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COMMENTAIRES

FINAL POSITION ARBITRATION AND INTERTEMPORAL COMPROMISE : THE UNIVERSITY OF ALBERTA COMPROMISE

Gene SWIMMER

Fixed position or final offer arbitration has been a subject of controversy, since Stevens [1] originally proposed this new mode of dispute settlement. Under this system, an arbitrator must pick the final offer of either management or the union, without a compromise. The logic for adopting final offer arbitration can be summarized as follows. When a contract dispute goes to compulsory arbitration [2], the temptation for the arbitrator to compromise is great. He appears « fair » by giving some concessions to both sides and does not alienate either of the parties, avoiding the possibility that he won't be called in as an arbitrator at some later date. Because both the union and management are aware of the tendency to compromise, neither side will likely make real concessions during the negotiations. In other words, if arbitrators « split the difference », the more outrageous your side's final position the more likely you will get a better settlement.

Final offer arbitration attempts to neutralize this kind of negotiating strategy. Without the possibility of compromise, it is presumed that neither side will take extreme positions because they want their side to be selected. Unlike regular arbitration which leads to erosion of collective bargaining, the risk of final offer arbitration should encourage both sides to bargain in good faith, in order to avoid the final step.

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1 Carl STEVENS, « Is Compulsory Arbitration Compatible with Bargaining ? » *Industrial Relations,* Vol. 5, No. 2, February 1966, pp. 38-52. For additional articles dealing with the theoretical and empirical benefits of fixed position arbitration see Joseph GRODIN, « Either or Arbitration for Public Employee Disputes », *Industrial Relations,* Vol. 11, No. 2, May 1972, pp. 260-266, and Gary LONG, and Peter FEUILLE, « Final Offer Arbitration : 'Sudden Death' in Eugene », *Industrial and Labor Relations Review,* Vol. 27, No. 2, January 1974, pp. 186-203.

2 This is most likely to occur in public employment or essential services negotiations where the right to strike has been eliminated by consent or by legislation.

We believe, however, that in many situations final offer arbitration merely substitutes an intertemporal compromise for a static (one period) compromise. If the final step in the procedure is reached in one wage round, there is a strong probability that negotiations will go to the final step in subsequent wage rounds, with the arbitrator's selection flipping from one side to the other between wage rounds. The benefits of final-offer arbitration may be illusory.

In order to illustrate the problem associated with final offer arbitration, we will discuss the experience of the University of Alberta Academic Staff negotiations. Since 1971 the Association of Academic Staff of the University of Alberta (AASUA) and the Board of Governors of the University have agreed to submit all unsettled issues to final offer arbitration (actually called final offer selection) [3]. During the four wage rounds, since the institution of the procedure, the only issue to be negotiated was the size of the cost of living or scale adjustment.[4] The Board of Governors has generally taken the view that how the percentage increase was distributed between wages and fringe benefits was up to the association. In the first year of operation, the AASUA and the Board of Governors agreed on a 4.5% scale increase, subject to the provincial grant to the university being no more or less than 2% away from a jointly agreed upon projection. In fact, the Alberta grant fell more than 2% short so that the previous agreement was nullified, and negotiations resumed. Actually the AASUA could do little but demand that the 4.5% be retained. Their constituency would not look kindly on a voluntary decrease in the scale adjustment to a level below the cost of living increase for the previous year. The Board of Governors demanded a reduction to a 3.14% increase, in line with its fiscal crisis. No agreement could be reached, a selection officer was appointed and he eventually selected the Board of Governors final offer of 3.14%.

Notice that the first resort to final offer arbitration was caused by a random phenomenon, an unexpected decline of the provincial grant to the university. Having reached the final selection step once, both parties were thrown into a situation where arbitration would be resorted to in the next two rounds with this round's loser (AASUA) being next round's winner and so on, until another random event broke the cycle. The rea-

[3] For a detailed description of the Alberta process, see John CHUNG, « Collective Bargaining on University Campuses : The Experience of the University of Alberta », paper for the Fédération des Associations de Professeurs d'Université du Québec, January, 1972. In this article, Chung expresses concern as to the legality of the selection officer's award. In practice this has not been a problem. The Board of Governors, the Province, and the Academic Staff Association have honoured every award handed down by the selection officers.

[4] The one exception was an issue dealing with the structure of merit increments for full professors. This issue was settled without resort to arbitration, during the 1973 negotiations.

sons were simple : inflation and the fiscal problems of the university did not go away, and neither did the desire of arbitrators to compromise.

