working effectively would result in most disputes being resolved quickly at the lowest organizational level, that is, by the supervisor, employee, and union steward who represents the employee=s interests. Employees as well as the four postal unions that represent them can initiate grievances. Depending on the type of grievance, the process may involve up to 4 or 5 steps, and each step generally requires the involvement of specific postal and union officials. For instance, at each of the first 3 steps in the process, the parties that become involved include lower to higher union and postal management level officials in their respective organizations, such as post offices, mail processing and distribution centers, and area offices. Step 4 in the grievance process occurs only if either the Service or the union believes that an interpretation of the union=s collective bargaining agreement is needed, in which case, national level postal and union officials would become involved. The fifth and final step in the grievance process involves outside binding arbitration by a neutral third party. Generally, at each step in the process, the involved parties are to explore and discuss the grievance to obtain a thorough understanding of the facts. During any of the first 4 steps that occur before arbitration, the grievance may be settled by the parties. If the grievance is not settled, the Service makes a decision in favor of either postal management or the employee. If the Service denies the grievance (i.e., makes a decision in favor of management), the employee or union steward can elevate the grievance to the next higher step in the process until the last step, which concludes the process with a final and binding decision by a neutral arbitrator.