In the 1972 negotiations, the Association demanded a scale increase of 5.3% which was equal to the cost of living increase while the Board of Governors would not offer anymore than 4%. The AASUA was unwilling to settle for that figure because they felt they had been given too low an increase the year before and were therefore, entitled at least to the cost of living. Going to final offer selection fit in perfectly with the Association's goals. They could argue to the arbitrator that their salaries were below many other universities and secondly that the university could afford the settlement because it had gotten off easily last year. [5] It appears that these arguments made sense to the arbitrator, because he sided with the staff for a 5.3% increase.

Looking at the situation hypothetically from the arbitrator's viewpoint, siding with the AASUA was much less risky than siding with the Board of Governors. His selection would be less likely to alienate the Board of Governors, because he had « compromised » between the award of last year's selection officer and his own. If he sided against the staff, making them « losers » two years in a row, we believe he would not have been considered again as an acceptable selection officer by the AASUA. Thus, the temptation to compromise, albeit between wage rounds, still exists with final offer arbitration.

In 1973, the situation was exactly reversed. The Staff Association demanded a scale adjustment equal to the cost of living. The Board of Governors agreed on the merits of the AASUA case, but was totally unable to increase salaries by that figure, because of a small increase in the provincial grant to the university and secondly because the cost of last years settlement had necessitated budget tightening even before the bad news from the Province. Again the Staff Association did not want to go on record as offering to take a cut in real wages, and facing a « management » who thought it could win at the final offer selection, resort to arbitration was inevitable. The Board of Governors, in their presentation before the selection officer, stated that while the academic staff was entitled to a scale adjustment commensurate with the cost of living increase, the university was unable to pay anymore than 5.0%. While one never knows for sure, the fact that the staff had received a reasonable increase in the preceeding year likely made the selection of the Board of Governor's final offer more palatable for the arbitrator. His selection is certainly consistent with a desire not to alienate via intertemporal compromise.

Strangely, in May the Administration found itself with a surplus of one million dollars (despite its pleas of poverty), due mainly to excep-

[5] Informal discussions with members of the association's bargaining team suggests that these arguments were in fact used.

tional performance of the university investment portfolio. The Board of Governors, having gone on record as believing that both academic (and non-academic) staff wage increases should be commensurate with CPI increases, decided to distribute the surplus to the staff. For academic staff, this meant an additional scale increase of 2.5% to a total of 7.5% which was roughly equivalent to the AASUA final offer. Thus a second random occurrance broke the chain. Despite losing in arbitration, the Association could not be considered a loser, and neither could the Board of Governors. Neither side could complain to the arbitrator in 1974 about their unfortunate plight as a result of the 1973 award, and therefore, there would be no way for an arbitrator to make an intertemporal compromise. With both the AASUA and the Board of Governors aware of this situation, it is not surprising that in the 1974 wage round the parties settled on the scale adjustment without resorting to the final step.

We believe that the Alberta experience is consistent with our basic premise that final offer arbitration substitutes intertemporal compromise for static compromise. [6] Indeed the underlying problem of the Alberta case has been prevalent for many North American jurisdiction in the 1970's. Inflation has been eroding wages of public service workers and their respective managements' budgets. We believe substituting final offer arbitration for regular arbitration in any of these jurisdictions would not increase the likelihood of real collective bargaining between management and union. Indeed, without a possibility of static compromise the likelihood of going to the final step might be higher than under regular arbitration.

6 An obvious question is how likely is it that the flip-flopping of awards could have occurred by chance. In particular, given that management's offer was selected in 1971, what is the probability that the union side would be selected in 1972 and management's side would be selected in 1973. If fixed position arbitration has no impact on bargaining, then let's assume that the probability of going to arbitration in any year is .5 and the probability of either side being selected by an arbitrator in any year is also .5. The probability of the union being selected by an arbitrator in 1972 and management being selected in 1973 therefore equals :

$$\text{PR (Arbitration)}_{1972} \times \text{PR (Union selection)}_{1972} \times \text{PR (Arbitration)}_{1973} \times \text{PR (MGMT selection)}_{1973} = (.5)^4 = .0625$$

In other words this outcome would occur by chance only 6.25% of the time. If one assumes that the probability of going to arbitration in any given year is .8, then the flip-flop of awards would have occurred by chance 16% of the time.